

# State Responsibility and Sunken Ships: Perspectives of Flag States and Coastal States

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# State Responsibility and Sunken Ships

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## Structure

1. The Scope and Limits of **State Responsibility** (brief)
2. Recent Developments under **UNCLOS**
3. **Application to Sunken Ships/Wrecks? Possible at all? Case Studies...**
4. Conclusions

# 1. The Scope and Limits of State Responsibility

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## Whose Responsibility?

- **States**
- Non-State actors...?
- Individuals???

State Responsibility is classically concerned with States as the only actors (States as primary subjects of international law)

→ State Responsibility represents the set of rules governing the international legal consequences of violations, by States, of their international legal obligations (wrongful acts).

# 1. The Scope and Limits of State Responsibility

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***'[State] Responsibility is concerned with the incidence and consequences of illegal acts and ..the payment of compensation for loss caused.'***

*Brownlie*, Principles of International Law.

→ State Responsibility covers the rules determining the situation once States have been deemed liable for breaching the international legal obligations they owe.

# 1. The Scope and Limits of State Responsibility

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## **Sources** for the Rules on State Responsibility?

- **NO comprehensive treaty...**
  - General rules to be found in custom and through decisions of Courts and Tribunals...
- **ILC Articles on State Responsibility of 2001**  
(largely reflecting custom... codification between 1956-2001)
- **International Treaties addressing the matter**, see for example, Art. 235 UNCLOS

# 1. The Scope and Limits of State Responsibility

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## Article 235 UNCLOS - Responsibility and Liability

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

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

3. [...]

# 1. The Scope and Limits of State Responsibility

## Article 235 UNCLOS - Responsibility and Liability

- → State Responsibility generally exists under the Law of the Sea (and in Int'l Environmental Law)
- No specific UNCLOS case law under Art. 235, for example as a result of transboundary marine pollution
- States are generally reluctant to sue each other in an international forum for financial compensation (diplomatic reasons) – **local remedies preferred**...
- “*Par in parem non habet imperium*” has some limiting effect...

# 1. The Scope and Limits of State Responsibility

## Article 235 UNCLOS - Responsibility and Liability

- A further limiting effect is generated by **attribution** – see Chapter II of the ILC ASR 2001 (Articles 4-11):  
What is an “**act of State**” under international law?
  - What are “organs of a State”?
  - Persons or entities exercising elements of governmental authority?
  - Conduct directed or controlled by a State?



# 1. The Scope and Limits of State Responsibility

## Article 235 UNCLOS - Responsibility and Liability

- Conduct directed or controlled by a State?



Is an IRISL ship  
a commercially operated  
vessel under the flag of  
Iran...?

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Or is an IRISL vessel an  
Iranian State ship...?

# 1. The Scope and Limits of State Responsibility

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## Article 235 UNCLOS - Responsibility and Liability

- → “*Par in parem non habet imperium*” has limiting effects...
- → **Sovereign State immunity** has limiting effects
- → The problem of **attribution** (and causality) has limiting effects...

**Some EXAMPLES:**

# The Prestige Example – Spain Did Not Sue the Flag State (Bahamas) but other non-State Parties

Crown Resources  
(Charterers)



Universe Maritime  
(Managers)



Mare Shipping (Owners)



Hitachi Shipbuilding &  
Engineering Co. (Ship  
Builder)



Flag State



???



1 Billion \$ claim

ABS  
(Class Society)



P & I



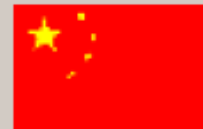
Spanish  
Authorities



Smit Salvage  
(Salvors)



Cosco Shipyard  
(Repairs)



State  
Respon  
sions

# Spain loses appeal in \$1bn Prestige lawsuit against ABS

**Landmark ruling in New York has huge implications for classification industry**

RAJESH JOSHI – NEW YORK

THE classification sector appears to have dodged a potentially fatal bullet, after Spain lost its \$1bn *Prestige* lawsuit against US class society ABS in a federal appellate court in New York yesterday.

The US Court of Appeals denied Spain's September 2010 appeal against a district court verdict that had favoured ABS.

The three-judge appellate panel held that Spain did not furnish sufficient evidence to establish its allegation that ABS behaved recklessly in the November 2002 sinking of the ABS-classed *Prestige* off the Spanish coast.

With much more than \$100m in total legal bills run up by both sides, the lawsuit is already legendary in certain quarters as the "biggest lawsuit in maritime history".



The ABS-classed *Prestige* sank off the Spanish coast in November 2002.

AP/Douanes Française/Avion Polmar II

# The Erika Example – France Did Not Sue the Flag State (Malta) but other non-State Parties

Note:

Italian class  
„RINA“  
protected by  
**sovereign flag**  
**State immunity**  
but held to have  
implicitly  
**waived** any  
immunity  
rights...

## Total's conviction in Erika case upheld

Roger HULLY

FRANCE's highest court has upheld a conviction against oil giant Total over the 1999 *Erika* tanker casualty in which 20,000 tonnes of crude oil was spilled off the coast of Brittany.

The Cour de Cassation in Paris retained a 2008 ruling placing criminal responsibility over the spill on Total.

*Erika*, a 24-year-old tanker chartered by Total, split apart in a storm in the Bay of Biscay.

The ruling is a blow to the French state-owned oil company, which had hoped it would be absolved of blame for one of France's worst environmental disasters.

The court also ruled that Total, which has paid a €375,000 (\$486,000) fine and nearly €400m for the clean-up operation, had civil responsibility in the accident.

According to Reuters, lawyers for Total had hoped to overturn the ruling on the grounds the Italy-owned *Erika* was technically just outside French waters and flying a Maltese flag when it sank, limiting the applicability of



*Erika*, a 24-year-old tanker chartered by Total, spilled 20,000 tonnes of crude when it split apart in a storm in the Bay of Biscay.

AP

French laws. The lawyers had argued that convicting Total went against international conventions that place liability for accidents with shipowners rather than the companies chartering the vessels.

The *Erika* incident resulted in a significant regulatory response from the European Union, including the mandatory phase-out of single-hull tankers. ■

# Montara Spill (2009) – Transboundary Pollution, nevertheless, cautious approach by Indonesia...



Montara Spill - Cumulative Oil Slick Impact - October 21, 2009

# 1. The Scope and Limits of State Responsibility

## Article 236 – Sovereign Immunity

The provisions of this Convention regarding the protection and preservation of the marine environment **do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.**

However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

# State Responsibility and Sunken Ships

## Structure

1. The Scope and Limits of **State Responsibility** (very brief)
2. Recent Developments under **UNCLOS**

→ Modern Case Law of ITLOS and of the ICJ **establishing potential State responsibility** and, thus, **liability** of (flag) States...



# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2015

2 April 2015

List of cases:

No. 21

**REQUEST FOR AN ADVISORY OPINION  
SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)  
(Request for Advisory Opinion submitted to the Tribunal)**

**ADVISORY OPINION**

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

WHALING  
IN THE ANTARCTIC

(AUSTRALIA *v.* JAPAN: NEW ZEALAND intervening)

**JUDGMENT OF 31 MARCH 2014**

# State Responsibility and Sunken Ships

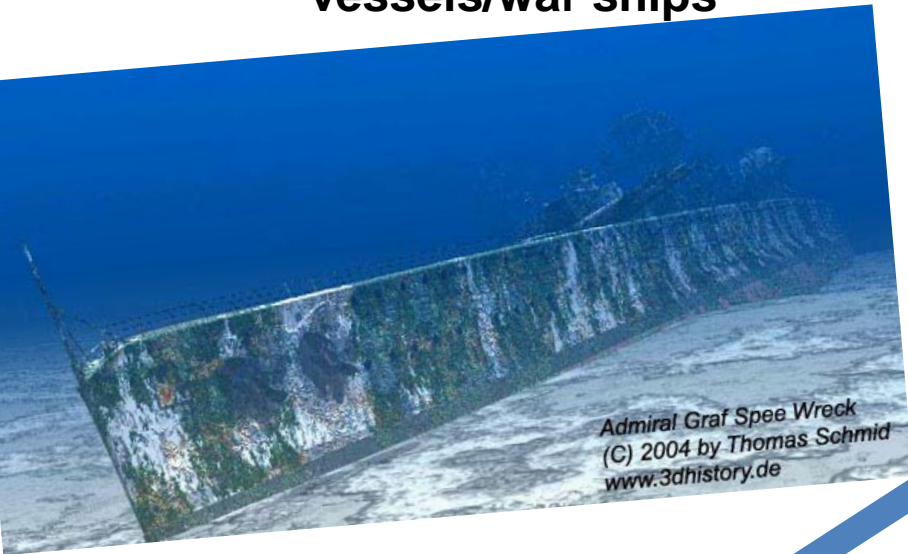
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## Structure

- 3. Application to Sunken Ships/Wrecks?  
Possible at all? Case Studies...**

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

Public Ships, in particular navy  
vessels/war ships



Privately  
operated  
Ships?



# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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Unfortunately, both the issue of the legal status of shot and sunken military aircraft and sunken warships is “***subject to great uncertainty.***”

## Some Problems:

- Who owns a sunken warship?
- Is a sunken warship (still) entitled to State Immunity?
- (Could a salvage operation be a violation of international law...?)

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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*“Unfortunately, both the issue of the legal status of shot and sunken military aircraft and sunken warships is  
“subject to great uncertainty.”*

## Ownership?

- *Implied abandonment? (by passage of time...)*
- **Strong opposition of some flag States** (for example by the USA, UK, Japan, Germany) arguing that – if at all – abandonment of military craft should be express...

# Édouard Manet (1864): Battle at Sea between the USS Kearsarge and the CSS Alabama

*1864:  
CSS Alabama  
sank before  
Cherbourg,  
France*





# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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## Ownership?

### USA (1991 on the “CSS Alabama“):

*“[...], although the CSS Alabama sank in 1864 on the high seas, the final resting place of the vessel is now within the territorial sea of France. [...] However, **this in no way extinguishes the ownership rights** of the United States.”*

### Japan (1987 on the “Awamaru“):

*“[...] it **cannot** be concluded that the ship [...] becomes the property of the coastal State to which the territorial sea belongs.”*

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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## Ownership?

### so-called “MMP” (Major Maritime Powers):

*“[...] a coastal State **does not acquire property to a State ship** merely by reasons of its being located on or embedded in land or the sea-bed over which it exercises sovereignty or jurisdiction.”*

### ILC on Art. 2.1 of the Continental Shelf Convention:

*“[...] the rights of the coastal State [on the CS] **do not cover objects such as wrecked ships** and their cargoes [...] lying on the seabed or covered by the bed of the subsoil.”*

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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- Who owns a sunken warship?

→ generally: strong evidence in State Practice that flag States expressly insist on continued ownership

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→ opposite example: Norway seized the wreck of the German warship „*Blücher*“ in 1948 and sold any rights to the wreck to a private Norwegian shipping company

# The „*Blücher*“ sinks in the Oslo fjord (1940)



# The „Blücher“wreck in the Oslo fjord (from 1940)

- The wreck was constantly leaking oil, monitored by the Norwegian authorities
- In 1991, the leakage rate increased to 50 liters per day...

*In 1991, the German Green Party officially asked the German government whether Germany would take any steps to mitigate the leakage...*

*→ Negative reply*

Deutscher Bundestag  
12. Wahlperiode

Drucksache 12/1539

12. 11. 91

**Antwort**  
der Bundesregierung

auf die Kleine Anfrage des Abgeordneten Dr. Klaus-Dieter Feige und der Gruppe  
BÜNDNIS 90/DIE GRÜNEN  
— Drucksache 12/1343 —

Austreten von Öl aus den Tanks des deutschen Kreuzers „Blücher“ im Oslofjord

# The „Blücher“wreck in the Oslo fjord (from 1940)

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- The Norwegian government decided **to remove as much oil as possible** from the wreck (at its own costs)
- In 1994 holes were drilled in 133 fuel tanks, 1.000 tons of oil could be removed oil but **47 fuel bunkers were unreachable and still contained oil.**
- The wreck is now protected as a war memorial since 2016.

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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- Who owns a sunken warship?

→ strong evidence in State Practice that flag States expressly insist on continued ownership

## Further Problems:

- Is a sunken warship (still) entitled to sovereign State Immunity?
- Could a salvage operation – by a coastal State and/or by a private company, aiming to remove leaking oil – be a violation of international law?

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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## Further Problems:

- Is a sunken warship (still) entitled to sovereign State Immunity? What about salvage operations?  
  
→
- **High Court of Singapore, Judgment of 24 October 1974**
- **Dispute in relation to the German submarine „U 859“**  
(torpedoed and sank in the Malakka strait...)
- „U 859“ had loaded a cargo of quicksilver... parts of the cargo had already been subject to **third-party salvage operations... illegal?**



# State Responsibility and Sunken Ships – Applicable at All? Case Studies

- 1972: Contract between the (West) German government and a private salvor in relation “***to the lifting and appropriation of the wreck and cargo of U 859***”
- “[*The West German government*] ***will transfer the property rights of the wreck and cargo of submarine U 859 as well as all rights and obligations [...] to the salvage operator [...].***”
- → **Singapore High Court held that this contract was valid** – other salvors had to release parts of the cargo and had **no rights in relation to the wreck...**

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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## Further Problems:

- Could a salvage operation – by a coastal State and/or by a private company, **aiming to remove leaking oil** – be a violation of international law?
- The flag State has a duty to remove the wreck if the wreck causes damage to the environment (→Trail Smelter Arbitration)
- If the flag State fails to comply with its duties, an affected coastal State can remove the wreck as a **reprisal**, despite the immunity of the flag State...

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

- If any detriments are caused by the wreck, should the harmed coastal State be able to **claim damages** according to the principles of **State responsibility**?

- Open question...

## INVOICE:

4 Mio. €  
for the removal of  
YOUR wreck  
(state vessel)  
in OUR waters...

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

- If any detriments are caused by the wreck, should the harmed coastal State be able to **claim damages** according to the principles of **State responsibility**?

## Open question...

- **Possible justifications**, for example:
  - Payment of reparations between 1949 and 1990...
  - material recompensation incurred by Germany has been estimated to be more than € 500 billion
  - “Two-Plus-Four Treaty” of 1990 as final settlement...

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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- If any detriments are caused by the wreck, should the harmed coastal State be able to **claim damages** according to the principles of **State responsibility**?

## Open question...

- **Possible justifications**, for example:
  - The status of public international law at 1945, particularly, **the law of armed conflict at 1945**, is not comparable to the second half of the 20<sup>th</sup> century and to the 21<sup>st</sup> century...

# **State Responsibility and Sunken Ships – Applicable at All? Case Studies**

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## **Principle 24 of the Rio Declaration (1992)**

**Warfare is inherently destructive of sustainable development.**

**States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.**

# State Responsibility and Sunken Ships – Applicable at All? Case Studies

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## Finally:

- Harmed individuals – according to the **local remedies rule** – must claim their damages from the flag State, which is entitled to immunity.
- The courts of this State will/should apply their **domestic / public laws** to decide this question.

# Kiitos!

*“Unfortunately, both the issue of the legal status of shot and sunken military aircraft and sunken warships is  
“**subject to great uncertainty.**”*

