

Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas

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Carnival Cruise Lines owns and operates the largest cruise ship passenger fleet in the world.¹ In practice, Carnival Cruise Lines is an American company. Carnival's corporate headquarters located in Doral, Florida, a suburb of Miami, houses 3,900 employees.² 23 out of 24 of its cruise ships are home ported in the United States. Every year these ships, which account for 21% of the worldwide cruise market share,³ carry 4.5 million passengers in itineraries that always begin and end in American ports.⁴ Its corporate parent, Carnival Corporation (also headquartered in Doral, Florida), is publicly traded on the New York Stock

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¹Carnival Cruise Lines is the largest cruise line in the world based on passengers carried. *Carnival Cruise Lines Fact Sheet*, <http://carnival-news.com/2014/01/17/carnival-cruise-lines-fact-sheet-2/>.

²*Id.*

³2014 *Worldwide Cruise Market Share*, *Cruise Market Watch*, <http://www.cruisemarketwatch.com/market-share/>.

⁴Carnival Cruise Lines' home ports are in the following American cities: Miami (Florida), Fort Lauderdale (Florida), Port Canaveral (Florida), Tampa, San Juan (Puerto Rico), Charleston (South Carolina), Baltimore (Maryland), New York (New York), New Orleans (Louisiana), Galveston (Texas) and Long Beach (California). See *Carnival Cruise Lines Fact Sheet*, <http://carnival-news.com/2014/01/17/carnival-cruise-lines-fact-sheet-2/>.

Exchange. Therefore, in practice, Carnival is as American as General Motors and American Airlines.

Yet, on paper, the story is different. All of Carnival Cruise Lines' ships are registered in Panama, the Bahamas, and Malta. Carnival's ships fly these foreign flags, despite having little, or no connection to these countries.

This practice is not unique to Carnival. Other major American-based cruise companies have similar corporate structures. Royal Caribbean Cruises, with 15.8% of the market share,⁵ is headquartered in Miami, Florida (where it employs over 6,900 people) and its stock is publicly traded on the New York Stock Exchange. Its ships, most of them home ported in American cities, are registered in the Bahamas and Malta.⁶ Norwegian Cruise Line, with 9% of the market share⁷ and corporate headquarters in Miami, Florida, has all of its ships registered in the Bahamas.

Despite their overwhelming connections with the United States, including the fact that 51.7% percent of cruise passengers are U.S. citizens,⁸ all American based cruise lines use foreign flags on their vessels. In fact, of all commercial vessels calling on U.S. ports (i.e. passenger cruise lines, container shipping vessels, oil and gas tankers, etc.) 90% fly non-U.S. flags.⁹

The legal fiction that allows American shipowners to disguise themselves as 'foreign entities' can trace its origins to both domestic and international jurisprudence. Under international law, every merchant ship must be registered with a country, known as the flag state. Indeed, one of the premises of the principle of

⁵2014 *Worldwide Cruise Market Share*, *Cruise Market Watch*, <http://www.cruisemarketwatch.com/market-share/>.

⁶*Royal Caribbean Cruises, Ltd. 2013 Annual Report*, p. 23. <http://phx.corporate-ir.net/phoenix.zhtml?c=103045&p=irol-reportsAnnual>.

⁷2014 *Worldwide Cruise Market Share*, *Cruise Market Watch*, <http://www.cruisemarketwatch.com/market-share/>.

⁸*Passenger Sourcing*, 2014 CLIA Annual State of the Industry Press Conference & Media Marketplace. <http://www.cruising.org/sites/default/files/pressroom/PressConferencePresentation.pdf>.

⁹*Maritime Industry Background*. *Cruise Lines International Association*, <http://www.cruising.org/regulatory/resources/maritime-industry-background>

freedom of the high seas is that all states have the right to grant nationality to a vessel.¹⁰ The International Maritime Organization (IMO),¹¹ a United Nations body of which the United States is a member, “requires all ships engaged in international trade to have a country of registry in order to sail on international waters.”¹² Article 4 of the 1958 United Nations Convention on the High Seas states that “[e]very 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 “[e]ach State shall fix the conditions [. . .] for the right to fly its flag.”¹³

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 impose certain duties upon those ships.¹⁴ For example, the flag State, the state granting nationality to a vessel, has exclusive jurisdiction over that vessel on the high seas.¹⁵ Additionally, the flag State is responsible for ensuring that the vessel is safe to sail and to check on that crew’s working conditions.¹⁶ In *Lauritzen v. Larsen*,¹⁷ the United States Supreme Court offered the following comprehensive summary of the law of the flag:

¹⁰H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L. J. 139, 140 (Winter, 1996).

¹¹The International Maritime Organization (“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. See Nivedita M. Hosanee, *A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of the United Nations Convention on the Law of the Sea*, at p. 28. Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, United Nations, New York, (2009), http://www.un.org/Depts/los/nippon/unhff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritius.pdf.

¹²Sarah J. Tomlinson, *Smooth Sailing? Navigating the Sea of Law Applicable to the Cruise Line Industry*, 14 VILL. SPORTS & ENT. L. J. 127, 137 (2007).

¹³See United Nations Convention on the High Seas, 29 April 1958. Entered into force on 30 September 1962. United Nations, Treaty Series, vol. 450, p. 11, p. 82. http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷345 U.S. 571, 584 (1953).

Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to 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 its 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.

Traditionally, ships used to fly the flags of their nation. They were floating pieces of their home country on ungovernable seas.¹⁸ In the early 20th century, this began to change. Panama, seeking to attract American ships avoiding Prohibition laws, allowed non-Panamanian ships to fly its flag, for a fee. During that time, several U.S. vessels, including two cruise liners, the *M/V Reliance* and the *M/V Resolute*, were reflagged in Panama to avoid the U.S. law banning the sale of alcohol aboard U.S. ships.¹⁹ Liberia and other countries followed suit. Today, these "open registries" are used by over 60% of shippers, up from 4% in the 1950s.²⁰ As of 2013, almost three quarters of the world's fleet was registered under a flag of a country other than its own.²¹

These flags are widely referred to as "flags of convenience." A flag of convenience ship is a vessel where the nationality of the owner is different from the country in which the ship is registered. Countries that offer registration to ships owned by foreign interests, operate an "open registry."

A broadly accepted definition for flags of convenience can be found in the Rochdale Report, published in the United Kingdom.²²

¹⁸Rose George, *Flying the Flag, Fleeing the State*, NEW YORK TIMES, April 24, 2011, at A25.

¹⁹Anderson, *supra* note 10 at p. 158.

²⁰*Id.*

²¹*Why So Many Shipowners find Panama's Flag Convenient*, BBC NEWS LATIN AMERICA & CARIBBEAN, August 4, 2014. <http://www.bbc.com/news/world-latin-america-28558480>.

²²Anderson, *supra* note 10, at p. 158, quoting Committee of Inquiry into Shipping: London, H.M.S.O. 1970, Comnd 4337 (hereinafter "Rochdale Report").

According to the Report, there are six criteria for determining the status of flags of convenience:

1. The country of registry allows ownership and/or control of its merchant vessels by non-citizens;
2. Access to the registry is easy; a ship may be usually registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted;
3. Taxes on the income from the ships are not levied locally, or are very low. A registry fee and annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;
4. The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges may produce a substantial effect on its national income and balance of payments;
5. Manning of ships by non-nationals is freely permitted; and
6. The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor does the country even wish or have the power to control the shipowner companies themselves.²³

The Rochdale Report's definition highlights the fact that most open registry countries are developing countries as opposed to politically powerful and economically developed states.²⁴ Moreover, it also supports the notion that the creation of open registries was largely masterminded by the shipowner entrepreneurs of rich developed countries.²⁵ Countries such as Liberia, Mongolia, Panama and the Bahamas, places where fees, taxes, regulations and laws protecting seafarers are often minimal

²³Id.

²⁴Anderson, *supra* note 10 at p. 158.

²⁵Id.

or nonexistent, offer a safe haven to American and European shipowners. In return for allowing shipowners to legally disguise themselves under the flag of convenience, these cash-strapped developing nations fill their national treasuries with a steady flow of registration fees.²⁶

II ECONOMIC AND LEGAL BENEFITS OF OPEN REGISTRIES FOR SHIPOWNERS

By opting to re-flag in a new nation, a vessel owner becomes subject to the safety, labor and environmental codes of that nation. Not surprisingly, those nations whose open registries have become the most popular also tend to be those who possess the most lax labor, safety, and environmental codes.²⁷ Therefore, a vessel owner can ostensibly forum shop to find the laws most favorable and advantageous to his or her company's operations.²⁸ Most shipowners wishing to cut costs or evade scrutiny register under foreign flags where fees, taxes, regulations and laws protecting seafarers are often minimal or nonexistent.²⁹ These shipowners now represent three quarters of the world's fleet.³⁰

²⁶The following countries have been declared flags of convenience by the International Transport Worker's Federation: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, Faroe Islands, French International Ship Register, German International Ship Register, Georgia, Gibraltar, Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, Moldova, Mongolia, Netherlands Antilles, North Korea, Panama, Sao Tome and Principe, St. Vincent, Sri Lanka, Tonga, Vanuatu. See <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>

²⁷Maria J. Wing, *Comment: Rethinking the Easy Way Out: Flags of Convenience in the post-September 11th Era*, 28 TUL. MAR. L.J. 173, 176 (Winter, 2003).

²⁸*Id.* at p. 177.

²⁹Michael Richardson, *Cambodia-Listed Ship was Carrying Cocaine: Raid at Sea Highlights Flag Abuses*, NEW YORK TIMES, June 24 2002. http://www.nytimes.com/2002/06/24/news/24iht-a5_64.html.

³⁰*Why So Many Shipowners Find Panama's Flag Convenient*, BBC NEWS LATIN AMERICA & CARIBBEAN, August 4, 2014. <http://www.bbc.com/news/world-latin-america-28558480>.

In the case of American-based shipowners, the open registry system provides huge advantages. First, these shipowners are currently exempt from U.S. federal income and branch profit taxes.³¹ Thus, even though cruise lines like Carnival and Royal Caribbean earn a substantial proportion of their profits by selling cruises to millions of American citizens, to embark on itineraries that begin and end on U.S. ports, they can avoid income taxes by registering as foreign corporations and sailing under foreign flags. This is possible thanks to a decades-old loophole in the Federal tax code. Under section 883 of the Internal Revenue Code, certain non-U.S. corporations (such as North American cruise ship businesses) are not subject to U.S. federal income tax or branch profits tax on U.S. sources of income derived from, or incidental to, the international operation of a ship or ships.³²

Second, the open registry system gives American-based shipowners the ability to avoid strict U.S. federal labor laws, minimum wage law and many environmental and safety regulations.³³ Even if a cruise line is based in the United States (with ships home ported in the United States), it can be immune from lawsuits for violations of federal labor laws, such as the Labor Management Relations Act (“LMRA”) and Title VII of the Civil Rights Act. A recent example is *Lobo v. Celebrity Cruises, Inc.*³⁴ In *Lobo*, a group of Indian seafarers working for Celebrity Cruises (a cruise line headquartered in Miami, Florida), filed suit against their employer under section 185 of the LMRA, alleging that Celebrity had illegally deprived them of their wages in violation of their Collective Bargaining Agreement. The seafarers also filed suit against their labor union under section 159 of the National Labor Relations Act (“NLRA”), alleging the union engaged in collusion with their employer in breach of the duty of

³¹Carnival Corporation’s 2014 Annual Report, p. 22 <http://phx.corporate-ir.net/phoenix.zhtml?c=140690&p=irol-irhome>.

³²Id. See also 26 U.S.C. §883.

³³Douglas Frantz, *Sovereign Islands: A Special Report; Cruise Lines Reap Profit from Favors in Law*, NEW YORK TIMES, February 19, 1999. <http://www.nytimes.com/1999/02/19/us/sovereign-islands-a-special-report-cruise-lines-reap-profit-from-favors-in-law.html?src=pm&pagewanted=3>.

³⁴*Lobo v. Celebrity Cruises, Inc.*, 667 F. Supp. 2d 1324 (S.D. Fla. 2010).

fair representation. The federal district court, citing United States Supreme Court precedent, dismissed the seafarers' claims, holding that United States laws, such as the LMRA and the NLRA did not apply to foreign seamen working on foreign flagged vessels (even if those vessels are home ported in the United States and owned and operated by U.S. based shipowners).^{35,36}

III PITFALLS OF OPEN REGISTRIES AND FLAGS OF CONVENIENCE

Under the flag of convenience system, registries have been divorced from government oversight. North Korea has a thriving registry, as does landlocked Mongolia. Liberia's registry, the second-largest in the world, flourished even during a dozen years of civil war. Some registries allow shipowners to change the flags they are registered within 48 hours, some require little more than a signature or an online form from the shipowners.³⁷

Journalist William Langewiesche has described the contradictions of the open registry system as follows:³⁸

No one pretends that a ship comes from the home port painted on its stern, or that it has ever been anywhere near. Panama is the largest maritime nation on earth, followed by bloody Liberia, which hardly exists. No coastline is required either. There are ships that hail from La Paz, in landlocked Bolivia. There are ships that hail from the Mongolian desert. Moreover, the registries themselves are rarely based in the countries whose names they carry: Panama is considered to be an old-fashioned "flag" because its consulates handle the paperwork and collect the registration fees, but "Liberia" is run by a company in Virginia, "Cambodia"

³⁵Id.

³⁶*Lobo v. Celebrity Cruises, Inc.*, 704 F. 3d 882 (11th Cir. 2013).

³⁷George, *supra* note 18.

³⁸William Langewiesche, *Anarchy at Sea*, THE ATLANTIC MONTHLY; September, 2003. <http://shipmun.pbworks.com/f/Anarchy%20at%20Sea.pdf>.

by another in South Korea, and the proud and independent “Bahamas” by a group in the City of London . . . The system, generally known as “flags of convenience,” began around World War II, but its big expansion occurred only in the 1990s - and in direct reaction to an international attempt to impose controls. By shopping globally, shipowners found that they could choose the laws that were applied to them rather than haplessly submitting as ordinary citizens must to the arbitrary jurisdictions of their native states. The effect was to lower operating costs - for crews and upkeep - and to limit the financial consequences of the occasional foundering or loss of a ship. The advantages were so great that even the most conservative and well-established shipowners, who were perhaps not naturally inclined to play along, found that they had no choice but to do so. What’s more, because of the registration fees that the shipowners could offer to cash-strapped governments, the various flags competed for the business, and the deals kept getting better.

Critics of the open registry system point out that many flag of convenience states lack the capacity or the will to monitor the safety and working conditions on ships, or to investigate accidents.³⁹ As discussed in a 2002 U.S. House of Representatives, Armed Services Committee Hearing: “[C]onvenience countries have neither the desire, the power, nor the administrative machinery to impose regulations that temper the narrowest private economic concerns with social objectives. If they tried to, they would cease to be convenient.”⁴⁰ Moreover, because ship safety certificates are given out by private classification societies, shipowners are allowed to choose any society they want. The worst offenders, predictably, choose the least demanding classification societies.⁴¹ This self-policing can be compared to registering a car

³⁹George, *supra* note 18.

⁴⁰United States, House of Representatives, Armed Services Committee Hearing, *Vessel Operations Under Flags of Convenience and their Implications on National Security*, dated June 13, 2002. http://commdocs.house.gov/committees/security/has164220.000/has164220_of.htm.

⁴¹*Id.*

in North Korea so that you can drive it in the United States with faulty brakes.

The failure of open registry countries to monitor the safety and working conditions on ships leaves millions of seafarers vulnerable to exploitation and abuse. Rose George, in an Op-Ed piece for *The New York Times* described the human cost of the system as follows:⁴²

[M]aritime lawlessness isn't confined to pirates. Thanks to a system of ship registration called "flags of convenience," it is all too easy for unscrupulous ship owners to get away with criminal behavior. They have evaded prosecution for environmental damage like oil spills, as well as poor labor conditions, forcing crews to work like slaves without adequate pay or rest. But unlike piracy, which seems intractable, the appalling conditions on some merchant ships could be stopped.

. . . The human cost of this system is unacceptably high. Long hours and punishing port schedules rarely provide sailors with enough time to rest; some international regulations permit 98-hour work weeks. Salaries often go unpaid: the International Workers' Federation, which represents seafarers, recovered 30 million in unpaid wages last year. When the *Most Sky*, a Turkish ship registered in Panama, docked at a British port last November, its crew had not been paid for months. They had to pool together enough money to buy bread and there was no light or heat in their cabin; they have been using a kebab grill to keep warm.

In 1981, the United Nations Conference on Trade and Development ("UNCTAD"), issued a report describing ten reasons why the observance of safety standards is less stringent amongst open registry states:

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

⁴²George, *supra* note 18.

2. Real owners can change their entities by manipulating brass-plate companies and consequently avoid being identified as repeated substandard operators or risk-takers;
3. Since the master and other key shipboard personnel are not nationals of the flag State, they have no need or incentive to visit the flag State and can avoid legal action;
4. Owners who reside outside of the jurisdiction of the flag State can defy the flag State by refusing to testify at an inquiry by the flag State and avoid prosecution;
5. Since open-registry owners do not have the same interest in preserving good relations with the flag State, they do not feel the need to co-operate with inspectors of the flag state;
6. Open-registry shipping lacks the union structure which is so essential to the application of safety and social standards in countries of normal registry; namely, a national trade union of the flag State representing basically the interests of national seamen on board vessels owned by owners who have economic links with the flag State;
7. Open-registry owners are in a better position to put pressure on the masters and officers to take risks, since there is no really appropriate government to which shipboard personnel can complain;
8. Port State control is weaker because the port State can only report substandard vessels and practice to a flag State which has no real control over the owner;
9. Owners can suppress any signs of militancy among crews by virtue of their freedom to change nationalities of crews at whim; and
10. Enforcement of standards is basically inconsistent with the operation of a registry with the sole aim of making a profit.⁴³

⁴³Action on the Question of Open Registries, United Nations Conference on Trade and Development (“UNCTAD”) 1981.

One of the primary dangers of the open registry system recognized by the UNCTAD report is how shipowners can get a high degree of anonymity. Many open registry States do not require shipowners to disclose their identities at all.⁴⁴ In the event of environmental accidents and disasters (e.g. an oil spill), affected nations can have serious difficulties in holding the anonymous shipowner accountable. For instance, in 1999, an oil tanker, the *Erika*, sank off Brittany and polluted 250 miles of French coastline. The French government could not penetrate a chain of shell companies in seven countries that stood between the ship and its owner. The owner eventually came forward voluntarily and, when questioned by the BBC about the complex ownership agreements, said, “[t]hat is standard practice in shipping.”⁴⁵

Notably, the most catastrophic of the oil spills in recent years have involved vessels registered under flags of convenience: *M/V Torrey Canyon* (1968), *M/V Argo Merchant* (1976), and *M/V Amoco Cadiz* (1978). Untrained labor and lack of regulation enforcement have been implicated as factors in the catastrophes, with courts implying that this phenomenon is strongly linked to flags of convenience.⁴⁶ However, oil tankers are not the only concern. Approximately seventy-seven percent of all maritime pollution arises from foreign registered cruise ships.⁴⁷

Shipowners who pollute on the high seas have also attempted to use flags of convenience as a “get out of jail free card,” to avoid criminal prosecution for dumping toxic waste on the high seas. In 1993, the United States Coast Guard caught the Royal Caribbean (“RCCL”) ship *Nordic Empress* dumping oil in waters off the coast of the Bahamas as it made its way to Miami.⁴⁸ The

⁴⁴George, *supra* note 18.

⁴⁵*Id.*

⁴⁶Wing, *supra* note 27 at p. 179, citing *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1992 AMC 913 (7th Cir. 1992).

⁴⁷*Id.* See also Andrew Schulkin, *Note, Safe Harbors: Crafting An International Solution to Cruise Ship Pollution*, 15 GEO. INT'L ENVTL. L. REV. 105, 109 (2002).

⁴⁸Paul T. Hinckley, *Raising the Spector of Discrimination: The Case for Disregarding “Flags of Convenience” in the Application of U.S. Anti-Discrimination Laws to Cruise Ships*, THE MODERN AMERICAN, Special Summer-Fall 2007, p. 76.

ship was flagged out of Liberia.⁴⁹ This and other pollution incidents led the Coast Guard and the Justice Department to begin what would grow into a four-year inquiry that led to the discovery of a fleet-wide conspiracy within RCCL to save millions of dollars by dumping waste into the ocean.⁵⁰ During the course of the investigation, RCCL, a corporation with its headquarters in Miami, denied the charges.⁵¹ In addition to the denial, RCCL made the unprecedented claim that it was immune from criminal prosecution in the United States because its ships fly foreign flags.⁵² RCCL maintained that under the International Convention for the Prevention of Pollution from Ships (MARPOL), the international law that addresses the discharge of pollutants at sea, only Liberia had jurisdiction to prosecute because the *Nordic Empress* flew a Liberian flag.⁵³

While the Justice Department and Coast Guard were conducting their investigation, in July 1993, the matter was referred to Liberia. Predictably, on February 10, 1994, Liberia accepted the company's claims that no dumping occurred, filed its determination that there was reasonable doubt that the *Nordic Empress* had contravened MARPOL, and asked the Coast Guard to erase the incident from its records.⁵⁴ The Justice Department did not give up, however, and used a novel approach to gain jurisdiction over the *Nordic Empress*: on February 19, 1998, RCCL was indicted in Miami on a single count, not for dumping

<http://www.wcl.american.edu/modernamerican/documents/Hinckley.pdf> See also William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J., 73 (2000).

⁴⁹Goldberg, *supra* note 48 at 71, citing *U.S. v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358, 1361 (S.D. Fla. 1998).

⁵⁰Goldberg, *supra* note 48 at 71, citing Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, NEW YORK TIMES, January 3, 1999 at A1.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴Goldberg, *supra* note 48 at 71, citing *U.S. v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358, 1361 (S.D. Fla. 1998).

oil, but for “making” a false statement to the Coast Guard.⁵⁵ The *Nordic Empress* discharged its waste in international waters, but the ship had presented the Coast Guard in Miami with an oil record book that omitted the discharge.⁵⁶ While making a making a false statement to the Coast Guard is a crime in the United States, this was one of the first times that the statute was used in this manner.⁵⁷ RCCL was also indicted by a federal grand jury in July 1996 for another dumping episode that occurred on October 1994, from its ship *The Sovereign of the Seas* in San Juan, Puerto Rico. RCCL was indicted for dumping oily bilge into Puerto Rican waters, falsifying its log books, and making false statements to the United States Coast Guard.

On April 22 and 23, 1998, a hearing took place in the federal district court in Miami in which RCCL asked the judge to dismiss the charges. At the hearing, RCCL argued that the United States overreached its prosecutorial authority because only Liberia had jurisdiction over the matter and that Liberia had determined there was insufficient evidence of a crime. The United States argued in response that international law did not preclude the prosecution. On May 12, 1998, the District Court denied RCCL’s motion to dismiss.⁵⁸ Having lost the argument over jurisdiction and faced with indisputable evidence that the *Nordic Empress* had polluted, RCCL pled guilty on June 3, 1998, and agreed to pay U.S. \$9

⁵⁵Goldberg, *supra* note 48 at 71, citing Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, NEW YORK TIMES, January 3, 1999 at A1.

⁵⁶Goldberg, *supra* note 48 at 71–72. The United States alleged a violation of 18 U.S.C. §1001, The False Statements Act, which states: “(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up any trick, scheme, or devise a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.”

⁵⁷Goldberg, *supra* note 48 at 72.

⁵⁸*Id.*

million in fines.⁵⁹ The settlement covered both RCCL polluting incidents.⁶⁰

These cases demonstrate both how difficult it is for local port authorities to police shipowners, and how determined the industry is to make itself exempt from American regulation. It also reveals the questionable effectiveness (and unwillingness) of open registry countries to guard the world's waterways.⁶¹

Another cited concern of the open registry system is its potential exploitation by organized crime and terrorist groups. At a 2002 hearing of the Armed Services Committee of the United States House of Representatives, David Heindel, secretary-treasurer of the Seafarers International Union of North America testified that,

[o]ne of the most serious deficiencies of the FOC system is the lack of transparency in corporate structure, that both the ITF and SIU view as a facilitator of transnational criminal activities as well as terrorism. FOC vessels have been linked to the registration of hijacked ships, phantom ships, fraudulent mariner documentation, illegal unreported and unregulated fishing, illegal alien smuggling and, most recently, to international terrorism.⁶²

That same year French commandos, acting on information gleaned from a 15-month surveillance program by U.S., French, Spanish and Greek authorities, boarded the Cambodian-registered freighter *Winner* in international waters 1,100 kilometers southwest of the Canary Islands. Amid the firefight with the crew, the French government seized more than a ton of cocaine with a street value then estimated at \$235 million.⁶³ In an interview,

⁵⁹Id.

⁶⁰Id. at footnote 13.

⁶¹Goldberg, *supra* note 48 at 73.

⁶²United States House of Representatives, Armed Services Committee Hearing, *Vessel Operations Under Flags of Convenience and their Implications on National Security*, June 13, 2002, http://commdocs.house.gov/committees/security/has164220.000/has164220_of.htm.

⁶³J. Peter Pham, *An Inconvenient Flag*, FOUNDATION FOR DEFENSE OF DEMOCRACIES, at 3, <http://www.defenddemocracy.org/media-hit/an-inconvenient-flag/>.

David Cockcroft, general secretary of the International Transport Workers' Federation, called the Cambodian registry—which is based in Singapore, one of the world's busiest ports—"a sleazy, no-questions asked operation that has managed to attract some of the world's worst ships and owners, some of whom have been involved in people trafficking, drugs smuggling and contraband linked to a terrorist group."⁶⁴

IV THE ECONOMIC COSTS OF REQUIRING AMERICAN SHIPOWNERS TO FLY U.S. FLAGS

Despite the aforementioned shortcomings, shipowners and their trade groups vigorously defend the long-standing use of open registries and flags of convenience. According to the Cruise Lines International Association ("CLIA"), an industry trade group, a majority of the major U.S. controlled shipping companies engaged in international commerce have chosen to operate under flags other than that of the United States.⁶⁵ CLIA justifies this practice by arguing that the crewing, ship construction and ownership requirement to flag a vessel in the United States are among the most restrictive of the maritime nations.⁶⁶ Current manning regulations for U.S. flag vessels engaged in coastwide trade mandate that all officers and pilots and 75% of other onboard personnel be U.S. citizens or residents. In addition, U.S. flag vessels engaged in coastwide trade must be owned by U.S. citizens and constructed in U.S. shipyards. This construction requirement applies to the entire hull and superstructure of the ship and the majority of all materials outfitting the vessel.

⁶⁴ Michael Richardson, *Cambodia-Listed Ship was Carrying Cocaine: Raid at Sea Highlights Flag Abuses*, NEW YORK TIMES, June 24 2002. http://www.nytimes.com/2002/06/24/news/24iht-a5_64.html.

⁶⁵ Maritime Industry Background, Cruise Lines International Association, <http://www.cruising.org/regulatory/resources/maritime-industry-background>.

⁶⁶Id.

Accordingly, supporters of the system view this as a free-market debate in which burdensome U.S. regulations have forced shipowners to plant their flags elsewhere. If American shipowners were forced to register their vessels in the United States and to fly the American flag, their labor costs would skyrocket. Instead of hiring cheap foreign labor to man their ships, these American shipowners would be forced to hire American citizens and residents, requiring them to pay the U.S. minimum wage and to observe U.S. federal labor laws. Further, instead of commissioning the building of their ships overseas (at arguably cheaper costs), they would have no choice but to “buy American.” Moreover, American based shipping companies could be potentially liable to pay Federal Income Taxes. The end result translates into higher shipping costs to transport oil, gas and cargo, and therefore more expensive cruises for American passengers.

But, do higher profits for shipowners and cheaper fares for consumers justify the high human and environmental cost of the flags of convenience system?

CLIA’s position is that greater business flexibility and lower costs do not necessarily compromise safety on foreign flag ships. According to CLIA, open registration nations provide vessel owners with comprehensive, competitive ship registry services and maritime expertise.⁶⁷ CLIA explains that in the competitive international shipping industry there are a number of factors that must be met for a valid registry. First, a flag state must be member of the International Maritime Organization (“IMO”), and therefore must have adopted all of the IMO’s maritime safety Resolutions and Conventions. Second, a flag state should have an established maritime organization that is capable of enforcing all international and national regulations. Third, open registration countries always require annual safety inspections prior to the issuance of a passenger vessel certification, and utilize recognized

⁶⁷Id.

classification societies to monitor that their vessels comply with all international and flag state standards.⁶⁸

CLIA further points out that regardless of the flag the vessel flies, compliance with the International Convention for the Safety of Life at Sea (“SOLAS”) standards and other internationally recognized conventions are monitored not just by the flag States, but also by the port States.⁶⁹

Port States, that is, countries at whose ports vessels call, also play an important role in the regulatory framework of foreign flagged vessels. Indeed, the United States, a major port State represented at the IMO by the U.S. Coast Guard, has a reputation for its vigorous enforcement of SOLAS standards. To ensure compliance with SOLAS safety requirements, the Coast Guard conducts quarterly inspections on all vessels embarking passengers at U.S. ports. CLIA argues that the cooperative effort between flag and port states provides a maritime safety enforcement system which has proven effective over the years.⁷⁰

As noted above, the United States, as a port State, is involved in the regulation of non-U.S. flagged vessels that touch U.S. ports. Sporadic American enforcement of SOLAS through Coast Guard inspections, however, does not address: 1) the precarious working conditions of seafarers, 2) environmental disasters, such as dumping of toxic waste on international waters, and 3) the lack of transparency in the corporate structure of shipowners, that both the ITF and SIU view as a facilitator of transnational criminal activities.

More importantly, sporadic United States Coast Guard inspections on foreign flag vessels do not compensate for the flag

⁶⁸Id.

⁶⁹Id. The International Convention for the Safety of Life at Sea (SOLAS) is an international maritime safety treaty. It ensures that ships flagged by signatory States comply with minimum safety standards in construction, equipment and operation. The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. See also, International Convention for the Safety of Life at Sea (SOLAS), International Maritime Organization (IMO), [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx).

⁷⁰Id.

States' lax enforcement (and even non-enforcement) of international rules and regulations. For example, CLIA's so-called "cooperative effort between flag and port states" failed miserably in two of the most recent maritime disasters: the capsizing of the *Costa Concordia*, which killed 32 people, and the engine fire on the *Carnival Triumph*.

The cruise ship *Costa Concordia* partially sank on January 13, 2012 when it ran aground at Isla del Giglio, Italy.⁷¹ The ship, carrying 4,253 people, hit a reef during an unofficial near-shore salute to the local islanders. To perform this maneuver, the captain deviated from the ship's computer-programmed route. Notably, during the sinking, the *Concordia* crew (overworked and understaffed) was unable to properly manage the evacuation of passengers. The end result: 32 people are known to have died.^{72,73}

A year later, on February 10, 2013, the *Carnival Triumph* suffered a fire in the engine room, resulting in the ship's loss of power and propulsion. This left the ship adrift 150 miles off the coast of Mexico. Over the next four days, 3,143 passengers and 1,086 crew were forced to make do with cold food, no hot water, sweltering indoor temperatures, and few working toilets (leading to what passengers described as sewage running down the walls and across the ship). Reportedly, the thousands of souls on board had to endure these precarious conditions primarily because the ship's understaffed and overworked crew never got around to fixing leaks from engine fuel hoses.⁷⁴

⁷¹*Carnival Corporation & plc Press Release Regarding Costa Concordia*, <http://phx.corporate-ir.net/phoenix.zhtml?c=200767&p=irol-newsArticle&ID=1648204>.

⁷²*Costa Concordia: Five More Bodies Found*, BBC NEWS EUROPE, 22 March 2012. <http://www.bbc.com/news/world-europe-17472345>.

⁷³*Another Night to Remember*, VANITY FAIR, May 2012, <http://www.vanityfair.com/culture/2012/05/costa-concordia-sinking-scandal-italy>.

⁷⁴*Lawsuit: Fire Risk Known Before Carnival Triumph Sailed*, ASSOCIATED PRESS, December 19, 2013. <http://www.usatoday.com/story/travel/news/2013/12/19/carnival-cruise-fire-lawsuit/4122947/>.

A. Panama: The World's Largest Registry

Panama, a small nation of just three million, has the largest shipping fleet in the world, greater than that of the United States and China combined.⁷⁵ About 8,600 ships fly the Panamanian flag.⁷⁶ At first glance, the vast difference makes no sense. After all, Panama only has one small shipping line. The answer, of course, is Panama's status as an open registry. Its flag offers the advantages of easier registration (often online) and the ability to employ cheaper foreign labor onboard ships. The end result is that Panama now has the largest registry in the world, followed by Liberia, the Marshall Islands, Hong Kong and Singapore.⁷⁷ The registry is extremely lucrative for Panama, bringing in half a billion dollars for the economy in fees, services and taxes.⁷⁸

As noted earlier, international legal requirements insist that countries operating open registries inspect vessels, comply with international regulations and investigate accidents and corruption. Critics, however, say that Panama cuts corners in all of these tasks, putting maritime workers at risk, pointing out that accidents involving Panamanian-registered ships are high.⁷⁹ One gruesome example was recently reported by the BBC. Two years ago the International Transport Workers' Federation ("ITF") investigated the death of a woman sailor, 22, on her first voyage. She became trapped in machinery that was reportedly faulty and died. The ITF says that, rather than heading for the nearest port as rules dictate, the ship continued to sail for more than two weeks with her body in a freezer.⁸⁰

Panama's registry is also consistently beset by allegations of corruption. In 2000, the ITF's Secretary General was able to buy a Panamanian first officer's certificate for \$4,000 to navigate a ship

⁷⁵*Why So Many Shipowners Find Panama's Flag Convenient*, BBC NEWS LATIN AMERICA & CARIBBEAN, August 4, 2014. <http://www.bbc.com/news/world-latin-america-28558480>.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

- even though he had no maritime skills and experience.⁸¹ Despite repeated assurances that the country was cleaning up its act, Roberto Linares, the head of the Panama Maritime Authority, resigned in June, 2014 after it was discovered that workers were being certified without the proper qualifications.⁸²

B. Liberia: Open for Business even in the Midst of a Bloody Civil War

For most of its recent history, Liberia has endured a catastrophic civil war. The conflict, starting in 1989 and ending in 2003, killed more than 250,000 people and displaced nearly 1 million people. As a seafaring nation, Liberia is tiny by global standards - about the size of Tennessee, with just 360 miles of West African coastline.⁸³ Liberia's main port in Monrovia is in poor condition, littered with wrecked vessels and, in parts, visibly shoaling.⁸⁴ Up until a few years ago, the Liberian Navy was comprised of just six small patrol craft, which had been inoperative since the early 1980's for want of spare parts.⁸⁵

But within the international shipping industry, Liberia is a powerhouse as the second most popular "flag of convenience" - a lightly regulated, cheap place for a ship to call home. Approximately 4,000 foreign owned ships are registered there,⁸⁶ carrying everything from containerized cargo to cruise ship vacationers, along with much of the oil imported to the U.S. (only Panama, registers more ships).⁸⁷

How did this come about? In 1948, Liberia enacted a Maritime Code, which continues to generate revenues for Liberia through the registration of foreign owned ships that are allowed to fly the

⁸¹Id.

⁸²Id.

⁸³*Liberian Shipping Draws Scrutiny*, NBC NEWS, Aug. 11, 2013, <http://www.nbcnews.com/id/3072983/t/liberian-shipping-draws-scrutiny/>.

⁸⁴Pham, *supra* note 63 at 1.

⁸⁵Id.

⁸⁶The Liberian Registry, Liberian International Ship and Corporate Registry brochure, at 1, <http://www.liscr.com/liscr/portals/0/LISCRmaritimebrochureweb.pdf>.

⁸⁷NBC NEWS, *supra* note 83.

Liberian flag and enjoy tax and other economic benefits.⁸⁸ The effort was originally spearheaded with the support of former U.S. Secretary of State Edward Stettinius, one of the key figures in the formation of the United Nations.⁸⁹

Notably, the Liberian ship registry is not directly managed or controlled by the Liberian government. Since its inception, the Liberian registry has been operated from the United States.⁹⁰ In fact, the U.S. structure and principles governing the administration of the Liberian registry are embedded into Liberian law.⁹¹ Under these statutes, the registry must be principally operated from the United States.⁹²

The registry was first managed by a U.S. company founded by Secretary Stettinius, International Registries Inc. (“IRI”). In 1997, Charles Taylor was elected president of Liberia. At the time, IRI was also running the Marshall Islands registry (a direct competitor).⁹³ As reported by the Washington Post, the Taylor administration hired Washington lawyer Lester Hyman to be its U.S. counsel. Among Hyman’s tasks: to replace IRI.⁹⁴ Hyman, who was paid more than \$600,000 by Liberia, ended up getting the concession himself. Then, along with Yoram M. Cohen, a business consultant he knew through his law firm, he formed the Liberian International Ship & Corporate Registry (“LISCR”),⁹⁵ a private U.S. owned company based in Virginia.⁹⁶ LISCR took over the registry in 2000.⁹⁷

LISCR handles the day-to-day operations of registering ships under the Liberian flag.⁹⁸ LISCR handles all of the paperwork and

⁸⁸Pham, *supra* note 63 at 1.

⁸⁹The Liberian Registry, *supra* note 86 at 3.

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Controversial Liberian Shipping Registry a Top Donor to McAuliffe Gubernatorial Campaign*, WASHINGTON POST, October 21, 2013.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶The Liberian Registry, *supra* note 86 at 1.

⁹⁷Washington Post, *supra* note 93.

⁹⁸*Id.*

turns over the taxes and fees it collects to the Liberian Treasury.⁹⁹ In exchange, LISCR gets a quarter of all net profits for its troubles.¹⁰⁰

The process of obtaining a Liberian flag is very easy. The shipowner contacts LISCR in Virginia, who helps it set up a corporation with a Liberian charter under which he or she can register a vessel with the payment of minimal application and administrative fees and nominal tonnage taxes. The corporation and its vessel are consequently tax-free outside Liberia since they are legally under Liberian jurisdiction.¹⁰¹ Given that its contract with the Liberian government pays it by commission, LISCR makes the entire process as easy as possible for its potential clients.¹⁰²

Business can be transacted via the Internet at LISCR's website where visitors can download the necessary forms.¹⁰³ Potential clients can form a new Liberian corporation online in just a few minutes using an on-line portal, dubbed by LISCR as a "state-of-the-art web-based client interface that provides clients with secure, convenient, real time, 24/7 access to their accounts to: form new corporations ... [and] make payments via credit card."¹⁰⁴

An existing foreign entity that was formed in another jurisdiction (i.e. a U.S. shipowner) can re-domicile to Liberia for free. This process enables the U.S. entity to retain its business history and maintain its legal identity while also reaping the benefits of becoming a Liberian entity.¹⁰⁵ In essence, re-domiciliation is a continuation of the existing foreign entity as a Liberian entity. Re-domiciliation does not create a new legal entity nor does it constitute dissolution of the existing entity.¹⁰⁶

⁹⁹Id.

¹⁰⁰*Keeping the Country Afloat*, THE ECONOMIST, August 23, 2007.

¹⁰¹Pham, *supra* note 63 at 1.

¹⁰²Id.

¹⁰³Id.

¹⁰⁴*The Liberian Corporate Registry, 'Ecorp.'* <http://liberiancorporations.com/ecorp/>.

¹⁰⁵*The Liberian Corporate Registry, Re-domicile to Liberia*, <http://liberiancorporations.com/re-domicile-to-liberia/>.

¹⁰⁶Id.

Once the foreign entity is “Liberian,” it is statutorily exempt from Liberian income and withholding taxes. It is also not subject to annual reporting or audits.¹⁰⁷

In an open letter to potential clients, CEO Yoram M. Cohen describes pricing as “the most competitive of all registries.”¹⁰⁸ For ships of 14,000 or more net tons, tonnage taxes are \$0.10 per net ton, plus a flat annual fee of \$3,800. For ships less than 14,000 net tons, tonnage taxes are \$0.40 per net ton.¹⁰⁹ Accordingly, foreign shipowners with revenues in the hundreds of millions (and even billions of dollars), have an annual tax exposure of just a few thousand dollars.

While these amounts may be nominal to foreign shipowners, the Liberian registry is an important source of hard currency for a country whose exports have dwindled after years of civil war.¹¹⁰ Ship registry fees and taxes generate some \$18 million a year, as much as 25 percent of the nation’s revenue, by some estimates.¹¹¹ During the worst days of Liberia’s civil war, when almost everything that could be was being stolen or destroyed, as much as 90% of government revenues came from the registry.¹¹²

Critics say some of the money was funneled to support non-governmental projects during the presidency of Charles Taylor.¹¹³ Taylor served as president from August 2, 1997 until his resignation on August 11, 2003. During his terms in office, Taylor was accused of war crimes and crimes against humanity as a result of his involvement in the neighboring Sierra Leone civil war.¹¹⁴ In 2001, a United Nations report found that some vessel

¹⁰⁷*About the Registry*, <http://liberiancorporations.com/about-the-registry/>.

¹⁰⁸Open Letter from Yoram M. Cohen, Chief Executive Officer of the Liberian International Ship and Corporate Registry. <http://www.liscr.com/liscr/Maritime/Pricing/tabid/85/Default.aspx>.

¹⁰⁹*Id.*

¹¹⁰NBC NEWS, *supra* note 83.

¹¹¹*Id.*

¹¹²THE ECONOMIST, *supra* note 100.

¹¹³NBC NEWS, *supra* note 83.

¹¹⁴In 2012 Taylor was prosecuted and convicted by a United Nations Special Court for Sierra Leone of eleven charges including terror, murder, and rape, and sentenced to 50 years in prison.

registration payments from LISCR ended up in accounts that U.N. investigators believed were used to buy guns and help fight the civil war in Sierra Leone.¹¹⁵ The United Nations report found that LISCR had wired nearly \$1 million from the registry to Middle Eastern Bank accounts to pay off arms dealers.^{116,117} In a 2013 interview with NBC News, Yoram Cohen, LISCR's CEO, stated that the payments amounted to "less than \$1 million," and that non-governmental payments were stopped once the U.S. based company found out about them.¹¹⁸

V

POSSIBLE SOLUTIONS TO THE STATUS QUO

The world of merchant shipping is undeniably complex. Nearly half of all crews today are made up of four or more nationalities.¹¹⁹ As author Rose George noted, after sailing in a container ship for five weeks in the summer of 2010, she sat in the officer's mess next to a Burmese engineer, opposite a Romanian and a Moldovan. The men at the table behind her were Chinese, Filipino and Scottish. The crew mess next door was entirely Filipino. The ship had a portrait of Elizabeth II on the wall.¹²⁰ The multicultural mix Ms. George experienced is representative of a globalized maritime industry, serving a globalized world economy. As Ms. George properly observes, however, "Globalization is no reason that states can't take responsibility for the ships they register."¹²¹

There is no question that open registries are here to stay. As long as flags of convenience offer shipowners vast economic and legal incentives, the practice will continue to grow. The challenge for the international community is to find ways to prevent

¹¹⁵NBC NEWS, *supra* note 83.

¹¹⁶THE ECONOMIST, *supra* note 100.

¹¹⁷WASHINGTON POST, *supra* note 93.

¹¹⁸*Id.*

¹¹⁹George, *supra* note 18.

¹²⁰*Id.*

¹²¹*Id.*

dangerous exploitation of the system: evading prosecution for environmental damage like oil spills, poor working conditions for crewmembers, and organized crime. Ships sailing the world's oceans should be safe, offer workers fair labor standards, and meet common-sense environmental and security safeguards.¹²²

First, the veil of secrecy shrouding the identities of shipowners should be lifted. One way to discourage shipowners from masking their identities under a web of shell companies registered in flag of convenience countries, would be to enforce genuine links between the vessel's flag and the shipowner. Article 5 of the 1958 Convention on the High Seas and Article 91 of the 1982 UN Convention on the Law of the Sea ("UNCLOS") each provide that there must exist a "genuine link" between a ship and the State purporting to confer its nationality upon that ship.¹²³ Both articles require that a genuine link be established between the State and the ship, apparently imposing a limit to States' sovereignty in defining ship registration conditions.¹²⁴ Further, the 1958 text specifies that such a link must enable the State to exercise effective jurisdiction and control in administrative, technical and social matters over the ships flying its flag.¹²⁵

While neither Convention gives a legal definition of "genuine link," there is some consensus that the act of registration alone

¹²²Pham, *supra* note 63 at p. 3–4.

¹²³Robin R. Churchill, *The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships*, October 2000, Cardiff Law School, University of Wales, Cardiff, at p. 4. The Convention on the High Seas was adopted at the First United Nations Conference on the Law of the Sea, held at Geneva in 1958. As Mr. Churchill points out at page 10 of his study, the Convention came into force on September 30, 1962. The Convention currently has 62 parties. The 1982 UN Convention on the Law of the Sea prevails over the 1958 Convention as between parties to it. About two-thirds of the current parties to the 1958 Convention are also parties to the 1982 Convention. Thus, the 1958 Convention at the present time applies only between about 21 States, but they include two States with significant interest in shipping, Denmark and the USA.

¹²⁴Ariella D'Andrea, *The "Genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Developments*, Food and Agriculture Organization of the United Nations, Development Legal Service, p. 2. http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf

¹²⁵*Id.* at p. 1.

does not satisfy the genuine link requirement.¹²⁶ Indeed, a review of the drafting history of both Conventions shows that the genuine link was originally intended as an *economic* and *social* connection between the owner of the vessel and state of registration.¹²⁷ Required economic and social links could include: 1) the shipowner's fleet contributes to the national economy of the open registry; 2) open registry nationals are employed on the vessels; 3) the shipowner has a base of operations (i.e. offices and land-based employees) in the open registry country; 4) the vessels periodically visit the ports of the open registry nation.

Second, port States should enact measures to discourage shipowners from registering their vessels in lawless places. One way to do so, suggested by Rose George,¹²⁸ would be for port authorities, which have the power to detain unsafe or abusive ships that dock in their harbors, to pay extra attention to ships registered under notoriously lax states. To avoid the extra scrutiny and the possibility of detention fees, shipowners should pressure the registries to raise their standards.¹²⁹

Third, to tackle pollution in international waters, polluters should be subject to prosecution anywhere in the world. Under articles 136 and 140 of UNCLOS, the world's oceans are common heritage of mankind. As a result, they should be held in trust for future generations and be protected from exploitation by individual nation states or corporations (i.e. foreign flagged shipowners). When a shipowner pollutes international waters, and the vessel's flag state is unwilling to prosecute, the international community as a whole (through international law enforcement organizations such as INTERPOL) should have mechanisms in place to prosecute the ship and its owners. For instance, port States could seize and detain the polluting vessel (and other vessels in the fleet), to force the shipowner to come forward, accept responsibility and pay for all cleanup costs.

¹²⁶Id. at p. 4.

¹²⁷Id. at p. 1.

¹²⁸George, *supra* note 18.

¹²⁹Id.

There is clear precedent allowing any nation to exercise jurisdiction over a vessel that pollutes international waters. As set forth earlier, ships sailing the high seas are generally under the jurisdiction of the flag state. However, when a ship is involved in certain criminal acts, such as piracy, any nation can exercise jurisdiction under the doctrine of universal jurisdiction. Indeed, article 105 of UNCLOS provides that “[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.” Polluting international waters, much like piracy, is a crime that affects all nations. Polluters, like pirates, do not respect borders and sovereignty. Accordingly, when a ship willfully dumps toxic substances that can affect the well-being of all mankind, it should not be treated any different than a pirate for purposes of jurisdiction.

Finally, the flag State of the ship should also face the prospect of liability and be required to pay for cleanup costs, in the event that the shipowner is unwilling or unable to do so. Article 194 of UNCLOS can be interpreted to require flag states to take responsibility for the acts of vessels under their control and jurisdiction.¹³⁰

¹³⁰Article 194 of UNCLOS provides that:

2. States shall take measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These include . . . (b) pollution from vessels [. . .].