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Flags must hoist a different standard

Nik Winchester, of the Seafarers' International Research Centre, looks at the relationship between open registers and criminal acts

January 2002, Israeli forces captured a Tongoan-registered general cargo ship in the Red Sea laden with 20 tons of arms. The Israeli authorities claimed that the vessel, Karine A, was on route to Yasir Arafat's Palestinian Authority. June 2002, French authorities, suspecting cocaine smuggling, seized the Cambodian-registered vessel, Winner. The Vessel was subsequently charged with drug trafficking, putting a stop to the operation.

The Tongoan-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)

The question is then, why is the registration of vessels to countries with minimal control of ships notes the centre, looks at the relationship between criminal activities and open registries. 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 the 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.

While 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, 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 wish. 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 structure costs yet still maintain their own standards.

The problem is that these structures enable both kinds of action, by providing, in some instances, the ultimate place for self-regulation. Illegal activities have been carried out on a number of occasions and have related to these registers and the experience of self-regulation in other sectors of the transportation industry has taught us that free markets are wholly inadequate to undertake 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 convenience of a single state; and ensure 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 without the presence of directed state control. This system creates the conditions for a range of criminal activities as it does for running a lean effective business within the boundaries of the law. We have attempted to prevent the occurrence of illegal activities conducted by and through vessels of a country or jurisdiction is prone to significant difficulties. A number of states have made vast international agreements which ban the use of vessels for criminal activity, yet there are 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 ships. The various port state control regimes around the world are designed to tackle the problem of substance 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 vessels flying the flags appearing on the Paris port state control “blacklist” to be banned from European Union waters.

A common theme to these activities is that they tacitly accept the failure of the flag state from the regulatory regimes. These activities are not an addition to flag state control but a replacement for it, a retreat 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 assumption that if something is illegal it is prone to significant difficulties. 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 must have set 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 sea of crime, it will get rid of a system that enables it.