

Chapter 2

The Concept of the Flag State

Abstract The starting point for this study of flag State jurisdiction and control is to trace the historic development of its component parts: the flag as a symbol of nationality, development of the nation State, and how these two concepts came together to form the flag State that assumed responsibility for jurisdiction over ships flying its flag. The important role that the flag plays as a potent symbol of pride in nationhood is examined from its very earliest records, through its evolution as a visible sign of the protection of a sovereign for ships, to its codification in modern national law as a symbol of the flag State. The development of the nation State is recalled from prior to Westphalia to the present day, along with concurrent formation of the concept of the freedom of the high seas. The concept and evolution of the flag State are discussed along with the status of the flag State in international law. Essential differences between nation States and flag States are identified along with associated matters of exercise of sovereignty and ability to ratify international instruments. Historical issues associated with the ability of landlocked States to register ships are discussed, along with resolution of these issues post the First World War.

2.1 The Flag as a Symbol of Nationality

Symbols are sacred things, and one of the chief that every man holds dear is the national flag. Deep down in our nature is the strong emotion that swells the heart and brings the tear and makes us follow the flag and die around it rather than let it fall into the hands of an enemy. This is no new emotion, no growth of a few generations, but an inheritance from ages before history began. (Gordon, 1915)

From the vexilloid of ancient Greece, to the ensign flying today from the stern of a Greek ship, including countless pennants, flags, standards, burgees and banners over the intervening millennia, the flag has played a central role in the identity of people, tribes, armies, cities, states and, particularly, ships. Its symbolism has entered our everyday vocabulary, almost entirely from the long-standing traditions formed aboard those ships. We “nail our colours to the masthead” to symbolise

determination not to surrender, “sail under false colours” to give a false impression, “reveal our true colours”, “come in with flying colours” (success), “strike the flag” to surrender, “show the flag”, and “fly the flag at half mast” for mourning. The flag is as ancient as that of known civilisation. John Potter’s *Antiquities of Greece*¹ makes reference to the *Akrostolia* in the prow of a ship and the *Aphgasta* in the stern where “ribbons of various colours were hung and served, in place of a flag, to distinguish the ship” (Campbell 1980, p. 9). The same publication refers to the *Parasemon*, the name given to the flag that distinguished ships, and the *Tutela*, a flag that always represented one of the Gods, to safeguard and protect the ship.

The Vikings were the first Europeans to display flags at sea; symbols that translated onto coins in Northumbria in the tenth century. Merchant ships trading on the Baltic and North Seas carried a metal gridcross at the masthead; a symbol of the king’s protection (Znamierowski 2004, pp. 12, 13). It was not, however, until the Middle Ages that the flag slowly came to represent the port, country of origin, or nationality² of a ship (Znamierowski 2004, p. 88)

At sea, flags became a necessity from the first time a ship ventured out of its home waters. Wherever men have sailed on the oceans their flags have indicated their nationality and allegiance and the ship without a flag has justly been recognised in international law as a pirate (Znamierowski 2004, p. 88 (citing Smith 1970))

Models and paintings of northern European ships of the twelfth century clearly show flags flying from the prow, stern and mastheads; usually of a heraldic design (Phillips-Birt 1971, pp. 94–116) representing the coat of arms of the port of origin, as in Cinque, Hanseatic and Mediterranean ports,³ or of the owner or patron. These symbols were often very similar but, as ships of the time did not travel great distances, there was no scope for confusion. The ships of the great explorers of the fifteenth century – Magellan, Diaz, Da Gama and Columbus – were festooned with flags, usually with religious associations, as were those of the Spanish Armada. Paintings of British warships of this time, show the cross of St George flying from the mastheads; an early symbol of nationality. This symbolism and evidence of nationality was inextricably linked with the development of registration of ships, as the name and port of registry, along with the ensign (national flag), were the most visible evidence of nationality. The history of the British ensign is of significance in this context; particularly as the legislation that came to underpin it (Merchant Shipping Act 1894, sections 73 and 74) served as a model for most traditional maritime nations well into the twentieth century.

In 1625 the Royal Navy adopted a red ensign to denote one of their squadrons and there are records that blue and white ensigns were also in use in 1633. The use

¹Published in Edinburgh in 1813.

²“The first national flags used by ships seem to have been the English cross of St George and the Danish *dannebrog* in northern Europe; the Genoese cross of St George and the Venetian lion of St Mark in the Mediterranean region”.

³For example Hamburg, Riga, Lubeck, Stralsund, Elbing, Danzig, Bremen, Rostok, Konisberg, Wismar, Genoa, Pisa.

of these three ensigns to denote the van, centre and rear divisions, with their associated admirals,⁴ remained in force until 1864. Over a period from 1602 to 1634 the Union Flag⁵ was flown aboard British merchant ships until a Proclamation of 5th May 1634 ordained that it be reserved for naval ships. English ships were to fly the St George's cross and Scottish ships that of St Andrew (Perrin 1922, pp. 55, 129). A further Proclamation of 1674 ordained that the red ensign with a St George's cross in the canton (upper left hand corner) should be recognised as the special flag of British merchant ships, but wearing of this flag was not mandatory and it continued to be used by naval ships (Perrin 1922, pp. 68–69, 130). The increasing usage of flags caused "Their Majesties", by Proclamation on 12th July 1694, to fire a broadside at all those ships which were flying colours "...which according to Ancient Usage have been appointed as a distinction for Their Majesties' ships..." (Perrin 1922, p. 97) In 1707 the St Andrew's cross was added in the canton and all merchant ships were ordered to wear the red ensign and, in 1801, upon union with Ireland, the present red ensign came into being when the St Patrick's cross was added to the Union flag (Perrin 1922, pp. 71–72, 132).

The British ensigns of today came about by an Order in Council of 9th July 1864 (Admiralty Orders 1904, pp. 46–7) which decreed that the white ensign was restricted to naval ships, the blue ensign to ships in Government or public service and ships in the naval reserve, and the senior naval flag, the red ensign, to merchant ships (Admiralty Orders 1904, pp. 119, 136). The historic Merchant Shipping Act 1894, declared that, for all merchant ships belonging to a British subject, the proper national colours were the red ensign (Merchant Shipping Act 1894, section 73), a requirement that has been carried forward in subsequent national legislation to the present day. In most States, national law exists to both declare which flags are allowed to be used to represent the nation and its ships, and to protect the national flag from abuse.⁶

The flag has come to be an officially sanctioned and very powerful symbol of the State and is the visible evidence of the nationality conferred by the State upon ships registered under its national law.

2.2 Development of the Nation State

[I]f every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve (McCorquodale 2005, p. 184)⁷

⁴"Lord Nelson was a Vice Admiral of the White and therefore carried the white ensign at the peak. Before the Battle of Trafalgar he ordered that all his ships bear the white ensign in the presence of the enemy to prevent confusion which different colours might have caused in action". (Perrin 1922, pp. 116, 117)

⁵St George's and St Andrew's crosses joined together and flown in the maintop.

⁶See for example in New Zealand, the Ship Registration Act 1992 and the Flags, Emblems and Names Protection Act 1981.

⁷"Boutros-Ghali's comment, made when he was Secretary-General of the United Nations, indicates some of the reasons why the creation and recognition of states has been so critical to the international community".

At the same time that the flag was being recognised and legitimised as a very visible symbol of nationality in the early seventeenth century, the concept of the nation State that it would come to represent was emerging from the chaos and carnage of the 30 Years' War⁸ (1618–1648). Europe had, until the sixteenth century, been a patchwork of kingdoms, principalities, duchies and other feudal identities governed under the moral authority of Holy Roman Law and the military power of the Roman Emperor. These precepts were challenged by Luther in the sixteenth century who, when refused the papal reforms he desired, sought support from certain Lutheran German princes to “assert their power of the State in executing those reforms” (Wasnik 1995). An agreement was concluded in 1555 between the Holy Roman Emperor and these Lutheran Princes: the Peace of Augsburg. The conflicts, however, simmered on with the Hapsburg world empire collapsing in 1557, and profound religious antagonism building during the reign of Holy Roman Emperor Rudolf III (1576–1612) between Roman Catholic and Protestant Germans.

With the creation in 1608 of the Protestant Evangelical Union and its counterpart, the Catholic League, in 1609, the situation deteriorated steadily to the inevitable conflict that was to decimate the population of Germany and involve most of Europe and Scandinavia. The end of this conflict was marked by 4 years of negotiations during which European powers desperately sought to agree upon a framework that would recognise their right to function as independent and sovereign entities having undisputed political control, with the right to uphold freedom of religion, and to reach agreement between neighbouring States on territorial boundaries. The resultant Treaty of Westphalia and its system of nation States “is still recognised by jurists, 350 years later, as the cornerstone of modern international law” (Thomas 2000, p. 11). Not all European powers immediately abandoned “the edifice of Latin Christendom” (Thomas 2000, p. 30) and assumed the notion of Statehood coming out of Westphalia.

The transition of the Christian Commonwealth to an international system of secular, independent sovereign States was not achieved overnight. Nationalistic and economic imperialism often prevented the Westphalian settlement from being maintained. ... The balance of power doctrine had to be constantly restated at Utrecht in 1713, Aix-la-Chapelle in 1748, Hubertsburg in 1763 and Vienna in 1815, after the Napoleonic Wars. ... From the Congress of Vienna in 1815 until 1900 European State relations were relatively stable (Thomas 2000, pp. 31, 32).

From 1648 to the present day the international system of law and relations between States enabled by Westphalia has played a vital role in the maintenance of good order between States, not least in their ability to engage in trade, and to ultimately agree upon safety standards for ships engaged in that trade. Burgeoning international trade and shipping in the sixteenth and seventeenth centuries reinforced the need for international law and establishment of the nation State to govern relationships.

⁸“Modern international law began to develop at the same time as the modern system of states, in the sixteenth and seventeenth centuries” (Akehurst 1988, p. 12).

The era of Portuguese exploration and trade during the sixteenth century following Vasco Da Gama's successful rounding of the Cape of Good Hope in 1498, and the subsequent establishment of trade with the East Indies, was the catalyst for vast extensions of the trading routes of Portuguese, Spanish, Dutch and English ships beyond European waters.

Following this contact with far distant States came a "need for some sort of international law to govern relations ... but medieval Europe was not very suitable for the development of international law, because it was not divided into States in the modern sense" (Akehurst 1988, p. 12). After Westphalia it was possible for nation States to develop international law and for both European and non-European States to recognise each other's sovereignty and to form legal relationships. Shortly before the 30 Years' War the father of international law, Hugo Grotius, published his seminal *Freedom of the Seas*, (a document that emanated from the trading imperatives and self-interests of his employer, the Dutch East India Company, as evidenced by the subtitle⁹), expanding the regional outlook of most European States to consider the concept of freedom of the high seas as the common heritage of all mankind. This doctrine was somewhat at odds with that of the Treaty of Tordesillas, signed in 1494, when Pope Alexander VI had approved the division of the entire world into Spanish and Portuguese territories, and prohibited all other nations from sending out expeditions anywhere in the world; a persuasive argument for secular rather than spiritual law¹⁰.

During the centuries succeeding Westphalia the nation State concept steadily took hold with England becoming a parliamentary constitutional monarchy during the seventeenth century, America voluntarily subjugating the aspirations of individual states to form a nation State, and the French Revolution putting paid to the *Ancient Regime*. By the mid-nineteenth century when increasing international trade and pressures on vessel safety, arising from the transition of sail to steam, required international agreement, the regime of nation States provided a vehicle for amicable resolution of issues and setting of standards. This process was finally given a formal framework with adoption of the Convention on the Inter-governmental Maritime Consultative Organization (IMCO) at Geneva in 1948.

More than 300 years after Westphalia the customary right of States to negotiate treaties was codified through the Vienna Convention on the Law of Treaties¹¹ which recognises "the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems"; a fitting legacy to Westphalia.

⁹"... or, the right which belongs to the Dutch to take part in the East Indian trade"

¹⁰"In Chap. V of his *Mare Liberum* Grotius re-iterated that donation of the East Indies to the Portugese by Pope Alexander was nothing more than 'empty ostentation – since neither sea nor the right of navigating can be the property of any man'" (Anand 1983, pp. 87, 88).

¹¹Vienna Convention on the Law of Treaties. Geneva, 22 May 1969. <http://www.un.org/law/ilc/texts/treaties.htm>

2.3 The Concept of the Flag State

A State may assume a number of roles in a maritime context dependent upon its location, function, sovereignty, boundaries, and relationship with vessels of another State. Some of these maritime associations are reflected in the LOSC such as coastal, flag, port and landlocked States.¹² One commentator (Molenaar 1998, pp. 30–32) uses the term “maritime State” to distinguish, in terms of its focus and influence, a State which has a large merchant fleet under its flag; which fact gives it more influence in maritime matters than it would have as a nation under other aspects of Statehood.¹³ Examples of maritime States could be so-called “open registry” States¹⁴ or nations with large distant water fishing fleets. The primary aspect of Statehood relevant to this discussion is that of the flag State and the inextricable link, dating from the thirteenth century, between ship registration, the flag, and nationality. “The flag, together with the marking of the port of registry, are the most obvious manifestation of a ship’s nationality, and strict requirements and procedures govern the use of national colours” (Campbell 1980, p. 28).

It is not necessary here to trace the historical development of ship registration¹⁵, suffice to say that customary English law on ship registration, the model for most maritime administrations, was consolidated in 1823 under An Act for the Registering of British Vessels (Campbell 1980, p. 12) and has since been further incorporated into the primary maritime Acts of Britain and most States. However, the resultant flag State of a ship differs from other models of statehood and it is instructive to explore these differences and associated issues, particularly in the twentieth century. Before doing so it is useful to define “State” and “flag State”.

Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, defines the generally accepted four elements of a State in international law as follows:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

However, traditional concepts of Statehood do not always apply to international shipping and international maritime law. There are a number of definitions of “flag State”: “the State which has granted to a ship the right to sail under its flag” (Churchill and Lowe 1999, p. 208); “the State whose nationality the ship possesses” (Akehurst 1988, p. 182); “a State whose flag a ship flies and is entitled to fly”

¹²Others, such as developing and developed States are pertinent to economic and environmental matters, which are not the focus of this study, but which are of relevance regarding the degree of their influence in international maritime fora, such as the IMO, ILO, and the Food and Agriculture Organization (FAO).

¹³This State could well also have roles as a coastal and port State.

¹⁴For example, Panama, the largest flag State with more than 20% of world tonnage, exercises minimal port State control and, due to its small coastline, has few coastal State responsibilities.

¹⁵See Chap. 3 for a detailed examination of the registration of ships.

(Convention on Conditions for the Registration of Ships 1986, Article 2); “the State in whose territory a ship is registered” (LOSC Article 91(1)). The flag State’s customary role in relation to jurisdiction and control of ships was first codified in 1958 through the HSC and reiterated with minor change in the LOSC.¹⁶ The concept of the State, and the link between the flag and the State, is at the heart of the work of the IMO (as IMCO became in 1982) and international regulation of shipping that reflects the intent of the LOSC. Individual Member States of the IMO have equal voting power regardless of the size of their fleet and have the right to grant nationality to ships flying their flag upon the high seas and to exercise jurisdiction and control over them as flag States.

The necessary elements of a flag State in international law are for a State to have granted ships its nationality through the registration process (LOSC Article 91) and to effectively exercise its jurisdiction and control over those ships in administrative, technical, and social matters, apart from where treaty provisions deem otherwise (LOSC Article 94). The exercise of prescriptive and enforcement jurisdiction by a flag State is more proscribed than that of a State. Whereas a State is generally recognised as having the ability to assert its criminal jurisdiction, and prescribe and enforce its laws through at least five principles – national, territorial, protective, universal, and passive personality (Blay et al 2005, pp. 157–168) – a flag State’s jurisdiction is limited to two of those principles: nationality and territoriality.

A flag State clearly cannot exercise criminal jurisdiction through the “passive personality principle”, according to which, “aliens may be punished for acts committed abroad harmful to nationals of the forum” (Brownlie 1988, p. 306), nor the “protective security principle”, according to which, “nearly all States assume jurisdiction over aliens for acts done abroad which affect the security of the state” (Blay et al 2005, p. 307). There is an association with the powers of a flag State under the LOSC regarding the “universality principle” (LOSC Articles 99–108). A State must ensure that ships flying its flag do not commit universally deplored crimes such as piracy and slavery. Under Article 110 of the LOSC, a warship of a State has the right to board ships engaged in these activities, but the State (government) has the primary duty and responsibility, not the flag State maritime administration.

2.4 Flag States and Sovereignty

There are essential differences in international law between nation States and flag States although both claim sovereignty over their “subjects”. Some flag States clearly do not meet the accepted definition of a State with regard to population, defined territory, government, and the capacity to enter into relations with other

¹⁶See Articles 90, Right of navigation, 91 Nationality of ships, 92 Status of ships, 94 Duties of the flag State. Articles 90, 91 and 92 of the LOSC are identical to Articles 4, 5 and 6 of the HSC. Article 94 of the LOSC considerably expands and clarifies the Duties of the Flag State over and above Article 10 of the HSC.

States (Montevideo Convention 1933). This could be due to the legal character of a flag State due to its dependent status with another State, and its legal relationship with that parent State; for example, Dependent Territory Registers.¹⁷ The Red Ensign Group¹⁸ of British crown colonies and dependent territories clearly falls within this category. Dependent territories are not nation States and do not have the ability to enter into treaties with other States. They are not States in international law and are not eligible for membership of the UN, IMO or ILO,¹⁹ yet they have assumed the ability to establish registers and become flag States.

Second Registers, established by many traditional maritime nations within the territory of the parent State, in order to offer tax and crewing advantages to entice ships to remain upon their register,²⁰ are inextricably linked with the maritime administration and law of the parent State and are, effectively, a State within a State²¹.

Every State has the ability, under the LOSC (LOSC Article 91), to grant its nationality to ships which then assume the nationality of the State whose flag they are entitled to fly. Yet a country that does not have the capacity to enter into relations with other States, for example Taiwan, is not recognised by the international community as being a State. However, Taiwan still has the ability to become a flag State and exercise sovereignty over the ships to which it has granted its nationality.

Paradoxically, many countries that meet all the requirements of the Montevideo Convention to be considered as States choose to effectively sell their sovereignty as flag States to private organisations for commercial gain, and take no active part in the exercise of their jurisdiction and control over ships flying their flag.²²

Distinctions between the nation State and the flag State in international law are not, in practice, of any great moment. Flag States have the ability to ratify maritime instruments even though they are not members of the UN, IMO or ILO²³. Although

¹⁷An example would be the Kerguelen Islands which is a territory of France (The French Southern Antarctic Territory) but is a flag State that is administered in France. All of the flag States that shall be defined in this study as Dependent Territory Registers (Quasi-National flag States; see Chap. 7) fall into this category.

¹⁸Anguilla, Bermuda, British Antarctic territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Isle of Man, Montserrat, Pitcairn Islands, St Helena and Dependencies, Sovereign base areas of Akrotiri and Dhekelia, and the Turks and Caicos Islands.

¹⁹See: List of UN Member States: <http://www.un.org/Overview/unmember.html>; Alphabetical List of ILO member countries: <http://www.ilo.org/public/english/standards/relm/country.htm>; IMO Member States with year of joining: http://www.imo.org/About/mainframe.asp?topic_id=315&doc_id=840.

²⁰See discussion in Chap. 7.

²¹Further examples of Second Registers are given in Chap. 7.

²²This derogation of flag State responsibility is at the heart of the issues of flag State control analysed in this study.

²³The Cook Islands, for example, is not a member of the UN, and was not a Member State of the IMO until August 2008, but has ratified a number of maritime Conventions.

a flag State has almost exclusive jurisdiction over ships flying its flag this sovereignty is very narrowly defined and exercised; is limited to the ship upon the high seas²⁴; and is sometimes concurrent with that of a coastal or port State (LOSC Article 19 and 27).

One particular type of the State that was historically disadvantaged with regard to registration of ships were those States that do not have a border upon the coast: landlocked States.

2.5 Landlocked States as Flag States

In the early days of the twentieth century issues arose regarding the ability of landlocked States to have access to the sea and to register ships in their territory. Until that time flag States had largely comprised traditional maritime nations operating under their national law. There were no international standards for the operation and safety of ships and no international organisation in place with a mandate for drafting such law. The legal right to grant nationality under national law was, by definition and custom, exclusively that of coastal States on the presumption of customary flag State practice that a ship must be physically capable of departing from and returning to its flag State in order for that State to effectively exercise its administrative functions over the ship (Churchill and Lowe 1999, p. 434). Landlocked States were therefore not recognised as having the opportunity to register and grant nationality to ships in their territory.

The issue came to a head shortly after the First World War when the triumphant powers were deciding the future of Germany and its allies through the Versailles Peace Treaty. It was made clear in Article 321 of this treaty that Germany must *inter alia* provide “freedom of transit through her territories” for vessels and goods from landlocked States and that “no charge, facility or restriction shall depend directly or indirectly on the ownership or on the nationality of the ship”. The right of transit through the waters of adjacent States to the sea was codified through the Convention and Statute on the Regime of Navigable Waterways of International Concern²⁵ that was opened for signature in Barcelona on 20 April 1921. The door had thus been opened for landlocked States to enjoy the same benefits as coastal States, to have free and unimpeded access to the high seas, and, in particular, to register ships in their territory. A Declaration Recognising the Right to a Flag of States having no Sea-coast was attached to an Additional protocol to the Versailles Treaty as follows:

The undersigned, duly authorised for the purpose, declare that the States which they represent recognise the flag flown by the vessels of any State having no sea-coast which are registered

²⁴LOSC, Article 92: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas...”

²⁵http://www.legislation.gov.hk/doc/multi_904v1.pdf.

at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels.²⁶

It therefore became possible for the nationals of landlocked States, to register their ships at a “notional” port within their territory and to obtain the same rights and protections available to their ships under international law as applied to ships flying the flags of coastal States²⁷. This ability was codified in due course through both the HSC²⁸ and the LOSC²⁹.

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²⁶http://www.legislation.gov.hk/doc/multi_905.pdf

²⁷ The vexed question of freedom of transit by a landlocked State through an adjoining State to the sea has not been as clearly and satisfactorily dealt with under international law. See Churchill and Lowe, Chap. 18, ‘Landlocked and geographically disadvantaged States’, for a useful summary of the issues surrounding landlocked States.

²⁸HSC, Article 3 (1)(b): To ships flying the flag of that (land-locked) State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

²⁹LOSC, Part X, Right of Access of Landlocked States to and from the Sea and freedom of Transit, Article 131, *Equal treatment in maritime ports*: Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

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