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## FLAGS OF CONVENIENCE AND THE PROTECTION OF COMMERCIAL SHIPPING

As part of the process of global deregulation and capital mobility, ships sailing under flags of convenience (FOC) have come to dominate maritime trade. This is particularly evident in the bulk trades with some 60% of the world's tanker fleet and 62% of the bulk carrier fleet currently sailing under flags of convenience<sup>1</sup>.

Nationally flagged merchant fleets are diminishing rapidly. The Australian merchant fleet, for example, has declined by 15% since 2000 and currently consists of 96 vessels. Of this number, only 60% actually fly the Australian red ensign<sup>2</sup>. The dramatic growth in FOC shipping is a clear manifestation of the internationalisation of maritime trade. As Aspinwall has observed, it is

'a difficult and misleading proposition to discuss nationality when a ship may be built in Japan, owned by a Greek bank, crewed by Italians, Indonesians and Filipinos, managed by an American firm and underwritten by a British firm. This hypothetical example is further complicated by assuming it is carrying Saudi oil to Chile for an Australian merchant and flying the flag of Liberia. What state claims this ship? Under international law, it is a vessel of Liberia.....Yet many states have an interest in it...' <sup>3</sup>

The internationalisation of trade has had a considerable impact on the manner in which navies go about their traditional task of trade protection. Western navies, including the RAN, have adopted the NCAGS doctrine, in place of the flag/alliance based NCS doctrine for the protection of trade<sup>4</sup>. However, there has been little doctrinal development in the manner in which physical protection may be accorded by warships to vessels sailing under foreign flags.

These practical issues were high-lighted during the Tanker War of 1981-88. During the Tanker War, the US merchant fleet, as it is today, was largely registered under flags of convenience, with US tankers sailing predominately under the Liberian flag. Accordingly, a substantial portion of the FOC tonnage, that transited the Gulf between 1981 to 1988, was beneficially owned by US nationals. Of the balance, a very substantial portion was on charter to US nationals. When one adds to this the foreign owned and flagged tonnage also employed in lifting oil from the Gulf to US refineries, then it becomes apparent that the US had the largest single interest in merchant shipping exposed to attack<sup>5</sup>. Exposed it was, with more than 80% of the ships attacked being FOC vessels.

Despite this, the USN was restricted to providing physical protection to US flagged shipping which, as it happened, was largely not owned beneficially by US nationals. This policy was not altered until 1988<sup>6</sup>.

We are therefore confronted with the paradox that, for most of the Tanker War, the vast majority of US beneficial property in the Gulf was unprotected by US naval forces which were, instead, engaged in protecting ships and cargoes that were not beneficially owned by US interests.

The policies of other western nations produced similar contradictions. The UK Government announced that the RN's Armilla Patrol would provide assistance to vessels sailing under the red ensign or flags of its dependent territories (that is, the Isle of Man, Gibraltar, Hong Kong & the Cayman Islands) and which were trading with neutral ports. This included an expanding number of vessels which were not beneficially owned by UK nationals. Many of these had arranged UK registration simply to acquire the protection of the Armilla Patrol. This latter category included at least three Kuwaiti tankers. However, unlike the US, the UK Government did permit its warships to provide direct support to foreign-flagged vessels, provided that these vessels had a clear majority UK or dependent territory ownership. Despite urgings from the National Union of Marine, Aviation & Shipping Transport Officers (NUMAST), the Armilla Patrol was not permitted to protect foreign flagged vessels crewed by British subjects, while British vessels trading with belligerent ports did not qualify for any assistance from the Armilla Patrol<sup>7</sup>.



Figure 1. Oil tanker ablaze in the Arabian Gulf.  
[www.iranchamber.com/iran\\_iraq\\_war3php](http://www.iranchamber.com/iran_iraq_war3php)

All other non-Gulf States, with naval forces in the Gulf, restricted their warships to protecting merchant vessels sailing under their own flags, although France asserted a right to protect any neutral ship under illegal attack and



further announced that its warships would closely scrutinise foreign-flagged vessels on which French seamen were employed<sup>8</sup>.

Even these limited measures were not without controversy. Some commentators asserted that the right of self-defence under Article 51 of the UN Charter did not permit a neutral warship, in general, to protect a merchant vessel from belligerent attack. This is so, because, as Professor Bothe<sup>9</sup> has pointed out, 'The individual merchant ship (like a national abroad) cannot be equated with the state itself and the attack against it must not be seen as an armed attack against the flag state.' According to Prof. Bothe, a neutral warship may only protect a merchant vessel of the same flag-state in two instances. Firstly, when the neutral merchant vessel is sailing in convoy protected by neutral warships. In that instance, any attack on the convoy is deemed to be an attack on the sovereignty of the State of the neutral escorts. Secondly, in those circumstances, where the neutral warship can interpose itself between the merchant vessel and the attacker so that the attack on the merchant ship becomes an attack on the warship<sup>10</sup>.



**Figure 2.** ULCC Bridgeton (400,000 dwt) under tow after hitting an Iranian mine west of Farsi Island on 24 July 1987. [weblog.leidenuniv.nl/fdr/1948/Bridgeton]

The Bridgeton was one of the Kuwaiti tankers that had been re-flagged under the US ensign. It was under USN escort when mined. The Tanker War demonstrated that VLCCs and ULCCs are very difficult to sink. Only 23% of the tankers attacked were sunk or declared CTL.

In compliance with these principles, Italy, the US and the Soviet Union convoyed merchant vessels sailing under their own flags. The UK and US governments also permitted the

practice of re-flagging of merchant ships to develop. Most commentators deemed this practice to be legitimate provided that the re-flagged vessels were not engaged in un-neutral service.

The US and UK governments also took measures well beyond these accepted principles. Firstly, the UK government permitted its warships to protect vessels which were not sailing under the protection of a convoy escort. Secondly, the UK Government authorised the Armilla Patrol to provide physical protection not only to its flagged vessels but also to foreign-flagged vessels, albeit, beneficially owned by UK interests. While, thirdly, from 1988, USN warships were permitted to intervene against belligerent attacks directed at any neutral merchant vessels within their protective reach.

The UK based its practice on the right of self-defence under Article 51 of the UN Charter and on the right to protect the freedom of international navigation under UNCLOS. The UK asserted that the definition of 'armed attack' had to be interpreted within the context of state practice which, it asserted, had, from 1940, developed in such a manner that international law now treated an unlawful attack upon a merchant ship as an act to which the flag state might respond to with force, if the presence of its warships gave it the means of going to the assistance of the vessel under attack.

This view has won considerable support and, as a result of state practice in the Tanker War, it is generally accepted that neutral States have a right to employ their warships to defend their own merchant vessels, under a right of self-defence, as well as allied merchant vessels under the doctrine of collective self-defence.

The claimed right to protect neutral vessels sailing under foreign flags remains much more controversial. Given that maritime trade is now largely carried on by vessels sailing under flags of convenience, this is surely the issue that navies must address. What then are the rights of a state to use its warships to protect ships, or persons or cargoes on ships, sailing under the flag of a different state?

There are a number of possible justifications for this claimed right, these are:

- (a) a right to collective self-defence where the state of the neutral merchant vessel and the state of the neutral warship have a mutual defence alliance – This is the least controversial right. Many commentators have suggested that an inter-governmental request from the authorities of the merchant vessel's flag-state would be sufficient to justify the use of protective force by the neutral warship<sup>11</sup>.
- (b) a right to act on humanitarian grounds – It is argued that there is a right of humanitarian intervention permitting action in order to protect nationals from death or injury. This right is most likely to arise when the ship's flag-state is unable to act effectively<sup>12</sup>.
- (c) a right to protect important goods owned by nationals- This was raised by the UK government to justify its intervention in the Suez Crisis in 1956. As a right recognised under international law, it has won little support<sup>13</sup>.
- (d) a right to act in collective self-defence by virtue of the ratification of the use of force by the foreign-flag state– This right is said to arise when the Master of a neutral merchant ship calls on a foreign warship



for protection. The Master has no authority to invite the use of force on behalf of his vessel's flag-state. However, if the neutral warship responds to this distress call can any initial deficiency in the entitlement to use force be cured by the subsequent ratification of the Master's request by the authorities of his vessel's flag-state? Several jurists have argued that it can, others have argued that the weight of international law presently is against this view<sup>14</sup>. As such, it would be improper to regard 'subsequent ratification' as a solid basis for the protection of Third Party shipping.

- (e) a right to protect the vessel on the grounds of self-defence when the vessel is targeted because of its links with the defending state – This is said to be the most promising basis for the right to intervene with armed force to protect Third Party shipping<sup>15</sup>. This right is said to arise when a foreign-flagged ship is targeted simply because it represents an economic interest of the state claiming the right to use force to protect it. This right is analogous to the rights that permit states to act to protect their interests under various anti-terrorism conventions<sup>16</sup>.

These 'rights' have not yet attained general acceptance. One of the most important lessons of the Tanker War is that both customary international law and naval doctrine require clarification with regard to the treatment of attacks on neutral merchant vessels engaged in neutral trade. The need for such clarification has increased with the inexorable rise of FOC shipping.

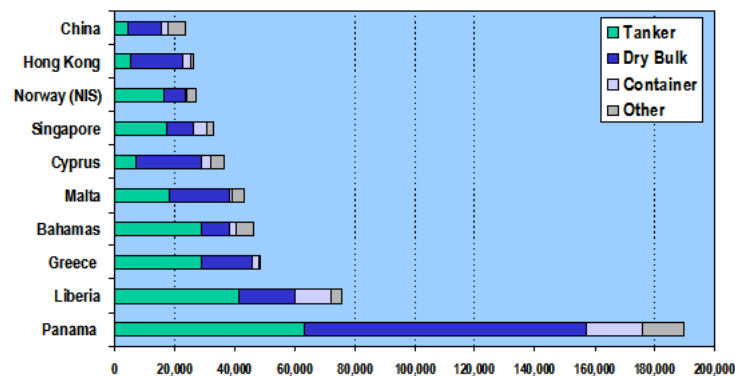
#### Notes

1. Cafruny, A.W. - Ruling the Waves: The Political Economy of International Shipping, Berkeley, University of California (1987)
2. BITRE 'Australian Sea-Freight 2006-7' Information Paper 61, Aust Govt Printer (2008)
3. Aspinwall, M. - Moveable Feast: Pressure Group Conflict and the European Community Shipping Policy, Avebury (1995)
4. see 'Globalisation, Neutrality & the Protection of Shipping' - Goorangai, Vol 3 No 2 (March 2008).
5. Wiswall, F.L. 'Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf' - Virginia Journal of International Law Vol. 3 [1991] pp619-629 at p620.
6. Ibid p622; see also 88 Dept. of State Bulletin (July 1988) p61.
7. Kinley, G – 'Legal Principles Governing the Armilla Patrol' - Lloyds Weekly News 27 Aug 1987.
8. Bothe, M. 'Neutrality at Sea' in The Gulf War 1980-88 – Ige F. Dekker & H.H.G. Post (eds) (1992) at p 238
9. Bothe op cit at p205. For a different view see C. Greenwood in - Law of Naval Warfare, W.H.V. Heinig (ed) 1991 at p214
10. Ibid p209 ; Bothe argues that this right is derived from the decision of the International Court of Justice in the Corfu Channel Case [1949] ICJ p35.
11. Lowe, A.V. 'Self-Defence at Sea' in The Non-Use of Force in International Law – W.E Butler (ed) (1989)
12. Gill, T.D. 'The Law of Armed Attack in the Context of the Nicaragua Case', 1 Hague Year Book of International Law 30, 50(1988).
13. Lowe op cit p 195
14. Ibid
15. Ibid p197
16. Compare the 1979 International Convention Against

#### Taking Hostages



**Figure 3—** *Surge et Vince* – HMS Chatham (F87), a type 22 frigate on trade protection patrol in the Arabian Gulf. The Armilla Patrol was very effective in meeting the UK Government's objectives of re-assurance and co-operation with commercial operators. Moreover, no vessel flying the Red Duster was attacked whilst a warship from the Patrol was in the immediate vicinity. However, only 1% of the vessels that transited the Gulf during the Tanker War were flagged on the UK Registries. Source: [www.submerged.co.uk](http://www.submerged.co.uk)



**Figure 4—** Shipping tonnage ranked by flag in 2004. The most well established FOCs are Panama, Liberia, the Bahamas and Malta. Source: Office of Maritime administration, US Dept. of Transportation.

[www.marad.dot.gov](http://www.marad.dot.gov)

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