

Document:-  
**A/CN.4/L.56**

**Nationality of Ships. Proposal by Mr. Zourek (Regarding articles 8, 9 and 10) - incorporated in the summary record of the 293rd meeting, footnotes 7 and 9; 294th meeting, footnote 1**

Topic:  
**Law of the sea - régime of the high seas**

Extract from the Yearbook of the International Law Commission:-  
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1951 under the auspices of the *Instituto Francisco de Vitoria*.<sup>6</sup> Professor Gidel had stated that the concept of the freedom of the high seas had now lost the absolute and tyrannical character which it had derived from its origin as a reaction against claims to sovereignty over the high seas.

58. Mr. AMADO said that in article 2 the whole emphasis must be laid on the principle of the freedom of the high seas. Any derogations from that important general principle must be presented as exceptions to the general rule. He could not therefore approve of the last sentence of Mr. Sandström's text—or of the Special Rapporteur's similar proposal—namely: "This rule does not affect the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf..." That wording suggested that the derogations were the rule rather than the exception.

59. If the Commission felt that a reference to the policing of the high seas, the contiguous zones and the continental shelf was necessary, it could only be worded as follows:

"The provisions concerning the policing of the high seas, the contiguous zones and the continental shelf, forming part of the present draft articles, do not affect the principle of the freedom of the high seas."

60. The CHAIRMAN said that at that stage of the discussion he would tentatively suggest that Mr. Zourek's and Mr. Sandström's drafts might be combined in the following way: Article 2 would begin with the words "The high seas shall be open to all nations. No State may subject them to its jurisdiction". That formulation would then be followed by the more detailed exposition of the four freedoms in paragraphs (a) to (d) of Mr. Zourek's proposal.

61. Finally, the Commission would have to decide whether it was necessary to include a final paragraph referring to the policing of the high seas, the contiguous zones and the continental shelf.

62. Mr. SANDSTRÖM said that he would not insist on his own text, and was prepared to agree to the Chairman's suggestion.

63. Mr. FRANÇOIS (Special Rapporteur) agreed to include in article 2 a reference to the freedom to fly over the high seas for peaceful purposes.

64. With regard to the reference to the related questions, he agreed with Mr. Salamanca that an integrated approach was necessary. The Commission was presenting several drafts; on the high seas, on the continental shelf, on fisheries, and on the contiguous zones. It was necessary to make it clear that those several drafts constituted one single system; otherwise serious misconceptions might arise. Should the Commission, at its present session, adopt an article expressing unqualified recognition of the principle of the freedom of the high seas, that decision might erroneously be construed as

implying some attenuation of the decisions taken at the fifth session (A/2456, paragraphs 62, 94 and 105) in the adoption of the draft articles on the continental shelf, on fisheries and on the contiguous zones which derogated from the principle of freedom of the high seas.

65. Mr. SCELLE said that the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf did not constitute exceptions to the principle of the freedom of the high seas. They constituted limitations of or restrictions on the absolute freedom of the high seas. He agreed with Mr. Amado that the general principle must first be laid down, and then the limitations set forth in a subordinate clause.

66. The CHAIRMAN, at the request of the Special Rapporteur, asked the Commission to vote on the principle of including in article 2 a reference to the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf.

67. Sir Gerald FITZMAURICE, intervening on a point of order, said that if a vote were taken on the last sentence of Mr. Sandström's (and the Special Rapporteur's) draft, he would have to vote against it; but if the sentence were amended along the lines suggested by Mr. Amado and Mr. Scelle, he would be able to support its inclusion in article 2.

68. Mr. FRANÇOIS (Special Rapporteur) agreed to the amendment suggested by Mr. Amado and Mr. Scelle.

*Article 2 was unanimously adopted subject to re-drafting as proposed by the Chairman, and to recasting of the final sentence.*

*Article 8 [4]; Merchant ships on the high seas*  
(resumed from the 284th meeting)

69. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. Zourek's draft for article 8 (A/CN.4/L.56).<sup>7</sup>

70. Mr. SANDSTRÖM pointed out that in the discussion<sup>8</sup> on article 7, the Commission had amended the text so as not to qualify the jurisdiction of the flag State as exclusive. A similar amendment would be called for in the case of article 8.

*Article 8 was approved in principle.*

*Article 9 [6]: Merchant ships on the high seas*  
(resumed from the 284th meeting)

71. Mr. SANDSTRÖM proposed that article 9 be replaced by the following text:

"A ship cannot be validly registered in more

<sup>7</sup> Article 8 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

"Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in the present articles, they shall be subject to its exclusive jurisdiction on the high seas."

<sup>8</sup> 284th meeting, para. 35.

<sup>6</sup> *Revista española de derecho internacional* (1951), IV, 1, pp. 187 et seq.

than one State. A new registration shall not be valid until the previous registration is extinguished.”

72. Mr. Zourek’s proposed article 9 (A/CN.4/L.56)<sup>9</sup> appeared to suggest that it was possible for a ship’s nationality to be changed at will. If that were so, the rule laid down in article 7 regarding the jurisdiction of the flag State would become meaningless.

73. Mr. ZOUREK said that Mr. Sandström’s objection was met by his proposed article 10, in which it was laid down that “each State is entitled to fix the conditions to which registration and transfer of registration are subject”.

74. The first two sentences of his proposed article 9 were inspired by international conventions on the registration of aircraft; the final sentence had been added to prevent a ship having two nationalities or flags.

75. The CHAIRMAN pointed out that the difference between Mr. Zourek’s and Mr. Sandström’s texts was not a matter of mere drafting. According to Mr. Zourek’s draft, a ship flying, say, the British flag, would not require any authority from the British authorities before being re-registered in another country. The new registration would automatically cancel the old one.

76. Mr. ZOUREK explained that his purpose had been to prevent dual nationality of ships. His proposed article 10 enjoined respect for the legislation of both States concerned in the transfer of registration.

77. The CHAIRMAN pointed out that, if that were the construction placed by Mr. Zourek on his proposal, his text would have to be re-drafted.

78. Mr. AMADO pointed out that the term “transfer” was misleading.

79. Sir Gerald FITZMAURICE agreed with Mr. Amado. The case which it was intended to cover was apparently that of a ship taking a new registration. Existing international law made it possible in such a case for that ship to have a double registration. If Mr. Zourek intended the Commission to impose a definite rule that the second registration cancelled the first, that would be a case of *lex ferenda*. There would be great practical difficulties in the way of such an attempt.

80. Mr. Zourek’s wording for article 9 seemed to suggest that a ship would be able to evade all its obligations under its old registration by taking out a new one. He hardly thought that such was Mr. Zourek’s intention.

81. Mr. Sandström’s text, on the other hand, was rather too drastic in the opposite sense. It would enable the authorities of a State to maintain a stranglehold on

the ships flying its flag, since they would be able to prevent valid registration elsewhere.

82. Perhaps the Commission could find a *via media* between those two extreme courses.

83. Mr. SANDSTRÖM said that in drafting his proposal he had had in mind the case of the sale of a ship.

84. Mr. AMADO objected to the words in Mr. Zourek’s draft: “registration may, however, be transferred from one State to another”. A ship was private property, and did not belong to a State, nor was it transferable from one State to another. It could, however, be transferred as property from one person to another by way of sale or inheritance, and such change of ownership might affect its flag; in other words, the ship could come under the protection of a different State as the result of a transfer of property.

85. The CHAIRMAN said that the Commission was concerned with the codification of international law relating to the regime of the high seas, namely, the rights and duties of States in that connexion. The problem of the transfer of ownership of a vessel, including its effects on the flag of that ship, was a matter of maritime law rather than international law.

86. Mr. AMADO said that the first sentence of Mr. Sandström’s text, namely, “a ship cannot be validly registered in more than one State”, was sufficient to formulate the general principle of international law on the subject.

87. Mr. ZOUREK said there appeared to be divergent interpretations of what was meant by the nationality of a ship; whether the term referred to the ship’s flag, to its right to a particular flag, or to the nationality of those owning or operating it. He agreed with Mr. Sandström that, for the purposes of the development of international law, it was sufficient to formulate the principle embodied in the first sentence of his own proposal, which was identical with Mr. Sandström’s. It was not necessary to add anything else.

88. Mr. KRYLOV agreed that the first sentence was sufficient for article 9.

89. Mr. Zourek’s proposed article 10 was a statement of fact which, though unobjectionable, would not solve the problem of dual nationality.

90. Finally, he proposed that Mr. Zourek’s article 10 *bis* should be set aside as dealing with too special a case.

91. Mr. LIANG (Secretary to the Commission) said that, in its present state, international law allowed any State to decide how it would attribute its nationality to a ship and authorize it to use the flag of that State.

92. The Commission had two courses open to it. It could adopt a course of *lex ferenda* and lay down a new principle according to which no ship could validly be registered in more than one State. Alternatively, it could affirm the *lex lata*, and regulate the effects of dual nationality as had been done in article 9 of the draft

<sup>9</sup> Article 9 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

“A ship cannot be validly registered in more than one State. Its registration may, however, be transferred from one State to another. Transfer of a registration automatically cancels the previous registration.”

articles in the Special Rapporteur's sixth report (A/CN.4/79).

93. Strictly speaking, article 10 of the original draft (A/CN.4/79) was not concerned with the problem of the transfer of registration, but with the conditions under which a ship might acquire the nationality of a State or the right to fly its flag.

94. Mr. SANDSTRÖM said that the mere enunciation of the principle that a ship could not be validly registered in more than one State was not sufficient. If the Commission were to stop there, every State would be free to legislate according to its own lights, in order to prevent dual nationality; that would lead to chaos.

95. The Commission should either abandon the whole question of dual nationality or else lay down in what way such dual nationality could be avoided. For his part he had no preference for any particular method of preventing dual nationality.

96. Mr. SCHELLE agreed with Mr. Sandström that it did not serve any useful purpose to lay down a principle unless its application was also provided for. If the Commission adopted article 10 of the Special Rapporteur's draft, it would be laying down a uniform international rule in the matter, a rule which would supersede municipal law; the conditions laid down by article 10 would apply to all States, which would no longer be free to legislate on the question.

97. The CHAIRMAN said that the Commission was not concerned with the unification of the rules governing the nationality of ships, but only with international law relating to the regime of the high seas.

98. Sir Gerald FITZMAURICE endorsed Mr. Liang's remarks on the present state of international law and the two courses open to the Commission.

99. The status of vessels was relevant to the regime of the high seas, but it was important in other connexions as well.

100. In view of the fact that the existing law of nations admitted the possibility of dual nationality for a ship, the best course would be for the Commission simply to state the consequences of that fact, rather than to endeavour *de lege ferenda* to eliminate the consequences of dual nationality.

101. Mr. FRANÇOIS (Special Rapporteur) recalled that his original draft article 9 had specified that a ship sailing under the flags of two or more States should be treated as if it were a ship without nationality. In that connexion it was important that the Commission should take a decision on article 10.

102. Mr. Zourek's proposal (A/CN.4/L.56) reduced article 10 to one short sentence and completely changed the meaning. He recalled that his own original draft, setting out the conditions for the recognition of a new registration, had been adopted by the Commission at its third session with only one dissenting vote.<sup>10</sup>

<sup>10</sup> *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

103. He accordingly proposed that discussion on article 9 be deferred until the Commission had reached a decision on article 10.<sup>11</sup>

*It was so agreed.*

The meeting rose at 1 p.m.

<sup>11</sup> See *infra*, 294th meeting, para. 52.

## 294th MEETING

Wednesday, 18 May 1955, at 10 a.m.

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\* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

*Chairman* : Mr. Jean SPIROPOULOS

*Rapporteur* : Mr. J. P. A. FRANÇOIS

*Present* :

*Members* : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. Jaroslav ZOUREK.

*Secretariat* : Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

### Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

*Article 10 [5]: Merchant ships on the high seas*  
(resumed from the 285th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Zourek's proposed articles 10 and 10 *bis* (A/CN.4/L.56)<sup>1</sup> were the very opposite of the text of article 10

<sup>1</sup> Articles 10 and 10 *bis* as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

Article 10:

"Each State is entitled to fix the conditions to which registration and transfer of registration are subject."

as adopted at the third session of the Commission with only one dissenting vote.<sup>2</sup> That text had been aimed at restricting the freedom of States by laying down the conditions under which a State could permit a ship to be registered in its territory and to fly its flag.

2. He could not accept Mr. Zourek's text for article 10 since it would allow States to fix for themselves the conditions under which their registration would be granted.

3. Mr. ZOUREK said that article 10 as drafted by the Special Rapporteur really dealt with two problems: the nationality of ships and the nationality of commercial companies and partnerships. It could not be expected that States would adopt uniform legislation concerning either.

4. The article was also unsatisfactory in another respect. It provided for registration only on the basis of ownership, although in many States—Czechoslovakia, for example—it was possible for a ship to be registered by an operator who was not the owner.

5. He felt, with other members of the Commission, that the best course would be simply to state the general principle, and not to go into such details as the nationality of partners or shareholders in commercial concerns owning ships. As regards the principle, he was in favour of recognizing the flag of a ship only in cases where it had been registered by a person or a legal entity of the same nationality as the flag, or if it actually belonged to the flag State.

6. Mr. SCELLE preferred the Special Rapporteur's draft to Mr. Zourek's proposal, because the former laid down conditions for the acquisition of a given flag by a ship. In fact, he would favour even stricter conditions; in particular, that the captain and the majority of the crew of the ship should have the same nationality as the flag: that condition had been proposed by Mr. François at the third session, but the Commission had not adopted it.<sup>3</sup>

7. With regard to proviso (a) of article 10, he proposed that persons permanently resident in the territory of the State concerned should also be required to be domiciled there before they could register a ship in that State. He also proposed that the requirement in proviso (b) should be a majority of nationals—or fifty-one per cent ownership—which was usual in most countries.

8. As to proviso (c), it was not sufficient to require that such joint stock companies should be organized under the laws of, and have their registered offices in

the territory of, the State concerned; it must also be stipulated that the company should have its operating head office, as distinct from its nominal registered office, in that State. Finally he proposed the addition of a requirement that the majority of the managers and directors of the company be nationals of the flag State.

9. Mr. FRANÇOIS (Special Rapporteur) said that in his second report (A/CN.4/42),<sup>4</sup> submitted to the Commission at its third session, he had drawn inspiration, with regard to the nationality of ships, from the work of the Institute of International Law at its session held in Venice in 1896.<sup>5</sup> The Institute's draft had served as the basis for discussion at the Commission's third session (121st meeting), when Mr. Manley O. Hudson had suggested a number of improvements to it.

10. As explained in his second report, the legislation of the majority of countries required the captain, and frequently also a proportion of the crew, of a ship to possess the nationality of the country concerned as a condition for registration in that country. He had accordingly then proposed a set of rules embodying principles adopted by nearly all States and constituting the basis of international law on the matter. Provisos (a), (b) and (c) concerning the ownership of the ship as then drafted did not differ substantially from the proposals now before the Commission. He had, however, proposed a further requirement, namely, that the captain should possess the nationality of the State to which the flag belonged.<sup>6</sup> That second condition was extremely useful, in that it constituted an assurance that the law of the flag State would be properly enforced on board by a captain familiar with it and was a guarantee against unjustified concession.

11. The Commission had examined the question and approved the principle underlying his conclusions, namely, that States were not entirely at liberty to lay down conditions governing the nationality of ships as they thought fit but must observe certain general rules of international law governing the subject. It had given a first reading to the concrete provisions proposed by the rapporteur;<sup>7</sup> but the majority, while recognizing its desirability, had considered the rule concerning the nationality of the captain too strict, considering that allowance must be made for the fact that certain States still lacked sufficient qualified personnel to enable them to comply with the condition.

12. Although not sharing that opinion, he had naturally deferred to the Commission's decision, and had accordingly omitted the requirement concerning the captain's nationality from the relevant article in his sixth report.

#### Article 10 bis:

"In exceptional cases and for urgent reasons, the right to sail under the national flag may be granted by the government of any State for a strictly limited time to a ship which has not yet been entered in the national register, provided, however, that the owner or charterer of the ship is a national of the State in question."

<sup>2</sup> See *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

<sup>3</sup> *Ibid.*, paras. 103–127.

<sup>4</sup> In *Yearbook of the International Law Commission, 1951*, vol. II.

<sup>5</sup> Asser-Reay Report to the Institute of International Law, Venice 1896, *Annuaire de l'Institut de droit international*, vol. 15, p. 52.

<sup>6</sup> A/CN.4/42, para. 16.

<sup>7</sup> See "Report of the International Law Commission covering the work of its third session" (A/1858), para. 79, in *Yearbook of the International Law Commission, 1951*, vol. II.