Denver Journal of International Law & Policy

Volume 17
Number 1 *Fall - Symposium*

Article 11

May 2020

The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers

Julie Mertus

The Nationality of Ships and International Responsibility: The Reflagging of The Kuwaiti Oil Tankers

I. INTRODUCTION

"Nationality" is a term which has been used to define the legal relationship between a state and a ship authorized to fly its flag. The concept is a corollary of the principle of freedom of the high seas.[1] It reflects the belief that every ship should be subject to the sovereignty of some state which can ensure that the ship fulfills its international responsibilities.[2] A ship looks first to the law of the state whose nationality it possesses for a definition of its rights and duties. From the legislature of that state may come both the promise of favorable regulation and the demand for new standards in mechanical equipment or lifesaving devices.[3]

Maritime flags are a symbol of nationality. As such, they generally are thought to be important for determining when a relationship exists between a state and a ship and, thus, when a vessel is subject to the law of a state.[4] It is the thesis of this discussion, however, that maritime flags fulfill a second purpose: Maritime flags not only represent a link between a vessel and a state, but also represent a link between a state and the international community. This linkage arises from the mutual responsibilities which are corollary to the right to flag a ship.

States are subject to two categories of responsibility. First, responsibilities arise in the decision of whether to flag a ship. States must grant nationality to a ship under internationally respected criteria. Because international law places few restrictions on the right to grant nationality to ships, this responsibility is easily fulfilled. Second, responsibilities arise in the sailing of a flagged vessel. The flag state has a general obligation to neither impede nor endanger other states' use of international waters. Consideration for the right of all states to sail on the high seas requires that each state undertake efforts to sail safe ships.

The purpose of this discussion is to refocus analysis of the nationality

---

1. The S.S Lotus, P.C.I.J., Ser. A, No. 10 at 25 (1927).

2. Several writers have stated that the entire legal system evolved for use of the high seas depends upon each ship possessing the flag of a recognized international personality. *See, e.g.* R. RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL 12-15 (1937); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1066 (1962); N. Singh, *International Law Problems of Merchant Shipping*, 107 RECUEIL DE COURS DE L'ACADEMIE DE DROIT INT'L 19 (1962).

3. RIENOW, *supra* note 2, at 7.

4. *See, e.g.* I.M. Sinan, *UNCTAD and Flags of Convenience*, 96 J. WORLD TRADE 95, at 95, 97 (1982).

of ships in order to highlight the important state responsibilities which are incumbent upon all flag-bearing states. A reexamination of the nationality of ships is warranted in light of the United States' decision to reflag Kuwaiti oil tankers in the Persian Gulf, a decision which may lead to other political reflaggings. This discussion will examine the obligations of flag states and determine whether the United States met these obligations in reflagging the tankers. It will examine: (1) whether the United States gave its nationality to the Kuwaiti oil tankers under internationally-accepted criteria and, thus, the tankers had the right under international law to carry the American flag; and (2) whether the United States, in sailing the Kuwaiti tankers, has fulfilled its responsibility to sail safe ships. In order to provide a background for discussion of these issues, the initial discussion will review the circumstances surrounding the reflagging of the Kuwaiti tankers.

II. BACKGROUND: THE REFLAGGING OF KUWAITI OIL TANKERS

In response to the increasing frequency of attack on civilian vessels arising out of the Iran-Iraq war, Kuwait formulated a proposal in early April, 1987, under which the U.S. would attempt to protect Kuwait-owned ships from attack in the Persian Gulf by transferring the registration of tankers to the American flag.[5] The Reagan Administration agreed to the plan. The stated rationale was to preserve freedom of navigation in the Persian Gulf.[6] In their letter to the United States Coast Guard, setting forth the reflagging proposal, Kuwaiti officials offered another rationale. They simply stated that "[t]he reasons for Kuwait wishing to reflag are political. . ."[7]

Representatives of the Coast Guard and representatives of the Kuwait Oil Tanker Company (KOTC) met on April 22 and 23, 1987, to explore the requirements for reflagging.[8] The parties noted that the tankers might fall below internationally acceptable standards in many areas, including: life-saving equipment, automation, steering gear requirements, fire protection, navigation, electrical installation, and ventilation systems.[9] Facing political pressure, the Coast Guard agreed to waive certain

---

5. N.Y. Times, April 7, 1987, at A10, col. 3.

6. It has been suggested that there were deeper reasons for the reflagging: "to tilt to Iraq by helping its ally, Kuwait . . . to block Soviet help for Arab moderates . . . and to help the Arab world forget the Iran arms-for-hostages fiasco." N.Y. Times, July 19, 1987, at E24, col. 1. *See also* CONG. REC. H4095, 4104 (daily ed. June 2, 1987) [statement of Rep. Miller of Washington]. President Reagan has admitted that protection of freedom of navigation is not an altruistic goal. Rather, it is most important for Western economies because it will allow Persian Gulf oil to reach Western markets. N.Y. Times, May 30, 1987 at A1, col. 2.

7. Letter to Captain James C. Card, Chief Merchant Vessel Inspection and Documentation Division, U.S. Coast Guard Headquarters, from Tim Stafford, Manager Fleet Development, Kuwait Oil Tanker Company (April 24, 1987).

8. *Id.*

9. Memorandum to members, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, from Walter B. Jones, Chairman, and Robert W. Davis, Ranking

procedures and regulatory requirements for a period of one year from certification.[10] Nevertheless, the Coast Guard refused to grant waivers for life preservers and any "manifestly unsafe conditions found during inspections."[11]

After the April meetings, the reflagging process proceeded rapidly. Deputy Secretary of Defense William H. Taft IV requested national defense waivers[12] from the U.S. Coast Guard Navigation and Inspection Laws and Regulations, the requirements of which exceed those contained in the several applicable international conventions.[13] Under the Code of Federal Regulations, such waivers may be granted if they are "necessary in the interest of national defense."[14] The Deputy Secretary of Defense noted the interests involved:

> President Reagan has stated that the U.S. considers the continued flow of oil through the Strait of Hormuz and freedom of navigation in the Persian Gulf as interests of vital importance. The reflagging is necessary to facilitate U.S. Naval protection of the Kuwaiti tankers in and around the Persian Gulf.[15]

The Coast Guard granted the waiver request on May 29, 1987.[16] At the same time, the Federal Communications Commission issued a one-year exemption from the requirement that the Kuwaiti ships carry the type of radio and telegraph equipment required of U.S. vessels.[17]

Kuwait circumvented the requirement that applications for documentation be made by U.S. citizens by forming Chesapeake Shipping,

---

Minority Member (June 5, 1987), [hereinafter House Memorandum].

10. Telex to Mr. Stafford, Kuwait Oil Tanker Company, from U.S. Coast Guard Headquarters (May 4, 1987).

11. *Id.*

12. The authority for the waiver is contained in the Act of December 27, 1950, 46 App. U.S.C. note prec. 1 (1958). The waiver law originally was designed by the Truman Administration to facilitate the movement of military supplies and personnel to the Korean conflict. Many of the 132 waivers granted since 1950, however, were for coastwise movements and were totally unrelated to military conflict. House Memorandum, *supra* note 9, at 6.

13. Memorandum for the Commandant, U.S. Coast Guard, William H. Taft IV, Deputy Secretary of Defense (May 14, 1987).

14. 46 C.F.R. §6.01 (1986) [procedures for effecting individual waivers of navigation and vessel inspection laws and regulations].

15. Memorandum from William H. Taft, *supra* note 13. Whether this actually constitutes a national defense interest is open to debate. For the opinion that the reflagging responds more to politics and perceptions than to an objective military situation see N. Y. Times, July 12, 1987 at E3, col.1.

16. Letter to William H. Taft, IV, Deputy Secretary of Defense, from P.A. Yost, U.S. Coast Guard Commandant,(May 29, 1987). The Coast Guard has no discretion when the Department of Defense requests a waiver. House Memorandum, *supra* note 9, at 6.

17. Telex to Tim Stafford, Chesapeake Shipping Inc., from Robert H. McNamara, Chief, Aviation and Marine Branch, Federal Communications Commission (May 28, 1987). *See also* Exemption Certificate, issued under the International Convention for Safety of Life at Sea by the U.S. Federal Communications Commission, for the *M.T. Townsend* (May 25, 1987).

Inc., a "paper company" incorporated in the U.S.[18] Under a complex commercial transaction, ownership of the tankers was shifted to Chesapeake Shipping, which remained indirectly owned by the Kuwaiti Oil Tanker Company.[19] Applications for inspection were then submitted through Chesapeake Shipping. The Coast Guard began its inspections in May, 1987, but due to the limited availability of each vessel, concentrated only on major safety areas and granted one-year grace periods during which strict compliance with U.S. laws would not be required.[20] The vessels were inspected individually and were re-registered at a slow pace throughout the summer and early fall.[21]

After the inspections had already begun, the Kuwait Oil Tanker Company and The U.S. Coast Guard signed a formal memorandum of agreement.[22] The parties agreed to the one-year safety requirement waivers and to minimal manning requirements—only the master of each vessel was required to be a U.S. citizen.[23] Traditional U.S. manning requirements were avoided due to a loophole in the regulations,[24] which normally require that upon leaving a U.S. port, all officers and 75% of the unlicensed seamen must be U.S. citizens.[25] Since the vessels were not departing a U.S. port, they were not required to employ U.S. mariners until such time as the tankers return to a U.S. port, an unlikely eventuality.[26]

---

18. Statement of the Honorable John Gaughan, Maritime Administrator of the Department of Transportation, before the House Merchant Marine and Fisheries Committee (June 18, 1987). The address of Chesapeake is listed care of Prentice Hall Corporate Systems Inc., but Prentice Hall has been unable to supply any details of Chesapeake executives, thus adding weight to the hypothesis that the company is little more than a shell. Seatrade Week, May 15-21, 1987, at 2. In addition, Chesapeake does not manage the Kuwaiti tanker. Instead, recruiting and other personnel matters are conducted by an outside company, Glen Eagle Ship Management of Houston, Texas. Telephone Conversation with John Lovell, President, Glen Eagle Ship Management (January 27, 1988).

19. N.Y. Times, July 22, 1987, at A1, col. 6.

20. Letter to Mr. Tim Stafford, Kuwait Oil Tanker Company, from J.C. Card, Captain, U.S. Coast Guard (May 21, 1987) [hereinafter May 21 Coast Guard Letter].

21. "Inspections, Manning Slow Kuwaiti Ship Reflagging," Journal of Commerce, June 1, 1987. All 11 vessels were inspected by June 15, 1987. "Labor Steps Up Heat on Kuwaiti Tankers," Journal of Commerce, June 15, 1987. The first two tankers were cleared by the U.S. Coast Guard on July 16, 1987. N.Y. Times, July 17, 1987, at B8, col. 6. Three more ships were re-registered in August. N.Y. Times, August 3, 1987, at A1, col. 5; N.Y. Times, August 9, 1987, at A12, col. 3.

22. Memorandum of Agreement Between Kuwait Oil Tanker Company and The United States Coast Guard, signed by J.C. Card, Captain, U.S. Coast Guard (May 21, 1987), and by the Kuwait Oil Tanker Company (June 2, 1987).

23. *Id. See also* May 21 Coast Guard Letter, *supra* note 20, at 2. Under U.S. law, all officers must be U.S. citizens, unless "for any reason deprived of (their) services" in which case foreigners may be employed. This exception applies to all officers except for the master who must be a U.S. citizen at all times. 46 U.S.C. §§ 7102 & 8103(a),(e) (Supp. II, 1984).

24. N.Y. Times, May 23, 1987, at A5, col. 1 (Representative Helen Bentley, Democrat of Maryland, criticizing decision to use loophole in manning requirements).

25. 46 U.S.C. § 8103(b) (Supp. II, 1984).

26. The loophole in the regulations was closed by the passage of H.R. 2598 which was adopted into law on January 11, 1988. Pub. L. No. 100-239. The new law requires that on

After the Iraqi attack on the American frigate *Stark*, which killed 37 sailors, the U.S. Senate voted to block reflagging until the Reagan Administration could produce a report on how the newly-flagged ships would be protected.[27] The Reagan Administration therefore postponed implementation of the reflagging plan until it could determine what forces were necessary to safely escort the vessels.[28] An intricate plan which met the requirements of the Senate was eventually developed,[29] and the first two re-registered Kuwaiti tankers, accompanied by U.S. warships,[30] sailed into the Persian Gulf on July 22, 1987.[31]

III. STATE RESPONSIBILITIES IN THE REFLAGGING DECISION

The scenario outlined above indicates that the decision to reflag the Kuwaiti oil tankers is rather unique in that it was politically motivated, rather than a product of economic factors. In a more common situation such as the latter, an American ship might be reflagged by a state having little or no connection to the ship in order to avoid stringent (and relatively expensive) American labor laws, tax provisions, and safety regulations.[32] In the present case Kuwaiti ships were reflagged by the United States, similarly with little or no connection to the vessels, for political reasons.[33] In both cases, however, the responsibilities of the flag-carrying state to the world community are the same. In order to analyze the significance of the Kuwaiti reflagging under international law, this section first examines the internationally-accepted criteria which must be met for flagging a ship, and then attempts to determine whether the criteria were met in the present case.

American-flagged vessels all licensed seamen, and 75% of all unlicensed seamen must be U.S. citizens regardless of whether the ship calls on American ports. This provision means that the Kuwaiti tankers must now be reviewed. Manning waivers still may be granted in order to fulfill national defense interests.

27. N.Y. Times, May 25, 1987, at A3, col. 5.

28. N.Y. Times, May 29, 1987, at A1, col. 6.

29. N.Y. Times, July 19, 1987, at A12, col. 1.

30. A flag state has the right to protect its vessels from deprivation from other states. A.D. Watts, *The Protection of Merchant Ships*, 33 BRIT. Y.B. INT'L L. 52, 56 (1957). Whether this doctrine should necessarily be applicable in the present case is outside the scope of this discussion.

31. N.Y. Times, July 23, 1987, at A14, col. 1.

32. *See infra* notes 54-63 and accompanying text.

33. While ships are generally reflagged for economic reasons, the practice of reflagging for political reasons is not without precedents. During the war of 1812, American ships sailed under the Portuguese flag in order to protect themselves from British warships blockading the American coast. *Flags of Convenience—The 'Offshore' Registration of Ships*, in E. GOLD, NEW DIRECTIONS IN MARITIME LAW 85 (1978). Also, during Napoleon's continental blockade, English vessels were registered under the colors of tiny German principalities to avoid capture. BOCZEK, FLAGS OF CONVENIENCE 8 (1962). More recently, in 1969, during the Vietnam War, two former Taiwanese ships manned by Chinese crews were granted provisional U.S. registry, but that reflagging was called off after protests from labor unions. *See Reflagging Battle Goes International*, Journal of Commerce, June 15, 1987.

A. *Criteria for Establishing Nationality*

The oft-used term "the nationality of ships" connotes a legal relationship between a vessel and a country unlike that found between either a nation and any other tangible piece of property, or a nation and an individual.[34] It might better be termed a "pseudo-nationality" since the relationship between a ship and a state differs markedly from those more common relationships implied by the term "nationality."[35] This term is misleading when applied to ships in that it seems to suggest that a ship is subject to only one system of law—the law of the country in which it is registered or whose flag it flies. It must, however, be remembered that a ship is also a creature of international law, in that it is international law which provides for or excludes the manifestation of sovereign power with respect to ships.[36]

Under international law, each state "whether coastal or not, has the right to sail ships under its flag,"[37] and each state "may determine for itself the conditions on which it will grant its nationality to a merchant ship."[38] In general, there are only three limitations on the right to grant nationality. First, a state may not grant nationality to a ship where doing so would impinge upon the rights of other states. For example, a state is not allowed to impose its nationality upon vessels that already have, and desire to maintain, the nationality of another state.[39] Secondly, a state will not be allowed to grant its nationality to a ship if there is reasonable ground for suspicion that the ship will be used in violation of international law.[40] Finally, a state must choose a single nationality for its ships.[41] A ship which sails under the flag of two or more states may not lawfully claim any of the nationalities in question and, thus, may become a ship without nationality.[42] This is a particularly undesirable situation because, under international law, ships without nationality may be boarded by foreign warships.[43]

---

34. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, (1982).

35. BOCZEK, *supra* note 33, at 121.

36. For example, only warships and state owned or operated ships have complete immunity from the jurisdiction of any state other than the flag state. 1958 Geneva Convention on the High Seas (hereinafter cited as 1958 Convention), art. 8(1) and (9), 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82. *See also* O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 747 (1984).

37. The Barcelona Declaration, April 20, 1921, incorporating the Treaty of Versailles, 1919; in 1958 Convention, *supra* note 36, art. 4; 1982 Convention on the High Seas [hereinafter cited as 1982 Convention], art. 90, U.N. Doc. A/CONF. 62/161, U.N. Public Sales No. E.83.V.5.

38. Lauritzen v. Larsen, 345 U.S. 571, 584 (1983). *See also* Oppenheim, INTERNATIONAL LAW I, at 595 (8th ed., 1953).

39. BOCZEK, *supra* note 33, at 105-106.

40. *Id.*

41. 1982 Convention, *supra* note 37, art. 92(1).

42. 1958 Convention, *supra* note 36, art. 6.

43. A warship that encounters a foreign ship on the high seas may board such ship if

Because a great deal of reliance is placed on the individual state to promulgate its own criteria for granting nationality to a vessel, states usually have little difficulty in meeting the relatively minimal requirements requisite for recognition of ship nationality under international law. These requirements may be grouped under three headings: the flag, "genuine link" and registration. As the discussion below indicates, the satisfaction of only one of these criteria may be sufficient to establish nationality under international law, depending on the situation.

1. The Flag

"The law of the flag" as used in the field of maritime law has often been equated with the law arising out of a ship's nationality."[44] This usage tends to place undue emphasis on the importance of the flag in the determination of ship nationality. In actual practice, the flag of a ship is less than conclusive evidence of a vessel's national affiliation. The flag is simply the conventional way in which a vessel evidences its purported endowment with a nationality.[45] As such, the flag is generally accepted under international law as prima facie evidence of this.[46] It is not, however, conclusive proof.

2. "Genuine Link"

The 1958 Geneva Convention on the High Seas states that "there must be a genuine link between the State and the ship."[47] This test of nationality was not new. A similar concept had been adopted as early as 1896 by the Institut de Droit Internationale.[48] The term "genuine link", however, was borrowed directly from a decision of the International Court

---

there is reason to believe that the ship is without nationality. 1958 Convention, *supra* note 36, art. 22; *see also* Naim Molvan v. Attorney-General for Palestine, 1948 A.C. 351.

44. The enunciation of the principle that the law which governs the regulation of a merchant ship on the high seas is "the law of the flag" first emerged in The Lamington, 87 F. 753 (1898). The "law of the flag" has been defined as "a concise phrase to express a simple fact, namely the law of the country to which the ship belongs and whose flag she bears." RIENOW, *supra* note 2 at 5, *citing* Brantford City, 29 F. 383 (1886).

45. O'CONNELL, *supra* note 36 at 757.

46. The Chiquita, 19 F.2d 417, 418 (1927).

47. 1958 Convention, *supra* note 36, art. 5. The 1982 Convention, *supra* note 37, repeats this criterion in nearly identical language in art. 91(1):

> Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. States 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. (emphasis added)

The rest of the provision pertaining to the nationality of ships simply provides: "Each state shall issue to ships of which it has granted the right to fly its flag documents to that effect." Art. 91(2).

48. In 1896 the Committee on Usage of National Flags for Merchant Ships agreed that laws of certain countries concerning the nationality of ships ought not to dilute the criteria which most states had adopted. The Rules adopted by the Institut provide that as a condition of registration, a ship should be at least one-half the property of nationals of the country of registry or of nationally-owned companies. O'CONNELL, *supra* note 36, at 758.

of Justice holding that a state could refuse to recognize an individual's nationality when there is an absence of a genuine link between an individual and the state. In the *Nottebohm Case*[49] the court reasoned:

> . . . 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 fact that the individual upon whom it is conferred, either directly or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with any other State.[50]

The applicability of the court's holding in *Nottebohm* to cases involving ship nationality is questionable, since the holding was explicitly limited in scope to individuals.

The main problem with the application of the "genuine link" doctrine to ships is that frequently no concrete, exclusive connection can be established between a ship and a state because the vessel may be owned by a legal person, such as a multinational corporation, whose shareholders may be of many different nationalities.[51] Despite this difficulty, the proposition that the concept of "genuine link" is common to the problem of identifying people and ships arose in a dissenting opinion in the International Court of Justice. Judge Jessup, in his separate opinion to *Barcelona Traction*,[52] wrote:

> If a state purports to confer its nationality on ships by allowing them to fly its flag, without assuming that they meet such tests as management, ownership, jurisdiction, and control, other states are not bound to recognize the asserted nationality of the ship.[53]

The requirement is premised upon the belief that a state can carry out its obligation to exercise control over its ship only if such a genuine link exists.

The "genuine link" doctrine can be viewed as part of an international effort to restrict "flags of convenience."[54] This phrase covers flagging and

---

49. Liechtenstein v. Guatamala, 1955 I.C.J. 1 (Nottebohm Case).

50. *Id.*

51. Boczek argues that the *Nottebohm* principle simply is unworkable when applied to ships. BOCZEK, *supra* note 33, at 122. He also contends that the requirement of certainty is much more important with respect to ships than with respect to individuals. *Id.* at 123. *Nottebohm* has been criticized for increasing uncertainty in international affairs. *See* Jones, *The Nottebohm Case*, 5 INT'L & COM. L. Q. 230, 244 (1956).

52. Case Concerning The Barcelona Traction Light and Power Company, Limited, 1970 I.C.J. 4.

53. *Id.* at 188.

54. "Flags of convenience" have also been called four other names: (1) They have been termed "flags of necessity" by shipowners who argue that such flags are essential in order to operate competitively. N.Y.Times, April 11, 1958, at A47; E.B. Shils and S. Miller, *Foreign Flags on U.S. Ships: Convenience or Necessity?*, 2 INDUS. REL. 131 (1963). (2) They have been termed "flags of survival" by military personnel who contend that they are necessary for military purposes. N.Y.Times, June 21, 1961, at A10, col.1. (3) They have been called

registration of ships in a country with which they otherwise have little or no connection in order to take advantage of that country's favorable laws and regulations. Although there is no specific reference to "flags of convenience" in the 1958 U.N. Conference on the Law of the Sea,[55] the debates and proceedings of the conference indicate that they were aimed at controlling such vessels.[56] Advocates of the "genuine link" doctrine frequently tie their arguments to attacks upon flags of convenience.[57]

Liberia, Panama, Singapore, and Cyprus are most often cited as culprits as regards flags of convenience.[58] While each of these nations offers different advantages to ship owners, six features which they have in common are: (1) access to registry is easy and inexpensive; (2) the country of registry allows owner-ship and/or control of its merchant vessels by non-citizens, and the owner enjoys almost complete secrecy of operations; (3) collective labor agreements are absent and there are no wage reporting requirements; (4) taxes on the income from the ships are not levied or are low; (5) manning of ships by non-nationals is freely permitted; (6) the country of registry does not have the power to impose international regulations upon vessels flying its flag.[59]

The title to a vessel which flies a flag of convenience is often held by a "paper" company incorporated under the laws of the nation of registry.[60] Individuals and companies in other countries, however, are the beneficial owners, receiving the profits and advantages while bearing little or

---

"runaway flags" by maritime unions who describe such registration practices as attempts to run away from U.S. labor laws. Statement of Executive Secretary of AFL-CIO, in Study of Vessel Transfer, Trade-in and Reserve Fleet Policies: Hearings Before the Sub-committee on the Merchant Marine, 85th Cong., 1st Sess. 685, 694 (1957). (4) More recently, they have been termed "open registry fleets." UNCTAD adopts this terminology. *See* UNCTAD Secretariat, *Economic Consequences of the Existence of a Lack of a Genuine Link Between Vessel and Flag of Registry*, UNCTAD Doc. TB/B/C.4/168, at 53 (1977). [hereinafter cited as UNCTAD Report on Economic Consequences]. The term "open," however, inaccurately implies access and disclosure. Ship owners choose flags of convenience specifically because they allow secrecy of operations. Thus such flags cannot be characterized as "open." For this reason, and because "flags of convenience" is the most common term, "flags of convenience" will be used throughout this discussion.

55. 1958 Convention, *supra* note 36.

56. E. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AMER. J. INT'L L. 604, 606 (1979).

57. For example, the 1984 Soviet Yearbook of Maritime Law argues: "Taking into account the widespread practice of 'flags of convenience' it is high time to establish more concrete inter-national law principles to ensure genuine jurisdiction of the flag State over each ship flying its flag in administrative, technical and social matters." 1984 SOVIET Y.B. MAR. L. 39.

58. *See* OECD Maritime Transport Committee, *Flags of Convenience*, *reprinted in* ILO Doc. JMC/21/4 (1972). For historical background on flags of convenience, see generally R. CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981), and BOCZEK, *supra* note 33, at 26-63.

59. The listing was taken, in part, from a United Kingdom inquiry into shipping. Committee of Inquiry into Shipping, Report 51 (1970) [Rochdale Committee Report].

60. An UNCTAD report calls these companies "brass plate companies." *Action on the Question of Open Registry*, UNCTAD Doc. TD/B/C.4/220 (March 3, 1980).

no responsibility for the problems arising from daily operations. Operators of ships flying a flag of convenience can often avoid public inquiry and prosecution because they reside outside the flag state and have no assets there. If their identity becomes known, they can erase their bad reputation by simply changing the name of their company or ship.[61] In 1980, the United Nations Conference on Trade and Development (UNCTAD) produced a report analyzing the true beneficial owners of ships with this type of registry.[62] According to the report, about one-third of all tonnage considered to be sailing under a flag of convenience is controlled by U.S. interests.

Both UNCTAD and the International Labor Conference (ILO)[63] support the "genuine link" doctrine as a means of restricting "flag-of-convenience" (or open-registry) fleets. UNCTAD contends that the expansion of open-registry fleets has adversely affected the development and competitiveness of fleets of countries which do not offer open-registry provisions, and has endangered the orderly and safe development of international trade.[64] In contrast, the international labor movement opposes flags of convenience because safety and labor conditions aboard such ships are extremely poor.[65] In support of both claims, commentators have presented data indicating that fleets operating under a flag of convenience are more likely to suffer serious losses at sea.[66] As an example, consider that according to *Lloyd's Register of Shipping*, Greece, Liberia

---

61. Sinan, *supra* note 4 at 103.

62. UNCTAD Report, *supra* note 60.

63. The ILO seeks to promote higher labor standards in international merchant shipping. *See* F.L. Wiswall, *The ILO at Sea*, 3 CORNELL INT'L L.J. 153, 154 (1970).

64. *See* Conditions for the Registration of Ships, UNCTAD Doc. TD/B/AC (Jan. 22, 1982), *reprinted in* 4 OCEAN Y.B. 492 (Borgese and Ginsburg, eds. 1982). UNCTAD would require that states adopt an internationally acceptable and agreed definition of what constitutes a genuine link. UNCTAD Report on Economic Consequences, *supra* note 54, at 5, 7 and 12.

65. The ILO has actively opposed flags of convenience since 1933. E. Argiroffo, *Flags of Convenience and Substandard Vessels: A Review of the ILO's Approach to the Problem*, 110 INT'L LAB. REV. 437, 439 (1974). The ILO has adopted two international labor recommendations concerning the enforcement of safety laws, social security measures abd standards of competency aboard vessels which fly flags of convenience: the Seafarer's Recommendation (No. 107) and the Social Conditions and Safety Recommendation (No. 108). *Id.*, at 446-455. International maritime unions have challenged flags of convenience through strikes, boycotts and legislative action. *See e.g.*, Ewing, *Union Action Against Flags of Convenience—The Legal Position in Great Britain*, 11 J. MAR. L. & COM. 503 (1980); Note, 16 J. MAR. L. & COM. 423 (1985) [strike by the International Transport Workers Federation against flag-of-convenience ship held unlawful]; Note, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet*, 69 YALE L. J. 498, 502-503 (1969) [U.S. maritime unions oppose flags of convenience].

66. *See* U.S. Department of Transportation, United States Coast Guard, Technical Memorandum No. MMI-3, 866-5-1 (March 29, 1986); S. Bergstrand and R. Doganis, *The Impact of Flags of Convenience*, in THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-SOVIET POST-UNCLOS PERSPECTIVE 421-424 (W.E. Butler, ed. 1985); Transportation Institute Memorandum, *The Safety of U.S.-Flag Ships Compared to Flag of Convenience Ships*, (October 19, 1977).

and Panama together accounted for 40.93% of the losses at sea in 1984.[67]

Disasters caused by ships with this type of registry have increased public awareness of the dangers presented by flags of convenience. In 1978, the *Amoco Cadiz*, a tanker registered in Liberia, spilled nearly all of its 230,000 tons of light crude oil onto the high seas and the French coast in Brittany.[68] Eleven years earlier, the *Torrey Canyon*, another flag of convenience ship, spilled half of its cargo of 117,000 tons of Kuwaiti oil on the beaches of Brittany and Cornwall.[69] The United States is not without its own share of tragedies. The Liberian-flagged *Argo Merchant* broke apart off Nantucket in December, 1976, spilling 7.5 million gallons of oil into New England fishing waters.[70]

Ironically, these disasters have prompted international organizations to move away from attempts to directly prohibit flags of convenience. Instead, the international community has focused upon the problems arising under the operations of substandard vessels[71] generally, regardless of whether they sail under flags of convenience.[72] For example, both the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[73] and the 1969 International Convention on Civil Liability for Oil Pollution Damage[74] were prompted by the *Torrey Canyon* incident.[75]

Unfortunately, the use of the genuine link doctrine to limit the number of vessels flying flags of convenience has failed to have significant influence upon the maritime industry. There has been no consensus among states that the provisions of Article 5 of the Geneva Convention on the High Seas should govern their relations in determining the nationality of ships.[76] Flag-of-convenience fleets have expanded rapidly,[77] and presently

---

67. SAMIR MANKABADY, THE INTERNATIONAL MARITIME ORGANIZATION: ACCIDENTS AT SEA 27 (1987) [hereinafter cited as MANKABADY, IMO VOL. 2].

68. The Sunday Times (London), March 19, 1978, at 1, col.1 and 2, col. 2.

69. The *Torrey Canyon* disaster caused 18 million dollars worth of damages. A. Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L.R. 783, 788 (1969). *See also* Brown, *The Lessons of the Torrey Canyon*, 21 CURRENT LEGAL PROBS. 134 (1968).

70. The Transportation Institute, *Flags of Convenience: An American View*, at 1 (1978).

71. The term "sub-standard" ships refers to those of unsound structure, ill equipped, badly operated, or having incompetent crews. It is estimated that 5% of the world's tanker fleet could be termed sub-standard. MANKABADY, IMO VOL.2, *supra* note 69, at 35, n.2.

72. Osieke, *supra* note 56, at 626.

73. 64 A.J.I.L. 471 (1970) [convention affirms the right of coastal states to take such measures on the high seas as may be necessary to prevent, mitigate, or eliminate danger, or threat of danger to coastline; provides provisions for settling disputes by means of negotiations, conciliation, and arbitration].

74. *Id.* at 481 (placing liability on the owner of the ship transporting oil).

75. *See* Mendelsohn, *supra* note 69.

76. Osieke, *supra* note 56, at 607.

77. *See* THE INTERNATIONAL SHIPPING FEDERATION, GUIDE TO INTERNATIONAL SHIP REGISTERS (1987) [hereinafter cited as ISF GUIDE]; *See also* Transportation Institute Transport Studies Group Discussion Paper No.8, *Flags of Convenience in 1978*, at 3-24 (November,

Liberia and Panama, two of the worst flag-of-convenience offenders, command the largest merchant fleets in the world.[78] Fleets operating under flags of convenience now account for one-third of the world's tanker tonnage as well as one-third of the world's bulk oil carriers.[79] This demonstrates that the "genuine link" doctrine is, at least in its traditional form, widely ignored.

Perhaps states find the "genuine link" requirement so easy to ignore because the U.N. Conventions on the Law of the Sea[80] contain no provisions indicating the consequences of registration when no genuine link exists. In fact, the Conventions do not enable a state to withhold recognition if it believes that no link exists. Article 94(6) of the Law of the Sea merely provides that a state "which has clear grounds to believe that a proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state," which has a duty to investigate.[81] Also, the "genuine link" requirement may be avoided because it not defined. Even though early drafts of the International Law Commission attempted to define "genuine link," by requiring ownership by nationals and manning by national officers,[82] the final draft failed to do so.

The International Court of Justice has also failed to actively support the "genuine link" requirement. It declined to apply the *Nottebohm*[83] principle to ships when the opportunity arose in the *IMCO* Case.[84] In *IMCO*, the Court advised that Liberia and Panama should be eligible for membership in the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO).[85] The Court reasoned that the term "largest ship-owning nations" in Article 28(a) of the IMCO Convention referred to registered tonnage and not beneficially owned tonnage. After the *IMCO* opinion, there can be little doubt that irrespective of ownership, registration alone is sufficient to determine the nationality of ships as far as international law is concerned.[86]

U.S. courts similarly have rejected a "genuine link" test which would define nationality by ownership. For example, in *Grivas v. Alianza Com-*

1978).

78. Important statistical data on the major merchant fleets of the world, as of July 1, 1986, are summarized in 31 ALMANAC OF SEAPOWER 235 (1988).

79. GOLD, *supra* note 33, at 89. *See also* LLOYD'S REGISTER OF SHIPPING (1987).

80. *See* 1958 Convention, *supra* note 36, art. 52; 1982 Convention, *supra* note 37, art. 91.

81. 1982 Convention, *supra* note 37, art. 94(6).

82. 1951 Y.B. INT'L L. COMM'N 330-32; U.N. Doc. A/CN.4/4 Ser. A/1953.

83. *See* Nottebohm Case. *supra* note 49.

84. 1960 I.C.J. 150.

85. In 1982, the IMCO became known as the International Maritime Organization (IMO). SAMIR MANKABADY, THE INTERNATIONAL MARITIME ORGANIZATION 2 (1984) [hereinafter cited as MANKABADY, IMO VOL.1].

86. A similar observation was made in Sinan, *supra* note 4, at 98. However, Sinan wrote that "the flag determines the responsibility of states as far as the enforcement of international law is concerned." As stated, Sinan's observation is misleading because the flag alone does not establish nationality. *See supra* notes 44-46 and accompanying text.

pania Armadora, S.A.,[87] the ship was registered in Liberia but owned by a Panamanian corporation. The plaintiffs sought to have the Panamanian Labor Code applied. The court, however, rejected jurisdiction by ownership, concluding that the fact that the vessel was owned by a Panamanian corporation did not in itself entitle the crew to the benefits of the Panamanian Labor Code.[88]

While at least some Eastern European states require a "genuine link"[89] in its traditional sense, most states do not follow the same practice. In fact, only one of the elements that has been traditionally thought to establish a genuine link for purposes of ship nationality has been consistently required under international law-registration. The use of the place of the vessel's construction to establish a link has become, for all practical purposes, anachronistic.[90] While many states have some manning requirements, evidence of a national crew is neither necessary nor sufficient to establish nationality.[91] Similarly, as the *IMCO* Case demonstrates,[92] there is no necessary correlation between ownership and nationality.[93] Registration, accompanied by the appropriate documents, is the only "genuine link" required to establish nationality under international law.

3. Registration

Registration falls within the jurisdiction of the individual nation, and, therefore, requirements and procedures for this process vary from

---

87. 150 F.Supp. 708 (S.D.N.Y. 1957).

88. *Id.* at 712. For a similar case, see Evangelinos v. Andreavapor Compania Naviera, S.A., 162 F.Supp 520, 521 (S.D.N.Y. 1958). In holding that foreign seamen aboard flag-of-convenience ships were not entitled to the protection of U.S. labor laws, the U.S. Supreme Court further rejected an ownership test in McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 83 S.Ct. 614, 9 L.Ed.2d 541 (1963) and in Incres S.S. Co. v. Int'l Maritime Workers Union, 372 U.S. 24, 83 S.Ct. 611, 9 L.Ed.2d 557 (1963) (seamen not entitled to protection of Labor Management Relations Act, although 40% of the vessels were owned by Americans and these ships carried one-third of the United State's foreign trade in 1958). *See* Currie, *Flags of Convenience: American Labor and the Conflict of Laws*, 1963 SUP. CT. REV. 34.

89. The Soviet Union requires a substantial link in order to sail under Soviet nationality. Under Soviet law, the right to fly a USSR flag is granted to vessels owned by the state, by collective farms or other state cooperative organizations, or by Soviet nationals. Upon registration, vessels are issued papers attesting the right to sail under the flag of the USSR. Only Soviet nationals may be crew members aboard Soviet-flagged ships, except under extraordinary circumstances. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 174 (1971), *citing* articles 22, 23, 26, 30-33 and 41 of the Merchant Shipping Code of the USSR.

90. RIENOW, *supra* note 2, at 24-49.

91. *Id.* at 216. States continue to have manning requirements for economic reasons (to promote employment for nationals) and for military reasons.

92. 1960 I.C.J. 150; *see supra* notes 73-76 and accompanying text.

93. Rienow states: "[T]he bare fact of national ownership does not impress upon a vessel a closer connection with the state of the owner's nationality than with any other state." RIENOW, *supra* note 2, at 116.

state to state.[94] Most states make general disclosure requirements regarding such things as the ownership of the vessel, the type of the vessel and its exact specifications, the age of the vessel, and its inspection history.[95] It is commonly recognized that it is the act of registration which results in the granting of a flag to a vessel.

Early treaties expressly stipulate the particular conditions under which parties would recognize the nationality of each other's vessels.[96] On the other hand, more recent treaties provide for reciprocal flag recognition on the basis of valid registration documents. The United States' standard flag recognition clause today reads:

> Vessels under the flag of either party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that party both on the high seas and within its ports, places and waters of the other party.[97]

The U.S.S.R. uses similar language in its treaties:

> The nationality of vessels shall be reciprocally recognized in accordance with the law and enactments of the two contracting parties on the basis of the documents and certificates on board the vessel issued by the proper authorities of either contracting parties.[98]

Under both of the texts, the focus is upon registration. No reference is made to the question of who owns the ship, by which country's nationals it is manned, or where it was built.[99]

In the absence of a treaty, under international law evidence of registration is both necessary and sufficient to establish nationality.[100] The U.S. Code of Regulations specifically recognizes that a certificate of documentation is "conclusive evidence of nationality for international pur-

---

94. For a comparison of the registration requirements of the United States, Liberia, and Panama, see E. GOLD & N.G. LETALIK, NEW DIRECTIONS IN MARITIME LAW 262-290 (1980) (reprinting sections of each country's statutes pertaining to registration of ships).

95. For a review of U.S. documentation procedures, see Drzal and Carnilla, *Documentation of Vessels: The Fog Lifts*, 13 J. MAR. L. & COM. 261 (1982).

96. For flag recognition clauses in bilateral treaties up to 1937, see RIENOW, *supra* note 2, at 19-21 and 167-170.

97. BOCZEK, *supra* note 33, at 98, n. 23, *citing*, *e.g.* treaties of FCN: With China, Nov. 4, 1946, art. XXI, 63 Stat. (2) 1299; T.I.A.S. 1871, 2 U.N.T.S. 69. With Italy, Feb. 2, 1947, art. XIX; 63 Stat. (2)2255; T.I.A.S. 1965; 79 U.N.T.S. 171. With Ireland, Jan. 21, 1950, art. XVIII(2); 1 U.S.T. 785; T.I.A.S. 2155. With Japan, April 2, 1953, art. XIX; 4 U.S.T. 2063; T.I.A.S. 2863. With Israel, Aug. 23, 1951, art. XIX; 5 U.S.T. 50; T.I.A.S. 2948.

98. *Id.*

99. It is interesting to note that the U.S. has flag recognition provisions with Honduras and Liberia, two of the main flag of convenience states. These provisions were one of the main arguments put forward by some of the International Law Commission against making recognition of a vessel's nationality dependent upon a "genuine link." BOCZEK, *supra* note 33, at 99, n.26, *citing* Treaty of Friendship, Commerce & Consular Rights with Honduras, December 7, 1927, art. X; 45 Stat. 2618; T.S. 764; 87 L.N.T.S. 421. Treaty of FCN with Liberia, August 8, 1938, art. XV; 54 Stat. 1739; T.S. 956; 201 L.N.T.S. 163.

100. N. SINGH, MARITIME FLAG AND INTERNATIONAL LAW 40 (1977); BOCZEK, *supra* note 33, at 106; RIENOW, *supra* note 2, at 154.

poses."[101] A ship without documents to establish nationality is treated as being without nationality, even if the ownership of the vessel may be established.[102] Thus, the country of registration remains the single, essential criterion for determining the nationality of a ship.

B. Was the Re-registration of the Kuwaiti Tankers Sufficient to Confer U.S. Nationality?

According to the criteria discussed above, the Kuwaiti tankers need only be properly registered under U.S. law in order to legally sail under the American flag. Under international law, if the Kuwaiti vessels carry documentation evidencing American registration, issued by competent authorities, then they are to be considered American ships. This relatively minor requirement was met in the present case.

Under U.S. law, vessels of at least 5 net tons[103] are eligible for documentation if two main requirements are met. First, the vessels must meet the inspection requirements provided by the Coast Guard.[104] This requirement was satisfied because U.S. law also allows violations to be waived if national defense concerns are present.[105] The Coast Guard inspected each ship on site[106] and granted national defense waivers for violations of U.S. law that did not constitute "manifestly unsafe conditions."[107]

Second, the vessels must meet ownership requirements. In order to trade overseas,[108] a vessel must be owned by an individual who is a U.S. citizen, partnership whose general partners are U.S. citizens, or corporation organized and chartered under the laws of the United States.[109] If

---

101. 46 U.S.C. § 12104(1) (1987) provides that while a certificate of documentation issued under U.S. laws is conclusive evidence of nationality for international purposes, it is not conclusive evidence in any proceeding conducted under the laws of the U.S.

102. *See, e.g.*, The Merritt, 84 U.S. (17 Wall.) 582, 587 (1873) (American-owned, foreign-built ship without any documents could not establish nationality and thus was "entirely destitute").

103. 46 U.S.C. § 12102 (1987).

104. 46 U.S.C. § 3301 - *et. seq.* (1987). 46 U.S.C. § 3705 (1987) details specific standards applicable to oil tankers. In addition, regulations have been issued pursuant to 46 U.S.C. § 3306 (1987). U.S. Coast Guard Navigation and Inspection Circular No. 10-81, dated October 5, 1981, contains the requirements for foreign flag vessel brought under the U.S. flag.

105. Such waivers are granted under 46 C.F.R. § 6.01.(1987) and 46 App. U.S.C. Note prec. 1 (1958) (Act of December 27, 1950). *See supra* notes 12-15, and accompanying text.

106. N. Y. Times, July 17, 1987, at B8, col. 6; N. Y. Times, August 9, 1987, at A12, col. 3.

107. May 21 Coast Guard Letter, *supra* note 20.

108. The distinction between overseas trade and coastal trade is crucial because the Shipping Act of 1916 independently imposes further requirements concerning the citizenship of owners of vessels engaged in coastal trade. 46 U.S.C. §§ 802 & 808 (1959). *See* Drzal & Carnilla, *supra* note 95 at 265. In addition, vessels which engage in coastal trade must be built in the United States. On the other hand, ships engaging in foreign trade may be built anywhere. 46 U.S.C. § 12105(d) (1987).

109. 46 U.S.C. § 12102 (1987). In comparison, under Panamanian law, there are no

the vessel is owned by a corporation, the chief executive officer, chairman of the board of directors, and a majority of the directors must be U.S. citizens.[110] The equity ownership in a U.S. flag vessel registered for foreign trade need not be held by American citizens unless the United States is at war, or the President has declared a national emergency. Were that to be the case, a majority of the interest in the corporation would have to be owned by Americans.[111]

The Kuwaiti government satisfied the ownership requirement by establishing a "paper corporation," Chesapeake Shipping, Inc., to act upon its behalf.[112] The equity interest in Chesapeake Shipping is not owned by Americans. This is not a fatal defect because, while the Administration was seeking waiver of inspection rules based on "national defense," it did not go so far as to declare a "national emergency." A House of Representatives report analyzing this problem noted that "[a] 'national emergency' declaration would trigger a shift in equity ownership of the Kuwaiti tankers."[113] Under the present circumstances, however, Chesapeake Shipping is in apparent compliance with the ownership requirement.

In sum, because the Kuwaiti tankers met the United States's requirements for registration, they were properly issued certificates of documentation.[114] The fact that the Kuwaiti tankers have little connection to the United States is irrelevant. Under international law, these certificates of documentation are conclusive evidence of nationality.[115] Thus, the vessels had the right to carry the U.S. flag.

IV. STATE RESPONSIBILITY IN THE SAILING OF FLAGGED VESSELS

Every state has the right to have ships fly its flag on the high seas.[116] However, all rights of an international character involve international responsibility. Consideration for the rights of other states requires that flag states observe international rules relating to environmental protection, the protection of human life at sea, and safety in navigation.[117] The vast majority of states, including many of those associated with fleets sailing under flags of convenience, agree that they have a general obligation to sail safe ships.[118] This general acknowledgement is evidenced by the fact

---

ownership requirements. GOLD & LETALIK, *supra* note 94, at 282.

110. 46 U.S.C. § 12102(4) (1987).

111. House Memorandum, *supra* note 9, at 11.

112. *See supra* note 18 and accompanying text.

113. House Memorandum, *supra* note 9, at 11. The Report further observed that "[i]t may be possible that invoking the War Powers Act, as Congress has asked, would be tantamount to declaring a national emergency."

114. 46 U.S.C. § 12103 (1987) (certificates of documentation).

115. *Supra* note 100 and accompanying text.

116. 1982 Convention, *supra* note 37, art. 87.

117. Limitone, *The Registration of Ships by International and International Organization*, 2 SEA GRANT BULLETIN 4-5 (1971).

118. *See* Transportation Institute discussion paper No. 8, *supra* note 77, at 58. For evidence of the international emphasis placed upon safety of life at sea, see Law of the Sea,

that the largest fleets which are considered to fly flags of convenience, including those of Panama, Liberia and Cyprus, have ratified the key international conventions pertaining to safety at sea.[119]

While it is perhaps difficult to point to precise, uniform safety obligations, the norm of sailing safe ships is not completely devoid of concrete content. Rather, the duties arising out of this norm are set forth both in multilateral conventions and through customary international law. Obligations articulated in conventions and the customary rules of navigation and safety attempt to regulate the use of the seas.[120] The flag state's failure to comply with the requirements of the conventions and customary laws could conceivably make them liable internationally to injured states.[121] The interrelationship of these specific sources of the law of the sea creates a general obligation to sail safe ships.[122] This section details states' obligations in sailing vessels and determines whether such obligations were met with respect to the Kuwaiti oil tankers.

A. *Obligations of State Sailing a Flagged Vessel*

The obligations of states sailing flagged vessels arise out of a basic principle of the law of the sea: freedom of the sea.[123] In recognition of the sovereign equality of states, "all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for navigation."[124] The doctrine, as it has evolved through custom, is contained in Article 87

Report of the Secretary-General, November 27, 1985, U.N. Doc. A/40/923 (1985), *reprinted in* 1 INTERNATIONAL AND U.S. DOCUMENTS ON OCEANS LAW AND POLICY, at Part A (J.N. Moore ed. 1986).

119. Panama, Liberia, Isle of Man, Hong Kong, Cyprus, Malta, Vanuatu and Singapore have all ratified the U.N. Convention for Safety of Life at Sea. ISF Guide, *supra* note 77. In addition, Liberia, Hong Kong, Cyprus and the Bahamas have adopted the International Convention on Standards of Training, Certification and Watchkeeping. *Id. See infra* note 155 and accompanying text.

120. Limitone, *supra* note 117, at 5.

121. *Id., citing* McDOUGAL & BURKE, *supra* note 2, at 1081-82. The main international convention pertaining to liability for maritime claims is The International Convention relating to the Liability of Owners of Sea-Going Ships, October 10, 1957, *entry into force*, 1968 U.N.T.S. 52; *reprinted in* SINGH, 4 INTERNATIONAL MARITIME LAW CONVENTIONS 2976 (1983) (hereinafter cited as Singh Conventions). For a discussion on the potential liability of flag states, see MANKABADY, IMO VOL. 2, *supra* note 67, at 68-115.

122. Eduardo Jimenez de Arechaga has noted that one of the principle features of the lawmaking process in contemporary international law is the simultaneous interplay of its sources. EDUARDO JIMENEZ DE ARECHAGA, *International Law in the Past Third of a Century*, 1978 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1 (vol. 1).

123. *See* 1984 SOVIET Y.B. MAR. L. 32; TOWARD A NEW INTERNATIONAL MARINE ORDER 2 (Laursen, ed. 1982); P.S. RAO, THE PUBLIC ORDER OF OCEAN RESOURCES: A CRITIQUE OF THE CONTEMPORARY LAW OF THE SEA 154-156 (1975)(Freedom of the seas and conflicting uses); SCIENTIFIC AND TECHNICAL REVOLUTIONS AND THE LAW OF THE SEA 7 (M. Frankowska, ed. 1974); McDougal & Burke, *Crisis in the Law of the Sea: Community Perspective v. National Egotism*, 67 YALE L. J. 539, 547 (1958)(compromise between demands of coastal and non-coastal states).

124. Le Louis, 2 Dod. Adm'y Rep. 210, 244 (1817).

of the U.N. Convention on the Law of the Sea, which states:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It compromises, inter alia, for both coastal and land-locked states:
>
> (a) Freedom of navigation;
>
> (b) Freedom of overflight;
>
> (c) Freedom to lay submarine cables and pipelines. . .
>
> (d) Freedom to construct artificial island. . .
>
> (e) Freedom of fishing. . .
>
> (f) Freedom of scientific research. . .[125]

The Convention emphasizes that freedom of the high seas must be exercised "with due consideration for the interests of other States in their exercise of freedom of the high seas. . ."[126]

If freedom of the high seas is to exist, it is necessary that international rules are followed in order to alleviate conflicting or dangerous uses of the oceans. International cooperation is more necessary today because shipping has become an industry which greatly effects the quality of life of the world community. One commentator succinctly noted: "Shipping is no longer a personal affair dependent upon a brave captain."[127] The large fleets of today carry a considerably larger amount of dangerous cargo than did the ships of yesterday. As a result, the problem of safety at sea has expanded from the concern for the well-being of a few to concern for safety of the entire human race.

The number of disasters at sea are astonishing. According to Lloyd's Register of Shipping, in 1984 marine losses amounted to 161 vessels, a total of 2.3 million tons gross.[128] Between 1968 and 1980, over 1,593 lives were lost at sea due to shipping disasters.[129] These numbers do not reveal the true dimensions of the problem. Disasters at sea have a much wider impact when social, economic, and ecological factors are taken into account. Professors McDougal and Burke have noted that it is in states' self-interest to cooperate with others in the use of the oceans. They write that:

> States concerned for their long-term national interest might be better advised not to destroy their equality of access to inclusive uses of the oceans, but to increase their effective capacity for the fuller enjoyment of their common existing rights.[130]

---

125. 1982 Convention, *supra* note 37, art., 87(1) (items (c) through (f) are subject to limitations set forth in the Convention).

126. *Id.* art. 87(2).

127. MANKABADY, IMO VOL. 1, *supra* note 85, at 174.

128. MANKABADY, IMO VOL. 2, *supra* note 67, at 27.

129. *Id.* at 175.

130. MCDOUGAL & BURKE, *supra* note 123, at 589.

Without international cooperation, the problems of safety at sea cannot be solved or even substantially reduced.[131] In an attempt to alleviate this problem, states have set forth safety obligations in both international and domestic regulations.

1. International Standards

The starting point for determining the content of international norms pertaining to safety at sea is the U.N. Convention on the Law of the Sea,[132] the basic source of international law of the sea.[133] The provisions of the Convention have been grouped into three categories:

> (1) provisions that codify or restate the existing law of the sea, either customary or conventional; (2) provisions that clarify, redefine or make more precise what has already been implicit in international law or related developments; and (3) new, unique or unprecedented provisions.[134]

Which provisions fall into each category is often a subject of controversy.[135] Still, the main provision relating to the responsibilities of flag states, Article 94, merely restates previously existing principles which are corollary to the long-standing principle of freedom of the seas.[136] Such

---

131. For agreement with this proposition, see MANKABADY, IMO VOL. 1, *supra* note 85, at 176.

132. The U.N. Conventions have a long history. First, the League of Nations produced the Acts of the Conference for the Codification of International Law on August, 19, 1930. Minutes of the Second Committee, League of Nations Conference for the Codification of International Law Vol. IV, Doc. C. 351 (b). M. 145 (b). 1930 V (1930); *reprinted in* 24 AM. J. INT'L. L. 234-53 (supp. 1930). The United Nations held the First Conference on the Law of the Sea in 1958 and adopted the Convention on the High Seas. 1958 Convention, *supra* note 36. This Convention has been substantially revised twice, first in 1960 and, most recently, in 1982. *See* Second U.N. Conference on the Law of the Sea, Final Act of Conference, April 26, 1960, UNCLOS III, OFFICIAL RECORDS 175, U.N. Doc. A/CONF.19/L.15 (1960); 1982 Convention, *supra* note 37.

For a convenient summary of the issues surrounding UNCLOS III, see G. M. White, *Unclos and the Modern Law of Treaties: Selected Issues,* in W.B. BUTLER, THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO - SOVIET POST UNCLOS PERSPECTIVE 15-37 (1985).

133. Many commentators agree that apart from provisions concerning the utilization of the seabed and possibly those related to dispute resolution, UNCLOS is the best evidence of the current state of customary international law. J. N. Moore, *Customary International Law After the Convention,* in THE LAW OF THE SEA INSTITUTE, THE DEVELOPING ORDER OF THE OCEANS, at 41 (1984). *See also* Bruce Harlow, *Commentary, id.* at 62; BUTLER, *supra* note 132, at 3-14. For a discussion of the deep seabed mining controversy that has caused conflicts in Third U.N Conference on the Law of the Sea, see PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA: PRELUDE TO THE FINAL SESSION OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA (C.L.O. Buderi, D.D. Caron, eds. 1985).

134. T. Treves, *The United Nations Law of the Sea Convention of 1982: Prospects for Europe,* in GREENWICH FORUM, BRITAIN AND THE SEA: FUTURE DEPENDENCE, FUTURE OPPORTUNITIES 6 (1983).

135. *Id.* at 5-6.

136. Notably, this provision was accepted without controversy at the U.N. Law of the Sea Conferences. Instead, disputes have focused on the question of fishing zones, seabed mining, and the limits of the territorial sea. *See* CLYDE SANGER, ORDERING THE OCEANS: THE

principles are reflected in numerous treaties and have been adopted by many states. Therefore, Article 94 may be regarded as falling into either the first or second category.[137]

Article 94 of the U.N. Convention on the Law of the Sea enumerates the administrative, technical, and social matters over which the flag state should exercise effective control. In particular, the Convention states:

> Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
> (a) The construction, equipment and seaworthiness of ships;
> (b) The manning of ships, labor 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.[138]

The flag state also must ensure that each vessel is surveyed by a qualified surveyor of ships, that each ship is in the charge of a master who possesses the proper qualifications, and that the crew is appropriate in qualifications and in number.[139] In fulfilling the requirement of Article 94, each state is required to "conform to generally accepted international regulations."[140]

The U.N. Convention on the Law of the Sea has had a profound effect both upon conventional and customary international law pertaining to safety.[141] Guided by the Convention, the Intergovernmental Maritime Organization (IMO)[142] has promoted several maritime safety measures

---

MAKING OF THE LAW OF THE SEA 13-22, 40-55 (1987). The United States has taken the position that virtually every provision outside the seabed mining section is already customary law and, thus, needs no convention or treaty to add to the body of international law. *Id.* at 106. While the United State's position has met with great opposition, many states do agree that the sections pertaining to state responsibilities and freedom of the high seas are part of customary international law. Tullio Treves, *The U.N. Convention on the Law of the Sea as a Non-Universally Accepted Instrument: Notes on the Convention and Customary Law*, in A.W. KOERS & B.H. OXMAN, THE 1982 CONVENTION ON THE LAW OF THE SEA 685 (1983).

137. Treves, *supra* note 136, at 688. The implication of this observation is that not all states have to sign the latest Convention on the Law of the Sea for Article 94 to become binding on all states. As of this writing, the 1982 Convention has been signed by a sizable number of states, but ratified by only a few. *Id.* at 685. The phenomenon of rules set forth in a treaty becoming binding on third states as customary rules of international law is recognized by the Vienna Convention on the Law of Treaties (Art.38) and the International Court of Justice in North Sea Continental Shelf, 1969 I.C.J. 41.

138. 1982 Convention, *supra* note 37, art. 94(3).

139. 1982 Convention, *supra* note 37, art. 94(4). *See also* the 1958 Convention, *supra* note 36, especially Articles 5, 10, and 12.

140. 1982 Convention, *supra* note 37, art. 94(5).

141. *See* Budislav Vukas, *The Impact of the Third United Nations Conference on the Law of the Sea on Customary Law*, in THE NEW LAW OF THE SEA (C.L. Rozakis & C.A. Stephanou, eds. 1983).

142. The IMO is an agency of the U.N. which promotes the safety of maritime shipping through three different instruments: conventions, resolutions and codes. Only conventions, when ratified, are binding. Nevertheless, in practice, resolutions may carry more weight than certain conventions, and some of the codes are incorporated into national law.

which have found a very great measure of acceptance. An international conference convened under its auspices adopted the International Convention and Regulations for the Safety of Life at Sea (SOLAS),[143] which contains detailed provisions about the minimum standards for construction of ships and the safety precautions to be maintained on board. The Convention also details inspection procedures, grants authority to flag states to investigate any casualty involving their ships, and authorizes port states to prevent ships not meeting the Convention's standards from leaving their ports. The Convention has been ratified by most of the major shipping nations including Panama, Cyprus, Liberia, USSR, Greece and the United States.[144]

A set of safety regulations which has gained even greater acceptance are the IMO's Collision Regulations ("The Rules").[145] The Rules have been adopted by 95 countries, the aggregate of whose merchant fleets constitute approximately 95% of the gross tonnage of the world's merchant fleet.[146] The Regulations consist of 38 detailed requirements applying to steering, sailing, lighting and sound and light signals. The Rules' primary objective is to prevent accidents by minimizing the risk of collision, and their secondary objective is to set up standards of conduct for navigating officers.[147] These objectives can be achieved only through a precise and uniform application. For this reason, the IMO has adopted its "Guidance for the Uniform Application of Certain Rules" of the Collision

---

MANKABADY, IMO VOL. 1, *supra* note 85, at 1.

143. This Convention has seen many revisions: International Convention for the Safety of Life at Sea, London, June 17, 1960, *entered into force*, May 26, 1965, 536 U.N.T.S. 27; International Convention for the Safety of Life at Sea, London, November 1, 1974, *entered into force*, May 24, 1980, *reprinted in* 14 I.L.M 963; Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, London, February 17, 1978, *entered into force* May 1, 1981, reproduced from IMCO Document TSPP/CONF/10/Add.1, in MOORE, *supra* note 118, at 324; 1981 Amendments to Protocol, London, November 1981, entry into force September 1, 1984, *reprinted in* IMO STAT. OF MULTILATERAL CONVENTIONS 29 (1984).

The 1960 SOLAS built upon the work of many previous safety of life at sea conventions. As a result of *The Titanic* incident, the first convention was adopted in 1914. MANKABADY, IMO VOL. 1, *supra* note 85, at 29.

144. ISF GUIDE, *supra* note 77; *see also* International Convention for the Safety of Life at Sea in MOORE, *supra* note 118, at part B.

145. Convention on the International Regulations for Preventing Collisions at Sea, London, October 20, 1972, *entered into force*, July 15, 1977, U.N. Registration No. A-15824; Cmnd. 6962; *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 3 (Vol. 1); QUENEUDEC, CONVENTIONS MARITIMES INTERNATIONALES 287 (1979). *See also* 1981 Amendments to Convention, London, November 19, 1981, entry into force, June 1, 1983, IMO Resolution A.464 (XII), in IMO STAT. OF MULTILATERAL CONVENTIONS 31 (1984).

146. Countries which have adopted the rules include Canada, Cyprus, Czechoslovakia, France, German Democratic Republic, German Federal Republic, Greece, Honduras, Israel, Italy, Japan, Kuwait, Liberia, Panama, Republic of Korea, Singapore, Saudia Arabia, USSR, United Kingdom, and the United States. MANKABADY, THE LAW OF COLLISIONS AT SEA 557-559 (1987)(hereinafter cited as MANKABADY, COLLISIONS).

147. *Id.* at 71.

Regulations.[148]

Other widely-accepted regulations which indicate the international community's concern with safety at sea include: The International Code of Signals;[149] The International Convention on Load Lines;[150] The Tonnage Measurement of Ships Convention;[151] The International Convention for Safe Containers;[152] The International Convention on Maritime Search and Rescue;[153] and The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.[154]

The safety regulations detailed above may be enforced by port states. Fourteen Western European states[155] have signed a "Memorandum on Port Control" which attempts to prevent the operation of sub-standard vessels. To this end, each state will require that foreign merchant ships visiting their ports comply with the standards laid down in a number of international instruments, including: The International Convention on Load Lines, The International Convention for Safety of Life at Sea, The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, and The Convention on The International Regulation for Preventing Collisions at Sea.[156]

In addition to proposing general safety measures, international conventions propose detailed measures to prevent, reduce and control pollution of the marine environment. Article 25 of the 1958 Convention on the High Seas requires states to cooperate with competent international organizations in taking measures for the prevention of pollution of the seas

---

148. MSC/Circ. 320, of April 5, 1982, *cited in* MANKABADY, COLLISIONS, *supra* note 146, at 71, n.2.

149. MANKABADY, COLLISIONS, *supra* note 146, at 7. The first International Code of Signals was drafted by the British Board of Trade in 1855. This code was revised several times. A significantly different version was published by the International Radiotelegraph Conference in 1930. After the establishment of the IMO, the Code was revised once more. The IMO's Code, completed in 1964, embodied the principle that each signal had a complete meaning and therefore it left out the vocabulary method used in the previous editions. This Code was amended again in 1972, 1974, 1980, and 1984. *Id.*

150. London, April 5, 1966, 640 U.N.T.S 133; 18 U.S.T. 1857; T.I.A.S. 6331; SINGH, CONVENTIONS, *supra* note 121, at 982 (Vol. 2) (1983); QUENEUDEC, *supra* note 146, at 381.

151. London, June 23, 1969, *entered into force*, July 18, 1982, U.N. Registration No. A-21264; SINGH, CONVENTIONS, *supra* note 121, at 1848 (Vol. 2); QUENEUDEC, *supra* note 151, at 433.

152. Geneva, December 2, 1972, entry into force, September 6, 1977, U.N. docs. E/CONF.59/44 and E/CONF.59/46; 1064 U.N.T.S. 3; 29 U.S.T. 3709; T.I.A.S. 9037.

153. Hamburg, April 27, 1979, *entered into force*, June 22, 1985, *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 1671 (Vol. 2).

154. London, July 7, 1978, entry into force, April 28, 1984, U.N. Regist. No. 20690, IMO Publication Sales No. 78.15.E, at 5.

155. The fourteen states are: Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and Northern Ireland. The memorandum provides for wider participation from non-EEC members with the consent of Party States. MANKABADY, IMO VOL. 2, *supra* note 67, at 38, n.3.

156. *Id.* at 39.

resulting from any activities with "harmful agents."[157] The main international agreement of this type is the International Convention for the Prevention of Pollution from Ships.[158] Particular emphasis has been placed on preventing oil pollution.[159] Several widely-adopted international agreements attempt to prevent this type of contamination of the seas.[160] For example, in 1975 the IMO adopted the "Code for the Construction and Equipment of Ships Carrying Liquified Gas in Bulk" which provides safety standards for the construction and operation of ships transporting gas.[161]

International agreements also attempt to compensate the victims of oil pollution. Under the International Convention on Civil Liability for Oil Pollution Damages,[162] liability is placed on the owner of the ship transporting oil.[163] The shipowner's liability is limited according to the

---

157. *See* art. 194 of the 1982 Convention, *supra* note 37.

158. London, November 2, 1973, *entered into force*, October 2, 1983, U.N. Doc. ST/LEG/SER.B/18, at 457-517; 1973 U.N. JURIDICAL Y.B. 81 (1973). This is modified by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, London, February 17, 1978, *entered into force*, October 2, 1983, U.N. Registration No. 22484; *reprinted in* IMO STAT. OF MULTILATERAL CONVENTIONS 47 (1984).

159. A detailed discussion of these efforts are beyond the scope of this discussion. *See generally*: KINDT, MARINE POLLUTION AND THE LAW OF THE SEA (1986); GOLD, HANDBOOK ON MARINE POLLUTION (1985); ABECASSIS & JARASHOW, OIL POLLUTION FROM SHIPS, (2nd ed. 1985); HAKAPAA, MARINE POLLUTION IN INTERNATIONAL LAW: MATERIAL OBLIGATIONS AND JURISDICTION (1981); Juda, *IMCO and the Regulation of Oil Pollution from Ships*," 26 INT'L & COMP. L. Q. 558, 562-564 (1977); Anderson & Bissell, *International Cooperation for the Prevention of Marine Oil Pollution*, SEA GRANT TECHNICAL BULLETIN No. 33 (1975); Mendelson, *Ocean Pollution and the 1972 U.N. Conference on the Environment*, 3 J. MAR. L. & COM. 385 (1971); Neuman, *Oil on Troubled Waters: The International Control of Marine Pollution*, 2 J. MAR. L. & COM. 349 (1971).

160. *See* International Convention for the Prevention of Pollution of the Sea by Oil, London, May 12, 1954, *entered into force*, July 26, 1958, U.N. document E/2609, ST/LEG/SER.B/15, at 787-799, 327 U.N.T.S. 3, 12 U.S.T. 2989; T.I.A.S. 4900; International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, November 19, 1969, *entered into force* May 6, 1975, 26 U.S.T. 765, T.I.A.S. 8068; Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, London, November 2, 1973, *entered into force*, March 30, 1983, U.N. Doc. ST/LEG/SER.B/18, at 457-517.

161. Countries which have implemented the Gas Code in national regulations include: the United States, Sweden, Japan, Norway, Netherlands, Mexico, Finland, and Belgium. The Soviet Union and the United Kingdom apply the code on a voluntary basis. MANKABADY, IMO VOL.1, *supra* note 85 at 78.

162. Brussels, November 29, 1969, entry into force, June 19, 1975, U.N. Regis. No. A-14097; U.N. Doc. ST/LEG/SER.B/166, at 447-454; Protocol to the International Convention on Civil Liability for Oil Pollution Damage, London, November 19, 1976, *entered into force*, April 8, 1981, U.N. Regis. No. A-14097, *reprinted in* SINGH, CONVENTIONS, *supra* note 121, at 2489 (Vol. 3).

163. Liability is placed upon the owner unless the damage (1) resulted from an act of war or a natural phenomenon; (2) was wholly caused by an act or omission committed with intent to cause damage to a third party; or (3) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational equipment. The text of the convention is reprinted in 64 A.J.I.L. 481 (1970). For an extensive discussion of the convention, see Healy, *The International Conven-*

tonnage of the ship. Victims who are unable to obtain adequate compensation under the Civil Liability Convention may receive relief under the International Convention on the Establishment of an International Fund for Oil Pollution Damage.[164]

2. Domestic Standards

States must do more than follow internationally accepted safety and anti-pollution standards to fulfill their obligation to neither impede nor endanger other states' use of international waters. In addition, they must attempt to abide by their own safety standards. Although domestic regulations are not in themselves part of the corpus of international law, they do have an important relationship to the international law of the sea. Domestic standards exert a significant influence on the development of both conventional and customary international law.[165] Conversely, international standards are reflected in domestic regulations because states frequently incorporate all or part of international conventions into their own legislation.

As noted above, Article 94 of the U.N. Conference on the Law of the Sea requires that states take measures " 'as necessary' to ensure safety at sea."[166] In their own regulations, states define for themselves what they believe is necessary to abide by this requirement. The state definition may be more or less stringent than international regulations. In any event, the regulations indicate the measures that a state believes are necessary in order to sail a safe ship.[167] A state which does not even attempt to comply with its own definition of safety, and acts in a manner which it has defined as unsafe or environmentally unsound, cannot be said to be fulfilling its obligation to sail safe ships.

Furthermore, domestic safety standards are important simply because international conventions do not cover every situation. When international conventions are not directly applicable, the only way to tell whether a state is attempting to sail safe and nonpolluting ships is to examine whether the state is in compliance with its own standards. Thus, both international and domestic standards must be considered when determining whether a flag state has fulfilled its safety obligations.

---

tion on Civil Liability for Oil Pollution Damage, 1 J. MAR. L. & COM. 317 (1970).

164. Brussels, December 18, 1971, *entered into force*, October 16, 1978, U.N. Doc. ST/LEG/SER.B/18, at 387. The Convention also provides some relief to shipowners who comply with certain international safety and antipollution standards.

165. Francisco Orrego Vicuna, *The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelation-ships*, in THE DEVELOPING ORDER OF THE OCEANS 11 (Krueger & Riesenfeld, eds. 1985)(stating that paramount example is that of the exclusive economic zone).

166. *See supra* note 138 and accompanying text.

167. *See* Transportation Institute Memorandum, *The Safety of U.S.-Flag Ships Compared to Flag of Convenience Ships*, *supra* note 66, at 9.

B. *Whether the United States Met Its Obligations*

The United States' actions in the reflagging of the Kuwaiti oil tankers indicates that it was influenced in its decision by its international obligation to sail safe ships. If the United States had believed that it had no obligations to the world community in the sailing of the Kuwaiti tankers, it would have merely reflagged the vessels and declared them ready to sail into the Persian Gulf. However, the United States did not stop with the nearly-mechanical reflagging process. Rather, at great expense it followed the mandate of Article 94 of the U.N. Conference of the Law of the Sea and sent U.S. Coast Guard inspectors to inspect all ships on-site.[168]

Arguably, these actions were undertaken in order to ensure that the ships complied with domestic regulations. However, as noted above, domestic regulations reflect and incorporate international norms pertaining to safety. In addition, a desire to comply with domestic regulations could not have been the sole motivation for the costly inspections because Coast Guard officials specifically were instructed to take steps to ensure that international conventions were observed. Moreover, they were directed to refuse to give waivers for violations of Safety of Life at Sea Convention, or the International Load Line Convention.[169] Indeed, from review of publicly released documents, it appears that all ships were brought into compliance with international safety standards.[170]

While the United States complied with international conventions, it allowed the ships to sail in violation of several domestic safety and antipollution regulations.[171] The extent to which these regulations were violated is not clear. It appears, however, that the ships fell below acceptable standards in several important areas including: automation, steering gear requirements, fire protection, navigation, and ventilation requirements.[172] Nevertheless, while national defense waivers were granted for some domestic safety violations,[173] the Coast Guard refused to grant waivers for "manifestly unsafe conditions."[174]

The only area in which the United States completely waived international and domestic safety obligations is manning. By waiving its own manning requirements, the United States failed to fulfill Article 94's requirement that a flag state take measures to ensure safety at sea with

---

168. *See supra* note 21.

169. *See* Telex to Mr. Stafford, May 4, 1987, *supra* note 10; May 21 Coast Guard Letter, *supra* note 20; House Memorandum, *supra* note 9, at 5.

170. House Memorandum, *supra* note 9.

171. The regulations for Coast Guard certification of foreign flag vessels brought under the U.S. flag are set forth in U.S. Coast Guard Navigation and Inspection Circular 10-81 (October 5, 1981). Additional requirements apply to oil tankers traveling in U.S. waters. *See* Davis, *Ports and Waterways Safety Act of 1972: An expansion of the Federal Approach to Oil Pollution*, 6 J. MAR. L. & COM. 249 (1975).

172. House Memorandum, *supra* note 9.

173. *See supra* notes 12-16 and accompanying text.

174. *See supra* note 10.

respect to manning ships and training seamen.[175] It allowed the ships to sail without meeting the U.S. manning requirements which provide that on U.S.-flag vessels, upon leaving a U.S. port, at least 75 percent of the unlicensed crew and all of the officers must be American citizens.[176] Since the tankers were not departing from a U.S. port, the Coast Guard reasoned, they were not required to use an American crew other than a master.[177]

The loophole in the manning requirements has been closed by the passage of a law which requires that the manning requirements apply regardless of whether the ship calls upon domestic ports.[178] This means that the if U.S. citizens are available for employment, they may be placed on the Kuwaiti tankers. Still, language in the existing law[179] and contained within the new provisions permits the President to waive the citizenship requirements for either a national emergency or because of lack of qualified seamen.[180]

While the manning policy stems in part from economic and military concerns, it also addresses safety concerns. By monitoring the qualifications and training requirements of U.S. seamen, the Coast Guard ensures that crews comprised of U.S. citizens are capable of sailing ships safely and of managing emergency situations. For example, licensed masters, mates, engineers, pilots, operators and radio officers must satisfy specific statutory requirements.[181] These and other manning requirements enhance the safety of U.S.-flagged vessels and, in ordinary situations, should be followed.

However, the situation in the Persian Gulf is not ordinary; oil tankers are not usually accompanied by a military escort. Under the extraordinary circumstances presented in the Gulf, military concerns dictate manning policies, rather than safety concerns. Therefore, under the extraordinary circumstances, the United States' decision to waive its own manning requirements was within its discretion.[182]

---

175. *See supra* note 138 and accompanying text.

176. 46 U.S.C. § 8103(b) (1987).

177. *Supra* notes 24-26 and accompanying text.

178. H.R. 2598 was adopted into law on January 11, 1988. Pub. L. No. 100-239.

179. 46 U.S.C. § 8103(h) (1987).

180. As of this writing, a waiver has not yet been requested but it is likely that it will be requested in the near future. U.S. maritime unions are attempting to counter this anticipated request by underscoring the availability of American seamen. The Seafarers Union, for example, has initiated a membership letterwriting campaign requesting employment aboard the U.S.-flagged Kuwaiti tankers. Memorandum to all area vice-presidents, port agents and filed representatives, from Frank Drozak, President, Seafarers International Union (January 20, 1988).

181. 46 U.S.C. § 7101 (1987); 46 C.F.R. §§ 5.01-1 *et seq.* (1987).

182. This does not mean that other countries should have he unrestricted ability to waive manning requirements. Under more stable conditions, when a ship is reflagged for economic reasons, a state still is obligated to take measures to ensure safety at sea with respect to manning ships and training seamen.

V. CONCLUSION

This discussion has attempted to emphasize the importance under international law of the decision to flag and sail a ship. The flag which a ship bears is not only a symbol of a link between a ship and a state, but also a symbol of a link between a state and the international community. The United States' decision to reflag eleven Kuwaiti oil tankers may be characterized simply as a political decision. This does not mean, however, that this action could have been properly undertaken without consideration for the world community. All flag states, including those whose fleets might be considered to be sailing under flags of convenience, must fulfill two categories of responsibilities to the world community.

First, states must grant nationality to ships according to internationally accepted criteria. Currently, registration is both necessary and sufficient in order to establish nationality under international law. The United States met this criterion by properly registering and documenting the Kuwaiti tankers. But responsibilities to the world community do not stop with the granting of nationality. States also have an affirmative obligation to attempt to sail ships. In consideration for the right of all states to sail on the high seas, states must sail only those ships which are believed safe. In sailing the Kuwaiti tankers, the United States was cognizant of this general obligation. At great expense, the United States ensured that the tankers met international safety standards and most domestic standards.

It is likely that maritime flags will continue to be used for both political and economic reasons. In the future, states should continue to be aware of the implications of their decisions to grant nationality to a ship and their general obligation to sail safe ships. Only if states attempt to fulfill their responsibilities to the world community can freedom of the high seas continue to exist.

Julie Mertus