FLAG OF CONVENIENCE: A MASK OR A MACHINE?
FIKAYO OYEWUNMI*

ABSTRACT
The aim of this paper is to analyse the various uses that the open registry system is being put to. The paper will seek to generally classify all uses under 2 headings. The first category deals with instances where the system is being used as a means for tax evasion and skirting of safety and health laws. The second category deals with instances where the system is being utilised as a tool for economic buoyancy and the legitimate creation of wealth. The paper will seek to show that the open registry system (Flag of Convenience) has done more harm than good and is used in most instances as a mask, that is, the main function, which it has been reduced to, is to allow it’s bearer cover his criminal activities with the mask of legitimacy. The paper will conclude by analysing the current legal framework in place, to tackle the issue.

1.0 INTRODUCTION
In all cases before the Court, the question, “which law will be applied?” largely depends on the country within whose boundaries the dispute occurred. In most cases, the law that will be applied is the law of the country where the injury occurred. While this may be true as regards disputes on land, the position as regards uncharted or unclaimed waters is less clear. It is in such instances that admiralty

*Undergraduate (Unilag); Member, The Mooting Society, Faculty of Law, University of Lagos; President, The Oil & Gas Bar, University of Lagos. He can be reached at: fikayooyewunmi@gmail.com
law operates. True to its flexible and practical nature, admiralty law allows ships to choose the country by whose laws they will be bound. *Articles 5 and 6 of the Convention on the High Seas* provide that a ship adopts the nationality of the state whose flag it flies and that the ship is subject to that state’s jurisdiction. The state must effectively exercise its jurisdiction and control, in administrative, technical and social matters over ships flying its flag. The registration of a ship in the registry of a particular country brings the vessel and those on board under the exclusive jurisdiction of the ‘flag state’ and subject to its laws and regulations for the duration of the marine venture.

Ship registration is the process of attaching a particular nationality to a ship. Registration in this sense operates like the passport for the ship itself, in that the ship becomes a registered ‘citizen’ of that country and identifies itself with its laws, rules and regulations. International agreements and conventions dictate that every merchant ship must be registered to a particular country. The term ‘flag state’ therefore refers to the country to which a ship is registered and such a vessel is bound by the laws of this flag state. It is important to note the provisions of *Article 6 (1) of the Geneva Convention on the High Seas* which states that

“A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry....” *Article 6 (2)* goes further to state that

A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in

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question with respect to any other State, and may be assimilated to a ship without nationality…

From these provisions, it is clear that the general intention of the law is to limit the amount of flags which a ship can fly in one voyage. This is done with a view towards preventing a situation whereby ships engage in forum shopping - the art of picking and choosing different states to register under, solely to gain some benefit or take advantage of certain lapses in its law and avoid punishment.

The two most popular types of registry systems which are in operation today are: the traditional or national registry, and the open registry.

Traditional or national registries refer to those registries operated by nations which only allow the registration of vessels that are owned by companies or persons that are residents of that country. Countries that have national registries typically require that a ship must be owned and constructed by national interests and at least partially crewed by citizens of that nation. Other nations on the other hand, allow companies and persons from many other countries to register their vessels under that nation's flag. These are known as “open registries”. Open registries do not have such requirements. Indeed, some nations with open registries even offer online registration. Ships registered under open registries are sometimes said to fly under ‘flags of convenience.’

The term Flag of Convenience stems from the flag that ships fly to show their country of registration. A ship is said to be flying a flag of convenience if it is registered in a foreign country to reduce its

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2Ship Registration Law available at https://www.hg.org/ship-registration.html
operating costs or avoid government regulations. Due to the complex formalities and heavy financial implications imposed by other countries, certain states deliberately develop themselves as open registries, also referred to as ‘flags of convenience’, to service the particular needs and requirements of multinational ship owning companies and individuals.

Over the years, there has been an increase in the amount of countries practicing the open registry system. What is clear is that more and more countries now seek to be identified with this system. In questioning the motive behind this sudden upsurge, it is easy to relate it to the numerous advantages that the system presents to ship owners whose main focus is to cut costs and shirk labour regulations. A ship that is registered in an open registry system automatically gains access to that country’s laws and regulations and no longer needs to abide by the tax and labour laws of its country of origin. According to Bonacich, this became a tool for companies to escape strict regulation and strong seafaring unions, and select countries with weak to non-existent laws on the books.\(^3\)

The greatest difference between the selective registration system and the more modern open registry system is premised on the motivation for registering. An examination of the motivating factors and elements will lead us to the inevitable conclusion that although a Flag of Convenience was initially established along the lines of economic development and globalization, these considerations have been taken over by others which pose ethical challenges and create a self-perpetuating tax evading system. In other words, the flag

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which was once intended to be used as a machine that brings about economic buoyancy is now being used as a mask behind which states hide those vessels that flout maritime safety and labour laws.

2.0 FLAG OF CONVENIENCE AS A MASK

On the face of it, a states’ desire to engage in the practice of open registries is informed by the need to enhance its economy, by creating services that attract ship owners, managers and maritime support services to operate there. This laudable intent is however a mask that conceals the numerous cracks and gaps in admiralty laws. On the part of ship owners and shipping executives, the intention is to gloss over strict labour standards with a view to avoiding labour regulations and implementing relaxed safety rules aboard their ships. Refusing to abide by one’s national laws aboard the ship has great advantages for the cost-driven owner. He can not only bypass the labour and maritime laws of his home state, but can do so while enjoying all of the benefits of operating from his home office (such as, access to capital).

Certain nations such as Panama, Liberia and Malta are attractive to ship-owners because they have lenient registration phases and pliant rules. These eye-catching features are put in place by the flag state to appeal to ship owners, shipbuilders, lenders and insurance underwriters who all in turn have their own profit-making concerns. The effect of this is that many ships escape strict punishment for

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4 Ibid
perpetrating illegal activities because the flag states are reluctant to discipline the major contributors to their economies.

As noted earlier, a vessel registered in a closed registry will have certain restrictions placed on it, and usually, one of these is the hiring of national seafarers for the shipboard labour. Open registries on the other hand bypass such restrictions, and ship owners take advantage of this by completely overhauling their crew from officer all the way down to able seaman. Because there is no genuine link between the country of owner and the country of registration, it is much easier to replace an entire crew, and this freedom is a major point of consideration when an owner is looking to replace a more costly national crew with a cheaper international crew. Arguments for the ship owners in this context are centred on the freedom of ship owners to operate low budget schemes and be financially prudent. While this is true, it has detrimental effects on the national development and job provision of the home country. The long term practice of outsourcing one’s crew has ensured that less and less jobs are created for citizens of the home country, the result being that the economy of foreign countries are rapidly improved by expatriates who have little or no connection to them.

Another point to note is the responsibilities imposed on ships by national registries. All registries, regardless of whether or not they are open or national, foist numerous responsibilities on those who seek to identify with them and these responsibilities are usually in tandem with the laws of the country under which the ship is registered. By virtue of registration, the country can enforce its laws and regulations on the ship owner mainly because the ship has voluntarily chosen to fall within its jurisdictional scope. Choice of
registry then becomes a question of which regulation favours the activity that the ship owner seeks to execute. For example, ships which transport fruits and cargo will seek out that registry that allows it to convey such goods with minimal restrictions. Ships which aid the exportation and importation of oil and other natural resources will seek out those registries which allow it engage in such activities while at the same time paying minimal duties, fees and levies. Similarly, ships which seek to engage in illegal activities will seek to identify with that registry which does not emphasise high labour standards and safety precautions, and which does not make it mandatory to abide by certain international conventions and laws that prohibit such activities.

Odeke writes that the universal expectation of states is to “issue documents, exercise effective jurisdiction and take measures to ensure safety,” of which we could draw the conclusion that seafarer licensing would be the responsibility of the flag state, as are shipboard labour standards and safety. The responsibilities continue with certain international responsibilities, including that the state takes measures to protect the marine environment, exercise penal judgment in matters of collision or other incidents of navigations, render assistance, prohibit transport of slaves, and cooperate in the repression of piracy, among others.\(^6\)

*Article 13 of the Convention on the High Seas* states that;

> Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its

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\(^6\)Odeke, *An Examination of Bareboat Charter Registries*, p.342.

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flag, and to prevent the unlawful use of its flag for that purpose…

Article 24 further states that;

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25 (1) emphasises the prevention of pollution by stating that;

Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations…

Article 25(2) emphasises the need for international cooperation by noting that;

All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents…

What is clear from these provisions is that there exist international regulations which comprehensively prohibit pollution, slavery and other illegal activities. These laudable provisions can however be rendered impotent by the open registry system which allows countries to opt against enforcing them for the purpose of attracting ship owners and companies.
Another valid point to note is the problem of abandonment of seafarers and refused repatriation. As noted by William Gregory7, repatriation, a globally recognized right of seafarers to be returned to the port where they joined their ship, is to be done at the ship owner’s expense. Repatriation could be for either termination of employment or poor health but is not limited to these reasons. The repatriation privileges that ought to be enjoyed by seafarers are sometimes ignored by owners who, having registered under a Flag of Convenience State, seek to employ cheap crews so as to spend minimally. The great cost involved in transporting these seafarers to their home countries is therefore contrary to the main aim of ship owners. The ultimate end-result is that, a seafarer left in a port he did not choose would have little recourse but to seek help from charity or his consulate, if one is nearby, and hope they are able to return him. Abandonment is an issue across all substandard owners seeking to employ low cost crew. An owner bound by the liberal laws of most open registries will not feel as threatened by legal enforcement and as such, there are many horror stories of entire crews being left in a foreign port where they may not speak the language or possess the proper papers for entry into the country. Without enough currency to return to their homelands they are instantly rendered destitute.8 The largest and most public example of seafarer abandonment occurred during the collapse of Adriatic Tankers, a Greek-owned and internationally flagged tanker.

8Ibid
company. The company, after going bankrupt in the mid-1990s left a large amount of seafarers without recourse. Some were even stranded at ports for over two months before International Organisations such as the International Transport Workers Federation intervened on their behalf and liaised with Adriatic to ensure passage back to their home ports.\(^9\)

An alternative to creating difficulties for the crew is to flat out ignore them and forget them. This is the fate met by the crew of *The Rhone*, a Turkish-owned and flagged vessel that had been physically and financially neglected by her owners for some time. The vessel, in severe disrepair, managed to arrive at the Spanish administered port of Ceuta in Africa, off the coast of Morocco, in September of 2009. When she arrived, there was a crew of 14 on board and barely any provisions as she had sailed under-stocked from Russia. In bad need of repair, the Spanish Port authority detained *The Rhone* pending sufficient repair of her hull and other aspects of the ship deemed as serious safety violations and risks to labourer health.\(^10\) OrtakDenizecilikSanayiveTicaret Ltd, the shipping company who owned the vessel, stressed that the issue would be resolved and tried to calm an anxious crew and captain. They never provided any assistance, despite repeated promises to do so. At this point, the crew was “penniless and forced to rely primarily on the handouts from the Ceuta port authority and local charities,” despite a small cash advance from the vessel’s mortgage holder. Rhone’s

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crew spent the next five months in this state - lonely, abandoned, and without cash; trapped on board a dilapidated vessel with little to no attention from the owner. Eventually, the Spanish authorities paid repatriation costs for the seafarers not able to afford it. In summary, other dangers posed by a Flag of Convenience (FOC) include poor working conditions, lack of basic rights, improper work schedule and low regulation of legal trade.\footnote{Available at http://www.marineinsight.com/maritime-law/7-dangers-of-flags-of-convenience-foc-to-seafarers/ (assessed 29th April 2017)}

2.1 Working Conditions

FOC vessels have been reported to have much lower standards of working conditions as compared to other vessels. This is mainly due to lesser regulation of such vessels. As such, seafarers always run the risk of having to work under extremely dangerous conditions without proper insurance and compensation.

2.2 Basic Rights

The most important of the drawbacks of FOC is that it does not necessitate a seafarer’s basic rights. Rights which usually come under the seafarers rights such as the right to form or join trade unions and the right to demand suitable pay may not be available on ships functioning under Flag of Convenience.

2.3 Regulation of Legal Trade

FOC vessels operate under the jurisdiction of the nation of ship’s registration. However, the many manipulations that can be done in records and legal documents make it extremely easy for such ships to be involved in illegal trade. FOC vessels have been reported to be
involved in everything from drug smuggling to human trafficking. Seafarers may be unknowingly dragged into such a business while doing their job on such a ship. Under these circumstances, and with lack of basic rights, a seafarer runs the high risk of being caught for crimes he did not partake in. This is one of the reasons that make awareness about FOC extremely crucial in this industry.

2.4 Improper Work Schedule
A mariner may not be allowed the necessary rest period between consecutive shipping assignments as per the standard guidelines. These guidelines are set taking into view the health of a mariner from continuous exposure to sea conditions. Inability to do so can harm the mariners’ health in long term but this right may be denied to workers of FOC vessels.

3.0 FLAG OF CONVENIENCE AS A MACHINE
A critical analysis of the historical reason for registering ships will provide us with a better understanding of the true spirit behind the open registry system. The need for ship registration has been in practice since the beginning of business conducted over the seas. It was originally used to control ships ferrying cargo among European countries and to ensure that ships were built locally and using local crews. Flags of convenience became popularised in the twentieth century due to the political and economic influence of the United States of America.\textsuperscript{12} It was also an attractive option to many countries who sought to obtain political neutrality in a time of

\textsuperscript{12}Vorbach, 2001, p.28
pending hostilities. This system of less-restrictive flags was therefore politically and economically motivated. Today, it is used to document ships for ownership in order to provide definitive evidence of nationality for international treaty purposes. For example, ships flying under certain flags may be allowed into the territorial waters of a nation while other nations' ships would not be. Also, financing entities may be willing or able to provide funding opportunities to ships flying under certain flags and not others due to laws allowing or prohibiting financial transactions with certain nations. Countries such as Singapore and Panama will be used as case studies to properly understand the true intention of the open registry system, its laudable benefits and its potential effect on the economy of countries which properly utilise it.

As earlier stated, Flags of Convenience were an attractive option to many countries who sought to obtain political neutrality in a time of pending hostilities. The development of the Panamanian register into one of the world’s largest flag states is a classic illustration of this point. It was not until after World War II that Panama became a true flag of convenience state. Strong cooperation with the United States laid the groundwork for Panama’s open access system. Rodney P. Carlisle notes that a combination of easy registration laws and wide access facilitated a swift transfer for any owner wishing to reflag his vessel. Such easy access was made possible by a unique section of the registry policy: a ship owner could choose to

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re-register his vessel at any of the Panamanian consulates across the globe without ever setting foot inside of Panama, allowing access not just to American ship owners in New York and Washington but also to European and Asian ship owners in their respective countries. At the early stages, the Panamanian government practiced a national registry system when it limited vessel registration to only its citizens. This however changed by 1916 and the doors of the country’s register were thrown wide open. To make its country even more attractive to foreigners, Panama viewed English-language contracts as legally binding and held in the exact same regard as the Spanish versions. Over time, the country reformed its legal structure and by the 1920s Panama had evolved into a system specifically and consciously designed to attract shipping. It was at this point that the state became a true open registry.

Steady support from the United States ensured that the country’s rate of development did not lose steam. For example, the United States offered assistance in registration tasks in return for Panamanian assistance in policing smuggling aboard Panamanian flagged vessels. The American government also agreed to offer aid in the form of registration at American consulates in locations where no Panamanian satellite consulate existed. The final catalyst that promoted Panama to its current status as a world-power in ship registration was the activities of Standard Oil in 1935. The

16Ibid
American corporation in that year transferred its entire fleet to be registered under Panama’s flag. This single action gave Panama a lot of credibility in the eyes of the world and aided its public image greatly.

The case of Singapore is drastically different from that of Panama, and also Liberia. Although it is an open registry, the policy that informed the development of the system was one which was premised on national development and retention of control over shipping and trade. Unlike other states, the Singaporean registry did not begin to develop until the 1970s and grew rapidly in a short period of time. The registry was open only to Singaporean citizens and companies, and sought to attract nationals to return with their ships to help Singapore develop. Repatriation of existing assets was an important aspect of the policy.\(^\text{17}\) The Singaporean government therefore viewed the open registry system as an instrument, or a machine, for the economic development of other sectors. In other words, the registry was seen by the government as an essential piece of a much larger economy which played vital roles in boosting employment, limiting the amount of foreign exchange used for international shipping, developing a national shipping line, and aiding in the transport of domestically produced export products.

Rather than increase the amount of foreign currency in circulation, Singapore instead sought to focus on creating local jobs at the expense of international transactions. The emphasis on large expenditure on international shipping was doused by providing for local fleets which were serviced in domestic currency. All this was

achieved by providing tax rebates to ship owners who chose to fly the Singapore flag and employ Singaporean seafarers which, coupled with lower registration fees, created a very affordable shipping environment. Management of the overall export-focused economy was a key aspect of Singapore’s registry program. Immediately the nation accomplished its goals of amassing a very large fleet and sufficient employment and foreign exchange goals, the government began to gradually tighten restrictions for its registry. This is perhaps the single greatest difference in policy between Singapore and the other flag of convenience states: once Singapore became developed, it sought to increase transparency for the registry and also improve the overall technical standards of the fleet. In 1981, registration was limited strictly to Singaporean citizens and age restrictions for vessels were introduced as a means of controlling the safety standard on board. Singapore also increased the use of “spot checks” to verify compliance, and forced stricter compliance with the national seafarer link, making it much more difficult for a ship owner to hire a cheaper international crew. Singapore’s strategic use of its shipping registry managed to accomplish all these goals without compromising the quality of life for the seafarer.18

4.0 LEGAL FRAMEWORK

Gradually, the mask of economic buoyancy being used to conceal criminal activities is being unearthed by states, who are beginning to enact laws which discourage ship owners from registering their

18Ibid at 264.
ships in a nation that they do not necessarily belong to. For example, many nations under the International Ship and Port Facility Security Code (ISPS) require minimum standards for vessels entering their national waters. The effort of the International Maritime Organization (IMO) is also commendable. The organisation has successfully enacted conventions which regulate the relationship between seafarers and their employees with an emphasis on safety and pollution. The relevant international conventions are the Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), Convention on Safety of Life at Sea (SOLAS) and Convention for the Prevention of Pollution from Ships (MARPOL).

The STCW was created to set training and certification standards for masters and watch personnel on seagoing merchant ships. The 1978 STCW Convention was the first to establish basic requirements on training, certification and watchkeeping for seafarers on an international level. Previously, the standards of training, certification and watchkeeping of officers and ratings were established by individual governments usually without reference to practices in other countries. As a result, standards and procedures varied widely even though shipping is the most international of all industries.

Today however, the Convention prescribes minimum standards relating to training, certification, and watchkeeping for seafarers which countries are obliged to meet or exceed. 1995 was a key year for the Convention because the 1995 amendments represented a major revision of the Convention in response to a recognized need
to bring the Convention up to date and to respond to critics who pointed out the many vague phrases such as "to the satisfaction of the Administration" which resulted in different interpretations being made. The 1995 amendments entered into force on 1 February, 1997. One of the major features of the revision was the division of the technical annex into regulations, divided into chapters as before, and a new STCW Code, to which many technical regulations were transferred. Part A of the Code is mandatory while Part B is recommended. Dividing the regulations up in this way makes administration easier and it also makes the task of revising and updating them simpler: for procedural and legal reasons there is no need to call a full conference to make changes to Codes. Another major change was the requirement for Parties to the Convention to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention. This represented the first time that IMO had been called upon to act in relation to compliance and implementation; generally, implementation is down to the flag States while Port State control also acts to ensure compliance. Under Chapter I, Regulation I/7 of the revised Convention, Parties are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention, education and training courses, certification procedures, and other factors relevant to implementation. The information is reviewed by panels of competent persons nominated by Parties to the STCW Convention who report their findings to the IMO Secretary-General, who in turn, reports to the Maritime Safety Committee (MSC) on the parties
which fully comply. The MSC then produces a list of "confirmed parties" in compliance with the STCW Convention.\textsuperscript{19}

The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions also allow Contracting Governments to inspect ships of other Contracting States if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention - this procedure is known as Port State control. Certain chapters of the convention deserve special attention due to their intent and purpose. For example, Chapter III of the convention titled ‘Life-Saving Appliances and Arrangements’ includes requirements for life-saving appliances and arrangements, requirements for life boats, rescue boats and life jackets according to the type of ship. The International Life-Saving Appliance (LSA) Code gives specific technical requirements for Life Saving Appliances, and is mandatory under Regulation 34 which states that all life-saving appliances and arrangements shall comply with the applicable requirements of the LSA Code. Chapter IX speaks on Management for the Safe Operation of Ships and makes mandatory the

International Safety Management (ISM) Code, which requires a safety management system to be established by the ship owner or any person who has assumed responsibility for the ship (the "Company").

MARPOL contains regulations whose general intent is to spearhead the prevention of pollution by oil from ships. MARPOL is the main international convention aimed at the prevention of pollution from ships caused by operational or accidental causes. It was adopted at the International Maritime Organization (IMO) in 1973. The importance of having an international convention like MARPOL cannot be overstated. Oil pollution has been identified as one of the most serious threats to marine environment since the first half of the 20th century. Within this context, a number of countries in the early 1920s introduced national regulations to control discharges of oil in their territorial waters. Following some fruitless attempts for the adoption of a convention to address the problem of marine pollution, the first MARPOL Convention was finally adopted in 1973 by the Inter-Governmental Maritime Consultative Organization, later to be known as the IMO (International Maritime Organization). MARPOL was the first integrated legislation that was ever adopted, covering all types of pollution, arising from both operational and accidental causes. Still, it was not until 1983 that the convention entered into force. The last amendment of the convention took place

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in 1997, with the adoption of the Protocol on the Prevention of Air Pollution from Ships, which entered into force on May 19, 2005. In 2004, amendments to MARPOL Annexes I and II were adopted by the IMO; these became effective on January 1, 2007.21 The technical requirements of MARPOL are included in six separate Annexes which have wide provisions that cover the field exhaustively. Not only are there Regulations for the Prevention of Pollution by Oil, there are also Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk. The provisions also seek to prevent pollution by Harmful Substances Carried in Sea in Packaged Form. Annex IV is dedicated to the prevention of Pollution by Sewage from Ships and Annex V is concerned with the Prevention of Pollution by Garbage from Ships. Annex VI, the final section of the convention, is committed to the Prevention of Air Pollution from Ships.22

5.0 CONCLUSION

The Global laws above are designed to bridge the latent gaps in admiralty jurisdiction by ultimately eliminating the exploitation of Flags of Convenience. Although states are encouraged to pursue all avenues that lead to economic emancipation and dominance, the utmost concern of the state should be the standards of safety,


crewed and manned, and all the matters which are connected with
good standards in shipping. The objectives of a state should not be
to use the maritime laws as a cover for the performance of illegal
activities. Constant abuse of admiralty laws over the years has
driven the status quo to its current position wherein many ships fly
a Flag of Convenience, not as an insignia or ensign but as a security
shield. The essence of admiralty law and lawyers in this regard is to
inspire a rapid, effective and operational change in the existing state
of affairs.