

A UNIFIED UNDERSTANDING OF SHIP NATIONALITY IN PEACE AND WAR

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ABSTRACT

The entrenched understanding of the law governing nationality does not permit a state to look beyond a ship's flag and registration to ascertain its nationality during peacetime. Nonetheless, this very understanding also allows a state to pierce the veil of a ship's registration to ascertain its enemy character during wartime. However, the war in Ukraine has witnessed fresh state practice whereby states have claimed equivalent rights during peacetime as well, thus encouraging the concordant interpretation of the status of nationality across both the peace and wartime legal orders.

I. INTRODUCTION

Russia's war of aggression¹ against Ukraine has ignited a firestorm of developments across varied fields of international law. While most legal commentary has remained transfixed on the landward developments, there have also been striking developments at sea. In particular, the law governing ship nationality has witnessed an outpouring of fresh state practice. The United Kingdom (UK), the European Union (EU), the United States (U.S.), and Canada have responded to the Russian aggression by, *inter alia*, banning Russian shipping from accessing their ports and/or waters. In identifying which ships qualify as Russian, these states have refused to limit themselves solely to an examination of a ship's flag or registration. Now they are also looking at who is behind the flag or registry. This is a momentous development, since by adopting this stance, these states have declared that they may ascertain a ship's nationality during peacetime in the same manner as a ship's nationality is ascertained when the relevant states are at war.

The Law of Naval Warfare (LNW) unambiguously recognizes the right of a state at war to pierce the veil of a ship's registration so as to ascertain its nationality and enemy character. However, at the time of the imposition of the bans on Russian shipping, the UK, the EU, the United States, and Canada all existed in a state of peace with Russia. The applicable peacetime law remains the Law of the Sea Convention (LOSC). The interpretation of the relevant LOSC provisions, adopted by the International Tribunal for the Law of the Sea (ITLOS), suggests that these bans are not legally valid. However, this Essay argues that the ITLOS interpretation is incorrect and, consequently, that these bans are indeed legally valid.

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¹ GA Res. ES-11/1, Aggression Against Ukraine (Mar. 18, 2022).

The consequences of adopting this understanding have a significance that extends far beyond the current conflict.

Eighty percent of the global merchandise trade by volume and seventy percent by value continues to be moved by sea.² The shipping industry acts as the arteries of our globalized world. Furthermore, unlike its pre-industrial era counterparts, maritime trade is no longer confined to high value, non-competitive goods. Today's world is characterized not just by interdependent economies but by interdependent production processes. In such a world, the effects of an interruption of trade are not confined just to a state's finances; they affect many other sectors of the society, as well. Thus, the forcible disruption of maritime trade arguably represents the single greatest disruptor of the contemporary international order.³

Nationality remains by far the most important criterion for determining what shipping vessels may or may not be sunk, captured, denied passage, or otherwise targeted during a state of war. However, a move towards determining nationality identically during both peacetime and war makes the status of nationality a critical factor in deciding whether or not a ship may be denied passage rights during peacetime too. States, particularly those in the Indo-Pacific, will find the current state practice to be of deep interest in any future conflicts. These developments are also of crucial interest to non-state actors, since the private maritime industry has grown accustomed to using open registries and flags of convenience⁴ as a substitute to ensuring the presence of a genuine link and the consequent status of nationality. This Essay commences by examining the measures adopted by the UK, the EU, the United States, and Canada. It then examines the criterion used under the LNW to determine nationality, before pivoting to examine the approach under the LOSC. The final section of the Essay critically analyzes and debunks the ITLOS's interpretation of the LOSC, in favor of an alternative interpretation that is concordant with the approach under the LNW.

II. THE BAN ON RUSSIAN SHIPPING

In response to the Russian invasion of Ukraine, Canada, the UK, the United States, and the EU promulgated laws banning Russian shipping from accessing their ports and/or waters. Canada prohibited the docking or passage of Russian-registered ships and ships that are "used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of Russia, a person in Russia or a designated person."⁵ Similarly, the UK stipulated that an

² UN Conference on Trade and Development (UNCTAD), Review of Maritime Transport 2019, at 4, UN Doc. UNCTAD/RMT/2019/Corr.1, available at https://unctad.org/system/files/official-document/rmt2019_en.pdf; UNCTAD, Review of Maritime Transport 2017, at 16, UN Doc. UNCTAD/RMT/2017, available at https://unctad.org/system/files/official-document/rmt2017_en.pdf.

³ Daniel Moran, *The International Law of the Sea in a Globalized World*, in GLOBALIZATION AND MARITIME POWER (Sam J. Tangredi ed., 2002); Robert C. Rubel, *Navies and Economic Prosperity – The New Logic of Sea Power* 8–9 (Corbett Paper No. 11, Kings College London, Oct. 2012), available at <https://www.kcl.ac.uk/dsd/assets/corbettpaper11.pdf>.

⁴ JOHN N.K. MANSELL, FLAG STATE RESPONSIBILITY: HISTORICAL DEVELOPMENT AND CONTEMPORARY ISSUES 76, 95 (2009). Flags of convenience/open registries refers to the phenomenon whereby a flag state does not require a ship's beneficial owner to be resident and subject to the very same laws as any other company in the same state. States offering flags of convenience/open registries have no requirement for crewing ships by nationals of the flag state, have extremely low registration fees and annual tonnage fees, offer relief from taxing earnings, and have lowered scrutiny with respect to international safety and crewing requirements.

⁵ Regulations Amending the Special Economic Measures (Russia) Regulations, SOR/2022-47, reg. 3.4 (Can.).

individual may not provide a ship with port access if it is, *inter alia*, flying the Russian flag, registered in Russia, or “owned, controlled, chartered or operated by persons connected with Russia.”⁶ The United States prohibited “Russian-affiliated vessels” from entering its ports, covering both Russian-owned (be it by the Russian government, company, citizen, or a permanent resident) and Russian-operated (be it by the Russian government or by a Russian company, citizen, or permanent resident) vessels.⁷ The EU’s decision to prohibit port access to Russian shipping was more limited than the other three in that the EU opted to prohibit port access only to any vessel registered under the Russian flag, including vessels that changed their Russian flag or registration to any other flag or registration after February 24, 2022.⁸

These bans give rise to legal concerns for individuals and corporations who may (validly or otherwise) find their possessions and capital at risk of seizure or depreciation. It also gives rise to legal concerns for port operators because they may have to choose between being penalized for violating the ban by having granted entry to a banned ship, or becoming embroiled in a legal dispute for mistakenly denying entry to a legitimate vessel.

For the reasons initially discussed, these legal risks will be experienced much more acutely by actors having to interface with UK, Canadian, and U.S. authorities, as opposed to the EU. What is common to all of these measures is that they involve general bans that are applicable to all Russian shipping. What differentiates the EU measures from the others is the criteria for determining what qualifies as Russian shipping. The EU’s position enjoys greater compatibility with the dominant understanding of nationality in the LOSC (as affirmed by the ITLOS) because of the centrality that it accords to a ship’s flag and registration for purposes of ascertaining a ship’s nationality. By contrast, the UK, U.S., and Canadian measures are rooted in an alternative understanding of ship nationality that thus far has been rejected by the ITLOS. This understanding is one wherein a state looks beyond a ship’s flag and registration so as to determine whether it actually possess a genuine link with the state whose flag it flies.

As demonstrated in the subsequent Part, this UK, Canadian, and U.S. understanding of nationality bears a striking resemblance to the criteria under the LNw. Also, while the EU’s understanding of ship nationality overlaps with that of the ITLOS, it is not exactly identical to that adopted by the ITLOS. This is due to the fact that the EU decision to prohibit port access to vessels that have changed their Russian flag or registration is also clearly inspired by equivalent provisions found in the law of war, as we will see.

III. NATIONALITY AND THE LAW OF NAVAL WARFARE

As previously mentioned, the LNw recognizes the right of a state at war to pierce the veil of a ship’s registration so as to ascertain its nationality and possible enemy character. This is permitted because, during a state of war, international law allows the targeting of enemy (and in

⁶ The Russia (Sanctions) (EU Exit) (Amendment) (No. 4) Regulations 2022, SI 2022/203, reg. 6, 57(A)(5)(b) (UK).

⁷ Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports, 87 FR 24265 (Apr. 21, 2022).

⁸ Council Regulation (EU) 2022/576 of 8 April 2022 Amending Regulation (EU) No. 833/2014 Concerning Restrictive Measures in View of Russia’s Actions Destabilising the Situation in Ukraine, Art. 3ea(1), (2), [2022] OJ L111 (Apr. 8, 2022).

some cases even neutral) merchant shipping by way of interference, seizure, or destruction as part of the long-accepted practice of economic warfare.⁹ A key difference between the law of peace (the LOSC) and the Law of Naval Warfare (LNW) is that during war, a belligerent state can engage in the targeting of vessels following a determination of its “enemy character.” This “enemy character” can be determined not just by a vessel’s registration but also by the ownership or charter of the vessel. By contrast, during peace, the ITLOS maintains that a vessel’s registration is the paramount determinant of a ship’s nationality.

These wartime rules can be found in the 1909 London Declaration Concerning the Laws of Naval War,¹⁰ the 1913 Oxford *Manual on the Laws of Naval War*,¹¹ and the 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.¹² The *San Remo Manual* affirms that enemy character may be determined by registration, ownership, charter, or other criteria.¹³ The United Kingdom’s *Joint Service Manual of the Law of Armed Conflict* provides illustrations of what is meant by “other criteria,” including a ship’s transfer to a neutral flag for the purpose of evading belligerent capture. Such a transfer could be considered genuine only if it were to result in the complete divestiture of enemy ownership and control.¹⁴ This particular provision is an excellent example of how the criteria adopted by the EU to ascertain what qualifies as Russian shipping under the LOSC (a peacetime law) is similar to the criteria in the LNW.

The formulation in the *San Remo Manual* enjoys near universal acceptance, as well. The provisions set forth above are replicated in the legal manuals of numerous other states. For instance, the U.S. *Law of War Manual* and *Handbook on the Law of Naval Operations* states that a vessel may be treated as an enemy merchant vessel if it remains under the ownership or control of individuals who themselves possess an enemy character or who operate under enemy control, orders, charter, employment, or direction.¹⁵ The definition of enemy character varies from that of “Any merchant vessel or civilian aircraft owned and controlled by a belligerent”¹⁶ to “Any merchant vessel or aircraft owned or controlled by or for an enemy State, enemy persons, or any enemy corporation.”¹⁷ Norway’s *Manual of the Law of Armed*

⁹ Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, MAX PLANCK ENCYCLOPAEDIA INT’L L. (Mar. 2013); Wolff Heintschel Von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 4th ed. 2021).

¹⁰ Declaration Concerning the Laws of Naval Warfare, Arts. 57–58, 60, London (Feb. 26, 1909).

¹¹ Manual of the Laws of Naval War, Arts. 51, 52, Oxford (Aug. 9, 1913).

¹² James Kraska, *Military Operations*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA (Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott & Tim Stephens eds., 2015) (“The San Remo Manual . . . serves as an authoritative restatement of law.”); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995); Steven Haines, *War at Sea: Nineteenth-Century Laws for Twenty-First-Century Wars?*, 98 INT’L REV. RED CROSS 419, 434–35 (2016).

¹³ SAN REMO MANUAL, *supra* note 12, para. 117.

¹⁴ THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 367 n. 104 (2004) (UK).

¹⁵ DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 15.14.1, 15.14.2.2 (updated 2016); THE COMMANDER’S HANDBOOK ON THE LAW ON NAVAL OPERATIONS 7.5, 7.5.2 (NWP 1-14M/ MCTP 11-10B/ COMDTPUB P5800.7A, 2022).

¹⁶ THE COMMANDER’S HANDBOOK ON THE LAW ON NAVAL OPERATIONS, *supra* note 15, at 7.5.

¹⁷ LAW OF NAVAL WARFARE, para. 501 (NWIP 10-2, 1955). Though the United States of America published the *Commanders Handbook on the Law of Naval Operations* after the adoption of the LOSC, the U.S. *Department of Defense’s Law of War Manual* (last updated in 2016) continues to make references to NWIP 10-2. See footnotes 274, 278, 281, 294 and 309 to the *DoD Law of War Manual*.

Conflict states that “‘enemy character’ simply means that a vessel is affiliated with a state which is an enemy in armed conflict.”¹⁸ Similar provisions are found in the legal manuals of the UK,¹⁹ Germany,²⁰ New Zealand,²¹ Canada,²² Norway,²³ Australia,²⁴ and Denmark.²⁵

IV. NATIONALITY AND THE LAW OF THE SEAS CONVENTION

Both the LOSC and its predecessor, the 1958 Geneva Convention on the High Seas (GCHS), provided that, “Ships have the nationality of the State whose flag they are entitled to fly.” They also note that there must exist “a genuine link between the State and the ship.”²⁶ The ITLOS has commented on this genuine link on two separate occasions: in the *M/V “SAIGA” (No. 2)*²⁷ and *MV Virginia*²⁸ cases. The Tribunal grappled with the problem of

¹⁸ MANUAL OF THE LAW OF ARMED CONFLICT 10.63 (2013) (Nor.).

¹⁹ THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 14, at 12.79 (“Enemy character can be determined by registration, ownership, charter, or other criteria.”).

²⁰ KOMMANDANTEN-HANDBUCH – RECHTSGRUNDLAGEN FÜR DEN EINSATZ VON SEESTREITKRÄFTEN (COMMANDER’S HANDBOOK: LEGAL BASES FOR THE OPERATIONS OF NAVAL FORCES) (Ger.) (translation from German, para. 329: “All enemy merchant vessels and enemy civil aircraft are vehicles which either fly the flag or bear the markings of the opposing party to the conflict or whose enemy character may be presumed on the strength of other features (e.g., enemy owners, charter or control). Information to this effect will, as a rule, be provided by the intelligence services.”); *see also* para 268; LAW OF ARMED CONFLICT MANUAL, paras. 1026–27 (2013) (Ger.) (“The adversary character of a merchant vessel is determined by the flag the ship is entitled to fly. . . . All measures of economic warfare at sea may be performed against merchant ships of the adversary without consideration of their cargo and owners.”); para. 1032 (“The adversary character of cargo is determined by the nationality of the owner or, if the owner is stateless, by his residence. In the case of organisations and companies, their seat is relevant. In case of a transfer of ownership during a journey effected after the outbreak of hostilities, goods of the adversary retain their adversary character until they reach their destination.”).

²¹ MANUAL OF ARMED FORCES LAW, VOL. 4: LAW OF ARMED CONFLICT, sec. 6, 10.6.2 (2d ed. 2017) (N.Z.) (“If the commander of a New Zealand force suspects that a merchant vessel flying a neutral flag actually has enemy character then, subject to orders, the commander may visit and search that vessel or may divert it for search. The same rights of interception and diversion apply in respect of neutral aircraft. . . . Enemy character can be determined by registration, ownership, charter or other criteria.”).

²² LAW OF ARMED CONFLICT MANUAL AT THE OPERATIONAL AND TACTICAL LEVELS 719(2)(c) (2001) (Can.) (“Neutral merchant vessels may also be captured if it is determined as a result of visit and search or by other means, that they: are operating directly under enemy control, orders, charter, employment or direction.”).

²³ MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 18, at 10.65 (“If it is suspected that a vessel sailing under a neutral flag has enemy character, the vessel may be visited and, in relevant cases, searched. If reasonable grounds remain for suspecting that the vessel has enemy character, it may be captured as a prize and submitted to a prize court for determination of whether it may be confiscated.”).

²⁴ LAW OF ARMED CONFLICT 6.57 (2006) (Austl.) (“Neutral merchant vessels are subject to capture outside neutral waters if they. . . are operating directly under enemy control, orders, charter, employment or direction.”).

²⁵ MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS 4.5.2.3 (2016) (Den.) (“Enemy merchant vessels are merchant vessels flying the flag of the enemy. Thus, the term ‘enemy’ exclusively describes the formal affiliation of the merchant ship and has no implication for its acts.”).

²⁶ UN Convention on the Law of the Sea, Art.91(1), Dec. 10, 1982, 1833 UNTS 433 (“Every 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.”); Geneva Convention on the High Seas, Art. 5, Apr. 29, 1958, 450-5 UNTS 82 (“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.”).

²⁷ The *M/V “SAIGA” (No. 2) Case* (Saint Vincent v. Guinea), Judgment (ITLOS July 1, 1999).

²⁸ The *M/V “Virginia G” Case* (Pan./Guinea Bissau), Judgment (ITLOS Apr. 14, 2014).

whether the term “genuine link” concerns only a flag state’s duty to effectively exercise jurisdiction and control in administrative, technical, and social matters, or whether the existence of a genuine link is a condition *sine qua non* for there to be a grant of nationality to a ship.²⁹ In both cases, the ITLOS decided that the term “genuine link” was about the exercise of jurisdiction and control.³⁰ It held that the requirement for a genuine link “should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.”³¹

Article 91 of the LOSC uses the term “genuine link,” and in the *SAIGA* case, the ITLOS noted that Article 91 of the LOSC had its origins in Article 5 of the 1958 GCHS, which itself was informed by a 1956 draft of the International Law Commission (ILC). This ILC draft had proposed that the concept of the genuine link be a criterion not just for the attribution of nationality to a ship but also for the recognition by other states of such nationality. The language employed was: “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.” Because the latter part of this formulation was included in neither the GCHS nor the LOSC, the ITLOS reasoned that the requirement of a genuine link was not a condition *sine qua non* for there to be a grant of nationality to a ship.³²

The LOSC unambiguously requires states to fix the conditions for the grant of its nationality to ships. However, the LOSC does not precisely specify the content of this obligation. There exists a wide variety of combinations by which states flesh out the substantive content of this obligation.³³ The United Nations Convention on Conditions for Registration of Ships (UNCCRS) was framed so as to provide greater specificity and thus strengthen the genuine link between ships and the state whose flag they flew.³⁴ The UNCCRS required the state of registration to ensure the participation of its own nationals in the ownership or the manning of ships (it could also require both)³⁵ and to ensure that the ship-owning company is established or has its principal place of business within its territory (it could also require both).³⁶ However, despite having been concluded decades ago, this treaty never entered into force. The ensuing lack of clarity as to the specific situations when the requirement of the genuine link may be considered satisfied has created a legitimate cone of uncertainty. It is within this cone that the actions of the states targeting Russian shipping are located.

²⁹ Nivedita M. Hosanee, *A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of the 1982 United Nations Convention on the Law of the Sea*, 86, Division for Ocean Affairs and the Law of the Sea, UN Office of Legal Affairs (2009).

³⁰ *The M/V “SAIGA” (No. 2) Case*, *supra* note 27, para. 83.

³¹ *The M/V “Virginia G” Case*, *supra* note 28, para. 110.

³² *The M/V “SAIGA” (No. 2) Case*, *supra* note 27, para. 80.

³³ Nagendra Singh, *International Law Problems of Merchant Shipping*, 107 RECUEIL DES COURS, 1, 61 (1962) (noting that the test of genuine link could depend on some or all of the following factors: “(a) Construction of the ship in national yards, (b) manned by national crew, (c) controlled by national officers and master, (d) majority ownership in national hands, (e) registration and flag being national, (f) enactment of appropriate national law to control the operation, management and running of ships”).

³⁴ UN Convention on Conditions for Registration of Ships, Art. 4(2), Feb. 7, 1986, UN Doc. TD/RS/CONF/19/Add.1 (“Ships have the nationality of the State whose flag they are entitled to fly.”).

³⁵ *Id.* Arts. 8–9.

³⁶ *Id.* Art. 10.

V. THE CONCORDANT INTERPRETATION OF NATIONALITY IN PEACE AND WAR

The LNW, a United Nations Security Council (UNSC) mandate, or the LOSC represent the three possible bases of legal authority that could justify the piercing of a ship's veil of registration. The LNW is inapplicable as none of these states were in a state of war with Russia at the time of the imposition of the bans. The UNSC has been unable to take any action on the issue owing to Russia's veto power. This leaves us with the LOSC. The criteria adopted by the UK, the EU, the United States, and Canada to ascertain ship nationality can be considered consistent with the LOSC, only if the requirement of the genuine link is interpreted as being a condition *sine qua non* for there to be a grant of nationality to a ship. Indeed, there is a very strong argument that this was the very reason that the phrase was inducted into the LOSC.

Judge Philip Jessup observed, while sitting on the International Court of Justice, that the "link" concept represented a general principle of law.³⁷ He noted that, "If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship."³⁸

The ITLOS, which subscribes to the opposite view, bases its stance on a combined reading of LOSC Articles 91 and 94. Article 91 as noted previously, is concerned with the nationality of ships, the requirement of a genuine link and the right to fly a state's flag. Article 94 by contrast is concerned solely with the specific duties of a flag state.³⁹ The ITLOS's reading of both the articles elevates Article 94 to a general rule, and makes Article 91 function as an ancillary to Article 94. Such a reading has the practical effect of rendering Article 91 of the LOSC meaningless, something that flies in the face of the accepted canons of treaty interpretation, specifically the principle of effectiveness,⁴⁰ which requires an interpreter is required to read all treaty provisions harmoniously so that meaning and effect is given to every term of the treaty.⁴¹

Furthermore, the ITLOS's decision is also rooted in a questionable interpretation of key ILC texts. The ILC had affirmed that the grant of nationality "must not depart too far from the principles adopted by the majority of States, which may be regarded as forming part of international law."⁴² It is true that the ILC did acknowledge that these principles, which must ensure the existence of a minimal national element, varied widely across states. Consequently, in recognition of the divergence in state practice, the ILC elected to not flesh out further detailed criterion. However, the ILC explicitly stated 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." While the ILC extended states a wide latitude in

³⁷ *Barcelona Traction, Light and Power Company, Ltd.*, Judgment, 1970 ICJ Rep. 3, para. 44 (Feb. 5) (sep. op., Jessup, J.).

³⁸ *Id.*, para. 46.

³⁹ Article 94 requires every state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Among other things, it deals with the requirement of maintaining registers, assuming jurisdiction and taking the necessary regulatory measures to ensure safety at sea.

⁴⁰ ROBIN R. CHURCHILL, *THE MEANING OF THE "GENUINE LINK" REQUIREMENT IN RELATION TO THE NATIONALITY OF SHIPS* 69–70 (2000).

⁴¹ RICHARD GARINDER, *TREATY INTERPRETATION* 180 (2d ed. 2015).

⁴² Report of the International Law Commission Covering the Work of Its Eighth Session, Apr. 23–July 4, 1956, at 278, UN Doc. A/3159 (1956), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf.

determining the details of what the genuine link may constitute, it was abundantly clear that a state's grant of its flag to a ship cannot be a mere administrative formality. The exercise of a state's jurisdiction and control over a ship "can only be effective where there exists in fact a relationship between the State and the other ship other than mere registration or the mere grant of a certificate of registry."⁴³ It is also telling that during the ILC's deliberations, an initiative to eliminate the words "for the grant of its nationality to ships" with "are under the jurisdiction" did not succeed.⁴⁴

In the *SAIGA* case, Judge David Anderson disagreed with the majority's stance that the requirement of the "genuine link" was of no relevance to the grant of nationality.⁴⁵ President Thomas Mensah also concurred that a ship cannot "acquire nationality merely because an official of the State declares that it has such nationality."⁴⁶ In the *M/V Virginia* case, there was an even stronger pushback from the dissenting judges. For instance, Judge José Luis Jesus held that the "granting of the nationality precedes the flag-State duty to take measures to secure the genuine link."⁴⁷ Judge Tafsir Ndiaye also noted the impossibility for a flag state to effectively exercise its jurisdiction and control if it could not exercise jurisdiction and control over the ship owners and operators as well.⁴⁸

VI. CONCLUSION

The belligerents in the current war are maritime minnows. Since the conclusion of World War II, the international community has not witnessed a single naval conflict between major maritime powers. Today, there exist more nuclear weapon states than states with multidimensional blue water navies.⁴⁹ Given this, the notion that great power maritime conflicts are a relic of the past is certainly an attractive one, right until it is not. Until just a few months ago, the international community believed exactly the same about the prospects of naked interstate aggression at the very doorstep of Europe as well.

There exists no business on the face of the Earth that is more globalized than maritime transportation. Legal uncertainty about a factor as basic as a vessel's nationality is anathema to such an industry. The outbreak of a major maritime conflict where states unilaterally recognize or disavow a ship's nationality would spell the death knell for any kind of legal predictability. Such developments will shake up international commerce, existing supply chains, and, by extension, much of the international order, which remains overwhelmingly dependent on maritime transportation.⁵⁰

The meaning of the term "genuine link" and the consequences that follow in cases where it does not exist, remains "notoriously difficult to pin down."⁵¹ It is this interpretative controversy that creates a gap that has been used by the states banning Russian shipping. These

⁴³ *Id.* at 279.

⁴⁴ H. MEYERS, *THE NATIONALITY OF SHIPS* 29 (1967).

⁴⁵ *The M/V "SAIGA" (No. 2) Case* (sep. op., Anderson, J.), *supra* note 27, at 132.

⁴⁶ *Id.* (sep. op., Mensah, J.), para. 13.

⁴⁷ *The M/V "Virginia G" Case* (diss. op., Jesus, J.), *supra* note 28, para. 47.

⁴⁸ *Id.* (diss. op., Ndiaye, J.) at 254–56.

⁴⁹ GEOFFREY TILL, *SEAPOWERS: A GUIDE TO THE TWENTY-FIRST CENTURY* 114 (2d ed. 2009).

⁵⁰ UNCTAD, *supra* note 2.

⁵¹ Richard A Barnes, *Flag States*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA*, *supra* note 12.

measures are a relative rarity insofar as state practice relating to ship nationality is concerned and they merit close attention and further discussion. For if piercing the veil of a ship's nationality is considered legitimate for the protection of one set of core values (the prohibition of aggression) today, then states may attempt the same for the protection of a different set of values as well (environmental protection or the protection of human rights for instance) tomorrow.

The ITLOS's interpretation of the requirement of the genuine link as being concerned only with the exercise of jurisdiction and control, as opposed to being a condition *sine qua non* for there to be a grant of nationality to a ship, is flawed. Commercial expediency and the absence of interstate conflict had incentivized states to maintain ambiguity on this issue thus far. However, the current spate of state practice marks a significant departure from this trend. Over half a century ago, Judge Moreno Quintana observed that: "The flag-that supreme emblem of sovereignty which international law authorizes ships to fly-must represent a country's degree of economic independence, not the interests of third parties or companies."⁵² Each state must now grapple with this issue so as to decide what its own stance on the issue of ship nationality is to be.

⁵² Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 ICJ Rep. 150, 178 (June 8) (diss. op., Quintana, J.).