

A CRITICAL ANALYSIS OF
FLAG STATE DUTIES AS LAID
DOWN UNDER ARTICLE 94 OF
UNCLOS

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The basics to begin with....

- The concept of flag state came into being through the evolution of the customary use of the flag as a means of identification and symbol of nation States when ships belonging to a particular sovereign State were plying the seas and started moving further on the high seas
- Freedom of navigation and the right of flag States to sail ships on the high seas are enshrined under customary law and these customary rules have been codified under the 1958 High Seas Convention and later under the 1982 United Nations Convention on the Law of the Sea – Articles 87 and 90

The 2 sides of the coin.....

- Flag States have been given the right to sail ships on the high seas and the right to fix conditions for registering ships under their flag and giving their nationality to these ships, *vide* Art. 90 and 91 of UNCLOS
- As a counterpart, as per Art. 94 UNCLOS, the flag State is under the duty to exercise effective jurisdiction and control over administrative, technical and social matters on their ships on the high seas

THE "10 COMMANDMENTS" FOR FLAG STATES

Article 94(2) expands on the obligations that the flag State needs to fulfill when allowing ships to fly its flag

- Maintain register of ships containing particulars of ships flying its flag – Art. 94(2)(a)
- Assume jurisdiction over the ship, the master, officers and crew - Art. 94(2)(b)
- Take measures regarding safety of navigation and seaworthiness of the ship, in particular with respect to:
 - construction and equipment of the ship -Art. 94(3)(a)
 - radio communications and prevention of collision -Art. 94(3)(c)
 - the pre-registration and post registration surveys of ships by approved surveyors - Art. 94(4)(a)
 - the presence on board of appropriate nautical charts and publications - Art. 94(4)(a)

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THE "10 COMMANDMENTS" FOR FLAG STATES

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- labor conditions and safe manning of the ship -Art. 94(3)(b)
- training and certification of officers and crew -Art. 94(4)(b)
- Ensure that the measures taken for exercising jurisdiction and control over the ships plying its flag conform to international rules and practices –Art. 94(5)
- Carry out an investigation whenever another state reports inadequate exercise of control or jurisdiction over any ship flying its flag and take any remedial action where appropriate – Art. 94(6)
- Carry out or cooperate with other States in the carrying out of investigations in any case of marine casualty or incident of navigation – Art 94(7)
- Flag State duties, with respect to ships registered under a particular flag, as listed under Article 94 are not meant to be exhaustive. They are complemented by the international laws and regulations adopted by the relevant international organizations (IMO and ILO)

THE "10 COMMANDMENTS" FOR FLAG STATES

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- Some duties with respect to anti pollution measures are also assigned to flag States under UNCLOS
- Under Article 217 of UNCLOS the responsibility of the flag State to enforce measures and adopt laws and regulations aiming at prevention, reduction and control of pollution and ensure compliance of those vessels flying its flag with marine pollution laws.
- The flag State is also under the obligation to investigate any case where any ship registered under its flag violates any international anti pollution laws

OOPS! THERE ARE CRACKS IN THE HULL.....

- Flag State implementation of its duties is unfortunately not effectively carried out; most flag States and especially those which have been termed as open registers or flags of convenience adopt a very lax attitude with respect to their international obligations under UNCLOS and other relevant international maritime conventions
- The implications are serious: given that flag States have the exclusive jurisdiction on ships flying their flag on the high seas, in the event of improper or inadequate exercise of its duties by the flag States, safety and security are jeopardized
- Measures have been and are still being put in place by the international community in order to make flag States shoulder their responsibilities. However, there are still certain loopholes in the legal international framework, some of which can even be said to have been deliberately left out...

CLASSIFICATION SOCIETIES : THE ALTER EGO OF FLAG STATES

- Classification Societies are private institutions in the shipping industry which establish and maintain standards for the construction and classification of ships and offshore structures; supervise that construction is according to these standards; and carry out regular surveys of ships in service to ensure the compliance with these standards.
- In addition to performing surveys for ship owners, Classification Societies also offer their services to Governments to perform statutory surveys on ships registered under their flags on their behalf

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- PROBLEM :

- more and more flag States are delegating most of their technical duties to these Societies
- there is a judge and party situation which has developed
- Classification Societies have also been criticized for lowering their standards to keep up with competition and attract more clients who engage into "class hopping"

CURRENT REMEDIES

- On a regional basis :
 - coastal States can exercise their rights and jurisdiction as per, inter alia, Articles 56 and 73 of UNCLOS to prevent any infringement of its laws relating to the EEZ by ships sailing into its waters
 - port States can exercise jurisdiction on those vessels calling at their ports through the port state control mechanism – “safety net” to catch substandard ships
 - regional PSC Memorandum of Understandings developed for better inspection and control of ships

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On the international plane :

-IMO has come up with the ISM Code, STCW Code, the ISPS Code and now VIMSAS

-ILO has developed the Maritime Labor Convention 2006 with innovative provisions regarding certification of labor conditions on board ships

THERE IS STILL A HOLE IN THE NET...

- All measures being taken at the regional or international levels are all geared towards tackling the improper and/or inadequate exercise of flag state duties on an *a posteriori* basis
- There is a general reluctance to question the discretion of flag States to set their own individual standards for registering ships and attempts made to fix some conditions for ship registration have so far failed (the famous 1986 UN Convention on Conditions for Ship Registration, is THE example most often cited)
- The legal framework in place for monitoring and ensuring effective flag state implementation is not complete

IMPLICATIONS

- After the 9/11 events global concerns have been expressed for security issues and the fear of shipping being either used as an instrument or being the target of terrorists attacks has been growing throughout the last years
- Not enough attention is given to the importance of ensuring ownership identification and accountability
- Most ship registers allow the registration of ships without requiring the identification of the beneficial owners. This is very often hidden under the veil of incorporation and the use of corporate structures spread over a number of jurisdictions

SO HOW DO WE DEAL WITH THIS?????

EUREKA!!!!

- Revive the “genuine link” concept:
 - Article 91 of UNCLOS mentions that there needs to be a genuine and visible link between the ship and the State
 - flag States to ensure that beneficial ownership and management are properly identified and constantly monitored with the lifting of the corporate veil
 - put into place the customer due diligence principle and require the financial and management institutions dealing with the beneficial owners to keep records of all transactions and all changes in ownership
- Those flag States champions of anonymity need to review their shipping policy; they could instead “advertise” their flag for its confidentiality, while at the same time having in place all the legal structure for gathering information on the owners and keeping it at hand as and when the need for it arises

HAPPY ENDING

- Instruments in place are all striving at bringing more effective flag State implementation of its duties
- What is needed is a legal basis for pressurizing States to require the establishment of a visible connection with the ship and its owner
- This would help in completing the framework for enhancing flag State implementation of its duties
- Safe and secure shipping: this is what we want

A blue-tinted photograph of a vast ocean under a cloudy sky. The text "THANK YOU!" is centered in white, bold, sans-serif font.

THANK YOU!