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Addendum to Comments by Governments on the revised Draft Convention on the Elimination of Future Statelessness and the revised Draft Convention on the Reduction of Future Statelessness, prepared by the International Law Commission at its sixth session

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UNITED NATIONS CONFERENCE ON THE ELIMINATION OR REDUCTION OF FUTURE STATELESSNESS

Addendum to Comments by Governments on the revised Draft Convention on the Elimination of Future Statelessness and the revised Draft Convention on the Reduction of Future Statelessness prepared by the International Law Commission at its sixth session

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COMMENTS ON THE DRAFT CONVENTIONS ON THE ELIMINATION AND REDUCTION OF STATELESSNESS

1. Statelessness and Spanish legislation

The Civil Code of 1889, as virtually all the statutes of that period, never envisaged the possibility of any of its provisions causing cases of statelessness; and subsequent international doctrine and practice both failed to bring about a sufficient change in ideas on the law of nationality to prompt the prevention of such cases through the legislative process, which would have required the adjustment of traditional principles such as the rule of the supremacy of the national interest.

Moreover, Spain did not become a party to the Protocols of 1930. It was thus a radically new departure - preceded only by a few special orders of the Registrar-General's Office - when the act of 15 July 1954, for the first time in Spanish legal history, placed the principle of the reduction of statelessness on the statute book.

The preamble of the Nationality Act states that the legislator wished "to facilitate the acquisition of Spanish nationality, so far as is reasonably possible,

and to restrict accordingly the causes of its forfeiture". These words, read in their context and with due regard to the general structure of the Act, must be understood to mean that the purpose was not to increase the number of nationals indiscriminately, but rather to make the acquisition or retention of Spanish nationality somewhat easier. It is expressly and solemnly stated that "the Act has rectified the excessively automatic character of the Civil Code, which was so apt to create cases of statelessness". This line of thought is particularly apparent in the following provisions:

> "Children born of a Spanish mother shall be Spanish nationals, even if their father is an alien, if they do not follow the nationality of the father" (part 17 (2)).
>
> "The following shall lose Spanish nationality:
>
> "A Spanish woman who, by marriage with an alien, acquires her husband's nationality" (art. 23, (3)); "A woman whose husband loses Spanish nationality, if she is not legally separated from him and her nationality depends on his" (art.23, (4)); "Minors under parental authority whose father loses Spanish nationality, provided that their nationality depends on that of the father." (art. 23, (5)).

Other provisions which contribute to the reduction in cases of statel ssness are the rule according to which persons born in Spain of unknown parents shall be deemed Spanish nationals (art. 17, 4), and the rule which vests in all other persons born in Spanish territory of foreign parents the power or right to acquire Spanish nationality by option (without restrictions, or the possibility of objection on the part of the Government) (art. 18, (1)).

The special consideration shown to refugees and stateless persons is also evident from the fact that they are entitled to enjoy the same benefits as Spanish nationals under the Urban Rents Act of 22 December 1955 (consolidated text of 13 April 1957, embodying the amendments contained in article 1 of the Decree of 22 February 1957). Furthermore, a stateless person is allowed to make an official declaration of domicile (art. 96, (3) of the Civil Status Act of 8 June 1957; art. 337 of the Regulation of 14 November 1958) in order to facilitate the application, in his favour, of the Domicile Act (to which the preamble of the Decree of 22 February 1957 refers).

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In order to assess properly the legislator's preoccupation with the elimination of statelessness, it should be noted that he considered this objective more important than the conservation of the juridical unity of the family; yet such conservation is a fundamental principle of Spanish law, authoritatively described as designed to prevent cases where members of one family "become foreigners to each other, with several different laws governing their relationships" (speech of the Minister of Justice before the Cortes in defence of the Nationality Bill).

In conclusion, therefore, it would be difficult to find today a legal system which makes more comprehensive provision than Spanish legislation for the reduction of statelessness and for furthering the interests of stateless persons and refugees.

2. Purpose and general characteristics of the draft conventions

The preambles of the International Law Commission's two drafts both refer, in the first place, to the Universal Declaration of Human Rights (adopted on 12 December 1948), which proclaims that "Everyone has the right to a nationality" (art. 15).

In reality, however, the drafts could not remain true to the precept of the Universal Declaration. The idea of the supremacy of State sovereignty and the belief of States in the soundness of their own legislation are today as serious obstacles to international action as they were in 1930. So much so, in fact, that the International Law Commission has abandoned its attempt to prepare a Convention on the elimination of present statelessness, stating that, in view of the great difficulties of a non-legal nature which beset the problem, the proposals adopted, though worded in the form of articles, "should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem.

The full text of the relevant provision of the Universal Declaration reads as follows:

"1. Everyone has the right to a nationality.

"2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The drafts unfortunately have not adhered to the letter and spirit of that provision. None of their articles recognize a stateless person's right to acquire a nationality. A nationality is imposed upon him, whether he wishes it or not. Would it not have been more consistent with the Declaration and more convenient for the stateless persons and even for the receiving States to grant such persons a right to opt for the nationality of their country of residence?

Both drafts propose that the domestic legislation of States should be amended, to ensure that no person shall find himself without a nationality merely because the husband or father loses his. This may be said to be an equitable safeguard. It should have been accompanied, however, in order to conform with the Declaration, by a right right to change nationality; the convention should recognize that the wife or child are entitled to acquire the nationality of the husband or father.

One defect of the drafts, which gravely impairs their effectiveness, is that they refer solely to "de jure" stateless persons, i.e., those whose lack of nationality has been duly established. No provision is made for de facto stateless persons, i.e. those suffering persecution or enjoying no protection from their country of origin. The acquisition by such persons of the nationality of the country of residence should be facilitated, for they are at present confronted with the difficulty of proving statelessness. This negative condition can only be fulfilled in a relatively satisfactory manner in cases where there has been deprivation of nationality by an express statutory provision or by a judicial or administrative order; in other cases, it is practically impossible to prove anything other than flight, persecution or abandonment.

The drafts start from the premise that the possession of a nationality is desirable. The Commission has taken into account the fact that the oft-proclaimed equality of nationals and aliens before the law (stipulated in article 27 of the Civil Code) has again been on the wane, until very little of it remains. The stateless person is subject to all the restrictions which the law places on aliens and enjoys none of the rights and advantages granted to subjects of specified countries (no most-favoured-nation clause can operate in his favour). Since an individual cannot be an active subject of international law, the stateless person, being unable to claim the protection of any country (status activus,

jus ad protectionen), is abandoned to his fate. But it is doubtful whether the stateless person's interests are best served by imposing a nationality upon him. What displaced persons and refugees seem to desire is the restoration of the jus communicationis, on the removal of artificial barriers, freedom of establishment and the facilitation of naturalization in the country of their choice.

The aforesaid should not be construed as a censure or reproach directed against the authors of the drafts. The attainment of the liberal objectives of the Universal Declaration was undoubtedly hindered by the cautious attitude of Governments. The proposals may be regarded as a first step, likely to contribute both to the removal of inequities and, above all, to the formation of a proper climate of opinion.

3. Preambles of the drafts

The preambles of the two drafts are substantially the same and can consequently be considered together.

The first two preambular paragraphs base the drafts on the Universal Declaration of Human Rights and on the recognition by the Economic and Social Council of the need to consider the problem of stateless persons in order "to ensure that everyone shall have an effective right to a nationality". The third paragraph refers to the "suffering and hardship shocking to conscience and offensive to the dignity of man", to which statelessness gives rise.

As has already been shown, the drafts fail to guarantee human rights or to offer an effective and complete remedy for the evils mentioned in the preambles. In fact, their objective has been so limited that it seems to be no wider than that of the 1930 Protocols: the suppression of a cause of the "friction between States" mentioned in the fourth preambular paragraph.

The fifth paragraph is ambiguously worded and, unless revised, may be interpreted as a statement inconsistent with the body of opinion favouring the recognition of the individual as an active subject of international law.

The general wording of the preambular paragraphs seems inexact or over-sanguine. It is incorrect to say that the practice of States has increasingly tended to the progressive elimination of statelessness. Rules sponsored by feminist movements and those brought about by the weakening of family ties can hardly be

regarded as evidence of such a tendency. All that can be said is that the legislation of various countries - as, for example, Spanish legislation - seeks to prevent cases of statelessness from arising.

4. The articles of the drafts

The two drafts are similarly numbered and contain many common provisions. In view of this, and in order to avoid needless repetition, they will be considered together, with the differences pointed out where they occur. Also, for the sake of brevity, they will be referred to as "the elimination draft" and "the reduction draft".

Article 1

(a) The "elimination draft" automatically imposes the nationality of the place of birth on any person who would otherwise be stateless.

The wording, at least in the Spanish text, leaves something to be desired. The expression "shall acquire at birth" may be interpreted to mean that every person who finds himself without a nationality shall acquire - even though without retroactive effect - the nationality of the State in whose territory he was born. Such a stipulation seems inadmissible.

The proposed rule has the defects inherent in a rigid jus soli system. For example, a stateless woman may become indisposed while travelling and give premature birth to a child at Barcelona airport. Shortly afterwards, the mother and child continue their journey to Brazil, where the family proceeds to settle. Why should the child, in such a case, have Spanish nationality imposed upon him ex nativitate?

The solution proposed in the draft is contrary to Spanish law. Before the 1954 reform it might have been admissible, by virtue of the original article 17 of the Civil Code, although most learned authorities thought otherwise. Since the new wording of the Civil Code, however, there seems no doubt that it would be rejected.

(b) The "reduction draft" is not so difficult to reconcile with the legislation of countries which follow the jus sanguinis. But there is a difficulty about the provision that a stateless person who on attaining the age of

eighteen years "does not opt for" another nationality thereupon acquires the nationality of the country of his birth; it disregards the will of the stateless person, for it imposes on him a nationality which he may not desire. If he has not been normally resident in the country of his birth (from the time of his birth) and there is no possibility of his acquiring or having imposed on him any other nationality, i.e. if he continues to be stateless (the text incorrectly uses the words "would become"), he is automatically made to take the nationality of one of his parents (jus sanguinis). But, here again, there is the possibility that the State concerned may make the acquisition of its nationality dependent upon the person having been normally resident in its Territory. Moreover, it should be made clear what is meant by "normally resident", for the Spanish text of the draft speaks of residencia normal in article 1 and of residencia habitual in article 4.

(c) It would seem preferable to adopt a simple and clear system.

The system envisaged in the "elimination draft" has the advantage of fixing nationality from the time of birth. This is in the interest of the person concerned, for it will entitle him to benefits during his youth (facilities for study, scholarships etc.), and also of the State, for the sense of national "belonging" helps to develop that sentiment of attachment and fidelity which has always been regarded as a necessary concomitant of citizenship. Spanish law does not provide for this mode of acquisition, but neither does it reject it.

The "reduction draft" raises difficulties through its needless complexity. The system envisaged in article 18 (1) of the Spanish Civil Code, which is clear and easy to apply, would seem more appropriate for the purpose.

Article 2

This article is the same in both drafts and its incorporation into Spanish law should not present serious difficulties. It would only be necessary to convert what is now a presumption of fact (Civil Code, arts. 1249 and 1253) into a presumption juris tantum (arts. 1250, 1251). The presumption in the draft neither seems to be nor should be a presumption juris et de jure.

At least in the Spanish text, the excessively narrow term expósito (foundling) should be replaced by an expression designed to cover a child in whose case the unknown factors are not only the parents but also the place of birth.

Article 3

This article is the same in both drafts. The cases envisaged are so exceptional that it is of little practical importance whether this provision is approved or rejected. The only danger is that it might give the impression that the acquisition of a nationality is a matter of pure chance and, at times, also open to fraud. A child may be born, for example, on a coasting vessel plying between national ports but flying a foreign flag; on a ship in transit between territories neither of which belongs to the State of the flag or of registration; or on a ship flying a flag of "convenience" (Panamanian, Liberian etc.). Again, childbirth may occur during a visit on board a foreign ship; or the mother may embark in order to give birth during the voyage, so that the child may acquire the ship's nationality.

Article 4

The "elimination draft" lays down the jus sanguinis rule as a supplement to the jus soli rule in article 1, in order to provide for cases where the latter cannot apply because the birth takes place in a country which is not a party to the Convention. According to the view held in Spain and many other countries, the reverse order should have been followed and the jus sanguinis given priority. The proposed article, however, is not open to serious objection, as it would have certain beneficial effects. For example, a child born of a German father and a stateless mother in the territory of a State whose nationality is not acquired by the jus soli would take German nationality (assuming that Germany ratified the Convention).

The "reduction draft" seems excessively restrictive. It allows a party to make the acquisition of its nationality dependent on the person having been "normally resident" in its territory. This would hinder the practical application of the provision, for each State would be free to determine what it meant by normal residence.

Articles 5 and 6

These are the same in both drafts and do not seem open to objection, since the underlying considerations in both cases seem to be substantially the same as those which prompted the reform of 1954.

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Some mention should perhaps be made of the special case of change in status in consequence of the discovery of a true parent of the person concerned (e.g., as a result of recognition or ascertainment of paternity or maternity; or upon a declaration of legitimate filiation). In any such case the jus sanguinis would come into play.

Article 7

The contents of the first paragraphs of this article, which is the same in both drafts, are designed to render ineffective any renunciation of nationality which results in statelessness. As renunciation is unknown in Spanish law, there would be no legal objection to accepting the proposal. The same can also be said regarding the second paragraph.

The third paragraph, which is differently worded in each draft, also does not clash with Spanish legislation and, like the entire article, seems designed to serve a reasonable purpose. Some difficulties may perhaps be caused, however, by the vagueness of the phrase "or on any other similar ground".

Article 8

In both drafts, this article is fundamentally incompatible with the letter and spirit of Spanish legislation and would seem likely to prove unacceptable to the majority of States.

So far as its practical consequences alone are concerned, it is admittedly unexceptionable. No person has ever lost his nationality for any of the reasons indicated in article 23, paragraphs 1 and 2 of the Civil Code and no such cases of forfeiture are likely to occur in the future. The difficulty is not practical but a matter of principle. On the one hand, these grounds of forfeiture are listed in a fundamental law (art. 20 of the Charter of the Spanish People) and, on the other hand, there is no convincing reason for abandoning certain basic criteria (fidelity, obedience, loyalty) which have to be considered in determining whether a person who would otherwise be without a nationality (and only such a person) should be deemed a national. However desirable the prevention of statelessness may be, it would be unreasonable to undermine for that purpose the very conception of nationality.

By reason of the above, the text proposed in the "elimination draft" seems difficult to accept. The one in the "reduction draft" could be considered, subject to a few modifications. There should certainly be a possibility of depriving of nationality persons who "voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State". This provision is substantially consistent with Spanish legislation (Civil Code, article 23, 1). As regards paragraph 2, provision should be made for the possibility of loss of nationality (even if it results in statelessness) in cases of naturalized persons who are convicted for serious offences, if the court orders deprivation as an accessory penalty. (Penal Code, articles 34 and 141; Civil Code, art. 23, (2)).

The provision, common to both drafts, which stipulates that a State may not deprive its nationals of their nationality "by way of penalty or on any other ground" seems unduly far-reaching. Such a provision could render ineffective a court order declaring null and void an acquisition of nationality based on false or defective documents.

Article 9

The same text is used in both drafts. The principle stated is most praiseworthy and can be accepted, provided that it is properly construed. For example, deprivation by court order in consequence of a conviction for serious offences committed against the external security of the State should not be regarded as dictated by "political" motives (Penal Code, arts. 120 to 139).

Article 10

So far as its substance is concerned, this article, which is the same in both drafts, does not seem open to serious criticism. On the other hand, it seems hardly suitable for inclusion in a convention on statelessness. Governments can hardly envisage, on signing the convention, all the various possibilities to which a transfer of territory may give rise, and they clearly cannot assume a binding international commitment in that matter in advance. The provision thus seems to be as unnecessary as it is impracticable and imprudent.

Article 11

Both drafts propose the establishment of: (1) an agency, within the framework of the United Nations, to act on behalf of stateless persons; (2) a tribunal, also within the framework of the United Nations, competent to decide any dispute between States concerning the interpretation or application of the convention and between stateless persons and States in cases of denial of nationality. Furthermore, the parties would agree to submit to the International Court of Justice any dispute concerning the interpretation or application of the convention not referred to the aforementioned special tribunal.

The organization envisaged seems wholly disproportionate. The drafts call for the establishment of a gigantic, inevitably costly and complicated machinery to deal with a matter which the convention would render of secondary significance and which, in any event, cannot be expected to give rise to numerous and important cases. It is not easy to imagine situations sufficiently serious to justify the creation and putting into operation of United Nations organs; but if the unlikely should happen and, because of the attitude of the parties or the gravity of the issues, the agency or special tribunal were in fact called upon to give decisions, the proceedings themselves could endanger the purposes of the convention and even its continued existence. There would be the risk of States, anxious to be spared vexing complaints, closing their frontiers to stateless persons altogether. Moreover, if conflicts should arise between States, they would probably proceed to denounce the convention which was the source of such annoyance.

The lack of confidence which the drafts seem to show in the national courts of the possible signatory States seems neither fair nor prudent. Normally, the national courts will be the stateless person's best and most convenient safeguard.

Formal provisions (arts. 12 to 18)

Article 13 deals with reservations. It permits any State to postpone, for a period not exceeding two years, the application of the convention pending the enactment of necessary legislation. This seems also to give States the possibility of choosing the mode of applying the convention: either by changing

(or enacting the necessary) domestic legislation, or by making the rules of the convention have (or acquire) the force of municipal provisions with immediate effect.

Paragraph 2 of article 13 prohibits any other reservation. It should be noted, however, that articles 1 and 4 of the "reduction draft" contain provisions which would amount to reservations in practice (States may impose conditions).

Lastly, the period of two years allowed by article 13 for bringing the different national legislations into line with the convention seems excessively short and should preferably be extended.
