

# THE SUI GENERIS NATURE OF FLAG STATE JURISDICTION

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## Introduction

1. The Question
2. The Lotus Case: Ships are Territory
3. Literature: Silent or Unsubstantiated
4. Outline

## I. Flag State Jurisdiction Is Not Personal

1. Ships Are Not Persons
2. Personal Jurisdiction Does Not Allow Enforcement
3. Ships and the Prohibition of the Use of Force

## II. Flag State Jurisdiction Is Not Territorial

1. The “Genuine Link” Requirement
2. The Transferability of Flag State Jurisdiction
3. The UNCLOS Article 97

## III. Flag State Jurisdiction Is Sui Generis

1. Diplomatic Protection on Behalf of Ships
2. The Rome Statute and the North Atlantic Treaty
3. The ECHR on Ships

## IV. Explaining the Variations

## Conclusion

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# Introduction

## 1. The Question

The UNCLOS<sup>1</sup> Article 92(1) says that the flag State has “exclusive jurisdiction” over ships on the high seas. This means that the flag State may legislate over the ship, adjudicate over it, and use force on or against it. No other State may exercise jurisdiction over the ship. The goal of the present text is to explain the nature of this jurisdiction, by showing how it is a *sui generis* form of jurisdiction, different from both the “territorial” and the “personal” forms of jurisdiction.

The present text is not concerned with flag State jurisdiction in territorial waters. In territorial waters the UNCLOS Article 92 no longer applies, as it only applies in the “high seas” (as per its wording) and the exclusive economic zone (by virtue of Article 58(2)). The flag State may still have jurisdiction over ships when they are in foreign territorial waters and ports, even though this is not expressed by the UNCLOS.<sup>2</sup> This jurisdiction will be concurrent with and to varying degrees subservient to the coastal State’s territorial jurisdiction. The jurisdiction will be different from the one stipulated in the UNCLOS Article 92(1) in that it will not entail enforcement jurisdiction (see chapter I.2 below).

The present text moreover does not say anything about the status of stateless vessels on the high seas. It also does not discuss aircraft, although these are subject to similar rules.<sup>3</sup>

There are at least four bases for (criminal) jurisdiction in international law: The personality principle, the territorial principle, the universality principle, and the protective principle.<sup>4</sup> This gives States jurisdiction over actions occurring on and affecting their territory (“the effects doctrine”), actions committed by their nationals, actions violating certain fundamental rules, and actions threatening the vital interests of the State. It is debatable whether there is also a “passive personality” principle, giving jurisdiction over (certain) actions committed against the State’s nationals.

These bases of jurisdiction give three forms of jurisdiction: legislative, adjudicative, enforcement. As a general rule (albeit with at least one exception, for piracy) only the territorial principle gives enforcement jurisdiction.

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<sup>1</sup> United Nations Convention on the Law of the Sea, *United Nations Treaty Series*, Vol. 1833, p. 3.

<sup>2</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2012), p. 16; Doris König, “Flag of Ships,” in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2009, available at [www.mpil.de](http://www.mpil.de)), paras 30-32. This is implied by the UNCLOS Articles 94(2)(b), 211(3), 218(2) and 220.

<sup>3</sup> This is reflected in the Convention on Offences and Certain Other Acts Committed On Board Aircraft, *United Nations Treaty Series*, Vol. 704, p. 220, Article 3 and the Convention on International Civil Aviation, *United Nations Treaty Series*, Vol. 15, p. 295, Article 17.

<sup>4</sup> James Crawford, *Brownlie’s Principles of International Law* (2012), pp. 457-464. The ‘effects doctrine’, giving jurisdiction over actions that produce effects in a State’s territory, but this can be classified as part of territorial jurisdiction.

Jurisdiction can also be based on treaties. Treaties can be used to transfer customary jurisdiction, but not to create “new” jurisdiction. Treaties can also codify customary rules on jurisdiction. The UNCLOS is a treaty, but is discussed in the present text as a presumed codification of customary rules. It thus assumes that flag State jurisdiction is part of customary international law.

## 2. The Lotus Case: Ships are Territory

In the *Lotus*<sup>5</sup> case, the Permanent Court of International Justice (PCIJ) held that Turkey had criminal jurisdiction over French individuals who were located on a French ship when it was involved in a collision with a Turkish ship. The Court held this on the basis that “by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory [...] It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.”<sup>6</sup> The most logical way to interpret this passage is that flag State jurisdiction, which Turkey had over the Turkish ship, was part of Turkey’s territorial jurisdiction. The Court adjudicated the issue on the basis of the “effects doctrine”, which gave Turkey jurisdiction over the incident since it affected Turkish territory (in form of the Turkish ship).<sup>7</sup>

An alternative interpretation of the passage is that flag State jurisdiction follows the principles of personal jurisdiction, and that Turkey had jurisdiction based on the principle of “passive personality”, *i.e.* because the incident affected a vessel with Turkish nationality. This alternative interpretation is, however, not consistent with the text of the judgment, and it is also doubtful whether the passive personality principle is part of international law at all (as discussed in the introduction section 1 above).

The Lotus case thus seems to assert that flag State jurisdiction is a subcategory of territorial jurisdiction. Chapter II below will show why that assumption is mistaken.

## 3. Literature: Silent or Unsubstantiated

Academic literature discussing jurisdiction usually distinguishes between personal and territorial jurisdiction. Whether a text places flag State jurisdiction under one or the other heading may say something about the author’s view of the nature of flag State jurisdiction. Some works classify flag State jurisdiction as personal.<sup>8</sup> At least one classifies it as neither.<sup>9</sup>

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<sup>5</sup> Permanent Court of International Justice, *The Case of the S.S. “Lotus”, P.C.I.J. (ser. A) No. 10 (1927)*.

<sup>6</sup> *Lotus*, *supra* note 5, p. 25.

<sup>7</sup> *Lotus*, *supra* note 5, p. 23: “the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory”, and p. 25: “produces its effects”.

<sup>8</sup> Bernard Oxman, “Jurisdiction of States”, in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2007, available at [www.mpil.de](http://www.mpil.de)), para 20; Vaughan Lowe, *International Law* (2007), p.175. Christopher Staker, “Jurisdiction”, in Malcolm D. Evans ed., *International Law* (4th ed. 2014), p. 309, p. 317 writes that ships are not floating territory, while at p. 319 discussing flag State jurisdiction under the heading of “the national principle”. Malcolm Shaw, *International Law* (6th ed. 2008) mentions flag State jurisdiction under both

Some works treat the matter in more detail. Some authors reject the view that flag State jurisdiction is territorial, without necessarily classifying it as personal.<sup>10</sup> This is compatible with the view that it is *sui generis*. Other authors say explicitly that flag State jurisdiction is either personal<sup>11</sup> or territorial<sup>12</sup>. Others yet see it as *sui generis*.<sup>13</sup>

In short, existing literature seem to take different positions on the nature of flag State jurisdiction, but generally without much substantiation. The aim of the present text is to compensate for this, by examining the question in depth.

#### 4. Outline

The rest of the present text is divided into four parts, plus a conclusion. Chapter I presents three arguments for why flag State jurisdiction is different from personal jurisdiction: ships are not persons (I.1); personal jurisdiction, unlike flag state jurisdiction, does not allow enforcement, (I.2); and the prohibition of the use of force seems to apply to ships, while it does not generally apply to persons (I.3). Chapter II presents three arguments for why flag State jurisdiction is not territorial: a “genuine link” is required for granting nationality to ships, similarly to personal jurisdiction (II.1); the flags of ships can, unlike territory, be transferred without the consent of the former flag State (II.2); and the UNCLOS Article 97’s allocation of jurisdiction over collisions at sea is not compatible with a territorial perspective (II.3). Chapter III presents three arguments for why flag State jurisdiction is a *sui generis* form of jurisdiction, *i.e.* different from both personal and territorial jurisdiction: diplomatic protection on behalf of ships follows neither a personal nor territorial model (III.1); the ICC Rome Statute<sup>14</sup> classifies flag State jurisdiction as a separate basis for criminal jurisdiction (III.2); and the European Court of Human Rights (ECtHR) applies the European Convention on Human Rights<sup>15</sup> (ECHR) to ships under a test that treats ships neither as territory nor as persons (III.3). Chapter IV presents possible explanations for why different fields of international law treat ships differently. The conclusion in the final chapter is that flag State jurisdiction is *sui generis*, albeit closer in nature to territorial than to personal jurisdiction.

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personal and territorial jurisdiction (pp. 655-657 and 664).

<sup>9</sup> Robert Jennings and Arthur Watts eds., *Oppenheim’s International Law: Volume 1: Peace: Introduction and Part I* (9th ed. 1992), p. 479.

<sup>10</sup> Andre Clapham, *Brierly’s Law of Nations* (2012), p. 227; Crawford, *supra* note 4, pp. 464-466.

<sup>11</sup> Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (2007), p. 7. Jennings and Watts, *supra* note 9, pp. 734-735 may be understood to claim that flag State jurisdiction is based on the nationality principle and not the territorial principle.

<sup>12</sup> Ilias Bantekas, “Criminal Jurisdiction of States under International Law”, in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2011, available at [www.mpil.de](http://www.mpil.de)), paras 6-9.

<sup>13</sup> Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006), p. 26; referring to Nigel P. Ready, *Ship Registration* (1998), p. 6, which, however, does not seem to comment on the classification of flag State jurisdiction.

<sup>14</sup> Rome Statute of the International Criminal Court, *United Nations Treaty Series*, Vol. 2187, p. 90.

<sup>15</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *United Nations Treaty Series*, Vol 213, p. 222.

# I. Flag State Jurisdiction Is Not Personal

## 1. Ships Are Not Persons

Personal jurisdiction is, as its name suggests, jurisdiction over persons, legal or natural. A ship is not a person.<sup>16</sup> A ship does not have agency and cannot violate laws. It is usually not possible to sue a ship, or to contract with a ship. It is possible to contract with a company operating a (single) ship, or sue a person over possession or title to a ship. Crimes may be committed by persons located on a ship, operating a ship and/or owning a ship, but generally not by the ship as such. Dumping toxic waste, smuggling, unauthorized transmissions, and violence and various other crimes that can be committed at sea are committed by people on a ship, and not by the ship as such. In certain contexts the ship as such is treated as a rule breaker. The UNCLOS Article 19 says that the “passage” of a ship is not “innocent” if “it” (meaning the ship) engages in certain specified activities (such as pollution, smuggling, or the use of weapons). This affects how the ship as such may be treated by the coastal State. The general rule is still that legislation tells a person what he, she, or it can, cannot, must, or does not have to do. Legislation cannot tell a ship what it can do; it can only tell persons what they can do on, against, and with a ship.

Territorial jurisdiction is about regulating the conduct of persons on, with or against a given territory or space. This is exactly what flag State jurisdiction is about: regulating what can be done by person on, with or against the area of the ship.

A domestic law analogy is possible on this point.<sup>17</sup> In domestic law private ships are owned similarly to real estate, and trespassing and breaking into them is the same offence as on land. By contrast, *e.g.* parents’ authority over children is more similar to the State’s personal jurisdiction over citizens. People do not have any similar authority over an object such as a boat.

Ships are not *regular* territory, however. They are man-made rather than natural. Artificial land territory does exist, in the form of reclaimed land. There is still the difference that ships move around and float on water. This makes ships different from land territory. This difference is, however, less fundamental than the difference between a ship and a person.

When one State has flag State jurisdiction over a ship, other States will still have personal jurisdiction over their own nationals located on the ship. This is similar to the situation where one State has territorial jurisdiction over an area where a foreign national is located, over whom another State has personal jurisdiction. It is less natural to see this as two competing forms of personal jurisdiction.

This suggests that flag State jurisdiction cannot be considered “personal” in nature”.

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<sup>16</sup> Yang, *supra* note 13, p. 14.

<sup>17</sup> See also the domestic law analogy for property made by Lowe, *supra* note 8, p. 171.

## 2. Personal Jurisdiction Does Not Allow Enforcement

Personal jurisdiction is a basis for legislative and adjudicative jurisdiction, while territorial jurisdiction is a basis for enforcement jurisdiction as well. Flag State jurisdiction is a basis for enforcement jurisdiction as well as legislative and adjudicative jurisdiction. This is a fundamental difference between flag State jurisdiction and personal jurisdiction.

The UNCLOS Article 105 gives enforcement jurisdiction against piracy.<sup>18</sup> Jurisdiction over piracy is based on the universality principle. This is an exception from the general rule that only territorial jurisdiction gives enforcement jurisdiction. This does not, however, undermine the general point made in the previous section.

## 3. Ships and the Prohibition of the Use of Force

Article 2(4) of the UN Charter prohibits “the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. This means, among other things, that the use of force by a State against or on the territory of another State is prohibited, unless an exception from the prohibition applies.

If flag State jurisdiction is considered a form of territorial jurisdiction, a logical corollary is that the prohibition of the use of force applies to ships.<sup>19</sup> Thus a State using force on or against a ship flying the flag of another State on the high seas would not only violate the international law of jurisdiction (and potentially other applicable rules), but also the prohibition of the use of force. By contrast, if flag State jurisdiction is merely under a form of personal jurisdiction, the prohibition should presumably not apply, as it does not cover the use of force against foreign nationals.<sup>20</sup> Thus the applicability of the prohibition to vessels on the high seas may have implications for the nature of flag State jurisdiction.

The UNCLOS does allow certain forcible actions against other States’ ships, in Articles 105 (against piracy), 110 (giving a “right to visit”), and 111 (on the right to “hot pursuit”). If the use

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<sup>18</sup> Tullio Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia,” *European Journal of International Law*, Vol. 20, No. 2 (2009), p. 399, p. 413.

<sup>19</sup> Robin Churchill and Vaughan Lowe, *The Law of the Sea* (1999), pp. 422-426 assume that the prohibition applies to foreign ships. As does Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (2013), pp. 45, 149-154, and 157.

<sup>20</sup> Many sources assume that military forces can be subjects of “armed attack” under the UN Charter Article 51, which means that the prohibition applies to such forces, although this not mean anything for individuals generally. The sources include Christine Gray, *International Law and the Use of Force* (2008), p. 118; Independent International Fact-Finding Mission on the Conflict in Georgia, *Report: Volume II* (2009), p. 253; The North Atlantic Treaty, *United Nations Treaty Series*, Vol. 34, p. 243, Article 6(1), Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), Annex, Article 3(d); Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2013), p. 200. There is also a debate over States’ potential right to use force to protect their nationals (e.g. Gray, *ibid.*, pp. 88-92 and 156-160), but that does not mean that the use of force against foreign nationals is prohibited.

of force against ships is covered by the prohibition of the use of force, these UNCLOS provisions would have to be exempt from the prohibition in order to be valid.<sup>21</sup>

Article 88 of the UNCLOS says that “[t]he high seas shall be reserved for peaceful purposes”. This does not in itself exclude the application of the general international law rules on the use of force.<sup>22</sup>

Article 8 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation presupposes that States must get the approval of the flag State before boarding foreign vessels. Using force with the consent of the territorial State is generally legal.<sup>23</sup> Thus Article 8 does not say or imply anything about whether boarding a vessel without such approval would violate the prohibition of the use of force or only the rules of jurisdiction. As a consequence it does not contribute to the understanding of the nature of flag State jurisdiction.

Several judicial decisions have discussed the legality of using force against foreign vessels on the high seas, albeit with a certain degree of ambiguity and lack of substantiation.

The ITLOS apparently did not apply the prohibition in the *Saiga* 2<sup>24</sup> case.<sup>25</sup> It Stated that “international law, which is applicable by virtue of article 293 of the [UNCLOS], requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances”.<sup>26</sup> The prohibition of the use of force does not permit force that is “reasonable and necessary”, it rather prohibits all force except in cases of self-defence, Security Council authorisation, or consent. The ITLOS may have been motivated by an assumption that the force in question (shots fired by a patrol boat against a foreign vessel) did not meet the threshold of the prohibition.<sup>27</sup> A more plausible interpretation is that the ITLOS assumed that the general prohibition of the use of force does not apply to vessels

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<sup>21</sup> As explained in Sondre Torp Helmersen, “The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations,” *Netherlands International Law Review*, Vol. 61, No. 2 (2014), p. 167, pp. 178-180, they would be *outside the scope of* the prohibition.

<sup>22</sup> E.g. Myron H. Nordquist, Satya N. Nandan, and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea*, available at <<http://referenceworks.brillonline.com/browse/united-nations-convention-on-the-law-of-the-sea>>, Part VII – Articles 86-120, p. 91, with references to preparatory works.

<sup>23</sup> E.g. Gray, *supra* note 20, pp. 80-81.

<sup>24</sup> International Tribunal for the Law of the Sea, *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, *Merits, Judgment of 1 July 1999*.

<sup>25</sup> Louise Angélique de La Fayette, “Saiga Cases,” in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2009, available at [www.mpepil.de](http://www.mpepil.de)), para 24.

<sup>26</sup> *Saiga 2*, *supra* note 24, para 155. The tribunal analogised this law from The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *United Nations Treaty Series*, Vol. 2167, p. 3, Article 22(1)(f). The tribunal also stated that “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law”.

<sup>27</sup> This possibility is raised (although not connected to that case) by Papastravidis, *supra* note 19, pp. 45, 149-154, and 157.

on the high seas.

By contrast the arbitral tribunal (operating under auspices of the Permanent Court of Arbitration) that decided the *Guyana v. Suriname*<sup>28</sup> case did apply the prohibition to a threat of the use of force by Suriname against a foreign oil rig and vessels in the high seas.<sup>29</sup> The tribunal drew a distinction between the use of force and “law enforcement”, and said that the latter must be reasonable and necessary, while the former is prohibited by the UN Charter Article 2(4).<sup>30</sup> The tribunal found that the Surinamese action violated the prohibition of the use of force.

The International Court of Justice (ICJ) in the *Oil Platforms*<sup>31</sup> case also applied the prohibition. The case concerned two US-flagged ships were hit by a missile and a mine respectively, and the US’ counterattack against Iranian oil platforms.<sup>32</sup> One of the US ships was hit by a missile while in harbour,<sup>33</sup> and the other ship was on hit while on the high seas.<sup>34</sup> The court said that it “does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’”.<sup>35</sup> This passage seems to discuss the gravity threshold of the term “armed attack” in the UN Charter Article 51, which necessarily means that the prohibition of the use of force applies to military vessels. This does not necessarily mean that it applies to civilian vessels too, however.<sup>36</sup> As for the US counterattacks, the court found these to have been contrary to the prohibition of the use of force.<sup>37</sup> The status of oil platforms outside

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<sup>28</sup> Permanent Court of Arbitration, *Guyana and Suriname, Award of the Arbitral Tribunal, 17 September 2007*.

<sup>29</sup> The tribunal did not specify whose flag the oil rig and vessels flew, but it was presumably not Surinamese. **The** incident occurred beyond the territorial waters of Guyana or Suriname (*Guyana v. Suriname, supra* note 28, para 151). The tribunal overstepped its jurisdiction by ruling on the threat of the use of force (Lorand Bartels, “Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?,” in Tomer Broude and Yuval Shany eds., *Multi-Sourced Equivalent Norms in International Law* (2011), p. 115, pp. 128-129), but that does not matter for the purposes of the present text. Guilfoyle, *supra* note 2, pp. 274-275 considers it possible that the tribunal’s findings are limited to use of force in boundary disputes.

<sup>30</sup> *Guyana v. Suriname, supra* note 28, para 445. It referred to the first Saiga case (*The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgment of 4 December 1997*), as well as *S.S. "I'm Alone" (Canada/United States)*, R.I.A.A. Vol. 3, p. 1615, and *Red Crusader (Commission of Enquiry, Denmark-United Kingdom)*, 35 I.L.R. p. 199 (*Guyana v. Suriname, supra* note 28, footnote 518).

<sup>31</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *ICJ Reports* (2003) p. 161.

<sup>32</sup> *Oil Platforms, supra* note 31, para 25.

<sup>33</sup> The present text is concerned with jurisdiction over ships on the high seas, not in internal or territorial waters or harbours. However the attack was directed against a US ship which was in Kuwaiti waters, and the Court discussed whether this constituted an “armed attack” against the US for purposes of self-defence (UN Charter Article 51). The attack could also constitute a use of force against Kuwait, but what the Court discussed was the attack as a use of force against a ship as such. That assumes that the prohibition applies to the ship, which makes the Court’s reasoning relevant to the present text.

<sup>34</sup> See the introduction section 1, limiting the present text to flag State jurisdiction on the high seas.

<sup>35</sup> *Oil Platforms, supra* note 31, para 72.

<sup>36</sup> Ruys, *supra* note 20, p. 208 concludes that the judgment implies that attacks on civilian vessels can also be subject to “armed attacks”.

<sup>37</sup> In para 43 the Court explained that it reads the Treaty of Amity, Economic Relations, and Consular Rights, *United Nations Treaty Series*, Vol. 284, p. 93, Article XX, which was in contention in the case, in light of the prohibition of the use of force. In para 45 the Court noted that the US admitted that its actions constituted use of force. In para 125 the Court concluded that the US actions were not justified under Article XX read in light of the right to self-defence.



territorial waters is the same as that of ships,<sup>38</sup> which makes this finding relevant to the present text.

The San Remo Manual<sup>39</sup> Articles 67, 98, and 146 permit the use of force against neutral<sup>40</sup> non-military ships. Article 67 does not specify where this may take place. Article 98 is complemented by Article 96, which says that it may be done at a “distance” (presumably from the shore) “determined by military requirements”. Article 146 concerns areas outside “neutral waters”, which according to Article 14 means the internal, territorial, and archipelagic waters of neutral States, which means that Article 146 applies to the high seas. However the substantive provisions of the San Remo Manual concern humanitarian law. The manual itself assumes that its provisions are subject to limitations imposed by the prohibition of the use of force and its exceptions, as these rules apply to ships.<sup>41</sup>

The “Palmer Report”<sup>42</sup> on Israel’s raid on the “Gaza Flotilla” on 31 May 2010 states in an annex dealing with legal issues that using force against a foreign flagged vessel is legal if “used in self-defence, in line with Articles 2(4) and 51 of the U.N.”<sup>43</sup> The raid was also widely commented on in the media, including by academics. Some thought the operation violated the prohibition of the

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<sup>38</sup> Under the UNCLOS Article 60, installations and structures in the exclusive economic zone (and through Article 76, on the continental shelf) are under the exclusive jurisdiction of the coastal State.

<sup>39</sup> International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994). This instrument is not legally binding, but its contents are intended to reflect customary international law.

<sup>40</sup> *I.e.* whose flag State is not involved in the conflict in question.

<sup>41</sup> “The majority of participants were also of the opinion, as reflected in the Manual, that the rights of belligerents are affected by the restraints of the law of self-defence and that this will affect the rights of belligerents to make full use of all the methods of naval warfare that the traditional law automatically allowed once a state of war existed. This is particularly the case with regard to the institution of various measures of economic warfare against neutral shipping, such as the capture of contraband, and other measures affecting the economic interests of neutral nations, such as the institution of a blockade.” (International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Explanation* (1994), p. 68). Andrew Sanger, “The Contemporary Law of Blockade and the Gaza Freedom Flotilla,” *Yearbook of International Humanitarian Law*, Vol. 13 (2010), p. 397, pp. 406-407 seems to treat the San Remo rules on blockade as an independent exception for the prohibition from the use of force, which was not the manual’s intention and which is not generally recognised. The UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), para 13.106 says that it is legal to capture neutral vessel if breaching or attempting to breach blockade. It does not explain whether this is legal because an exception to the prohibition of the use of force may apply or because the prohibition as such does not apply to ships.

<sup>42</sup> Sir Geoffrey Palmer, Alvaro Uribe, Joseph Ciechanover Itzhar, and Süleyman Özdem Sanberk, *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident* (2011). There is also a ‘Goldstone Report’ (U. N. Doc. A/HRC/12/48 (2009), United Nations Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*), which does not deal with the legality of using force against foreign-flagged ships. The raid raised a host of other legal questions, but these are not relevant to the present text. There was also a similar but smaller incident on July 16 2011, involving only the threat of use of force, and attracting far less commentary.

<sup>43</sup> Palmer, Uribe, Itzhar, and Sanberk, *supra* note 42, para 70. The report is not able to explain convincingly how a private Comoran ship on the high seas can constitute or be part of an “armed attack” against Israeli territory, but for the present text that is beside the point. Sanger, *supra* note 41, p. 441 is even more cursory in his treatment of the prohibition as applied to the interception.

use of force.<sup>44</sup> Others assumed that the operation was legal,<sup>45</sup> but without specifying whether this was because the prohibition did not apply to ships on the high seas, because the right to enforce a blockade is a separate exception from the prohibition, because Israel had a right to self-defence against the ship, or another ground.

The North Atlantic Treaty Article 6(1) includes (military and civilian) “vessels” as potential targets of armed attacks,<sup>46</sup> which assumes that the prohibition applies to them.

The UN General Assembly’s *Definition of Aggression* Article 3(d) also includes non-military vessels, but only “fleets” of them, as potential targets of aggression. This may mean that only large-scale attacks against civilian vessels trigger a regular right to self-defence, whereas attacks on a single ship only gives a right to limited “on-the-spot” defence.<sup>47</sup> This would not mean that the prohibition of the use of force does not apply to individual civilians ships, however, since not all uses of force constitute “armed attacks”.

In conclusion, a preponderance of the sources discussed in this chapter assume that the prohibition of the use of force applies to ships.<sup>48</sup> This suggests that flag State jurisdiction is different from regular personal jurisdiction, where the prohibition of the use of force does not apply.

## II. Flag State Jurisdiction Is Not Territorial

### 1. The “Genuine Link” Requirement

The UNCLOS Article 91(1) requires a “genuine link” for a flag of registry to be valid towards other States. This is the same principle that was applied to personal citizenship in the ICJ’s *Nottebohm*<sup>49</sup> case.<sup>50</sup> The International Law Commission has suggested abandoning the principle.<sup>51</sup> That the requirement is found in the UNCLOS nonetheless suggests that its drafters

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<sup>44</sup> E.g. Robin Churchill, as reported here: “Condemnation Follows Israeli Raid On Gaza Flotilla”, *NPR*, May 31 2010, available at <<http://www.npr.org/templates/story/story.php?storyId=127286256>>.

<sup>45</sup> E.g. Eric Posner, “The Gaza Blockade and International Law: Israel’s position is reasonable and backed by precedent,” *Wall Street Journal*, June 4 2010, available at <<http://www.wsj.com/news/articles/SB10001424052748704025304575284210429984110?mg=reno64-wsj>>.

<sup>46</sup> Ruys, *supra* note 20, p. 206.

<sup>47</sup> Ruys, *supra* note 20, p. 209. That “armed attacks” may generally occur against ships is assumed by Mary Ellen O’Connell, “Historical Development and Legal Basis,” in Dieter Fleck ed., *The Handbook of International Humanitarian Law* (2013), p. 1, p. 6; Guilfoyle, *supra* note 2, p. 273 (who also refers to Raab, “Armed Attack after the Oil Platforms Case,” *Leiden Journal of International Law*, Vol. 17, No. 4 (2004), p. 719, p. 727; Christine Gray, “The British Position with Regard to the Gulf Conflict (Iran-Iraq): Part 2,” *International and Comparative Law Quarterly*, Vol. 40, No. 2 (1991), p. 464, p. 469; Vaughan Lowe, “Self-Defence at Sea,” in William E. Butler ed., *The Non-Use of Force in International Law* (1989), p. 185, p. 189.

<sup>48</sup> This is also the conclusion of Guilfoyle, *supra* note 2, pp. 272-294.

<sup>49</sup> *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4.

<sup>50</sup> *Nottebohm*, *supra* note 49, p. 23.

<sup>51</sup> International Law Commission, *Draft Articles on Diplomatic Protection with commentaries, Yearbook of the International Law Commission, 2006*, vol. II, Part Two (2006), Article 4 para 5.

saw flag State jurisdiction as analogous to personal jurisdiction.

## 2. The Transferability of Flag State Jurisdiction

Personal jurisdiction over natural persons and companies can be transferred by the subject itself, through gaining new citizenship or corporate nationality. The same is the case for ships, which can change their flag of registry without the consent of the previous flag State. Territory, by contrast, cannot pass out of a State's jurisdiction without the consent of the State.<sup>52</sup> This is another difference between territorial jurisdiction and flag State jurisdiction.

## 3. The UNCLOS Article 97

The UNCLOS Article 97 says that in the case of collisions on the high seas, a person may only be prosecuted by the flag State of the vessel where the person was located at the time of the collision. This solution is different from that prescribed by the PCIJ in the *Lotus* case (see the introduction section 2).<sup>53</sup> This suggests that the UNCLOS drafters did not design the Convention's system of flag State jurisdiction with territorial jurisdiction in mind. If flag State jurisdiction were to follow the system of regular territorial jurisdiction, persons could be prosecuted by the flag State of the other ship involved in a collision, because of the collision would affect the prosecuting State's ship.<sup>54</sup> Article 97 instead leaves prosecution of each individual to the relevant ship's flag State. This mutual exclusivity is more reminiscent of personal jurisdiction, which is always reserved to the national State(s), regardless of where the individual is located or what they do.

# III. Flag State Jurisdiction Is Sui Generis

## 1. Diplomatic Protection on Behalf of Ships

Diplomatic protection cannot be exercised on behalf of ships, only for persons (who may have been located on a ship). This confirms that ships are not treated as persons in international law (see chapter II.1 above), which would imply that flag State jurisdiction is not "personal".

At the same time, the International Law Commission's Draft Articles on Diplomatic Protection (2006) Article 18 say that a State can exercise diplomatic protection over non-nationals on its flagged ships.<sup>55</sup> This suggests that flag State jurisdiction is also different from regular territorial jurisdiction, since there is no right to exercise diplomatic protection on behalf of a foreigner

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<sup>52</sup> The right to self-determination does not give a right to unilateral secession (Daniel Thürer and Thomas Burri, "Secession," in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2009, available at [www.mpepil.de](http://www.mpepil.de)), paras 14-21), and territory cannot legally be taken by force (Rainer Hofmann, "Annexation," in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2013, available at [www.mpepil.de](http://www.mpepil.de)), para 21).

<sup>53</sup> Armin van Bogdandy and Markus Rau, "Lotus, The," in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2006, available at [www.mpepil.de](http://www.mpepil.de)), para 20.

<sup>54</sup> See footnote 4 above, regarding the "effects doctrine".

<sup>55</sup> The same point is made by Crawford, *supra* note 4, p. 702.

located on a State's regular territory.

Since this treatment of flag State jurisdiction has distinct differences from both personal and territorial jurisdiction, it suggests that flag State jurisdiction must be *sui generis*.

## 2. The Rome Statute and the North Atlantic Treaty

The ICC Rome Statute Article 12(2)(a) gives the ICC jurisdiction over cases where “one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: [...] The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft”. Article 12(2)(b) concerns “[t]he State of which the person accused of the crime is a national”.

The ICC Rome Statute thus classifies flag State jurisdiction alongside jurisdiction over territory, and separately from jurisdiction over persons. This suggests that its drafters considered flag State jurisdiction to have a territorial nature. On the other hand, the Statute distinguishes between territorial jurisdiction and flag State jurisdiction, which means that the Statute classifies these as distinct forms of jurisdiction.<sup>56</sup> Thus according to the ICC Statute, flag State jurisdiction is different both from territorial jurisdiction and personal jurisdiction.

The ICC Statute Article 12(2)(a) is the basis for the Union of the Comoros' referral<sup>57</sup> of the “31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip” (which is also discussed in chapter I.3 above). The referral asserts that “Comoros has territorial jurisdiction on M.V. Mavi Marmara” based on Article 12(2)(a),<sup>58</sup> which suggests that the Comoros at least considers flag State jurisdiction to be closer to territorial jurisdiction than to personal jurisdiction.

An opposite approach is found in the North Atlantic Treaty Article 6, which lists “territory” in one bullet point and “forces, vessels or aircraft” in another when enumerating possible target for attacks on parties to treaty. The North Atlantic Treaty thus seems to consider ships to be closer to individuals (forces) than to territory.

## 3. The ECHR on Ships

Most human rights conventions are understood, at least by their interpretative organs and many

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<sup>56</sup> Buchan may nonetheless be taken to assume that ships are classified as part of territory when writing that “[a]rticle 12(2)(a) further states that territory in this context includes vessels that fly under the flag of a State that is party to the Rome Statute” (Russell Buchan, ‘The *Mavi Marmara* Incident and the International Criminal Court,’ *Criminal Law Forum* Vol. 25, No. 2 (2014), p. 456, p. 471).

<sup>57</sup> Ramazan Aritürk and Cihat Gökdemir, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation* (2013), available at <<http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

<sup>58</sup> Aritürk and Gökdemir, *supra* note 57, para 19.

States, and at least for their “negative” (as opposed to “positive”) obligations, to be applicable to whatever acts that are attributable to a State party. These conventions reveal nothing about the nature of flag State jurisdiction, since they apply to official acts committed anywhere, including on ships.<sup>59</sup> For the ECHR, however, the situation is different. The ECtHR distinguishes between a State’s own territory and anywhere else, and applies a “control” test to determine whether the ECHR applies outside a State’s territory.<sup>60</sup> Thus the ECtHR’s treatment of official actions taken on a State’s flagged ships reveals whether the ECtHR considers ships to be part of a State’s territory.

According to the *Hirsi*<sup>61</sup> case (2012) it does not. The court applied its control test to Italian official actions on a ship registered in Italy. It presented this as a matter of a State having “effective control of an area outside its national territory”<sup>62</sup> and “operating outside its territory”<sup>63</sup>. The ECtHR has also given more general statements of “extra-territorial exercise of jurisdiction” including “on board craft and vessels registered in, or flying the flag of, that State”.<sup>64</sup> Thus the ECtHR does not consider flagged ships to be part of a State’s territory for jurisdictional purposes.<sup>65</sup>

In the *Al-Skeini* case the ECtHR distinguished between two forms of extraterritorial jurisdiction: “effective control over an area” and “State agent authority and control”.<sup>66</sup> The former is about a State’s control of territory, the latter about control of persons. *Al-Skeini* classified the *Medvedyev* case, which concerned official actions aboard a ship, as being about “State agent authority and control”.<sup>67</sup> In this connection the ECtHR explicitly distinguished between “control [...] over the [...] ship” and “control over the person”, and held that the latter was “decisive”.<sup>68</sup> This distinction shows that the ECtHR does not consider ships as persons for jurisdictional purposes.

In short the ECtHR treats ships neither as State territory nor as persons for jurisdictional purposes. This shows that, at least to the ECtHR, flag State jurisdiction is truly *sui generis*.

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<sup>59</sup> E.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), pp. 174-182.

<sup>60</sup> This test was outlined in European Court of Human Rights, *Bankovic v Belgium and Others*, 52207/99 (2001), para 71, and further refined and developed in European Court of Human Rights, *Al-Skeini and Others v the United Kingdom*, 55721/07 (2011), paras 130-141. It was later followed e.g. in European Court of Human Rights, *Al-Jedda v. United Kingdom*, 27021/08 (2011), para 85), and European Court of Human Rights, *Hassan v. the United Kingdom*, 29750/09 (2014), para 74. The test is also discussed by Robin C. A. White and Claire Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (2010), pp. 89-92.

<sup>61</sup> European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, 27765/09 (2012)

<sup>62</sup> *Ibid.*, para 73.

<sup>63</sup> *Ibid.*, para 74.

<sup>64</sup> *Bankovic*, *supra* note 60, para 73; European Court of Human Rights, *Medvedyev and Others v. France*, 3394/03 (2010), para 65.

<sup>65</sup> Another case of the ECHR applied to ships is the *Medvedyev*, *supra* note 64, but in that case France exercised control over a foreign ship, which makes the case less relevant to the present text.

<sup>66</sup> *Al-Skeini*, *supra* note 60, paras 133-140.

<sup>67</sup> *Ibid.*, para 136.

<sup>68</sup> *Ibid.*

## IV. Explaining the Variations

The foregoing chapters have shown that different sources and fields of international law treat ships differently, in a way that is only compatible with flag State jurisdiction being neither of a personal nor of a territorial nature. This chapter examines possible explanations for these different treatments of ships.

In some fields, the treatment of ships can be seen as something of a logical necessity. For the purposes of innocent passage under the UNCLOS (chapter I.1), violating the conditions of the passage may affect the treatment of the ship. Therefore it is natural to describe the conduct of ships as such, even though the conduct must necessarily be performed by individuals. By contrast, the field of diplomatic protection is concerned with vindicating the rights of individuals. Ships can play no role in this, beyond being where an individual may be located when their rights are violated.

In other fields, excluding ships from a general rule could be seen as a “loophole”. For example, it would be somewhat arbitrary if the prohibition of the use of force did not cover ships at all, with States being free to conduct naval warfare while land warfare was outlawed. Similarly in the North Atlantic Treaty, an attack on a member State’s ship is a hostile act in the same vein as an attack on its territory. It would therefore be strange if only land attacks triggered the treaty’s collective self-defence obligation.

Yet other fields’ treatment of ships may be merely formalities or a matter of convenience. Being able to transfer flag State registration without the consent of the existing flag State is beneficial to the shipping industry, and is also convenient for States.<sup>69</sup> That ships are placed alongside territory in the ICC Statute is a formality without any legal consequences.

The ECtHR’s treatment of ships is part of the *Bankovic* decision and its aftermath. That decision sought to limit the potential scope of the ECHR, especially with regards to foreign territory and in situations of armed conflict.<sup>70</sup> Excluding the Convention’s application to ships is in line with this more general limitation, although ships seem to be only a minor part of a bigger picture.

Other points discussed in the present text are not concerned with the status of ships as such, including the “genuine link” requirement in the UNCLOS Article 91(1) and the allocation of jurisdiction in the UNCLOS Article 97.

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<sup>69</sup> Edwin Anderson, “The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives,” *Tulane Maritime Law Journal*, Vol. 21, No. 1 (1996), p. 139, p. 169.

<sup>70</sup> Marko Milanovic, “*Al-Skeini* and *Al-Jedda* in Strasbourg,” *European Journal of International Law*, Vol. 23, No. 1 (2012), p. 121, pp. 123-124.

Despite these differing explanations, the treatment of ships in the different fields of international law discussed in the present text still have something to say about the status of ships in international law generally, as described in the conclusion below.

## Conclusion

The present texts has attempted to show three things: That flag State jurisdiction is different from personal jurisdiction, that it is different from territorial jurisdiction, and that it should be seen as a *sui generis* form of jurisdiction. It is different from territorial jurisdiction because ships are not persons, because flag State jurisdiction (as opposed to personal jurisdiction) allows enforcement, and because the prohibition of the use of force seems to apply to ships. Flag State jurisdiction appears to be different from territorial jurisdiction because of the “genuine link” requirement in the UNCLOS, the transferability of flag State registration, and the jurisdictional allocation in the UNCLOS Article 97. The *sui generis* nature of flag State jurisdiction is supported by the possibility to exercise diplomatic protection on behalf of foreign citizens located on a State’s flagged ships, the classification of ships in the ICC Rome Statute and the North Atlantic Treaty, and the way the ECtHR treats ships.

While flag State jurisdiction should be seen as *sui generis*, the argument that ships are fundamentally not persons (see chapter I.1) means that flag State jurisdiction should be seen as more similar to territorial than to personal jurisdiction. Thus for classification purposes, if one has to choose between placing flag State jurisdiction under the heading of either “personal” or “territorial” jurisdiction, the latter should be preferred. However no substantive inferences can be made from this; classifications should be inferred from substantive law, and not the other way around.