The Notion of Sovereignty in Relation to Flag States Regulating Flags of Convenience

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Abstract

The primary responsibility for ships rests with the vessel's flag state. Thus, every merchant ship needs to be registered under the flag of a particular state under whose regulatory control it consequently falls. The flag state is, for instance, responsible for the inspection of the vessel and its seaworthiness, ensures safety and pollution prevention, and certifies the crew. As rights and obligations under international law are mainly imposed on to vessels via the flag states, they are a crucial factor in determining the enforceability of international standards.

The problem is: there is no international rule prescribing how a ship gets its nationality. There is no rule stating that - for example - the nationality of the ship must be the same as that of the owner. The latter can freely choose the most convenient flag for his vessel(s), avoiding stringent safety, environmental and labour conditions imposed by established maritime countries. This practice of 'flags of convenience' often involves states that offer 'benefits' such as lower taxes or wages, lower environmental standards or the right for shipowners not to reveal their identity when a vessel is in trouble have become popular flag states.

What is more, owners do not have to stick to a once-chosen flag, they can change it anytime they want. This flag-hopping allows them for example to bring a ship at the end of its economic life under a flag of a state that is not too stringent with the environmental and human rights situation of notorious ship-breaking yards in Southeast Asia.

Attempts to stop the practice of flags of convenience is often met with the 'sovereignty argument' where States claim it is their sovereign right to allow ships to register with them. But why would they be so keen on registering ships? Because it is good business. Countries such as Liberia or Panama have built a lucrative ship registration industry (often, ironically, not run from the country itself but from offices in London or New York). Isn't it anno 2021 time

to have as closer look at this practice, which allows for numerous breaches of environmental and human rights law?

Is the use of flags of convenience stronger than ever or is it slowly but surely eroded of most of its advantages? The legal framework in which flags of convenience operate will be discussed, followed by a brief overview of the grievances that exist against flags of convenience. Then possible remedies, ranging from abolishing open registries to a more targeted approach will be dealt with, and finally a conclusion will be drawn as to what the current state of affairs is.

Key words: Flags of convenience, Human rights, maritime law, Seafarers labour law, Ship breaking, Sovereignty.

Introduction

The practice of flags of convenience allows ships to sail under the flag of a state that has nothing to do with its owner, cargo, crew or route. Tiny tax haven jurisdictions such as The Marshall Islands have become major players in the ship-registration business, with thousands of ships sailing under its flag in 2021[(1)]. Probably none of those ships has ever visited The Marshall Islands and none of the crew members hails from the Marshall Islands. The same goes for the owner.

Then why does he register in The Marshall Islands? Because it gives him benefits such as lower taxes or wages, lower environmental standards to comply with or the right not to reveal his identity when the vessel is in trouble. And what is more, he does do not have to stick to a once chosen flag but can change it anytime he wants. This flag-(s)hopping is often used at the end of the economic life of a vessel, when it is brought under a flag of a state that is not very concerned with basic environmental and human right standards for ship-breaking, enabling the owner to beach his ships at one of the notorious ship-breaking yards in South East Asia[(2)].

And just as it can be profitable to 'sell' nationality to natural persons, so can it be for ships. The majority of the world's merchant ships now sails under the flag of countries such as the Marshall Islands, Liberia, the Bahamas and Panama. These 'open registration' countries offer ship-registration as a source of income in the form of registration fees and annual tonnage-dues and have no desire to impose their sovereignty on the vessels.

Rather, they deliberately offer their sovereignty so that the shipowners can escape fiscal, social and environmental regimes of their national flags. These countries allow ship owners to register their vessels in their jurisdiction, without ever setting foot in it[(3)]. Some call this situation anarchy or freeriding[(4)].

However, contrary to anarchy or freeriding, the practice is legally enshrined. Open registry, which is at the basis of flags of convenience, is firmly anchored

(1) Cf. the numbers of the registration office of the Marshall Islands: www.register-iri.com.

(2) These yards are notorious for deplorable environmental and workers' health and safety conditions, as described at length and in great detail by Shipbreaking Platform, a non-governmental organization dealing solely with the issue of shipbreaking: cf. www.shipbreakingplatform.org.

(3) The top ten flag states of 2020: Panama, Liberia, Marshall Islands, Hong Kong, Singapore, Malta, Bahamas, China, Greece and Japan.https://lloydslist.maritimeintelligence.informa.com/LL1134965/Top-10-flag-states-2020

(4) W. Langewiesche, Anarchy at Sea, The Atlantic Sept. 2003; E. deSombre, Tune Fishing and CPR's, in: Barkin/Shambaugh (ed.), Anarchy and the Environment, SUNY Press 1999, p. 57.

in international law. It follows from the principle of sovereignty that states have the right to grant nationality to ships under whichever conditions they want.

This freedom has - roughly speaking - resulted in 'strict states' allowing only vessels that are owned by companies or persons that are resident of that country, and 'easy states' with open registries, welcoming all(5). The latter are known as flags of convenience.

There are many concerns related to the use of these flags, ranging from environmental and security issues to violations of seafarers' basic human rights(6). These concerns are not new. Ever since the practice of flags of convenience took a serious flight – in the 1970's – criticism has been growing. However, the practice has withstood time and today almost seventy five percent of the world's merchant fleet is sailing under a flag of convenience(7).

To the general public this goes largely unnoticed, although the Covid-19 pandemic did bring the problem temporarily to the surface. During the early stages of the crisis hundreds of ships and at one point over four hundred thousand seafarers were adrift. They were stuck on their vessels for months because flag states would not take their responsibilities - and port states or states of the owner were reluctant to step in(8). Ships and crew became "like some 21st century *Flying Dutchman"* with crews stranded at sea having no way home(9). Currently seafarers face similar problems with vaccinations. Once again, flag states do not take their responsibilities.

But, as bleak as the situation may sound, over the past couple of decades things *have* changed and are still changing for the better. The International Maritime Labour Convention saw the light, target agreements such as the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships came into being and occasionally a state assumes criminal jurisdiction against the abuse of flags of convenience.

(5) Examples of closed registries: UK, USA, India, Kuwait (cf. Chapter 1 of the Kuwait Law of Maritime Commerce 1980). Examples of open registries: Liberia, Panama, Malta, Lebanon.

(6) Cf. C.F. LlinasNegret, Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas, Journal of Maritime Law & Commerce, Vol. 47, no. 1, January 2016, pp. 1-28.; D.F. Matlin, Re-evaluating the Status of Flags of Convenience Under International Law, Vanderbilt Journal of Transnational Law, Vol. 23, [1991], pp. 1017-1055; R.J. Payne, Flags of Convenience and Oil Pollution: A Threat to National Security?, Houston Journal of International Law, Vol. 3:67 [1981], pp. 67-99.

(7) For the latest numbers see: https://stats.unctad.org/handbook/MaritimeTransport/MerchantFleet.html

(8) For a report regarding the situation cf: https://www.imo.org/en/MediaCentre/PressBriefings/Pages/32-crew-change-UNGA.aspx.

(9) D. Millar, Flags of convenience and the coronavirus cruise ship debacle, The Strategist 17 April 2020.

This paper explores where we stand in 2021 with the practice of flags of convenience. Is it stronger than ever or is it slowly but surely becoming an instrument eroded of most of its advantages? The legal framework in which flags of convenience operate will be discussed, followed by a brief overview of the grievances that exist against flags of convenience. Then possible remedies, ranging from abolishing open registries to a more targeted approach, will be dealt with, and finally a conclusion will be drawn as to what the current state of affairs is.

Legal framework of flags of convenience

Despite the fact that flags of convenience have an illegal ring to them, the practice is actually well-grounded in international law. This paragraph sets out how its legal framework has developed into what it now is.

Freedom of navigation is one of the leading principles of international law. There is no one sovereign that rules over of the high seas. However, those great commercial highways of the ocean may be open for all, each vessel must still be subject to some regulatory scheme and legal system. It is universally accepted and internationally agreed that this is achieved by registration. Ships must be registered and – for lack of a better solution - the country of registration (known as 'flag state') is the one that exercises exclusive high seas jurisdiction over its ships(10).

As rights and obligations under international law are mainly imposed on to vessels not directly but via the flag states, they are a crucial factor in safeguarding the enforceability of international standards. The flag state is, for instance, responsible for the inspection of the vessel and its seaworthiness. It ensures safety and pollution prevention and certifies the crew and safeguards its health and safety.

But where does one register a ship? Historically merchant ships were registered in and sailed the flag of their home country, home country being the country where the owner resides. US-company-owned vessels were registered in the US, French-company-owned vessels in France, and so on. The authorities of the flag-states had direct control over vessel operation, safety and crewing. The shipowners paid taxes to the countries where they were based, and the vessels were crewed with citizens of the country of registry.

(10) Cf.S.S. Lotus, (France v. Turkey) 1927, PCIJ (Ser A), No. 10; Y. Tanaka, The International Law of the Sea, Cambridge University Press 2019, part. 1 Ch. 4.; D. Rothwell, T. Stephens, The International Law of the Sea, Hart Publishing 2013, p. 159.

Occasionally, shipowners deviated from this practice and sailed under foreign flags. Initially this was to gain access to a particular trade, or to seek the protection of the maritime powers at the time. Ships would for example register under the Spanish flag to have access to trade in the West Indies, which was monopolized by Spain(11). The legality of that had never been questioned until the *Muscat Dhows arbitration* of 1905(12).

France had granted its flag to some dhow boats based in Muscat (then a British Protectorate). The British accused France of misusing the right to flag in order to give shelter to slave-trading dhows(13). In a still widely referenced award arbitrators decided thatit belongs to every sovereign state to decide to whom he will accord the right to fly his flag and under which conditions. It was the first case in which flags of convenience were acknowledged and the case is considered as the basis of international law for the practice of open registries.

Modern day use of flags of convenience is no longer about seeking privilege or protection of maritime nations, rather the opposite: it is used to stay away from the, often strict, legal frameworks of traditional maritime countries in order to incur less costs and gain more flexibility. Modern practice of flags of convenience started in the 1920's when American vessels re-flagged to Panamanian and Honduran flags to avoid new social legislation in the US, or to be able to serve passengers alcohol during the Prohibition.

In Europe, vessels followed suit, either to engage in clandestine trade or to avoid war-time maritime requisition by their governments. During WWII the US even actively allowed ships to register under Panamanian flag in order to be able to send weapons to their allies in the UK without violating the national Neutrality Act which prohibited US-flagged vessels from entering war zones.

In 1958 the - so far mostly customary - rules of international law related to the high seas were codified in the Geneva Convention on the High Seas. The convention lays down a set of provisions accepted as generally established principles of international law. One of the premises of these provisions is

(11) Thuong, LE T. "From Flags of Convenience to Captive Ship Registries." Transportation Journal, vol. 27, no. 2, 1987, pp. 22–34.

(12) Muscat Dhow case (France v. Great Britain), Permanent Court of Arbitration 8 August 1905, available at: https://pcacases.com. For a detailed legal-historical perspective of the case cf. R.P. Carlisle, The Muscat Dhows Case in Historical Perspective, The Northern Mariner/Le marin du nord XXIV, No. 1 (January 2014), pp. 23-40.

(13) For a detailed legal-historical perspective of the case cf. R.P.Carlisle, The Muscat Dhows Case in Historical Perspective, The Northern Mariner/Le marin du nord XXIV, No. 1 (January 2014), pp. 23-40.

that any country should have access to the sea and should be able to have jurisdictional control over its own ships. And as was already established in the *Muscat Dhows* arbitration, every state, coastal or not, has the right to sail ships under its flag(14). To that end, the convention explicitly states that:

> *Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

This principle re-appeared in art. 91 of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. It led to roughly two categories of countries: the ones that allow only traditional registry where only vessels which are owned (and sometimes (partly) manned) by local residents or companies can register, and those that have open registries, allowing everyone to sign up. The latter are the ones providing flags of convenience.

In 1970, a widely referenced British committee led by Lord Rochdale identified six features common to flags of convenience: 1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens. 2) Access to the registry is easy. 3)Taxes on the income made by the ships are not levied locally or are low. 4) The country of registry is a small country. 5) Manning of ships by non-nationals is freely permitted. 6) The country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulations, nor has the country the wish or the power to control the shipping companies(15).

These features explain why shipowners find these flags so convenient. Exxon Oil Corporation once (in 1982) revealed that a tanker with a crew of 28 costs USD 560.000 dollars a year to run if registered in the Philippines but 2.5 million dollars if registered in the United States(16). In principle there is nothing

(14) Art. 4 of the Geneva Convention on the High Seas.

(15) Committee of Inquiry into Shipping: London, H.M.S.O. 1970, Cmnd 4337 [Rochdale Report], cf. E. Osieke, Flags of Convenience Vessel: recent Developments, American Journal of International Law 1979, vol. 73, p. 604; E.A. Anderson, The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives, Tulane Maritime Law Journal, vol. 21, no 1, p. 157.

(16) Heneghan, Shipping Guidelines, Reuters North European Service, April 12, 1982, (Reuters Ltd.), cited by L.F.E. Goldie, Environmental Catastrophes and Flags of Convenience – Does the Present Law Pose Special Liability Issues? 3 Pace Y.B. Int'l L. 63, 73 n. 471 (1991).

wrong with running a business cost-effectively, were it not that this practice of "sovereignty for sale"[17] allows for numerous breaches of environmental and human rights. It begs the question whether higher profits for shipowners and cheaper fares for shippers justify the human and environmental cost of the flags of convenience system[18].

Main concerns around flags of convenience

The role of flags of convenience is pivotal to international commercial shipping and as we have just seen, it is sanctioned by international law. It is, however, a controversial and complex topic which raises many concerns. This paragraph points out some of the most poignant problems related to flags of convenience.

Flags of convenience are often fiercely criticized. The International Transport Workers Federation (ITF), for example, claims that flags of convenience allow "rogue ship owners to get away with abusing seafarers' rights without detection". By 'flagging out', ship owners can take advantage of minimal regulation, cheap registration fees, low or no taxes and the freedom to employ cheap labor from the global labor market.

It may lead, ITF states, to "very low wages, poor on-board conditions, inadequate food and clean drinking water and long periods of work without proper rest, leading to stress and fatigue"[19]. The main criticism is that flags of convenience countries have low standards and/or barely any enforcement schemes regarding work and environmental conditions. This, critics, say, endangers people, the environment and possibly even state security, the latter by depriving a 'home state' of maritime surge capacity in wartime.

Environmental disasters

In 1978 the Liberian-flagged and substandard maintained *Amoco Cadiz*broke in two, nine miles of the west coast of France, spilling oil covering 144 square miles of land and ocean. More recently, the explosion of the BP-leased oil rig *Deepwater Horizon* in the Gulf of Mexico in 2010, killed 11 and caused (environmental and other) damages of at least 20 billion USD.

(17) After the book, by R. P. Carlisle: Sovereignty for Sale: the Origins and Evolution of the Panamanian and Liberian Flags of Convenience, Annapolis, Maryland, Naval Institute Press 1981.

(18) "Carlos Felipe LlinásNegret, Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas, Journal of Maritime Law & Commerce, Vol. 47, No. 1, January 2016.

(19) https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience. See also the furious speech of MP Clinton Davis against the attitude of the British government towards flags of convenience: https://api.parliament.uk/historic-hansard/commons/1981/jul/06/flags-of-convenience.

Safety and security of the oil rig was not the responsibility of the United States government, where the disaster occurred, or of Switzerland, where the owner was having its principal place of business, or the UK, where lessee BP was having its place of business, but that of the Marshall Islands-a small, underdeveloped island nation located in the South Pacific Ocean. The Marshall Islands, as the registered flag of *Deepwater Horizon*, was responsible for inspecting it and ensuring that the rig was in compliance with all required safety rules and regulations.

According to various reports, the Marshall Islands failed to do so, or at least failed to do so up to the same stringent requirements as would have applied under US practice(20). The Marshall Islands had outsourced its obligations to inspect ships registered under its flag to an outside contractor, which allegedly allowed Deepwater Horizon to maintain low staffing levels and allowed a drilling expert to override the captain on crucial decisions made on the day of the explosion(21).

Now, it could be argued that these are all rather anecdotal incidents and that for example the *Exxon Valdez* – another notorious oil-catastrophe near Alaska in 1989 – was United States flagged. Less anecdotal and much more structural though, are the environmental disasters caused by the scrapping of end-of-life ships.

Shipbreaking (mal)practice

"We need to stop the shameful practice of European ships being dismantled on beaches," Karmenu Vella, the former commissioner for Environment, Maritime Affairs and Fisheries of the European Commission, said in an interview with Shipbreaking Platform, an NGO that tries to reverse the environmental harm and human rights abuses caused by shipbreaking practices(22). He is referring to the practice of oil tankers, cruise liners and other old ships being rammed onto a beach in South Asia – a practice called beaching(23).

(20) B. Baker, Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions, Houston Journal of International Law 2012 [Vol. 34], pp. 687-716.

(21) Cf. the Report of Investigation into the Circumstances Surrounding the Explosion, Fire, Sinking and Loss of Eleven Crew Members Aboard theMobile Offshore DrillingUnitDeepwater HorizonIn the Gulf of Meico April 20 – 22, 2010 by the United States Coast Guard: https://www.bsee.gov/sites/bsee.gov/files/reports/safety/2-deepwaterhorizon-roi-uscg-volume-i-20110707-redacted-final.pdf or the Deepwater Horizon Oil Spill: Selected Issues for Congress, 30 July 2010, Congressional Research Service 7-5700 www.crs.gov R41262.

(22) https://shipbreakingplatform.org.

(23) Ships usually reach the end of their commercial life after 25-30 years, but market conditions may force owners to scrap even newer ships. India, Pakistan and Bangladesh house 95% of the world's shipbreaking capacity. Not only do their beaches have ideal tidal conditions for ship breaking, but labour is extremely cheap. On top of that, health and safety laws are absent or not enforced.

Hundreds of extremely poor unskilled workers take apart the vessel with simple tools such as blowtorches, often dressed in nothing more than a lungi and flipflops. Workers regularly get injured or die and chemicals leak into the ocean when the tide comes in. Ships sailing under EU-flags are not allowed to bring end-of-life ships to these beaches. But, with re-flagging so easily done, shipowners found a way around this. In a nutshell, this is how they do it:

When a ship reaches the end of its commercial life, the owner sells it to what is known as a cash-buyer. Cash-buyers are companies specialized in the buying and selling of end-of-life vessels. They pay the owner up front, who from thereon has nothing to do with the ship anymore. The cash-buyer reflags the ship and sells it to whichever shipbreaker offers him the most for the vessel.

Such an end-of-life sale usually includes a change of flag to one of the typical 'last voyage flags' and the registration of the vessel under a new name and a new (PO box) company. These days, some of the largest cash-buyers are located in the UAE, strategically located between the West and the breaking yards of South East Asia(24). By using cash-buyers, ship owners avoid legal, financial and other risks related to selling a ship for breaking to a beaching yard. They can claim not to be responsible for the demolition of the ship if criticised for the poor standards under which their vessel is broken(25).

Seafarers working conditions

Labour supply in the maritime world is heavily dependent on lower income countries. The largest labour-supplier with around one fifth of the more than 1.5 million seafarers are the Philippines, followed by China, Russia and Ukraine(26). Numerous recruitment(27) agencies operate as middlemen between seafarers and ship managers.

A contract is made with the ship manager to work aboard a certain ship for a certain amount of time. If the seafarer is lucky, he works for a decent company. If not, he may have to do his job in harrowing conditions. Lack of medical care, nutritious food and rest are common. That, in combination with an unsafe ship often leads to 'fatigue', a condition endangering both the seafarer individually and the ship as a whole.

(24) The largest cash-buyer is GMS, headquartered in Dubai, cf: (https://www.gmsinc.net/gms_new/index.php).

(25) Cf. www.shipbreakingplatform.org.

(26) www.safety4sea.com

(27) R. George, 'Like being in prison with a salary': The Secret World of the Shipping Industry, excerpt from the book Ninety Percent of Everything, published on Longreads.com.

Furthermore, there are the cases of abandonment, where a shipowner abandons his responsibilities to ship and crew, often literally dumping ship and crew somewhere far from home(28). Being in a nomadic profession as they are, seafarers have little protection. Having little or no ties to the country of the flag or the owner, pursuing legal claims is extremely hard from a practical and legal point of view(29).

And as said before, the pandemic hit seafarers even harder. In April 2020 more than one hundred cruise ships were sitting off the coast of the United States alone, with thousands of crew members and - initially - passengers stuck at sea. They were considered Covid-19 hotspots and many port states refused the vessels into their ports.

The International Maritime Organization called upon the flag states to act and provide medical help and equipment on board the ship. Most flag states, especially the flags of convenience, reportedly remained passive. Take the *Braemar*, a cruise ship registered under the flag of the Bahamas. The ship was refused access to Bahamian ports and eventually ended up in Cuba(30). The Braemar was operated by a British Norwegian company but registered in a tiny country that doesn't have the means to actually support its vessels and crew when need be.

Security concerns

Apart from environmental and human rights concerns, flags of convenience are sometimes considered a threat to security. The open registry system can be used by organized crime and terrorist groups. Another security-aspect is that of the conscription and requisition of a country's registered vessels in times of war. Flags of convenience have led to the situation where countries no longer have (enough) registered vessels to form a 'merchant marine' for national defence purposes in war time(31).

All these concerns beg the question: why do we still have flags of convenience? Because, as will be argued below, it is unlikely that international law can take

(28) For reports and analysis of seafarers' rights and violations thereof, seehttps://www.itfseafarers.org/en. For one of the most poignant cases of abandonment, where a court order trapped a chief mate on a ship for four years see https://www.bbc.com/news/world-middle-east-56842506. For a case in Kuwait, see https://english.alarabiya.net/News/gulf/2021/03/25/Abandoned-seafarers-in-Kuwait-enter-eleventh-week-of-hunger-strike.

(29) For a list of current known abandoned ships see https://www.itfseafarers.org/en/abandonment-list/seafarer-abandonment.

(30) https://edition.cnn.com/travel/article/coronavirus-cruise-ship-braemar-docks/index.html

(31) E. Powell, Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience", Annual Survey of International & Comparative Law, 2013 [Vol. XIX], pp. 263-300.

away or seriously restrict the sovereign right of states to grant nationality. And another reason: it is not just negatives. Open registries serve the globalization of the maritime industry, something that has for long been encouraged by organizations like United Nations Conference on Trade and Development (UNCTAD).

In 2011, for example, UNCTAD reported in its annual review of maritime transport that the globalization of maritime businesses – in which the open registry principle plays an important role - allowed shipping companies to source from the most cost-efficient suppliers.

It had, the report stated, led to the reduction of international transport costs, which directly benefits global merchandise trade. Globalization of the maritime sector, it stated, shifting away from the monopolies of the traditional sea-faring nations, had lifted millions out of poverty. The organization then somewhat proudly announced that "[…] in shipbuilding (China and the Republic of Korea), scrapping (Bangladesh), and the provision of seafarers (Philippines), developing countries now account for more than three quarters of the world´s supply"[(32)].

Open registry is thus seen as a measure of egalitarianism, eradicating the gap between traditional maritime nations and developing countries, which now not only are the major suppliers of raw materials but of labour as well. There are of course others who do not consider this form of globalization positive at all and would argue that is has encouraged exploitation of workers.[33]This is not the place to go into this discussion, but we cannot and should not completely ignore it, because it forms the essential socio-economical background of the legal problem of flags of convenience.

Exploring remedies

Now that we have mapped the most pressing issues of the use of flags of convenience, the next question – logically – is what can be done to stop or at least curb the practice. This paragraph explores what has been achieved so far.

Prevalence of the principle of sovereignty

In the previous paragraph it was suggested to abolish open registries altogether.

(32) https://unctad.org/press-material/developing-countries-embrace-new-roles-shipping#endnote1.

(33) For more in depth reading about the dilemma of low-cost labour from developing countries see A. Van Vossen, Flags of Convenience and Global Capitalism, International Critical Thought 6(3) [2016], pp. 359-377; B. Ferguson, The Paradox of Exploitation, Vrije Universiteit Amsterdam, published with open access at www.springerlink.com.

This would come down to international law prohibiting states to grant nationality to ships according to their own rules. In other words: international law would have to take away the well-established freedom of states to grant nationality, a freedom that follows directly from the principle of sovereignty.

International law being consensual by nature, this is unlikely to happen. One only has to look at the Malta and Cyprus 'golden passport' issue to see the difficulty. These European island-states sell passports to wealthy people, some with criminal records, who wish to acquire EU passports through citizenship of the two countries, offering them legal protectionand the right to freely travel in the bloc.

The European Commission is concerned about these golden passports because they would facilitate money laundering and tax evasion. It repeatedly urged Malta and Cyprus to stop the practice (which brought a windfall to the two countries over the years, the required investment being around one million euros per passport).

There should, the Commission claims, be a genuine link between country and passport holder and by not requiring such a link in order to obtain citizenship the golden passports are a violation of EU-law, because they are "not compatible with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union".

This, the Commission says, also "undermines the integrity of the status of EU citizenship provided for in Article 20 of the Treaty on the Functioning of the European Union."[34] Malta's reply has thus far been that granting citizenship is a matter of national competence. In principle this is true, but in reality, European standards and principles limit its discretion and manoeuvring margins over decisions of nationality.

However, research and case law in this regard focuses on the *loss* of nationality.[35] The limits, if any, to *granting* nationality by individual member states are much less clear.[36] The Malta-case has not reached the European Court of Justice (yet), but it shows already one thing: it is extremely difficult to take away the right to grant nationality from individual states nor can it easily be

(34) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925.

(35) Cf. Sergio Carrera Nunez and Gerard-René de Groot (ed.), European Citizenship at the Crossroads – The Role of the European Union on Loss and Acquisition of Nationality, Wolf Legal Publishers 2015.

(36) S. Carrera, How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?, CEPS Paper in Liberty and Security in Europe no 64/April 2014, p.

curbed by extra requirements. Not even within the EU, a union to which member states have voluntarily surrendered a great deal of sovereignty. And if it is hard within the EU, it is impossible at the international level.

Failure of the genuine link requirement

The right to register ships at the discretion of states is not absolute, at least not on paper. In an attempt to prevent a sprawl of open registries, the drafters of the law of the sea conventions curbed the 'freedom of registration' with an additional a requirement:

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

The idea is borrowed from the *Nottebohm* case where the ICJ had to deal with the issue of whether citizenship required a genuine link in a *ius standi* situation. In Nottebohm the ICJ denied the state of Liechtenstein the right to exercise diplomatic protection because there was no genuine link between Mr. Nottebohm and Liechentstein. It did *not* forbid Liechtenstein to grant citizenship to Nottebohm, as it recognized that it is the sovereign right of states under which conditions it grants citizenship/nationality to people. It was held that in this particular matter of international law, namely the exercise of diplomatic protection by a state before the ICJ, the granted nationality needed to be held to a test: the genuine link(37).

With Nottebohm in mind the genuine link requirement was added to the ship-registration provisions, changing the gist of these provisions into:states are free to grant nationality to any ship they want, as long as there is a genuine link between the state and the ship.

However, that was *not* how things were done in Nottebohm. The ICJ did *not* say that Liechtenstein was only allowed to grant nationality to non-citizens if there was a genuine link. It only said that such link must exist to be able to address the ICJ in a case of diplomatic protection. On the contrary, the ICJ explicitly stated that it is up to individual states if and how to grant nationality.

Another argument against the genuine-link requirement is that Nottebohm was

(37) Nottebohm (Liechtenstein v. Guatemala), ICJ, 6 April 1955, accessible through: https://www.icj-cij.org/public/files/case-related/18/2676.pdf.

not intended for vessels(38). It would be illogical, some authors say, to require courts to ascribe human characteristics (such as attachment to a country, location of family and ancestors) to inanimate objects(39). This is not the most convincing argument though, as the criteria can theoretically be adjusted to ships, and that has indeed been tried.

Various attempts were undertaken to give meaning to the genuine link requirement, most notably by the United Nations Conference on Conditions for the Registration of Ships, which eventually resulted in a Convention for the Conditions for the Registration of Ships. Its articles provide for a rather complex set of conditions in order to meet the 'genuine link' threshold. In a nutshell: the country of registry must also be the country where the shipowner is established or has its principal place of business.

In addition, these owners must be nationals, *or* a 'satisfactory part' of the officers and crew must be nationals(40). It may not come as a surprise that the 1986 Convention has not entered into force.

Not only is it up for debate of which practical facts would constitute a genuine link, it is equally unclear what the consequences are when a genuine link is missing. Should vessels without a genuine link be denied access to ports, and if so, how would that practically work? Can we expect port authorities to check each incoming vessel's link to its flag state? Or should they just refuse every ship sailing under one of the 'usual suspect flags'? Not only world trade would come to an end, it has a discriminatory ring to it as well.

And besides all this, it is not even clear *when exactly* the genuine link should exist. The texts of the aforementioned provisions give rise to the argument that a genuine link can(and needs) only be established *after* registration: *There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*This makes sense, Anderson argues, because a ship has no separate personality of its own, so the only way a ship can establish 'reciprocal rights and duties' is by registration(41).

It is safe to say that a general rule of international law prohibiting flags of

(38) D.F. Matlin, Re-evaluating the Status of Flags of Convenience Under International Law, Vanderbilt Journal of Transnational Law, Vol. 23, [1991], pp. 1017-1055

(39) Ibid.

(40) https://unctad.org/system/files/official-document/tdrsconf23_en.pdf.

(41) H.E. Anderson, The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives, Tulane Maritime Law Journal 1996 [Vol 21], p. 149.

convenience – and thus eroding an important part of the sovereign powers of states - is not feasible in the near future. Perhaps we must acknowledge that the problem is *caused* rather than *solved* by international law(42). And rather than a largely theoretical and thus futile fight against the existence of flags of convenience, a more pragmatic approach might be to take the incentive of sailing under such flags away.

If the maritime arena is regulated in such a way that no owner – regardless the flag he sails - can escape his responsibilities, then flags of convenience will lose a big part of their appeal. Hence, over the years numerous targeted agreements saw the light, dealing with virtually everything related to merchant shipping.

Targeted agreements

The main incubator of these agreements is the International Maritime Organization (IMO), which has produced a thorough and extensive set of international regulations mainly governing the safety of both the ship and the marine environment(43). Some examples: the International Convention for the Safety of Life at Sea1974 (SOLAS), the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW), the International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001 (AFS), the International Convention for the Control and Management of Ship's Ballast Water and Sediments 2004 and The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009.

As to the working conditions of seafarers, the International Labour Organization (ILO) adopted the Maritime Labour Convention 2006(44), encompassing subjects such as minimum age, employment agreements, hours of work and rest, payment of wages, paid annual leave, repatriation, on board medical care, the use of recruitment and placement services, accommodation, food and catering, health and safety protection and accident prevention and complaint procedures for seafarers (of which the ILO estimates there are more than 1.5 million)(45).

(42) Cf. W.J. McLeod, The Flags of Convenience Problem, South Carolina Law Review 16 (3) (1964), pp.409-418.

(43) For a complete list of IMO conventions see: https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx.

(44) Entry into force 20 August 2013.

(45) https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm

The Maritime Labour Convention

To a great extent the Maritime Labour Convention (MLC) consolidates existing legislation, including no less than thirty six conventions, some of them dating back to 1920, with the aim of setting global standards for a global industry. By the end of 2020 nearly a hundred countries had ratified the convention, including flag of convenience states such as Liberia and Panama. By doing so, states promise to guarantee minimum working and living standards for all seafarers working on ships sailing under their flags.

Member states must implement the convention in their domestic laws. They have a measure of freedom as to how to do this, as long as the minimum standards of the convention are met. Ships flying the flag of a member State are required to carry a Maritime Labour Certificate and Declaration of Maritime Labour Compliance. These documents are to be accepted by other States as prima facie evidence of compliance with the Convention.

Shipowners and governments are to put in place administrative procedures to ensure that these documentary requirements are met, and States have an obligation to include MLC compliance as part of their port state control and the ILO has issued Guidelines for port State control officers(46).

Vessels that fail to comply can be detained, a situation most shipowners will want to avoid. Seafarers furthermore have access to an onshore-complaint procedure, regardless whether employment tribunals would otherwise have jurisdiction(47). All in all, it is one of the most encompassing international conventions of recent times and it can be called a success, at least on paper.

Shipbreaking

After decades of largely unnoticed and/or ignored scrapping of giant ships under circumstances that are extremely dangerous for both the environment and the workers, two international instruments finally came into being(48). The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 covers the design, construction, operation and maintenance of ships, as well as preparation for ship recycling.

(46) Regulation 5.1.3 and 5.1.4 MLC.

(47) Regulation 5.2.2 MLC.

(48) Things accelerated when the internet made it much easier to draw the attention of the world. Organizations like ITF and Shipbreaking Platform gained momentum and reports such as a documentary by investigative journalism platform Vice caused a lot of stir (https://www.vice.com/en/article/exmmgj/shipbreaking-chittagong-bangladesh-asbestos-explosions-676).

It aims to ensure that ships when being recycled at the end of their operational lives do not pose any unnecessary risks to human health and safety and to the environment. Responsibility of enforcement of the convention is put on the vessels flag states and the recycling states(49). The latter are by far the most important factor to make this convention a success, because as long as not every state sign up for the convention cash-buyers will still be able to reflag to a non-compliant state.

However, this would no longer pay off if there simply were no substandard yards anymore. And that sounds harder than it is, at least geographically. There are only five countries in the world – Turkey, China, India, Pakistan and Bangladesh – that count for over 98% of all ship recycling by gross tonnage.

The problem is: the convention has not entered into force yet and will only do so 24 months after ratification by 15 States, which must represent40 per cent of world merchant shipping by gross tonnage and must have an annual ship recycling volume not less than 3 per cent of the combined tonnage of the ratifying States(50).

So far Norway, Congo, France, Belgium, Panama, Denmark, Turkey, Netherlands, Serbia, Japan, Estonia, Malta, Germany, Ghana, India and Croatia have ratified the Convention. More tonnage and recycling volume are needed though. As to tonnage, 'big' flag of convenience states such as Liberia and the Marshall Islands are missing. Of the top five recycling countries, India and Turkey are in, but Pakistan, China and Bangladesh still not.

At EU-level a similar instrument entered into force. The European Parliament and the Council of the European Union adopted the Ship Recycling Regulation of 20 November 2013, applying to vessels that sail under an EU-flag. In a nutshell, the regulation stipulated that after 31 December 2018, commercial vessels above 500 GT that are sailing under the flag of a EU-state, must be recycled in safe and environmentally sound ship recycling facilities that are included on a European List of approved ship recycling facilities.

To be included in the list, any ship recycling facility irrespective of its location has to comply with a number of safety and environmental requirements. Facilities operating in the EU are approved by their national authorities for listing. The European Commission assesses applications received from the ship recycling facilities located in countries outside the EU. Currently, apart

(49) https://www.imo.org/en/OurWork/Environment/Pages/Ship-Recycling.aspx.

(50) Art. 17 Hong Kong Convention.

from yards in EU-countries, there are some approved yards in the USA and Turkey(51).

Enforcement

The previous paragraph made clear that there is quite the array of rules and regulations directly or indirectly dealing with the consequences of flags of convenience. The final question to be answered is: do they work? This paragraph deals with enforcement, or the lack thereof.

The law is only as good as its enforcement, and that applies certainly in the elusive (but massive) world of maritime trade. No matter how good national or international agreements are, if there is no enforcement, then it is all in vain. For example, a crew member may have a range of rights under the Maritime Labour Convention, but where would he be able to sue his employer for – say - unpaid salaries? Let us assume that he is from the Philippines, his ship sails under the flag of Panama and the owner are Greek. To determine jurisdiction (and applicable law) is complicated. Should it lead to the flag state, the port state, the labour-supplying state or the state of shipowners?

As we know, international law made the flag state the starting point. In the above example it would mean that a Filipino seafarer who has a conflict over his contract with the Greek owner should bring a case against the owner in Panama. This is not only impractical; it is illusory. To give seafarers better options, the MLC created a system that should give them something to work with. Port states have been equipped with an onboard- and offshore complaint system (which is not the same as having access to a court) and labour-supplying states must assume jurisdiction over complaints against seafarer recruitment services (which is not the same as bringing a case against shipowner).

It does not create an obligation to adjudicate a case of a seafarer for any of these states and leaves it up to the port states. Most of them will not easily assume jurisdiction, which is logical. If courts in Rotterdam or Hamburg or Kuwait would assume jurisdiction over a case between a Filipino seafarer and a Greek owner of a ship that just happens to call to the port of Rotterdam, Hamburg or Kuwait, it might lead to a tsunami of cases – especially if jurisdictions are known to be employee-friendly.

As to the forum of the shipowner's domicile, the MLC does not give any hint that these courts should assume jurisdiction, but under most conflict of laws

(51) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0095&from=EN.

systems they probably would be competent(52). But then again, would it be reasonable to expect a Filipino seafarer to bring a case in the courts of Athens?

What we *have* seen in recent years, are sporadic cases of shipowner-states prosecuting owners that sold end-of-life vessels to cash buyers in order to circumvent national or European laws regarding waste management and ship breaking requirements. For the first time in Europe, Dutch public prosecutors brought criminal charges against a Dutch shipowner for selling vessels to be scrapped in countries "where current ship dismantling methods endanger the lives and health of workers and pollute the environment"(53).

The court found that the owner of the ships had acted in violation of the EU Waste Shipment Regulation and convicted the shipowners for selling four ships to acash-buyer who would scrap the ships at beaching yards in India and Bangladesh. Furthermore, two company executives were banned from exercising the profession as director, commissioner, advisor or employee of a shipping company for one year(54).

The Court scrutinized internal email exchanges and exchanges between the accused and the shipbrokers prior to and during the last voyages of the ships and concluded that when the ships left the ports of Rotterdam and Hamburg in 2012, the intention at that time was to demolish the ships, which categorizes the ships as waste, despite the fact that they were still seaworthy, certified, insured and operational.

The fact that three of the ships were still in commercial service and carried cargo during part of the voyage to their final destination did not affect this conclusion (as this was mainly done to maximize profits until the last minute, the court noted). The ships were a combination of non-hazardous and hazardous waste and must therefore, the court concluded, be regarded as hazardous waste(55).

A similar case happened in the Norwegian courts. In February 2017 a vessel tried to leave Norway under a new name, new owner and new flag. Only

(52) G. Chen/D. Shan, Seafarer's access to jurisdictions over labour matters, Marine Policy 77 (2017), pp. 1-8.

(53) District Court of Rotterdam, 15 March 2018, accessible through www.rechtspraak.nl.

(54) Regulation (EC) 1013/2006 on shipments of waste, accessible through www.eur-lex.europa.eu.

(55) In 2018, the Norwegian sovereign wealth fund, which invests Norway's oil income and has shares in shipping giants Maersk and Teekay, decided to offload shares in shipping line Evergreen and several smaller liner companies in Asia after investigating shipbreaking practices in Pakistan and Bangladesh.

hours later, the engine stopped, and the coast guard needed to carry out a rescue operation to safe the crew and prevent the ship from spilling oil and grounding. The owner then re-named and re-flagged the vessel again and tried to get the ship out of the country. It was discovered that a repair-contract that would need the vessel to sail to the UAE was false and probably used as a way to escape checks for the illegal export of the vessel.

The "Harrier", as it was now called, was arrested and not allowed to leave Norway unless it was to sail to a ship recycling destination in line with international and European hazardous waste laws. Norwegian authorities pressed charges against the owners for having attempted to illegally export hazardous waste. Eventually the court convicted both the owner and the cash-buyer to fines and prison sentences, a first in Norway(56).

Finally, perhaps the most interesting case was brought before the courts of Bangladesh. In August 2016 the FPSO North Sea Producer(57) was beached in Chittagong, Bangladesh. The vessel, once it had reached the end of its commercial life, was sold by the Danish/Brazilian owners to a cash-buyer through a St. Kitts and Nevis PO Box company, which gave the UK authorities – where the ship had been waiting for over a year – a false contract stating that the ship had a new Nigerian owner. Based on that document, the UK allowed the vessel to leave.

Instead of going to Nigeria it went straight to the beaches of Bangladesh, where upon arrival it was found that the ship contained radioactive and other toxic materials. A case was started by the Bangladesh Environmental Lawyers Association, an NGO. After an initial scrapping injunction, the court declared the import, beaching and breaking of the North Sea Producer illegal. It also urged the government to regulate the sector and scrutinize cash-buyers and agents(58).

Conclusion: where do we stand today?

All in all, there is a wide range of well-intended and detailed agreements in place. And not only traditional western maritime nations ratified them, but most flag of convenience states as well. If all these member states would comply with these conventions, the difference between closed and open registry

(56) For a more detailed report on the case see. https://shipbreakingplatform.org/spotlight-harrier-case/. Author has the full text of the case, which is so far unpublished and in Norwegian.

(57) FPSO = Floating Production System. It facilitates the processing and storage of oil and gas at sea.

(58) At the moment of writing, it is unclear what eventually happened to the North Sea Producer. A request for information is still pending at the NGO involved.

states would no longer matter that much anymore. If they would all adhere to minimum labour, safety and environmental standards, there wouldn't be much of a problem.

However, flag of convenience states often do not have the intention nor the capacity to enforce the rules and regulations they sign up for, as became clear once more during the first months of the pandemic.

To fix this problem, it is not realistic to advocate a ban of open registries as that would come down to curtailing the sovereign right of states to grant nationality. It is not expected that there will be consensus about such an intrusive measure anytime soon, if ever. Instead of taking away the sovereign right to grant nationality, there have been feeble attempts to erode that right by adding a genuine link condition. That hasn't worked either. The genuine link requirement is unclear in both its meaning and methods of enforcement.

So instead of 'going after' the right to grant nationality, targeted agreements are used to mitigate the detrimental effects of flags of convenience by not only setting material rules and regulations, but by offering alternative jurisdictions. That has proven to be a more successful approach, as it partly eliminates the advantages of sailing under a flag of convenience and makes it harder to escape accountability.

The Maritime Labour Convention is the best example of this. Not only does it create an extensive set of rights and obligations of shipowners and seafarers, it also creates a system of semi-enforcement. Semi, because it doesn't create additional jurisdictions, but it does provide seafarers with procedures of complaint. Another noteworthy development is an increased willingness in some countries to prosecute ship owners who are trying to circumvent national or European regulations by selling their ships at the end of their economic lives to cash-buyers, who would then re-flag the ship to a convenient flag and sent it on its last journey to unsafe and polluting shipbreaking yards.

Furthermore, flags of convenience are not only a cumulation of negatives and to bluntly abolish open registries may be equivalent to throwing the baby out with the bathwater. A balance between economic interests and human rights must be found. Shipowners benefit from registering their vessels under a flag of convenience. Factors such as lower taxes and lower operation costs lead to greater profits. And although the idea of open registries was largely 'masterminded' by merchants of developed countries, ship registration is a lucrative business for tiny

and/or poor countries such as Liberia, the Marshall Islands or Panama(59).

The same can be said, in a slightly more indirect way, for developing countries with an important seafaring labour pool (such as the Philippines) or ship-breaking industry (such as India or Bangladesh). Taking away the possibility of flags of convenience from them may obviously lead to unemployment and financial problems, maybe even bankruptcy, for some small ship owners.

It will also lead to higher prices of consumer goods, as part of those prices are made up of shipping costs. Consumers usually are aware of the conditions faced by the workers in sweatshops stitching the latest fashion, but much less when it comes to what transporting that fashion on board ships of dubious flag means to workers and the environment.

(59) Anderson, p. 158.

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Table of Contents