

**A CRITICAL ANALYSIS OF FLAG STATE DUTIES AS
LAI D DOWN UNDER ARTICLE 94 OF THE 1982
UNITED NATIONS CONVENTION ON THE LAW OF
THE SEA**

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Abstract

Throughout the history of the law of the sea, the question of jurisdiction over ships plying the seas has been the subject of much debate and controversy. The evolution of flag State jurisdiction is undeniably linked to the developments that have been brought to the concepts of nationality, ship registration, safety and also to the efforts of the international community through international organisations to set rules and standards to govern the operation of ships. The discretion of flag States to fix the conditions for ship registration and the abuse that sometimes has been associated to it is constantly being discussed at the international level, the more so as nowadays more and more emphasis is being put on maritime security. Thus, from the 1958 Convention on the High Seas to the United Nations Convention on the Law of The Sea of 1982 flag State duties in relation to ships registered under its flag have been identified and codified. But as much as it is more and more recognised that the effective enforcement and implementation of flag State duties depends much on the flag State itself as much as on other actors of the maritime world, which are the international organisations such as IMO and ILO, port and coastal States and also Classification Societies, it is also time to accept the fact that there is also the need for the “genuine link” between the flag State, the ship and the owner to be visibly established. The objective of this research paper is therefore to analyse flag State duties as laid down under the 1982 United Nations Convention on the Law of the Sea and the effectiveness of their implementation and enforcement and also the steps being taken, and that should be taken, at the international level to give further impetus and credibility to flag State control. At first instance, the historical development of flag State duties will be retraced, then ancillary issues associated with flag State duties examined, and finally some propositions will be made in addition to the assessment of the current international development in this field.

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Acronyms

A.C.	Appeal Case
COLREG	Convention on the International Regulations for Preventing Collisions at Sea(1972)
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization
FOC	Flag of Convenience
FSI	Flag State Implementation
HSC	High Seas Convention
ILC	International Law Commission
ILO	International Labour Organisation
IMO	International Maritime Organisation
ISPS	International Ship and Port Facility Code
ITF	International Workers' Transport Federation
IMCO	Inter-Governmental Maritime Consultative Organization
ISM	International Safety Management Code
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal Unreported and Unregulated
LL	Load Lines Convention
MARPOL	International Convention for the Prevention of Pollution From Ships (1973) as modified by the Protocol of 1978
MLC	Maritime Labour Convention
PSC	Port State Control
OR	Open Registries
RO	Recognised Organisation
SOLAS	International Convention for the Safety of Life at Sea (1974)
STCW	The International Convention on Standards of Training, Certification and Watch keeping for Seafarers 78/95
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea

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1 INTRODUCTION

1.1 Background and Context

One cannot venture into analysing and getting a good grasp of the duties assigned to the flag State under the United Nations Convention on the Law of the Sea 1982 – UNCLOS - without going through the historical development of the concepts associated with flag State duties, albeit briefly.

The introduction to this research paper will therefore endeavour to brush upon the evolution of the concept of flag State through the history of maritime law and on the issues which are ancillary to it, particularly those which are related to the object of this research paper; that is freedom of the high seas, nationality of ships, the registration process, the “genuine link” concept and flag State jurisdiction. Finally, the position adopted by the international community on these issues will also be outlined.

The implications of all these concepts will then be discussed in the successive chapters so as to show the close inter relationship among them and their respective importance with respect to the subject matter of this research paper better understood.

1.2 Development of the flag State concept

The expression “flag State” is made up of two words, each with a rich history, and having been juxtaposed to denote another yet important concept. The beginning of the use of flag can be traced back to around 1000 BC, when the Egyptians first used versions of the flag for identification purpose¹. This usage of the flag expanded to the other civilisations and eventually came to be used on ships also with the same motive of identification, and since the middle ages has been used as a symbol of a nation, a country². It gained importance as vessels began distancing more and more from their homeport. Flying the flag has, out of practice, become part and parcel of customary law. In the *Asya Case* (1948) A.C. 351, it was ruled that a ship not sailing under the flag of

¹ <http://www.worldflags101.com>

² <http://www.en.wikipedia.org/wiki/Flag>

any State had no right to freedom of navigation³. The identification mark of the flag therefore symbolises the legal regime of the ship on the seas and has become a necessity for the maintenance of public order, be it on the high seas or in the territorial waters of coastal maritime States. The flag determines the point of responsibility and how and where a right can be enforced in relation to that ship⁴.

Eventually, the flag gained its recognition with the codification of the usage under first the 1958 High Seas Convention and ultimately under UNCLOS 1982.

Article 4 of the 1958 High Seas Convention it is states that:

Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Article 5 of the same Convention further stipulates, *inter alia* that:

Each State shall fix the conditions [...] for the right to fly its flag...

The corresponding provisions of the above Articles are laid down respectively under articles 90 and 91 of UNCLOS 1982.

As for the definition of State, or Statehood, it is argued that one of the earliest definitions bearing legal connotation was given by Vitoria in *De Indis de Iure Belli Relectiones*⁵:

A perfect State or community... is one which is complete in itself, that is, which is not a part of a community, but has its own laws and its own council and its own magistrates, [...]

³ Naim Molvan v. Attorney General for Palestine (The "Asya"), 81 Ll L Rep 277, United Kingdom: Judicial Committee of the Privy Council, 20 April 1948, available at: <http://www.unhcr.org/refworld/docid/3ae6b6544.html>

⁴ Nagendra Singh, Maritime Flag and International Law, Master Memorial Lecture 1977, Sijhoff Leyden 1978, p. 3

⁵ Publ. 1696, ed. Simon, James Crawford, "The Creation of States in International Law", 2nd Edition, Clarendon Press, Oxford p.7

The origins of the law of nations and the birth of the concept of Statehood can be traced to the treaty of Westphalia (1648)⁶, which ended the Thirty Years' War. Before that the law of nations was principally based on the European State system, marked by religious antagonism and conflicts. The Treaty of Westphalia was adopted by the European States in an attempt by the European powers to elaborate a framework that would recognise their right to function as independent and sovereign entities having undisputed political control, with the right to uphold freedom of religion, and to reach agreement between neighbouring States on territorial boundaries.⁷ The Treaty of Westphalia is thus the precursor to the system of nation States and the development of the international system of law and relations between States, European and non-European States.

Thus, ships plying the seas used the flag to identify themselves to the sovereign States to which they belonged and the States whose ships were navigating the seas were referred to as flag States. While all these developments were taking place on the land territories another historical debate was being conducted during practically the same period on the status of the seas – *the mare liberum versus mare clausum* debate.

Ruling the seas had always been a wish cherished by the great maritime nations and this wish was mainly driven by economic interests. In order to attack the Portuguese monopolistic rule over the Indian Ocean and the very lucrative spice trade the Dutch came forward with the doctrine of the freedom of the seas through a Dutch lawyer, Grotius, in his well known 1609 publication *Mare Liberum*. According to Grotius, things that cannot be seized nor be subject to enclosure may not become property, they are common to all, and their usage pertains to the entire human race⁸. Through the Grotian

⁶ Ibid. p.9

⁷ An analysis of flag State responsibility from a historical perspective: Delegation or Derogation? Mansell, John Norman Keith, University of Wollongong 2007, <http://ro.uow.edu.au/theses/742>

⁸ Law of the Sea, Oceanic Resources, Jones p.9

view, therefore, navigation is free to all persons. This notion of the freedom of the open seas thus gained recognition, this despite the idea set forward by Selden in his *Mare Clausum* and propounded by the British at a certain moment in order to protect their exclusive dominion of the seas. The doctrine of *Mare Liberum* ultimately came to be seen as inevitable and of prime importance for the progress of trade and navigation and was included in the customs of nations and principles of international law.

The same British sea power which had at one point of time rejected the notion of the freedom of the seas, in fact, used its maritime superiority to champion the issue and soon was rallied by the other maritime powers to dominate the seas as freedom was equated with laissez faire and this laissez faire played in their advantage.

Another important notion that also developed in parallel was the recognition of the coastal State's exclusive jurisdiction and control on its territorial sea for the protection of its security and other interests⁹, although uniformity of views as to the breadth of the territorial sea was yet to be achieved.

The international community gradually recognised the importance of codifying these concepts of State practice customary international law of the sea and thus as from the 19th century there were several attempts made at codifying the law. Such attempts gained momentum with the institution of the International Law Commission (thereafter: ILC) under the UN Charter as from 1947. The ILC held its first session in 1949, having as one of its mandates the codification of the law of the sea¹⁰. The invaluable work of the ILC on the law of the sea aspect thus set the basis for the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958¹¹. One of the outcomes of UNCLOS I was the adoption of the High Seas Convention 1958 whereby the "rules of the road" with respect to, *inter alia* nationality and registration of ships, the rights and obligations of the flag States over ships registered under its flag, were first laid down. These issues would be

⁹ Origin and Development of the Law of the Sea, R.P. Anand 1983, Martinus Nijhoff p. 137

¹⁰ Sir Arthur Watts, The International Law Commission 1949-1998 Vol.I,pg 9

¹¹ The Law of the Sea, 3rd ed. Churchill and Lowe

revisited throughout the discussions held under UNCLOS III up to the final provisions as currently laid down under the 1982 UNCLOS.

The contents of both the 1958 High Seas Convention (thereafter: 1958 HSC) and those of UNCLOS 1982 with respect to the above mentioned issues will hereunder be examined.

1.3 Nationality and development of the registration process for ships

Section A: Right of navigation and nationality of ships

According to Article 90 of 1982 UNCLOS which is the same in substance as Article 4 of the 1958 HSC:

Every State, whether coastal or land locked, has the right to sail ships flying its flag on the high seas.

These corresponding articles codify the customary right of navigation open to all States. Moreover, it can be said that this freedom of navigation is bestowed upon States, as subjects of international law and enjoyed through them by ships to which the right to fly their flag has been accorded and which henceforth bear the nationality of the flag State.

Flowing from this right of flag States to sail ships on the high seas is the prerogative of the flag States to exercise certain rights and duties upon those ships. Indeed, as the high seas are not under the jurisdiction of any State, if public order is to be preserved the right to navigate there must be restricted to those vessels which, through their link with the flag State, are subjected to its jurisdiction and can thus be required to comply with the network of customary and conventional rules which make up the public order of the oceans. As the ILC explained,

*The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State*¹²

A *fortiori* it can be said that vessels which are without nationality do not have the right to sail on the seas. This was put forward by the United States Court of Appeals in *US v Marino-Garcia (1982)*¹³

Vessels without nationality are international pariahs. They have no internationally recognised right to navigate freely on the high seas...Moreover flagless vessels are frequently not subject to the laws of a flag State. As such they represent "floating sanctuaries from authority" and constitute a potential threat to the order and stability of navigation on the high seas.

Hence, the flag State is sovereign in its decision to grant its nationality to ships. In *Lauritzen v Larsen*¹⁴, the US Supreme Court offers a comprehensive summary of the law of the flag:

Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering State.

In the *Saiga (no.2) Case*¹⁵ the International Tribunal for the Law of the Sea (hereafter: ITLOS) reiterated the sovereignty of the flag State in setting the conditions for registering ships and allowing them to fly its flag. As concluded by ITLOS in this case,

¹² "Report of the International Law Commission to the General Assembly", Yearbook of the International Law Commission 1956, Vol. II, p. 253, Commentary on draft art. 30 on status of ships, M.H. Nordquist (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary

¹³ 679 F.2d 1373, 1985 AMC 1815 (11th Cir. 1982), cited in "The meaning of the Genuine Link Requirement in Relation to the Nationality of Ships" by R. Churchill, Oct. 2000 at www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct 2000

¹⁴ Cited by Justice John Middleton in "Ship Registration and the Role of the Flag" p. 8, 345 US at 584, 1953 AMC at 1220

¹⁵ http://www.un.org/Depts/los/Judg_E.htm

[...] determination of the criteria and establishment of procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.

However, this right is not an absolute one. Indeed, this right to permit ships to fly under its flag has been qualified, in order to counter any laissez faire attitude on the part of States. As stated under Article 5 of the 1958 HSC:

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.

Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

In its comments on what was to become Article 5 of the 1958 HSC, the ILC noted¹⁶:

Each State lays down the conditions on which ships may fly its flag. Obviously the State enjoys complete liberty in the case of ships owned by it or ships which are the property of a nationalised company. With regard to other ships, the State must accept certain restrictions. As in the case of the grant of nationality to persons, national legislation must not depart too far from the principles adopted by the majority of States, which may be regarded as forming part of international law. Only on that condition will the freedom granted to States not give rise to abuse and to friction with other States. With regard to the national element required for permission to fly the flag, a great many systems are possible, but there must be a minimum national element.

Thus, although the drafters of Article 5 thought it better to leave it to each State to impose its own conditions for granting the right to fly its flag, that is, its own criteria for registering ships, the flag States are nevertheless called upon to ensure that there is a genuine link between their registry and the ship. The issue of the genuine link and its close ties with nationality and registration concepts will be expanded further in chapter 3.

¹⁶ Yearbook of the International Law Commission, 1956 Vol. II at 253, 278

Article 91 of UNCLOS 1982 is identical to Article 5 of the 1958 HSC except for the omission of the phrase “[...] in particular the State must exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The omitted phrase now is to be found under article 94(1) of UNCLOS 1982.

In the light of the above it can be said that each and every ship plying the seas needs to bear the nationality of a State which, although having the discretion to set criteria for registering ships, must nevertheless have some minimum criteria in place to assess whether a particular vessel can sail under its flag.

Section B: Conditions for ships to fly the flag of a State

States taking the decision to entitle ships to fly its flag must therefore have preset conditions; more exactly, domestic legislation in place to permit same. Such legal requirements generally relate *inter alia* to the nationality of owners and/or charterers of the ship, the age of the ship, the nationality of the crew, manning requirements, registration fees.

Once all the legal domestic requirements have been duly fulfilled the flag State is under the duty, in accordance with Article 5 of the 1958 HSC and Article 91 of UNCLOS 1982, to issue to the ship such documents attesting of the right of the ship to fly its flag. The main document attesting nationality and registration is generally the ship’s Certificate of Registry and it normally contains details such as, for instance, the name of the ship, its type and tonnage, the official IMO number allocated to it, the name of the port of registry, its trading area, particulars of the registered owner and/or of the bareboat charterer, if any, and any limitation as to the period of registration, that is, whether temporary or permanent.

Other documents which the flag State may also issue together with the certificate of registry are the statutory safety certificates.

Thus it can be said that in addition to the flag, registration papers are another symbol of nationality. As commented by the ILC, “[p]aragraph 2 has been added so that the nationality can be proved in case of doubt”¹⁷ ; and as further commented by Meyers: “[t]he allocation [nationality] is thus cognisable through registration, through the documents and through the flag”¹⁸.

It is worth noting that every ship is to fly the flag of only one State at a time, in other words it cannot have double nationality, as expressly provided under Article 6 of the 1958 HSC and Article 92(2) of UNCLOS 1982. Thus, ships with double nationalities are, according to these two articles, to be assimilated to ships without nationality. In its commentary on the corresponding article of the 1958 HSC, the ILC noted that “[d]ouble nationality may give rise to serious abuse by a ship using one or another flag during the same voyage according to convenience.”¹⁹

This is not to be confused with bareboat chartering and parallel registration of ships whereby, for economic and operational convenience, ships suspend the use of their primary register and take up the flag of another State only for a limited period. In these cases ships fly the flag of one State at a time.

1.4 Exercise of flag State jurisdiction

Once the ship is registered, it has on board the official documents attesting nationality and it is duly flying the flag of the country in which it is registered, it can be said to be under the jurisdiction of that country and when the ship is on the high seas it is, according to Articles 6 and 92 of the 1958 HSC and UNCLOS 1982 respectively, under the

¹⁷ The International Law Commission, 1949-1998 Vol.1 The Treaties, sir Arthur Watts, p.61

¹⁸ The Nationality of Ships ,Martinus Nijhoff/The Hague/1967 p.140

¹⁶ The International Law Commission, 1949-1998 Vol.1 The Treaties, sir Arthur Watts, p.62

¹⁹ Ibid.

exclusive jurisdiction of that State²⁰. This, save for instances expressly provided under these conventions or any other international treaty, including instances provided for by the 1958 HSC and the UNCLOS 1982 include *inter alia* piracy, slave trading and hot pursuit.

By “jurisdiction” it is meant that the flag State has the power to prescribe rules of conduct, to threaten sanctions and to enforce sanctions with regard to the ship users.²¹

Article 5(1) of the 1958 HSC and Article 94 of the UNCLOS 1982 respectively lay down that the State is to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”. Article 94 of UNCLOS 1982, although non exhaustive, is more prescriptive than the related provisions of the 1958 HSC as it lays down explicitly some of the administrative, social and technical duties to be fulfilled by States as part of flag State implementation. The extent, the ability and the effectiveness through which flag States discharge the duties laid down under Article 94, which are the core of this research paper, will be examined under the first chapter. It is also critical to note that not all flag States have the necessary means to discharge the duties laid down under UNCLOS 1982 on their own, and so they resort to Classification Societies. The role of these Classification Societies in assisting flag States to discharge their duties will also be fully evaluated under the first chapter.

Thus, although having navigated through much troubled waters throughout history, the law of the sea has successfully emerged into a coherent legal framework, with the biggest achievement being undoubtedly UNCLOS 1982, the unanimously proclaimed constitution of the oceans. But it should not be forgotten that UNCLOS 1982 is only the backbone, the flesh is composed of the numerous other international treaties which are already in the implementation stage and others which are currently in the pipeline. This is necessary because the law of the sea is a domain which is not static, it is ever changing and laws and norms have to be devised to adapt to the changing situations and to fill the legal vacuum in any specific field relating to the sea. Here it is important to note that

²⁰ In the Lotus Case the Permanent Court of International Justice Stated that “vessels on the high seas are subject to no authority except that of the State whose flag they are entitled to fly”, Nagendra Singh, Maritime Flag and International Law, Sitjthoff Leyden 1978 p.39, P.C.I.J. A 10 p.19

²¹ Meyers, The nationality of Ships, p.41

international organisations such as IMO and ILO are important actors striving to regulate the field, and although they have so far achieved a lot, the question has sometimes been put as to whether their actions are as effective as they should be.

The endeavour in this introduction has been to shed some light on the basic concepts relative to the research paper, that is the historical development of the *raison d'être* of exercise of flag State duties under Article 94 of UNCLOS1982. It would be difficult to attempt to analyse such duties without first identifying the ancillary issues which revolve around flag State duties. Thus the concept of flag State, nationality, registration and genuine link have been touched upon and the main actors on the maritime scene related to this subject matter have been identified. The objective now will be to broaden the thoughts on these issues for a better understanding of flag State duties.

2 THE DUTIES OF THE FLAG STATE

At the outset, it is vital to mention that the focus of this research paper is on the flag State duties laid down mainly under Article 94 of UNCLOS 1982, as it is a well acknowledged fact that the list of duties under this particular Article is not to be taken as exhaustive. Indeed, the responsibilities of the flag State are laid down under various other articles of UNCLOS 1982 as well as under several international maritime conventions.

Before analysing the extent and effectiveness of flag State enforcement of its obligations, it would be appropriate to consider these duties as laid down under Article 5(1) of the 1958 HSC and Article 94 of UNCLOS 1982. Those duties relating to prevention and control of marine pollution, as per Article 217 of UNCLOS 1982, will also be touched upon. When the flag State agrees to allow ships to fly its flag and thereby gives its nationality to such ships, it must also at the same time endorse the responsibility which is corollary to the prerogative of sailing ships on the high seas and having the exclusive jurisdiction on them. The flag State must demonstrate its connection with the ships – the genuine link – by exercising effective jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Indeed, when a State assumes legal authority over a ship by grant of its flag, the State also assumes a certain obligation to take measures to ensure that the vessel, viewed both as an instrument of navigation and a collective of ship-users, acts in a fashion consistent with international law. The “genuine link” formulation, whether seen as a condition to the attribution of nationality or as an independent, affirmative flag obligation, proceeds directly from this principle. If the flag State is to perform its international duties, it must possess and exercise effective jurisdiction and control over its vessels.²²

The examination of the duties of the flag State in this chapter will mainly be focused on 1982 UNCLOS as, under this Convention, the duties laid down under the 1958 HSC

²² Briand Smith, *State Responsibility and the Marine Environment*, The Rules of Decision, Clarendon Press, Oxford 1988, p.154

have been made more explicit. The implications of the provisions of Article 94 will be assessed and from this assessment the extent to which a flag State is in a position to fulfil its international obligations can be measured.

2.1 The duties laid down under Article 94 UNCLOS 1982

Article 94 of UNCLOS 1982 reads :

Duties of the flag State

1. *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
2. *In particular every State shall:*
 - (a) *maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and*
 - (b) *assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.*
3. *Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regards, inter alia, to :*
 - (a) *the construction, equipment and seaworthiness of ships;*
 - (b) *the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;*
 - (c) *the use of signals, the maintenance of communications and the prevention of collisions.*
4. *Such measures shall include those necessary to ensure :*
 - (a) *that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship*
 - (b) *that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;*
 - (c) *that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of*

collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.”

The provisions of Article 94 are based on those of the 1958 HSC. Paragraph 1 is based on the closing provision of Article 5(1) of the 1958 HSC, while paragraphs 3 and 5 are adapted from Article 10 of the 1958 HSC. During the discussions which were held under UNCLOS III, nine West European States submitted a working paper on the high seas setting out the rights and duties of flag States on the high seas.²³ The working paper proposed additions to the 1958 HSC and contained two relevant provisions. Introducing the working paper, the representative of France explained that it was

necessary to state precisely the obligations of the flag State since relevant articles of the Geneva Convention were incomplete.

According to him, the two relevant provisions, which were to become, after drafting changes at the level of the Drafting Committee of UNCLOS III, paragraphs 2, 4, 6 and 7 of Article 94,

²³ United Nations Convention on the Law of the Sea 1982, A Commentary, Nordquist, Vol III, p. 138

Made Article 5 of the Geneva Convention more explicit with respect to the responsibilities of the flag State.”²⁴

This working paper brought innovations, as it introduced the possibility of other States being able to request that the flag State exercise its jurisdiction and control and also proposed the idea of the flag State carrying out inquiries into marine casualties and incidents.

2.1.1 Paragraph 1: General Statement of the Duties

Under Article 94(1) the matters on which the flag State is to exercise its duties is made explicit, that is jurisdiction and control over administrative, technical and social matters. This requirement, also present under the 1958 HSC, was added to strengthen the concept of “genuine link” with regard to the nationality of a ship, by indicating matters over which the flag State should exercise its jurisdiction.

The United Nations Convention on Conditions for Registration of Ships 1986 (hereafter the 1986 Convention) amplifies the objective set out under paragraph 1. Article 1 of that convention prescribes that the flag State is to apply the provisions of that convention

[f]or the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of ship owners and operators as well as with regard to administrative, technical, economic and social matters[.]

The reference there to “economic” matters has no direct counterpart in Article 94, but given the comprehensive character of the obligations imposed on flag States generally throughout the convention, this slight widening of the purpose served by registration and of the duties of the flag State is compatible with the convention. The 1986 Convention

²⁴ Ibid. p.140

also insists that each flag State have a competent national maritime administration which ensures its ships comply with all applicable international rules and regulations.

Article 94(1) also complements Article 92(1) of UNCLOS 1982, to the effect that, on the high seas or in exceptional cases provided for in international treaties, a ship is subject to the exclusive jurisdiction and control of its flag State.

2.1.2 Paragraph 2: Maintain Register and Assume Jurisdiction over the ship and the crew

Under Article 94(2), specific duties are imposed on the flag State. One of them is to maintain a register of ships flying its flag. The other is to assume jurisdiction under its internal law in respect of administrative, technical and social matters, over each ship flying its flag and over its master, officers and crew.

Article 94(2)(a) is the principal statement regarding the duty of the flag State to maintain a register of ships. Beyond the requirement that the register should contain the names of the ships and “particulars”, no further requirements are prescribed in this provision. Although by virtue of Article 91 of UNCLOS 1982 each State is free to fix the conditions for the grant of its nationality, so long as it adheres to minimum accepted international standards²⁵ and that it is free to establish laws and regulations concerning registration of ships and the manner of registration, the 1986 Convention does set out in considerable detail the information that should be included in a register of ships. Thus, Article 11 of the 1986 Convention provides thus:

Article 11

Register of ships

²⁵ ILC on the corresponding 1956 draft article 29: “ As in the case of the grant of nationality to persons, national legislation on the subject must not depart too far from the principles adopted by the majority of States, which may be regarded as forming part of international law.”, The International Law Commission, 1949-1998 Vol.1 The Treaties, Sir Arthur Watts p.60

1. A State of registration shall establish a register of ships flying its flag, which register shall be maintained in a manner determined by that State and in conformity with the relevant provisions of this Convention. Ships entitled by the laws and regulations of a State to fly its flag shall be entered in this register in the name of the owner or owners or, where national laws and regulations so provide, the bareboat charterer.

2. Such register shall, inter alia , record the following:

(a) the name of the ship and the previous name and registry if any;

(b) the place or port of registration or home port and the official number or mark of identification of the ship;

(c) the international call sign of the ship, if assigned;

(d) the name of the builders, place of build and year of building of the ship;

(e) the description of the main technical characteristics of the ship;

(f) the name, address and, as appropriate, the nationality of the owner or of each of the owners;

and, unless recorded in another public document readily accessible to the Registrar in the flag State:

(g) the date of deletion or suspension of the previous registration of the ship;

(h) the name, address and, as appropriate, the nationality of the bareboat charterer, where national laws and regulations provide for the registration of ships bareboat chartered-in;

(i) the particulars of any mortgages or other similar charges upon the ship as stipulated by national laws and regulations.

3. Furthermore, such register should also record:

(a) if there is more than one owner, the proportion of the ship owned by each;

(b) the name, address and, as appropriate, the nationality of the operator, when the operator is not the owner or the bareboat charterer.

4. Before entering a ship in its register of ships a State should assure itself that the previous registration, if any, is deleted.

5. *In the case of a ship bareboat chartered-in a State should assure itself that right to fly the flag of the former flag State is suspended. Such registration shall be effected on production of evidence, indicating suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances.*

One important aspect of national shipping registration is ready public access to the register and its requirements. Details of the more efficient registers are increasingly becoming available from the office via the internet²⁶.

The register of ships need not include those ships “which are excluded from generally accepted international regulations on account of their small size,” *vide* Article 94 (2)(a) of UNCLOS 1982. In fact, a register of ships should include all ocean-going vessels but the possibility to exclude small vessels from the register was created to avoid imposing onerous requirements on small local vessels or pleasure boats which, because of their small size, would not normally be used outside coastal waters. For these small vessels, international regulations as well as the laws and regulations of the State of registry are applicable to them and to their activities.

The policy of the flag State on maritime matters generally determines the type of ship register entertained by the State. The ship register may be used as a vehicle of the shipping policy of the country. Indeed, traditional maritime nations being proponents of having national registers whereby the ships therein registered are managed, manned and owned by nationals will opt for the closed register, while those States endeavouring to attract foreign investment, to create a revenue stream and create maritime related economic activity in the country, may establish an open register for ships, which allows ships to be beneficially owned by foreigners and managed and manned by other nationalities as well. Finally, those traditional maritime countries that wish to stem the tide of flagging out by national ship owners to attractive open registers may adopt a

²⁶ These Internet sites provide a useful showcase of public access models being developed by some countries: [Australia<<http://www.amsa.gov.au>>] [Hong Kong <<http://www.info.gov.hk/mardep/register>>] and [Singapore<<http://www.mpa.gov.sg>>]

policy to establish a second register, which, while establishing a solid legal framework for ship registration with stringent rules governing shipping activities, at the same time also offers attractive incentives to its national ship owners encouraging them to retain their ships under the national flag.

However, most of those flag States operating ship registries fail most of the time to look behind the veil of incorporation of those companies and other legal persons which at face value are stated to be the registered owners of the ships. In the name of confidentiality and anonymity clauses, most flag States – especially open registers – are reluctant to question the identity of the beneficial owners of those vessels plying their flag.

Article 94(2)(b) requires the flag State to assume jurisdiction not only over ships flying its flag, but also over the master, officers and crew of such ships. The reference to “master” would tend to confirm that the drafters of the provisions of UNCLOS 1982 were more concerned with merchant shipping rather than fishing vessels, although the importance of Article 94 is now more and more recognised as a basis for exercising jurisdiction over the skipper, officers and crew of fishing vessels as well²⁷. Finally, it can also be argued *a fortiori*, that Article 94(2)(b) also applies to all persons on board a ship, legally, such as passengers on a passenger vessel, or unlawfully, as in the instance of stowaways.

Thus, by virtue of this paragraph, the flag State exercises exclusive jurisdiction over a ship of its registry in all parts of the sea within its national jurisdiction, and elsewhere in all parts of the sea which are beyond the jurisdiction of any other State. The jurisdiction is “in respect of administrative, technical and social matters concerning the ship,” *vide* Article 94(1) Those are not so much matters “concerning the ship” as concerning the activities of the ship, or more accurately, the persons on board.

²⁷ Evaluating Flag State Performance Part I : Background, February 2006, prepared for the High Seas Task Force by Ocean Law Information and Consultancy Services @ [http:// www.high-seas.org/docs/Flag State Part I and II.pdf](http://www.high-seas.org/docs/Flag State Part I and II.pdf)

2.1.3 Paragraphs 3 and 4: Safety Measures on board ships

It is obviously in the interest of ship owners, seafarers and the community at large that the transportation of people and goods by ships should be made as safe as possible, and that accidents such as foundering, stranding, or collision should be kept to a minimum. Recognising this necessity, Article 10 of the 1958 HSC, and Article 94(3) of 1982 UNCLOS lay down safety measures at sea for vessels.²⁸

Article 94(3) requires the flag State to take such measures for ships flying its flag as are necessary to ensure safety at sea with regard to the matters listed in sub paragraphs (a), (b) and (c). The words “*inter alia*” indicate that the list is not exhaustive. The application of Article 94(3) is subject to the requirements set out under Article 94(5) and this aspect will be examined below. It is also to be noted that the provisions of this paragraph are also to be read in conjunction with the provisions of Article 2 of UNCLOS 1982 viz. innocent passage through territorial sea as under this article, the Coastal State may not enact laws and regulations relating to the innocent passage of foreign ships through its territorial sea applying to the design, construction, manning or equipment of foreign ships unless those laws and regulations “are giving effect to generally accepted international rules or standards”.

2.1.3.1 Safety measures relating to the construction, equipment and seaworthiness of ships

²⁸ Churchill and Lowe, *The Law of the Sea*, 3rd ed. P. 264

The term “seaworthiness” can be defined as meaning “the fitness of a ship in all respects to cope with conditions likely to encounter at sea; this includes not only her hull and equipment, but also her crew competency, sufficient stores and bunkers quantity.²⁹ Thus, the term encompasses the design, construction, manning and equipment as well as the standards of maintenance of the ship. It is to be noted that “seaworthiness” under this paragraph is supplemented by Article 219, which provides for vessels to be in a seaworthy condition in order to avoid pollution of the marine environment. The provisions of this paragraph are further qualified by the contents of Article 94(5) which stipulates that the measures taken by the flag State are to conform to “generally accepted international regulations, procedures and practices”. In this context, the latter would refer to the international conventions and codes developed through IMO.

IMO is a specialized agency of the United Nations which is responsible for measures to improve the safety and security of international shipping and to prevent marine pollution from ships. The convention establishing the IMO was adopted in Geneva in 1948³⁰ and IMO first met in 1959. IMO's main task has been to develop and maintain a comprehensive regulatory framework for shipping and its premise today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping³¹. Thus, key safety treaties have been enhanced or developed by the IMO to address issues such as maritime safety and security, prevention of pollution and compensation and liability³².

SOLAS is the main convention dealing with the seaworthiness of ships. The convention contains a large number of complex regulations laying down standards

²⁹ <http://www.m-i-link.com/dictionary/default.asp?term=seaworthiness>

³⁰ Convention on the Intergovernmental Maritime Consultative Organisation 1948, www.imo.org/conventions/mainframe.asp?topic_id=771

³¹ Ibid

³² Some of the maritime conventions developed under the aegis of IMO include the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for Prevention of Pollution from Ships (MARPOL), the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), the International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW), the Load Lines Convention, the International Tonnage Convention, the International Safety Management (ISM) Code and International Ship and Port Facility Security (ISPS) Code. For the complete list of the IMO conventions see @ www.imo.org

relating to the construction of ships, fire safety measures, life-saving appliances, the carriage of navigational equipment and other aspects of safety of navigation. States parties to SOLAS are obliged to impose, through their own legislation, the standards laid down in the Convention upon the vessels sailing under their flags and enforcement of these standards depends largely on the flag State. The IMO, as such, has no power to enforce the conventions.

2.1.3.2 Safety measures related to the manning of ships, labour conditions and training of crews, taking into account the applicable international instruments

With respect to safe manning of ships and competency of crew and officers working on board ships the IMO has devised the Seafarers' Training, Certification and Watchkeeping (STCW) Code (hereafter the STCW Code) and this is the Code that flag States have to implement under national laws in order to provide for safe, adequate and competent manning of ships – merchant ships in this context – flying their flags. It is worth noting that IMO has also developed a convention for training, certification and watch keeping for fishing vessel personnel, the International Convention on Training, Certification and Watchkeeping for Fishing Vessel Personnel 1995 (hereafter the STWC-F Convention), which applies to fishing vessels of 24 meters and above. The safety regime for fishing vessels provided under the STCW-F Convention is supported by the 1993 Torremolinos Protocol for the Safety of Fishing Vessels but these instruments are not yet in force, due to lack of the prescribed number of ratification³³. Moreover, IMO has developed, in collaboration with the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO), a number of non-mandatory instruments. These include the FAO/ILO/IMO Document for Guidance on Fishermen's Training and Certification and

³³ www.imo.org

the revised Code of Safety for Fishermen and Fishing Vessels, 2005, and the Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels, 2005³⁴.

With respect to labour conditions on ships, it is the ILO which has assumed the regulatory role in this field, and most of the “related international instruments” have been developed by this organisation. Within the ILO, maritime issues are dealt with by the Sectoral Activities branch (SECTOR). The main focus of ILO's maritime programme concerns the promotion of the maritime labour standards³⁵. This is done using all of the ILO's means of action. The ILO's work concerning seafarers has also resulted in the adoption of codes of practice, guidelines and reports which address seafarers' issues. Since 1920, the International Labour Conference has adopted over 60 maritime labour standards³⁶. This international seafarers' "code" directly or indirectly influences both the terms of collective agreements and national maritime labour legislation. An important maritime labour instrument is the Convention No. 147³⁷ which sets out the minimum internationally acceptable standards for living and working conditions on board ships.

In 2001, the International Labour Office launched a major consolidation of more than 60 maritime labour instruments into a single instrument in line with recommendations made by the ILO Joint Maritime Commission in January 2001 (The Geneva Accord) and approved by the ILO Governing Body at its 280th Session (March 2001). The objective of the consolidation was to bring the system of protection contained in existing standards closer to the workers concerned, in a form that was consistent with this rapidly developing, globalized sector and to improve the applicability of the system so that shipowners and governments interested in providing decent conditions of work do not

³⁴ Ibid; Tools for Improved Fishing Vessel Safety : The Torremolinos Protocol and theSTCW-F Convention @ http://www.spc.int/coastfish/news/Fish_News/116/MBIanc_116.pdf; see also www.fao.org/DOCREP/003/X9656E/X9656E01.htm

³⁵ www.ilo.org/public/english/dialogue/sector/sectors/mariti/security.htm,

³⁶ Seafarers standards cover a multitude of questions including minimum age of entry to employment, recruitment and placement, medical examination, articles of agreement, repatriation, holidays with pay, social security, hours of work and rest periods, crew accommodation, identity documents, occupational safety and health, welfare at sea and in ports, continuity of employment, vocational training and certificates of competency; see <http://www.ilo.org/ilolex/english/convdisp1.htm> for a complete list of ILO maritime labour conventions and recommendations

³⁷ ILO Convention (No. 147) concerning Minimum Standards in Merchant Ships
<http://www.ilo.org/ilolex/english/convdisp1.htm>

have to bear an unequal burden in ensuring such protection. The aim of the consolidation was for greater consistency and clarity, more rapid adaptability and general applicability. On 23 February 2006, the 94th International Labour Conference (Maritime) adopted the Maritime Labour Convention, 2006 (hereafter MLC 2006).

The MLC 2006 sets minimum requirements for seafarers to work on a ship and contains provisions on conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection. Compliance and enforcement are secured through onboard and onshore complaint procedures for seafarers, and through provisions regarding shipowners' and shipmasters' supervision of conditions on their ships, flag States' jurisdiction and control over their ships, and port State inspection of foreign ships. The MLC 2006 also provides for a maritime labour certificate, which can be issued to ships once the flag State has verified that labour conditions on board a ship comply with national laws and regulations implementing the convention³⁸.

Among the novel features of the MLC 2006 are its form and structure, which includes legally binding standards accompanied by non-mandatory guidelines. It departs significantly from that of traditional ILO conventions. Parts of the MLC 2006 relating to technical and detailed implementation of obligations can be updated under an accelerated amendment procedure. The convention is to become what has been called the "fourth pillar"³⁹ of the international regulatory regime for shipping, complementing the key conventions of the IMO.

In 2007 the International Labour Conference adopted new instruments specifically for the fishing sector: the Work in Fishing Convention 2007 and the work in Fishing

³⁸ <http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2006/maritime.pdf>; The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments by Cleopatra Doumbia-Henry, Dominik Devlin and Moira L. Mc Connell, September 13 2006, The American society of International Law Insights (ASIL)vol. 10, Issue 23; Maritime Labour Convention 2006, www.oit.org/wcmsp5/groups/public/---/wcms_088042.pdf

³⁹ The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments by Cleopatra Doumbia-Henry, Dominik Devlin and Moira L. Mc Connell, September 13 2006, The American society of International Law Insights (ASIL)vol. 10, Issue 23

Recommendation 2007⁴⁰. These new instruments demonstrate the renewed commitment by the ILO to providing decent work to fishers. The convention and recommendation revise several existing ILO standards for the fishing sector and provide a comprehensive set of standards aimed at improving working conditions of fishers⁴¹.

2.1.3.3 Safety measures relating to the use of signals, maintenance of communications and the prevention of collision

Means of communications are vital for accident prevention and for safety and the provisions of 1982 UNCLOS on this issue have been addressed by the IMO. In the 1960s, IMO recognised that satellites would play an important role in search and rescue operations at sea and in 1976 the IMO established the International Maritime Satellite Organization, which later changed its name to the International Mobile Satellite Organization to provide emergency maritime communications⁴². In 1988, IMO's Member States adopted the basic requirements of the Global Maritime Distress and Safety System, or GMDSS, as part of SOLAS, and the system was phased in from 1992 onwards. The GMDSS was fully implemented in 1999, thereby improving forwarding ship distress and safety communication into a new era of advanced technology⁴³. The GMDSS communications system under SOLAS complements the International Convention on Maritime Search and Rescue (hereafter SAR), 1979⁴⁴, which was adopted to develop a global SAR plan, so that no matter where an incident occurs, the rescue of persons in distress will be coordinated by a SAR organization and, where necessary, by co-ordination between neighboring SAR countries⁴⁵. As for prevention of collisions, Convention on the International Regulations for Preventing Collisions at Sea, 1972

⁴⁰ Work in Fishing Convention, 2007 (No. 188) and Work in Fishing Recommendation, 2007 (No. 199)
www.ilo.org/ilolex/cgi-lex/convde.pl?C188

⁴¹ www.ilo.org; see also http://www.un.org/Depts/los/consultative_process/mar_sec_submissions/ilo.pdf

⁴² Convention on the International Maritime Satellite Organization (INMARSAT) 1976,
www.imo.org/conventions/contents.asp?doc_id=674&topic_id=257

⁴³ www.imo.org/Safety/index.asp?topic_id=390; www.imo.org/safety/mainframe.asp?topic_id=389

⁴⁴ www.imo.org/conventions/mainframe.asp?topic_id=253; Shipping Emergencies - Search and Rescue and the GMDSS, Focus on IMO, March 1999 @www.imo.org

⁴⁵ www.imo.org

(hereafter COLREGs) were developed by IMO. The COLREGs was designed to update and replace the Collision Regulations of 1960 which were adopted at the same time as the 1960 SOLAS Convention⁴⁶. These regulations are principally concerned with a vessel's conduct and movements in relation to other vessels, particularly when visibility is poor, for the purposes of collision avoidance, and with the establishment of common standards in relation to sound and light signals. Under UNCLOS 1982 ships exercising their right of innocent passage through the territorial sea or their right of transit passage through straits must observe the Regulations, regardless of whether the flag State or the coastal State is a party to the COLREGs, *vide* articles 21(4) and 39(2) of UNCLOS 1982. One of the most important innovations in the COLREGs was the recognition given to traffic separation schemes: Rule 10 gives guidance in determining safe speed, the risk of collision and the conduct of vessels operating in or near traffic separation schemes. Traffic separation schemes are an important means of reducing the risks of collision between ships by separating shipping in congested areas into one-way-only lanes. As well as traffic separation schemes, IMO also recommends deep water routes, areas to be avoided and other routing measures. The observance of such measures is mandatory under amendments to the SOLAS adopted in 1995 and enshrined under SOLAS Chap V⁴⁷.

2.1.3.4 Pre-registration and post –registration survey of ships

The flag State is under the obligation to inspect the vessel which is requesting to be registered prior to allowing it to fly its flag. Thereafter the obligation is to carry out such surveys at regular intervals. Such surveys are to be carried out by duly qualified and approved surveyors working in the maritime administration of the flag State or may be delegated to recognised Classification Societies. This liberty of delegating surveys to

⁴⁶ www.imo.org/Conventions/mainframe.asp?topic_id=251
Ships routing www.imo.org/safety/mainframe.asp?topic_id=770;
http://www.imo.org/includes/blast_bindoc.asp?doc_id=537&format=PDF

surveyors outside the maritime administration is implicitly granted under Article 94(4) of 1982 UNCLOS. The role of the Classification Societies will be examined at a later stage.

2.1.3.5 Training of officers and crew

Again, these provisions are an enhancement of the provisions of Article 94(3) on the need for adequate training of sea personnel for safety reasons. The major maritime accidents of the past have, on several occasions, proved that inadequately trained or qualified crews are a major factor in the cause of shipping accidents. The STCW Code 78/95 developed under the auspices of the IMO lay down the minimum training and certification requirements for officers and crew and for the keeping of navigational and engineering watches.

2.1.4 Need for safety measures conforming with international rule and practice

Article 94(5) addresses the issue of the nature of the international instruments to which the flag State is required to conform in applying the provisions of Article 94 (3) and (4). It empowers the flag State to take “any steps which may be necessary to secure observance” of the “generally accepted international regulation, procedures and practices,” including those relating to the safety of life at sea, the prevention of collisions, the prevention, control and reduction of marine pollution, and the maintenance of radio communications. This rule applies to all ships on the national register. The ILC here, in its commentary on draft Article 34 in 1956 Stated :

This expression also covers regulations which are a product of international cooperation, without necessarily having been confirmed by formal treaties. This applies particularly in the case of signals⁴⁸

⁴⁸ ILC Yearbook , II YB ILC 1956 at 253,281

On the other hand, the formulation of paragraph 5 does suggest that regulations, procedures and practices accepted by only a few States will not be considered as “generally accepted” unless they are well established as being of regional application.⁴⁹

2.1.5 Reporting to the flag State

Article 94(6) provides support to the general principle set out in paragraph 1 that the flag State is to exercise jurisdiction and control over ships flying its flag. It provides possibility for any other State which has grounds to believe that the flag State has not exercised proper jurisdiction and control with respect to a ship flying its flag, to report the facts to the flag State. When the flag State receives such a report, it is to investigate the matter and, if necessary, take remedial actions.

These provisions reiterate the concept of exclusive flag State jurisdiction on vessels flying its flag on the high seas.

The application of this paragraph calls for good faith on the part of the other States and on the part of the flag State also.⁵⁰

2.1.6 Inquiry into marine casualties

Article 94(7) requires a flag State to hold an inquiry before a suitably qualified person, or persons, into “every marine casualty or incident of navigation on the high seas” involving a ship flying its flag. This applies to incidents which cause loss of life or serious injury to nationals of another State, or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State concerned are to cooperate in the conduct of any such inquiry.

⁴⁹ Nordquist, Volume III, United Nations Convention on the Law of the Sea a Commentary at 149

⁵⁰ Ibid.p.150

The IMO has encouraged cooperation and recognition of mutual interests of States in marine casualty and marine incident investigation through a number of resolutions which were finally amalgamated and expanded by IMO with the adoption of the Code for the Investigation of Marine Casualties and Incidents in 1997⁵¹. In 2008 the IMO, through the Maritime Safety Committee⁵² adopted a new Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, (hereafter the Casualty Investigation Code), which incorporates and builds on the best practices set under the previous code. The objective of the code is stated as being “to facilitate objective marine safety investigations for the benefit of flag States, coastal States, the IMO and the shipping industry in general.”⁵³

A few flag States consistently investigate casualties involving ships registered under their flag in a professional and objective way. They produce reports which show they have dug deeply into the root cause(s) of the casualty and which contain suggestions and recommendations as to how to avoid a similar incident in future. The Marine Accident Investigation Branch (MAIB) in the UK is a good example of such an organisation⁵⁴.

Many flag States, however, appear either unable or unwilling to carry out such an investigation. Some may not have the technical infrastructure and competence to perform the detailed investigation required. Others may be unwilling to dig into the operational practices of a ship owner who has a significant number of ships registered under the flag in question. Whatever the reason(s), the result is the same: no, or inadequate investigation is performed. The Casualty Investigation Code is about to remedy this situation.

The Casualty Investigation Code will be annexed to SOLAS. By so doing and by virtue of the tacit agreement principle applicable under SOLAS, the provisions of the

⁵¹ IMO Assembly 20th session Agenda item 11, Res A849(20) adopted in November 1997, http://www.ismcode.net/accident_and_near_miss_reporting/849final.pdf

⁵²http://www.imo.org/newsroom/mainframe.asp?topic_id=1709&doc_id=9205,
<http://www.maiif.org/codes.htm>

⁵³ *MSC-MEPC.3/Circ.2* at www.imo.org

⁵⁴ http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn192/art_9.htm

code will become mandatory for all States that are party to SOLAS. Therefore, it seems as though the Code will come into effect on 1st July 2010⁵⁵.

The new regulations expand on SOLAS Regulation I/21, which requires Administrations to undertake to conduct an investigation of any casualty occurring to any of its ships "when it judges that such an investigation may assist in determining what changes in the present regulations might be desirable".

The Casualty Investigation Code recognises that co-operation between interested parties (e.g., the flag State and the coastal State) is crucial and seeks to promote this, as well as a consistent, common, approach to casualty investigation. It makes it clear that the investigations should be separate from any other investigation(s) and should focus on fact-finding and lesson-learning and should try to avoid apportioning blame and "finger-pointing"⁵⁶. It makes specific reference to flag States' "duty" to carry out an investigation "into any casualty occurring to any of its ships" under Article 94 of UNCLOS 1982⁵⁷. There is a requirement under the code for flag States to carry out an investigation into every "very serious marine casualty", which is defined, under the "definition" section of the code as a marine casualty involving the total loss of the ship or a death or severe damage to the environment. In the case of other, less serious, casualties or incidents, the code recommends that an investigation is carried out if it is considered likely that it would provide information that could be used to prevent future accidents, as stated in the Preamble of the code.

The code makes a distinction between "marine casualties" and "marine incidents". As might be expected, a "casualty" is more serious than an "incident". Both are stated to exclude a "deliberate act or omission, with the intention to cause harm to the safety of a ship, an individual or the environment," *vide* section 4 of the Casualty Investigation Code.

⁵⁵ www.imo.org/humanElement/mainframe.asp?topic_id=813

⁵⁶ *vide* the objective set under the code <http://www.regjeringen.no/nb/dep/jd/dok/nouer/1999/nou-1999-30/14.html?id=355941>

⁵⁷ *Ibid*, in the Preamble of the code and section 6 of the code

The code also contains provisions on the treatment of seafarers during investigation into the casualty or incident. Chapters 12 and 24 deal with “obtaining evidence from seafarers” and “protection for witnesses and involved parties”. Much concern has been expressed about the way in which seafarers are treated by the authorities after a casualty or incident. In many cases, seafarers are treated very differently from the survivors, say, of an aeroplane or train accident, despite the fact that they are probably just as scared and shocked and may have lost their place of work. The immediate thought in many countries seems to be to treat seafarers as possible criminals and to detain them for “investigation”, often for far longer than could be justified by the investigative process. Sometimes, criminal prosecutions are brought, often in circumstances where, to people within the industry, there is no suggestion of criminal behaviour. Inevitably in such circumstances, seafarers seek to protect their personal position, with the result that the facts of the incident and the lessons which can be learned from them are often submerged under the legal manoeuvres which take place. Chapters 12 and 24 set out the basic “human rights” to which seafarers are entitled in the event they are questioned and required to give evidence, particularly evidence which might incriminate them.⁵⁸

It can finally be noted here that the MLC 2006 also makes a provision for the investigation of marine casualties⁵⁹. Moreover, in 2006, recognizing the need for special protection for seafarers during a investigation, the IMO and the ILO promulgated the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident⁶⁰.

With respect to the flag State duty to carry out investigation into any marine casualty or incident causing serious damage to the environment, the provisions of Article 94(7) are supplemented by the obligations laid down on the flag State under Article 217.

⁵⁸ Flag States to Tighten up casualty investigations at http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn192/art_9htm

⁵⁹ Regulation 5.1.6 of MLC 2006 - Marine casualties: 1. Each Member shall hold an official inquiry into any serious marine casualty, leading to injury or loss of life, that involves a ship that flies its flag. The final report of an inquiry shall normally be made public. 2. Members shall cooperate with each other to facilitate the investigation of serious marine casualties referred to in paragraph 1 of this Regulation.

⁶⁰ Ref. A1/B/2.06(a), IMO Circular letter No.2711 26 June 2006

2.2 Flag State duties with respect to control, reduction and prevention of marine pollution under UNCLOS under article 217

Before 1960 there was little concern with pollution of the sea. This situation changed, however, as a result of such accidents involving the oil tankers *Torrey Canyon* in 1967, *Amoco Cadiz* in 1978 and *Exxon Valdez* in 1989, all of which ran aground, spilling thousands of tons of crude oil into the sea. These and many more instances over the last decades have alerted policy-makers, legislators and the public generally to the growing problem of marine pollution. Not much attention was paid to pollution at UNCLOS I, apart from the general obligation imposed on States to prevent marine pollution by oil and radioactive waste, in Articles 24 and 25 of the 1958 HSC.

The international law relating to marine pollution has mostly been developed under the auspices of the IMO and the IMO exercises certain supervisory functions in relation to them. In 1954, the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), was adopted and came into force in 1958⁶¹. In 1973 this Convention was superseded by the International Convention for the Prevention of Marine Pollution from Ships 1973, which was in turn to be absorbed under the 1978 Protocol and the combined instrument is now referred to as the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (hereafter MARPOL 73/78), and it entered into force on 2nd October 1983 (Annexes I and II)⁶². The Convention, which is the main multilateral regulatory instrument for pollution

⁶¹ http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258

⁶² Ibid; The convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes:

Annex I	Regulations for the Prevention of Pollution by Oil
Annex II	Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk
Annex III	Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form
Annex IV	Prevention of Pollution by Sewage from Ships
Annex V	Prevention of Pollution by Garbage from Ships
Annex VI	Prevention of Air Pollution from Ships

States Parties must accept Annexes I and II, but the other Annexes are voluntary.

from ships, is intended to deal with all forms of intentional pollution of the sea from ships, other than dumping.

The relevant articles relating to pollution under UNCLOS 1982 can thus be said to be inspired from MARPOL.

Article 217 of 1982 UNCLOS as a whole, coupled with its place in the convention reaffirms the rule that the primary responsibility for enforcement of vessel-source pollution rests with the flag State. The enforcement obligation imposed on flag State reflected under this article is part of the response to the long-standing criticisms of the exclusive flag State jurisdiction, particularly to lax enforcement by so called “flags of convenience” States⁶³ and UNCLOS 1982 can be said to give a better boost to enforcement regime of flag States viz. pollution issues.

Under Article 217(1), the flag State is to ensure compliance by vessels registered under its flag with applicable international rules and standards, which here particularly refer to MARPOL 73/78. Flag States are also to ensure under Article 217(3) that vessels flying their flag carry on board the appropriate certificates and that the vessels are duly periodically inspected to verify that the vessels are in conformity with the relevant certificates on board.

Article 217(4) of UNCLOS 1982 imposes on the flag State, in the circumstances contemplated, the obligation to initiate an investigation and, if warranted, to institute proceedings against a vessel in respect of an alleged violation in a foreign port, in the territorial sea or in the exclusive economic zone of a foreign State.

Under Article 217 (6), the flag State is obliged to take the different actions contemplated: investigation and, if sufficient evidence is available, the institution of proceedings in accordance with its own laws, implying that legislations exist or will have to be enacted to give effect to Article 217.

Article 217(7) requires the flag State to promptly inform the coastal State and IMO of the enforcement action taken as well as the results of the action.

⁶³ Nordquist, Volume IV, United Nations Convention on the Law of the Sea a Commentary at 242

Finally, Article 217(8), modeled on the relevant provisions of MARPOL 73/78 requires penalties provided by the flag State to be “adequate in severity to discourage violations wherever they occur.” Thus, the flag State must have in place an effective enforcement regime for vessels registered under its flag.

The different aspects of flag State duties with respect to vessels registered under its flag, as laid down under Article 94 and, to some extent, Article 217 of UNCLOS 1982 have therefore been detailed in the above exposé. Moreover, the main international rules and standards enhancing the implementation of the various duties have also been mentioned. At first view it can be said that the framework for proper flag State implementation is well structured and adequate. However, in addition to the fact that there are certain issues which have been unfortunately overlooked by the drafters of UNCLOS 1982, it is to be borne in mind that the implementation of all the duties and obligations stated under the various international instruments and even the 1982 UNCLOS ultimately depends upon the willingness of the flag State to do so. The loopholes in the international legal framework will thus be considered in the following section.

2.3 Inadequacies of UNCLOS with respect to flag State duties

One issue which, it is submitted, has not been adequately addressed by UNCLOS 1982 is the status of fishing vessels and flag State duties in relation to these. As we know, fishing activities are currently at the forefront of the international scene due to the abuses being made of this diminishing resource of the sea and due to the lax attitude of some flag States with respect to the control to be exercised on the fishing vessels registered under their flags⁶⁴. Whereas the 1958 HSC did not deal with this subject matter, perhaps due to

⁶⁴ For example there is the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU fishing (IPOA-IUU), the 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing; see also the Report of the TECHNICAL CONSULTATION TO DRAFT A LEGALLY-BINDING INSTRUMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING Rome, 23–27 June 2008, 26–30 January 2009, 4–8 May 2009 and 24–28 August 2009@ <ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2009/report.pdf>; also the 2002 European commission Plan of Action Against IUU Fishing @http://ec.europa.eu/fisheries/cfp/external_relations/illegal_fishing_en.htm

the fact that at that time fishing activities were not seen as a matter of concern, UNCLOS 1982 and especially Article 94 on flag State duties have only addressed the problem to some extent and have not acknowledged the fact that fishing vessels and fishing operations require a separate set of rules and regulations for flag States to implement and enforce. There is perhaps a need to revisit this issue in the light of flag State duties as a whole concept.

Moreover, a very evident proof that it is acknowledged that flag States alone cannot, and do not, implement fully the prescribed duties assigned to them is the increasing importance being given to port State control. For instance under UNCLOS 1982 port States have been given the power to exercise control on pollution matters over ships calling at their ports, *vide* Article 218. The control exercised by port States extend to most aspects of ship safety and even security to some extent nowadays and port State control can be said to be the response to ineffective exercise of flag State duties. The role and importance of port State control will be discussed further in the next chapter.

Another very important lacuna in UNCLOS 1982 is the issue of ownership identification in ship registration. By only requiring the vague notion of “genuine link” as per Article 91 to exist between the ship and the flag and leaving it at the discretion of individual flag States to define, there is a legal vacuum as to the essence of this notion and as to the implication of its absence. In other words, what in fact is the genuine link and what are the consequences for the ship and the owner in the absence of this link. The origin, development and importance of the concept will be examined below under Chapter 3.

Finally, implementation of the duties ultimately is based on the willingness and good faith of the flag State in exercising effective control and jurisdiction and at times this willingness may be lacking on the part of some flag States. On the other hand, some flag States may have the desire to fulfill their duties as prescribed under UNCLOS but are limited in their actions due to the lack of technical, human or financial resources. For these reasons many flag States have resorted to the delegation of their flag State duties to Classification Societies, which is permitted under the international maritime law, with the

approval of the relevant international maritime organizations, principally, IMO⁶⁵ and, to a lesser degree, ILO⁶⁶. However, in some cases this delegation of power has resulted in abuses and this is where the role of Classification Societies has been questioned.

It can be said that UNCLOS 1982 and the other relevant international instruments are very explicit *viz.* the duties which flag States, having committed themselves to abide by when registering ships. But the question remains as to whether when they are abiding by these duties the flag States are in fact fulfilling all the necessary conditions which will establish the direct relationship between the ship and the flag. The answer to this question is further blurred by the fact that flag States are more and more delegating their statutory duties to Classification Societies. The activities and role of these Classification Societies will be examined hereunder and it will be seen that it is in fact these Classification Societies, acting as alter ego to flag States, which are working to meet the prescribed duties under Article 94 of UNCLOS 1982 on behalf of the flag States.

2.4 Classification Societies acting as alter ego for flag States

It is not possible to evaluate the effectiveness of flag State duties to its full extent without also considering the role and performance of the Classification Societies (or Recognised Organisations (ROs), that, in the majority of cases, implement many of the technical, but increasingly administrative, operational and social duties of flag States. Flag States have the ability, pursuant to Article 94 of UNCLOS 1982, and supported by, *inter alia*, the SOLAS, MARPOL, Load Line Conventions⁶⁷ to entrust their survey, inspection and certification functions to ROs. Recognised Organisations or Classification Societies have, since their creation, played a very important role in the enhancement of maritime safety, in the prevention of marine pollution and loss of life. Recourse to ROs has greatly helped many flag States in fulfilling their obligations under article 94 of

⁶⁵ As can be seen from resolution A.739(18) – “Guidelines for the authorization of organizations acting on behalf of the Administration” and resolution A.789(19) – “Specifications on the survey and certification functions of recognized organizations acting on behalf of the Administration”

⁶⁶ For instance Standard A5.1.2 of the MLC 2006 lays down conditions for the flag State when it opts to delegate its inspection duties to Recognized Organizations

⁶⁷ SOLAS rule 6ptB, MARPOL app.1reg4(3), Load Line article 13.

UNCLOS 1982 as many of them lack the expertise and financial standing to ensure that vessels flying their flags are in compliance with international conventions. However, the ability to delegate such responsibilities to ROs has sometimes led to denial on the part of flag States in shouldering the responsibility which always rests upon them, that is effective exercise and control over ships flying their flags. At the same time, ROs also have in several occasions been found guilty of lack of professionalism in carrying out the statutory duties on behalf of flag States⁶⁸. The role of Classification Societies in general will be addressed and subsequently the extent and implications of the delegation of flag State duties to ROs will now be looked at. Finally, the actions taken at the international level in order to set the standards for the prevention of abuse and for the proper delegation of statutory duties will be examined.

2.4.1 Classification Societies: judge and party

Classification societies came into existence during the 17th and 18th centuries out of the needs of marine insurers and ship owners. Ship owners required technical assistance to ensure that their vessels were seaworthy, whilst insurers wanted the guarantee that such vessels were seaworthy. Such insurers wished to calculate realistic premiums, but had to rely on 'hearsay' regarding the condition of vessels which proved extremely unreliable. Coffee houses, bars and inns near ports became the forums where marine insurers gathered their information, which clearly was not conducive to operating a profitable business.

Due to this undesirable State of affairs, and so as to provide marine insurers with reliable information, the first 'classification societies' were founded, namely: Lloyd's Register of Shipping (1760), followed by Bureau Veritas (1828); American Bureau of Shipping (1862) and Det Norske Veritas (1864). The purpose of the classification societies was to develop and monitor standards of design, construction and maintenance of vessels for shipowners and insurers.

⁶⁸ Boisson, *Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future*, 18, *Marine Policy* 363(1994); see also P.F. Cane, *The Liability of Classification Societies*, 1994, *Lloyd's Maritime and Commercial Law Quarterly* (LMCLQ)364.

In order to ensure the complete independence of Classification Societies, the clients of such societies were not ship owners, as is the case today, but marine underwriters themselves. From the information provided by these societies, marine underwriters were in a healthier position to accurately assess their risks. Due to the success of classification societies in this respect, such societies became extremely effective and profitable.

During the later part of the 19th century, a significant change took place in the function of Classification Societies. Ship owners desired 'ratings' to be assigned to their vessels that would be valid for a significant period following a comprehensive survey of their vessels. Consequently, Classification Societies issued ratings that would be valid for a fixed period of time and, in turn, were paid certain fees for such surveys and certificates. All Classification Societies developed similar methods of evaluating risks through a process of assessing the actual condition of ships and assigning them a "rating". This would entail a visit to the ship by an experienced captain based in the port. He would assess the construction quality and State of maintenance of the hull, State of the rigging, and navigational categories i.e. the area of operation of the ship.

A combination of factors during the second half of the 19th century resulted in a movement by all Classification Societies away from solely ratings, and a fundamental change in the relationship between Class and the ship owner, and, eventually, the flag State. Ship owners increasingly wanted more value from Class than just a survey of construction and the occasional rating; they wanted proof, through regular certification, of the ongoing standard of their vessel. Class responded through the concept of classification certificates issued for a number of years dependent upon regular survey of the ship. The erstwhile independence of classification societies was dwindling: the very organisation whose duty it was to ensure that vessels maintained their standards was now being paid by ship owners for such services. But this enabled the Classification Societies to develop their technical resources and international coverage and also resulted in the need for all societies to produce clearly understood and uniform guidance to their surveyors, who increasingly became technical people such as engineers, rather than the shipmasters used in the rating system. This was the genesis of the "Class Rules" that

have become paramount in the regulatory framework for design and construction of ships.

Parallel to this system of Class surveys, as national law evolved for safety of ships from the 19th century, flag States began to carry out statutory surveys to verify the condition of the remainder of the ship and its equipment, particularly safety and navigational equipment. Flag States thus began to delegate their statutory powers to Classification Societies which had the technical expertise and personnel to carry out the increasingly complex task of surveying ships. With the passage of time the role and activities of Classification Societies evolved into 2 categories : private and public.

Classification is the traditional private part of the functions of Classification Societies, which consists of⁶⁹:

- (1) the technical review of design plans and related document for a new vessel to verify compliance with the applicable rules, the assignment of class and the issuance at a later stage, and upon the ship owner's request of a class certificate to the ship; and
- (2) the periodical class surveys, carried out onboard the vessel, to verify that the ship continues to meet the relevant rule conditions for continuation of class.

There are four status of class, namely: assignment, maintenance, suspension and withdrawal of class⁷⁰. Class is assigned to a vessel after the completion of satisfactory surveys. In order to maintain the class, the vessel should be operated and maintained in a proper manner by the shipping company, and should be subject to the specified program of periodical surveys after delivery. These surveys include annual surveys, intermediate surveys and class renewal/special surveys. In case the maintenance of a vessel is not

⁶⁹ http://www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF

⁷⁰ Ibid.

properly undertaken with, or the survey program is not carried out properly, the vessel will lose its class temporarily (suspension) or permanently (withdrawal) with the result that the vessel will lose its insurance automatically and will not be able to trade.

The responsibilities of Classification Societies increased with the delegation by flag States of the responsibility to perform statutory certification of vessels registered under their flags; thus began the public function of classification societies. The responsibility of flag States here evidently refers to the obligations laid down under Article 94 of UNCLOS 1982, *viz.* to exercise effective control upon ships flying their flags with respect to inspection, survey and certification matters. Without the specific knowledge, experience and personnel, it is not realistic for flag States to fulfil their responsibility as per Article 94. Therefore, by their expertise and world-wide availability of highly qualified personnel, Classification Societies came out to be the best candidates which could act on behalf of flag States and this is in line with the provisions of Article 94(4) of UNCLOS 1982, which requires ships to be surveyed “by a qualified surveyor of ships”.

The statutory requirements and delegation of survey duties commonly cover three areas as per the relevant provisions of SOLAS and MARPOL 73/78⁷¹:

- (1) Aspects of ship’s design and its structural integrity-load line and stability in the intact and damaged condition, essential propulsion, steering equipment, etc;
- (2) Accident prevention, including navigational aids and pollution and fire prevention and
- (3) The situation after an accident (fire, flooding) including containment and escape.

In the 1960s, there were concerns among the “traditional” Classification Societies regarding the proliferation of what were perceived as substandard societies which operated with low standards. This led to the creation of IACS, the International

⁷¹ Supra note 67

Association of Classification Societies and currently represents ten major societies⁷². The substantial level of know-how in IACS and its member societies, and the resulting contribution However, it is becoming more and more obvious that Classification Societies, whilst carrying out regular surveys to ensure the vessel remained in class, are at the same time undertaking statutory surveys on behalf of the flag States on the same vessels, with clear issues of conflict of interest.

The contribution that IACS could make to the industry regarding safety rules was recognised by IMO, which gave IACS consultative status within the first year of its existence in 1969. Even today IACS remains the only non-governmental organisation with this status which is able to develop and apply structural rules. IACS is also co-operating closely with IMO regarding MARPOL 73/78 through IMO's Marine Environmental Protection Committee, (MEPC)⁷³. Many of the specialists from IACS working groups are also participating in the work teams of the relevant IMO Committees.

Classification Societies offer their services to more than 100 Governments around the world. In some countries, the respective maritime administration issues the certificates itself based on survey reports of the Classification Societies, whereas in other flag States the Classification Society is solely responsible for the whole certification process. The

⁷² The members of IACS are:

- ABS American Bureau of Shipping
- BV Bureau Veritas
- CCS China Classification Society
- DNV Det Norske Veritas
- GL Germanischer Lloyd
- KR Korean Register of Shipping
- LR Lloyd's Register
- NK Nippon Kaiji Kyokai (ClassNK)
- RINA Registro Italiano Navale
- RS Russian Maritime Register of Shipping

IRS Indian Register of Shipping is currently an Associate; www.iacs.org

⁷³ For example, submissions of IACS at the IMO MEPC 54th session Agenda item 6 MEPC 54/6/3, 13 January 2006 on ship recycling; IACS participation at the MEPC 58th session Agenda item 4 MEPC 59/4/44 22 May 2009 on prevention of air pollution from ships @www.imo.org

interpretation of the statutory rules, however, rests with the flag State, often advised by Classification Societies.⁷⁴

In recent years, the maritime industry has expended much effort battling excessive competition in the world shipping market resulting from continuous over-capacity. At the same time, there has been a general shift from traditional company fleets managed with pride in the quality of their fleet and its operation, to more fragmented arrangements, with far looser personal ties of owners or operators to their ships. This scenario has resulted in sub-standard shipping to develop and operate at a commercial advantage by cutting corners regarding maintenance and new investment. This situation has in turn placed increasing demand and pressure on the technical skills, knowledge and experience available in the class societies and this is why it is important today to re-visit the relationship between the flag State and Classification Societies.

2.4.2 Abuse resulting from delegation of statutory surveys

Even if there are responsible flag States, there are also many flag States that cannot fully implement the provisions of the international maritime conventions and regulations, in particular those open registries with large number of fleets which opt to delegate more and more their statutory obligations to ROs. Moreover, there is clearly a conflict of interest which comes out of the activities and role of Classification Societies, given that they are being paid by ship owners for surveys being undertaken on behalf of maritime administrations with which the vessels are registered. The maritime industry has levelled many criticisms against Classification Societies such as wide variations in the delivery of class services and identified unwarranted extensions of Class for older substandard ships⁷⁵.

In addition, the fact that information regarding classification is the property of the ship owner and deemed to be commercially confidential between the ship owner and the

⁷⁴ www.iflos.org/media/9340/lecture%20gesa%20heinacher-lindemann.pdf: Classification Societies Guarantors for Maritime Safety? 4th March 2006 Germanischer Lloyd ITLOS Hamburg, Ms Gesa Heinacher- Linderman, Third maritime Talks

⁷⁵ Supra note 68, also The EU Law on Classification Societies: Scope and liability Issues by Juan L. Pulido Begines, Journal of Maritime Law and commerce, vol.36,no.4,Oct 2005

Classification Society is judged unacceptable by some actors of this industry. Finally, the competition among Classification Societies in getting more clients has led to Classification Societies attempting to persuade ship owners with large fleets to transfer class by dubious means and has resulted in unacceptable flexibility of standards. Ship owners also have the freedom to transfer Class and the result is “class hopping”: a threat that is perceived to lead to reduced standards from the “losing society”, or a move that can result in lower standards and reduced compliance costs from the “gaining” society.

The absence of standards for the transfer between classification societies had clearly exacerbated this issue. Finally, the broadening of the role of Class with the introduction of the International Safety Management (ISM) Code in 1998 and the International ship and Port Facility (ISPS) Code in 2004 and the ready delegation of these statutory functions to Class by most flag States has further blurred the boundaries between their technical private and public services.

2.4.3 Regulation of the delegation of flag State duties

The IMO, having been closely involved in the work of UNCLOS III⁷⁶ and fully aware of the lack of uniformity in the implementation of the IMO conventions by flag States coupled with the increasing abusive delegation of flag State duties to Classification Societies, has called for the development of standards for the effective implementation of the Conventions developed under its aegis.

Thus in 1992 a Flag State Implementation (FSI) Committee was set up with the task of enhancing and promoting the implementation of IMO instruments and survey and

⁷⁶ http://www.imo.org/INFORRESOURCE/mainframe.asp?topic_id=406&doc_id=1077: IMO interface with the Law of the Sea Convention, 6-9 January 2000. Article by Mr. Agustín Blanco-Bazán *Senior Deputy Director/Head Legal Office, Legal Affairs and External Relations Division, IMO*, Paper presented at the Seminar on current maritime issues and the work of the International Maritime Organization. Twenty-Third Annual Seminar of the Center for Ocean Law and Policy, University of Virginia School of Law, IMO, January 6-9, 2000; See Implications of the United Nations Convention on the Law of the Sea, 1982 for the International Maritime Organization, Study by the Secretariat of IMO, doc.LEG/MISC 1 (1986)

certification matters *inter alia*.⁷⁷ The primary objective of the FSI Committee is the identification of measures necessary to ensure effective and consistent implementation of global instruments, including the consideration of difficulties faced by developing countries primarily in their capacity as flag States. It is under its aegis that the IMO Resolution A.739(18) was developed *viz.* Guidelines for Recognized Organizations acting on behalf of the Administration and which codifies the long standing practice of delegation of flag State jurisdiction and control⁷⁸. It is to be noted here that by virtue of this IMO resolution flag States are under the obligation to notify IMO of the specific responsibilities and conditions of the authority delegated to nominated surveyors or ROs. Flag States are also required to see to it that the RO has adequate resources in terms of technical, managerial and research capabilities to accomplish the tasks being assigned.⁷⁹

In Europe an EU Directive on Classification Societies⁸⁰ applies since 1996. European Member States can grant an authorisation to Recognised Organisations to undertake fully, or in part, inspections and surveys related to certificates under the international conventions. The authorisation can be granted provided that the Recognised Organisations comply with the criteria as set out in the annex of the Directive⁸¹. Such information then has to be submitted to the EU Commission for recognition. A recognised organisation can offer its services to all European flag States. The working relationship between flag State and classification societies is described in the Directive and is regulated by a formalised written agreement which also sets up minimum figures for financial liability.

One important matter which is often overlooked is the fact that that although the various resolutions and provisions of the international maritime safety Conventions allow

⁷⁷ Hoppe H., Technical Officer, Maritime Safety Division, IMO, The Work of the Sub Committee on Flag State Implementation – An Overview (2000), www.imo.org

⁷⁸ Through reference in the Resolution to: ...the provisions of reg I/6 of SOLAS 74, article 13 of Load Line convention 1966, reg 4 of Annex 1 and reg 10 of Annex II of MARPOL 73/78 and article 6 of Tonnage 69

⁷⁹ Res. A.739(18) Annex 2.1.

⁸⁰ Council Directive 94/57/EC, as amended by Council Directive 2001/105

⁸¹ *Ibid.*, see also The EU Law on Classification Societies: Scope and liability Issues by Juan L. Pulido Begines, Journal of Maritime Law and commerce, vol.36,no.4,Oct 2005

delegation of flag State statutory duties to ROs, the flag State must retain the capacity and resource to monitor and verify the work of the ROs, to carry out its own flag State inspections of vessels flying its flag, and maintain an effective Administration for the many other administrative, technical and social matters required of a properly functioning flag State administration. It is very clear from the examination of the IMO instruments and the resolutions that it is only the inspection, surveying and certification functions of a flag State that are allowed to be delegated and that enforcement and granting of exemptions cannot be delegated. In any case, the flag States bears the ultimate responsibility for the completion and efficiency of the inspection and survey and it is the flag State that is primarily responsible for the ships in its fleet. Therefore the flag State remains under the obligation to exercise a degree of control over ships registered under its flag; delegation of statutory functions should not be equated with derogation from responsibilities.

2.5 Conclusion

True it is that, as a whole, Classification Societies, particularly IACS Member societies, have been playing a vital role in the maritime industry and that the existence of Classification Societies is essential for the promotion of safety of life and property at sea, as well as to preserve our sensitive environment and marine resources, as they more often than not represent the “executive branch” of the maritime administration in fulfilling its duties under UNCLOS 1982, especially Article 94. However, it is the conflict of interest and the embarrassing and persisting relationship which Classification Societies entertain with the ship owners on one side and with flag States on the other side which need to be regulated as such situation may create fundamental flaws in the international safety regime and result in unsafe ship obtaining the nationality of a State through the registration process and being able to operate with duly issued statutory safety certificates while all the time endangering human life and the marine environment. Moreover, it is the abuse that some flag States – including the most prominent ship owning nations in

terms of tonnage – are making of the possibility of delegating the power of survey, certification and inspection to Class which casts serious doubts on the genuineness of the work undertaken by Classification Societies. IMO has tried to intervene and regulate the State of affairs with the creation of the FSI Committee and the development of a resolutions A739(18) and A789(19) on the subject matter. Moreover, IMO, acknowledging the fact that one of the solutions to this State of affairs resides in bringing flag States to shoulder their responsibilities under the international instruments themselves⁸², has come forward with some initiatives to promote effective flag State control as per article 94 of UNCLOS 1982. Such an approach, which currently appears to be able to achieve some degree of success, is the Voluntary Flag State Audit Scheme⁸³. Furthermore, it is the formidable potential of port State control which is giving a boost to proper flag State implementation of its duties under UNCLOS 1982.

The examination of the flag State duties has shown that there are certain issues which have been left out or overlooked under UNCLOS 1982 and this has led to some abuse and deviations in certain areas of ship administration, such as delegation of statutory duties as explained above. The international community is trying to remedy the situation through a series of measures which will be expanded on further in the next chapter. However, all the actions being taken at regional or international levels tend to address only one side of the problem of effective implementation of flag State duties. Indeed, the issue which is being deliberately left out by the international community at large is the control of those who originally and primarily need to be regulated: the ship owners, the ship owning companies and their activities which are protected and hidden under corporate artifice and shams. The next chapter will explain the measures being adopted on regional and international levels to regulate flag State enforcement of its duties, but, as it will be seen, the international community is out to tackle only one facet of the problem.

⁸² O'Neill W., Raising the Safety Bar – Improving Marine Safety in the 21st Century; speech to the Seatrade Safe Shipping conference, London 2001 @ www.imo.org/Safety/mainframe.asp?topic_id=82&doc_id=703

⁸³ Making a Case for the Voluntary IMO Member State Audit Scheme, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17981/Voluntary.pdf

3 HOW IS THE DISCHARGE OF FLAG STATE DUTIES BEING CURRENTLY REGULATED

Having examined the various flag State duties as laid down under Article 94 and under Article 217 of UNCLOS 1982, it has been possible to get an aperçu of the manner in which flag States in reality implement such duties. It has thus been explained that as a matter of fact, it is Classification Societies which are more and more acting as alter ego to flag States, especially for open registries, without any follow up or back up action being undertaken by those flag States in order to exercise a degree of control on the actions of those Classification Societies. If left on a voluntary and discretionary basis, effective exercise of jurisdiction and control as prescribed under Article 94 of UNCLOS 1982 will not be uniform and will depend upon such factors as economic and financial pressures and exigencies. Such slack enforcement by flag States has resulted in substandard shipping, thus posing a threat to safety and to the marine environment and, nowadays, to maritime security also.

In view of this State of affairs, the international maritime community has had no other alternative than to develop more stringent schemes in order to counter the deviations from proper exercise of jurisdiction and control by certain flag States on the ships registered under their flag. Thus port State control was enhanced and has to date become a vital means in “policing” flag States. Moreover, the IMO elaborated some instruments such as the ISM Code and the IMO Voluntary Audit Scheme to pressure flag States to fulfil their obligations. Also the ILO has devised a new instrument, the MLC 2006 whereby State parties will be requested to be more active in flag State enforcement of labour conditions on board ships. Finally, coastal States are now also playing a more important role in assisting in flag State compliance of international duties, especially in the domain of prevention of marine pollution and the deterrence of IUU fishing.

This chapter will therefore endeavour to assess the international community's actions for enhancing implementation of flag State duties, on both the regional and international level.

3.1 Regional Approach to tackling enforcement of flag State duties

3.1.1 Port State Control

Sovereign and other self-governing States have the right to control any activities within their own borders, including those of the visiting ships, as per the provisions of UNCLOS 1982⁸⁴. Control of port State, over the foreign flag ships in their ports, for verifying compliance with the requirements of the international maritime conventions, on the basis of the above provisions of UNCLOS 1982, is called Port State Control (hereafter PSC).

Today, the world merchant fleet is registered under many different flags, including many nations which do not have the resources to adequately regulate the management of their national fleet. Yet, the primary legal obligation to regulate and ensure the safe operation of ships remains that of the flag State and there is increasing acknowledgement that in a significant number of instances adequate regulation is not achieved. Indeed, under international maritime law, the authority with the greatest degree of legal control over an individual ship is the flag State administration and, in an ideal world, flag States will ensure that ships registered within their jurisdiction are adequately managed and operated. Unfortunately this is not so.

This latter view coupled with the realisation that the likely damage contingent upon a maritime casualty will affect a much wider constituency than described above has obliged responsible authorities to reconsider the issue of effective regulation of international

⁸⁴ For instance Articles 22 and 24 of UNCLOS 1982

shipping. Political and statutory imperatives oblige national and regional authorities to protect their constituents from harm and it is clear that mere reliance on flag State authorities “doing the right thing” will not be considered sufficient by the public in the event of a major maritime casualty causing damage on the environment and to local interests. Towards this end, the port State control (PSC) regime has emerged as an important and effective instrument.

The maritime territorial jurisdiction of a State can be divided into two broad categories, coastal State regulation and port State regulation. Very generally, the focus of the former is primarily concerned with protection of territorial integrity and maritime resources, border protection and the national obligations to the international community to provide maritime and aviation search and rescue (SAR) services. Thus, in a practical sense this entails the exercise of a wide range of regulatory powers over ships “underway” within the State’s maritime territorial jurisdiction.

PSC is defined by IMO⁸⁵ as the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules. As such, its objective is to ensure that foreign ships are seaworthy, do not pose a pollution risk, provide a healthy and safe working environment and comply with relevant Conventions of the IMO and those of the ILO. It is usually limited to regulation of ships which have “moored” at a port within the territory of the State⁸⁶.

While the concept of “right of innocent passage”, and practical constraints limit the ability of coastal States to pro-actively regulate the operation of foreign ships under way within their wider maritime jurisdiction, the situation is quite different when a ship is berthed (or anchored) in port. It is well established in customary law that when a vessel is in port, within the sovereign territory of the coastal State, it will be subject to the laws of

⁸⁵ http://www.imo.org/Facilitation/mainframe.asp?topic_id=159

⁸⁶ Kasoulides defines PSC as control of ships and their equipment, control of discharge at sea, control of crew competence and working conditions, and other requirements present in ships while ships lie in port. G. Kasoulides, *Global and Regional Port State Regimes*, Henrik Ringbom (ed.)

the “host” nation. This is reinforced by UNCLOS Article 25(2) where authority is conferred on coastal States to “prevent any breach of the conditions to which admission of those ships to internal waters or to such a call is subject”. Article 218 of UNCLOS, “Enforcement by Port States” and Article 219 “Measures relating to Seaworthiness of Vessels” are more explicit in this regard. These provisions validate the inspection of vessels, under international law, to verify compliance with prescribed operating standards and procedures, irrespective of whether the ship has committed, or is reasonably suspected of, any breaches⁸⁷.

Under international law the concept of port State control embraces the requirement of a foreign vessel not only to comply with the laws of its own flag State, but also those of the port State. Thus, even if the flag State is not party to a particular international convention, if municipal law of the port State makes compliance mandatory, international law will respect the port States right to enforce compliance by foreign vessels within its sovereign territory.

Whereas the 1982 UNCLOS gave States the right to exercise port State control over foreign flagged ships within their jurisdiction but only for matters of environmental pollution, various IMO instruments contain control provisions for every ship in matters of environmental protection, safety and security, when in the port of another contracting Government⁸⁸.

⁸⁷ See Port State jurisdiction and Article 218 of the UN Convention on the Law of the Sea, Ho-Sam Bang, *Journal of Maritime Law and Commerce*, Apr. 2009, vol.40, no.2

⁸⁸ *Vide, inter alia*, Regulation 19 of Chapter 1, regulation 6.2 of Chapter IX and regulation 4 of Chapter X of SOLAS, Article 21 of the International Convention on Load Lines, 1966 (Load Lines 66) as modified by the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (Load Line Protocol 88); Articles 5 & 6, regulation 8A of Annex 1, regulation 15 of Annex II, regulation 8 of Annex III and regulation 8 of Annex V of MARPOL 73/78; Article X of STCW 78/95; and Article 12 of the International Convention on Tonnage Measurement of Ships, 1969.

In addition to the above, IMO Resolutions A.787(19), *Procedures for Port State Control* adopted on 23 November 1995 and A.882(21), *Amendments to Procedures for Port State Control* adopted on 25 November 1999:

provide basic guidance on conduct of Port State control inspections and afford consistency in the conduct of these inspections, the recognition of deficiencies of a ship, its equipment, or its crew, and the application of control procedures

It envisages that subject to the provisions of the applicable conventions, inspections may be conducted at the initiative of the port State authority, at the request or on the basis of, information about the ship provided by a third party.

While flag State authorities are free to delegate flag State control inspections to “contractors”, Resolution A.789(19) invites Governments, when exercising port State control, to limit the exercise of authority to board, inspect, demand remedial action and detain foreign ships under the port State control regime only to officers duly authorised by the Port State.⁸⁹The designation, Port State Control Officer (hereafter PSCO), is defined as:⁹⁰

A person duly authorised by the competent authority of a Party to a relevant convention to carry out port State control inspections, and responsible exclusively to that Party

Resolution A.787 (19) goes further to clearly specify that Port State Control should only be carried out by officers complying with the qualification criteria specified in the resolution. It requires that the individual(s) concerned should have no commercial interest, either in the port of inspection, or in the ships inspected nor be employed by Recognised Organisations and that they carry an identity card issued by the port State attesting authority to conduct such inspections.

It is particularly interesting to note that IMO Resolution A.787(19) highlights that SOLAS, MARPOL and STCW stipulate that no more favourable treatment is to be given to the ships of countries which are not party to the relevant convention and requires the

⁸⁹ IMO Resolution A.787(19), 2.1.3.

⁹⁰ IMO Resolution A.787(19) para 1.6.6.

PSCO to be satisfied that the ship and crew do not pose a danger to life, property or the environment. The Resolution specifies that “the ship shall be subject to such restrictions as are necessary to obtain a comparable level of safety and protection of the marine environment.”

It is therefore quite clear that the nations of the world (or at least the majority of them) share the view that ship owners/operators should not be allowed to avoid compliance with internationally agreed standards to which particular nations have not become party simply by registering their ships under such flags.

3.1.1.1 Regional Memorandum of Understandings on Port State Control

Originally, PSC started as a multilateral State initiative outside IMO. Some significant casualties in the European waters (*Torrey Canyon* 1968, *Amoco Cadiz* 1979) and the widespread resultant pollution of the marine environment brought home to coastal States their vulnerability from foreign flagged ships, over which they had no control, transiting their coastal waters and visiting their ports.

In 1978, the ‘Hague Memorandum’ between a number of maritime authorities in Western Europe was developed⁹¹. It contained provisions with respect to enforcement of minimum shipboard living and working conditions, as required by ILO Convention no. 147⁹². However, just as the Memorandum was about to come into effect, in March 1978, there was the grounding of the super tanker ‘*Amoco Cadiz*’. This incident caused a strong political and public outcry in Europe for far more stringent regulations with regard to the safety of shipping. This pressure resulted in a more comprehensive memorandum which

⁹¹ <http://www.parismou.org/ParisMOU/Organisation/About+Us/History/xp/menu.3950/default.aspx>: A Short History of the Paris MOU

⁹² Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)

covered safety of life at sea, prevention of marine pollution from ships, and living and working conditions on board ships.

Subsequently, a new, effective instrument known as the Paris Memorandum of Understanding on Port State Control was adopted in January 1982 and was, initially, signed by fourteen European countries⁹³. It entered into operation on 1 July 1982. Since that date, the Paris MOU has been amended several times to accommodate new safety and marine environment requirements stemming from the IMO as well as other important developments such as the various EU Directives which address marine safety. Currently, 24 European countries and Canada form part of the Paris MOU on Port State control.⁹⁴This MOU has been followed by 8 other regional MOUs, in addition to the unilateral port State control programme operated by the United States.⁹⁵ These regional port State control MOUs are increasingly cooperating and exchanging inspection data electronically in order that significantly substandard ships have nowhere left to trade. IMO is contributing here by playing a proactive role in the global harmonisation of port State control through technical assistance in the development of the regional MOUs, organisation of technical workshops for secretariats and database managers of regional PSC MOUs and the establishment of an *ad hoc* working group at the Flag State Implementation Committee (FSI) on harmonisation of port State control activities⁹⁶.

⁹³ Supra note 92; www.parismou.org

⁹⁴ Ibid.

⁹⁵ http://www.imo.org/Facilitation/mainframe.asp?topic_id=159:List of regional Port State Control MOUs:-

1. Paris MOU for Europe and North Atlantic;
2. Tokyo MOU for Asia and the Pacific;
3. Acuerdo de Viña del Mar for Latin America;
4. Caribbean MOU for the Caribbean;
5. Abuja MOU for West and central Africa;
6. Black Sea MOU for the Black Sea region;
7. Mediterranean MOU for the Mediterranean;
8. Indian Ocean MOU for the Indian Ocean; and
9. GCC MOU (Riyadh MOU) for the Arab States of the Gulf.

⁹⁶FSI16/7/7,16thsession,agendaItem7,FSI14/19,14thsession,http://www.imo.org/Newsroom/mainframe.asp?topic_id=106&doc_id=6209

Finally, it is worth noting that when a ship is detained in a port following a PSC inspection, the fact needs to be reported to the flag State, the Recognised Organisation, if applicable, and the IMO.

Thus, PSC, given the success that it has proved to be able to achieve in obliging flag States to shoulder their obligations under international maritime conventions to which they are party to, has seen its role amplified. This more so with the advent of new international instruments requiring greater compliance on the part of ship operators and hence from flag States, and also with new issues which have recently cropped up such as IUU fishing and the new MLC 2006.

3.1.1.2 Port State control and IUU fishing

The concept of port State control, as a means to deter IUU fishing, is a relatively recent concept in international fisheries law. Provisions concerning port State control have been adopted in many of the recent instruments developed in international fisheries law, but until recently these have consisted mainly of rather general references to the concept, rather than setting out detailed measures.

UNCLOS 1982 does not specifically envisage measures by the port State for the conservation and management of fisheries, although it can be said to be undisputable that States in whose territory ports are located have full sovereign authority over them. The first international fisheries treaty to specifically refer to port State control was the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (hereafter the 1993 Compliance Agreement)⁹⁷, which States the rather conservative position that if a boat suspected of fishing in breach of conservation measures enters the port of a State party, then that party should inform the relevant flag State.⁹⁸ The Agreement goes no further than this, however,

⁹⁷ <http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.HTM>

⁹⁸ Article V (2) Compliance Agreement

and is thus entirely reliant upon the flag State to make any investigation and take any meaningful action.

The role of port State control is further elaborated in the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereafter 1995 UN Fish Stocks Agreement)⁹⁹, with Article 23 restating the position that a port State has the right (and the duty) to take measures, in accordance with international law, to promote the effectiveness of internationally agreed conservation and management measures. Thus, the Agreement provides that a port State may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports and may adopt regulations to prohibit landing and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of internationally agreed conservation and management measures on the high seas.

In 2005 the FAO Committee on Fisheries, COFI, adopted a Model Scheme on Port State Control (hereafter Model Scheme)¹⁰⁰, which sets out basic, minimum port State measures. The Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing is addressed to all States, fishing entities and regional fisheries management organizations. Its purpose is to facilitate the implementation of effective action by port States to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. Following the Preamble, the model Scheme addresses general considerations, issues relating to the inspection of vessels while they are in port, actions to be taken when an inspector finds there is reasonable evidence for believing that a foreign fishing vessel has engaged in, or supported, IUU fishing activities, and information that the port State should provide to the flag State. It is a voluntary and non-binding instrument. Port State measures include activities such as undertaking inspections of documentation, catches and equipment when boats land to take on fuel and supplies or offload fish or requiring vessels to make activity reports before entering port. Vessels

⁹⁹ <http://www.fao.org/fishery/topic/13701/en>

¹⁰⁰ <http://www.fao.org/fishery/psm/en>

found to be involved in IUU fishing can be denied docking rights, causing considerable financial losses to their owners. Such measures are among the most-effective means of preventing the import, transshipment or laundering of illegally caught fish.

The provisions of the Model Scheme can be said to be a great step ahead in using port State control as an instrument for effective flag State duties with respect to exercising effective control over fishing vessel; the Model Scheme provides that unless the port State is satisfied that the flag State has taken or will take adequate action, the vessel should not be allowed to land or transship fish in its port¹⁰¹. Thus such port State measures can be said to be a back up measure to flag State compliance and enforcement of its international obligations.

There is perhaps the need to make such port State measures mandatory in order to give greater force to their effectiveness.

3.1.1.3 Port State control and the new Maritime Labour Convention 2006

Port State control has, from its early stage, set as one of its objectives the inspection of living and working conditions on board ships calling in ports, thus supplementing the role and duty which are assigned to flag States under Article 94 of 1982 UNCLOS on this matter. Norms regarding living and working conditions on board ships have mostly been developed by ILO.

The ILO has adopted some 70 instruments¹⁰² (Conventions and Recommendations) since 1920 in an attempt to ensure decent working and living conditions for seafarers while at sea and in ports. Flag States having ratified those maritime labour conventions are under the obligation to give effect to the provisions therein. The key maritime labour conventions relate to minimum age for recruitment of seafarers, hours of work, living and working conditions on board ships, seafarers' identity documents, Collective Agreements,

¹⁰¹ Paragraph 5 of the Model Scheme <http://www.fao.org/docrep/010/a0985t/a0985t00.HTM>
http://www.ilo.org/global/What_we_do/InternationalLabourStandards/MaritimeLabourConvention/lang--en/index.htm

amongst others. Flag States party to these conventions and also party to UNCLOS 1982 therefore have the duty to ensure compliance with the conventions on board ships registered under their flag, through adequate regulatory measures and flag State control. However, reality is very often far from this as many flag States are reluctant to assume or even ignore their duties vis a vis seafarers and thus port State control acts as a backup to some extent to ensure that seafarers are given the treatment and rights they are entitled to when working on board ships.

On the other hand, the volume and detail of these instruments has sometimes made it difficult for Governments to ratify and enforce all of them. Many reasons thus called for a change in maritime labour law perspective in order to ensure better flag State compliance and implementation and same can be summarised as below¹⁰³:

- Need to update the existing ILO instruments;
- Need to adapt existing instruments to extensive structural change in the shipping industry;
- Emergence of the world's first genuinely global industry and workforce;
- Changes in ownership, financing and the rise of ship management companies resulting in significant shifts in the labour market for seafarers;
- Development of consciously composed mixed nationality crews in highly organized global network linking ship owners, ship managers, crew managers, labour supplying agencies and training institutions
- Increased internationalization of ship registries and “flags of convenience”
- Need to provide a “level playing field” and avoid exploitation of workers
- Increased stress and complexity in the maritime work place has an impact on the health and social security of workers
- Relatively low ratification rate for some key Conventions
- High level of detail combined with the large number of Conventions having led to problems for inspections and enforcement

¹⁰³ www.ilo.org

- Need for international instruments to be more versatile and fitted with rapid amendment mechanisms in order to cope with rapid changes in conditions of employment;

Hence, in 2006, after five years of preparation by international seafarers' and ship owners' organizations and governments, the ILO's International Labour Conference adopted a major new Convention that consolidated and updated almost all of the existing maritime labour instruments. To borrow an image from shipping, it was like winding many small strands into a single, strong hawser.

The MLC 2006, often described as a "Bill of Rights" for seafarers, also helps to achieve a "level-playing field" for quality ship owners. Its basic aim is to achieve worldwide protection for all seafarers and to give them the ability to have their concerns addressed where conditions fail to meet the requirements of the Convention. It covers the minimum requirements for seafarers to work on a ship, conditions of employment, hours of work and rest, wages, leave, repatriation, accommodation, recreational facilities, food and catering, occupational safety and health protection, medical care, welfare and social security protection.

In addition to consolidating and modernizing the existing requirements, the Convention also introduces important developments in connection with compliance and enforcement. These are intended to ensure that labour standards are enforced as effectively as the IMO conventions on ship safety, security and environmental protection (SOLAS/MARPOL) by both flag and port States.

Under the MLC 2006, States must inspect all ships flying their flag and also issue those ships with a maritime labour certificate and a declaration of maritime labour compliance to ships if they are 500 GT or over and go on international voyages. If a flag State inspection is unsatisfactory, the inspector will not issue the certificate, refuse to

endorse it or, in especially bad cases, withdraw it¹⁰⁴. These are greater powers than inspectors have under the present regime.

The ILO has developed guidelines for flag State inspections and for port State control officers carrying out inspections under the MLC 2006¹⁰⁵. These guidelines provide “how to” practical assistance for ratifying countries and will help them implement their obligations under the MLC 2006. The MLC 2006, encourages inspections for compliance with its requirements on all foreign ships visiting a ratifying country’s ports, even ships from countries that have not ratified the MLC 2006.

Some innovative features of the new Convention include¹⁰⁶:

- a new system for effective enforcement and compliance - a certification system for labour standards (a Maritime Labour Certificate & a Declaration of Maritime Labour Compliance issued by the flag State)
- flag State certification and a foreign port inspection system applies to ships above 500 GT engaged in international voyages or voyages between foreign ports, however the certificate system is available, on request by ship owners, to other ships
- The Certificate and Declaration will provide prima facie evidence of compliance with the requirements of the Convention
- standards will still apply to most other ships (smaller ships can be exempted from some requirements) however, the port inspection provisions and certification requirements would not be mandatory.
- accelerated Convention amendment procedures to update Code provisions to address changes in the sector

¹⁰⁴http://www.ilo.org/global/What_we_do/InternationalLabourStandards/MaritimeLabourConvention/FAQs/lang--en/index.htm

¹⁰⁵ http://www.ilo.org/global/What_we_do/InternationalLabourStandards/MaritimeLabourConvention/lang--en/docName--WCMS_101787/index.htm;
http://www.ilo.org/global/What_we_do/InternationalLabourStandards/MaritimeLabourConvention/lang--en/docName--WCMS_101788/index.htm

¹⁰⁶ Supra note 105

- onboard and onshore complaint procedures to encourage rapid resolution of problems, if possible
- a complaint and inspection system that is linked with the well-established ILO supervisory system
- provisions setting international standards for flag State delegation of some functions to a Recognized Organization
- a modernized management based approach to occupational safety and health

Thus from the above it can be gathered that port State control is proving to be an essential back up instrument in promoting the enforcement of duties by flag States on ships registered under their flags and both international organisations, that is the IMO and the ILO have acknowledged this fact and thus gearing enforcement provisions of the international maritime conventions being developed under their aegis towards enabling port State jurisdiction in the matters involved in addition to flag State jurisdiction, which goes *de facto*.

3.1.2 Coastal States' rights and jurisdiction

There has always existed a clash of interests between, on the one hand, coastal States wishing to extend and tighten their jurisdiction over maritime space and on the other, maritime or user States seeking to maintain maximum freedom of navigation. UNCLOS creates a delicate balance between the rights of the coastal State and those of other States with respect to the freedom of navigation.

The coastal State's rights and duties are set out in broad terms in Article 56 of UNCLOS and amplified in later articles. Article 56 *inter alia* reads:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the waters

superjacent to the sea-bed and sub-soil, and with regard to other activities for the economic exploitation and exploration of the zone,[...]

*(b) **jurisdiction**¹⁰⁷ as provided for in the relevant provisions of this Convention with regard to:*

(i) [...]

(ii) [...]

(iii) the protection and preservation of the marine environment.

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

First, the coastal State has ‘sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources whether living or non-living....’ It is significant that unlike in the territorial sea, the coastal State cannot exercise ‘sovereignty’ in its EEZ; it has only ‘sovereign rights’ in respect of the natural resources of the EEZ. And the coastal State needs to balance these sovereign rights with the freedom of navigation granted to all other States. Under Article 73 of UNCLOS 1982, the coastal State is given the right,

in the exercise of its sovereign rights to explore, exploit, conserve, and manage the living resources of the exclusive economic zone, take such measures, including boarding, inspection, arrest, and judicial proceedings as may be necessary to ensure compliance with its laws and regulations adopted by it in accordance with this Convention¹⁰⁸.

Thus it can be argued that those flag States which do not exercise proper enforcement measures with respect to fishing vessels registered under their flags and which engage in IUU fishing will, to some extent, be “policed” by the coastal States whose fisheries laws have been violated. This “policing” power of coastal States is given further impetus by

¹⁰⁷ emphasis added

¹⁰⁸ Striking a Balance between the rights of a coastal State in its Exclusive Economic Zone and Freedom of Navigation of Other States: A Critical Analysis By Abdul Ghafur Hami Khin Maung Sein Associate Professor Ahmad IbrahimKulliyah of Laws International IslamicUniversityMalaysiaAsianJournal,<http://staff.iiu.edu.my/ghafur/Published%20Articles/Rights%20of%20Coastal%20State%20in%20its%20EEZ%20and%20freedom%20of%20navigation%20of%20other%20States.pdf>

the international and regional fisheries agreements in place and which have been mentioned earlier.

Secondly, the coastal State has 'jurisdiction' with regard to artificial islands and installations, marine scientific research and protection of the marine environment. In respect of this, UNCLOS 1982 confers on the coastal State, not sovereign rights, but the more limited 'jurisdiction'.

The jurisdictional rights of coastal States with respect to the protection and preservation of the marine environment does have some bearing on the navigational rights of other States. Part XII of 1982 UNCLOS gives the coastal State legislative and enforcement competence in its EEZ to deal, among others, with the dumping of waste, and other forms of pollution from vessels. The role of the coastal State can be described as the custodian of the international community with respect to the protection of the zone's environment. Nevertheless, where international rules and standards are inadequate to meet special circumstances, and coastal States have reasonable grounds of believing that a particular, clearly defined, area of their EEZ is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required, they may consult with the competent international organization (the IMO) to designate that area as a 'special area'¹⁰⁹.

As far as enforcement jurisdiction is concerned, under Article 210(5) of UNCLOS 1982, dumping within the territorial sea and the EEZ or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate, and control such dumping. Article 216(1)(a) of UNCLOS 1982 obliges the coastal State to enforce, with regard to dumping, the relevant laws and regulations adopted in accordance with the Convention.

Article 220 of UNCLOS 1982 recognizes the coastal State's competence to enforce within its EEZ pollution laws and regulations which conform to generally accepted

¹⁰⁹ Ibid.

international rules and standards. The coastal State's competence can be categorized into three situations.

In the first situation, the coastal State may only seek information from the foreign vessel where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea of a State has, in the EEZ, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that coastal State conforming and giving effect to such rules and standards, that coastal State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

The second situation is where there is a violation resulting in a substantial discharge causing or threatening significant pollution of the marine environment, and the coastal State may undertake physical inspection of the vessel for matters relating to the violation if the circumstances of the case justify such inspection.

The third situation is where there is clear objective evidence of a violation resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, and the coastal may, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

There can be no doubt that freedom of navigation within the zone will be affected by the coastal State's control over vessel-source pollution. There are a number of provisions in UNCLOS 1982 purporting to restrict the above mentioned enforcement rights of the coastal State in order to ensure that they are not exercised in a discriminatory fashion and that freedom of navigation is not unreasonably hampered. Under Article 297(1)(c) of UNCLOS 1982, compulsory dispute settlement procedure is to be applied when a coastal State has acted in violation of the convention. In addition, under Article 228(1) 1982 UNCLOS, the enforcement rights of coastal or port States are subject to the right of the flag State to institute proceedings itself.

Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels.

Here again the UNCLOS 1982 tries to strike a balance between the right of the coastal State and that of the flag State. Although it appears that the convention endows the flag State with the prior right to enforce vessel-source pollution laws, the coastal State definitely has competence to enforce if the violation caused a major damage to its coast or the environment.

Thus coastal States also play a major role as backup for flag State shouldering the corollary responsibilities associated with the freedom of navigation granted to them under UNCLOS 1982.

3.2 The international “policing” of flag State enforcement of duties

It has long been recognized by the maritime community in general that there are ample Conventions and standards to regulate shipping activities. However, it is on the compliance and enforcement side that much still needs to be done in order to ensure that flag States abide by their international obligations under the maritime conventions to which they are party to. It is thus in an attempt to achieve a certain degree of satisfactory compliance on the part of flag States that the IMO has developed the ISM Code and the Voluntary Audit Scheme¹¹⁰.

¹¹⁰ Supra, note 84

3.2.1 The ISM Code

With the globalisation of shipping activities and the expansion of the open registry phenomenon and the emergence of ship management companies in its wake, the operation of ships has known another dimension. Indeed, the traditional way of conducting shipping business has evolved into a more pragmatic matter, driven by competition and cost cutting priorities. This has in several occasions led to poor or mismanagement in this very sensitive field of activity where safety of life and of the marine environment and the sensitive issue of maritime security are at stake and this State of affairs is rendered more alarming when States which operate ship registries fail to exercise the proper control and jurisdiction over the management of ships through the existence of proper administrative control.

A number of very serious accidents which occurred during the late 1980s, were manifestly caused by human errors, with management faults also identified as contributing factors. At its 16th Assembly in October 1989, IMO adopted resolution A.647(16)¹¹¹, IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention. The purpose of these Guidelines was to provide those responsible for the operation of ships with a framework for the proper development, implementation and assessment of safety and pollution prevention management in accordance with good practice¹¹². The objective was to ensure safety, to prevent human injury or loss of life, and to avoid damage to the environment, in particular, the marine environment, and to property. As stated in the Preamble of the Guidelines

...

RECOGNIZING ALSO that the most important means of preventing maritime casualties and pollution of the sea from ships is to design, construct, equip and maintain ships and to operate them with properly trained crews in compliance with international conventions and standards relating to maritime safety and pollution prevention,

...

¹¹¹ www.directemar.cl/dai/dai-esp/r-omi/asamblea/las%20q%20faltan/A.647.pdf

¹¹² http://http://www.imo.org/HumanElement/index.asp?topic_id=182

The Guidelines were based on general principles and objectives so as to promote evolution of sound management and operating practices within the industry as a whole. After some experience in the use of the Guidelines, in 1993 IMO adopted the International Management Code for the Safe Operation of Ships and for Pollution Prevention (hereafter the ISM Code)¹¹³ which became mandatory in 1998.

The ISM Code addresses the responsibilities of the people who manage and operate ships and provides an international standard for the safe management and operation of ships and for pollution prevention¹¹⁴. It places direct responsibility on shore side management to ensure that its ships operate to the prescribed level of safety¹¹⁵. The aim of the ISM Code is to achieve the creation of a culture of safety within shipping companies throughout the world. Previously, IMO's attempts to improve shipping safety and to prevent pollution from ships had been largely directed at improving the hardware of shipping - for example, the construction of ships and their equipment. The ISM Code, by comparison, concentrates on the way shipping companies are run.

The flag State is under the duty to ensure effective enforcement of the ISM Code, including verification that ship owners' Safety Management Systems (SMS) comply with the requirements as stipulated in the ISM Code, as well as verification of compliance with mandatory rules and regulations and the Issuance of the Document of Compliance to the ship.¹¹⁶

Thus, in addition to setting standards for flag States for onboard running of shipping activities, the IMO has moved towards regulation of shipping operation from the management perspective, a major step ahead indeed in its continuous attempt to enhance exercise of flag State duties as laid down under UNCLOS 1982. However, whilst the introduction of the ISM Code has consolidated ownership and management of a ship into the definition of the "company", and the STCW Convention has, through its "White List" process addressed the training and shipboard operational competencies of seafarers, flag

¹¹³ Full text at http://www.imo.org/humanelement/mainframe.asp?topic_id=287

¹¹⁴ Ibid

¹¹⁵ Sections 2 to 10 of the ISM Code

¹¹⁶ Section 13 of the ISM Code

States, recognised organisations and even companies remain still largely unaccountable for their actions.

Indeed, even with all the legal instruments in place, flag States are given great latitude under several international conventions to determine their own shipping standards through the phrase “to the satisfaction of the Administration” and equivalency and exemption provisions, and this is coupled with the increasing delegation of statutory flag State duties to recognised organisations. This in turn has resulted in great variations in the implementation of shipping treaties. Hence, flag State accountability is diluted and ship registration business becomes an attractive and legitimate business and ship owners engage in “flag hopping”, encouraged by the lack of uniform flag State enforcement. Moreover, as stated in earlier chapters, there is no mechanism as such in place to determine the degree of accountability of Recognised Organisations which are at the center of an obvious conflict of interest between their role as certifier and inspector on behalf of the flag State and their commercial relationship with the ship owners /clients.

It is less and less advisable and possible to tolerate such a state of affairs nowadays in view of security concerns which are at the forefront of most international fora. With the advent of the ISPS Code¹¹⁷ and its attachment to the SOLAS Convention, it can be said that another duty has been added to those laid down under article 94 of UNCLOS 1982 for flag States: that of exercising effective jurisdiction and control over security matters with respect to ships registered under their flags. Indeed, flag States need now to approve ship security plans¹¹⁸, issue Continuous Synopsis Records for ships¹¹⁹ and also set security levels on board those ships¹²⁰. Lax attitude of flag States regarding security issues will, it is submitted, not be accepted by other States and thus flag States need to be able to assume their international obligations or otherwise be accountable to the international community.

¹¹⁷ <http://www.vpa.org.vn/english/news/isps-code.pdf>; www.imo.org

¹¹⁸ Part A Regulation 9 of the ISPS Code

¹¹⁹ Regulation 5 of SOLAS XI-1

¹²⁰ Part A Regulation 9 of the ISPS Code

In view of the above issues it was felt on the international scene and publicly acknowledged by IMO¹²¹ that a universal approach had to be developed to review Government role in the implementation and enforcement of international shipping treaties. As Stated by Mr O’Neill,

All IMO Members have the right to a voice in defining standards and regulations that will be applied to international shipping and that right is equal for all regardless of the size of their fleets, the strength of their economies or the depth of their maritime traditions. But the rights bring with them responsibilities and accountabilities that are commensurate with the rights.

Thus, at its 88th session in 2002¹²², the IMO Council considered and approved in principle the proposal for the development of an IMO Model Audit Scheme, which would draw on the model of the ICAO Universal Safety Oversight Audit Programme.¹²³ With the adoption of resolution A.946(23) in 2003 by the IMO Assembly, the IMO Model Audit Scheme was formally approved. The framework for the implementation of the Model Audit Scheme was further elaborated under resolutions A.974(24) and A.973(24)¹²⁴. The adoption of the framework and procedures for the Scheme heralded a new era for IMO, in which the organization has at its disposal a tool to achieve harmonized and consistent global implementation of IMO standard, which is key to realising the IMO objectives of safe, secure and efficient shipping on clean oceans¹²⁵.

3.2.2 The Voluntary IMO Member State Audit Scheme (VIMSAS)

Further to the request of the IMO Council in 2002, a Joint Working Group (JWG) consisting of the Maritime Safety Committee (MSC), the Marine Environment Protection

¹²¹ www.imo.org, W. O’Neill, Raising the Safety Bar – Improving Marine Safety in the 21st Century

¹²² http://www.imo.org/newsroom/mainframe.asp?topic_id=114&doc_id=2343

¹²³ www.imo.org : Making a Case for the Voluntary IMO Member State Audit Scheme by Mr Barchue Sr,

¹²⁴ http://www.imo.org/Safety/mainframe.asp?topic_id=841; res A.974(24) is entitled Framework and Procedures for the Voluntary IMO Member state Audit Scheme and res A973(24) is entitled Code for the Implementation of mandatory IMO instruments

¹²⁵ Ibid.

Committee (MEPC) and the Technical Cooperation Committee (TCC) was established to develop the documentation of the Audit Scheme. Concurrently, the Code for the implementation of mandatory IMO instruments was also being developed by the sub Committee on Flag State Implementation and it was agreed that the Code would be developed in such a manner that it would also serve as the audit standard under the Audit Scheme¹²⁶. The strategy was to provide a comprehensive and objective assessment of how effectively flag States administer and implement key IMO technical treaties. The IMO's system of flag State audit is, as mentioned above, based on the system of audit developed by the International Civil Aviation Organisation (ICAO).

IMO sees the VIMSAS as a means to achieve harmonised and consistent global implementation of the IMO standards¹²⁷. The scheme addresses current issues of conformance in enacting appropriate legislation for the IMO instruments to which a Member State is a party, administration and enforcement of national law, delegation of statutory authority, and control and monitoring of Recognised Organisations.¹²⁸ Attention is not all upon the effectiveness of flag State implementation but extends to the identification of needs for capacity building of Member States which are endeavouring to provide a proper administration, and assistance through technical cooperation where recommended by the appointed IMO auditors.

Many of the requirements laid down for flag States under the 1982 UNCLOS are covered by the VIMSAS, including general information on the capacity of the flag State administration, on international instruments and how they have been incorporated into national legislation, on enforcement, recruitment and training of surveyors, on investigation and analysis of marine casualties and pollution incidents, on port State control and coastal State activities, on reporting requirements to the IMO, and from there

¹²⁶ Ibid p.3

¹²⁷ Supra note 126

¹²⁸ Voluntary IMO Member State Audit Scheme, www.imo.org

evaluation and review is carried out to measure the performance of the maritime administration and on management systems.¹²⁹

This scheme is a value added to the framework in place for the enforcement of flag State duties as per UNCLOS 1982 as it addresses the sensitive issue of measure of degree of effectiveness of implementation of those duties mentioned under the Convention. VIMSAS also tackles the sensitive issue of sovereignty by making the audit scheme voluntary, in other words, it is ultimately the Member State's decision as to whether it wishes its maritime administration to be audited or no. Moreover, the sovereignty principle still commands that flag States parties to the international maritime conventions are under the obligation to accept *ipso facto* that the other State parties are conforming to the agreed rules of play.

However, it is also true that the assertion of sovereign rights by flag States to ships entitled to fly their flag in dealings amongst States that are Party to various treaties is a diminishing notion. One needs only to look at the trend in port State control interventions, legal recourse by coastal and other States relating to alleged pollution from ship, interdiction agreements on the high seas of ships suspected of conveying illegal cargo or activities and the increasing emphasis on enforcement provisions in conventions being developed. Finally, with the international pressure, flag States are encouraged to show good faith and spirit of cooperation. All these factors should therefore tend to give the necessary impetus to States to volunteer for audit.

VIMSAS will also provide a yardstick for measuring the degree of effectiveness of Recognised Organisations too when fulfilling the delegated statutory duties on behalf of flag States and this is a very important positive point as accountability on both the part of the sovereign flag State and the Recognised Organisation will henceforth be probed, assessed and ultimately the weaknesses in proper flag State enforcement of its duties as per UNCLOS 1982 identified.

¹²⁹ ⁵An analysis of flag State responsibility from a historical perspective Delegation or Derogation? Mansell, John Norman Keith, University of Wollongong 2007, www.library.edu.au/adt-NWU p. 196

Finally, it is worth noting that the provisions of UNCLOS 1982 however, although trying to balance the rights of the parties involved through the contents of its provisions, also rely much on international and regional cooperation among the States for achieving this balance of rights.

This chapter has therefore attempted to explore the instruments which have recently or are currently being developed in order to regulate the discharge of flag State duties as per UNCLOS by the maritime community and has given an aperçu of the role of the international actors such as IMO, ILO, port and coastal States in completing the picture for proper flag State implementation as per article 94 of UNCLOS 1982. The spectrum of instruments elaborated by the relevant international organisations for enhancing flag State duties in addition to the provisions of UNCLOS 1982 itself do represent a substantial framework for flag States to abide by their duties under Article 94. However, all the mechanisms and measures put into place are all geared to finding *a posteriori* solutions to the problem of lax attitude of flag States with respect to their duties as laid down under Article 94 of UNCLOS 1982; nothing has yet been achieved in terms of measures and actions for defining and securing the essential “genuine link” element which needs to exist in the relationship between the flag and the ship .

3.3 Conclusion: Looking at one side of the coin

From the above discussions and those in the previous chapter it can be concluded that to date the international community - and even courts - as will be explained later, have moved away from the need to establish the “genuine link” concept, that is a strong and visible bond between the ship and the flag. Instead, a more practical approach has been adopted, that of putting emphasis on the **role** of the “genuine link” and equating it to effective jurisdiction and control of the flag State and ships sailing under its flag.

Thus, it is submitted that there is still a problem to be tackled: that of defining the concept in order to address the issue of effective flag State jurisdiction and control upstream. The 1986 Convention on the Condition for ship Registration developed by UNCTAD was a fine attempt to reach the core of the problem and give a meaning to the concept by requiring the explicit establishment of a relationship between the flag, the ship owner and the ship, an issue which is avoided by open registries offering the confidentiality and anonymity sought after either by genuine businessmen wishing to protect their business activities or by dubious ship owners wishing to carry out maritime activities at the brink of illegality or frankly illegal and criminal. However, it is a fact that such State of affairs need now to be reviewed and urgently so that flag State duties are made to be effectively enforced both upstream as soon as the interest to register a ship under a particular flag is expressed and downstream, that is ensure that the ship, its management, its activities and its crew are under the scrutiny of the flag on a constant basis.

The following chapter will therefore be geared at looking at the development and birth of the genuine link concept, the case law on the issue and the trend adopted by the relevant stakeholders when dealing with the issue. Finally, the possibility and importance of reviving the concept will be examined.

4 THE RIGHT OF THE FLAG STATE TO SAIL SHIPS AND THE GENUINE LINK CONCEPT

The 1958 HSC and UNCLOS 1982 codify the customary rule of freedom of navigation by stating in the respective articles¹³⁰ that every State “has the right to sail ships flying its flag on the high seas.” In the wake of this freedom to allow ships to sail under its flag lie certain corollary issues. Indeed, the sovereignty enjoyed by the flag State in registering ships and allowing them to be endowed with its nationality is not an absolute one, as has been explained in the introduction, and is tempered by the requirement laid down under the two conventions for the need for flag States to establish a “genuine link” with those ships.

Under Article 5(1) of the 1958 HSC it is provided 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.

In a similar vein Article 91(1) of UNCLOS 1982 provides

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.

The “genuine link” requirement was added by the ILC in the draft articles on the Regime of the High Seas “as the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee

¹³⁰ Articles 4 and 90 respectively

that the ship possesses a real link with its new flag State.”¹³¹ On the other hand, there is the sensitive sovereignty issue, whereby flag States are free to prescribe the conditions upon which they wish to register ships and allow same to operate. Questioning the prerogative of the flag State in granting the right to ships to fly its flag is tantamount to questioning the sovereignty of the State in question.

Since 1958, to date, there have been on-going debates on the matter and this has been exacerbated by a few judicial decisions.

In fact, it is the deviation which has sometimes resulted out of the liberty given to all States to allow ships to be registered and to sail under their flag in the absence of an adequate framework for ship registration and for the exercise jurisdiction and control on the activities of these ships which has in the first instance prompted the international community to resort to the genuine link concept. However, as it will be demonstrated and as mentioned above throughout this paper, political impasse and economic realities have gradually geared control and jurisdiction to be exercised on ships in another direction.

The following analysis will therefore attempt to get a proper understanding of the term “genuine link”, and its relevance to nationality of ships and exercise of jurisdiction and control by flag States. The *raison d’être* and the actions being taken on the international level regarding the balancing of the discretion to fix conditions to register ships and the need to establish a genuine link with the said ships will also be looked at. The problematic issue of fishing vessels and IUU fishing will be brushed upon. Finally and most important, the need for and importance of instating the “genuine link” will be expanded on.

¹³¹ The International Law Commission, 1949-1998 Vol.1 The Treaties, Sir Arthur Watts,p.61

4.1 Section A: The development of the “genuine link” concept

Much controversy has surrounded - and still does - the introduction of the concept of “genuine link” under Article 5 the 1958 High Seas Convention, and this controversy can probably be traced back to the reasons which have motivated its incorporation under the said Article.¹³² The “genuine link” has gradually been debated at the level of the ILC then at UNCLOS I and eventually incorporated into the 1958 HSC¹³³. The ILC had, as mentioned in the introduction, been instructed by the General Assembly of the United Nations in 1949 to codify the law of the high seas. In 1950, at the second session of the ILC, the issue of “nationalité des navires” was already on the agenda. In his report, the special rapporteur, Francois, stated¹³⁴ :

D'une facon generale il appartient a tout Etat souverain de decider a qui il accordera le droit d'arborer son pavillon et de fixer les regles auxquelles l'octroi de ce droit sera soumis. Toutefois, pour etre en toutes circonstances efficaces, il faut que la legislation d'un Etat sur cette matiere ne s'ecarte pas trop des principes qui ont ete adoptes par le plus grand nombre des Etats et qui peuvent de ce fait meme etre consideres comme formant a cet egard un element du droit international.

Since 1951 the ILC and its special rapporteur jointly tried to elaborate rules which were to lead to unification of national registration conditions and this unification at the start tended to focus on the connection between the ship owner and the flag State. Several conditions to establish this connection were proposed and dropped as the views of the States on the proposals and also State practice regarding registration rules were very divergent. In 1955 the ILC came forward with the following rules regarding nationality and ship registration in its set of draft articles on the high seas :

¹³² “The Genuine Link Concept: Time for a Post Mortem?” by Alex G. Oude Elferinck Research Associate. Netherlands Institute for the Law of the Sea (NILOS) www.uu.nl/uupublish/content/genuine%20link.pdf

¹³³ Meyers, The Nationality of Ships, Martinus Nijhoff/the Hague/1967, Chapter IV; see also “The meaning of the genuine link requirement in relation to the nationality of ships”, by R.Churchill, Oct.2000, www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct2000

¹³⁴ Ibid.p.205, ILC Yearbook 1950 II pp 38 ff

Right to fly the flag

Article 5.

Each State may fix conditions for the registration of ships in its territory and for the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either

Be the property of the State concerned; or

Be more than half owned by:

Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.

As can be noted from the above article, much emphasis was put on the “national character” that the ship was to possess before being registered under a particular flag. However, debates still continued and there was no consensus on the article. The greatest reluctance to the pre-setting of conditions for registration of ships came from open registries which feared that this would deter prospective registration under their flag as they would no longer be able to offer attractive registration incentives to ship owners. It was clear to the ILC that it was a hopeless task to prescribe detailed conditions for ship nationality and registration, and in 1956 it was agreed that the ILC should work towards the formulation of a general principle for ship registration¹³⁵. Among the proposals made by the different Governments on the issue, it was the Dutch one which first contained the “genuine link” element. The Netherlands proposed to have draft Article 5 of the ILC replaced and suggested to have as Article 5a the following:

*Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine connection between the State and the ship.*¹³⁶

¹³⁵ Supra notes 134 and 135

¹³⁶ Supra note 134; ILC Yearbook 1956 II,p.63; Alex G. Oude Elferink p.3 : In its commentary on this proposal the Netherlands noted that to establish the presence of a genuine connection account would have to be taken of the ownership of the ship or the nationality of its crew or captain.

The introduction of the “genuine element” by the Dutch with the emphasis being put on the link between the ship and the flag State to be established by personal circumstances of individuals (to be a national, to have a domicile) was surely influenced by the judgment of the ICJ in the *Nottebohm Case*¹³⁷ in 1955. The case concerned whether Liechtenstein could exercise diplomatic protection on behalf of one of its nationals, Mr Nottebohm, in respect of certain acts committed by Guatemala against him which were alleged to be breaches of international law. Nottebohm had been born in Germany in 1881. He possessed German nationality, but from 1905 had spent much of his life in Guatemala which he had made the headquarters of his business activities. He obtained Liechtenstein nationality through naturalisation in 1939. His connections with that country were slight, being limited to a few visits. On deciding whether Liechtenstein could exercise diplomatic protection in respect of Nottebohm *vis a vis* Guatemala, the Court noted that while under international law it was up to each State to lay down rules governing the grant of its nationality, a State could not claim that:

*the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.*¹³⁸

The Court went on to add:

*Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the State conferring nationality than any other State. Conferred by a State, it only entitles that State to exercise protection vis a vis another State, if it constitutes a translation in juridical terms of the individual’s connection with the State which has made him his national*¹³⁹.

¹³⁷ [1955] ICJ Rep.4

¹³⁸ Ibid.,p.23

¹³⁹ Ibid.

The Court found on the facts that there was insufficient connection between Nottebohm and Liechtenstein for the latter to be able to exercise diplomatic protection on Nottebohm's behalf *vis a vis* Guatemala.

Hence the ILC adopted the proposal of the Netherlands and same was incorporated in the draft articles which were submitted to UNCLOS I. Article 29(1) of the final draft Articles thus read:

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. Nevertheless, for the purpose of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

Furthermore, during the debates on the final draft Article 29(1) at the level of the ILC, mention was made of the possibility of defining the “genuine link” in terms of the ability of States to exercise effective control over ships to which it had granted its nationality in addition to establishing an economic and social connection between the vessel owner and the State of registration¹⁴⁰. This point of view was retained by the UNCLOS I and included under Article 5(1) of the 1958 HSC.

Unfortunately, by merely having the “genuine link” mentioned under the 1985 HSC and UNCLOS 1982 the outcome has been the codification of a vague criteria for granting nationality to ships, with the latitude left to flag States to set their own domestic conditions for translating this link between the State and the ship into concrete terms: the minimum national element. Article 5 of the 1958 HSC and Article 91 of UNCLOS 1982 can be said to be a compromise between States favouring nationality requirements for the owner or crew of ships and those rejecting such requirements.

¹⁴⁰ Fitzmaurice said: “although the principle laid down in article 5 [29(1)] was both valid and necessary, he would have preferred the Commission to have adopted the criterion of the ability of the flag State to exercise effective control over ships on the high seas ...the more so since some States tended to grant the right to fly their flag without being able to exercise control over the ships in question or assume international responsibility for them.”, Meyers op.cit.p.212

Thus, this “genuine link” concept has become a concept of the law of the sea and of international law pertaining to ship registration, without any definition having been – on purpose – been assigned to it. UNCLOS III has exacerbated the discussions on the definition of the concept when the part on the effective jurisdiction and control to be exercised by flag States was removed from Article 5 and set as a separate article which became Article 94 under UNCLOS 1982. Discussions tend to relate to whether the genuine link is solely linked to the need for the effective exercise of jurisdiction and control by the flag State in administrative, technical and social matters over ships flying its flag or whether the genuine link is a condition *sine qua non* to be established between the State and the ship prior to granting nationality to any ship.

4.2 Section B: Defining the genuine link

When the case on the composition of the Maritime Safety Committee of IMCO – now the IMO - arose in 1960 and the ICJ was asked to deliver an advisory opinion on the interpretation of Article 28 of the Convention of the Intergovernmental Maritime Consultative Organisation¹⁴¹, it gave an aperçu of the persisting reluctance to ascribe any definition to the genuine link concept in spite of the efforts made by some States to try to fix certain elements of interpretation to the genuine link .

Article 28(1) provides that the Committee shall “*consist of fourteen members [...] of which not less than eight shall be the largest ship-owning nations[...]*” Liberia and Panama, at that time having the third and eighth largest shipping tonnage registered under their flags, were not selected in this category, being considered as open registries by the

¹⁴¹ Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation [1960] ICJ 150; “The meaning of the genuine link requirement in relation to the nationality of ships”, by R. Churchill, Oct.2000 www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct2000p.23

majority in the IMCO Assembly. Some States came forward with the argument of the genuine link to keep open registries out of the Maritime Safety Committee.

For instance, the Netherlands pointed out that it was clear from the discussions at the 1958 Conference that there was a consensus that mere registration was not sufficient to establish a genuine link between a ship and a State. It argued that the genuine link requirement in Article 5 of the HSC codified the rules of international law and clearly imposed limitations on the freedom of a State to determine which ships belonged to that State. The Netherlands concluded that there was no genuine link between Liberia and Panama and the ships registered by them because the legislation of those countries had no provisions on incorporation of ship-owning companies or the nationality of the management, which were common connecting factors in other States¹⁴².

The Court held that the Committee had not been validly constituted in accordance with Article 28(1)¹⁴³. The Court stated that the phrase “*largest ship-owning nations*”, should be read in its ordinary and natural meaning. “Largest” means the largest tonnage: this was the only practicable form of measurement. “Ship-owning” could mean either owned by nationals of the States concerned or the registered tonnage of the States concerned regardless of beneficial ownership. The Court opted for the latter interpretation as being more appropriate because this was in accordance with other provisions of the IMCO Convention and treaties concerning load lines, safety at sea, salvage and pollution of the marine environment.¹⁴⁴ The concept of the “genuine link” was held by the Court to be irrelevant in deciding the issue.

Hence, although the ICJ did not consider it opportune to tie the concept of genuine link to the ability to register ships, other countries such as Netherlands attempted to demonstrate that it was necessary that it was of prime importance that at the outset the flag State is in a position to show evidence of the genuine link in order to be able to

¹⁴² Ibid.

¹⁴³ ICJ Report 1960 pp.167-170

¹⁴⁴ Ibid

assign nationality to ships. Thus, for the Netherlands, the genuine link, *lien substantiel* as in the French version of the convention, would exist if the ship owner was a citizen of the flag State or the principal place of business was there and that national laws of the flag State imposed same.

In the *Barcelona Traction Case*¹⁴⁵ this reasoning was reiterated by Judge Jessup when he argued that :

“If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognise the asserted nationality of the ship.”

There are writers who have the same stand on the matter; in other words according to them without factors such as the beneficial ownership of ships being by nationals of the flag States or the ships being manned by nationals of the flag State there is no genuine link between the ship and the State, the latter cannot engage in ship registration.¹⁴⁶

On the other hand, many other writers have asserted that registration of a ship is sufficient to establish the nationality of a ship and from this premise the genuine link is to be considered only in the light of effective implementation of flag State duties. It is even argued that insistence on the establishment of the genuine link will lead to increasing numbers of Stateless vessels and to frequent searches of ships flying a flag suspected of not being bound by a genuine link: such developments would put into jeopardy the entire world’s shipping industry¹⁴⁷.

¹⁴⁵ [1970] ICJ Rep.1 p.188

¹⁴⁶ “The meaning of the genuine link requirement in relation to the nationality of ships”, by R. Churchill, Oct.2000 www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct2000 p.36

¹⁴⁷ Ibid.p.34

There is hence the growing assertion that the genuine link is to be connected to the exercise of effective jurisdiction and control by flag States and not to the nationality of ships and therefore there was no need to define such a link, with the ensuing shift of attention to *a posteriori* flag State responsibility as a means of achieving the ultimate goal of public order on the high seas¹⁴⁸.

A similar trend of “disconnecting” the genuine link from the nationality issue can be said to have been adopted by the Courts. Hence in the *Anklagemyndigheden v. Poulsen and Diva Navigation*¹⁴⁹ the European Court took the view that administrative formalities alone are sufficient and that there are no other criteria required for the grant of nationality and that *a fortiori*, nothing further is required to establish a genuine link. The European Court upheld the same view in the case of *Commission v. Ireland*.¹⁵⁰

In 1999 the International Tribunal for the Law of the Sea (ITLOS) delivered the judgment in the *M/V Saiga No. 2 Case*¹⁵¹ (*St Vincent and the Grenadines v Guinea*) and it was therein reaffirmed that the genuine link was to be viewed in the context of the effective exercise of jurisdiction and control and not for determining whether a State is apt to allow ships to fly its flag¹⁵².

ITLOS, after considering Article 5 of the 1958 HSC, the deliberations of the ILC and UNCLOS I on the subject, and Article 94 of UNCLOS 1982, Stated that:

*The purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.*¹⁵³

¹⁴⁸ Ariella D’Andrea : “The “genuine link” concept in responsible fisheries: legal aspects and recent developments”, FAO Legal Papers Online, www.fao.org

¹⁴⁹ [1992] ECR I-6019

¹⁵⁰ [1992] ECR I-6185

¹⁵¹ http://www.un.org/Depts/los/Judg_E.htm

¹⁵² Judgment para.83

¹⁵³ Ibid.

From the above exposé it may be gathered that the trend is to do away with the perception that the genuine link is to be defined and used as criteria for assessing the capacity of a State to register ships. So far, any attempt to do so has failed. Indeed, the United Nations Convention on the Conditions for Registration of Ships (1986), developed by UNCTAD, whereby criteria to establish the genuine link were laid down without the concept of “genuine link” itself having been clearly defined, has remained to date dead letter and it is doubtful whether it will ever enter into force.

The same situation repeated itself when the FAO attempted to provide elements of the genuine link in the Draft Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures¹⁵⁴. There also no consensus could be reached among Government representatives when criteria for establishing the genuine link between fishing vessels and the flag State were set and so the idea was ultimately dropped from the text of the Agreement which was finally adopted in 1993¹⁵⁵. The focus of the document became instead the authorisation of fishing vessels on the high seas, the concept of flag State responsibility and the free flow of information on high seas fishing operations¹⁵⁶.

Even at the level of the Ad Hoc Consultative Meeting of Senior Representatives of International Organisations on the Genuine Link, convened in response to Resolution 58/240 and 58/14 adopted at the United Nations General Assembly during its 58th session, whereby IMO and the other concerned relevant agencies were invited to study, examine and clarify the role of the “genuine link” in relation to the duty of flag States to exercise effective control over ships flying their flag, it was observed that:¹⁵⁷

it was not within their competence to provide a definition of the term “genuine link”. In their view this was a matter to be determined by States and international and domestic tribunals on the basis of provisions contained in the 1982 United Nations Convention on the Law of the Sea 9[...] and other applicable international instruments.

¹⁵⁴ FAO Document COFI/93/10 Annex 2

¹⁵⁵ www.fao.org/fi/agreem/complian/complian.asp;

¹⁵⁶ www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct2000

¹⁵⁷ IMO Council 96th Session Agenda item 14 (a) C96/14(a)/1/Add.1, 24th March 2006

It is also stated in the report that:

*The organisations considered that the question of the role of the “genuine link” under UNCLOS [...] is directly related to the issue of the effective exercise of flag State obligations.*¹⁵⁸

As can be seen from the above, the tendency is firstly that there is a reluctance to define the “genuine link” and secondly that it is proposed to equate “genuine link” solely in terms of effective implementation of flag State duties and to disregard the fact that a bond should first and foremost be established between the flag, the ship and its owner(s).

This reluctance to ascribe a definition to the genuine link has its roots in the disagreements among States as to its constitutive elements, mainly for economic reasons as mentioned earlier, with especially open registries dreading flagging out from their Ship Register. For such registers, it is more convenient to having the notion and conditions for ship registration remaining vague and left to their discretion to be fixed, and this is one of the reasons why they are termed as flags of convenience.

4.3 The flag of convenience issue

With the advent of the open registry and the internationalisation of the mode of operation of shipping there has been an inexorable movement from the traditional maritime flags – whose registers are available only to nationals of those States, being operated by the maritime administration of those States and requiring owners, demise charterers to be nationals of those countries or having the body corporates duly incorporated under their national laws and all or the majority of the crew to be nationals

¹⁵⁸ Ibid. p.3

of those States¹⁵⁹ - to those flag States offering better economic and fiscal incentives for flagging. Indeed, although these flag States bear certain administrative, technical and social responsibilities when attributing its flag to ships, *vide* Article 5 of 1958 HSC and Article 94 UNCLOS 1982, it is the flexible degree with which these flag States oversee and enforce these responsibilities. Together with, *inter alia*, flexible crewing requirements and costs, tax incentives and attractive minimal registration and tonnage fees which very often determine the ship owner's decision to register his ship under such flag.

These types of registries offering more incentives for registration can be classified into two broad categories, namely the open registries, flags of convenience (FOC) for some, and quasi flags of convenience or hybrids.

4.3.1 Open Registries

The open registries, pejoratively known as FOC, thus generally present the following attributes¹⁶⁰:

- 1) Allowing ownership and/or control of their flag ships by non-citizens.
- 2) Permitting access to and unrestricted transfer of ship registration.
- 3) Levy no or low local taxes on income.
- 4) Operated usually by small countries that depend on registration and annual tonnage fees for a substantial portion of their national incomes.
- 5) Permitting manning of their flag ships by non-nationals.

¹⁵⁹ An analysis of flag State responsibility from a historical perspective Delegation or Derogation? Mansell, John Norman Keith, University of Wollongong 2007, www.library.edu.au/adt-NWUp.137

¹⁶⁰ Report of the Committee of Inquiry into Shipping, chaired by Lord Rochdale (London, May 1970), at www.allbusiness.com/operations/shipping/416713-1.html

6) Having neither the power nor the administrative machinery to effectively impose any government or international regulations or to control the shipping companies.

Registries such as that of Liberia, Panama, Malta are amongst those which are said to be open registries. The international concern regarding open registries has grown out of the last qualification often attributed to the latter in the Rochdale Report, that is the ineffective or lack, of control and jurisdiction of those flag States on the vessels registered under their flag especially with respect to safety and prevention of marine pollution and which have resulted in a number of maritime catastrophes closely associated with this element, such as those of the *Torrey Canyon*, *The Erika* and *The Prestige*. Another serious accusation made against FOCs has been the use of such flags for contraband and other illegal activities¹⁶¹. The attractiveness of such flags resides in the fact that they provide, and even encourage, the ship owners to use their domestic laws as a shield with the corporate veil device. These days, and especially in the aftermath of the 9/11 events, the major concern is for security issues and the concern is that ships may be used for terrorist activities, facilitated by the lax attitude of flags of convenience with respect to ships registered in their register of ships. Such concern had even prompted IMO to issue a resolution warning against the registration of phantom ships: Resolution 923 (22) 2001 on Measures to Prevent the Registration of Phantom Ships.

It is worth noting that the international campaign against open registries has also been geared by the ITF to reduce the difference of salary scales between the crews employed on ships registered under traditional national flags and those working on those vessels registered under open registries. Furthermore, developing States have argued for the eradication of open registries, claiming that this would help in diverting the registration of ships under their flags as they were also competitive labour supplying countries¹⁶².

Faced with the international outcry against open registries the international community has therefore set itself the task of reinforcing the juridical and enforcement arsenal to

¹⁶¹ Flags of convenience provide cover for illegal activities, <http://www.itfseafarers.org/illegal-activities.cfm> ; Ships of Shame, <http://www.nation.lk/2008/01/20/busi4.htm>; Misuse of flags of convenience by Sheik Mohammad Iqbal, <http://www.dawn.com/2004/01/19/abr9.htm>

¹⁶² La Mer Et Le Droit E. Du Pontavice, P. Cordier, Tome Premier, p.136

curb the abuses which have resulted with the use of FOCs. This has been engineered through the existing related legal instruments, and also by adopting a number of international conventions. Thus, for instance, in this wake, SOLAS, the COLREGs, MARPOL 73/78 and STCW 78/95 were initially developed under the aegis of the IMO, while the ILO came forward with the ILO Convention No.147, called the Merchant Shipping (Minimum Standards) Convention, and covering safety and training standards, conditions of employment and shipboard living arrangements. All these international conventions reinforce the flag States duties laid down under article 5 of 1958 HSC and it can even be said that the expanded duties laid down under article 94 are a result of the advent of these conventions as the IMO was at the time working in parallel with UNCLOS III.

To circumvent the ill effects of the open registries the international community, through UNCTAD also came forward with the Convention on the Conditions for ship Registration (1986), in an attempt to enable *a priori* control over ownership, management and manning of ships but as we know this convention is dead letter.

On the other hand, in order to reduce the drastic flagging out from their traditional maritime registries, some States have created second registers. Moreover, some of the open registries, tired of being targeted in international fora as FOCs, have re-branded and upgraded their flags to meet international standards. Hence this has led to the creation of what can be termed as quasi FOCs or hybrid registers.

4.3.1.1 Quasi FOCs or hybrid registers

Such registers offer some or even all of the advantages of FOCs to attract tonnage to their registry, but differ from FOCs because they (a) have or can develop the administrative machinery to effectively impose any government or international regulations, and (b) do have a substantial requirement for some of the shipping registered under their flags. Typically, quasi-FOCs do not impose taxes on corporate profits or seamen's incomes, and assess only nominal registration and tonnage taxes. But they do administer and enforce

strict regulations pertaining to ship management manning, and safety, and insist that all owners be clearly identifiable and be held accountable for liabilities.

Thus, countries such as France, Norway and Germany have developed such registries and offer the same fiscal and manning incentives as open registries but at the same time have in place stringent maritime legislations in line with international instruments. In the same vein other ship registers such as that of Singapore have reinvented themselves and while still offering attractive fiscal and registration incentives to prospective ship owners, Singapore has also uplifted its maritime administration in order to be in a position to exercise its flag State duties more effectively.¹⁶³

Thus is now a new trend which is developing, that of establishing registries which are flexible enough to attract registration by offering fiscal, economic and even political incentives but at the same time keeping substandard shipping at bay by having in place adequate administrative and legal framework coupled with effective enforcement powers to regulate shipping activities. This evolution in ship registries is closely connected to the actions initiated at the international level for the exercise of stricter control on shipping activities.

However, the issue is to what extent this is a solution to the whole problem of effective flag State control will be addressed later in this chapter. There is yet an area where the international community is still navigating in troubled waters and finding it difficult to set standards for control and this is in the field of fishing vessel registration and IUU fishing.

4.4 Fishing vessels and flag State duties

One of the freedoms of the high seas is the freedom of fishing granted to the nationals of all States, *vide* Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas 1958 and Article 116 of 1982 UNCLOS. This right, coupled

¹⁶³ www.allbusiness.com/operations/shipping/416713-1.html p.17

with the prevailing jurisdiction of the flag State on the high seas means that it is primarily the duty of the flag State to exercise control and jurisdiction over the activities of those fishing vessels. However, it is evident from the contents of these articles that fishery matters were not really a concern for States when those conventions were drafted initially. From the conclusion and entry into force of UNCLOS 1982 to date, there have been dramatic changes in the fishing industry, with new technologies increasing fishing vessel capacity and efficiency and thereby having a direct relationship with the world's fish stocks.

The major challenge to the legal regime of high seas fisheries has taken the form of IUU fishing, with some flag States, in addition to not exercising their duties with respect to safety and working conditions on fishing vessels, also failing to ensure that their vessels comply with internationally or regionally agreed standards for high seas living resource conservation as per Article 117 of 1982 UNCLOS¹⁶⁴. Open registries have long been blamed for encouraging IUU fishing as such flags exercise minimal controls over their ships and impose lower standards as they are often not parties to agreements on high seas fisheries. In view of the inadequacy of the provisions of UNCLOS 1982 on fisheries matters especially under Article 94, the international community decided to initiate actions to remedy the situation, as attested from the attention given to the problem in Chapter 17 of Agenda 21.¹⁶⁵ Indeed under Chapter 17 of Agenda 21, problems of unregulated fishing, vessel reflagging to escape control and lack of sufficient co-operation between States in the management of high seas fisheries were pointed out. It is based on the concerns expressed on the subject under Agenda 21 and the Cancun Declaration¹⁶⁶ that the FAO initiated consultations on high seas fisheries and which ultimately resulted in the 1993 Agreement to Promote Compliance with International

¹⁶⁴ Article 117 states that : “All States have the duty to take or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”

¹⁶⁵ 1992 United Nations Conference on Sustainable Development, Agenda 21, Chapter 17, Rio de Janeiro 1992, A/Conf.151/26 (vol3), 13 August 1992, see also *The Law of the Sea, Progress and Prospects*, Freestone, Barnes and Ong, Oxford University Press p.281

¹⁶⁶ In 1992 International Conference on Responsible Fishing (Cancun, Mexico) adopted the Cancun Declaration, which called upon FAO to develop an International Code of Conduct on Responsible Fishing., http://www.oecd.org/document/24/0,3343,en_2649_33901_23460248_1_1_1_1,00.html

Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter Compliance Agreement)¹⁶⁷.

Attempts have been made to regulate the problem of IUU fishing through the revival of the genuine link concept and thus, for instance, in the 1993 the Compliance Agreement it is provided that no Party to the Agreement

*shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel*¹⁶⁸

At the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action held in Canada in 2008, during one of the presentations it was argued that defining the genuine link concept would help in establishing assessment criteria for flag State performance with respect to control and jurisdiction on fishing vessels.¹⁶⁹

During the same workshop, it was pointed out that bringing cases against fishing vessels on the ground of lack of genuine link with the flag State are bound to fail. As mentioned during the workshop, it is better to speak of flags of non compliance in matters of fisheries rather than flags of convenience¹⁷⁰. Relating the genuine link concept to the obligation to effectively exercise jurisdiction and control by States on ships flying their flags was once again stated to be more the sole way to give impetus to effective enforcement flag State duties.

Hence, together with the Compliance Agreement other instruments have been developed to complete in a certain way the provisions of Article 94 of 1982 UNCLOS. The Compliance Agreement sets out the responsibility of the flag State in controlling and

¹⁶⁷ Ibid

¹⁶⁸ Article 3 parag. 3; IMO Council 96th Session Agenda item 14 (a) C96/14(a)/1/Add.1, 24th March 2006p.4

¹⁶⁹ Expert Workshop on Flag State Responsibilities : Assessing performance and Taking Action, 25-28 March 2008, Meeting Report February 2009, <http://www.dfo-mpo.gc.ca/overfishing-surpeche/documents/flag-State-eng.htm>

¹⁷⁰ Ibid. p.4, presentation by Matthew Gianni

surveying the activities of fishing vessels operating on the high seas and elaborates a number of obligations for parties whose fishing vessel operate on the high seas, including maintaining a record of registered fishing vessels operating on the high seas and taking necessary measures for real time access of such information by the FAO¹⁷¹. Flag State control is also propounded by the 1995 UN Fish Stocks Agreement¹⁷² and also makes it an obligation on the flag State to investigate into any alleged violation of sub-regional and regional conservation and management measures and have in place appropriate deterrent sanctions against the fishing vessels having committed such violation. Finally, the Code of Conduct for Responsible Fisheries reiterates the same idea, putting more emphasis on enforcement regimes of flag States¹⁷³.

It has therefore been demonstrated that all the existing measures for effective flag State implementation of its duties are all geared at tackling only one facet of the issue. True it is that the international community has attempted to consider and find solution to the problem at its essence, that is setting international standard conditions for ship registration but such efforts have failed and this has resulted in the issue being avoided and thus left unsolved. The *Ad Hoc* Consultative Meeting of Senior Representatives of International Organizations which had been given the task General Assembly of examining the role of the “genuine link”, although given the opportunity to go into elaborating at least some criteria for defining the notion, merely restricted themselves in reaffirming the stand taken by the ITLOS in the “*M/V Saiga (No.2)*” Case, in other words that the requirement of the “genuine link” under UNCLOS 1982 related only to the discretion of the flag State to fix condition(s) upon registering ships under its flag and that its *raison d’être* under UNLCOS 1982 is solely an operational concept to secure more effective implementation of the duties of the flag State.

However, it is submitted that without a harmonized, uniform and internationally agreed definition of the “genuine link” and the mandatory establishment of a direct relationship between this concept and ownership - beneficial ownership- it is not possible to affirm

¹⁷¹ <http://www.fao.org/docrep/007/y2776e/y2776e03.htm>. Article III of the Compliance Agreement

¹⁷² http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htmA/CONF.164/37, Article 18

¹⁷³ <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM>, Article 8

that there is complete, fool proof and effective flag State implementation of its duties as per UNCLOS 1982. The 1986 Convention on Conditions for Ship Registration, as stated before, was a good and laudable start to address this problem as it laid down specific and sound conditions for ascertaining ownership and for controlling the activities in which the ship is to be engaged as before registering any ship under its flag, the State was required as per this convention to ensure that it had all the information regarding the owner, the owner's representative, the crew and the business activities which would be involved. The exercise of such *a priori* control would help in completing the legal framework in place for proper flag State implementation of its duties which is vital today, in view of the concern expressed for maritime security issues.

4.5 Why do we need the “genuine link” concept to be instated

It has been acknowledged in several international fora¹⁷⁴ and discussed in a few articles¹⁷⁵ that shipping is a potential victim and weapon for terrorists and that there is the need to take all the necessary measures to prevent and deter such intentions. There is therefore the need to do away from the concept that a fee-for-service relationship between the owner and the Flag State is sufficient as the lack of a true bondage had led to the situation that the beneficial owner of the ship can hide his identity, thus creating idealistic opportunities for prospective terrorists and other criminals to engage into shipping activities without the fear of being identified.

Even if the Flag State has the capacity and does exercise effective control and jurisdiction over the operation of the ship from a safety perspective, there is the need to reinforce the

¹⁷⁴International Conference on the revision of the SUA treaties, http://www.imo.org/newsroom/mainframe.asp?topic_id=1042&doc_id=5302http://www.bimco.org/Members%20Area/News/General_News/2009/07/~/_media/BIMCO_News_2009/General/MaritimeSecurity2009brochure.ashx, Maritime Security Conference 2009, Threats to Shipping: the need for a long term strategy, Oct 2009

¹⁷⁵Real and Present Danger, Flag State Failure and Maritime Security and Safety by Matthew Gianni. http://assets.panda.org/downloads/flag_state_performance.pdf, Redouble efforts to protect shipping against terrorism, IMO urges, http://www.imo.org/Newsroom/mainframe.asp?topic_id=848&doc_id=3405, Old and New Threats: Piracy and Maritime Terrorism, <http://www.southchinasea.org/docs/Galletti-Piracy,%20Old%20and%20New%20Threats.pdf>

safety net from the ownership and registration point of view. The superficial attempt of most Flag States to ascertain the ownership of the vessels on their register is restricted to requiring the ownership details to be provided, without any confirmation as to the veracity of the information provided as most of them, especially the open registers, advertise more or less openly the fact that they offer anonymity and confidentiality of information under their Register.

Maritime security is of prime importance and it is submitted that mechanisms such as the ISPS Code, the IMO Ship Identification Number¹⁷⁶ and the IMO Unique Company and Registered Owner Identification Number Scheme¹⁷⁷ are substantial but not sufficient measures to achieve secure shipping as they address the problem only from an *a posteriori* perspective.

4.5.1 How is anonymity secured by the ship owners

There are various mechanisms and corporate devices that enable the identity of beneficial ship owners to remain cloaked, or at least known to a very few people only and those ship owners seeking the greatest anonymity will resort to a combination of these artifices to meet this goal.

The Maritime Transport Committee has carried out a study on the issue of transparency in the ownership and control of ships¹⁷⁸ and has thus identified the way by which ship owners go about hiding their identity.

According to the study, those ship owners resort, *inter alia* to the use of bearer shares, nominee shareholders or nominee directors, intermediaries and/or institutional devices

¹⁷⁶ Resolution A600(15) and Circular Letter No. 1886/Rev.2

¹⁷⁷ Resolution MSC.160(78) and Circular Letter no.2554

¹⁷⁸ Ownership and Control of Ships, The Maritime Transport Committee, OECD, Directorate for Science, Technology and Industry, March 2003, www.oecd.org/dataoecd/53/9/17846120.pdf

such as International Business Corporations, foundations and trusts operating under offshore regimes. The ship owner would then use a combination of these methods and means to create a series of corporate layers spread over several jurisdictions permitting such corporate legal constructions and thus achieve an effective impenetrable web to hide his identity.

Once the corporate shield is created, the next step is to register a ship and this is done easily as most jurisdictions allow foreign corporations to register ships, with many open registers even offering as incentive and promise: the non disclosure of information. The situation is not better with the hybrid ship registers set up by developed countries in their dependencies and overseas territories which act as offshore centers and therefore represent flags *par excellence* for ship owners on the lookout for the least suspicion from investigation agencies as such flags are seen as more “credible”.

As it can be seen from the above, where these methods are resorted to and allowed, there is no direct genuine link between the beneficial owner and the flag. The beneficial owners can easily remain unidentified if they choose to be so, such that if ever potential terrorists intend to use ships to carry out their terrorist activities, they will be able to do so “legally”.

All this situation prevails due to the fact that there is no definition of the “genuine link” concept; had criteria been pre-set regarding accountability and identification of ship operators and beneficial owners and international agreement reached as the elements which would make the relationship between the flag and the ship more visible and palpable, the probability of the risk of criminal intention associated with the use of ships would have lessened.

This is the reason why it is advocated that this concept needs to be revived and a win-win situation can even be resorted to, whereby those proponents of the freedom to fix conditions for registration would be satisfied, as well as those who have maritime security at heart.

4.5.2 Customer “due diligence” principle

There are certain measures that can be taken to enhance transparency in the ship registration process through the use of the “genuine link” concept, thereby completing the legal framework for the exercise of effective jurisdiction and control over ships. Such measure are outlined in the Final Report of the Maritime Transport Committee on “Maritime Security – Options To Improve Transparency In The Ownership And Control Of Ships”¹⁷⁹ and represent a very good initiative in starting to give some essence to the “genuine link” concept.

The measures proposed would in fact help in:

*increasing transparency in corporate vehicles that operate from jurisdictions that promote or permit anonymity [and] increasing transparency of ownership in shipping registers.*¹⁸⁰

Firstly, as mentioned in the report, those measures for dealing with corporate governance and financial transparency as proposed by bodies such as the Financial Action Task Force (TATF), the OECD Steering Group on Corporate Governance and the OECD forum on Harmful Tax Practices should be put into practice. The proposals brought forward by these bodies are, amongst others¹⁸¹:

- Up-front disclosure to the authorities of the beneficial ownership and control of corporate vehicles to the authorities charged with the responsibility for the establishment or incorporation stage, with the obligation of regular information update upon any change;

¹⁷⁹ Report of the Maritime Transport Committee following the study undertaken under the aegis of the OECD, June 2004, ntlsearch.bts.gov/tris/record/tris/00979391.html

¹⁸⁰ Ibid. pg 4

¹⁸¹ Ibid pg 11 to pg 13

- Allowing only licensed corporate service providers to serve as nominees or fiduciaries and putting the obligation upon them to maintain information on the beneficial ownership and control of those entities that they establish and administer;
- Setting up of an investigative system, in other words capacity building in terms of carrying out thorough investigations where there is any suspicion of illegality.
- Controlling the bearer shares and their transfer with mandatory reporting of owner identity;
- Reviewing of trust laws in place in order to promote identification and accountability of the settlor, trustees and beneficiaries.

Secondly, with respect to the control to be exercised on ship registers, the Maritime Transport Committee made a number of suggestions which ultimately boil down to establishing a visible and genuine link between the flag and the ship through ownership and management identification and accountability¹⁸². The requirement for the genuine and substantial presence of the beneficial ship owner or of his representative in the country where the ship is registered is also advised. It is also suggested that those States promoting their respective flags as guarantors of anonymity should refrain from doing so. The other measures proposed by the Maritime Transport Committee in the report are interesting, such as the abolition or avoidance of the use of bearer shares and nominee shareholders, but others are, it is submitted, too extreme, such as targeting ships whose beneficial ownership is obscure or which are registered with flag States permitting anonymity and restricting port access to only those ships whose beneficial ownership and control is known. True it is that under international maritime safety conventions and through actions of port State control under MOUs, it is accepted that ship targeting and denial of port access may be resorted to, but this is for safety and for prevention of maritime pollution reasons. Applying the same principle for ownership identification and

¹⁸² Supra note 180

control would be tantamount to questioning the sovereignty of the flag State to register ships and this it not feasible.

Overall, it should be said that the measures for achieving transparency in ship registration proposed in the report of the Maritime Transport Committee represent a big step forward for the eventual formulation of criteria for the establishment of the mandatory genuine link which should exist between a ship, its owner and the flag. The international community should, however, strike a balance between the undisputable discretion of flag States to set requirements for ship registration and the need to exercise control on the criteria set by respective flag States when registering ships. The success of it all will reside in the creation of a win-win situation whereby flag States would consent to have their right of registering ships fettered by internationally set standards with respect to prior control to be exercised by those flag States.

4.6 Conclusion: Win-win situation

Promoting the provision of confidentiality as opposed to anonymity may offer a workable compromise for all interested parties as it would represent the balance between security imperatives and commercial considerations. The flag States would therefore need to have the legal framework in place for obtaining and keeping of information on beneficial owners, management and shipping activities for each individual ship and for doing the follow up on such matters. While such information would remain confidential, it would however be readily available when the need for it arises, especially in case any incident involving maritime security *viz* a particular ship crops up. This, coupled with the initiatives being taken on the international front to regulate corporate vehicles and their mode of operation, would represent the base for the definition of the “genuine link”.

5 CONCLUSION

The objective of this paper has been to examine the different facets of flag State duties, as primarily laid down under Article 94 of UNCLOS 1982, while bearing in mind that the list of duties laid down under the Article is not meant to be exhaustive. The primacy of flag State jurisdiction on vessels plying its flag has been examined and the weaknesses in the regulatory framework allowing the registration and operation of substandard ships have been identified. The implications of the unfettered right of a State to grant its nationality to ships, the ability of the flag States to delegate its duties and responsibilities to private organisations and the associated issues which crop up when this delegation does not meet the standards demanded by the international conventions have also been examined together with the measures being taken by the international community to enhance satisfactory enforcement of flag State duties as per Article 94 of UNCLOS 1982. Finally, it has been demonstrated that the actions of the international community, although substantial, only tackle the problem of effective enforcement of flag State duties from an *a posteriori* perspective and focussing on ship operation while disregarding the security and liability issues attached to the registration process for ships. It has therefore been argued that there is the need to remedy such loopholes in the arsenal of measures proposed by the international community by reviving the “genuine link” concept and framing the concept in a manner that will appease the growing concerns with respect to maritime security and at the same time not endanger the commercial objectives of flag States.

Thus, an eventual international instrument drafted to regulate the discretion of individual flag States to set criteria for supervising the ownership and management of ships registered under their flags, coupled with the system of flag auditing being put into place by the IMO with VIMSAS and the future entry into force of the Maritime Labour Convention (2006) which promises to set standards for the certification of living and working conditions on board ships all represent the perfect cocktail for successful and

effective flag State implementation of its duties over navigational safety, vessel-source pollution and security matters while at the same time eradicating substandard shipping. That being said, it must not be assumed that concepts such as sovereignty and exclusive flag State jurisdiction should be put on a lower level. Far from it; these remain very much the core doctrine in maritime affairs. The difference today lies in the fact that flag States now share their once exclusive jurisdiction, in well defined circumstances, with other actors such as coastal and port States.¹⁸³

Finally, the emphasis of the efforts for enhancing effective flag State duties as per Article 94 of the 1982 UNCLOS should not be geared towards eradicating open registries or flags of convenience because such types of registers are a phenomenon which has its roots in the underlying dynamics of the global maritime trading system and therefore can hardly be wished away by the “genuine link” requirement. In fact, the solution to the vessel safety and marine pollution problems is not the phasing out of open registries, but the creation of market disincentives for sub-standard shipping through the tightening of flag State and port State enforcement obligations and the setting up of a reward mechanism for quality flags. In order to achieve this goal, coordination and goodwill among the various actors in the maritime sector – be it ship owners, cargo owners, classification societies, insurers, flag States, IMO - is essential. An interlocking and mutually accountable network of actors behaving responsibly is the only effective means of eradicating sub-standard shipping and ensuring effective implementation of flag State duties. Freedom of navigation on the high seas is a sacrosanct right for all States and needs to be preserved while at the same time it needs to be balanced with the entailing responsibilities. Ultimately, it is for the flag State to show “genuine” good faith to abide and implement effectively its obligations when allowing ships to ply the seas under its flag.

¹⁸³ *Ibid.*, p.19

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