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Doctrine of State Responsibility  
in the Law of Inter-state Marine  
Pollution Damage

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# Abbreviations

Bunker Convention	The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage
CLC	The 1969/1992 International Convention on Civil Liability for Oil Pollution Damage
DASR	The 2001 Draft articles on State Responsibility for Internationally Wrongful Acts
Fund Convention	The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
HNS	The 2010 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
ICJ	International Court of Justice
ILC	International Law Commission
IWA	Internationally Wrongful Act
MARPOL	The 1973/1978 International Convention for the Prevention of Pollution by Ships
Salvage Convention	The 1989 International Convention on Salvage
UNCLOS	The 1982 United Nations Convention on the Law of the Sea

# Summary

*The blunt truth about the politics of climate change is that no country will want to sacrifice its economy in order to meet this challenge, but all economies know that the only sensible long term way of developing is to do it on a sustainable basis.*  
(Tony Blair, a British politician).

The question of environmental protection has lately become essential due to the increased number of polluters and accidents that have occurred in recent decades. The starting point was the *Torrey Canyon* disaster which happened in March 1967 and exposed the entire international community to a great danger of environmental harm in general and marine pollution in particular. The accident also pointed to the fact that the doctrine of state responsibility, which by that time was quite young and undeveloped, was indeed too weak to deal with the multifaceted problem. Thus, there arose the question of improvement and perfection of the doctrine of state responsibility; and that issue gave rise to multiple scholarly discussions and legislative approaches to proper implementation of the doctrine. Nevertheless, though half a century has passed since the unfortunate disaster, the doctrine of state responsibility remains largely ineffective and therefore, not entirely operative. The most significant international documents on this subject are still at a draft stage.

Nonetheless, while the legal instruments are only being drafted, the realities demonstrate a strong necessity for the doctrine of state responsibility to be fully developed and put into proper effect. It needs no reiteration that four fifths of planet earth consists of water: and together with the related resources including the flora and the fauna, the marine environment should have first priority in terms of environmental protection. This subject therefore requires further study for the development and implementation of new rules concerning the doctrine of state responsibility.

*Ad interim*, the meaning and utility of the doctrine of state responsibility is dependent on what type of implementation instrument operates. Marine environmental protection for the most part falls within the public law domain whereas the majority of existing international conventions deal with private law. Thus, the utility of the doctrine is questionable in terms of its application through those private law instruments. In any case, this issue needs to be addressed not only to separate entities, regardless of whether they are public or private, but to the world community at large. Moreover, in cases of pollution of the marine environment, both states and individuals should be concerned and different kinds of legal instruments should be used. Thus, regardless of who violates the law or whatever may be the source of the pollution, states would bear the responsibility and be liable for the environmental harm caused.

Consequently, the doctrine of state responsibility, as applied to marine environmental law, is of major importance and thereby requires carefully considered development, especially with regard to its legal constituents.

# **Chapter1: INTRODUCTION**

## **1.1. Subject and Issues**

The main purpose of the work is to investigate the status of the doctrine of state responsibility in light of its evolution in the context of interstate marine pollution damage. The issues examined include the historical development and contemporary status of the doctrine of state responsibility from the dual perspectives of public and private law; the relevant international and domestic legal instruments dealing with regulation of responsibility that states bear for causing harm to the marine environment; the major judicial decisions concerning either state responsibility for marine environmental harm or international responsibility of states in other areas of environmental protection, or both, and their analysis. Besides, the problematic issues arising from the subject which provide the grounds for scholarly research, congruent arguments will also be considered within the thesis.

## **1.2. Reasoning, Intention, Theoretical Approach**

To thoroughly comprehend the importance of studying and examining the doctrine of state responsibility, several issues need to be taken into consideration. First of all, the general principle that makes an entity responsible for discharging its obligations giving rise to liability for its own actions, or failure to act, runs through the mainstream of international law. Secondly, any issue connected with ecology, which interstate marine pollution damage is, ought to be a matter of global concern. This concern has triggered the discussions pertaining to further development and implementation of the doctrine of state responsibility. The institution of nationality and citizenship in international law makes a state responsible for the actions and omissions of its citizens or other entities belonging to the state regardless of whether they are of public or private character and whatever kind of harm they might have caused. The study undertaken in this thesis is thus highly topical and justified especially given the level of its development in international maritime domain.

It is intended in this study to endeavor to answer the question concerning the doctrine's efficiency and applicability. Besides, it is intended to elucidate in what way the doctrine of state responsibility can be better put to practice considering the duality of its public and private nature. It is essential to consider the type of liability that should be imposed on a state for failure to discharge its obligations under international law, and finally, to demonstrate whether the doctrine is efficient by examining the major judicial decisions on the subject.

The theoretical approach of the thesis is based on the intentions mentioned above.

### **1.3. Necessity for International Legal Regulation of the Subject**

The notion of state responsibility itself has been one a major topic of judicial deliberation together with scholarly works and numerous discussions especially in the second part of the 20<sup>th</sup> century to present times. Interest in the doctrine has greatly increased in recent years, mainly because marine pollution is a matter of global concern and the responsibility of states for causing harm is an issue of major importance. However, there are still some drawbacks in the international legal regime governing state responsibility.

One such problem is the absence of a clear definition of the term of “state responsibility” which might be one of the reasons why the doctrine has remained notional without much practical significance. Surprisingly, in spite of it being of such contemporary importance in legal philosophy, state responsibility is difficult to define. Another problem is that development of the doctrine has been held in abeyance. The correlation between interstate and international considerations within the framework of this subject is based on both its global as well as its domestic features. Thus, there is a need to implement the new international treaty instruments through positive cooperation among them which is indispensable. In addition, due to lack of adequate international legislation, there is neither a proper understanding of terms such as “environmental harm” and “pollution damage”, nor their interactions. Moreover, the sovereign independence that states have by virtue of the theory of international law appears to generate debate on the absolute certainty of the international obligations and commitments of states as regards matters of international environmental protection. Needless to say, the existing deficiencies in international legal regulation need to be removed expeditiously.

### **1.4. Relevance of the Topic and the Research Questions**

Over the past century there has been a dramatic increase in marine pollution which has brought about concerted action and cooperation within the international community. Nevertheless, there are numerous examples which show that even such collaboration was not sufficient to make the doctrine of state responsibility sufficiently consolidated to become properly applicable in the practice of international law. Taking into account the universal character of environmental issues and the necessity of protecting the marine environment, it is virtually impossible to omit the question of state responsibility. However, far too little attention has been paid to what state responsibility really signifies and in what extent it can be applicable. Moreover, there is no public law convention dealing with state responsibility in general and for such responsibility in the context of marine environmental harm in particular. The necessity of international regulation in this field requires continuous and durable measures to face the currently existing realities. Flowing from this proposition, the purpose of this thesis is threefold; namely,

- 1) whether the existing law on state responsibility is sufficient for its proper application;
- 2) to what extent are the private maritime law conventions useful in the application of the doctrine?
- 3) against the background of the present level of its development, what are the possible ways to improve and perfect the doctrine of state responsibility?

### **1.5. Methodology of the Thesis**

To address the above-stated questions, the following research methodologies will be applied. The historical method will be used to investigate the roots and origins of the doctrine of state responsibility. This will enable arriving at a correlation between the past and the present legal principles of the doctrine. Also, a dialectical method will be used to point out the existing scholarly arguments and drawbacks in the current regulation of the matter. In addition, the deductive method through which case studies are done will be used to show the major findings of judicial decisions with regard to state responsibility for environmental harm to compare the findings and arrive at conclusions. The method of comparative analysis will also be used in respect of the terms on state responsibility used in existing international legislation and other issues arising from this debatable concept.

It is anticipated that the above methods will provide a unified approach to the research and enable the findings to be presented to the best advantage.

### **1.6. Materials**

For the purpose of finding out the best way for the appropriate application of the doctrine of state responsibility as well as the possibility of making such application through the private law conventions and finding the best possible ways to perfect the doctrine itself, use will be made of the legal literature available on the subject. This includes the major works of noted scholars as well as relevant case law. In addition, practitioners' works on the subject will also be incorporated in the thesis together with various textbooks on the subject addressing the common law system as well as Roman law and the Scandinavian legal system.

Legal periodicals will be used as may be appropriate to reach an overall and comprehensive analysis and conclusion for the purposes of the work. Aside from the above, online sources will also be consulted as may be deemed necessary.

### **1.7. Structure of the Thesis**

Aside from the Introduction and the Conclusion, the thesis comprises four substantive chapters.

In Chapter Two, which is the first substantive chapter, the preliminary and basic concept of state responsibility will be introduced particularly in the context of its roots and historical development. To show



what constitutes the utility of the doctrine the combination of public and private law concepts will be presented and examples will be given of instances of interstate litigation involving states acting as private entities. The outcomes will then be examined in terms of possible sanctions against states for causing environmental harm. These could be remedies in the form of compensation as well as administrative sanctions such as injunctions, prohibitions and the like.

Further, Chapter Three will elucidate the contemporary doctrine of state responsibility, in other words, its current status by reference to its advantages and disadvantages. Consideration will be given to existing drawbacks and unresolved issues with the aim of proposing viable solutions to alleviate the problems pertaining to appropriate implementation of the doctrine. There will be investigation regarding the preliminary pieces of legislation dealing with the doctrine of state responsibility and detailed analysis of their implementation.

Chapter Four will specifically deal with state responsibility for marine pollution. In this context the relevant provisions of the UNCLOS will be examined. In addition, the approaches taken by different legal systems will be presented with regard to state responsibility for damage to the marine environment. Moreover, the questions on what kind of responsibility states should have and whether the contemporary doctrine is sufficient or not, as well as its utility, will be addressed in this chapter.

Finally, the last substantive chapter will be entirely devoted to case law analysis of the major cases on the subject. The review will enable an appreciation of how the courts have applied the doctrine in practical terms. The review and analysis will be of significance in achieving the object and purpose of the research and the thesis.

In the Concluding chapter, a summary of the findings will be presented together with pertinent comments and proposals for further development of the doctrine.

## **1.8. Scope and Limitations**

In consideration of the focus of the present work, the thesis will be limited to addressing the research questions identified above. The questions relating to the sufficiency of the doctrine of state responsibility and the possibility of its application through private law conventions, and possible development and subsequent perfection of the doctrine will circumscribe the limits of investigation in this thesis. Any other dimension of the doctrine of state responsibility is by default beyond the scope of the thesis. Needless to say, the discussion is limited to the maritime domain concerning state responsibility for environmental damage.

## Chapter 2: PRELIMINARY CONSIDERATIONS

The doctrine of state responsibility was not very well developed until the very recent years, although there is the issue to find out whether it is developed enough at the moment. The first and the most principal document devoted particularly to this question is the Draft articles on State Responsibility for Internationally Wrongful Acts adopted by the International Law Commission in 2001<sup>1</sup>. The articles provide with the basic rules that have a “rigorously general character”<sup>2</sup> and are not bounding.

Nevertheless, whatever act currently regulates the doctrine, it is important to study its roots in order to comprehend the entire doctrine, and specifically state responsibility for marine pollution damage, as a whole. Another important issue to remember is the interconnection of the doctrine’s public and private law aspects which may be significant criteria determining utility of the doctrine. Moreover, the general rules on state responsibility and those of separate states’ laws are also considerable in this context. It is a fact that even when a state is not a party of an international treaty but the treaty includes the rules of customary international law then state would be bound under the treaty, and thus special legal remedies and sanctions would be applicable to those states which do not comply with international rules. Nonetheless, it is important not to mix state responsibility with obligations and duties themselves that states bear when being in international relations. State responsibility is most likely a principle that *arises from an obligation* of a state to guarantee its amenability *in case* of violation of international rules. Besides, state responsibility, even though it has some similarities with the responsibility that individuals bear, cannot be equated with it as well. It is such a complex legal institution that constitutes a very distinguished juridical position of an obligor-state in case of the breach of international obligations.<sup>3</sup>

These very basic aspects for their most parts deal with responsibility in its essence but at the same time have a decisive significance when defining state responsibility for the environmental harm either. Therefore, state responsibility is a special kind of responsibility that is only peculiar to international public law.

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<sup>1</sup> Draft articles on State Responsibility for Internationally Wrongful Acts, in *the United Nations Treaty Collection website*, viewed on 18 February 2012, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf).

<sup>2</sup> J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, United Kingdom, 2002, pp. 1 – 2, in *the Cambridge University website*, viewed on 18 February 2012, available at <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>.

<sup>3</sup> P. K. Mukherjee, the lectures on “Doctrine of State Responsibility and Marine Pollution Spectrum”, Lund University, 2011.

## 2.1. Historical Development of the Doctrine of State Responsibility: the Roots

There is a principle in international law that consists of conscientious fulfillment of duties and obligations by states towards other states and international community in general; thus, this principle called *pacta sunt servanda*<sup>4</sup> constitutes the basis of international relationship in the context of treaty law. Apparently, lawlessness in international relationship and dereliction of obligations harm the international law and order, and any breach of international obligation is unlawful act which shall entail international responsibility.<sup>5</sup>

Historically, the very first germs giving rise to state responsibility conception take its origins from the primary principle stated by Grotius in 1646 establishing that every wrong act creates an obligation.<sup>6</sup> It claimed that ‘every fault creates the obligation to make good the loss’<sup>7</sup>. In this context, it should be kept in mind that not only an act but omission of the act may also entail responsibility, For instance, due to Birukov’s opinion, state responsibility can have both positive and negative aspects; the first one takes place when a state directly *acts* wrongfully, the second one is about simple *omitting* the pursuance of its duties.<sup>8</sup> Guerrero and Smith are of the same opinion.<sup>9</sup> Nonetheless, it seems that the more important question is not how to define state responsibility but how to give it effect. For this reason, here and later the attempt on how to provide the proper application of the doctrine of state responsibility will be made.

Nevertheless, being based on Grotius’s principle, the rules of law concerning responsibility of states for international breaches stipulated the only type of such responsibility, namely the responsibility only came to the claim for damages caused by the breaking.<sup>10</sup> Undoubtedly, such a fact was quite explainable: the legal innovation was still too young to make any attempts to interpret it exhaustively. However, later on there appeared some tendencies towards changing the existed undifferentiated approach to the question of responsibility for various violations of law since the lawyers of those times gradually started to realize that some of the violations are of an

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<sup>4</sup> (lat.) – the agreements must be observed.

<sup>5</sup> U A Reshetov, *Reducing international crimes against peace and safety*, Moscow, 1983, p. 5.

<sup>6</sup> L. Lee, ‘The Cairo Declaration of Principles of International Law on Compensation to Refugees’, *American Journal of International Law*, vol. 87 (1), pp. 157 – 159, cited in M. Bradley, ‘The Conditions of Just Return: State Responsibility and Restitution for Refugees’, p. 3, in the *University of Oxford website*, viewed on 17 February 2012, available at <http://www.rsc.ox.ac.uk/publications/working-papers/RSCworkingpaper21.pdf>.

<sup>7</sup> Lee 1986: 536, cited in M Bradley, ‘The Conditions of just Return: State Responsibility and Restitution for Refugees’, in *University of Oxford*, Oxford University Press, Oxford, 2005, p. 5, in the *Refugee Studies Center of the University of Oxford website*, viewed on 19 February 2012, available at [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSCworkingpaper21.pdf](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper21.pdf).

<sup>8</sup> P. N. Birukov, *International Law*, Yurist Press, Moscow, 1998, p. 59.

<sup>9</sup> Guerrero, Report, cited in B. D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision*, Oxford University Press, New York, 1988, p. 10.

<sup>10</sup> *Supra*, note 6.

international character pursuant to their social danger.<sup>11</sup> Thus, various lists to be included to the lists of international crimes entailing states' responsibility were suggested by the great brains of the world at those times.<sup>12</sup> As Moshenskaya truly pointed out, a Romanian international lawyer V. Pella can be considered as an initiator of such an approach.<sup>13</sup> Thereby, state responsibility was mostly studied from its criminal perspective up to very recent years.

With the beginning of 20<sup>th</sup> century, the questions raised in past became more relevant and, therefore, were more often discussed. Starting from the early 20<sup>th</sup> century legal scholars in international law came to the conclusion that states should be responsible and liable for the inter-territorial offences since, apart from any written international agreement or treaty, a duty of indemnity subsists at least as a part of the states' customs. Thereby, the existence of customary rules and their absolute predominance was recognized by the international community. Besides, alien economic interest protection was clearly deduced through the discussions of that time.<sup>14</sup> So the notion of state responsibility as such was implied as a principle of international law in order to protect the rights of the aliens (those individuals who were noncitizens of a particular state)<sup>15</sup> which signified the obvious obligation of the states to be responsible for the harm they cause towards other states or the international community in general. Moreover, one of the basic rules in international law was a so-called "no harm rule" which "forbade the states to inflict the damage on or violate the rights of other states".<sup>16</sup> In spite of all, a number of the discussions were focused on injuries to aliens, and connected responsibility of states exactly with that issue.<sup>17</sup> It should be pointed out that protection of aliens aspect of doctrine of state responsibility is combined not only with states and their

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<sup>11</sup> *Ibid.*

<sup>12</sup> Pella V. *La criminalite collective des Etats et le droit penal de l'avenir*. Bucarest, 1925, p. 239—240; Saldana Q. *La justice penale In ternationale.— Recueil des cours de l'Academie de droit international*, 1925, p. 316; Politis N. *Les nouvelles tendances du droit international*. P., 1927, p. 127., cited in *supra*, note 6.

<sup>13</sup> Pella V. *Le Code des Crimes contre la paix et la securite de l'humanite*. Geneve, 1957, cited in N V Moshenskaya, *The Problems of Responsibility for Genocide*, Moscow City Pedagogical Press, Moscow, 2003, p. 2, in *the Genocide website*, viewed on 17 February 2012, available at <http://www.genocide.ru/lib/moshenskaya/2-1.htm>.

<sup>14</sup> D Linnan, 'State Responsibility and Alien Protection', in *the Law and Finance institutional partnership website*, viewed on 18 February 2012, available at <http://www.lfip.org/laws783fall04/documents/783fall04unit12dkl.pdf>.

<sup>15</sup> D. M. Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', in *Melbourne Journal of International Law*, May 2004, in *the Australian Legal Information Institute website*, viewed on 18 February 2012, available at <http://www.austlii.edu.au/au/journals/MelbJIL/2004/1.html>.

<sup>16</sup> R. S. J. Tol, R. Verheyen, 'State responsibility and compensation for climate change damages - a legal and economic assessment', in *the University of Hamburg website*. 2004, viewed on 18 February 2012, available at <http://www.mi.uni-hamburg.de/fileadmin/fnu-files/publication/tol/enpolliability.pdf>.

<sup>17</sup> *Yearbook . . . 1956*, vol. I, p. 246 (García Amador's summary of the debate), cited in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, United Kingdom, 2002, pp. 1 – 2, in *the Cambridge University website*, viewed on 18 February 2012, available at <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>.

interests but also with human rights<sup>18</sup> law as it is one of the areas in which states happen to be responsible for different kinds of harm.

Later on, when in 1948 the United Nations established the ILC the subject of state responsibility was one of the several topics selected within the framework of its activities.<sup>19</sup> It was not surprising since this area both was a major branch of international law and by that time had already become important and needed to be properly studied.<sup>20</sup> Thus, the main work concerning developing the doctrine of state responsibility began in 1956 led by García Amador and was again discussed within the context of responsibility for injuries to aliens and their property, in other words, within the context of exercising diplomatic protection.<sup>21</sup> But the 1957 the discussion limited the topic to only so-called *civil* responsibility.<sup>22</sup>

Nevertheless, the question of state responsibility was not always pointed only purposefully at the doctrine of state responsibility as such but also had been considered within the framework of the adjacent subjects. This became apparent after the final denying of the efficiency of the civil responsibility approach since the regulation of such an important legal institution as state responsibility was found quite difficult to be done via one-sided method.<sup>23</sup> For example, the doctrine of state responsibility was discussed while preparing the draft of the 1948 United Nations Convention on Genocide<sup>24</sup> as well as during the ILC's work on the draft of the 1996 Code of Crimes against the Peace and Security of Mankind<sup>25, 26</sup>. At that time it was recognized that state responsibility for international crimes bears an exclusively political character<sup>27</sup> since it sounded more reasonable to speak about responsibility of individuals rather than decide the issues regarding the matter that did not combine coordinated opinions.<sup>28</sup> Further, the question about responsibility of states was resumed by the ILC in 1983 when it was admitted that states were possible to be subjects of law of

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<sup>18</sup> *Supra*, note 15.

<sup>19</sup> M Bradley, 'The Conditions of just Return: State Responsibility and Restitution for Refugees', in *University of Oxford*, Oxford University Press, Oxford, 2005, p. 5, in *the Refugee Studies Center of the University of Oxford website*, viewed on 19 February 2012, available at [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSCworkingpaper21.pdf](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper21.pdf).

<sup>20</sup> *Supra*, note 2.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Yearbook . . . 1956*, vol. I, p. 246 (García Amador's summary of the debate), *cited in ibid.*

<sup>23</sup> I Fisenko, 'Responsibility of the state for International crimes', *Byelorussian Journal of International Law and Foreign Affairs*, vol. 3, 1998, in *the Razvitie (International Public Association on Scientific-Research and Information Educational Programmes) website*, viewed on 20 February 2012, available at [http://evolutio.info/index.php?option=com\\_content&task=view&id=155&Itemid=49](http://evolutio.info/index.php?option=com_content&task=view&id=155&Itemid=49).

<sup>24</sup> The 1948 United Nations Convention on the Prevention and Punishment for the Crime of Genocide, in *the United Nations Human Rights website*, viewed on 20 February 2012, available at <http://www2.ohchr.org/english/law/genocide.htm>.

<sup>25</sup> The 1996 United Nations Draft Code of Crimes against the Peace and Security of Mankind, in *the United Nations Treaty Collection website*, viewed on 20 February 2012, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf).

<sup>26</sup> *Supra*, note 24.

<sup>27</sup> United Nations Report A/2136, p.11, *cited in ibid.*

<sup>28</sup> *Supra*, note 24.

international responsibility though the main attention was still paid to individuals, especially within the contexts of the above mentioned crimes<sup>29</sup> in the view of political character of the issue<sup>30</sup>.

During all the various attempts to make the doctrine of state responsibility applicable and useful the ILC once changed its approach and tried to focus ‘on the definition of the general rules governing the international responsibility of the state’<sup>31</sup> which meant the very general rules applicable to state responsibility since any specific provisions would apparently differ from treaty to treaty and from state to state.<sup>32</sup> Such a claim was based on the fact that state responsibility is a very versatile category that is applicable to different spheres, not only diplomatic protection. The topic was thus seen as involving some combination of the as-yet-uncodified old and the still unspecified new.<sup>33</sup> One of the subcommittees of the ILC Roberto Ago tried to reconceptualize the entire topic and thus started development and elaboration of the doctrine by including into it the concrete remedies appurtenant to responsibility of states, such as reparations, countermeasures and others.<sup>34</sup> <sup>35</sup> Truly, as Lord Denning said, a right without a remedy is no right at all<sup>36</sup>. Even though those suggestions on including remedies into the doctrine of state responsibility were not very strong, they in any case were initial and that is why they became basic for this sector of the doctrine’s legal development.

Later on, more and more suggestions on improving the doctrine were made. For instance, in 1979 Willem Riphagen was the initiator to give the extended definition of “injured state”<sup>37</sup>. In 1988 – 1995 the head of ILC’s Drafting Committee Geatano Arangio-Ruiz developed the conception of “international crimes” as well as their consequences.<sup>38</sup> Nonetheless, it is hard to agree that the doctrine of state responsibility should be considered only within the context of international crimes. Undoubtedly, international crimes play a great part in it but nevertheless in order to comprehend the entire conception it is essential to study and implement all of the elements, even those merely concerning it. Thus, by 1996 the text of the DASR did not mean crimes as such but said the following:

“The term “crime” is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as “an international wrongful act of a serious nature” or “an

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<sup>29</sup> *Ibid.*

<sup>30</sup> The International Law Commission Annual, 1983, vol. II (Part 2), p. 17, *cited in ibid.*

<sup>31</sup> *Yearbook . . . 1963*, vol. II (Part One), doc. A/CN.4/152, p. 228, para. 5, *cited in supra*, note 21.

<sup>32</sup> *Supra*, note 21.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> It is worth to note that in the modern condition of the Draft Article on State Responsibility there exists a wide list of such remedies which are provided in articles 34 – 39 and 49 – 54 of Draft Articles.

<sup>36</sup> Zegveld 2003: 498), *cited in supra*, note 20.

<sup>37</sup> *Supra*, note 21.

<sup>38</sup> *Ibid.*

exceptionally serious wrongful act” could be substituted for the term “crime”, thus, *inter alia*, avoiding the penal implication of the term.”<sup>39</sup>

Thereby, although the entire formation and establishment of the doctrine of state responsibility, and especially the ILC’s DASR took a lot of time to negotiate, the greatest relevance of the existing articles may ultimately lie outside the scope of the project<sup>40</sup> since many states have now taken on new legal obligations which concern duties owed by states to individuals, other states or the entire international community.<sup>41</sup> In other words, having gone through such a long and complicated, but not yet finished, way of development the DASR are now the only and the most important international source regulating the responsibility of states for the wrongful acts they might commit.

## **2.2. Hybrid Character of the Doctrine: Combination of Public and Private Law Concepts**

*“...the function of a trained lawyer is not to know what the law was yesterday... or what is ought to be tomorrow, but to explain what are the principles of law actually existing.”<sup>42</sup>*  
(Blackburn, R. W.)

Being concerned about both public and private conducts the doctrine of state responsibility acts as a special legal category combining public and private law concepts. The question of interconnection between public and private aspects in law, in its turn, has always played an important role in the entire field of international law. A number of scholars had their say about it, and a lot of principles peculiar to international law are based on this essential division and at the same time interaction of public and private law concepts.

The idea of the division of law into public and private was given by Roman lawyer Ulpian in the Old Roman slaveholding society in connection with trade relations development.<sup>43</sup> As far back as in Roman Empire time after Ulpian the Roman lawyers started to separate these two matters.<sup>44</sup> Seregina believes that public law is much more imperative and has a lot of categoricalness based on power while civil society being a form of legal freedom is an attribute of private law.<sup>45</sup> In due time, Karl Marx properly noted that “the administrative power ends where the civil power starts”<sup>46</sup>.

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<sup>39</sup> *Yearbook . . . 1996*, vol. II (Part Two), p. 63, *cited in ibid.*

<sup>40</sup> Shelton 2002: 834, *cited in supra*, note 20.

<sup>41</sup> *Supra*, note 20.

<sup>42</sup> R W Blackburn, *Dicey and the Teaching of Public Law*, 1985, Public Law 679 at 681 – 682, *cited in* ‘What is Public Law?’, in *the Oxford University Press website*, viewed on 23 February 2012, available at [http://www.oup.com/uk/orc/bin/9780199228270/webley\\_ch01.pdf](http://www.oup.com/uk/orc/bin/9780199228270/webley_ch01.pdf).

<sup>43</sup> V V Seregina, the lectures on “Theory of State and Law”, Voronezh State University, 2004.

<sup>44</sup> N I Matuzov, A V Malko, *Theory of State and Law*, Yurust Press, Moscow, 1997, p. 357.

<sup>45</sup> *Supra*, note 44.

<sup>46</sup> K Marx, *cited in ibid.*



Hereby, the division of law into its public and private components has crucial meaning and is known for ages both by legal theory and practice; Nonetheless, Sorokina does not agree with it and claims that the division of law into public and private is only peculiar to continental, or Roman, system of law.<sup>47</sup> At the same time, Matuzov believes that such a thing is attributable to almost every legal system and is only called differently, such as well-known English common law and law of equity.<sup>48</sup> The meaning of the above-said division is the fact that any law contains those rules that are devoted to regulate public interests and those dealing with private ones.<sup>49</sup> Such a thought is quite deservable but is easily criticized by Sorokina's observations about the theories of the division. Due to them, there are a few approaches to the proper division since the matter is quite difficult and is versatile.<sup>50</sup> Thus, the above mentioned reasoning of the division is exactly the theory of interests which is only one of the theories of differentiation between public and private law in Sorokina's list among the subordination theory and the theory of relativity and admissibility.<sup>51</sup> In any cases, whatever character the division bares due to different opinions of different lawyers, the direct evidence is that all of them still do make such a division. It is worth to mention that both of the branches have equal significance; while private law serve the relates to all the proprietary matters of individuals or organizations acting on their own, public law deals with entire states and state bodies both as between them and between those governmental institutions with individuals<sup>52</sup>.

At the same time, it is very significant to note that there are opinions that call the division between public and private law fictitious. For instance, Deegan claims that when considering the public and private law dichotomy at a high level of generality it is clear that the dichotomy is inappropriate<sup>53</sup>. If the distinction in its present form appears to be based upon the separation of powers between the executive, the legislative and the judiciary, then there should also be a separation of legal duties; thus, it is rather fictional than a real distinction.<sup>54</sup> Thereby, the public and private law being an important instrument of international law is also a formalistic distinction that belies the fact that there are a lot of overlaps in private and

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<sup>47</sup> A I Sorokina, the lectures on "Theory of State and Law Problems", Voronezh State University, 2008.

<sup>48</sup> *Supra*, note 45, p. 358.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra*, note 48.

<sup>51</sup> *Ibid.*, note that by Sorokina the theory of subordination is based on the hierarchy principles between its parties for public law while in private law the parties have equal statuses; and the theory of relativity and admissibility issues from the fact that in public law the addressees are clearly states while in private law they are unlimited.

<sup>52</sup> 'What is Public Law?', in the *Oxford University Press website*, viewed on 23 February 2012, available at [http://www.oup.com/uk/orc/bin/9780199228270/webley\\_ch01.pdf](http://www.oup.com/uk/orc/bin/9780199228270/webley_ch01.pdf).

<sup>53</sup> A Deegan, 'The Public and Private Law Dichotomy and its Relationship with the Policy and Operational Factors Distinction in Tort Law', *QUT Law and Justice Journal*, vol. 1, February 2001, p. 243, in the *Queensland University of Technology website*, viewed on 23 February 2012, available at [http://ljj.law.qut.edu.au/editions/v1n2/deegan\\_full.jsp](http://ljj.law.qut.edu.au/editions/v1n2/deegan_full.jsp).

<sup>54</sup> *Ibid.*, pp. 243, 249.



public law and that all law is in fact guided by considerations of public policy.<sup>55</sup>

Moreover, the private aspect of law in context of division between public and public law should not be mixed with private international law as a separate, independent part of international law. Nevertheless, the question whether private international law shall be considered as a separate branch of international law is disputable. In Birukov's judgment, private international law is not a separate branch, but it is a complex institution that includes both international and domestic rules which regulate marginally similar relationship.<sup>56</sup> In this regard, it is worth to speak about private international law as a study, not a separate branch of international law, or domestic law, or any other legal system or subsystem.<sup>57</sup> Professor Mukherjee is of the same opinion, he believes that international cannot possibly be private and thus, it is absurdly to combine them into one formation.<sup>58</sup> Thus, what is called, private international law and that private law within its division with public are simply different things. For example, Marchenko affirms that international law and international public law are exactly the same thing; international private law is only connected with it when regulating civil, family, trade and other relations including a foreign element.<sup>59</sup> Hereby, in their names, namely "public international law" and "private international law" the word "international" is of different meanings.<sup>60</sup>

The division between public and private law does not always have to be complete and unconditional. For example, in the doctrine of state responsibility the division is not so absolute since the fundamental issue in this context is being under the jurisdiction of a definite state by either public or private entities. Thus, it can be said that public and private law may very often interconnect within the context of some essential parts of international law where it is worth to speak about responsibility of states as the entire entities. One of such branches is marine environmental law within which the wrongful act in the scope of marine environment committed by an individual belonging to a definite state would entail international responsibility of that state before the international community as a whole. Contrarily, it is worth to mention that such individuals may have different statuses in regard to the state held responsible. Hereby, it may remain difficult to distinguish governmental and private acts as all of the committed in the name of the state acts are in fact fulfilled by individuals that represent the state, on behalf of the state, and this would entail state responsibility. Nonetheless, committing a wrongful act against a foreign state or international community by an individual who acted only for its private purposes and not in the name of the state would also entail responsibility of the state to which such an individual belongs. Consequently, state

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<sup>55</sup> *Ibid*, p. 265.

<sup>56</sup> *Supra*, note 9, p. 10.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Supra*, note 3.

<sup>59</sup> M N Marchenko, *Theory of State and Law Problems*, Prospekt-N Press, Moscow, 1999, p. 224.

<sup>60</sup> *Ibid*.

responsibility may be entailed on the basis of both private or public internationally wrongful acts, but whatever ground would exist to entailing responsibility the public and private sides of the issue are highly dependent on each other.

On the assumption of aforesaid it is apparent that the division into public and private aspects has a great significance in international law but it is also obvious that, being divided, the both dimension interconnect a lot. Particularly, the doctrine of state responsibility can be said hybrid in its scope because of the shown interaction of public and private aspects in it. Thereby, even such a specific subject as marine environmental law regulating the relationship within the entire globe and therefore naturally referred to international public law still consists of *both* public and private law aspect. And they, in their turn, compile combination of one issue of international importance – marine environment protection.

### **2.3. Interstate Litigation Where States Act as Private Entities**

Having found that the doctrine of state responsibility is hybrid in its scope it is important to look at how state can be in position of private entities, in other words, how exactly the doctrinal interconnection of public and private law concepts is reflected in litigations. Professor Mukherjee believes that the public aspect of state responsibility is the fact that any state bears public character as such while the private aspect signifies a state to be responsible for any private entity under its jurisdiction that harms another state or states.<sup>61</sup> Thus, since any state can be a bearer either public or private interest or both, it is apparent that the situation when states act in positions of private entities is quite possible, too. Thereby, just like a person is responsible for property which is held for public good and liable for the misuse of that property as someone in the private sector would be<sup>62</sup>, a state acts as a private body when litigating on international matters and bears responsibility and liability for the misuse committed by any entity under its jurisdiction. This factor is important since jurisdiction is originally used to refer to the competence of a state, the authority of a state recognized by international decision-makers and by other states – to make law for, and apply law to, particular events or particular controversies<sup>63</sup>. Moreover, it appears that the constitutional requirements that govern liability do not change depending on whether the defendant is public or private<sup>64</sup>. Private parties or companies are not in general bound by public international law,

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<sup>61</sup> *Supra*, note 3.

<sup>62</sup> A Hudson, 'Public Interest Trusts', in the *Alastair Hudson's personal website*, viewed on 24 February 2012, available at <http://www.alastairhudson.com/trustslaw/publicinteresttrusts.pdf>.

<sup>63</sup> McDougal, 'Jurisdiction', 62 *Int'l L. Stud.* 634 (Lillich and Moore eds. 1980), cited in B D Smith, *State Responsibility and the Marine Environment: the Rules of Decision*, Clarendon Press, Oxford, 1988, p. 2.

<sup>64</sup> B Kritchevsky, 'Civil Rights Liability of Private Entities', in the *Cardozo Law Review website*, viewed on 3 March 2012, available at <http://www.cardozolawreview.com/content/26-1/KRITCHEVSKY.FINAL.pdf>.

although the practice of challenging environmental liability towards private actors in national law is now a widely developed alternative to the international liability of states in cases of pollution damage.<sup>65</sup>

The responsibility is entailed by the breach of international law, and thus, in order to look at the state as an actor, it is worth to consider the subjective element of such an *action*. The *state*, however, is an abstraction since the conduct, in a material sense, remains the exclusive province of natural persons<sup>66</sup>. Thereby, in order to satisfy the subjective element the conduct of individuals must be attributed juridically to the state.<sup>67</sup> Therefore, the responsibility *through* individuals of the state is only a legal device to adjust to the actual responsibility of the state itself since the subjective element occurs to be impossible to be met only by the state's actions. Identically, when litigating and acting as a private entity a state *represents* the conduct of its individuals who have acted on behalf of this state. In other words, the abstract state depends upon individuals charged to act on its behalf to express or realize its will<sup>68</sup>. It can be relatively compared with state responsibility for vessels as the conduct of vessels constitutes one of the principle sources of marine pollution but vessel conduct is something of a misnomer since vessels do not engage in conduct at all but are merely the instruments of human actor<sup>69</sup>. Thus, on the ground of their nationality as a legal tool to make distinction between the vessels by virtue of belonging to one another state, the conduct of the vessel being managed by any individual will be attributed to the vessel's flag state. When a state assumes legal authority over a ship by grant of its flag, the state also assumes a certain obligation to take measures to ensure that the vessel acts in a fashion consistent with international law.<sup>70</sup> Thereby, there is a circle of interconnection which combines both states' and individuals' representations and conducts.

A revealing non-maritime case dealt with environmental pollution was *Trail Smelter* which proved that state responsibility may arise upon the actions of the private entities and the respective state would bear the responsibility for such actions. It was about the dispute between the USA and Canada. The subject of the dispute was damage suffered by the US territory as a result of a Canadian smelter's private activity.<sup>71</sup> In this case the USA was claiming Canada to be liable for the environmental harm

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<sup>65</sup> P W Birnie, A E Boyle, *International Law & the Environment*, Oxford University Press, New York, 2002, p. 182.

<sup>66</sup> B D Smith, *State Responsibility and the Marine Environment: the Rules of Decision*, Clarendon Press, Oxford, 1988, p. 22.

<sup>67</sup> *Ibid.*

<sup>68</sup> *The German Settlers in Poland Case (Germ. v. Pol.)*, [1923] PCIJ, Ser. B. no. 6, at 22, cited in *ibid.*

<sup>69</sup> *Supra*, note 66.

<sup>70</sup> Boczek, *Flags of Convenience* 284 (1962) and Rienow, *The Test of the Nationality of a Merchant Vessel* 104 (1937), cited in *ibid.*

<sup>71</sup> *The "Trail Smelter" Case (The United States of America v. Canada)*, 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, in *the United Nations Treaty Collection website*, viewed on 2 March 2012, available at [http://untreaty.un.org/cod/riaa/cases/vol\\_III/1905-1982.pdf](http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf). Note that the damage was a result of sulphur dioxide fumes that were emitted from the Canadian smelter. It was a quite long procedure that took up to several years to finish the hearing and make a decision.

suffered by the USA due to the smelter's activity which was fulfilled by private entities, and the question of state responsibility arose before the court. The Tribunal took into account a number of important issues when making a decision on whether Canada was liable or not. After all, the court decided that Canada was responsible<sup>72</sup> in international law for the Trail Smelter's conduct since *the smelter was under the jurisdiction* of Canada and its activity broke the international obligation not to pollute the environment. Thus, Canada was responsible to predict such kind of a conduct be the smelter regardless of the character, public or private, or the actual violator. Moreover, the Tribunal obliged Canada to pay compensation and established a regime of control for the smelter in order to prevent the possible damage in the future.<sup>73</sup> Hence, the *Trail Smelter* case was not about marine environmental aspect of state responsibility, nevertheless, it did bring a new prospective to understand the doctrine and became a significant part of judge-made law where states acted as private entities.

## 2.4. Remedies and Sanctions

The question of the consequences of finding states responsible and liable after the internationally held litigations is closely connected with remedies and sanctions. A sanction is generally defined as a threatened penalty for disobeying a law or rule<sup>74</sup>. It is clear from the definition that the key, or determining, word for "sanction" is "penalty", in other words it is punishment lodged upon the violation of the rules.

However, it is important to distinguish the terms "civil penalty" and "sanctions". Thus, civil penalty is usually imposed by courts and is often financial in nature as it closely resembles fines, and from this perspective remedies can be said to be a types of such civil penalty. In opposition to remedies sanctions are broadly understood as being imposed by the regulator without intervention by a court of tribunal<sup>75</sup>. In his work on liability and compensation for environmental damage caused by ship-source oil pollution Professor Mukherjee come to the following conclusion:

"The private law of ship-source marine pollution essentially consists of two components, namely liability, a qualitative concept defined by conduct repugnant to the law, and remedy in the form of damages or compensation, which is, by contrast, a quantitative concept."<sup>76</sup>

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<sup>72</sup> It is important to notice that the meaning of the word 'responsibility' (instead of the word 'liability') should not confuse the reader in this context. The point is that the essence of the asked before the court question on whether a state was initially responsible or not also supposed to mean liability since the obligation had already been violated; thus, the exact wording would not play the decisive part in the concrete context.

<sup>73</sup> *Supra*, note 72.

<sup>74</sup> Oxford Dictionary definition of "sanction", in *the Oxford Dictionaries website*, viewed on 4 March 2012, available at <http://oxforddictionaries.com/definition/sanction>.

<sup>75</sup> J Dara Lynnot, 'Administrative Sanctions', in *the Slide Share website*, viewed on 4 March 2012, available at <http://www.slideshare.net/DLynott/administrative-sanctions>.

<sup>76</sup> P K Mukherjee, '*Maritime Pollution Liability and Policy: China, Europe and the US*', M G Faure, H Lixin & S Hongjun (eds), Kluwer Law International Press, The Netherlands, 2010, pp. 75 – 95.

By mean of this, Professor Mukherjee identifies liability and sanctions in the particular context.

International practice shows that the states have now accepted a general principle of responsibility for environmental harm; nevertheless, there still remain many uncertainties one of which is the legal the form of such international responsibility.<sup>77</sup> Birnie believes that when speaking about marine environmental responsibility various forms of reparation other than payment of damages be sought: discontinuance of the act concerned; application of national remedies; provision of guarantees that the act will not be repeated; or *restitution in intergum*<sup>78</sup>. Furthermore, an injured state may exercise a right of reprisal and of suspension of its legal obligations to the offending state.<sup>79</sup> The “polluter pays” principle is an economic rather than a legal principle, but is increasingly widely applied, having been developed and accepted by the European Community, among others.<sup>80</sup> In spite of it, Conforti argues by saying the following: “If we think once more about environmental damage, is it still possible to talk about an obligation to compensate which stems from general international law? I should most certainly say that it is not, unless one was to say in Professor Kiss’s brilliant and yet disappointing words, that responsibility is...soft”<sup>81</sup>.

Nonetheless, the regime of general responsibility is nothing special to do with particularly marine environmental harm since the general regime is attributable to any international violation.<sup>82</sup> In this context it is clearly seen that, unfortunately, marine environmental law and *inter alia* the doctrine of state responsibility in regard to it lacks the special provisions concerning remedies and sanctions exactly for marine environmental harm. Where the responsibility of a state is established, an obligation arises firstly to discontinue the wrongful conduct, secondly to offer guarantees of non-repetition, and thirdly to make full reparation for the injury caused.<sup>83</sup> Division is generally intrinsic in sanctions: similarly, ‘the remedies in tort are usually divided into compensation for the suffered harm and injunction

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<sup>77</sup> R P Mazzeschi, ‘Forms of International Responsibility for Environmental Harm’, in *International Responsibility for Environmental Harm*, F Francioni & T Scovazzi (eds), Graham & Trotman Press, London, 1991, pp. 15 – 16.

<sup>78</sup> P Birnie, ‘Protection of the Marine Environment: the Public International Law Approach’, in *Liability for Damage to the Marine Environment*, C M de La Rue (ed), Lloyd’s of London Press Ltd, London, 1993, p. 12. *Note that restitution in intergum* is a Latin phrase that means “restoration to original condition”.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, p. 9.

<sup>81</sup> B Conforti, ‘Do States Really Accept Responsibility for Environmental Damage?’, in *International Responsibility for Environmental Harm*, F Francioni & T Scovazzi (eds), Graham & Trotman Press, London, 1991, p. 179 – 180.

<sup>82</sup> 2000 State Responsibility Draft Articles 30, 31, 35; Annacker, 37 *GYLL* (1994), 206 at 212 – 13, *cited in* P W Birnie, A E Boyle, *International Law & the Environment*, Oxford University Press, New York, 2002, p. 190.

<sup>83</sup> ILC 2000 Draft Articles 30 -1, 35 – 8, *Rept. Of the ILC* (2000), UN Doc. A/55/10, CH. IV, *cited in* P W Birnie, A E Boyle, *International Law & the Environment*, Oxford University Press, New York, 2002, p. 190.

to prevent a future harm<sup>84</sup>. Thereby, it is worth to note that each and every of these stages of applying penalties to a state regardless of their forms can be called a “sanction” – but to its wide extend.

For all that, no attempt has yet been made to develop remedies specifically adapted to particular forms of damage, such as environmental damage<sup>85</sup>. In only a few cases have tribunals indicated environmental measures to be taken by the parties<sup>86</sup>, or awarded damages for environmental harm<sup>87, 88</sup>. Moreover, in *Trail Smelter* case Canada was ordered to adopt a regime for regulating the future operation of the smelter, including the payment of compensation for any damage which recurred notwithstanding compliance<sup>89</sup>. Thereby, sanctions bear public character while remedies do private, and are not as pecuniary, or financial, as remedies. Therefore, in the decision of the *Trail Smelter* the compensation to the injured party can be called a remedy, and the injunction to continue the same activity – a sanction.

Thus, it is apparent that even in different forms of punishment the hybrid scope of the doctrine is clearly seen, as well as it is seen how important remedies and sanctions in the factual application of the doctrine of state responsibility are. In spite of a number of drawbacks existing in their legal regulation there is still a high potential for their prospective development and improvement.

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<sup>84</sup> A Tufal, ‘Remedies in Tort’, in the *Law Teacher: the Law Essay Professionals website*, viewed on 4 March, available at <http://www.lawteacher.net/PDF/Remedies%20Lecture.pdf>.

<sup>85</sup> *Supra*, note 66, p. 190.

<sup>86</sup> *Behring Sea Fur Seals Arbitration* (1898) 1 *Moore’s Int. Arb.* 755, cited in *ibid.* Note that the Tribunal enacted the proper fur seals in the Bering Sea preservation and protection; the decision was binding for both of the parties – the United States of America and the United Kingdom.

<sup>87</sup> *Trail Smelter Arbitration*, 33 *AJIL* (1939), 182 and 35 *AJIL* (1941), 684, cited in *supra*, note 66.

<sup>88</sup> *Supra*, note 66, p. 190.

<sup>89</sup> *Ibid*, p. 191.

# Chapter 3: THE CONTEMPORARY DOCTRINE OF STATE RESPONSIBILITY

As it is clear from the above discussion, the responsibility institution plays a great part in securing of execution of international rules of law. Responsibility in international law is an assessment of the international violation as well as the entity committed such a violation by international community and is characterized by application of definite sanctions to a violator.<sup>90</sup> At present, the rules on international responsibility are scattered in different institutions of international law, nevertheless, ILC is currently trying to codify international responsibility as a separate institution.<sup>91</sup>

During such a work it is important to take into account international and interstate correlation of the rules regarding state responsibility. In its DASR ILC stipulated IWA as a necessary ground for state responsibility<sup>92</sup> that became a step forward in developing the doctrine. However, to be properly developed and widely applicable the doctrine of state responsibility still has a number of drawbacks hampering its further elaboration. The existing gaps of legal regulation of the doctrine engender the common misunderstanding of the doctrine by the international community and state separately. Thus, it is necessary to study the relevant condition of the doctrine of state responsibility, specifically as applicable to marine environmental law, and examine the disadvantages it has at the stage of time in order to suggest the better ways to improve it.

## 3.1. Internationally Wrongful Act

When speaking about state responsibility in public international law it is again worth to underline that the DASR it was noted that the ground of state responsibility is an IWA. Nevertheless, it is apparent that various opinions in this regard are being discussed since the DASR still remain to be a draft. Thus, Birukov believes that the grounds for state responsibility are based on objective and subjective criteria provided in international law rules and may be divided into legal, factual and procedural grounds.<sup>93</sup> Herewith, the legal ground is the international obligations of the states violation of which would be recognized as an international offence; the factual ground is an IWA itself; and, at last a procedural aspect is the procedure of investigations of the offences and bringing to justice upon the international responsibility.<sup>94</sup> Hereby, it is understandable that the ILC's IWA ground is nothing else but a restricted approach. At the same time, such an approach should not be

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<sup>90</sup> *Supra*, note 9, p. 57.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra*, note 1, art.1 stipulating that 'every international wrongful act of a state entails the international responsibility of that State'.

<sup>93</sup> *Supra*, note 9, p. 57.

<sup>94</sup> *Ibid.*

criticized since the legislative language of law is notable for being different that the theoretical views of scholars that are usually wide and multivariate.

Coming back to the DASR, article 1 implies that “every internationally wrongful act of a state entails the international responsibility of that state”<sup>95</sup>. It means that the ground for state responsibility is an IWA. Later, in article 3 the DASR establish the elements that constitute IWA, namely:

“There is an internationally wrongful act of a State when:  
(a) conduct consisting of an action or omission is attributable to the State under international law; and  
(b) that conduct constitutes a breach of an international obligation of the State”<sup>96 97</sup>

It is important to notice that both of the grounds are inseparable, and constitute the IWA only in case if both of them are fulfilled. For instance, article 210 of UNCLOS bounds the states to adopt their own laws and regulations in order to prevent, reduce and control pollution by dumping; moreover, such laws “shall insure that dumping is not carried out without the permission of the competent authorities of States”.<sup>98</sup> Consequently, in case if a vessel belonging to state A does the dumping in the maritime territory of state B, then the state A should be liable on the basis of both acting in the way that is attributable to the state A and breaking the international obligation. However, the provision is not absolute; there is a list of circumstances that preclude wrongfulness of the act, for instance: self-defense, force majeure, necessity and others.<sup>99</sup> Nonetheless, the exact wording formulated by a law-maker seems to be somewhat illegible. Thus, in the author’s opinion, the conduct that constitutes a breach of international obligation of the state initially means such a conduct to be attributable to the state under international law since the word “obligation” presupposes it.

In addition, it is worth to pay heed that an IWA can be done not only by a state or states but by the individuals as well since they are also possible to be subjects of international responsibility of a state they belong, as it has been mentioned above. A state is responsible for the behavior of those entities (whether it is a private company or a person) that *fall under the jurisdiction* of this state. This issue can be drawn from article 235 of UNCLOS:

“States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in

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<sup>95</sup> Garcia-Amador, ‘State Responsibility: Some New Problems’ *cited in supra*, note 66, p. 5.

<sup>96</sup> *Supra*, note 1, art. 2.

<sup>97</sup> The matter of marine environment are of a global character, that is the reason why any stater in the world *has the obligation* to preserve the environment regardless of being a party of a particular treaty or convention or not. These rules are a part of customary law that all of the states are bound by.

<sup>98</sup> The United Nations Convention on the Law of the Sea, art. 210, in *the United Nations website*, viewed on 6 March 2012, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>99</sup> *Supra*, note 2, chapter V.



respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction”<sup>100</sup> (Emphasis of the author)

Therefore, the possibility to invoke state responsibility by either states or individuals is the exact reason why the doctrine can be said to be “hybrid in its scope”<sup>101</sup>; it has both public and private aspects. Thus, breaking an international obligation by either or public entity entails international responsibility of the state under jurisdiction of which those entities are. Besides, in spite of this settles rule, it is needed to remember that state responsibility may be invoked upon the actions other than breach of obligations. For example, responsibility in environmental cases will normally arise *either* because of the breach of customary obligations or because of a breach of treaty.<sup>102</sup> At the same time, it can be said that any treaty provides its parties with obligations.

Ultimately, the basis of state responsibility is an international obligation or a treaty provision that can be violated in the form of IWA which is attributable to the state under international law, consists of the breach of the international obligation, and is done by the entities falling under the jurisdiction of the state.

### **3.2. Problematic Issues in a Proper Understanding of the Doctrine of State Responsibility**

As it has been mentioned above, the doctrine of state responsibility is quite new and that is the reason why it requires a lot of consideration since the matters it touches upon are of a global character and concern of the entire international community. Nevertheless, in spite of the recent progressive development of the doctrine there are some issues that are either not regulated well, or not understood properly, or both.

#### **3.2.1. Responsibility and Liability**

UNCLOS is the only convention that gives provisions on the subject. Thus, it speaks about responsibility for the marine environmental harm and the prompt measures which the states shall take in case of marine pollution, and international cooperation in this field.<sup>103</sup> Particularly, the article says that states are *responsible* for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be *liable* in accordance with international law<sup>104</sup>. From this provision it is clear that the terms “responsibility” and “liability” mean two different things, namely, responsibility is a primary category in comparison with liability. At the same time, the DASR provide that every internationally

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<sup>100</sup> *Supra*, note 98, art. 235, para. 2

<sup>101</sup> *Supra*, note 3.

<sup>102</sup> *Supra*, note 65, p. 181.

<sup>103</sup> *Supra*, note 98, art. 235.

<sup>104</sup> *Supra*, note 98, para. 1.

wrongful act of a state entails the international responsibility of that state<sup>105</sup>. To say more, the definition what responsibility and liability actually are is absent. The CLC, even though it deals particularly with liability, does not clarify the term either.<sup>106</sup>

In this ground it is obvious that different opinions and arguments exist. For instance, by some authors, responsibility is identified with liability: state responsibility, or international liability, is the principle by which states may be held accountable in interstate claims under international law<sup>107</sup>. As for state liability for marine environmental damage, Birnie and Boyle believe it is still in agenda since there is almost no practice from which to draw conclusions<sup>108</sup>. Smith sees responsibility differently, namely, it is not a synonym for “duty” or “obligation”, and it is rather the juridical position of an obligor-state following its breach of an international obligation<sup>109</sup>. Shaw thinks that state responsibility is a fundamental principle of international law arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states; whenever one state commits an internationally unlawful act against another state, international responsibility is established between two states<sup>110</sup>. Thus, it is seen that Shaw does not consider the question of responsibility to exist before the violation but he sees responsibility as status arising from the violation. Apparently, there is a diversity of opinions in regard state responsibility. Chirwa, for example, claims that since the Draft Articles were not adopted as a treaty, they are not binding so not very effective, nevertheless, the doctrine of state responsibility is developing and is a part of customary international law<sup>111</sup>. By these means Chirwa underlines that to be legally effective the DASR have to come into effect first.

It is also worth to mention that the difference between the terms “responsibility” and “liability” is dependent on legal systems and the variety of the legislations of the states. For instance, in English Law only liability is a legal term provided in the legislation. Moreover, in most of the continental legal systems and their languages (including the official languages of United Nations such as, for instance, Spanish or Russian) the terms “responsibility” and “liability” are identified, though they have two different meanings in English.

Literally, being responsible means to be in response for something. In regard to state responsibility states are in response for complying with the obligations that they have towards other states on behalf

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<sup>105</sup> *Supra*, note 1, art. 1.

<sup>106</sup> The 1969 International Convention on Civil Liability for Oil Pollution Damage, in *the Admiralty and Maritime Law Guide website*, viewed on 8 March 2012, available at <http://www.admiraltylawguide.com/conven/civilpol1969.html>

<sup>107</sup> *Supra*, note 65, p. 181.

<sup>108</sup> *Ibid*, p. 383.

<sup>109</sup> Garcia-Amador, *cited in supra*, note 66, p.5. Note that Smiths resumes that state responsibility represents the consequence of, and the sanction against, non-performance by states of their international obligations, and does not give too much importance to the existence of an obligation as such in comparison with the time when it is broken.

<sup>110</sup> M N Shaw, *International Law (sixth edition)*, Cambridge University Press, Cambridge, 2008, p. 778.

<sup>111</sup> *Supra*, not 15.

of their citizens. In this regard it can be inferred that the existence of an international obligation gives rise to state responsibility. But one cannot say the same about liability. Liability, in the context of its public imperative nature, is such a legal condition that itself starts *after* the breach of the obligation, so it can be considered as a *legal effect* of the breach. Thus, for example, if a state has an obligation not to dump within the Exclusive Economic Zone of a coastal state without its prior approval<sup>112</sup>, so it is *responsible* for not doing so. And if it violates the rule, then this state becomes *liable* for the breach of the obligation.

Undoubtedly, responsibility still *remains* even *after* the breach of the obligation since responsibility is such a legal state that is continuous in its nature; the fact of breaking the existing obligation does not stop the obligation, and so it does not stop the responsibility.

As concerns liability, normally, it can be of several forms, namely strict, fault-based, absolute liability depending on the “*culpa*”<sup>113</sup> element. Usually strict liability is the one ‘liability that does not depend on actual negligence or intent to harm’<sup>114</sup> (or the one based on *mens rea*<sup>115</sup>); absolute liability is as a rule based on *actus reus*<sup>116</sup> and is usually connected with culpability. Professor Mukherjee also distinguishes a so-called “half-way house” notion in which “the prosecution initially treats the offence as one of strict liability and carries the burden of proving the *actus reus*”.<sup>117</sup> Nevertheless, this particular question will be examined further in the thesis, but with relation to the relevant distinction between the terms “responsibility” and “liability” a very interesting question comes up. In those countries that linguistically identify the two terms, liability is presented as a form of responsibility, and is called strict or absolute responsibility correspondingly. Nevertheless, to *prove* whether a person had *mens rea* or *actus reus* when acting in this or that way becomes a huge problem in marine environmental aspects. But however it may occur, all these questions are still under discussions.

### 3.2.2. The Correlation: “Interstate” and “International”

Just like marine pollution is the area that comes across the other branches and that is why can be called a marine pollution spectrum<sup>118</sup>, the entire international relations is always a big interconnection of different areas and approaches. Accordingly, UNCLOS provide with the following:

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<sup>112</sup> *Supra*, note 98, art. 210 (5). *Note* that the same provision also applies for dumping within the territorial sea and onto continental shelf of the coastal state because the coastal state has the right to permit, regulate and control such dumping.

<sup>113</sup> *Culpa* is a Latin term that means ‘fault’ or ‘guilt’.

<sup>114</sup> A definition of “strict liability” by Oxford Dictionary, in *the Oxford Dictionaries website*, viewed on 8 March 2012, available at <<http://oxforddictionaries.com/definition/strict%2Bliability?region=us>

<sup>115</sup> *Mens rea* is a Latin term that means ‘guilty mind’.

<sup>116</sup> *Actus reus* is a Latin term that means ‘guilty act’.

<sup>117</sup> P. K. Mukherjee, ‘The Penal Law of Ship-Source Marine Pollution: Selected Issues in Perspective’, World Maritime University Press, Sweden, p.27.

<sup>118</sup> *Supra*, note 3.

“States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.”<sup>119</sup>

Marine environmental law in this context is not an exception. On the matters concerned international and interstate cooperation it is important to distinguish the two terms and understand their scopes.

Thus, “international” means ‘existing, occurring or carried on between two or more nations’<sup>120</sup> whereas “interstate” is defined as existing or carries on between states<sup>121</sup>. Apparently, it is clear that the difference is in an expressive governmental, official character of the term “interstate”. Hereby, it can be supposed that the two terms are used in different concepts. Besides, the term “interstate” should not be confused with “intrastate”: the second one refers to internal, or domestic, matters. Because of the shown difference on the grounds of national and governmental aspects, it can be said that interstate level has a more precise scope than the international one which includes both states and nations. Most probably, “interstate” refers not to the overwhelming majority of the countries but to their smaller number, or some sort of an inner circle.

As concerns marine environmental law, just like for any kind of pollution, it does not recognize state or international boundaries<sup>122</sup> because the entire question is the matter of a global concern. Moreover, even in cases of harm within the state’s own territory the international interest has an essential meaning<sup>123</sup>. Thus, one must conclude that *sic utere tuo*, meaning prohibition to use the own property in the way which harms the neighbors, would obligate a coastal state to prevent harm from environmental sources to, for example, foreign vessels in innocent passage through the territorial sea.<sup>124</sup> When marine pollution occurs it usually touches the questions of harming the neighbour states, too.

In addition, most of the treaties as a part of interstate legal regulation of the matter don’t adopt a form of responsibility for damage placed directly on states without more<sup>125</sup>, on the contrary, some treaties specify that it is only for the non-fulfillment of their international

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<sup>119</sup> *Supra*, note 98, art. 194, para. 1.

<sup>120</sup> Oxford Dictionary definition of “international”, in *the Oxford Dictionaries website*, viewed on 9 March 2012, available at <http://oxforddictionaries.com/definition/international?region=us>.

<sup>121</sup> Oxford Dictionary definition of “interstate”, in *the Oxford Dictionaries website*, viewed on 9 March 2012, available at <http://oxforddictionaries.com/definition/interstate?region=us>.

<sup>122</sup> ‘Interstate and International Air Pollution’, in *the EPA United States Environmental Protection Agency website*, viewed on 9 March 2012, available at [http://www.epa.gov/airquality/peg\\_caa/interstate.html](http://www.epa.gov/airquality/peg_caa/interstate.html).

<sup>123</sup> *Supra*, note 66, p. 100.

<sup>124</sup> *Ibid*, pp. 100 – 101.

<sup>125</sup> 1972 Space Objects Liability Convention, *infra*, Ch. 10. See Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, 159 – 166, cited in *supra*, note 65, p. 186.

obligations that states are responsible<sup>126</sup>. Nonetheless, it is a right observation of Birnie that treaties are not very reliable since if no relevant treaty exists in any given situation or the treaty is inapplicable or insufficient, the doctrine of state responsibility based on customary law remains important, though there are many disadvantages in it<sup>127</sup>. Thus, as it was shown earlier, customary law consists of there are international principles and provisions obligating all the states to be responsible for special issues of marine environmental protection and must be fulfilled by each and state of the world.

Professor Kiss strengthens the importance of so-called “transfrontier pollution” that is usually spoken in the context of either interstate or international environmental law:

“Transfrontier pollution means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within, the area under the national jurisdiction of one country and which has effects in the area under the national jurisdiction of another country.”<sup>128</sup>

The transfrontier pollution is secured by law on the grounds of each state’s right not to suffer damage and have its territory respected and be free from outside intervention; this right is no less absolute than that of the polluting state to utilize its own territory.<sup>129</sup>

Thereby, the correlation between international and interstate marine environmental pollution are different issues pursuing the similar objectives. Nevertheless, “international” does not emphasize the governmental, or only belonging to a particular state, character while “interstate” is relevant only in such cases where states are the parties.

### **3.2.3. State Responsibility Generally vs. as the Law of the State**

*A priori*, state responsibility is understood through the international or interstate levels because of the worldwide nature of the issue. Nonetheless, it is essential to remember that the law of states, namely, their domestic law, also have its influence and can be fully reflected.

Professor Birukov confirms the existence of two conceptions in regard to the forms of international and domestic law interaction: monistic and dualistic.<sup>130</sup> Thus, the monistic conception assumes primacy of any one of the two systems of law<sup>131</sup> (international or domestic) while the dualistic conception supports both on account of independence and self-

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<sup>126</sup> *Supra*, note 65, p.186.

<sup>127</sup> *Supra*, note 78, p. 10.

<sup>128</sup> Council Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, C (77) 28 (Final), May 17, 1977, cited in A Kiss & D Shelton, *International Environmental Law*, Transnational Publishers Press, New York, 1991, p. 118.

<sup>129</sup> *Ibid*, p. 121.

<sup>130</sup> *Supra*, note 8, p. 41.

<sup>131</sup> Note that the expression “system of law” is used regarding international or national character of the law in the context.

determination of each of the systems that, however, interact during the process of making and enforcement of law.<sup>132</sup> For instance, the Constitution of Russian Federation specifies the following:

“The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.”<sup>133</sup>

At the same time, as in the *Manhattan* case, the unilateral action can lead to international law<sup>134</sup>, some domestic rules have a very essential impact on international legal situation in general. Besides, in any case regarding marine pollution damage and state responsibility for it, the starting point on determining the relation between the particular state and the polluter under its jurisdiction is the municipal law of the state<sup>135</sup>. And the fashion in which the state elects to organize and delegate its powers is a purely internal matter.<sup>136</sup> Exactly on these grounds, the state is seen only in its unity and not divided into its different powers<sup>137</sup>. To say more, ‘in case of damage causes by pollution of international watercourses, if to speak about the situation today, it seems more likely that such things would be resolved by transboundary civil actions, once equal access for transboundary claimants had been assured; unlike it usually happened when states preferred to channel claims through national courts<sup>138</sup>. Besides, the international claims involving responsibility for injury to aliens have been conditional on the exhaustion of the local remedies which is again a part of the relevant national legal system<sup>139</sup>. At the same time, the application of the corresponding international legal rules is not clearly established<sup>140</sup>, and is one of the lacks of international legal regime giving rise to the existing problems on the subject.

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<sup>132</sup> *Supra*, note 8, p. 41.

<sup>133</sup> The Constitution of the Russian Federation, 1993, art. 15, para. 4, in *the Constitution of the Russian Federation website*, viewed on 10 March 2012, available at <http://www.constitution.ru/en/10003000-02.htm>.

<sup>134</sup> *Supra*, note 3. Note that in the *Manhattan case* occurred in 1969 between the US and Canada, Canada claimed the North passage through the archipelagos waters whereas the US considered it to be an international straight. To rule the situation, almost everything was designed by Canadian law makers; and most of the world didn't believe it considering only that Canada just tried to extend its sovereignty. Though it is a piece of the domestic legislation, it became very internationally popular. Eventually, in 1972 Canadians could persuade the rest of the world about and thus, the Canadian legislation was implemented.

<sup>135</sup> *Supra*, note 66, p. 23.

<sup>136</sup> Sohn & Baxter, ‘Convention on the International Responsibility of States for Injuries to Aliens )Final Draft with Explanatory Notes’, reprinted in *Recent Codification of the Law of State Responsibility for Injury to Aliens* 135 (Garcia-Amador, Sohn, and Baxter eds.1974), cite in *ibid*, p. 24.

<sup>137</sup> Ago, Third Report on State Responsibility, ii *Yb. Int'l L. Comm'n* 193, at. 248, cited in *supra*, note 66, p. 23.

<sup>138</sup> *Supra*, note 65, p. 187.

<sup>139</sup> *Ibid*, p. 198.

<sup>140</sup> *Ibid*.

Thus, though the impact of the law of the state upon the international law still remains to be demonstrable, there are still some evident problems existing. For example, Birnie reveals some drawbacks of reliance solely on interstate claims since there is a lack of international forum in which to bring claims and no international tribunal has been asked to adjudicate an international claim between states arising from any recent major marine or other form of environmental disaster.<sup>141</sup> On the other hand, the domestic rules could probably have been applied if the corresponding rules of what state's domestic law prevails existed. Moreover, the existing so-called "equal right to access" by victims to the relevant information, administrative hearings etc, is in Boyle's opinion serves to favour interstate claim over direct access to national courts: it precludes the use of local remedies by individual claimants<sup>142</sup>. But when the states as claimants are at stake, they also may resolve their interstate disputes by negotiation or through relevant international organizations, and use them to monitor activities and as a forum for receiving reports and complaints<sup>143</sup>.

In addition to that, as regard to the states' interests themselves, Hafner is aware that since the rules of international law usually deal with transboundary impacts only, irrespective of the interrelation of the domestic and transboundary parts of a watercourse, states are rather reluctant to incur international obligations mainly because they would feel their sovereignty impaired.<sup>144</sup>

Thereby, though in some cases the law of the state can be a necessary help to resolve the dispute, the international law still seems to have priority over it. Nevertheless, there are legal drawbacks in both of the conceptions and thus, the question remains to be in agenda.

### **3.2.4. The Correlation between "Marine Pollution Damage" and "Environmental Harm"**

In the context of state responsibility in marine environmental law it is essential to sort out such categories as marine pollution damage and environmental harm.

First of all, it is needed to examine the terms "damage" and "harm" as determining words in both of the expressions. Thus, "damage" is defined as physical harm caused to something in such a way as to impair its value, usefulness or normal function<sup>145</sup>. At the same time, "harm" is a

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<sup>141</sup> *Supra*, note 78, p. 10.

<sup>142</sup> A E Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in *International Responsibility for Environmental Harm*, F Francioni & T Scovazzi (eds), Graham & Trotman Press, London, 1991, p. 370.

<sup>143</sup> *Supra*, note 78, p. 13.

<sup>144</sup> Gerhard Hafner's Commentary on J G Lammers, 'International and European Community Law Aspects of Pollution of International Watercourses', in *Environmental Protection and International Law*, W Lang, H Neuhold & K Zemanek (eds), Graham & Trotman Press, London, 1991, p. 144.

<sup>145</sup> Oxford Dictionary Definition for "damage", in *the Oxford Dictionaries website*, viewed on 11 March 2012, available at <http://oxforddictionaries.com/definition/damage?region=us>.



physical injury, especially that which is deliberately inflicted<sup>146</sup>. Hereby, the two terms are synonyms and, as it is seen, can help to define each other. At the same time, “damage” is a more material category and can be supposed to be usually referred to absolutely physical aspect while “harm” can be used to express both material and non-material injuries. Environmental harm is a broadly-defined concept which may cover many different types of conduct affecting the environment.<sup>147</sup> Environmental harm is harm to the environment involving damage to native vegetation of the habitat or native animals, or an alteration of the environment to its detriment or degradation.<sup>148</sup> Trying to comprehend what harm and pollution damage are, Birnie believes that it still remains to formulate the limits of harm since the actual proof may be impossible to obtain<sup>149</sup>. Marine environment is a part of the global environment, and thus, it is apparent that marine environmental harm is a part of environmental harm, and, accordingly, environmental harm includes marine pollution damage alongside with its other components.

In addition, customary law now accepts the concepts of “pollution” and “pollution damage” only in general terms and this leaves many difficult questions of scope and effect unanswered; it is thus left to particular treaties to provide their own definitions, which inevitably vary.<sup>150</sup> While defining “pollution damage” as loss or damage caused outside the ship and occurring on the territorial sea or territory of a contracting party<sup>151</sup> the CLC does not, however, refer explicitly to environmental damage.<sup>152</sup> Such a definition is rather a restricted approach than an overall explanation of the term. The restricted approach tends to consider pollution damage only as a tool to the further compensation. With the same limits damage was doubly determined by the USSR 1989 Temporary Instruction<sup>153</sup>: it consisted of, firstly, the actual damage to marine environment, and, secondly, a comparison of polluted and non-polluted areas.<sup>154</sup> As regards the parties of the particular transaction in the context of pollutions damage, shipowners and charterers generally agree on what should constitute pollution

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<sup>146</sup> Oxford Dictionary Definition for “harm”, in *the Oxford Dictionaries website*, viewed on 11 March 2012, available at <http://oxforddictionaries.com/definition/harm?region=us>.

<sup>147</sup> ‘Pollution & Environmental Harm’, in *the Environmental Defender’s Office of Western Australia website*, viewed on 11 March 2012, available at [http://www.edowa.org.au/files/factsheets/pwm\\_pollution\\_environmental\\_harm.pdf](http://www.edowa.org.au/files/factsheets/pwm_pollution_environmental_harm.pdf).

<sup>148</sup> *Ibid.*

<sup>149</sup> *Supra*, note 78, p. 8.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Supra*, note 106, art. 2.

<sup>152</sup> *Supra*, note 65, p. 387.

<sup>153</sup> The Temporary Instruction for Determining the Economic Effectiveness of Nature Protection Measures and Evaluating Economic Damage to Aquatic Bio-resources by the Pollution of Fishery Waters, *cited in* A Kolodkin, V Kiselev, N Koroleva, ‘Some New Trends in Legislation of the Russian Federation and its Attitude towards Conventions with Regard to Marine Pollution’, in *Liability for Damage to the Marine Environment*, C M de La Rue (ed), Lloyd’s of London Press Ltd, London, 1993, pp. 35 – 36.

<sup>154</sup> A Kolodkin, V Kiselev, N Koroleva, ‘Some New Trends in Legislation of the Russian Federation and its Attitude towards Conventions with Regard to Marine Pollution’, in *Liability for Damage to the Marine Environment*, C M de La Rue (ed), Lloyd’s of London Press Ltd, London, 1993, pp. 35 – 36.



damage<sup>155</sup> in their agreements, and most it signifies the means of the possible compensation. Hereby, in such relationship the damage is also understood in the restrictive approach. In this regard, Professor Mukherjee strongly advises not to confuse the terms “damage” and “damages”: the first one is harm suffered while the second one is usually compensation in a common law sense<sup>156</sup>.

Thereby, marine pollution damage usually serves as a part of environmental harm as such and marine environmental harm in particular. In private sectors the lacks of legal regulation of the matter is usually filled in by means of the agreements between the parties; and when it comes to the legal drawbacks in public law context the international community has no alternative but to apply the rules of customary law and the general legal principles.

### 3.2.5. Sovereign Independence vs. International Obligations

*I have everything, yet have nothing;  
and although I possess nothing, still of nothing am I in want.*  
(Publius Terentius Afer, a playwright of the Roman Republic)

It has been found out that state responsibility has international obligation on its ground, thus, it is now necessary to examine to what extent such obligations of the states spread and how the limits of these obligations interrelate. The core of the question is the entire concept of state as the character of the obligations or rules follows from the position of a state as a participant in the international society in its relationship with other states and with international law.<sup>157</sup> On that ground and on the ground of territory as one of the initial indications of any state, Shaw affirms sovereignty to be founded upon the fact of territory since without it a legal person cannot be a state<sup>158</sup>.

The implication of sovereignty plays a significant role in the matter. Nonetheless, it is worth to agree with de Benoist who believes that with a lot of its definitions some total contradictory sovereignty remains one of the most complicated and complex concepts in political science<sup>159</sup>. The author points out the Hoffman’s assertion regarding such a statement as that “sovereignty has been an insoluble problem ever since it became associated with the state”<sup>160</sup> and affirms that sovereignty is inherent in any form of political authority and not related to any form of government or political organization<sup>161</sup>.

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<sup>155</sup> R O Phillips, ‘Charterer’s Point of View’, in *Liability for Damage to the Marine Environment*, C M de La Rue (ed), Lloyd’s of London Press Ltd, London, 1993, p. 160.

<sup>156</sup> *Supra*, note 3.

<sup>157</sup> *Supra*, note 66, p. 68.

<sup>158</sup> *Supra*, note 110, p. 487.

<sup>159</sup> A. de Benoist, ‘What is sovereignty?’, in *Alain de Benoist website*, viewed on 12 march 2012, available at [http://www.alaindebenoist.com/pdf/what\\_is\\_sovereignty.pdf](http://www.alaindebenoist.com/pdf/what_is_sovereignty.pdf)

<sup>160</sup> John Hoffman, *Sovereignty*, Buckingham: Open University Press, 1998, and *Beyond the State*, Cambridge: Polity Press, 1995, cited in *ibid*.

<sup>161</sup> *Ibid*.

Then, De Benoist continues with the international definition of sovereignty that is well-known in international law, such as “sovereignty means independence”<sup>162</sup> which basically, or in its literal sense means not being dependent on anyone else. So the question of polemics in this regard is those international obligations of the states that actually *limit* the independence descended from sovereignty. And actually, it is international law which defines the points of intersection, and therefore the limits of states’ sovereignty.<sup>163</sup> Concerning the limitations made by the obligations it is needed to understand that due to the nature of international law the independence of the states by no means is absolute, though it is principally granted on the highest levels. Smith believes that ‘in a system of equal states, order and the logic of relative sovereignty demand that the freedom or independence enjoyed by each state be restrained at the point at which it interferes with the exercise of the correlative freedom of other states’<sup>164</sup>. In the marine environmental aspect of the matter, no state can with the exclusive competence be allotted on the marine resources as on its own as the other states’ interests are implicated<sup>165</sup>.

At the same time, absolute sovereignty perspective sometimes may exist, for instance, in such states where the authority of the sovereign within the state is supreme, independent and unlimited, or absolute (monarchical states).<sup>166</sup> Nevertheless, in the point of such a global issue as marine environmental protection sovereignty signifies “non-interference by external powers in the internal affairs of another state”<sup>167</sup>. In addition, United Nation Secretary General Kofi Annan underlined the sovereignty’s changing character by saying that “sovereignty implies responsibility not power”<sup>168</sup> which a lot differs from the classical, initial approach.

Article 236 of UNCLOS speaks about sovereign immunity as follows:

“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”

Moreover, some important clauses regarding sovereign immunity can as well be provided in states domestic legislations. For

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Supra*, note 66, p. 70

<sup>164</sup> *Ibid.*, p. 71.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Supra*, pp. 67 – 68.

<sup>167</sup> *Supra*, note 160.

<sup>168</sup> In the 35th Ditchley Foundation Lecture, 26 June, 1998, cited in D. V. Potter, ‘State Responsibility, Sovereignty, and Failed States’, in *the University of Adelaide website*. 29 September – 1 October 2004, viewed on 12 March 2012, available at [http://www.adelaide.edu.au/apsa/docs\\_papers/Others/potter.pdf](http://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf)

instance, in *the Prestige case*<sup>169</sup> the counterclaim of the classification society was dismissed in accordance with the FSIA<sup>170</sup>. The District Court decided that the classification society's counterclaim did not fall under the FSIA exception permitting counterclaims against a foreign sovereign entity if they arose out of the same transaction as the sovereign entity's original claim.<sup>171</sup> Therefore, the general acquiescence in expressions of international concern over local environmental management is one thing; states' acceptance of specific international normative standards and rules that might impose severe limits on natural resource policies locally, is quite another.<sup>172</sup> It is, however, apparent that even when the measure of sovereignty is extended either internationally or domestically by the existing exclusions from the general rules, the obligations to ensure that it is done in a reasonable manner remain.

In summary, sovereignty is dual in its nature and combines independence within a state on the one hand and the obligation not to interfere in the matters of the other states' concern – on the other.

### 3.2.6. Global and Domestic Concerns

*It wasn't the Exxon Valdez captain's driving that caused the Alaskan oil spill. It was yours  
(Greenpeace advertisement, New York Times, 25 February 1990).*

Having examined the grounds of state responsibility for the marine environmental harm the eye-catching question on global or domestic nature of the matter arises apropos of it. In other words, should it be considered a global issue or only a part of a specific country's violated rights in case if state responsibility is invoked by the state which suffered the harm when the international obligation is violated? Thus, finding these the boundaries can become very tricky.

In Birnie and Boyle's opinion, the features which appear important in defining climate change and biological diversity as global concerns are their universal character and the need for common action by all states if measures of protection are to work.<sup>173</sup> AT the same time, they point out the fact that in certain contexts it might also be arguable that the management of a state's own domestic environment is a matter of common concern independently of any transboundary effects; but even though it indeed happens, the sustainable development and other legal principles involving some degree of international supervision can mean that the aspect

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<sup>169</sup> The *Prestige case* will be examined later in details.

<sup>170</sup> 'US Foreign Immunities Act', 1976, in the *University of California: Hastings College of the Law website*, viewed on 12 March 2012, available at <http://www.uchastings.edu/faculty-administration/faculty/paul/class-website/docs/ForeignSovereignImmunitiesAct.pdf>

<sup>171</sup> 'Prestige: Spain, 13 November 2002', in *International Oil Pollution Compensation Funds website*, viewed on 12 March 2012, available at <http://www.iopcfund.org/prestige.htm>

<sup>172</sup> G Handl, 'Environmental Security and Global Change: the Challenge to International Law', in *Environmental Protection and International Law*, W Lang, H Neuhold & K Zemanek (eds), Graham & Trotman Press, London, 1991, p. 86.

<sup>173</sup> *Supra*, note 65, p. 97.

of domestic environmental protection may by implication also be a matter of common concern.<sup>174</sup> Hereby, in the authors' opinion the marine environmental protection issue as such has id of global character regardless where the pollution or any other disaster takes place, what countries are involved in it or what domestic provisions exist in every state regarding the particular subject: international regulation spreads all over.

In any case, some of the countries (especially those that suffer the environmental harm) bare much more losses and obviously desire to implement some pieces of their domestic legislation which would favour them the most; it is probably the reason why such a question is still in agenda. Nevertheless, the environment suffers harm *as a whole*, regardless what the concrete circumstances of any special case are; so, the whole international community shall cooperate on this issue.

Therefore, it is clearly seen that the contemporary doctrine of state responsibility is well-established and, on the grounds of having some problematic issues in its proper understanding which are varied in the opinions of legal thinkers and law-makers, the doctrine still has a very serious potential for the further development.

However, such a development seems not to be happening. It is rather being stuck than moving on. The next Chapter will attempt to find both the reasons why it is so, and respective solutions for the present drawbacks.

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<sup>174</sup> *Ibid.*

# Chapter 4: STATE RESPONSIBILITY FOR POLLUTION DAMAGE

Having looked at and discussed the essence of the doctrine of state responsibility and some of its problematic issues, it is now necessary to explicitly examine the doctrine through the prism of its substance and practical use, namely, how can the doctrine be virtually applied and what are the most possible basis for it.

In order to reach this goal, it is needed to study the relevant legislation reflecting the respective subject. First of all, it is the major maritime law Convention – UNCLOS, secondly, some domestic legislation characterizing legal regulation of the doctrine in roman, common and Scandinavian systems of law, and, the third, looking at how the relevant international rules apply there.

To move on with the practical matters regarding the doctrine of state responsibility, it will also be important to examine the type of liability for marine environmental damage or harm suiting it in the best way which, in its turn, will help to draw the conclusions in respect to adequacy of the application and evaluate its utility nowadays.

This all will bring to a major discussion on application of the doctrine of state responsibility to vessels as extension of the flag state implication which will finally result a conclusion on the matters studies in this chapter.

## 4.1. UNCLOS on State Responsibility for Marine Pollution Damage and Environmental Harm

In the context of the doctrine of state responsibility particularly for marine environmental harm it is worth to bring up one of the fundamental legal sources dealing with law of the sea in the variety of its dimensions – the UNCLOS. One of its perspectives gives provisions on protection and conservation of the marine environment. The entire part XII of the Convention is devoted to it.<sup>175</sup>

As Sokolova truly underlines the obligations established in the UNCLOS for the states in order to prevent, control and regulate marine environmental protection, can be a subject of two groups<sup>176</sup>, such as:

- 1) the rules containing such common obligations as the general obligation of the states to protect and preserve the marine environment<sup>177</sup>;

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<sup>175</sup> *Supra*, note 98, part XII (articles 192 – 237).

<sup>176</sup> N A Sokolova, 'The United Nations Convention on the Law of the Sea about Marine Environment Protection (part XII) and Russian Legislation', in *Juridical Russia Federal Legal Portal website*, viewed on 13 March 2012, available at <http://www.law.edu.ru/doc/document.asp?docID=1118975>.

<sup>177</sup> *Supra*, note 175.

- 2) the rules containing some particular obligations having prevention, reducing, preservation and control over pollution of marine environment as their goal.<sup>178</sup>

At the same time, regardless of the nature or character of the obligations, they still have their common effect that is making states responsible to fulfill them in spite of any other conditions. By virtue of such a rule states become liable for the breach when violating at least one of these obligations.

One of the goals of the UNCLOS is to improve the previous situation by bringing together in one Convention all sources of marine pollution and clearly prescribe all the rights and duties of states when protecting the marine environment and committing them to develop the international law on state responsibility<sup>179</sup>. It is important that the entire separate part of the Convention deals with the particular subject.<sup>180</sup> It is worth to emphasize that the environmental provisions of the UNCLOS are dynamic in character, building on prior instruments, adding structure and establishing the means for incorporating future developments<sup>181</sup> as Kiss, who seems to be a lot in favour of these provisions, believes.

Article 192 of the UNCLOS establishes a basic rule relating to marine environmental protection, namely, it says that states have the obligation to protect and preserve the marine environment<sup>182</sup>, and when it comes to the jurisdiction of such protection, the Convention distinguishes three component states: flag states, port states and coastal states<sup>183</sup>. As Professor Mukherjee explains, flag state is the state which has confirmed the nationality of the ship and gave it the right to fly its flag; coastal state is the state in whose maritime zone the vessel is in, in the specific period of time; and, port state is the state in whose port or off shore terminal the ship is at the specific time.<sup>184</sup> Nonetheless, certain rules in the Convention are common to the exercise of jurisdiction of any of the three interested states.<sup>185</sup> The example of such a rule can be article 224 of the UNCLOS speaking about exercising of powers of enforcement<sup>186</sup> which is possible to be a subject of any of the three states. On the other hand, the introduction of the innovatory provisions in order to improve enforcement by other means and increasing role of coastal and port states, whilst continuing to recognize the primacy of the flag state's jurisdiction over the ship, leads to difficulties of enforcement of the UNCLOS's state responsibility regime.<sup>187</sup>

Moreover, the UNCLOS three types of liability for environmental harm: civil criminal and international liability.<sup>188</sup> These and

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<sup>178</sup> *Supra*, note 176.

<sup>179</sup> *Supra*, note 78, p. 15.

<sup>180</sup> *Ibid.*

<sup>181</sup> A Kiss & D Shelton, *International Environmental Law*, Transnational Publishers Press, New York, 1991, p.168.

<sup>182</sup> *Supra*, note 98, art. 192.

<sup>183</sup> *Supra*, note 181, p. 170.

<sup>184</sup> *Supra*, note 3.

<sup>185</sup> *Supra*, note 181, p. 172.

<sup>186</sup> *Supra*, note 98, art. 224.

<sup>187</sup> *Supra*, note 78, p. 16.

<sup>188</sup> *Supra*, note 181, p. 173.

some particular forms of liability for marine environmental harm will be discussed further in the chapter. Article 211, for instance, is the subject of pollution from vessels, which also will be examined later on. In other words, the UNCLOS does regulate some very important issues regarding marine environmental harm.

Article 235 of the UNCLOS is a very essential piece of legislation in the context of state responsibility for marine environmental harm. It gives provisions directly concerning responsibility and liability of the states in this regard as such:

“States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.”<sup>189</sup>

Thus, the article speaks about the responsibility of the states to fulfill their international obligations concerning the protection and preservation of the marine environment; the recourse for the compensation of the damage that is to be available and prompt; and the cooperation of the states in the implementation of existing international law and the further development.<sup>190</sup> Unfortunately, there are no any definitions or exact explanations of the terms in the article. So, the proper interpretation of the provisions is left to the legal entities that are obliged to fulfill the obligations, whatever strange it would seem. Thereby, due to these drawbacks in the legal regulation it becomes quite hard to comprehend why the article is called “Responsibility and Liability”. Most probably is that the law-maker should think over the paraphrasing either the name of the article or, the better, its content.

Nevertheless, not all of the UNCLOS’s obligations and terms are so absolute. Articles 139 and 235 of the UNCLOS specify that it is only for the non-fulfillment of their international obligations that state are responsible; most treaty obligations are expressed in terms of diligent control of sources of harm.<sup>191</sup> Some authors also believe that ‘the UNCLOS’s obligations in respect of the marine environment do not represent an absolute prohibition to pollute; rather they represent due diligence obligations with the goal to minimize rather than eliminate pollution.’<sup>192</sup>

At the same time, the implementation of this prescription is left to national legal systems coupled with an obligation “to co-operate in the implementation of existing international law” – which is weak.<sup>193</sup> Francioni in of the opinion that it is a very general principle that also encompasses a duty of consultation, but no specific procedures are laid

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<sup>189</sup> *Supra*, note 98, art. 235, para. 1.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Supra*, note 65, p. 186.

<sup>192</sup> General opinion, see UN Secretary General “Law of the Sea - Protection and preservation of the marine environment”, 18 September 1989, UN Doc A/44/461, para. 30, cited in R S J Tol, R Verheyen, ‘State Responsibility and Compensation for Climate Change Damages – a Legal and Economic Assessment’, *Energy Policy*, vol. 34, 2004, pp. 1109 – 1130.

<sup>193</sup> *Supra*, note 78, p. 17.

down for its implementation; such procedures, instead, can be found in most general and regional agreements on the protection of the marine environment from various forms of pollution.<sup>194</sup> Supporting it, Birnie claims that the UNCLOS is strong in laying down a comprehensive framework for the taking and enforcing of measures of the sources of pollution and thus clarifying the obligations breach of which invokes state responsibility, but weak in indicating precisely when a violation occurs and what consequences flow from that so far as liability is concerned.<sup>195</sup>

In addition, having examined not only the UNCLOS but most of the treaties found of conventional environmental norms, Kiss divided the existing provisions into several groups and underlined that the implementation measures are absent among them.<sup>196</sup>

When a similar situation regarding the absence of some important provisions in the legal regulation occurs, it is apparent that the extra attempts and measures of to elaborate them can be used. One of the solutions can be a so-called functional approach. For the most part, environmental elements needing protection remain under the sovereignty of individual states, although these states assume functions in the general interest to remedy problems of wider concern, including the survival of ecosystems and conservation of nature.<sup>197</sup> All the obligations on environmental protection provided by the INCLOS correspond to the *functions* which states must fulfill in serving the common interest of humanity; and when they are added to the obligations arising from other recognized subjects of the common interest the center of international society shifts from the individual interests and sovereign rights of each of its members to collective concerns and corresponding state functions.<sup>198</sup> Thereby, because of the goal of international law and legal rules to protect those common interests, the states are supposed to bare functions, not only sovereign rights. Professor Mukherjee comments on functional approach by explaining it through the prism of the strict way of law-making process.<sup>199</sup> He believes functionalism to be one of the ways to reach the goal in those cases when there is no needed law or it does not work but there is a necessity to rule the situation, so it is possible to attempt something that is not in the law at the present.<sup>200</sup>

With the same meaning of the concept of functional approach, Johnston describes the functional approach as an “ethical position” on the one hand, and the “logic” on the other.<sup>201</sup> The stratagem is quite clear: whenever this approach cannot make sense of international law as such, it is

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<sup>194</sup> F Francioni, 'International Co-operation for the Protection of the Environment: the Procedural Dimension', in *Environmental Protection and International Law*, W Lang, H Neuhold & K Zemanek (eds), Graham & Trotman Press, London, 1991, p. 214.

<sup>195</sup> *Supra*, note 78, p. 15.

<sup>196</sup> *Supra*, note 181, p. 97.

<sup>197</sup> *Supra*, note 181, p. 19.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Supra*, note 3.

<sup>200</sup> *Ibid.*

<sup>201</sup> Johnston, 1988, 57, cited in A Fichtelberg, *Law at the Vanishing Point: a Philosophical Analysis of International Law*, Ashgate Publishing Limited Press, Hampshire, 2008, p. 55.



reverted to ethics and how the law ought to be structured; taken in such a fashion, functional approach becomes both useful and valid.<sup>202</sup>

At the same time, given the role of a new “world conscience” and the need for new methods to ensure application of international environmental norms, the question arises whether a “right to environment”, recognized on the international level like other individual rights, could not have positive impact on the law of the environment.<sup>203</sup>

Thereby, in spite of the detailed norms on marine environmental protection provided by the UNCLOS in regard to different environmental and legal issues, there are still some gaps in the regulation which hamper the further development of the doctrine of state responsibility for marine environmental harm in the context of the absence of the measure of its implementation and, therefore, application. There are different ways to solve the relevant drawback one of which is using functional approach that might be a positive and useful challenge in marine environmental law-making process.

#### **4.2. Legislation on State Responsibility in Interstate Marine Pollution Damage in some National Legislation: Russia, England, Sweden; and Implementation of Respective International Rules on the Subject**

The UNCLOS studied earlier is the example of the most significant international legal sources dealing with state responsibility for the marine environmental harm. At the same time, it is important to examine the example of the other, domestic pieces of legislation reflecting the major legal systems: roman, common and Scandinavian. In order to do it the Russian, English and Swedish legislation on the subject will be considered respectively.

The regulation of state responsibility for marine environmental harm in Russia is based on several legal sources. First of all, it is the Constitution of the Russian Federation that speaks about land and other natural resources what shall be utilized and Protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories.<sup>204</sup> It should be noted that water and marine environment legally belonging to Russia and recognized so internationally are included in the natural resources of Russia. Moreover, a significant in the context of state responsibility conclusion can be drawn from the Civil Code of the Russian Federation providing the following:

“The Russian Federation, the subject of the Russian Federation and the municipal entity shall be answerable by their obligations with the property they possess by the right of ownership, with the exception of the property that has been assigned to the legal entities, which they have set up by the right of economic or of operative management, and also of the property that shall be placed only in the state or in the

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<sup>202</sup> *Ibid.*

<sup>203</sup> *Supra*, note 181, p. 21.

<sup>204</sup> *Supra*, note 133, art. 9, para. 1.

municipal ownership. The turning of the penalty onto the land and the other natural resources in the state or in the municipal ownership shall be admitted in the law-stipulated cases”.<sup>205</sup>

Thus, the recognition of the respective responsibility of the states is apparent.

Nevertheless, apart from the Constitution and the Civil Code, the legal norm dealing specifically with state responsibility for the marine environmental harm can be found in the Russian Federal Law on Environmental Protection. First of all, it spread its action on the continental shelf of the Russian Federation as well as its Exclusive Economic Zone based on the international norm on environmental protection and is aimed at the conservation of the marine environment<sup>206</sup>. Among the main principle of environmental protection there are responsibility of Russian Federation and its public officers for providing favorable environment and liability for failure to do so<sup>207</sup> and liability for violation of the legal rules on environmental protection<sup>208</sup>. For the violation of the rules on environmental protection property, disciplinary, administrative and criminal liability is provided.<sup>209</sup> In addition, the Federal Law presumes a principle of full compensation to the environment.<sup>210</sup> It should be noted here that such compensation is far too possible to be valued exactly, that is why the provision should be treated as an assessment category.

In Sapozhnikova’s opinion, the modern state of Russian Ecological Legislation is still at the stage of evolution from so-called “end-of-pipe” approach, which means eliminating the negative consequences of the wrong usage of the environment, to pollution prevention, at last<sup>211</sup>.

Considering the codification of the legislation as one of the main features distinguishing roman legal system from the common one, it is apparent that in England there are more pieces of legislation, or concrete rules, dealing with environmental protection generally and with state responsibility particularly than those provided by the very few Russian codified legal sources. The main source that is regulating protecting on the environmental, including marine environment, in England is the 1990 Environmental Protection Act. Unfortunately, it does not have any specific provision in regard to marine pollution but it does speak about the sea as

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<sup>205</sup> The Civil Code of the Russian Federation, 1996, art. 126, para. 1, in *the The Civil Code of the Russian Federation website*, viewed on 18 March 2012, available at <http://www.russian-civil-code.com/PartI/SectionI/Subsection2/Chapter5.html>.

<sup>206</sup> The Federal Law of the Russian Federation on Environmental Protection, 2002, art. 2, para. 3, in *the Network on Legal Services ConsultantPlus website*, viewed on 19 March 2012, available at [http://www.consultant.ru/popular/okrsred/70\\_1.html#p83](http://www.consultant.ru/popular/okrsred/70_1.html#p83).

<sup>207</sup> *Ibid.*, art. 4.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*, art. 75.

<sup>210</sup> *Ibid.*, art. 77.

<sup>211</sup> V Sapozhnikova, ‘Environmental Protection in Russia: The Evolution from Strict Enforcement Measures and Environmental Compliance Control to New Combined Approaches Based upon Preventive Strategies’, in *the INECE (International Network for Environmental Compliance and Enforcement) website*, viewed on 19 March 2012, available at <http://www.inece.org/conference/7/vol1/Sapozhinikova.pdf>.

one of the areas of the governmental environmental protection.<sup>212</sup> Besides, there different sources locally engaged into specifically English water legislation that deal with general rules on protecting the marine environment and thus conserve the nature.<sup>213</sup> Nevertheless, they do not provide with any rules on state responsibility or any marine harm of the interstate matter. For instance, the domestic entities' liability for derogation from a protection right is provided in the 1991 Water Resources Act<sup>214</sup>. The water discharge activity is established by the 2010 Environmental Protection Act<sup>215</sup>. Thus, with the example of the general regulation of protecting the marine environment it can be said that there is no any specific rule dealing with state responsibility for such protection. The existing acts sooner establish some typical protective measure to be fulfilled in the domestic level. In any case, the English legislation recognizes different types of liability that can arise as a result of the breach of the domestic environmental law in England.<sup>216</sup> In England breach of environmental law can give rise to both criminal and civil liabilities<sup>217</sup>, and it should be noted that the subject bearing such a liability is not always established which can be the ground to consider that state responsibility in England is recognized as much as in any other country.

The Scandinavian legal approach in regard to the marine environmental protection in general and the doctrine of state responsibility for the corresponding harm in particular differs from those of roman and common law legal systems, as in Russia and England. Nevertheless, the Swedish legal regulation of the subject is mostly presented by the 1999 Swedish Environmental Code. The Code is the most important Swedish piece of legislation in the context of preserving the environment and is aimed to the sustainable development which would provide the present and the future generations with the healthy and sound environment.<sup>218</sup> It provides with the rules on the licensing system, environmental courts; and it can be said that Swedish environmental legislation bear sooner a preventive character than estimating, since the difference between judging an environmental case and judging a criminal case is that in Sweden the

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<sup>212</sup> The UK Environmental Protection Act, 1990, arts. 146 - 147, in *the Official United Kingdom Legislation website*, viewed on 21 March 2012, available at <http://www.legislation.gov.uk/ukpga/1990/43/part/VIII/crossheading/pollution-at-sea>.

<sup>213</sup> 'English Water Legislation', in *the UK Environment Agency website*, viewed on 21 March 2012, available at <http://www.environment-agency.gov.uk/netregs/legislation/current/63616.aspx>.

<sup>214</sup> The UK Water Resources Act, 1991, art. 60, in *the Official United Kingdom Legislation website*, viewed on 21 March 2012, available at <http://www.legislation.gov.uk/ukpga/1991/57/section/60>.

<sup>215</sup> The 2010 No. 675 Environmental Protection, England and Wales, Act, schedule 21, in *the Official United Kingdom Legislation website*, viewed on 21 March 2012, available at <http://www.legislation.gov.uk/uksi/2010/675/made/data.pdf>.

<sup>216</sup> 'The International Comparative Legal Guide to: Environment Law 2008', in *the Freshfields Bruckhaus Deringer website*, viewed on 21 March 2012, available at [http://www.freshfields.com/publications/pdfs/2008/may08/ENV08\\_Chapter\\_21\\_England\\_Wales.pdf](http://www.freshfields.com/publications/pdfs/2008/may08/ENV08_Chapter_21_England_Wales.pdf).

<sup>217</sup> *Ibid.*

<sup>218</sup> U Bjallas, 'Experiences of Sweden's Environmental Courts', in *the Pace University website*, viewed on 27 March 2012, available at [http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/jciBjallas\\_Final%203-17\\_cropped.pdf](http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/jciBjallas_Final%203-17_cropped.pdf).

criminal judge looks backward trying to find out what has been proved about what happened, while the environmental judge looks forward asking what will happen in the future as the result of the decision<sup>219</sup>. The compensation is provided for the violation of a water protection legislation in Sweden and shall be payable for damage caused by pollution of water areas.<sup>220</sup> At the same time, it is not defined what kind of entity can be responsible or liable for the marine pollution harm. Thus, it is apparent that the question of state responsibility for the relative damage as such is left to be regulated in the international level, and applied by means of implementation of the international norms.

Thus, it is clearly seen that the implementation of the international provisions dealing with the doctrine of state responsibility is not exactly regulated by Russian, English or Swedish legislation. Apparently, the corresponding international rules are applicable within the domestic levels on the basic grounds of being international in their nature and thus being applicable in most of the states of the international community. Nevertheless, among the various provisions dealing with environmental protection in general and protection of the marine environment specifically, the detailed rules in regards to state responsibility for marine environmental harm are absent. They seem to be left to be regulated only in the international level. On the one hand, it is logically obvious since the doctrine of state responsibility is international in its nature; on the other hand, in order to escape confusion and disarrangements in domestic legislations and improve the system of implementation of the international provisions, the states should have expressive mechanisms elaborated on how such implementation is actually fulfilled.

In any case, international law does not place on the states a negative obligation to refrain, but rather a positive obligation to protect; and the active measures cannot guarantee a certain result<sup>221</sup>; therefore, it is logical that international law may place on the state only the obligation to “make every effort” to reach this result, and that is only a due diligence obligation<sup>222</sup>.

### 4.3. Type of Liability Implications

The liability provided by the rules of international law for the marine environmental harm may be considered to belong to different types of its division; and thus, it is often difficult to clearly distinguish to what particular type the specific liability for marine environmental harm shall be referred. In other words, one of the advantages on relying solely on state responsibility is the fact that it has remained unclear whether the liability is

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<sup>219</sup> *Ibid.*

<sup>220</sup> The Swedish Environmental Code, 1998, chapter 32, in *the Regeringskansliet Government Offices in Sweden website*, viewed on 27 March 2012, available at <http://www.regeringen.se/content/1/c4/13/48/385ef12a.pdf>.

<sup>221</sup> *Supra*, note 77, p. 35.

<sup>222</sup> P Mazzaschi, ‘Due Diligence’, cit., 387 – 411, *cited in ibid.*

based on fault or is strict or absolute.<sup>223</sup> In addition to that, some writers regard “fault” redundant in the context of establishing breach of an international obligation where the definition of due diligence is the key.<sup>224</sup> Because of that the conventions try to resolve the problem by mean of imposing strict liability<sup>225</sup>. For instance, the CLC abandoned the traditional concept of liability based on fault, and instead imposed a strict liability for oil pollution damage<sup>226</sup>. Replacing a fault liability by a strict liability may not be a revolutionary change today, but in 1969 it represented a major innovation.<sup>227</sup>

Mazzeschi distinguishes three types of international responsibility for environmental harm, namely, fault responsibility, objective responsibility and the regime of liability without a wrongful act.<sup>228</sup> Due to his approach, fault responsibility is characterized by the fact that it is up to the victim state to prove the psychological fault; objective responsibility signifies the responsibility that does not require fault but arises from the mere breach of an international obligation; and, at last, liability without a wrongful act is a financial liability that arises from lawful activities on the basis of the mere casual link between such activities and the damage done.<sup>229</sup> The concept of objective doctrine has been described as not subjective *culpa* but simply the fact of a violation of international law that serves as the basis of a state’s responsibility; only fault in the sense of a breach of obligation is required to be present.<sup>230</sup> The last type is such a form of liability which is, by its own nature, objective and absolute.<sup>231</sup>

At the same time, strict liability itself has various meanings, both in national and international law: it may imply reversal of the burden of proof in order to place on the defendant state the onus of showing that it was negligent, it may also imply that a failure of due diligence is not required, but that other defenses are available.<sup>232</sup> At the same time it absolute liability not necessarily means that no defenses will be available; the DASR identify a number of circumstances which may preclude wrongfulness in international law.<sup>233</sup> Because of the named reasons, the question whether states may be held strictly or absolutely liable for environmental harm cannot be answered merely by asking whether fault is a necessary condition of responsibility in international law.<sup>234</sup> In any case, in treaty practice and in the view of scholars it is apparent that a strict or absolute standard of

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<sup>223</sup> *Supra*, note 78, p. 11.

<sup>224</sup> *Ibid.*, p. 12.

<sup>225</sup> *Ibid.*

<sup>226</sup> M Jacobsson, ‘The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution C Compensation Fund’, in *Liability for Damage to the Marine Environment*, C M de La Rue (ed), Lloyd’s of London Press Ltd, London, 1993, p. 40.

<sup>227</sup> *Ibid.*, p. 41.

<sup>228</sup> *Supra*, note 77, pp. 16 – 17.

<sup>229</sup> *Ibid.*

<sup>230</sup> Anziliotti, *Teoria Generale Della Responsabilità Dello Stato Nel Diritto Internazionale*, 1902, cited in *supra*, note 66, p. 15.

<sup>231</sup> *Supra*, note 77, p. 17.

<sup>232</sup> *Supra*, note 65, pp. 183 – 184.

<sup>233</sup> Articles 20 – 26, cited in *ibid.*

<sup>234</sup> *Supra*, note 65, p. 184.

responsibility for environmental harm enjoys more support than the liability based on fault.<sup>235</sup> Due to the existing and continuing discussions on the subject and non-regulation of it by the international rules, the existence of strict liability in international law is still somewhat dubious<sup>236</sup>.

In any case, it is obvious that for a comprehensive system of redress for ecological damage strict liability is an indispensable element<sup>237</sup>, mostly, because it reflects the worldwide nature of state responsibility itself by means of no admission of options on such a global matter and making the liability literally strict. As even in spite of it, strict liability is absolute by means of the existing relation between cause and effect<sup>238</sup>.

Some authors underline that fault, in the sense of *culpa*, is a condition to the breach of any customary law obligation; while others, nonetheless, argue that the evidence is insufficient to conclude that a general standard of strict responsibility admittedly utilized in convention practice, has risen to customary status.<sup>239</sup>

Smith believes that the entire introduction into international jurisprudence of the Roman law principle adds up to the assertion that responsibility depends upon the presence of subjective fault or *culpa* in the conduct of the state.<sup>240</sup> Thus, the notion of *culpa* itself at the source of and a condition to state responsibility has formed the centerpiece of the traditional jurisprudence of state responsibility.<sup>241</sup> The doctrine of state responsibility was not very well developed until the 20<sup>th</sup> century and that is why the serious doctrinal debate with respect to the meaning and relevance of the concept of fault was not commenced until then<sup>242</sup>. The sense of fault is in many ways quite similar to the notion of “intention” which operates in the tort law and refers to what is generally described as the “psychological” attitude of the state with respect to the breach of the international rule.<sup>243</sup> At the same time, since the notion of *culpa* is quite diverse and ambiguous some of the authors do not agree with the universal meaning of *culpa*. In Shoen’s and de Visscher’s opinion *culpa* is requisite to a finding of state responsibility only with respect to the obligations of the state to protect foreign interests from the acts of private individuals<sup>244</sup> while Strupp and Garcia-Amador look at fault with more expansive approach by requiring

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<sup>235</sup> *Ibid.*, pp. 184 – 187.

<sup>236</sup> K Zemanek, ‘State Responsibility and Liability’, in *Environmental Protection and International Law*, W Lang, H Neuhold & K Zemanek (eds), Graham & Trotman Press, London, 1991, p. 193.

<sup>237</sup> *Ibid.*, p. 194.

<sup>238</sup> *Ibid.*, p. 195.

<sup>239</sup> *Supra*, note 66, pp. 118 – 119.

<sup>240</sup> *Supra*, note 66, pp. 12 – 13.

<sup>241</sup> *Ibid.*, p. 13.

<sup>242</sup> *Ibid.*

<sup>243</sup> Eagleton, *The Responsibility of State in International Law*, 1928, pp. 194 – 195, cited in *ibid.*

<sup>244</sup> P Shoen, *Die Völkerrechtliche Haftung der Staaten aus Unerlaubten Handlungen*, 1917, pp. 51 – 63, de Visscher, ‘La Responsabilité des états, ii *Biblioteca Visseriana*, 1924, p. 86, cited in *supra*, note 66, p. 15.

such fault in all case of breach by omission<sup>245</sup>. In any case, the notion of *culpa* is constantly changing and undergoing a slow process of evolution reflecting the reality; moving away from the classical elements of imprudence and negligence, it tends to draw nearer to the system of objective responsibility.<sup>246</sup>

Thus, it is apparent that there are different points of view in regard to distinguishing the types of liability which is mostly a matter of distinction only the two of them, namely, liability based on fault and liability without fault. On the score of this reason it would be very useful to introduce a new type of liability for marine environmental harm which would reflect both the characteristic of fault liability and those of liability without fault. Therefore, Professor Mukherjee is of the opinion that ‘the dilemma may be resolved by the introduction of a third element into in a position between the extremities of *mens rea* based criminal offences and the non-*mens rea* public welfare or regulatory offences.<sup>247</sup> In this way the fundamental tenet that the punishment should fit the offence is preserved.<sup>248</sup> The third dimension proposed by Professor Mukherjee is a so-called notion of “half-way house”<sup>249</sup> which is such a method of characterization where the prosecution initially treats the offence as one of strict liability and carries the burden of proving the *actus reus*; so, the accused must prove that he was not negligent, otherwise, he is found to be guilty, and the sanction can be higher than it would be in a case of absolute liability offence where no defense of due diligence is available and the accused is found to be guilty once the *actus reus* is proven by the prosecution.<sup>250</sup> In other words, half-way house liability implication is a transitional notion between the one based on *mens rea* and the one based on only *actus reus* without *mens rea* and signifies the types of liability which is strict in its nature and requires due diligence defense on a balance of probabilities.<sup>251</sup>

Taking into consideration the fact that liability and the type of the liability for the marine environmental harm play an important role in the doctrine of state responsibility in the context of the respecting field, it is apparent that the way of determining and establishing such liability should be clear and exact. The half-way house liability implication appears be an efficient tool in helping to reach this goal.

While it is recognized that the notion of the half-way house pertains to penal law especially with respect to marine pollution offences, it is submitted that the concept can be transposed to the arena of state responsibility even though this is primarily a matter of liability and remedy as it would apply in a private law situation. The uniqueness of the doctrine

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<sup>245</sup> Strupp, *Éléments de Droit International Public Universel, Européen et Américain*, 1930, p. 330 and *Das Völkerrechtliche Delikt*, 1920, p. 60; *supra*, note 95, pp.17, 27, *cited in supra*, note 66, p. 15.

<sup>246</sup> The *Corfu Channel Case (UK v. Alb.)*, [1949] ICJ 4, at 85 (Dissenting Opinion Judge Azevedo), *cited in supra*, note 66, p. 21.

<sup>247</sup> *Supra*, note 117.

<sup>248</sup> *Ibid.*

<sup>249</sup> G Williams, *Criminal Law: General Part, 2nd ed.*(1961), at p. 262, *cited in supra*, note 117.

<sup>250</sup> *Supra*, note 117.

<sup>251</sup> *Ibid.*

of state responsibility is that it is essentially hybrid in scope. In other words, even though the application of the doctrine arises only in situations of interstate litigation where the parties are subjects of public international law, the principles applied have been borrowed from private law as it operates in domestic jurisdictions. Therefore, it is arguable that penal law principles may well be imported into the field of state responsibility to establish the basis of liability. What needs to be clearly understood is that strict liability in a private law sense means “no fault liability” whereas in penal law it means liability without proof of *mens rea*.

Some scholars are of the view that strict liability as the basis for state responsibility has been entrenched on the law through the Trail Smelter decision; however, there are other views as well which have been set out by Birnie and Boyle<sup>252</sup>. The proposition offered by this author is another option that might be considered; which is an importation of penal law principles into the domain of state responsibility for the establishment of a basis for liability.

#### **4.4. Adequacy of Applicability of the Doctrine of State Responsibility in International Law**

Before examining adequacy of applicability of the doctrine of state responsibility it is needed to distinguish such categories as “application” and “implementation” in order not to mix them and get confused. Thus, application is defined as an action of pitting something into operation<sup>253</sup>; while implementation is the process of putting a decision or plan into effect<sup>254</sup>. So, it is seen that application is a little wider in its scope since it covers both decisions and plans, and something else, to be put into effect. At the same time, Professor Mukherjee called to pay attention when talking about implementation in the context its close connection with enforcement. In his opinion, implementation means giving effect to by both legislation and practical measures while enforcement is nothing about making legislation but is referred to pre- and post- event.<sup>255</sup> Judicial action is a part of the enforcement as well; and the marine environmental matters usually go to court because of their importance.<sup>256</sup>

In any case, the applicability of the doctrine of state responsibility can be said to be quite hard to be done. Kiss sorts out the relevant possible reasons why actual implementation of the doctrine is difficult. First of all, as it has been mentioned earlier, there is a problem in determining the legal basis or degree of fault necessary to impose liability.<sup>257</sup> Once the problem is solved, it would be much easier to apply the

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<sup>252</sup> *Supra*, note 65, p. 183.

<sup>253</sup> Oxford Dictionary definition of “application”, in *the Oxford Dictionaries website*, viewed on 30 March 2012, available at <http://oxforddictionaries.com/definition/application>.

<sup>254</sup> Oxford Dictionary definition of “implementation”, in *the Oxford Dictionaries website*, viewed on 30 March 2012, available at <http://oxforddictionaries.com/definition/implementation>.

<sup>255</sup> *Supra*, note 3.

<sup>256</sup> *Ibid*.

<sup>257</sup> *Supra*, note 181, p. 350.



entire doctrine. Moreover, the link of causality between a culpable act and the damage suffered is still not established; in this point pollution poses problems since the long distances between the source and the place of damage may create doubts about the causal link and the noxious effects of pollution may not be felt until years after the act.<sup>258</sup> In addition, the author of the pollution should be identifiable since proving the identity of the concrete polluter sometimes can pose problems.<sup>259</sup> Undoubtedly, in such cases the implication of jurisdiction over entities of a specific state helps to resolve the situation, nevertheless, it is not always possible, and the necessary measure on assuring on the matter should be provided. Another problem inhibiting a proper application of the doctrine is the issue of damages; damage must be measurable which is again more problematic in environmental matters than in other domains since the elements of environment often are not viewed as having economic value.<sup>260</sup> A final issue spoken by Kiss is connected with diplomatic protection.<sup>261</sup> According to generally recognized rules of international law, diplomatic protection can be exercised only under two conditions: the victim must be a national of the state which claims for the damage suffered by him and the legal remedies existing in the state which is considered as being responsible must be exhausted.<sup>262</sup> Nonetheless, in the context of marine environmental harm neither of the two conditions can actually be fulfilled. The very nature of the damage is not personal, the damage is cause to the territory of the claiming state and the rule which has thus been violated is that of the respect of foreign territory.<sup>263</sup> As a consequence, it is enough to prove that at the moment of the damage a person was under the jurisdiction of the state without finding out whether this person is a national of the claiming state or not; moreover, the exhaustion of local remedies cannot be required as for international law the damage is not that suffered by a person but by a state.<sup>264</sup>

Therefore, the problems exist, and different solutions are being proposed in order to solve them. For instance, Greve, on the contrary to Kiss, believes that private enforcement of environmental legal standards through “citizen suits” is an essential component in the effectiveness, especially in domestic law<sup>265</sup>. Birnie is of the opinion that controlling pollution damage before the actual disaster occurs is also a method of the enforcement of the doctrine since it is virtually impossible fully to restore the environment *after* the disaster.<sup>266</sup>

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<sup>258</sup> *Ibid.*, p. 352.

<sup>259</sup> *Ibid.*, p. 353.

<sup>260</sup> *Ibid.*, p. 354.

<sup>261</sup> *Ibid.*, p. 357.

<sup>262</sup> A Kiss, ‘Present Limits to the Enforcement of State Responsibility for Environmental Damage’, in *International Responsibility for Environmental Harm*, F Francioni & T Scovazzi (eds), Graham & Trotman Press, London, 1991, p. 7.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> Greve, ‘The Private Enforcement of Environmental Law’, 65 *Tulane L. Rev.* (1990), 339, cited in *supra*, note 172, p. 74.

<sup>266</sup> *Supra*, note 78, p. 12.

*Ipso facto*, the applicability of the doctrine of state responsibility in the matter of marine pollution damage in the international level is only theoretically adequate while practically there exist the problems not letting the doctrine be applicable non-problematically. Thereby, first there must be found solution for the problems to be solved and then it would be possible to speak about the proper and adequate applicability of the doctrine.

#### **4.5. Utility of the Doctrine in Comparison with Private Law Conventions**

Having studied the main features and implications regarding the doctrine of state responsibility, as well as its advantages and drawbacks, it is now worth to look at the utility of the doctrine as the legal instrument being applicable in international law and bringing the expected positive results.

The development of the doctrine in the recent years has shown its high potential and impact it has on the doctrine of international law. Nevertheless, while potentially effective as a means of resolving environmental disputes, reliance on state responsibility has serious deficiencies.<sup>267</sup> Birnie and Boyle sort out several reasons why utility of the contemporary doctrine still remains weak. First of all, cases may be brought only by states, the provision of diplomatic protection is discretionary and the state entitled to claim is the sole judge of whether it should do so<sup>268</sup>; it gives the individual victim no control over the negotiation of any settlement<sup>269</sup>. Further, since claims may be made only by states with standing, and the remedies available may be limited or inadequate, there is a particular problem in using international claims as a means of protecting the environment of common areas.<sup>270</sup> Moreover, state responsibility is an inefficient means of allocating the costs; the outcome of any claim remains unpredictable and reveals the absence of the well-formed basis for determining the payer of the transboundary costs.<sup>271</sup> After all, the most important objection to the utility of the doctrine is that it is an inadequate model for the proper enforcement of internationally recognized standards of environmental protection.<sup>272</sup>

The existing deficiencies arise from both public and private aspects. It is worth to note that private law part is very essential in marine environmental law: it is relevant at any case where private individuals get hurt or suffer losses and thus are entitled for damages or some sort of remedy. Here, taking into consideration the fact that the majority of the conventions are of private law character, such conventions regulating the corresponding private matters may come to the help.

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<sup>267</sup> *Supra*, note 65, p. 199.

<sup>268</sup> *Barcelona Traction Case, ICJ Rep.* (1970), 4, paras. 78 – 9. Claims in respect of injury to individuals must also satisfy the nationality of claims rule: see *Nottebohm Case, ICJ Rep.* (1955), 4, *cited in ibid.*

<sup>269</sup> *Supra*, note 65, p. 199.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

In his lectures Professor Mukherjee posed the question: who should be liable for the pollution?<sup>273</sup> The article IV of the CLC says that when an accident involving two or more ships occurs and pollution damage results therefrom, the owners of all the ships concerned shall be jointly and severally liable for all such damage which is not reasonably separable<sup>274</sup>. At the same time a lot of authors disagree with the particular provision arguing that the owners of the cargo should also bear some responsibility since because if not their actions and their cargo then maybe there would be no pollution at all.<sup>275</sup> Thus, because of no law providing the regulation for these particular gaps, it was agreed that importers of oil would contribute money to form a fund, so that the victims of pollution would be compensated from that fund.<sup>276</sup> So, the fund was established under the Fund Convention. CLC established three fundamental elements: strict liability under which a shipowner may be exempted from liability only in a few particular cases<sup>277</sup>, limitation of liability under which a shipowner is entitled to limit his liability to an amount which is linked to the tonnage of the vessel, and compulsory insurance under which a shipowner has to obtain the insurance coverage in case of a certain amount of oil cargo being carried so that the victims might thus bring legal action directly against the insurer.<sup>278</sup> It is apparent that the CLC furthers the victim's interests and therefore helps to solve the private part of marine environmental matters. The purpose of the Fund Convention was to provide supplementary compensation to those who cannot obtain full compensation for oil pollution damage under the CLC, and to indemnify the shipowner for a proportion of his liability under the CLC since by the time of adoption of the Fund Convention it was already recognized that the compensation regime under the CLC was insufficient.<sup>279</sup> The relationship between the Fund Convention and the CLC is in their different functions: the CLC establishes the main grounds for the liability for the oil pollution damage while the Fund Convention helps to carry out those principles, in other words, the Fund Convention acts as a remedy thereupon the CLC. In addition, such private law conventions as the HNS<sup>280</sup>, the Bunker Convention<sup>281</sup> and the Salvage Convention<sup>282</sup> have a

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<sup>273</sup> *Supra*, note 3.

<sup>274</sup> The 1992 International Convention on Civil Liability for Oil Pollution Damage, art. IV, in the *German Association for Transport Law website*, viewed on 31 March 2012, available at [http://www.transportrecht.org/dokumente/HaftungsUe\\_engl.pdf](http://www.transportrecht.org/dokumente/HaftungsUe_engl.pdf).

<sup>275</sup> *Supra*, note 3.

<sup>276</sup> *Ibid.*

<sup>277</sup> Such as: the damage resulted from an act of war, the damage is caused by sabotage by a third party, or the damage is caused by the failure of authorities.

<sup>278</sup> *Supra*, note 226, pp. 40 – 41.

<sup>279</sup> *Ibid.*, p. 42.

<sup>280</sup> The 2010 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, in the *International Maritime Organization website*, viewed on 31 March 2012, available at <http://www.imo.org/OurWork/Legal/HNS/Documents/HNS%20Consolidated%20text.pdf>.

<sup>281</sup> The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage, in the *United Kingdom Official Documents website*, viewed on 31 March 2012, available at <http://www.official-documents.gov.uk/document/cm66/6693/6693.pdf>.

<sup>282</sup> The 1989 International Convention on Salvage, in the *Faculty of Law of the University of Oslo website*, viewed on 31 March 2012, available at <http://www.jus.uio.no/lm/imo.salvage.convention.1989/portrait.pdf>.

very strong impact on the utility of the doctrine of state responsibility in the context of its applicability *through* them.

At the same time, Birnie and Boyle believe that civil liability schemes although valuable, have their own drawbacks and deficiencies which make it necessary to retain the option of recourse through international claims<sup>283</sup>. Therefore, considering the fact that public law conventions dealing with marine environmental harm and its consequences are very few and do not regulate the overall situation, the private law solution may logically be made. Thus, in order to reach such private aims as, for instance paying damages, the victims of the environmental harm would be able to claim for them *through* their own state when it comes to the private matters. As it was shown above, the existing provision in public law on the subject are insufficient for the doctrine of state responsibility to be properly applicable, so the regulation of the corresponding private issues through the existing private law convention would become a big support in the doctrine's utility.

Hence, when considering a question on where the doctrine of state responsibility for marine environmental harm would rather be applicable it is worth to note that it probably would be such where public victims exist. In other words, there initially should be some governmental interest in the essence of claim, or where the property owner is a state itself. In such cases it would be appropriate to refer to private aspects of the raised issues and proceed in interstate litigation.

#### **4.6. Application of the Doctrine of State Responsibility to Ships as Extensions of the Flag State**

There is a theory in maritime law in the context of nationality of vessels which considers ships as extensions of the flag states. Vessels when they sail are particularly out of the actual territory of states they belong; in this extent what is at issue is a notion of so-called duality of jurisdiction: a vessel itself is a part of territory of a state but at the same time it is located in the territory of a foreign state, or in the territory of no any state's jurisdiction. The conduct within the locus defined by the physical limits of a vessel is subject to an order of jurisdiction of the flag state best described as "quasi-territorial".<sup>284</sup> A ship which bears a nation's flag is to be treated as a part of the territory of that nation; a ship is a kind of floating island.<sup>285</sup> When it comes to marine environmental law it is needed to underline that such an approach may have a considerable impact on the application of the doctrine of state responsibility.

It is important that the vessel is considered to be a part of the territory of the state. As opposed to coastal state jurisdiction which is applicable only within the maritime zones, and port state jurisdiction which is applicable in the port, flag state jurisdiction always applies with no matter

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<sup>283</sup> *Supra*, note 65, p. 200.

<sup>284</sup> *Supra*, note 66, p. 150.

<sup>285</sup> *Q. v. Anderson*, LR 1 CCR 161, cited in *ibid*, pp. 150 – 151.

where the ship is at the particular moment of time.<sup>286</sup> In such territories like high seas where no any state spreads its jurisdiction the flag state jurisdiction applies.<sup>287</sup> It should be noted that though the primacy of flag state jurisdiction is respected it is not only more carefully balanced but also by imposing clearly defined duties on the flag state whether within its own or other jurisdictional zones or on the high seas.<sup>288</sup>

Smith believes that flag state responsibility presupposes the existence of the obligation of flag states to exercise jurisdiction over their vessels to prevent marine pollution, however, it remains to define the standard of performance of that obligation.<sup>289</sup>

If to consider a vessel to be an extension of flag state it is worth to look at how pollution *from* vessels is regulated. UNCLOS establishes the rules for flag states to prevent marine pollution by stipulating that “states shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry”<sup>290</sup>. Birnie believe that the obligations concerning the prevention of pollution provided in UNCLOS are quite flexible and very ambiguous<sup>291</sup>. Flag states are therefore responsible for the vessels flying their flags. Moreover, UNCLOS in details regulates the matters of enforcement by flag states.<sup>292</sup>

In any case, the various provisions of UNCLOS relating to jurisdiction over vessel violations of environmental norms have been supplemented by a global convention and by several conventions concerning regional seas; the general convention is MARPOL has as its objective “the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances”<sup>293</sup> .<sup>294</sup>

It is also worth to remember that pollution from ships can be generally of two kinds, namely, operational and accidental<sup>295</sup>, but the type of the ship-source pollution does not influence of the liability of flag states for such a pollution.

Hereby, as a source violation by means of pollution and being under the jurisdiction of its flag state a vessel thus identifies such flag state as a polluter and therefore makes it liable for the occurred marine environmental harm against the international community.

Hence, the notion of flag state as extension of territory might be a very relevant tool in the context of applicability of the doctrine of state responsibility, and could lead to the desired usefulness of the doctrine.

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<sup>286</sup> *Supra*, note 3.

<sup>287</sup> *Supra*, note 65, p. 360.

<sup>288</sup> *Supra*, note 78, p. 17.

<sup>289</sup> *Supra*, note 66, p. 155.

<sup>290</sup> *Supra*, note 98, art. 211, para. 2.

<sup>291</sup> *Supra*, note 78, p. 16.

<sup>292</sup> *Supra*, note 98, art. 217.

<sup>293</sup> The 1973/1978 International Convention for the Prevention of Pollution by Ships, art. 211, para. 6 (a), *cited in supra*, note 181, p. 175.

<sup>294</sup> *Supra*, note 181, p. 175.

<sup>295</sup> *Supra*, note 65, p. 359.

# Chapter 5: CASE LAW ON MARINE POLLUTION DAMAGE AND STATE RESPONSIBILITY

Case law in regard to state responsibility for marine pollution damage is an important aspect of the corresponding doctrine: it shows how the existing rules dealing with the doctrine were actually applied in reality, and what consequences it had. Moreover, some of the decisions made with respect to marine pollution damage and responsibility of the state for such harm revealed the relevant drawbacks in the legal regime of the time that should have been eliminated to better effectuate the doctrine of state responsibility for marine pollution harm. It is notable that the case law in this field is conspicuously sparse. Therefore, whatever decided or even undecided cases are there, need to be examined as far as possible; especially those that squarely address the issue of state responsibility even if they are non-maritime cases.

## 5.1. *Trail Smelter*

The classic case on state responsibility in the context of environmental damage, albeit non-marine, is the *Trail Smelter* Arbitration. The subject of the dispute was damage suffered by property within the territory of the US as a result of the activities of a Canadian smelter which emitted sulphur dioxide fumes.<sup>296</sup> In that case the USA alleged liability on the part of Canada and claimed damages for causing environmental harm. Thus, the question of state responsibility (Canada's responsibility) arose before the Tribunal which considered several important issues in the course of arriving at its findings and making a decision. Canada was held to be responsible<sup>297</sup> in international law for the smelter's conduct since it was physically located within the territory of Canada and fell under Canadian jurisdiction. In particular its activities were held to be in violation of Canada's obligation to refrain from polluting the environment in such manner as to cause harm to another state. The Tribunal ordered Canada to pay compensation and establish a regime of control for the smelter to prevent possible future damage.<sup>298</sup>

The *Trail Smelter* Arbitration is the first environmental case in modern times in which the doctrine of state responsibility was the central

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<sup>296</sup> *The "Trail Smelter" Case (The United States of America v. Canada)*, 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, in *the United Nations Treaty Collection website*, viewed on 9 March 2012, available at [http://untreaty.un.org/cod/riaa/cases/vol\\_III/1905-1982.pdf](http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf).

<sup>297</sup> It is important to notice that the meaning of the word 'responsibility' (instead of the word 'liability') should not confuse the reader in this context. The point is that the essence of the asked before the court question on whether a state was responsible or not initially also supposed to mean liability since the obligation had already been violated; and the exact wording would not play the decisive part in that particular context.

<sup>298</sup> *Supra*, note 296.

focus of interstate litigation. It brought to the forefront a new perspective to the understanding and application of the doctrine with regard to pollution law.

Be that as it may, the doctrine has never been used in ship-source pollution case even though a numerous occasions the doctrine could possibly have been utilized. Interstate litigation is quite infrequent, and in cases of pollution damage, maritime or otherwise, private litigants who are victims of pollution damage tend to use private law mechanisms which they find to be more expedient. Wherever the doctrine has been invoked the Tribunal in question, particularly the ICJ, has taken the opportunity to elaborate on the doctrine and add to the jurisprudence which is undoubtedly of great value to the international community.

## 5.2. *Lac Lanoux*

One of the cases dealing with the doctrine of state responsibility is *Lac Lanoux*. Lake Lanoux is located on the French side of the Pyrenees mountain chain the frontier between France and Spain was fixed by the Treaty of Bayonne in 1866 and an additional act whereby the regulations were made for the joint use of the water resources.<sup>299</sup> The French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne, between France and Spain and the Additional Act.<sup>300</sup> Spain alleged that the plans proposed by France would adversely affect Spanish rights and interests contrary to the Treaty, and could only be undertaken with prior consent of both Parties.<sup>301</sup>

Thus, the arbitration concerned the use of the waters of the lake; it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.<sup>302</sup> In any case, *Lac Lanoux* showed how the process of prior consultation and negotiation was interpreted by an international arbitral tribunal, not only as a treaty stipulation, and considered it from the customary international law prospective.<sup>303</sup> Nonetheless, thought the raised in the case issues were of the global environmental character, the matter of the doctrine of state responsibility was not touched upon. Once again, it makes it evident that the usability and validity of the doctrine is becoming rarer.

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<sup>299</sup> 'Compendium on Judicial Decision on Matters Related to Environment: International Decisions', in the *UNEP (United Nations Environmental Programme) website*, viewed on 10 April 2012, available at [http://www.unep.org/padeli/publications/Jud.dec.%20pre\(Int%20.pdf](http://www.unep.org/padeli/publications/Jud.dec.%20pre(Int%20.pdf).

<sup>300</sup> 'Lake Lanoux Arbitration (France v. Spain)', in the *ECOLEX (The Gateway to Environmental Law) website*, viewed on 10 April 2012, available at <http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf>.

<sup>301</sup> *Supra*, note 299.

<sup>302</sup> *Supra*, note 300.

<sup>303</sup> *Supra*, note 299.

### 5.3. Corfu Channel

In 1946 on October 22 there happened two incidents that gave rise to the *Corfu Channel* case<sup>304</sup> which was held in April of 1949. The mines were struck by two British destroyers in Albanian waters which resulted in damage including loss of life.<sup>305</sup> This case is probably the best example demonstrating how the doctrine of state responsibility was applied by the ICJ.

In the context of state responsibility, two issues were raised before the court, namely:

- 1) Was Albania responsible under international law for the explosions which occurred in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?<sup>306</sup>
- 2) Did the United Kingdom violate the sovereignty of the Albanian People's Republic under international law and was there any duty to give satisfaction?<sup>307</sup>

The court determined several issues in order to address the stated questions, namely, the existence of international obligations, the duty of due diligence and whether the state concerned were in breach of their international obligations<sup>308</sup>.

In its decision, the ICJ held that Albania was responsible<sup>309</sup> for the explosions and was under a duty to pay compensation. The court also decided that the United Kingdom violated international law by the acts of its Navy in Albanian waters.<sup>310</sup> Thus, both states were held liable under international law on the grounds that all the conditions for liability were met. In other words, both states were found to be in breach of certain obligations or duties to which they were subject under international law.

The *Corfu Channel* case therefore represents an illustration of how the doctrine of state responsibility can be applicable in interstate litigation.

### 5.4. Torrey Canyon

Until the second half of the 20<sup>th</sup> century no major environmental disasters at sea had occurred. However, towards the latter half of that century, high amounts of dangerous materials were increasingly being carried by sea, especially in the last decades. The *Torrey Canyon* disaster which occurred in March 1967 off the coast of the United Kingdom was the most dramatic and

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<sup>304</sup> *The "Corfu Channel" Case (The United Kingdom v. Albania)*, 9 April 1949, International Court of Justice.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*, cited in M. Enrico 'State Responsibility in Territorial Disputes before the ICJ', in *the European Society of International Law website*, viewed on 9 March 2012, available at [http://www.esil-sedi.eu/fichiers/en/Milano\\_441.pdf](http://www.esil-sedi.eu/fichiers/en/Milano_441.pdf).

<sup>309</sup> *Supra*, note 297.

<sup>310</sup> *Supra*, note 304.



significant oil spill both in size and effect.<sup>311</sup> It served as the impetus for the creation of new convention law in both the public as well as the private maritime law arenas. There was only the OILPOL Convention which was regulatory in scope and did not provide for any remedies for victims of pollution damage including a state which had suffered damage to its coastal interests. The damage occurred in waters which then were a part of the high seas where coastal states had no legislative or enforcement jurisdiction. The domestic law of the United Kingdom could not be invoked since the incident occurred outside the territorial seas of that state. In the words of one commentator, it was the necessity to turn to the national legal system for the solution but the international character of the disaster itself and the contrary economic interests of the countries led to a conflict of laws<sup>312</sup>.

The *Torrey Canyon* was owned by a subsidiary of the Union Oil Company of California, the USA, and was chartered out to the parent company. The ship which was registered in Liberia ran aground on Seven Stones Reef outside the territorial seas of the United Kingdom<sup>313</sup>. A considerable amount of crude oil cargo was released from the vessel which broke up into four sections; a hundred kilometers of English coastline and eighty kilometers of French coastline were polluted.<sup>314</sup> This disaster reportedly cost the United Kingdom more than three million pounds and France forty one million francs.<sup>315</sup> The incident had its worst impact on the rural coast of southwestern England.<sup>316</sup> The beaches were rendered unusable not only to wild life but also to humans.<sup>317</sup>

The committee of inquiry that heard the case considered the master of the vessel responsible for the damage. In the context of this case, the question whether the doctrine of state responsibility would have applied is a pertinent issue. In other words, could Liberia be held responsible at law and liable to the UK for the harm caused? It has been stated earlier that a state could be held responsible if a body falling under its jurisdiction is in violation of its international obligation. It is arguable that a ship is a body that falls within the jurisdiction of its flag state, and therefore, a breach of obligation committed by the ship could be imputed to the flag state, and the doctrine of state responsibility could apply. It is an important point of observation that in the *Torrey Canyon* case neither state responsibility, nor liability, were invoked by any party, although it would appear that the conditions for the imposition of the doctrine were met. The most probable reason is that the international community was not yet ready to absorb the

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<sup>311</sup> W. Chao, *Pollution from the Carriage of Oil by Sea: Liability and compensation*, Kluwer Law International Ltd Press, United Kingdom, 1996, p 9.

<sup>312</sup> *Ibid.*

<sup>313</sup> A C Simpson, 'Torrey Canyon Disaster and Fisheries', in *the Center for Environment, Fisheries & Aquaculture Science (CEFAS) website*, viewed on 6 April 2012, available at <http://www.cefas.defra.gov.uk/publications/lableaflets/lableaflet18.pdf>.

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> The Times (London), March 28, 1967, at 9, col. 1, in A E Utton, 'Protective Measures and the Torrey Canyon', *Boston College Law Review*, vol. 9, April 1967, pp. 613 – 632, in *the Digital Commons @ Boston College Law School website*, viewed on 9 April 2012, available

at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1094&context=bclr>.

<sup>317</sup> *Ibid.*

doctrine into a marine environmental catastrophe of such proportions that was unprecedented.

The *Torrey Canyon* signified that the doctrine of state responsibility by the middle of the last century was still not elaborated enough to deal with marine environmental disasters. As exemplified in this thesis, the situation has not changed significantly, and the ILC is still engaged in deliberations which will hopefully lead to a more definitive state of the law in relation to this doctrine.

### 5.5. *Erika and Prestige*

Two other major accidents which caused enormous oil spills and harmed the marine environment were the *Erika*<sup>318</sup> and *Prestige*<sup>319</sup> incidents. The French coastline was grossly affected in 1999 and 2002 respectively.

The *Erika* disaster took place on 12 December 1999 when the Maltese tanker *Erika* broke into two in the Bay of Biscay, which was approximately 60 nautical miles off the French coast. All the members of the crew were rescued by the French maritime rescue services. As a result of the accident, 19 800 tonnes of heavy fuel oil spilled into the sea.<sup>320</sup> The *Prestige* disaster occurred on 13 November 2002 when the Bahamian tanker *Prestige* began leaking oil 30 km off the Spanish coastline. On 19 November the vessel broke into two and sank 260 km west of Spain.<sup>321</sup> Both the break-up and sinking released an estimated 63 000 tonnes of cargo; besides, over the few following weeks oil continued to leak from the wreck. It was subsequently estimated by the Spanish State that approximately 13 800 tonnes of cargo remained in the wreck; and the leaked oil travelled great distances.<sup>322</sup>

With regard to the *Erika* the Criminal Court of First Instance in Paris held the four parties criminally liable for causing the pollution, namely, the ship owner's representative, and the president of the management company, the classification society and the contractor engaged by the French oil company to deal with the disposal of the recovered waste<sup>323</sup>. With regard to the *Prestige*, similar issues were raised, namely, the liability of the various parties involved both in civil as well as criminal terms.<sup>324</sup> However, in neither the *Erika* nor the *Prestige* cases, was the question of state responsibility raised by any party. It is submitted that due to the scholarly opinions on state responsibility and the developments at the ILC which are still in draft form, such questions should have been raised. It

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<sup>318</sup> 'Erika: France, 12 December 1999', in *the International Oil Pollution Compensation Funds website*, viewed on 9 March 2012, available at <http://www.iopcfund.org/ongoing.htm>.

<sup>319</sup> 'Prestige: Spain, 13 November 2002', in *the International Oil Pollution Compensation Funds website*, viewed on 9 March 2012, available at <http://www.iopcfund.org/ongoing.htm>.

<sup>320</sup> *Supra*, note 318.

<sup>321</sup> *Supra*, note 319.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Supra*, note 318.

<sup>324</sup> *Supra*, note 319.

is thus evident that the doctrine is being used less and less, and the popular perception is that it is not readily effective particularly in view of the various private law convention regimes addressing damage from marine environmental incidents.

It can be derived from these three important shipping disasters, even though environmental harm was caused by bodies falling under the jurisdiction of one state inflicted on another, the doctrine of state responsibility was neither raised or invoked by any of the involved parties. Instead, private law actions ensued in which proceedings were brought against the various entities by the victims of pollution damage. It is notable in this context that *de jure* the doctrine of state responsibility could have been applicable as all the necessary attributes concerning it were present, but *de facto* it was not used.

In the light of the above cases it is apparent that there is no new development in the case law with respect to the application of the doctrine of state responsibility. The authoritative cases are relatively old and it is a question of how victims of pollution damage view the interests and legal positions in the absence of any concrete development through convention law.

## Chapter 6: CONCLUSION

In this thesis the doctrine of state responsibility is revisited from the marine environmental perspective to enquire into the current status of the doctrine and what prognosis exists for its further development. First, a general understanding of the issue is presented, and then the arguable aspects of the doctrine and evidential drawbacks in the current legal status of the doctrine are discussed.

The doctrine of state responsibility has had a long way to be formed as it is at the present. The roots of the doctrine come from the ancient fundamental principles of international law. However, the doctrine of state responsibility as such and specifically the doctrine of state responsibility for marine environmental harm started to develop quite late, in its most part in the second half of the 20<sup>th</sup> century. This is understandable since the question of marine environmental protection, and thus the different possible entities which might be responsible and liable for different kinds misconduct in this regard, was entailed and spoken about only in the second part of the 20<sup>th</sup> century after the *Torrey Canyon* disaster which occurred in 1967. It was evident that the adequate law was lacking.

The doctrine of state responsibility is hybrid in its scope: it combines both public and private law aspects. The essence of the doctrine makes it possible for a state to be publically responsible for the private entities' conduct by virtue of those entities being under the jurisdiction of the state which mean that the state in a sense represents the conduct of the respective entities. As a result of it, states act as private entities in the corresponding interstate litigations. Moreover, in the context of various types of consequences for the international obligations breaches, like remedies and sanctions, the hybrid scope of the doctrine of state responsibility is still notable. The remedies and sanctions are those tools that make the doctrine factually applicable through them.

Furthermore, the matter of the contemporary status of the doctrine of state responsibility for marine environmental harm was examined. Due to the DASR, the ground of entailing such responsibility is an IWA which consists both of actions or omissions of attributable under international law conduct to a state and breach of the international obligation of the state. The DASR give quite a good notion of the matter and provide the most important issue necessary to be addressed to in the context of consideration of the subject; the DASR help to understand the essence of the doctrine. Nevertheless, the DASR still remain to be only drafts and no attempts have been lately made to take them to the higher level. Consequently, whatever provisions the DASR contain, they still do not have any effect and thus are not legally valid.

In addition, there are some problematic issues stopping the further development of the doctrine. One of them is confusing terminology in terms of "responsibility" and "liability" which is differently understood in different legal systems and linguistic societies. Moreover, the correlation between such implications as "interstate" and "international", "marine

pollution damage” and “marine environmental harm”, “sovereign independence” and “international obligations”, global character of the matter and domestic concerns relating to it, as well as international and domestic law in the question of marine protection and the corresponding state responsibility have been studied and interpreted. Thereby, in spite of the fact that the doctrine of state responsibility for marine environmental harm is ready to be established and applied in international law, there are a lot of arguable issues stopping its further development. Most probably, such problematic matters exist due to the absence of the united international source dealing particularly with the doctrine of state responsibility, in other words, the lack of the proper legal international regulation of the subject.

At present the doctrine of state responsibility for marine pollution damage is presented mostly in UNCLOS which provides a number of regulations in this field. Nonetheless, the worldwide character of the issue itself requires a separate piece of international legislation dealing particularly with the doctrine of state responsibility and including the provision in regard to how the doctrine shall apply to marine pollution.

Looking at some of the domestic legislation, namely those of Russia, England and Sweden, representing Roman law, common law and Scandinavian law legal systems correspondingly, pointed to evidence of the fact that the domestic rules mostly concern protective measures and regulation with regard to the nature in general and marine environment in particular. None of the legislation of the above mentioned countries provide for the regulation of the doctrine of state responsibility for either environmental harm or marine pollution. This fact is also evidence of the international nature of the matter which in this author’s opinion is of interstate and international concern.

When examining the doctrine of state responsibility for marine pollution damage it is impossible to omit the question of the most appropriate type of liability suitable for the issue. Apparently, in such a global matter the way of determining and establishing liability must be accurate and exact. The half-way house liability implication having been studied is a transitional notion between the liability based on *mens rea* and the one based on *actus reus*: this type of liability is strict in its nature but at the same time requires due diligence defense on a balance of probabilities. Thus, the half-way house liability implication appears to be an efficient tool in dealing with the doctrine of state responsibility for marine pollution damage.

Moreover, the applicability of the doctrine to ships on the grounds of the notion of vessels being extensions the flag state is explored. The application of the doctrine in this case is based on an argument that any vessel on the grounds of having the nationality of the state which flag it flies is a part of the territory of that state; and anything occurred on board of such a vessel is treated like occurred in the territory of the respective state. Thus, any ship that has been a source of marine pollution or which somehow else has violated international law is an entity through which state responsibility would be imposed with regard to the state whose flag the violator vessel flies.

Nevertheless, in spite of the various arguments and statements regarding the appropriate way of applying the doctrine of state responsibility to marine pollution damage, the adequacy of such applicability of the doctrine still remains only theoretical on account of a number of unregulated issues and the absence of an international instrument on the subject. Thus, in the light of the existing drawbacks the question of the utility of the problems also remains quite difficult and exacting. One of the solutions being able to attempt to solve the existing problems in this regard would be applying private law conventions to the doctrine of state responsibility. It has been shown in this thesis that at present there are more private law than public law conventions operating in the corresponding domains. Various provisions of the private law conventions could be applicable to the doctrine. In any situation concerning private aspects where there is a governmental interest in the essence of the claim or where the property owner is a state itself, the doctrine of state responsibility for marine pollution could be applicable through the private law conventions that have corresponding provisions on the matter. It would both help to fill the existing gaps in international public legal regulation of the doctrine of state responsibility and serve as a tool suitable to a hybrid nature of the doctrine consisting of both of public and private law aspects. Thus, the regulations and measures contained in private law conventions could be quite useful in these cases.

In this thesis a study has been carried out on the major judicial decisions concerning state responsibility in general and state responsibility for marine pollution in particular. It is important to note that there are only few cases that are worth examining in the context of fault. This indicates that the doctrine of state responsibility was not often applied. In addition, with respect to the cases decided on the subject it is worth emphasizing that only in very few of them the question of state responsibility was raised although all the necessary conditions for its application were present. The reason may be insufficiency of development of the doctrine of state responsibility at the times when these decisions were made. However, in spite of the recent growing interest in the doctrine by scholars and the international community as a whole, the doctrine still seems to be at the same level as it was several decades ago. In other words, it has not developed at all, especially in practical terms. What is obvious is that those few judicial decisions regarding the question of state responsibility for marine environmental harm that the authors refer to when discussing the subject are still only those old ones. There has been nothing new and no progress has been made in this field.

In this regard, coming back to the initial questions of the answers would seem to be as follows:

One of the questions posed was concerning the sufficiency of the existing law on state responsibility for the proper application of the doctrine. Consequently, the current legal status of the doctrine is quite insufficient which makes the doctrine practically inapplicable. Another question raised was regarding the extent of usefulness of private law conventions in the application of the doctrine. Needless to say, the private law conventions' usefulness in this context is apparent and probably is the

best choice to make the adequacy of the doctrine move to a higher level of development.

Consequently, answering the third and last question, regarding the possible ways of improvement and perfection of the doctrine against the background of the present level of its development, the following should be noted. In the condition of non-development of the doctrine, one of the best ways to make it work would be, as it has been mentioned above, to apply the provisions of private law conventions. Moreover, as it is clearly seen, the problems stopping the further elaboration and perfection of the doctrine come from the lack of international effective legislation devoted specifically to the issue of the doctrine of state responsibility for breach of international obligations in general and for environmental harm and marine pollution in particular. The DASR have had a long way of their elaboration and are still at a draft stage which needs to be put in force as soon as possible in order not to let the concept of state responsibility become extinct in its legal practical terms.

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