

to fundamentals. The book constitutes a high achievement of comparative law as well as of jurisprudence. Law teachers might well consider its use as a base for discussion in seminars or courses on jurisprudence. For one striving at clarifying his thoughts about the problem of how to defend our social and political system against its enemies, without in the effort undermining its very foundations, Kirchheimer's book is, I dare say, indispensable. To the judge, attorney, or prosecutor involved in a political case, it will serve as a useful practical guide.

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Flags of Convenience: An International Legal Study. By BOLESLAW ADAM BOCZEK. Cambridge: Harvard University Press, 1962. Pp. v, 323. \$8.00.

This, so far as I am aware, is the first monographic study of the legal and related problems that arise from the registration of seagoing vessels in countries other than those of the nationality of their true owners. Issues involving aspects of the "flag of convenience" problem are now in the courts in the United States.¹ A related issue has recently been before the International Court of Justice.² The Geneva Conference on the Law of the Sea showed that the participating countries differed as to the legitimacy, as concerns third states, of the practice of flying flags of complaisant and essentially non-maritime states in order to reduce the competitive disadvantage to the owners were the laws of their nationality to be applied to the internal economy of the vessel, particularly as to wage scales and social legislation.³ As a result of these differences, Article 5 of the Geneva Convention on the High Seas⁴ was left imprecise on the issue of non-recognition:

Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its

¹ *Incres S.S. Co. v. International Maritime Union*, 10 N.Y.2d 218, 176 N.E.2d 719, 219 N.Y.S.2d 21, *cert. granted*, 368 U.S. 924 (1961); *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962), *app. pending*; *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82 (D.D.C. 1962).

² Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, [1960] I.C.J. Rep. 150.

³ Chapter IX of the book under review is a detailed account of the positions taken at the 1958 Geneva Conference on the Law of the Sea on the competence of states to confer their nationality upon vessels. Chapter VIII is even more detailed as to pre-1958 attacks on the "traditional principle" that each state has exclusive competence to determine the conditions for the grant of its nationality to merchant vessels.

⁴ The four conventions open for signature as a result of the United Nations Conference on the Law of the Sea (1958) are not yet in force. The Convention on the High Seas, however, is regarded in most of its provisions as reflecting the present state of customary international law, thus sharpening the debate as to the meaning of Article 5 even before it comes into effect. Perhaps the most convenient citation to the four conventions, pending their coming into effect, is 52 AM. J. INT'L L. 830-67 (1958).

flag. Ships have the nationality of the state whose flag they are *entitled to fly*. There must exist *a genuine link* between the state and the ship; *in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*⁵

The central thesis of the book, buttressed by an approving foreword by Professor Myres S. McDougal, is that international law does and should require third states to recognize the nationality⁶ granted to ships by Panama, Liberia, Honduras, and the like, although they are owned by economic interests readily identifiable as having the nationality of the United States, Greece, and a few other maritime countries. As to the Geneva Convention:

Art. 5 of the convention cannot be interpreted to mean that if there is no link between the ship and the state the other states may refuse to recognize the ship's nationality, since this sanction is not laid down by the framers of the convention, and, on the contrary, was explicitly rejected.⁷

Both the author and Professor McDougal in his foreword point out that their insistence on incontestability for flags of convenience does not compel answers to questions as to the permissible reach of the legislative jurisdiction of non-flag states (including, but not always necessarily limited to, the state of the owner's nationality) to regulate aspects of the vessel's operation. The issue of jurisdiction under existing law to regulate labor-management relationships aboard flag-of-convenience vessels beneficially owned by United States interests is seemingly bound for settlement by the Supreme Court. It will be very interesting to see whether the premises of decision, articulated and inarticulated, will observe the differentiation contended for.

But even if observed, pressures for and against change in the reach of national law will continue in the United States; and if the Congress should be willing to make the labor law now applicable aboard vessels of United States registry also applicable to vessels of American ownership,⁸ I daresay the "fighting issues"⁹ discussed in this book would tend to wither away. However,

⁵ *Id.* at 443. Emphasis indicates manifest ambiguity in the text of Article 5 as drafted and without consideration of the negotiating history. As to the negotiations see, *inter alia*, Chapter IX of the work under review.

⁶ Nationality is usually symbolized by the right to fly the flag. Actually, as the author points out, the crucial operative fact is registration of the vessel under the national law.

⁷ P. 283.

⁸ Federal criminal law already is, so far as the statutory prescription goes, applicable to vessels of American ownership. 18 U.S.C. § 7 (1958) invokes United States legislative jurisdiction as to certain offenses committed within the "special maritime and territorial jurisdiction of the United States." This jurisdiction includes vessels "owned in whole or in part" by citizens of the United States.

⁹ The tensions—or the public relations awareness—involved in the operator-union struggle as to flag-of-convenience ships (a relatively neutral term) is shown by the fact that operators speak of "flags of necessity" whereas unions declaim against "runaway flags." The author adds other emotive (usually pejorative) terms sometimes used and reports the rather sweet Liberian term for their flag: "a flag of attraction." P. 6.

at the present time we are in the midst of the national policy fight and I cannot predict how it will come out. In any event, the book is useful for it contains, in addition to an analysis of the international legal issue of recognition by third states, solid descriptive material relevant to the resolution of basic policy issues as to the management of ocean-borne commerce.

Participants and decision-makers in the policy fray will find the problem well stated in the first two chapters and in Chapter VII. Historically and by statistics the author shows us that the "Flight from National Flags"¹⁰ has stepped up immensely since World War II in the case of vessels owned by United States enterprises where their operation is not within the scope of United States governmental subsidies. Roughly, subsidies are not available to relieve against the competitive disadvantage of high operating costs where American-owned vessels are engaged in carriage for the enterprises that own them (company tankers and fruit ships) or in tramping.¹¹ In addition to the general interest of the owners and of the public in keeping American shipping on the seas, even though not eligible for subsidy, there is the national security interest, officially declared, of having a substantial merchant fleet in being and on call in time of national need.

This latter interest is carefully analyzed in Chapter VII, dealing with the doctrine of "Effective United States Control." Legally and practically, can the United States get the Liberian, Panamanian, Honduran, and other flag-of-convenience vessels back for use in time of trouble? The author reports that the Executive Branch tells Congress that we can, but he goes on to show that this conclusion stems from an explanation "that we always have before" and to shrug off the logic of the basic international legal position contended for in the book, that under international law the flag state has sole right to control the use of the vessel.

Of course, the flag state could agree to surrender control to the ownership state by international agreement; but I was surprised to get the impression from Chapter VII that such agreements are not very tight. Legally, it was to be expected that they would not be proof against subsequent change of national law in the state of registration. Consider, momentarily, the situation that might have existed today if Cuba had been one of the flag-of-convenience states used by United States shipping interests!¹² The author is discreet to the point of vagueness as to how much weight can be put upon the fact that flag-of-convenience ships are sometimes under the command of United States

¹⁰ Ch. II.

¹¹ I understand that legislation in the 1950's opened the possibility of shipbuilding subsidies for tramps but that operating subsidies for tramping carriage are not authorized. See GILMORE & BLACK, ADMIRALTY 767-68 (1957).

¹² At several places the author hints that some of the registry states chosen are not states whose ports are regular ports-of-call for world shipping, as Havana and other Cuban ports long have been,

citizens. But he ends the Chapter with a practical point that some will argue cuts against his basic legal thesis of incontestability for flag:

Of decisive practical importance in the whole issue is the fact that the flag-of-convenience vessels in their bulk never put in at the ports of registry, and that the flag-of-convenience countries would be unable in case of emergency to enforce their control over ships flying their flags on the high seas.¹³

Perhaps so; but what of an act of nationalization, in a cold war context, by a flag-of-convenience state? The author does not deal with the uncertain issue of jurisdiction to nationalize a national vessel outside the territory of the state at the time of acting.¹⁴ He does report a dialogue between the Chairman of the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce and the representative of a shipping company:

The Chairman: What if Panama passed some legislation or issued decrees to the contrary? Would you have any control over them [*i.e.*, the ships]?

Mr. Teitsworth: I wouldn't want to speculate about that. They haven't done it.¹⁵

The American maritime unions will continue to argue, as they have before, that the doctrine of effective control is a phony. I do not think it is; but, certainly, it may be dangerously complacent from the security standpoint, both as to law and as to practical uses of power. And there is, of course, a fair question relevant to the present internal controversy as to whether we may not be paying too much (socially) for our whistle.

Cannot attention be directed to something better than the present fiction? As a former property lawyer, I am accustomed to fictions and to their incontestability in certain situations. Some of them have been socially useful. But in the international arena the "Liberia-is-a-maritime-power" one has divided us from many of our seagoing friends and allies.¹⁶ Our own national position

¹³ P. 208.

¹⁴ Cf. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 46 (Proposed Official Draft 1962), dealing with the extent to which acts of a foreign state affecting interests outside its territory are subject to examination in the courts of other states, especially Illustrations 4 and 5, dealing with flag vessels sought to be nationalized while in the territory of another state. The Restatement is silent on an attempted nationalization while the flag vessel is on the high seas.

¹⁵ P. 206.

¹⁶ The United Kingdom, The Kingdom of the Netherlands, and Norway are among the countries objecting to the flag of convenience practice of the United States. They do so, not only as competitors, but also as NATO allies: "The importance of the United States-owned Panlibhon shipping to the defense of the United States is also objected to by certain European shipping circles for which the emphasis on the importance of this fleet is an attempt to belittle the importance of West European merchant fleets to the North Atlantic Treaty Organization defense plans." BOCZEK, 191-92, citing a statement by the president of the Norwegian Shipowners Association.

is not even consistent. For some purposes (criminal law and, I can only assume, diplomatic protection¹⁷) true ownership, not flag, is the test the United States supports. For social legislation (what about antitrust?) we say that flag controls (the maritime unions, national and some foreign, and the NLRB dissenting). Usually consistency is more of a virtue internationally, in the context of establishing credibility for a national position, than it is nationally. The book shows at many places how we have had to labor in the world arena because of this inconsistency. It seems to me that we ought to re-think the whole problem, including:

- (i) the present pattern of subsidies, especially as they cut against tramping through insistence upon commitment to ply stated routes, uneconomical though they may be;
- (ii) proper international standards as to wages, working conditions and effective maritime safety, including inquiry both as to the possibly "too high" and the known "too low" aspects of various national laws.¹⁸

The author has made a good case against the application of a somewhat ambiguous article of the Geneva Convention to permit a third state unilaterally to go behind registration and flag. His position bolsters, and is bolstered by, the national position of the United States as brought out, for example, in the Senate Foreign Relations Committee hearings on the Convention.¹⁹ But I am not at all sure that the position would be tenable against proposals for international administrative regulation of the flag-of-convenience practice, and hence I think that from the standpoint of provident preparation on the international, as well as on the national, front other alternatives to the resolution of the basic economic and social problem should be explored. In such exploration the book under review will be an excellent place to begin.

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¹⁷ It is true that diplomatic protection for flag-of-convenience ships could be fitted into the United States view that real, rather than merely legal, ownership rights should determine the standing of the United States to espouse a claim. However, I was instructed in 1946 by the Department of State to hold fast to the position that for purposes of compensation (war damage in the Italian and Axis satellite peace treaties) ownership, *not flag or registry*, should control. My instructions sounded as if they were based on the Department's view of the law of the sea. In following them I found myself in a decidedly minority position among "the experts."

¹⁸ Surely today the Bricker amendment fight has receded far enough into history to permit casting off the timidity that once suggested that international conventions standardizing labor practices were not only unwise but possibly beyond the treaty power of the United States.

¹⁹ See, Committee on Foreign Relations, *Report on the Convention of the Law of the Sea*, 86th Cong., 2d Sess., Sen. Ex. Dept. No. 5, p. 5 (1960).