

Document:-  
**A/CN.4/R.5**

**Principles Submitted as a Basis of Discussion by J. M. Yepes - incorporated in A/CN.4/SR.64,  
footnote 4**

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

Extract from the Yearbook of the International Law Commission:-  
**1950, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

adding that "it was unnecessary for the International Law Commission to retain the item".

21. Mr. HUDSON considered, on the contrary, that it was very important for the principle. He did not think, however, that it was correct to speak of the territorial quality of ships. What should be said was: "Every State has the right to exercise its authority over ships flying its flag." He noted that the report stated that the theory of the territorial quality of ships "has been upheld by the Government of the United States." Would the Rapporteur tell him what authority he could quote in support of his affirmation, apart from Gidel I, p. 241?

22. Mr. FRANÇOIS replied that the Government of the United States had upheld the theory of the territorial quality of merchant ships. Professor Gidel (vol. I, p. 241) related that in 1842 Webster had written the following to Lord Ashburton: "Every merchant vessel on the seas is rightfully considered as a part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, is an act of force and is *prima facie* a wrong, a trespass which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations."

23. Mr. ALFORA thought that the principle contained in the sentence: "Every State has the right to exercise its authority over ships flying its flag" should figure in the code.

24. Mr. AMADO read out from the document he had submitted a formulation of the principle almost identical with the first sentence of the paragraph under study in the report of Mr. François.

25. The CHAIRMAN said that the Commission could request the Rapporteur-General to include the principle in his report.

*The Commission adopted the principle.*

#### SECTION 4: NATIONALITY OF SHIPS

26. Mr. Hudson said that he had for a long time been the follower of various French authors who claimed that one should not speak of the nationality of a ship but of the national characters of a ship. He recalled the convincing arguments of Niboyet<sup>3</sup> on the subject. He felt that the last sentence of section 4 should find a place in the principle which the Commission was to formulate. He thought he was right in saying that the majority of countries kept a register of the ships flying their flag and that the right to fly that flag was conditional on such registration. He could find no mention of that fact in the paragraph.

27. Mr. AMADO was anxious for the document he had submitted to the Commission to be taken into consideration and would wait until it was published before taking part in the discussion.

28. The CHAIRMAN pointed out that it so happened that the report of Mr. François and the document submitted by Mr. Amado were in agreement. The texts in

question were section 4 of the report and sub-paragraph (a) of paragraph 2 in Mr. Amado's document.

29. Mr. FRANÇOIS remarked that Mr. Hudson seemed to consider that the Commission should endeavour to unify the various national laws.

30. Mr. HUDSON replied that that was not what he had in mind. To be more exact, he thought that the laws of States should be studied in order to see on what conditions they conferred their nationality on ships and perhaps in order to derive some general rules therefrom.

31. Mr. FRANÇOIS could not see the utility of considering that subject. There were no doubt certain rules which were the same in different countries, but since the attainment of a uniform system was almost out of the question, he wondered if it was worth while considering the subject dealt with in section 4 of his report.

32. Mr. YEPES thought that the question might be the subject of a recommendation by the Committee expressing the hope that "All States would unify the conditions under which they conferred their nationality on ships."<sup>4</sup>

<sup>4</sup> Mr. Yepes submitted the following principles as a basis of discussion (A/CN.4/R.5):

1. Each State determines the conditions under which it confers its nationality on various ships, grants them the right to fly its flag and accords them its protection.
2. States having no seaboard have the right to possess their own fleet and flag, but such a right is only recognised in the case of States accepting the general principles of international law.
3. The nationality of a ship is proven by its ship's papers. The captain of a ship is bound to produce such papers whenever lawfully required to do so.
4. It is for the various maritime Powers to determine the conditions under which they recognise the nationality of foreign ships in their own territorial waters. Those conditions should not, however, be such as to render navigation and seaborne trade impossible or too difficult for a foreign nation.
5. It is not forbidden for a State, in time of peace, to confer its nationality on foreign ships by provisionally granting them the right to fly its flag and by according them the protection associated with the latter, but such right may not be exercised for fraudulent purposes or when prejudicial to already existing rights.
6. It is forbidden to fly the flag of a foreign State without the latter's authorization.
7. Ships in distress and their crews must be given all necessary assistance and be allowed free use of installation and equipment for rescue and salvage.
8. No one may seize the persons or property of shipwrecked persons. The right of flotsam and jetsam is abolished.
9. No State may, in time of peace, give orders to foreign ships on the high seas. The ship is covered by its flag.
10. No State has the right, in time of peace, to detain ships on the high seas, to send its officials on board, to demand the production of the ship's papers, or to carry out a search of the ship.
11. When the crew of a ship has committed crimes or offences on the territory or within the territorial waters of another State and is the object of pursuit by the authorities of that State, pursuit may be continued outside the territorial waters of the State and on the high seas. When, however, the ship has escaped pursuit, it may no longer be attacked on the high seas by the ships of the injured State.
12. Pirates are not tolerated and have no right to respect of

<sup>3</sup> A. de la Pradelle et J. P. Niboyet, *Répertoire de droit international* (Paris, 1931), vol. X, "Navires de mer", by J. P. Niboyet, chapter II, paras. 15 and 18.

33. Mr. ALFARO pointed out that only treaties could change the practice followed. All that the Commission could do, apart from formulating a recommendation, would be to outline the principles as they existed at the moment. The report was quite clear on that point, since it stated that "Generally speaking, it is for every sovereign State to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of the right."

34. Mr. YEPES proposed deleting the word "sovereign", and saying merely "every State".

35. The CHAIRMAN asked whether the Commission was in favour of the principle that each State be free to grant the right to fly its flag, or whether it was in favour of considering the possibility of unifying the various national laws on that point. The Commission could confine itself to expressing the principle and reject the idea of seeking for unification.

36. Mr. CORDOVA thought that the situation was not quite as presented. Mr. Hudson had not suggested attempting to bring about uniformity of law but rather discovering whether any common rules existed which were followed by all States. The Chairman had proposed rejecting that suggestion. The fact that the Commission accepted the principle was no reason for rejecting the idea of attempting to find common rules.

37. Mr. HUDSON thought that the Commission could not unify laws but should study how the question of the nationality of ships was dealt with in the law of States.

38. The CHAIRMAN invited the Commission to indicate a means of arriving at some directives for the Rapporteur-General.

39. Mr. YEPES quoted the following sentence of Mr. François' report: "That is why it would be desirable, as Mr. T. M. C. Asser and Lord Reay stated in their report to the Institute of International Law at Venice in 1896, 'if not to bring about the adoption of absolutely uniform regulations with regard to the nationality of ships—this might be extremely difficult to bring about—at least to achieve a greater degree of similarity between the laws of the various States on the fundamental principles involved'."

*The Commission decided by 9 votes to 2 that it was desirable to endeavour to determine the general prin-*

their flag. They may be attacked at all times and be captured on the high seas.

Those ships which seek to seize persons or booty or to destroy for criminal ends the property of others shall be considered as pirates.

13. When there are grave reasons for suspecting that a ship is guilty of piracy, any ship of war of whatever State has the right to detain the suspect ship and to board it.

14. When a ship, without renouncing its nationality and without breaking its ties with a particular State, commits acts of pillage, brigandage or other offences at sea, the international regulations and jurisdiction admitted in cases of piracy may not be applied to it, and only the tribunals of the State to which the ship is amenable are competent to deal with it.

*Note.* — These principles have been taken from Bluntschli's text, and adapted to modern conditions.

*principles which might permit the achievement of a certain degree of uniformity in the matter.*

40. The CHAIRMAN requested the Commission to take a decision on the principle contained in the last sentence of section 4 of the report of Mr. François: "The right to a maritime flag of States without a sea-board seems to have been recognized adequately by the Declaration of Barcelona of 20 April 1921."

41. Mr. ALFARO thought that the Commission should indicate what that principle was.

42. Mr. YEPES requested Mr. François to outline the general principles of the Barcelona Declaration.

43. Mr. FRANÇOIS complied.

44. The CHAIRMAN remarked that the Barcelona Declaration enunciated very general principles.

45. Mr. YEPES and Mr. ALFARO said that they would prefer the principle to be enunciated without the Declaration of Barcelona being quoted.

46. The CHAIRMAN thought that the Declaration might be mentioned in the commentary and not in the text of the principle.

*It was so agreed.*

47. Mr. el-KHOURY suggested that, to facilitate the discussion of each section, Mr. François should prepare a brief principle for submission to the Commission. In the case of the last paragraph, Mr. Amado had endeavoured to extract a principle from it. He hoped that Mr. François would receive his suggestion favourably.

48. Mr. FRANÇOIS said he had already stated that he had another conception of his task. He had wished to clear the ground and to invite the Commission to indicate what points it wished to study.

49. The CHAIRMAN declared that Mr. François was right, and that the decision taken by the Commission at its last meeting had changed the position. The Commission desired, on certain points, to adopt principles indicating its opinion. When Mr. Alfaro drew up his general report he would, in concert with Mr. François, formulate the ideas of which the Commission had expressed approval.

50. Mr. CORDOVA pointed out that Mr. Amado had already drafted some principles and that the Rapporteur had declared himself in agreement with him on certain points. He suggested that Mr. François and Mr. Amado together examine the document submitted by the latter, which could thus constitute a useful basis of discussion for the Commission.

51. Mr. HUDSON thought that the Commission was not seeking to draw up a text, but to choose the points it wished to deal with. Mr. François would give a precise formulation to those points in the light of the discussions and after having received certain directives from the Commission.

52. Mr. el-KHOURY was, on the contrary, under the impression that the Commission intended to adopt principles.

53. Mr. CORDOVA thought that the Commission should decide to draw conclusions from the report and to seek to formulate concrete declarations. It was for