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Extracts from Mr. Georges Kaeckenbeeck's book "The International Experiment of Upper Silesia" (1942) Prepared by Mr. Ivan S. Kerno, Expert of the International Law Commission

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NATIONALITY INCLUDING STATELESSNESS

Extracts from Mr. Georges Kaeckenbeeck's book "The International Experiment of Upper Silesia" (1942)

prepared by

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Note: Among the points submitted for discussion by Mr. Manley O. Hudson in Annex III to his Report on Nationality including Statelessness (A/CN.4/50) was the following point 8:

> "Can any useful system of arbitration be devised, on analogy to the precedent established in Upper Silesia, for resolving conflicts between national laws which have resulted in statelessness?"

In the course of the discussion of this point at the fourth session, the Commission, on the proposal of Mr. Lauterpacht, requested that extracts from Mr. Georges Kaeckenbeeck's book, The International Experiment in Upper Silesia, should be presented to it at its next session (A/CN.4/SR.161, paragraphs 17 and 36). The present paper has been prepared in pursuance of this request.

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The problem of nationality in Upper Silesia required, because of the divergent interpretations of nationality of Germany and Poland, the use of both organs of arrangement and organs of decision. The Geneva Convention provided for both, setting up in article 56 a Conciliation Commission of one member from each country and article 58 an Arbitral Tribunal with an impartial President. Failing settlement by the Commission, a matter went to the Tribunal which had the last word and the decisions of which were absolutely binding within the territories of the two States under article 591(2).

The Tribunal handled upwards of 7741 cases (pp.130-1) although, particularly in the early years, it found that the Commission tried to prevent cases from going further (p.130). It considered all of the facts as a whole in a case and tried to avoid rigidity (p.141) laying down general principles for such things as the interpretation of domicile (pp.138, 151) but not trying each time to formulate a rigid precedent (p.137).

The system is said to have been effective in saving persons from being considered stateless and hence without treaty rights (pp.173-4) and it is noted that a judicial atmosphere sometimes works wonders even where conciliation cannot (p.164). Further, the option cases in particular are said to give "a singular illustration of the usefulness of an international judicial organ - and show how ill adapted to the settlement of delicate individual issues traditional administrative and diplomatic methods are." (p.162). The particular weakness of the system is pointed out, that is, that even where the Tribunal found in some instances that rights had been infringed, there was no provision for redress (p.192). Even here though, the procedure pointed up the difficulties and exposed them to cure (p.193).

The working and effect of the system are indicated by President Kaeckenbeeck's own words. The operation is spoken of as follows:

> "The judicial control of the application of the nationality provisions of the Geneva Convention . . . has the following characteristics: it is initiated by the individual concerned, it forms the object of an independent procedure, and it leads to a decision which is absolutely and for all purposes binding within the territory of the two Contracting Parties" (p.172).

The advantages of the system are indicated in these terms:

> "This decision again strikingly shows the difference between the application of nationality provisions under international judicial control and as between sovereign States. Neither the individual's right to a nationality nor the rule of law can be assured, in the face of conflicting State policies, without a judicial organ of the kind of the Arbitral Tribunal. This has been abundantly proved in Upper Silesia, if one compares what happened there with the long-protracted insoluble conflicts which have happened elsewhere and have been so fertile in human misery"(p.171).

Kaeckenbeeck concludes that the Tribunal points the way to a solution of difficult problems:

> ". . .(my conclusions) are distinctly positive with regard to the international judicial control of change of nationality and option. Here I strongly believe that there is room, nay an imperative need, for international judicial control precisely in cases where racial and political antagonisms are to be feared. I believe that the experience of the Arbitral Tribunal in Upper Silesia is conclusive in this respect. The combination of a Conciliation Commission and of an Arbitral Tribunal commends itself. And above all, I am convinced that the experiment of letting individuals take the initiative of claiming and defending their right to a nationality is invaluable . . . it may not be amiss to lay once more stress on two of the essential conditions of its success: first, art. 591.cl.2 and art.592: the absolutely binding character of the Arbitral Tribunal's decisions on nationality, and the general binding force as precedents for all courts and authorities of the two States, of decisions published by the Arbitral Tribunal. . ."
>
> "The second condition was the conception of the right to a nationality according to the treaty provisions as a subjective right on which the Arbitral Tribunal was competent to pass." (pp.213-214).

His general conclusions are as follows:

> ". . . the experience of the Arbitral Tribunal . . . appears to me to be conclusive in showing the great advantage of an international judicial control. . . It demonstrated the value of some such notion as that of an individual right to one's nationality, the acquisition or loss of which should be a matter of law, and not simply one of discretion for national authorities.
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> "It also proved the usefulness of letting individuals claim and defend their right to a nationality before bilateral and even international judicial organs." (p.521).
