

# Flag State Jurisdiction and its Problems and Weaknesses

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### I. Introduction

The freedom of the high seas is noticeable among other principles of public international law. That freedom allows ships belonging to all States access to all parts of the sea other than the territorial sea and internal waters of a State. However, it is necessary to maintain maritime order effectively on the high seas where no State can dominate the areas under claims of its sovereignty. That is why the concept of flag State jurisdiction and ships' nationality arises. On the high seas, the cardinal rules are that jurisdiction over a ship resides in the State to which the ship belongs and that all ships using the high seas must possess a national character.<sup>1)</sup>

The jurisdiction over a ship has been related to its nationality.<sup>2)</sup> The nationality of a ship is attributed to the State which has authority over, and responsibility in respect of, the ship. The flag a ship flies is the symbol of its nationality, and a flag State generally means a State whose nationality a ship owns.<sup>3)</sup>

Traditionally, flag State had strict nationality rules as required by international law, but these traditional registers have weakened significantly in the past 20 30 years because some States have introduced so called open registers, more commonly known as flags of convenience.<sup>4)</sup>

A question arises while writing: why do the international community and international law reinforce port State jurisdiction rather than flag State jurisdiction? In order to seek the answer this essay will consider flag State jurisdiction and flags of convenience, and will point to some problems of both flag State jurisdiction and flags of convenience.

### II. The Critique of Flag State Jurisdiction

#### A. The Nationality and Registration of Ships

##### 1. The Concept of the Nationality

According to one writer, the concept of the nationality of ships has developed with the 'political sovereignty of nation states'.<sup>5)</sup> As a person has their own nationality, so a ship basically bears its nationality as required by international law.<sup>6)</sup> It is said that a ship on the high seas must possess its nationality in international law.<sup>7)</sup> If a ship has no nationality, it is a stateless ship and does not obtain any protection by international law. This principle was first introduced by English courts in *Naim Molvan v. Attorney General for Palestine*.<sup>8)</sup> In this case, the ship *Asya* which

1) N.P. Ready, *Ship Registration: Law and Practice*(London, LLP 200, p. 1.

2) R. R. Churchill and A.V. Lowe, *The Law of the Sea r e.* (Manchester, Manchester University Press), 199, p. 257.

3) Z.Oya Ozcayir, *Port State Control* (London, LLP 2001), p. 7.

4) International Commission on Shipping Inquiry into Ship Safety, *Ships, Slaves and Competitio*, [http://www.icons.org.au/images/ICONS\\_full\\_report.pdf](http://www.icons.org.au/images/ICONS_full_report.pdf)(accessed on 23rd November 2004) p.87

5) H.E. Anderson, The nationality of ships and flags of convenience: economics, politics, and alternatives, *21 Tulane Maritime Law Journal*, 1996, p.14.

6) Article91of UNCLOSays Nationality of Ship1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect

7) Z.Oya Ozcayir, *op. cit.*, p.8.; H.E. Anderson, *op. cit.*

8) 1948 A. C. 351(appel taken from Palestine)

the Turkish flag which the ship was not entitled to fly. She had no documents on board either. A British warship arrested her 100 miles off the Palestine coast. The Palestinian court ordered the forfeiture of the ship even though she had been seized on the high seas. On appeal, the Privy Council rejected the proposal that the principle of the freedom of the high seas extended to a ship possessing no nationality. It was held that the seizure of the ship was legitimate and that forfeiture of the ship was proper.

The reason why a ship must have its nationality is to ensure that each ship will be subject to some authority and rules. It is stated that the nationality of ships is one of the most important factors by which maritime order is preserved.<sup>9)</sup> According to one writer, the nationality of a ship is explained as follows:

As well as indicating what rights a ship enjoys and to what obligations it is subject, the nationality of a vessel indicates which State is to exercise flag State jurisdiction over the vessel. Nationality also indicates which State is responsible in international law for the vessel in cases where an act or omission of the vessel is attributable to the State, and which State is entitled to exercise diplomatic protection on behalf of the vessel.<sup>10)</sup>

So, the term, "the nationality of a ship" has significant meanings concerned with the act of a ship. Among the meanings the cardinal concept is that by means of nationality, a ship is subject to the particular regime concerned with the legal and administrative authority. The nationality of a ship is derived from the act of registration which will be reviewed below.

## 2. Registration

Generally speaking, States grant their nationality to ships by means of registration and by allowing ships to fly their flag. Therefore, registration can be defined as the administrative procedure by which a State bestows its nationality upon a ship. It is meaningful to perceive that the terms such as 'the State of registration' or 'the flag State' are synonyms for the State whose nationality the ship bears although some writers do not accept that the above three terms are identical.<sup>11)</sup> In the opinion of the writer registration bears significance rather than the nationality of a ship because not only the rights and duties

related to a ship but also the nationality of a ship are acquired after registration.

Registration is generally used to describe the ascription of national character to a ship. That is to say, a ship enters the public records of a State by means of registration. The registration of ships is crucial in terms of the view that all the rights and obligations with respect to ships occur from the act of registering. In international law a ship can be registered if it meets some conditions which a State fixes. Here, the concept of 'a genuine link' arises.

## 3. The Requirement of a Genuine Link

Every State has maintained a right to register ships on conditions which they may establish.<sup>12)</sup> However, the international community attempted to restrict this right of registration. The first attempt was Article 5 of the 1958 Geneva Convention on the High Seas (hereinafter the HS Convention).<sup>13)</sup> This HS Convention was to require some kind of link between the nationality of a ship and the State granting the nationality. This concept of 'a genuine link' provided in Article 5 of the HS Convention was rather vague in that there was no clear indication as to the ground for testing whether this link between ship and registry do or do not exist.<sup>14)</sup>

In spite of this unclear definition, this Article of the HS Convention was almost repeated in Article 91 of UNCLOS.<sup>15)</sup> It is pointed out that since the 1958 HS Convention came into effect, the genuine link requirement seems to have had little influence on State practice.<sup>16)</sup> Article 91 of UNCLOS also provided little about guideline for a genuine link between the State and the ship like the 1958 HS Convention.

UNCTAD continued studies of flags of convenience and adopted the United Nation Convention on Conditions for Registration of Ships, 1986 (hereinafter the UNCCRS). However, this attempt seems unsuccessful because of a

9) R. R. Churchill and A.V. Lowe, *op. cit.*

10) *Ibid.*

11) *Ibid.*

12) H.E. Anderson *supra* note 5, p.148; A. Odeke, Port State Control and UK Law, *Journal of Maritime Law and Commerce* Vol. 28 no. 499, p.6.

13) Art. 5 of the HS Convention says: 1. 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. 2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect

14) Z.Oya Ozcayir *supra* note , p.12.

15) Refer to *supra* note 6.

16) Z.Oya Ozcayir *op. cit.*, p.1.

lack of a sufficient number of ratified States and this UNCCRS failed to achieve its objective which was to reinforce the link between a ship and its flag State.<sup>17)</sup> It was difficult for many States, especially flag of convenience States, to accept the UNCCRS because it was considered to restrict trade opportunities.

In 1999, the UN Commission on Sustainable Development (UNCSD) also made another attempt to establish the definition of a 'genuine link'. According to the International Commission on Shipping report<sup>18)</sup>, the UNCSD recommended the IMO to develop actions in binding form to ensure that ships of all flag States meet international rules and standards, in order to give full and complete effect to the UNCLOS, especially Article 91(Nationality of Ships)<sup>19)</sup>. The General Assembly, however, did not pay any attention on this recommendation in the resolution it adopted later that year on the work of the UNCSD.<sup>20)</sup> The reluctance of the IMO to pursue the question of 'genuine link' seems to be rather unexpected because obviously international law provides a genuine link between a ship and the State whose flag it flies. In a sense, in the writer's opinion, the IMO should make every effort to approach some study on the clarification of 'a genuine link' in order to eradicate substandard ships and protect the marine environment.

#### B. The Concept of Flag State Jurisdiction

Flag State control is derived from the cardinal rule in the Article 92(1) of the United Nations Convention on the Law of the Sea 1982(UNCLOS) that, except in certain extraordinary situations, on the high seas a ship is subject only to the exclusive jurisdiction of the flag State.<sup>21)</sup> In other words, the State granting the ship the right to fly its flag has the exclusive right to exercise legislative and enforcement jurisdiction over its ship on the high seas.

17) R. R. Churchill and A.V. Lowe, *op.cit* p. 260. The writer says that 'the Convention aims to strengthen the link between a ship and its flag State, and to ensure that States effectively exercise jurisdiction and control over their ships, not only in relation to administrative, technical, economic and social matters, but also with regard to the identification and accountability of shipowners and operators who, in the past, have sometimes hidden behind a complex and artificial veil of interconnecting companies.'

18) International Commission on Shipping Inquiry into Ship Safety, *Ships, Slaves and Competitio*, [http://www.icons.org.au/images/ICONS\\_full\\_report.pdf](http://www.icons.org.au/images/ICONS_full_report.pdf)(accessed on 23rd November 2004) pp.92-93.

19) See *supra* note 6.

20) *Ibid*.

21) Art. 92(1) of 1982 UNCLOS; 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. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry and see A. Odeke *op. cit.*, p.6.

Both customary and treaty based international law have conferred a right to regulate a ship's activities on its flag State. According to Article 217 of UNCLOS, flag States bear central aspect of the enforcement regime by means of undertaking a number of specific obligations. However, according to one writer, what this Article means is an intention to ensure that flag State enforcement jurisdiction will be exercised in the future.<sup>22)</sup> He points out that this Article is a response to the criticism of the regime of exclusive flag State jurisdiction, especially concerning negligent enforcement exercised by flag of convenience States.<sup>23)</sup>

Flag State jurisdiction results from the Article 89 of UNCLOS that "No State may validly purport to subject any part of the high seas to its sovereignty." According to one case<sup>24)</sup>, in the event of a collision or any other incident of navigation on the high seas, only either the flag State or the State of which a seafarer is a national may institute legal proceedings against the person.

It is said that flag State jurisdiction was formally acknowledged in Article 1 of the 1952 Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation.<sup>25)</sup> This Article inverted the highly criticised decision of the *Lotus*<sup>26)</sup> and the 1952 Brussels Convention rule was repeated in Article 11 of the 1958 Geneva Convention on the High Seas<sup>27)</sup> and in Article 97(1) of UNCLOS.<sup>28)</sup>

22) *United Nations Convention on the Law of the Sea 1982 a Commentary* Vol. 4, M.H Nordquist(ed. in chief) (Dordrecht, Martinus Nijhoff Publishers), 1991, p.242.

23) *Ibid*.

24) *Nottebohm Case*(Liechtenstein v. Guatemala), 1955 I.C.J. 4(Apr. 6).

25) A. Odeke *op. cit.*, p.6.

26) S.S. *Lotus*(France v. Turkey),1927 P.C.I.J., Series A, No.10.n the *Lotu* case, the French ship *Lotus* had collided with a Turkish ship resulting in loss of life.n this case, it was held that ships on the high seas are subject to no authority except that of the State whose flag they fly" t also held that the collision had occurred to the Turkish ship and that both Turkey and France could therefore prosecute the deck officer responsible for the collision.

27) Article 11 of the 1958 Geneva Convention on the High Seas says:1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State

28) Article 97(1) of UNCLOS says: 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving

It is argued that flag State jurisdiction at sea has traditionally been the important jurisdiction like territorial jurisdiction on land and has, therefore, not required "special justification."<sup>29)</sup> One writer states that flag State jurisdiction is essential in that a ship on the high seas must be subject to the authority of some State to maintain maritime regularity effectively.<sup>30)</sup> He also maintains that a flag State may not normally take enforcement actions against its ships in another State's waters because those actions could encroach on another's sovereignty.<sup>31)</sup> Here, the limitation of flag State jurisdiction arises and this will be considered in detail at the chapter IV.

Flag States do have a duty to ensure that their ships comply with the rules and standards under international law. It is clearly stated in international law that the flag State is primarily responsible for ensuring compliance with international minimum standards. In other words, the flag State takes the primary responsibility for ensuring that its ships are operated and maintained in an appropriate way minimizing the risk to seafarers, the marine environment and the cargo.

In concerning flag State jurisdiction, the real question concerning flag State jurisdiction is whether flag States can control ships flying their flags sufficiently. Negative points of view about the adequacy of flag State jurisdiction occur to the writer very much. For one thing, critics argue that flag States are disinclined to enact environment standards or take proper enforcement measures because flag States are not normally influenced by pollution occurred on the high seas or in another State's waters.<sup>32)</sup> Another reason is that once shipowners choose the 'flags of convenience' or 'open registry', most flag States which have the 'flags of convenience' usually apply lax international standards and are unwilling or unable to exercise effective jurisdiction over its ships in matters of pollution control and shipping safety.<sup>33)</sup> Details on 'flags of convenience' will be discussed

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the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

29) H. Meyer, *The Nationality of Ship*(The Hague, Nijhoff), 1967, pp.33-40 in D. Bodansky, *Protecting the marine environment from vessel source pollution: UNCLOS and beyond*, 18 *Ecology Law Quarterly*, 1991, p.736.

30) D. Bodansky, *op. cit.*

31) *Ibid.*

32) M. S. Baker et al., *Jurisdiction over Vessel Source Pollution*, 30 *Rec. Asn B City N.Y.*, 1975 pp. 242-243; D. A. Fitch, *Unilateral Action Versus Universal Evolution of Safety and Environmental Protection Standards in Maritime Shipping of Hazardous Cargoes*, 20 *Harv. Int'l L. J.*, 1979, p. 167 in D. Bodansky *op. cit.*, p.737.

in the next section.

### III. The View of Flags of Convenience

In spite of the imposition of flag State responsibilities in international law, are all the flag States fulfilling their obligations to ensure that their ships comply with international standards, rules and regulations? In practice some States are not willing or are unable to fulfil their obligations in relation to international law, and substandard ship owners can flag out their ships to the flags of those States which do not implement their responsibilities.<sup>34)</sup>

One writer says the significance of ship registries becomes clear when one considers that the law that controls a ship is the law of the State whose flag the ship is flying.<sup>35)</sup> He goes on to say that in the shipping world, there are three main categories of ship registries which are national registries, open registries and second registries.<sup>36)</sup> He also explains that national registries are administered by each nation which gives the right to fly its flag to its ships and that open registries are also managed by individual nations, but every shipowner can register its ship to them regardless of his or her nationality.<sup>37)</sup> According to that writer, second registries were used to confront the trend of shipowners moving towards flags of convenience for their home registry.<sup>38)</sup> He points out this trend in favour of incentives normally connected with flags of convenience entitling them to name "flags of convenience."

Historically, while ships have been flagged or reflagged for various reasons,<sup>39)</sup> the modern use of flags of convenience normally dates back to the 1920s, the Prohibition era of the United States.<sup>40)</sup> During that time an American shipping company, United American Line, reflagged its U.S. flag passenger ships such as SS Resolute and SS Reliance to the Panamanian registry in order to circumvent the U.S. law prohibiting the sale or carriage of alcoholic beverages aboard American owned ships.<sup>41)</sup>

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33) R. R. Churchill and A.V. Lowe *supra note 2*, p.258-259.

34) Z.Oya Ozcayir *supra note 3*, p.24.

35) M.J. Wing, *Rethinking the easy way out: flags of convenience in the post September 11th era*, 28 *Tulane Maritime Law Journal*, 2003, p.17.

36) *Ibid.*

37) *Ibid.*

38) *Ibid.*

39) See R. Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (Annapolis, Md: Naval Institute Press), 1981.

40) Z.Oya Ozcayir, *supra note 3*, p.25.

Flags of convenience have been denoted variously.<sup>42)</sup> The term 'flags of convenience' has emerged to signify registration in favour of mainly economic incentives in a country. One writer points out that this term was used, earlier, for political reasons or for hiding criminal or questionable activities but today, the term is used in a degrading sense and means that a ship owner does avoid complying with stricter rules for registration.<sup>43)</sup>

It is true that flags of convenience or open registry States are the States which require very little or practically no link with the ship, commonly represented in the requirement that "all or a fixed proportion of the ship's owners and/or crew must have nationality of the State concerned."<sup>44)</sup> In flag of convenience countries, there are Panama which keeps the largest merchant fleet in the world under its flag, Liberia, Cyprus, Bahamas, Malta, St Vincent and the Marshall Islands.<sup>45)</sup>

Here, it is worth finding out what the characteristics of flags of convenience are. According to the Rochdale Report in 1970, "it is not easy to provide a simple definition of FOC which effectively encompasses their significance and characteristics."<sup>46)</sup> The Rochdale Report, which is quite helpful, defined six criteria of FOC as follows:

" i ) The country of registry allows ownership and/or control of its merchant vessels by non citizens.

ii) Access to the registry is easy; a ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted.

iii) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given.

iv) The country of registry is a small power with no national requirement under any foreseeable circumstances

for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments.

v) Manning of ships by non nationals is freely permitted.

vi) The country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulations; nor has the country even the wish to control the companies themselves."

The Rochdale Report said that "one or more of these features may be observable in the policies or circumstances of many countries; it is only for FOC countries that all apply and it is only they which effectively have no possibility of imposing taxation in the future."<sup>47)</sup>

One writer states that the definition on a State granting 'flags of convenience' of the Rochdale Report is too restrictive in that re flagging in developed States, which they do in favour of political expediency, is not contemplated.<sup>48)</sup> He goes on to say that developed countries consider FOC as a 'third world phenomenon'.<sup>49)</sup> On the other hand, it is argued that there is no single case that totally harmonizes with all the Rochdale criteria and not all the criteria have to apply for a flag of convenience.<sup>50)</sup> He maintains that many States propose financial and other advantages which are fairly similar to those of flags of convenience but to a different degree and especially with the potential of an effective enforcement and control in the future.<sup>51)</sup> Therefore, it is difficult to accept the contention that FOC is a 'third world phenomenon'.

#### IV. The Problems and Weaknesses of Flag State Jurisdiction

It is said that the problem with flag State implementation is that some countries lack the expertise, experience and resources necessary to do this properly. In this section the two aspects of the problem of flag State jurisdiction will be considered. The first one is the limitation of flag State jurisdiction and the second is problems caused by flags of convenience.

41) *Ibid.*

42) They have been called at times flags of necessity, free flag, flags of opportunity, easy registry, runaway flags, piratical flags, facilitating flags, shadow flags, cheap flags, flags of accommodation, safe harbours, etc.; in recent years the writers have used the terms such as flags of convenience(FOC) or open registry(OR) very frequently. See G.Kasoulides, *Port State Control and Jurisdiction Evolution of the Port State Control Regime*(Dordrecht, Nijhoff), 1993, p.78.

43) H.E. Anderson, *supra* note 5, p. 157

44) R. R. Churchill and A.V. Lowe, *supra* note 2, p.258.

45) *Ibid.*, pp.258 259.

46) Committee of Inquiry into Shipping: Report, London, HMSO 1970, Cmnd 4337, para. 183(hereinafter the Rodale Report), in G.Kasoulides, *op. cit.*

47) *Rodale Report, op. cit.*, p.183. *Emphasis added* in G.Kasoulides *op. cit.*

48) H.E. Anderson *supra* note 5, p.158.

49) *Ibid.*

50) G.Kasoulides, *op. cit.* p.79.

51) *Ibid.*

## A. The Limitation of Flag State Jurisdiction

It is clear that flag State jurisdiction is, in itself, an inevitable regime because, as is mentioned earlier, on the high seas ships should be subject to the authority of a State to maintain public order. In addition, it is reasonable that a flag State has sovereignty over a ship flying its flag because the ship bears the nationality of the flag State. In recent years, however, the international community has recognised that flag States alone have limitations for meeting a greater environmental consciousness.

One limitation that writers point out is that a flag State may not properly exercise enforcement jurisdiction over its ship in another State's territorial sea or internal waters because taking any enforcement action could encroach on the coastal State's sovereignty.<sup>52)</sup> It is definitely a corollary of the 'territoriality principle'. This 'territoriality principle' means that States have legislative and enforcement jurisdiction over activities that occur within their territory. This gives the ground of the port State's or coastal State's ability to exercise its right against foreign ships where the infringement of the law occurs while such ships are in port, in the territorial sea, or in the EEZ of the port State or coastal State.<sup>53)</sup>

Another limitation, mentioned earlier, which Bodansky points out, is that while discussing flag State jurisdiction, the question is not its permissibility but rather its adequacy.<sup>54)</sup> He maintains that writers state that because incidents on the high seas or in another State's waters commonly do not affect the flag State, the flag State has little motivation to enact rules and regulations to prevent incidents including pollution discharges or exercise enforcement jurisdiction adequately.<sup>55)</sup>

## B. Problems Resulting from Flags of Convenience States

### 1. Problems related to Safety

The main flag of convenience States are parties to the major international safety conventions. However, it is clear that most flag of convenience States, if not all, do not enforce these standards and that many ships under flag of convenience States are substandard and hazardous.<sup>56)</sup> That

is because flag of convenience States are often unwilling or unable to inspect and control effectively. For the past thirty years, many of the ships registered in flags of convenience have been involved in the major maritime incidents.<sup>57)</sup> Some of the most calamitous incidents which are concerned with ships under flags of convenience are M/V Torrey Canyon(1968), M/V Argo Merchant(1976) and M/V Amoco Cadiz(1978).<sup>58)</sup> The reasons for these incidents are a failure to fulfil safety regulations and cheap, untrained labour. One writer points out that the casualty records of flags of convenience fleets show the casualty rate of flags of convenience fleet is much higher than for normal registry fleets.<sup>59)</sup> He goes on to say that Panamanian flagged ships mark the most reported deficiencies in certification, safety, pollution and operation of all flag States.<sup>60)</sup>

First of all, the biggest problem is that most flag of convenience States tend not to observe internationally accepted rules and regulations related to safety. In 1981, UNCTAD made a report expressing ten reasons why flag of convenience States tend to observe safety standards less severely than closed registry States.<sup>61)</sup> The reasons are as follows:

(1) Real owners are not readily identifiable...and are therefore in a good position to take risks by comparison with owners in normal registries who are living under the eyes of a maritime administration;

(2) Real owners can change their identities by manipulating brass plate companies and consequently avoid being identified as repeated substandard operators or risk takers;

(3) Since the master and other key shipboard personnel are not nationals of the flag State, they have no need or incentive to visit the flag State and can avoid legal action;

(4) Owners who reside outside the jurisdiction of the flag State can defy the flag State by refusing to testify at an inquiry by the flag State and avoid prosecution;

(5) Since open registry owners do not have the same interest in preserving good relations with the flag State,

52) D. Bodansky *supra* note 19, p.736.

53) T.L. McDorman, Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention, *Journal of Maritime Law and Commerce* Vol. 28 no. 2, 1997, p. 313.

54) *Ibid.*, p.737.

55) *Ibid.*

56) R. R. Churchill and A.V. Lowe *supra* note 2, p.259;

57) Bill Shaw et al., The Global Environment: A Proposal to Eliminate Marine Pollution, 27 *Nat. Resources J.*, 1987, pp. 160-163, in H.E. Anderson, *supra* note 5, p.162.

58) D. Matlin, Note, Re-evaluating the Status of Flags of Convenience Under International Law, 23 *Vand. J. Transnational La* 1991, p 1053, in H.E. Anderson, *op. cit.*

59) Z.Oya Ozcayir, *supra* note 3, p.28.

60) *Ibid.*, p. 29.

61) H.E. Anderson *op. cit.*, p.163.

they do not feel the need to co operate with inspectors of the flag State;

(6) Open registry shipping lacks the union structure which is so essential to the application of safety and social standards in the countries of normal registry; namely, a national trade union of the flag State representing basically the interests of national seamen on board vessels owned by owners who have economic links with the flag State;

(7) Open registry owners are in a better position to put pressure on the masters and officers to take risks, since there is no really appropriate government to which shipboard personnel can complain;

(8) Port State control is weaker because the port State can only report substandard vessels and practice to a flag State which has no real control over the owner;

(9) Owners can suppress any signs of militancy among crews by virtue of their freedom to change nationalities of crews at whim; [and]

(10) Enforcement of standards is basically inconsistent with the operation of a registry with the sole aim of making a profit.<sup>62)</sup>

In accordance with these reasons, UNCTAD believes that non compliance of safety standard is not only customary in flag of convenience States, but also that this non enforcement is because of the lack of a 'genuine link' between the ships and the flags of convenience State. That is the main rationale why UNCTAD adopted the UNCCRS in 1986, as is mentioned earlier.

With regard to the statement of UNCTAD, International Commission on Shipping (ICONS) report says that the principal concerns about flags of convenience are:

1) The lack of a maritime legal and administrative infrastructure and/or sufficient qualified persons to effectively monitor and enforce compliance with international standards;

2) The lack of a substantial connection between the vessel and the flag makes it impossible for a flag State administration to exercise effective control through fines or other penalties;

3) Excessive secrecy in protecting the identity of beneficial owners limits the ability of flags States, port States, seafarers and others to seek redress in the event of incidents or disputes;

4) Avoidance of relevant labour and social security provisions and denial of human rights; and

5) Lack of appropriate procedures to prevent "flag

62) *Ibid.*, p.164.

hopping" before deficiencies in ship operations are addressed<sup>63)</sup>

These concerns about flags of convenience provided by the ICONS report are consistent with the opinion of the writer and quite condensable.

## 2. Labour problems

As is mentioned above, it is true that cheap, untrained labour is another reason for the major incidents related to ships under flags of convenience. Organised labour opposition to flags of convenience started in 1930s after U.S. ships transferred to the Panamanian and Honduras flags.<sup>64)</sup> The international Transport Workers' Federation (ITF) adopted a resolution where it opposed ships transferred to Panamanian flag in 1948.<sup>65)</sup> In its Congress of 1958, ITF decided to oppose 'flags of convenience' ships. Moreover, it forced the international community to take actions on a genuine link standard and to protect seafarers from exploitation.<sup>66)</sup> With regard to these actions, one writer argues that the aims of ITF are exclusive in that if a genuine link requirement were enforced, many seafarers from developing States would not be exploited but be unemployed.<sup>67)</sup>

According to Anderson, what the ITF boycott has primarily achieved is that shipowners flying flags of convenience become signatories to agreements that they will follow the ITF wage determination and other protective measures.<sup>68)</sup> There is no doubt that in recent years many ships of flags of convenience encompassed by those agreements have flagged out quickly.

Anderson argues that the labour dispute between the ITF and shipowners from developed States is a symptom of "how the dependent economies of the developing States can be affected and determined by social, economic and political factors of the industrialized States."<sup>69)</sup>

## V. Conclusion

Over the last several decades, flag State control has become very much inappropriate, and the international

63) International Commission on Shipping Inquiry into Ship Safety, *Ships, Slaves and Competitio*, [http://www.icons.org.au/images/ICONS\\_full\\_report.pdf](http://www.icons.org.au/images/ICONS_full_report.pdf) (accessed on 23rd November 2004), p. 90.

64) Z.Oya Ozcayir, *supra note 3*, p.3.

65) *Ibid.*

66) H.E. Anderson, *op. cit.*, p.166.

67) *Ibid.*

68) *Ibid.*

69) *Ibid.*

community has had to request port States or coastal States to exercise jurisdiction in their territorial sea or in their own waters over ships not complying with internationally accepted rules and regulations. In the 1970s and 1980s, a number of ships turned to flags of convenience in order to circumvent complex regulations and to obtain economic advantages.

Most flags of convenience States, except Liberia, have lax enforcement rules and regulations to oversee and control their ships under their flags. The developed countries and international community have attempted to control flags of convenience and make them less competitive for the past years. It seems to be difficult to abolish flags of convenience but it is possible to urge flag of convenience States to ratify and observe the major international conventions. This should be done by the International Maritime Organisation.

As is mentioned above, port State jurisdiction has been stressed very much more than flag State jurisdiction in recent years because of the inadequacy of flag State jurisdiction. It is true that port State jurisdiction and control can effectively complement the limitation and insufficiency that flag State jurisdiction bears. However, it is clear that the primary responsibility to ensure that ships comply with national and applicable international law resides in flag States.

It is obviously required that both flag States and port States should cooperate closely so as to enhance the safety of ships and protect the marine environment.

### Bibliography

- [1] H.E. Anderson, 'The nationality of ships and flags of convenience: economics, politics, and alternatives', 21 *Tulane Maritime Law Journal* (1996).
- [2] D. Bell, 'Port State control v. flag State control', 17 *Marine Policy* (1993).
- [3] D. Bodansky, 'Protecting the marine environment from vessel source pollution: UNCLOS and beyond', 18 *Ecology Law Quarterly* (1991).
- [4] R. Canty, 'Limits of Coast Guard Authority to board foreign flag vessel on the high seas', 23 *Tulane Maritime Law Journal* (1998).
- [5] R. Carlisle, *Sovereignty for Sale : The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (Annapolis, Md. : Naval Institute Press), 1981.
- [6] R. R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd ed. (Manchester, Manchester University Press), 1999.
- [7] E. Duruigbo, 'Reforming the international law and policy on marine oil pollution', 31 *Journal of Maritime Law and Commerce* (2000).
- [8] S. Gehan, 'United States v. Royal Caribbean Cruises, Ltd.: use of federal 'False Statement Act' to extend jurisdiction over polluting incidents into territorial seas of foreign States', 7 *Ocean and Coastal Law Journal* (2001).
- [9] J. Hare, 'Port State Control: strong medicine to cure a sick industry', 26 *Georgia Journal of International and Comparative Law* (1997).
- [10] C. Hill, *Maritime Law* 5th ed.(London, LLP), 1998.
- [11] H. Honka, 'The classification system and its problems with special reference to the liability of classification societies', 19 *Tulane Maritime Law Journal* (1994).
- [12] G. Kasoulides, *Port State Control and Jurisdiction Evolution of the Port State Control Regime* (Dordrecht, Nijhoff), 1993.
- [13] M.L. McConnell, "'... Darkening Confusion Mounted Upon Darkening Confusion": The Search for the Elusive Genuine Link', 16 *Journal of Maritime Law and Commerce* (1985).
- [14] "'Business as usual": an evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships', 18 *Journal of Maritime Law and Commerce* (1985).
- [15] T.L. McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention', 28 *Journal of Maritime Law and Commerce* (1997).
- [16] A. Odeke, 'Port State Control and UK Law', 28 *Journal of Maritime Law and Commerce* (1997).
- [17] Z.Oya Ozcayir, *Port State Control* (London, LLP.), 2001.
- [18] N.P. Ready, *Ship Registration: Law and Practice* (London, LLP.), 2002.
- [19] M.N. Shaw, *International Law* Fifth ed.(Cambridge, Cambridge University Press), 2003.
- [20] *United Nations Convention on the Law of the Sea 1982 a Commentary* vol. 4 M.H Nordquist(ed. in chief) (Dordrecht, Martinus Nijhoff Publishers), 1991.
- [21] M.J. Wing, 'Rethinking the easy way out: flags of convenience in the post September 11th era', 28 *Tulane Maritime Law Journal* (2003).
- [22] *International Commission on Shipping Inquiry into Ship Safety, Ships, Slaves and Competition,*



[http://www.icons.org.au/images/ICONS\\_full\\_report.pdf](http://www.icons.org.au/images/ICONS_full_report.pdf)

(accessed at 23 November 2004)