

ROUTLEDGE RESEARCH IN INTERNATIONAL LAW

Means of Transportation and Registration of Nationality

Transportation Registered by
International Organizations

Vincent P. Cogliati-Bantz



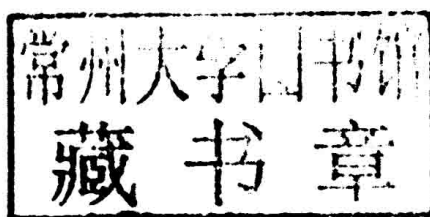
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Means of Transportation and Registration of Nationality

This book examines the concept of nationality of means of transportation in terms of jurisdiction in international law. It reassesses the definition of nationality and explores how it is conferred.

The book first places nationality in the broader perspective of jurisdiction in international law, and examines the historical development and necessity of the nationality of means of transportation. It goes on to investigate whether and under which conditions international organizations may confer a 'nationality' on means of transportation, examining the law of the sea conventions and air and space treaties. The book finally explores several questions relating to international registration of means of transportation, building a regime of international registration. Vincent Cogliati-Bantz introduces a necessary distinction between transport internationally registered and transport registered in a State but fulfilling a mission for an international organization.

As a work that proposes the ability for international organizations to access international spaces without reliance on State-registered means of transport, this book will be of great use and interest to scholars and students of public international law, international organizations, and maritime, space, and aviation law.

Vincent P. Cogliati-Bantz is Senior Lecturer at the TC Beirne School of Law, University of Queensland, Australia.

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To my family,

To K., R., M.N., T.

VINCENT P. COGLIATI-BANTZ
Brisbane, December 2014

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Introduction

In 1950, Clyde Eagleton wrote in his course at the Hague Academy on International Organizations and the Law of Responsibility that the United Nations 'has no army or *navy*, no military instruments through which to impose its wishes . . . , no population whose interests it must further and protect in relation to other entities'.¹ Less than five years later, several trawlers sailed from Hong Kong to Pusan, Korea, only flying the UN flag as maritime flag. This spurred controversy at the International Law Commission (ILC) which was then examining the regime of the high seas. It was unclear to some members whether international organizations may act as flag States, and the ILC in the end was unable to take a decision. The same debate took place at the Geneva Conference on the Law of the Sea which produced the vague formula in Article 7 of the Convention on the High Seas,² although for its sponsors it was clear that certain intergovernmental organizations had the right to sail ships under their flags. Article 93 of the United Nations Convention on the Law of the Sea (UNCLOS) adopts a more restricted scope without clear explanation.³ If international organizations may not act as flag States, then direct access to the oceans is impossible and they must use ships endowed with a State's nationality. Simonnet claimed that an international organization's maritime flag would be a 'revolution in the law of the sea'.⁴ This implies that, prior to the 'revolution', conferral of nationality was an exclusive right of States. If it was not an exclusive right of States, it still needs to be examined whether the right to a maritime flag extends *ipso facto* to international organizations, or if an enabling rule needs to be found, or if certain circumstances and conditions need to be realized.

1 Clyde Eagleton, 'International Organizations and the Law of Responsibility' (1950-I) 76 *Recueil des cours de l'Académie de droit international* 319, 385. Emphasis added.

2 'The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization.' 450 UNTS 82, opened for signature on 29 April 1958 and entered into force on 30 September 1962.

3 'The preceding articles do not prejudice the question of ships employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization.' 1833 UNTS 396, opened for signature on 10 December 1982 and entered into force on 16 November 1994.

4 Maurice René Simonnet, *La Convention sur la Haute Mer* (1966), 88.

Although the rules applicable to the oceans have inspired in many respects those applicable in the air and in outer space, it is conceptually wrong to import *in toto* the rules governing one space into the others. This book also examines the rules on nationality of aircraft and space objects and the capacity of international organizations to act as registering entities. The enabling rule in the 1975 Convention on the Registration of Objects Launched into Outer Space actually may put the discussions on the maritime flag of international organizations into perspective.

The nationality of means of transportation is at the core of this study. Although nobody contests the existence of subjects of international law other than States, it is less easy to determine whether the bundle of international rights and duties in relation to means of transportation, commonly known as 'nationality', may be linked to international entities other than States. International organizations have restricted legal capacity and defined purposes to achieve, but does this necessarily mean that the kind of jurisdiction that States exercise over means of transportation cannot be exercised by international organizations as well? The answer has not attracted a lot of attention and there is a shortage of analyses. Further, no writer dealt simultaneously with sea, air and outer space. This also means that materials are scant and the answer cannot dispense with a careful examination of the concept of nationality and of the position of international organizations in the international legal order. It is perhaps important to stress that this study is not a crusade for a permissive rule. Conversely, it is largely based on the premise that, from rarity of practice, no conclusion should be drawn *a priori*. Careful examination can not only provide an analytical frame for the assessment of past practice but can also supply guidelines for the future, with clear potential applications, be they at sea (e.g. the Area,⁵ international fisheries commissions, peacekeeping), in the air (internationally registered aircraft) and in outer space (internationally registered space objects in greater number and for more diversified uses).

The book is divided in three parts. Part One puts nationality in the broader perspective of jurisdiction in international law and examines nationality of means of transportation in general, its historical development and its necessity. This part includes in greater detail what the law is on the attribution by States of a nationality to transportation, seeing as any result reached when international organizations are examined will be assessed by reference to the rules applicable to States. Part One also contains a brief definition of each mode of transportation on which nationality is conferred: ships, aircraft and space objects.

Part Two investigates whether, and under which conditions, international organizations may confer a nationality on means of transportation. The analysis proceeds in two stages: Chapter 3 looks at the *external* environment of international organizations, that is, rules of international law on the registration of means of transportation that are of a potentially general application to a class of users, the

5 The Area is governed by Part XI of the 1982 Law of the Sea Convention. The same convention defines it in Art. 1(I) as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.

class 'international organizations'. All relevant treaties and practice are reviewed. Taking account of the conclusions reached there, Chapter 4 looks at the *internal* order of international organizations to determine whether an enabling rule may be found to the benefit of some of them. In doing so, the concept of implied powers is circumscribed in order to determine whether, and how, the right to register may exist as an implied power. This also calls for an analysis of the relations between international organizations and their members and third States, and for a brief definition of international organizations. Part Two also considers the status of other, *sui generis* non-territorial subjects of international law: The Holy See, the Order of Malta and the International Committee of the Red Cross (ICRC), and their possible right to confer nationality on transport. Chapters 3 and 4 look at the same issue from reverse angles: a power found in the charter of an international organization must be in conformity with the general international legal order, and a power found in the general international legal order may only be exercised by the organization when its founders have so determined.

Part Three examines in Chapter 6 several questions relating to international registration of means of transportation, including building a regime of international registration. It introduces a necessary distinction between transport internationally registered and transport registered in a State but fulfilling a mission for an international organization: these means of transportation are called 'internationalized' in this book and are examined in Chapter 5. Such a distinction is necessary to prevent wrong conclusions when an international sign is shown on means of transportation.