CHAPTER II

NATIONALITY OF SHIPS AND THE CONCEPT OF
FLAGS OF CONVENIENCE

A ship is a unique subject-matter of law. It is sometimes considered as a chattel as it is a negotiable asset of value. It is also not a chattel as it carries the law and jurisdiction of sovereigns\(^1\). In this sense it is said to have personality\(^2\) though only for procedural reasons as it is not a legal actor independent of those who operate it. Unlike other inanimate objects, it is the creature simultaneously of more than one system of law: of international law to the extent that this provides for or excludes the manifestation of sovereign power in respect of ships; of municipal law to the extent that this is the law that governs the ships; and of the principles of maritime law common to nations, which is an admixture of municipal and international laws.

There is therefore no generally accepted definition of 'ship' for either international or municipal laws. Different authorities have attempted their own definitions for particular purposes, but each definition has its own drawback. Thus the problem

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1. 33 BYIL (1957) 52 at 55.
remains whether international or other municipal authorities can accept a definition which includes hovercrafts or oil-rigs being towed as ships for their purposes, general or specific.

As a ship sailing the high seas must be under the suzerainty of a particular sovereign, the question of a ship's nationality crops up next. It is an accepted fact that a ship must have a nationality and possess documentary proof of it and that a ship without nationality could offer no guarantees and could invoke no protection.

The use of the expression 'ship's nationality' became current in the early nineteenth century and was used in diplomatic correspondence, legal opinions, multilateral and bilateral treaties, prize regulations, codifications, and in judicial parlance including that of the International Court. However, the expression 'ship's nationality', like the expression 'ship' has multiple uses depending upon the context. The problem has been that ships have been connected with countries, both in municipal law and in treaty, by reference to different

factors, and for different purposes, ranging from exemption from dues, through most favoured nation or national treatment to protection of seamen. Before the term 'nationality' became current, it was usual to express these factors.

Since these factors had been used to connect ships with countries for public purposes, they influenced the identification of the 'connecting factory' also for private international law purposes. Four such connecting factors for this purpose are: the nationality of the company owning the ship, the sovereignty of the territory registering it, the national character of the community of people on board, and the nationality of the owner or master or both.

In modern times, it has come to be assumed that the nationality of the ship is that of the country whose flag it flies, but this may be true only for limited purposes. Municipal laws generally require only that a master must make a declaration as to 'the nation to which he claims she belongs'. The word 'belongs' here indicates only a formal connection, while other factors may be relevant for other purposes.

1. Section 68 of the Merchant Shipping Act, 1894 of U.K. and Article 166 of the U.S. Customs Regulations.
Both the Geneva Convention on the High Seas, 1958\textsuperscript{1}, and the most recent Montego Bay Convention, 1982\textsuperscript{2}, referred to ships having nationality. They require each State to fix conditions for the grant of its nationality to ships, and provide that ships have the nationality of the States whose flags they are entitled to fly. The term 'nationality' as used in connection with ships is, however, not to be taken as indicative of the juridical nature of ships. On the other hand, it is merely short hand for saying that a ship is jurisdictionally connected with a State. That State's law is then the law of the flag, but, as in the case of Commonwealth ships, it may not be uniquely the law of the flag.

There are, therefore, no explicit rules for the attribution of ships to one or another State in international law. This is left to the domain of municipal law. International law merely requires that the country which offers its flag must regulate the conditions upon which ships may sail under it\textsuperscript{3}. In the case of \textit{Lauritzen v. Larsen}\textsuperscript{4}, the Supreme Court of the United States held that :

\textit{Perhaps the most and universal rule of maritime law}

\begin{itemize}
\item[1.] Article 5.
\item[2.] Article 91.
\item[3.] Boczek, B.A. (1962) page 102.
\item[4.] (1953) 345 US 571 at 571.
\end{itemize}
is that which gives cardinal importance to the law of the flag. Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it'.

The above, however, begs the question since it fails to indicate what is meant by 'nationality', and whether a ship is subject only to the responsibility the jurisdiction of the country whose flag it flies. The question also arose in the case of The Muscat Dhow, a decision of the Permanent Court of Arbitration in 1904. The primary question in this case was over the use of the French flags by the subjects of the Sultan of Muscat under which the subjects were authorised to fly the French flags on dhows. Great Britain alleged that the French flags were being used as a cover for slave trading and that the Sultan was disabled by the French authorisation from taking any action against his own subjects to suppress the trade. The relationship between international law and the grant of the right to fly a flag was examined thus by the Court:

'Generally speaking, it belongs to every sovereign to decide to whom he will accord the right to fly his flag

1. 11 U.N. Reports page 83 (1905). See Westlake in 23 LQR (1907) 83.
and to prescribe the rules governing such grants .... The granting of a French flag to subjects of His Highness the Sultan of Muscat in itself constitutes no attack on the independence of the Sultan .... (However, these subjects) do not enjoy in consequence of that fact any right of extraterritoriality which could exempt them from the sovereignty, especially from the jurisdiction of His Highness the Sultan of Muscat'\(^1\).

The above case, therefore, discloses that there is no unique connection between the national identity of a ship for jurisdiction purposes and the flying of a flag. The Sultan retained jurisdiction over the dhows because they were operated by his subjects, although they flew the French flag. In other words, they remained Muscat and did not become French ships. The personal law of the owners thus infused the ships so as to become the law specific to these ships. Thus, although the law of the flag will be the law of the country that registers the ship, this is not an absolute rule.

In the sphere of private international law, the choice

\(^1\) 2 AJIL (1908) 923 at 924, 928.
of law in litigations involving ships, does not necessarily follow
the formal relationship of a ship with a State, but is indicated
rather by the closest link between it and the interests that control
it. In a leading case\(^1\) concerning collisions at sea, the question
of the proper law of contract of carriage arose. It was argued
by the defendants that because the ship was registered in Holland,
the bill of lading was governed by Dutch law since it was given
by the Dutch captain in respect of carriage under the Dutch flag.
Brett L.J. held that although in this case the ships carried the
Dutch flags, they were owned and controlled by British subjects,
though a Dutch subsidiary of an English company. The contract
was in English form with an English merchant for carriage from
England, and therefore it was governed by English law although
the ships were considered to have been Dutch ships which 'I
think she is not'\(^2\). He further added that though both ships
carried the Dutch flag, but were English controlled, and considering
the degree of that control exercised, the mere fact that they
carried the Dutch flag made it absurd to suppose that she was
a Dutch ship. The nationality of a ship depends upon her ownership
and upon that alone\(^3\). However, in the light of recent develop­
ments in international law, Lord Brett's concept of the 'nationality'
of ships indicating specific and not general links between ships
and systems of law, would be open to review.

\(^1\) Chartered Mercantile Bank of India Vs Netherlands Steam Navigation
Co. (1883) 10 QBD 521.

\(^2\) Ibid, page 530.

\(^3\) Ibid, page 535.
The opinion of authors\textsuperscript{1} that a ship could have only one nationality requires rethinking as international law requires that a ship must be jurisdictionally attached to one State only for a particular purpose at a particular time. It is therefore implied that a ship may be connected to different States for different purposes. The \textbf{International Law Commission} probably had this in mind when it said, without citing examples that allocation of ships to two or more States frequently occurs\textsuperscript{2}. Both the Geneva and the Montego Bay Conventions have carefully avoided the requirement that ships sail only under the flag of the country of registration and by implication suggest the possibility of ships being entitled to the flags of more than one States. Ships shall sail under the flag of one State only\textsuperscript{3}, and, except in exceptional cases provided for in the treaties, shall be subject to its exclusive jurisdiction while on the high seas. A ship sailing under the flag of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality. All this is regarding the use of the flag and not entitlement to it, leaving aside the possibility that a ship is entitled to more than one flag, provided that it uses one or other of them consistently.

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\item \textsuperscript{2}ILC Yearbook 1955, II,23; I, 59-61, 65-66.
\item \textsuperscript{3}Geneva Convention on the High Seas, 1958, Art.6; Montego Bay Convention, 1982, Art.92.
\end{itemize}
This possible duality makes it difficult to attribute cogent meaning to the expression 'nationality of a ship'. Thus, a ship may be subject to the right of protection of more than one State and to the exercise of jurisdiction by more than one State, if it is connected either through registration or through the personal laws of the owners to the legal systems of more than one State. In this respect, a ship may have dual nationality like an individual.

A ship which is unregistered may be without nationality but is also without protection as held in Naim Molvan v A G for Palestine\(^1\) by the Privy Council. In this case, the ship Asya was flying no flag when sighted by British warship 100 miles southwest of Jaffa. Subsequently, when confronted, it hoisted the Turkish flag, but on arrival of a boarding party this was hauled down and a Zionist flag hoisted. The ship had no flag and in Haifa it was found to have illegal immigrants aboard. The vessel's forfeiture was ordered by the Palestinian Court under the Immigration Ordinance. One of the ground of appeal was that the Ordinance was unconstitutional as authorising the action taken on high seas, contrary to international law. The Privy Council rejected the plea that the freedom of the seas gave the Asya the right to sail, unqualified by place or circumstance. The freedom of the open sea is a freedom of ships which fly or are entitled to fly, the flag of a State within the comity of nations, it held\(^2\).

1. (1948) A C 351.
2. Ibid p.369
When a ship loses its formal nationality, its status is then a question for the municipal law of the owners, and it is likely that this would then claim to regulate the ship, and in this sense become a law of the ship's nationality. The flag under which a merchant ship sails is prima facie proof of her nationality. If she is not properly registered, her nationality is still that of her owner.

The law of the United States is quite complicated in this matter. In one particular case, it was held that although a ship may not be a 'vessel of the United States' for certain statutory purpose, she is 'an American vessel because of the nationality of her owner'\(^1\). Various U.S. municipal enactments assert rights of jurisdiction over ships on the ground of ownership or control by the United States citizens, even when documented under foreign law and on the high seas. This is not considered as amounting to jurisdiction on the ground that the vessels possess American nationality on account of American ownership, although it is doubtful whether such legislative declarations would suffice under international law to attach American nationality to American-owned foreign documented ships. Moreover, this view fails to recognise that nationality may not just be a question of documentation and it is not consistent with the fact that American-owned

\(^1\) The Chiquita, 19 F.2d 217 (1927) (F.2d = Federal Reporter, Second Series, (USA)).
or American-chartered foreign ships may fly the American flag at some place other than aft, to indicate the American nationality of the owner or the charterer, and that the only prohibition on the use of the American flag is its use to suggest documentation.

Irrespective of whether a ship is entitled to attribution to a State, — a matter for that State to determine, — other States and their Courts are not denied competence to ascertain whether the ship's documentation is properly completed, and the flag that is worn really indicates the ship's nationality. In a U.S. case it was argued, that the seizure of an American ship by the Spanish authorities on suspicion of gun-running to Cuba was justified because the ship's claim to be American was fraudulent. The United States adopted the view that only its courts could decide whether the claim was fraudulent or not, and that Spain had no jurisdiction, once the American flag was displayed, to ascertain whether the ship was sailing in violation of American law. Although the ship was released, the principle at issue remained undecided.

The function of a ship's flag is that of identification,

2. 22 USC 457.
3. The Virginus, For. Rels. of the US (1874), 1035.
including attribution to a particular State. The flying of a flag need not be continuous if it is used in the circumstances in which identification is required. It is generally believed that the display of the ship's name and port of registry may serve the purpose of identification and for visual reasons often better than the flying of a flag. However the conventional symbolism behind the flying of a flag makes its displacement as the necessary index of national character unusual.

Shipowners often register their ships in foreign countries, vesting their ownership in corporations registered in third countries to avoid restrictive fiscal, labour or operational requirements of their national laws. This has led to the proliferation of 'flags of convenience'. The Geneva Convention on the High Seas, 1958 (Art.5) and the Montego Bay Convention, 1982 (Art. 91) have attempted to put bounds to this practice by providing on analogy with the cases of human beings that there must exist a 'genuine link' between the ship and the State whose nationality it has. Judge Jessup in his dissenting opinion in the Barcelona Traction Case held that States are bound to recognise an attribution when such a link exists: 'If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring

that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognise the asserted nationality of the ship.

The above notion that States are restricted in their international competence to grant their nationality to ships considerably antedated the decision of the International Court. The question arose in the Institut de Droit International in 1896, when the rapporteurs of the Committee on Usage of National Flags for Merchant Ships agreed that the laws of countries concerning nationality of ships, if they were to be generally recognised, ought not to dilute the criteria which most States had adopted and which formed the basis of international law. The Rules adopted by the Institut reflected this and provided that as a condition of registration, a ship should, at least to one half, be the property of nationals or national companies.

Francois, the Special Rapporteur of the International Law Commission revived the Rule of the Institut of 1896 when in his Report of 1951, he succeeded in persuading the members that the grant

1. ILC Ybk 1951, II, 76.
of nationality to ships was limited by certain principles of international law\(^1\). The suggestion that this be changed to a requirement of 'genuine connection' came from The Netherlands\(^2\) and was accepted by the Commission in 1956\(^3\). There were several proposals at the Geneva Conference to reduce this, but the text survived in principle. This immediately gave rise to the question of registering American-owned ships in Panama with the State Department interpreting the provision as leaving it to each State to decide which ships it will register and authorise to fly its flag, and that a 'genuine link' would exist if a State exercised 'effective jurisdiction and control' over ships it registered\(^4\). This interpretation would, however, sever the case of nationality of individuals, and lead to altogether different criteria for attribution of nationality to them.

In the Constitution of the Maritime Safety Committee Case\(^5\), an attempt was made to establish the opposite interpretation by the United Kingdom, The Netherlands and Norway, and resisted by Liberia. Panama and Liberia argued that they should be classified among the 'largest shipowning nations' within the meaning of the Constitution of the IMCO\(^6\) on the ground that they were respectively eighth and fifth among shipowning nations

1. Ibid. I, 330.
2. ILC Ybk (1956) II, 15.
3. Ibid. I, 38.
6. IMCO stands for 'Intergovernmental Maritime Consultative Organisation'.
on the basis of registered tonnage, and that in disputing this, the other maritime Powers were 'going behind the flag'. The Court held\(^1\) that the expression was intended to be used with the same meaning as merchant shipping belonging to countries for the purpose of safety at sea and other maritime matters, and so as referring solely to registered tonnage. The Court therefore made it clear that it was not concerned with the question of 'genuine link' in this interpretation, although it is difficult to resist the conclusion that it reinforced the functional as against the social argument\(^2\).

The Conventions which the Court relied upon impose the obligation of 'effective jurisdiction and control' only on the State which registers a ship. Thus for the purposes of loadlines\(^3\), safety of life at sea\(^4\), and the ILO Conventions, ships are treated as belonging to the country of registration, and alternate links have been found to be impracticable. On the other hand, registration can be regarded as only one of a number of connecting factors that may need to be identified, depending upon the question put, whether it is to be the exercise of criminal jurisdiction on ships, or protection of ships, or redress for injuries to persons in ships.

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2. But See Judge Morena Quintana's dissenting opinion. Ibid 178.
4. 536 UNTS 27, Art. 2.
It is debatable whether it is practicable to seek to curtail flags of convenience by the device of 'genuine link' as the problem with the application of the 'genuine link' theory to ships is that no explicit connection can be established between a ship and a State when the ship is owned by a juristic person whose own composition may be nationally disparate. At least one authority has argued that the factor of certainty is more important with respect to ships than with respect to individuals. Moreover, attribution of ships to States has traditionally been based on various criteria ranging from national build in order to protect the local ship-building industry to national crew and national ownership. Registration originally resulted from the 'link' and did not create it and the general opinion is that registration is in principle only evidence of nationality and is not creative of it. As things stand now, the 'genuine link' formula has had no practical effect whatever in inhibiting the transfer of shipping to flag of convenience registry. The ILO has, in its Convention, which are based upon ship-registration, in a way, made provision of pressing for registration States to give practical effect to the maritime Conventions and thus tighten up the system of flag of convenience.

2. About half the shipping nations require that ships be owned by their nationals. Ripert, G, (4th Edn 1950) Vol I page 305 lists the UK, USA, Germany, Spain, Portugal, Turkey, Norway, Egypt, Brazil, Chile, Japan and Morocco. Others require partial ownership by nationals: Italy, Sweden, Austria, Denmark, Hungary, Czechoslovakia, Poland, France, Holland, Greece and Belgium.
The main problem that arises in connection with flags of convenience is the applicability to them of the laws of the countries of which the owners are nationals. This problem occurs mainly when a flag of convenience ship is in a port of the national State of the owners, while having a foreign registration. In such cases, questions analogous to those of "piercing the veil or corporate personality" are bound to arise. In the high seas, the practice, however, has 'rigidified since the Muscat Dhow Case' of treating registration as the only indication of responsibility and jurisdiction.

1. 11 UN Rep. 83 (1905). See also Westlake in 23 LQR (1907), 83-87.