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Flags must hoist a different standard

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Nik Winchester,
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relationship between open
registers and criminal acts

January 2002, Israeli forces captured a Tongan-registered general cargo ship in the Red Sea laden with 50 tons of arms. The Israeli authorities claimed that the vessel, Karine A, was on route to Yasser Arafat's Palestinian Authority.

June 2002, French authorities, suspecting cocaine smuggling, seized the Cambodian-registered vessel, Winner. The Greek owners of this vessel were subsequently charged with drug trafficking, setting up a criminal organisation and money laundering.

THESE and other high profile events have focused world attention on the relationship between open registers and criminal acts. Indeed, a recent OECD study into the ownership and control of ships notes the existence of "many compliant ship registers" which provide means for "potential terrorists to effectively hide their identity while engaged in such activities". In terms of drug trafficking, another report notes that "illicit drug traffickers use vessels registered with states that offer a convenient register". A Wall Street Journal article from September 2002 assesses the

Flags must hoist a different standard

Bolivian flag as follows: "As the fleet of vessels flying Bolivia's flag has expanded to more than 300 from just a handful a few years ago, authorities have caught scores of them trafficking narcotics, hauling toxic waste, fishing illegally and operating unsafely."

The question is then, why is there a relationship between criminal activities and open registration? The answer relates to the nature of the regulatory environments present in different flag states. The differing forms and strengths of regulation put in place and enforced by flag states give the shipowner differing levels to which they may put themselves at a distance from the flag state control and self-regulate their operations. It is these differing levels of regulation in which these kinds of illegal activity are given their conditions of existence, i.e. the potential for a shipowner to operate as they wish in the absence of effective state power.

When a shipowner elects to register their vessel under a specific flag they become located within a particular regulatory environment. Through this act of vessel registration, the shipowner is covered by a number of rights and obligations. Due to the practice of international law concerning ship registration, the flag state is afforded the opportunity to define these rights and duties in any manner they see fit,



THE Tongan-registered Karine A, which was captured in the Red Sea laden with arms, is one of a series of incidents which has raised questions about the regulatory regimes of some open registers. (Photo: AP)

from the authoritarian to the liberal, and the shipowners may choose which environment they feel is most amenable to vessel operation.

Taking the perspective of someone wishing to undertake criminal activity, it is possible to see these registers as an enabling device to produce extensive layers of corporate secrecy spanning multiple jurisdictions, remove any relationship between them and the vessel, and have no interference from the state concerning the operations of the vessel. Human intention and action being what it is, for those pursuing illegal activity such registers are entirely suited to their ends. Now, it would be incorrect to claim that these vessel registers are attempting to provide outlets for criminal

activity. However, it does seem that they produce regulations that are insufficient to prevent such activity.

However, we have to be careful in making claims about causality here. The flag of convenience system does not cause criminal activity, nor is it restricted to it. Instead, the open register system enables those wishing to engage in criminal activities with a ready-made system that they can use to their advantage. In essence these opaque structures of vessel ownership, low requirements for the incorporation of offshore business entities, limited registration requirements and the absence of effective monitoring procedures produce an environment which could be attractive to those engaged in illegal activities. However, it could also be seen as

a deregulated environment in which the shipowner can streamline costs yet still maintain their own standards.

The problem is that these structures enable both kinds of action, by providing, in some instances, the utmost space for self-regulation. Illegal activities have been carried out on a number of vessels attached to these registers and the experience of self-regulation in other sectors of the economy have taught us that free markets are wholly inadequate to underwrite effective standards and guarantee the legality of operations. The development of the open register system has led to a situation in which ship operators may choose the regulatory regime they wish. Essentially, within flag state law, shipowners are provided with the opportunity to: opt for a low taxation regime; reduce legal liability through the creation of a single-ship company; employ seafarers of any nationality and combination they wish; follow their own system of vessel maintenance; and, choose which organisation classifies their vessels. However, in general, the shipowner is also provided with the opportunity to: hide their identity under multiple dummy corporations; register their vessel with little or no checks from the flag state; not maintain their vessel; break fishing laws with minimal consequence from the

flag state and engage in a range of illegal activities in the absence of directed state control. This system creates the conditions for a range of criminal activity as it does for running a lean effective business within the boundaries of the law. Therefore, any attempts to prevent the occurrence of illegal activities conducted by and through the maritime industry is prone to significant difficulties.

A number of states have made various attempts to overcome the inherent deficiencies of the system. Intergovernmental organisations such as the Helsinki Commission have been set up to tackle the problem of pollution utilising a combination of aerial surveillance and developing techniques that enable a link to be made between oil pollution and individual vessels. The various port state control regimes around the world are designed to tackle the problem of substandard vessels by developing a comprehensive system of vessel inspection, and creating a scheme by which at-risk vessels may be targeted. A recent directive by the European Parliament, enables vessel flying the flags appearing on the Paris port state control "black list" to be banned from European Union waters.

A common theme to these activities is that they tacitly accept the falling out of the flag state from the regulatory regimes. These activities are not an

addition to flag state control but a replacement, filling in for a retreating flag state. The problem with this kind of approach is that it fails to address the central structural conditions that enable certain kinds of illegal actions. In so doing, it is vulnerable to the same criticisms laid at a criminal justice system based upon the principle of mass incarceration. It simply misses the root cause of the problem; the element that gives illegal activity its freedom to exist.

Addressing the issue of crime on the sea from the perspective of vessel registration requires a reinterpretation of the role and constitution of the flag state. Flagging a vessel to a state should have real consequence over and above an exchange of monies. This can only be addressed by changing the function of the flag state from a competitive market for foreign income, to a method of enforcing and maintaining best practice. Flag states will have to meet minimum requirements that enable them to act as a responsible partner in the effective regulation of the maritime industry. It is only by redefining and rebuilding the concept of the flag state that the issue of open registration and crime can be tackled at its source. Although such an approach will not free the seas of crime, it will get rid of a system that enables it.