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Summary record of the 223rd meeting

Topic:
Nationality including statelessness

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The additional article proposed by the Special Rapporteur was adopted as amended by 8 votes to 2, with 3 abstentions.

The meeting rose at 1.5 p.m.

223rd MEETING

Friday, 24 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Article VIII [9]

1. The CHAIRMAN invited the Commission to continue its consideration of the draft Convention on the Reduction of Future Statelessness, beginning with article VIII.

2. Mr. CÓRDOVA (Special Rapporteur) proposed that article VIII be replaced by the text which the Commission had adopted for the corresponding article (article 9) of the draft Convention on the Elimination of Future Statelessness. That text read as follows:

"1. Treaties whereby territories are transferred must include the provisions necessary to ensure that inhabitants of the territories affected do not become stateless, while respecting their right of option.

"2. In the absence of such provisions, States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality".[1]

3. Mr. YEPES supported Mr. Córdova's proposal as being the only logical course the Commission could follow.

Mr. Córdova's proposal was adopted by 9 votes to 2.

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*resumed from the 220th meeting*)

Article on the interpretation and implementation of the Conventions [Article 10]

4. The CHAIRMAN recalled that at the 219th meeting the Commission had considered a joint proposal by the Special Rapporteur and Mr. Scelle for an article dealing with the settlement by arbitration of disputes arising out of the draft Convention on the Elimination of Future Statelessness.[2] Some members had felt that it was undesirable to make provision for compulsory arbitration at all; others had been favourable to the idea in principle, but had pointed out that the joint proposal did not cover the case of disputes between a State and an individual. Mr. Hsu had subsequently submitted a proposal to the effect that an additional article, reading:

"A Commission under the auspices of the United Nations shall be established to act on behalf of stateless persons in cases of dispute contemplated in the preceding article",

be inserted after the joint proposal of the Special Rapporteur and Mr. Scelle, the latter proposal to be brought into line with it. The Special Rapporteur hal also submitted a revised proposal, reading as follows:

"The parties agree to the creation of an arbitral tribunal with jurisdiction to decide all controversial questions with regard to the interpretation of the terms of this Convention and to the determination of the nationality of individuals envisaged in its articles.

"Access to such tribunal will be open to the States parties to the Convention as well as to individuals whom the wrongful application of its provisions, or of those of the national legislations of such States, might render stateless".

5. Mr. HSU said that he had no objections to the new text proposed by the Special Rapporteur; the purpose of his own proposal had been to meet the objections which had been raised to the individual's having access

[1] See *supra*, 218th meeting, paras. 88-94.

[2] See *supra*, 219th meeting, paras. 45-63.

to the international tribunal, by providing for a commission which would act as an intermediary between him and it.

6. Mr. CÓRDOVA said that the sole aim of his new proposal was to clarify the main lines of the procedure which should be followed. As the question had already been discussed at length, he did not think that the Commission need go over the whole ground again.

7. Mr. KOZHEVNIKOV said that, as he had already made clear his general attitude in the matter,[3] he need only say that he could not accept the new text proposed by the Special Rapporteur, because, like the earlier joint proposal, it was based on two wholly unacceptable ideas. The first was that of compulsory arbitration, which was incompatible with such fundamental principles of international law as the sovereignty of States; the second was the idea that the individual could be a subject of international law. That idea was flatly contradictory to the existing structure of international law, which was designed to regulate relations between States.

8. Faris Bey el-KHOURI saw no need for setting up an arbitral tribunal, with the permanent staff and headquarters it would need, merely to settle disputes arising out of one particular convention. Disputes between States could be settled by the ordinary processes provided in the United Nations Charter, while if the dispute was between an individual and a State whose nationality he claimed, there was no reason why he should not apply to the national courts, which would have to apply the convention as part of national law. He could not therefore support the new text proposed by the Special Rapporteur.

9. Mr. ALFARO said that the joint proposal, Mr. Córdova's new proposal and Mr. Hsu's proposal all envisaged the possibility of some form of international tribunal to ensure the individual's right to a nationality. The fact that that might lead to litigation between individuals and States constituted no obstacle; as had been pointed out, there were several precedents for such litigation. There were, for example, the Anglo-Iranian dispute, and the arbitral tribunal in Upper Silesia. More important, there were all the claims commissions which States had set up to settle claims by the nationals of one of them against the government of the other. Litigation between individuals and States was, therefore, a juridical possibility.

10. It had been said that the individual could not be a subject of international law. He completely disagreed. That question was no longer a matter for academic disputation, as it had been when A. Alvarez and A. de Lapradelle had urged the opposite view at the Havana and Rome meetings of the American and European Institutes of International Law,[4] or when Spiropoulos and other authors had written books about it. The question had been juridically settled by the Charter of the United Nations, which contained no less than seven passages providing for the recognition, promotion and enforcement of the rights of the individual. The Judgment of the Nürnberg Tribunal, the Convention on Genocide and the Draft Code of Offences against the Peace and Security of Mankind also proved that the individual not only had certain rights before international law, but also had certain obligations, for the breach of which he could be summoned, tried and punished. The individual was now therefore recognized to be both an active and a passive subject of international law and he could not see why the Commission should be unwilling to include in the draft Convention on the Reduction of Future Statelessness a provision which would enable him to defend his rights before an international tribunal. If the Commission felt unable to do that, it should at least discuss fully the possibility and expediency of establishing such a tribunal, and should set down its conclusions in its report.

11. Mr. SCELLE warmly supported the new proposal submitted by the Special Rapporteur, and fully agreed with what Mr. Alfaro had just said. It was undeniable that the tendency of modern international law was to regard the individual as the primary cell of international society. That tendency was noted, for example, by an author such as Guggenheim, in his "*Lehrbuch des Völkerrechts*", which was purely positivist in approach, and did not proceed from any preconceived ideas as to what should be, but was solely concerned with presenting the facts as they were. The same tendency had been apparent in the Commission's own work. But the concept of the individual as a subject of international law was nothing new. Many precedents had already been mentioned, and he would only refer to the Mavromatis and Ambatielos cases, in which the intervention of a government on behalf of the individual had been pure formalities.

12. He still could not accept Faris Bey el-Khouri's argument that the individual would be free to appeal to national courts. However fair they might strive to be, such courts could not but be subject to countless different pressures, all combining to work on balance against the interests of the stateless individual.

13. It was again necessary to point out that the procedure which Mr. Córdova was proposing was not the ordinary long-drawn-out arbitral procedure, still less that of the International Court of Justice, it was a special procedure, which had a parallel in the European Court of Human Rights, to which Mr. Spiropoulos had drawn attention; that court, however, had to deal with violations of many different rights, whereas the proposed arbitral tribunal would have to deal only with violations of the right to nationality.

14. Mr. KOZHEVNIKOV said that the views expressed by certain authorities to the effect that the individual could be a subject of international law did not constitute proof, particularly when the contrary

[3] *Ibid.*, paras. 52-53, and 220th meeting, paras. 2-6.

[4] See, *inter alia*, *Annuaire de l'Institut de droit international*, 1921, pp. 203-224 and Instituto Americano de Derecho Internacional, *Actas y memorias y proyectos de las sesiones de La Habana* (New York, Oxford University Press, 1918), pp. 242-305; p. 312.

views of other authorities could be quoted, in even greater number, against them. It had also been argued that it was in accordance with the trend of international law to regard the individual as a subject of international law, but trends could be divergent, and even opposed. Certainly, there was a tendency to forsake such long-established principles of international law as that the sole subjects of international law were States; there was also a tendency to substitute for the sovereignty of States some kind of world government; but that tendency could only lead to the complete stultification of international law. It was not the Commission's task to create an entirely new system of international law but to codify and develop present law within its existing framework.

15. Several of the arguments which had been advanced in favour of the Special Rapporteur's proposal did not in fact buttress it at all. It was not true to argue, for example, that the Judgment of the Nürnberg Tribunal made the individual a subject of international law; international law forbade not only aggression itself, but also propaganda for and the preparation of aggression, as well as war crimes and crimes against humanity, and it was clear that any individuals guilty of those crimes should be punished. That however, in no way meant that the individual thereby became a subject of international law. The United Nations Charter, which began with the words "WE THE PEOPLES OF THE UNITED NATIONS" was also clearly based on the principle that international law was the means of regulating relations between "peoples", in other words between States.

16. The absurdity of the suggestion that international law was a matter for individuals could be seen if it were borne in mind that, in that case, all the texts which the Commission prepared should logically be submitted to individuals for approval. That of course was not the case. The texts were submitted to States, since States alone were responsible in the matter.

17. Many more arguments could be advanced against the Special Rapporteur's proposal, but he would confine himself to saying that in his view it was essential that the Commission should adhere to the recognized view of international law as an instrument for regulating relations between States.

18. Mr. LAUTERPACHT recalled that the Commission had agreed in principle that it would not be sufficient for it to refer to the question of settlement of disputes only in its report, but that it would consider an article along the lines of that proposed by the Special Rapporteur, even if it considered no other final clauses. There had been a full discussion at the 219th meeting, and further illuminating statements had been made at the present meeting by Mr. Alfaro and Mr. Scelle. He had no hesitation in supporting in principle the new text proposed by the Special Rapporteur.

19. That text, however, was incomplete in one respect. If it were adopted, the Parties would agree only to set up an arbitral tribunal at some indefinite date. It thus constituted what was sometimes called a "*pactum de contrahendo*". Had the Commission's draft on arbitral procedure been part of accepted law, that might have been sufficient, since in the event of the parties' failure to agree on the tribunal's composition and procedure, those matters would have been settled by the draft on arbitral procedure. That draft, however, was not yet law; moreover, it applied only to arbitral tribunals set up as occasion demanded to settle disputes between States, not to a permanent tribunal which would be mainly concerned with disputes between a State and an individual. He therefore proposed that the following paragraph be added to the new text proposed by Mr. Córdova:

> "If, after two years from the entry into force of this Convention, the parties have been unable to agree on the establishment of the arbitral tribunal referred to in paragraph 1 above, the composition and procedure of the tribunal shall be determined by the General Assembly."

20. Mr. CÓRDOVA said that he did not feel it necessary to reply again to the other arguments which had been advanced against his proposal. With regard to Faris Bey el-Khouri's, he would merely point out that the judges of any national tribunal were necessarily bound by existing national legislation and that the existing national law often resulted in statelessness.

21. Mr. ZOUREK recalled that he had already stated his views on the matter under discussion at the 220th meeting.[5] However, new arguments having been advanced, he felt obliged again to make his position clear.

22. In the first place, he considered that it was completely unnecessary to oblige States to have recourse to compulsory arbitration, as was proposed in the new text submitted by the Special Rapporteur; States which wished to settle their disputes by peaceful means could have recourse to many other procedures, for example, that provided in the optional clause of Article 36 of the Statute of the International Court of Justice. There was no good reason why States should be obliged to resort to arbitration in every case, unless the view was held, as it appeared to be held by some members of the Commission, that an arbitral tribunal constituted some kind of supra-national authority to which States were subject. That view, however, was quite unacceptable, and the arguments which had been advanced in favour of it were wholly unconvincing.

23. The new proposal by the Special Rapporteur also provided that access to the arbitral tribunal should be open to individuals not only in cases where they alleged that wrongful application of the provisions of the draft convention might render them stateless, but also in cases where they alleged that wrongful application of national legislation might have the same effect. It was true that individuals had been permitted access to an international tribunal in the past, but such access had always been exceptional, and severely limited in time

[5] See *supra*, 220th meeting, paras. 7-10.

and in space. The general practice was that an individual could be represented in international law only by the State of which he was a national, and the examples which had been adduced to the contrary only recoiled against those who had advanced them; the cases of Mavromatis and Ambatielos had only been submitted to an international tribunal because they had been taken up by the United Kingdom and Greek Governments. Reference to the Anglo-Iranian oil dispute revealed a regrettable confusion of mind between private international law and public international law; it was obviously an every-day occurrence for States to negotiate with individuals on matters of private international law. Finally, as Mr. Kozhevnikov had pointed out, the fact that individuals could be punished for certain offences against international law did not make them subjects of international law, and the Charter of the United Nations conferred certain rights and imposed certain duties not on individuals, but only on States. There was, of course, a "normativist" school of international law which maintained that the individual was the subject of international law, but that view was by no means generally accepted; at least as many authorities, no less eminent, could be cited in support of the contrary view.

25. For those reasons, and for other reasons too, he considered that the Commission would be wise to leave aside so controversial a matter as that raised by the Special Rapporteur's proposal.

25. Mr. SPIROPOULOS said that he started from the premise that the question of statelessness was only one aspect of the larger question of nationality. He agreed with Mr. Kozhevnikov that the question of nationality lay within the exclusive competence of States, provided, that was to say, that the actions taken by States in that field did not give rise to abuse. It was because statelessness was one such abuse that he agreed that the Commission was doing useful work by laying down certain standards or certain ideals towards which States should strive. The Commission had decided to embody those standards in a convention, though he personally did not see how any State could sign a convention on a matter which lay solely within its competence. If a State felt that it could sign such a convention, however, it would certainly not be deterred by the fact that it contained a provision such as that proposed by the Special Rapporteur.

26. Conventions sometimes contained special provisions relating to their implementation and interpretation, especially in the case of disputes; sometimes they did not, in which case it was understood that recourse would be had to existing tribunals and procedures. If the Commission's work on statelessness was to be cast in the form of a convention, it seemed to him obvious that in that convention, as in no other, it was absolutely essential that some such special provision should be made, since the existing tribunals and procedures would be unable to handle disputes arising out of it. By its very nature it was unlikely to give rise to disputes between States, which occurred only when there was a clash of interests. In the case of statelessness, the interests of States were not involved; it was only the individual who suffered. National tribunals naturally had to apply the law of the country, but if the convention was ratified it would automatically become the law of each ratifying State. To that extent Faris Bey el-Khouri was right. The national tribunals might, however, misinterpret the convention; such cases would be exceptional, but the Commission should not, for that reason, fail to provide for them.

27. The academic question whether or not the individual was a subject of international law was totally irrelevant to the practical question which the Commission had to consider. The International Court of Justice, for example, had never stopped to consider whether the claimant in any action brought before it was a subject of international law; its sole concern had been to ascertain whether under existing law he possessed certain rights, and whether those rights had been violated. If States were willing to conclude and sign a convention on statelessness, there was no reason whatsoever why they should not provide in it that individuals who considered that the rights which the convention conferred on them were threatened should be free and able to seek justice before an international tribunal. And, as had been pointed out, there were precedents for such a provision, in cases where it had not been so essential as in the present, where the intended beneficiaries of the Convention could look to no one but themselves to uphold their rights.

28. With regard to the detailed machinery which should be provided, he felt there was much to be said for Mr. Hsu's proposal, since the stateless person would usually have neither the means nor the knowledge to bring his case before an international tribunal; the proposed commission could, in that respect, take the place of his State, and it could also advise him whether his case was worth submitting to the arbitral tribunal.

29. Faris Bey el-KHOURI said that, no matter what other members of the Commission might have said, the Special Rapporteur's proposal would, for the first time in history, enable individuals to summon States before an international tribunal.

30. It had been argued that international tribunals had to pass judgment in accordance with the existing law, but his point was that, once ratified by Parliament, the convention would be part of a country's existing law. In theory, it was recognized that treaties were binding and superseded existing municipal law where they conflicted with it; it was unfortunately the fact that that principle was not everywhere respected. He hoped, however, and he believed that it was the intention of Mr. Lauterpacht, the Special Rapporteur for that subject, that when the Commission took up the law of treaties that principle would be clearly and explicitly confirmed.

31. Article VII, paragraph 2, of the draft Convention on the Reduction of Future Statelessness stated that deprivation of nationality, where allowed, "should be decided in each case only by a judicial authority acting

in accordance with the due process of law". In adopting that paragraph, the Commission had surely not been intending that decisions taken by a country's judicial authorities, in some cases after appeal to the Supreme Court, could be overridden by some outside authority.

32. The practical objections to the Special Rapporteur's proposal were also decisive. The establishment of an arbitral tribunal would encourage litigation, and the institution would be overwhelmed with literally thousands of cases.

33. Mr. AMADO said that he, like the country whose legal system he had the honour to represent, the country of Alvarez, had the most profound respect for arbitration as a means for the peaceful settlement of disputes. He was, however, with the best will in the world, utterly unable to comprehend how an individual, often without means and by definition without a State behind him, could engage in arbitration with a State, could conclude a *compromis* with it, agree on the composition of the tribunal, present his case and, in general, comply with all the costly and complicated formalities which arbitration entailed. As it stood, therefore, the Special Rapporteur's new proposal was quite impracticable, and he would be obliged to vote against it. However, as Mr. Spiropoulos had said, Mr. Hsu's proposal appeared to offer a way round the enormous practical difficulties.

34. Mr. SCELLE said that those members of the Commission who supported the Special Rapporteur's proposal did not do so in any academic spirit. Their purpose was severely practical; it was to make effective the bestowal of positive law on the individual. And Mr. Kozhevnikov and Mr. Zourek could not deny that to the extent that the convention was ratified, it would bestow a positive right on the individual.

35. The argument that the individual could not be a subject of international law could not for one minute be sustained; as he had said, "positivist" authors, whose only aim was to portray the facts as they were, not as they should be, recognized that the individual was both an active and a passive subject of international law. If the Commission accepted the contrary view, it would be fifty years behind the times; it would be ignoring not only the various precedents which had been mentioned, but also the Prize Court set up before the first World War and the mixed arbitral tribunals set up immediately after it. The fact that the State had been obliged to make a purely formal intervention in the Mavromatis and Ambatielos cases afforded an indication that international law had then been, in that respect, in a transitional stage.

36. There would, of course, be serious practical difficulties about applying the full arbitral procedure to disputes between States and individuals, but, as he had already pointed out, the proposal was to apply a special procedure, where the difficulties would be much less, particularly if Mr. Hsu's proposal were adopted. In any case, the difficulties had not been considered insurmountable in the case of the Prize Court; and the experience of that court had shown that even the least influential had been able to seek and obtain justice before it.

37. He could agree with some, but not with all, of what Mr. Spiropoulos had said. Least of all could he agree with the assertion that the question of nationality lay within the exclusive competence of States. It was true that the International Court of Justice had accepted that view "in principle", but agreement in principle could mean a great deal or it could mean very little. The whole Convention was a breach, and no small one, in the system of what States were pleased to term their "exclusive competence". In his view, the exclusive competence of States extended only so far as it was impossible to breach it, and that was all that the International Court of Justice had meant.

38. Mr. SANDSTRÖM was of the opinion that the article proposed by the Special Rapporteur should be accepted. As national tribunals tended to be at the mercy of political pressures, it seemed desirable to make provision for the individual to have recourse to a special jurisdiction.

39. Various objections had been raised to the proposal. It had been asserted, for example, that it was an innovation; but there were many examples of arrangements made to enable cases to be brought before mixed courts. Further, Mr. Amado had spoken of the difficulty of concluding a *compromis* between a State and an individual. But in his (Mr. Sandström's) view the Commission was not aiming at the creation of an arbitral tribunal in the strict sense of that term; and perhaps the wording of the article should be modified to bring that out.

40. The consideration that articles otherwise desirable might, if included in the convention, prevent States from accepting it, had loomed large in the Commission's discussions. That seemed to him, however, to be essentially a political issue; moreover, the chances of the Commission's getting States to accept unpalatable articles depended greatly on the way in which they were presented.

41. As to the precise wording of the article, he did not feel that the suggestion that the arbitral tribunal should "decide all controversial questions with regard to... the determination of the nationality of individuals" was happy; he would prefer the first paragraph of the article to read as follows:

> "The Parties agree to the creation of an arbitral tribunal with jurisdiction to decide all controversial questions concerning the interpretation of this convention or the claims to a nationality made pursuant to it by individuals."

42. Mr. HSU said that, in drafting his proposal, he had endeavoured to look at the question entirely from the point of view of the interests of the stateless person. He had hoped thus to avoid raising controversial issues: for example, whether or not the individual could be a subject of international law.

43. His intention was that the commission whose

establishment he proposed would not only entertain appeals from stateless persons, but would be empowered, perhaps through the agency of regional offices, to discover for itself what stateless persons needed help and in what form. As an international agency, it would not duplicate the function of local agencies, particularly as in his view stateless persons always enjoyed the possibility of appeal to local, national courts. The special commission he had in mind was to cater for circumstances in which it was desirable for the stateless persons involved to appeal direct to the arbitral tribunal.

44. It seemed that his proposal had found some support in the Commission. If it were to be thoroughly discussed, he would like to complete it, so that the whole article would then read:

"(1) The Parties agree to submit to arbitration any disputes arising from the application of the provisions of this convention.

"(2) A commission under the auspices of the United Nations shall be established to act on behalf of stateless persons in cases of dispute contemplated in the preceding paragraph."

45. Mr. ALFARO, referring to the difficulties which Mr. Amado had seen in the conclusion of the *compromis,* said that article 9 of the Commission's final draft on arbitral procedure opened as follows:

"Unless there are prior agreements which suffice for the purpose, the Parties having recourse to arbitration shall conclude a *compromis*..."

46. It seemed to him that, in the case of the tribunal which, it was suggested, might arbitrate in cases of dispute arising out of the implementation of the convention, there might well be prior agreements that would make it unnecessary to conclude a *compromis.* Further, there would normally be only one issue before the tribunal, namely, the claim of an individual to a nationality pursuant to the terms of the convention. Further, Mr. Hsu's excellent proposal concerning the establishment of a United Nations commission would ensure that the helpless individual would be heard by the tribunal and would not, whether by a government's arbitrary decision or by a misinterpretation of the convention made in good faith, be denied a nationality to which he was entitled.

47. He thought, therefore, that an article resulting from a proper combination of the proposals of the Special Rapporteur and of Mr. Hsu would enable the ideal that had been put before them by Mr. Scelle and Mr. Spiropoulos to be attained: the recognized rights of individuals would be guaranteed in practice. A working group, on which members of the Commission particularly interested in the clause might sit, would surely be able to draft an acceptable text.

48. In his experience of international arbitral tribunals it was not uncommon for an individual to appeal against a State; and such appeals were heard in the normal course of events and decided fairly.

49. Mr. SPIROPOULOS said that there seemed to be some misunderstanding between Mr. Scelle and himself. When he (Mr. Spiropoulos) had mentioned the exclusive competence of States in the matter of nationality, and their right to legislate for it as they pleased, he had assumed that it went without saying that that competence and that right should be exercised within the limits laid down by international law. Though it had to be recognized that it was impossible to prevent a State legislating in any way it pleased, and although questions of nationality were in fact decided by States, there were evident limits — for example, a State would not be competent to decide that someone flying in an aircraft over its territory should thereby acquire its nationality.

50. Mr. Amado had mentioned the difficulties that would arise in the conclusion of a *compromis* in arbitration proceedings between an individual and a State. To his (Mr. Spiropoulos') mind, a *compromis* was not in question; indeed, the very idea of a *compromis* between an individual and a State was extraordinary. The issue was whether or not an international institution to which an individual could address a claim should be established. The institution, once set up, might well decide to adopt a procedure akin to that of domestic tribunals.

51. Indeed, he suggested that it would be premature to decide on the exact form of international tribunal to be established. It was obviously desirable that the claims of stateless individuals should be referred to some sort of commission, but joint commissions might be established to operate in the territory of each State party to the convention; such joint commissions might include one member from the State in whose territory the commission was operating and a number of foreign members, whose presence would guarantee strict impartiality in the application of the terms of the convention. Other forms of tribunal were equally possible, and it might be unnecessary even to establish a commission under the auspices of the United Nations. He felt that a general article should be adopted, the detailed implementation of which could be discussed later.

52. Mr. CÓRDOVA said that it was essential that the Commission should comply with the directives of the General Assembly and the Economic and Social Council and ensure that stateless persons were given an effective right to nationality. Even if the draft convention were universally accepted by States it would be impossible to guarantee the rights conferred on individuals pursuant to it without providing some means of redress for individuals in respect of the actions of national administrations. Indeed, the convention under discussion was essentially one for which a system of enforcement was appropriate.

53. Many precedents for regarding individuals as subjects of international law had been cited. If an individual had obligations under international law, and the proceedings of the Nürnberg Tribunal showed that he had, he must equally have rights under it. He regarded the doctrinal issue of whether or not the individual had the right of access to international arbitral proceedings as decided, there being many

pertinent examples from the mixed arbitral tribunals established by the Treaty of Versailles onwards. The arbitral tribunals between Mexico and the United States of America had always adjudicated on the claims of individuals. In the cases where States had represented individuals before such tribunals, the individuals had been the parties primarily involved and the States concerned had followed their instructions both on the presentation and on the withdrawal of their claims.

54. There were elements in the suggestions made by Mr. Hsu and Mr. Lauterpacht which could be combined with his own suggestion in order to yield a formula which he thought, might command almost unanimous approval. Mr. Lauterpacht seemed to be fearful that States parties to the convention would not in practice set up a tribunal, even though its establishment were stipulated in the convention, and had suggested that in that event the United Nations itself should establish the tribunal. Mr. Hsu was concerned that stateless and helpless persons should have effective access to any tribunal that might be established. He (Mr. Córdova) accordingly suggested that the article under discussion might consist of three paragraphs, reading:

> "1. The parties agree to the creation within the framework of the United Nations of a jurisdiction to decide on controversial questions with regard to the interpretation of the terms of this convention and to the determination as to the nationality of the individuals envisaged in its articles.
>
> "2. [Paragraph unchanged from the previous proposal made by Mr. Córdova].
>
> "3. The General Assembly of the United Nations shall establish the tribunal and indicate its rules of procedure."

55. In that way the principle of establishing a jurisdiction or system of enforcement, whether it were called a tribunal, a commission or by any other name, would be accepted by States parties to the convention. Individuals would have access to it; and its establishment would be the responsibility of the United Nations.

56. The CHAIRMAN, speaking as a member of the Commission, said that the discussion had been fruitful and instructive. For his part, he supported, in general, those members of the Commission who had opposed the inclusion of arbitration clauses in draft conventions. On the other hand, he fully admitted, following Mr. Spiropoulos' reasoning, that the present convention was essentially one in which an arbitration clause was useful; for it was concerned rather with the regulation of the relationship between individuals and States than with that of the relationships between States. He had no theoretical objection to the recognition of individuals as the subjects of international law, yet he hesitated to support the proposed article because the Commission should, above all, be practical, as Mr. Amado had rightly said. No one would benefit if the convention remained unratified. In order to avoid such a failure as had, for example, befallen the 1907 Convention on Prize Jurisdiction,[6] it was necessary, as Mr. Kozhevnikov had said, not to be too suspicious. The impression had been given that the convention would be useless without some system of enforcement; but honest governments which made a practice of abiding by their undertakings were not unknown, and the acceptance of obligations under the convention would already be a considerable step forward. A system of enforcement might be theoretically desirable; but he expected that it would be difficult enough to secure universal acceptance for the convention even without the article on arbitration.

57. A perfectionist convention which remained a dead letter would do little good. Before a system of enforcement was considered, the practical results of the convention should be seen.

58. He could sympathize with the suggestion that an article on arbitration be included in the draft Convention on the Elimination of Future Statelessness; but both Mr. Amado and himself hoped that a large number of States would accede to the draft Convention on the Reduction of Future Statelessness. He suggested that if an article on arbitration was to be included in the latter, the Commission might follow the example of the draft conventions on human rights, and make its acceptance optional.

59. Mr. Hsu's proposal for the establishment of a United Nations commission to act on behalf of stateless persons might perhaps be acceptable in the form in which it was first made. But he (Mr. François) thought it difficult to accept it coupled with the article on arbitration.

60. Mr. LAUTERPACHT said that Mr. Amado's doubts appeared mainly to relate to matters of procedure. Mr. Amado had said that, if it could be demonstrated that the machinery of arbitration could be made to work without the necessity for a *compromis* and without any obvious difficulties, his attitude to the article on arbitration would not be so negative as it had been so far. He (Mr. Lauterpacht) had little to add to the descriptions already given by Mr. Alfaro and Mr. Sandström of the practical work of international arbitral tribunals. Many thousands of individuals had brought actions in their own names before the mixed arbitral tribunals established after the first World War. Not the slightest procedural difficulty had been experienced.

61. Nevertheless, it was undeniably a costly matter for individuals to appear before an international tribunal. Mr. Hsu's proposal should, therefore, be welcomed, as under it a United Nations body or agency would undertake what counsel would do for richer complainants.

62. The paragraph suggested by Mr. Hsu should be inserted as the third paragraph of the article, and his

[6] Convention relative to the creation of an International Prize Court, in J. B. Scott, *The Hague Peace Conferences of 1899 and 1907*, vol. II (Baltimore, Johns Hopkins Press, 1909), pp. 473-505.

(Mr. Lauterpacht's) proposal might then be made the fourth paragraph. He still had an open mind as to which particular form of words would be best; indeed, he felt that the suggested commission should be established by the Economic and Social Council rather than by the General Assembly.

63. The doctrinal issues still remained. They were: first, whether the individual could be regarded as a subject of international law; and secondly, whether nationality was a matter for the exclusive jurisdiction of States. They were, in relation to the particular issue now before the Commission, of an absolutely theoretical nature. That did not mean that they could be ignored.

64. The former issue was hardly open to question. It had been dealt with, indirectly but decisively, in the opinion of the International Court in the *Injuries* Case,[7] when the Court clearly rejected the view that only States could be subjects of international law. The Nürnberg Tribunal had also concerned itself with it — in the same sense. In his view, any persons on whom international law conferred rights and obligations must be regarded as the subject of international law; and there was nothing in positive international law to prevent the granting of such rights to individuals.

65. Regarding the second issue, he observed that Mr. Spiropoulos was inclined to agree with Mr. Kozhevnikov. Yet the Hague Convention of 1930 had dealt with statelessness in very much the same way, in some matters, as the Commission was dealing with it, and there had been no suggestion at that time that nationality was an exclusively domestic concern of States. Indeed, in its advisory opinion in the Tunis and Morocco case which had been mentioned by Mr. Scelle, the International Court had said that it was a relative matter whether or not anything was in the domestic jurisdiction of a State. In principle, of course, everything was within the domestic jurisdiction of a State, unless international law prescribed some limit. He was sorry that Mr. Spiropoulos had felt himself misunderstood, but he (Mr. Lauterpacht) thought that that was only to be expected if one agreed with Mr. Kozhevnikov and Mr. Scelle at the same time.

66. Addressing himself to what he described as the attitude of pessimism on the part of some members regarding the acceptance of the convention by States, he said that he could not attach much importance to purely subjective expressions of opinion. Some States would regard it as their duty and privilege to accept the convention; others would do so for the simple reason that their legislation had already adopted the main principles of the convention. It was true, as Mr. François had said, that the 1907 Convention on Prize Jurisdiction had not been ratified by the United Kingdom; but that was not because of theoretical objections to the right of individuals to make claims under it, but for different and more weighty reasons.

67. It was legitimate to feel concern lest the inclusion of an article on arbitration should diminish the likelihood of the acceptance of the convention by some States who would otherwise be inclined to accept it. He himself felt no such concern. For his part, he considered that States otherwise prepared to accept the convention would not be deterred from so doing by the presence of a clause designed to ensure its implementation. Evidently, disputes might arise not only between individuals and States but also between States themselves. Again, every signatory would have a legitimate interest in the convention being implemented by the other signatories. Further, it had been stated in the preamble that statelessness was frequently productive of friction between States. An arbitral tribunal was an obvious means of reducing that friction.

68. He attributed good faith to governments to the fullest extent, being of the opinion that they would accept an article on arbitration if they wanted to give effect to the terms of the convention, and if they were not afraid of having their good faith tested.

69. Mr. HSU suggested certain modifications in the wording of his proposal, which would then read:

> "1. An agency under the auspices of the United Nations shall be established to act on behalf of stateless persons in disputes arising from the application of the provisions of this Convention.
>
> "2. The parties further agree to submit such disputes to arbitration unless they are not otherwise settled."

70. Mr. SPIROPOULOS said that he did not wish to prolong the discussion of theoretical questions.

71. In the convention, the Commission was proposing that certain persons should be given certain rights. In considering the draft conventions proposed by the Special Rapporteur, matters of substance had been discussed, but points of procedure had not previously been raised. Arbitration was essentially a matter of procedure; it was of great importance, but it was not related to the other problems which the Commission had considered.

72. He suggested that it would be premature to draft specific rules, though there should be a reference to the matter, either in the general report or elsewhere. If the Commission had been discussing arbitration between States, many precedents could have been referred to: but the discussion in fact turned on arbitration between individuals and States. That was much more delicate, as had been shown by discussions in the Council of Europe.

73. Many alternative systems of enforcement were possible. He had already suggested mixed tribunals sitting in the several States parties to the convention. Faris Bey el-Khouri had also suggested the establishment of national tribunals to carry out preliminary investigations. Some international commission might well be desirable, though he doubted whether a single international tribunal would be wise. The establishment

[7] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

of joint commissions in each State to settle certain disputes was a procedure which had been recommended by the Council of Europe.

74. In view of the delicacy of the matter and of the many possibilities which required considerable study, he believed that the Commisison should not go further than recommend without specification that some form of international supervision should be provided for.

75. Mr. YEPES thought that the discussion was the best that the Commission had had since its inception.

76. Although many authorities had been quoted in support of the doctrine that the individual could not be a subject of international law, several others could be quoted, and by no means unimportant ones, which supported the contrary theory. He personally had always been on the side of those who considered that the individual, as well as the State, could be the subject of international law. In his lectures at Colombian universities he had taught that one of the pillars on which modern international law rested was precisely that notion of the individual as one of the subjects — obviously not the only one — of international law. That was the doctrine which had been put into practice as early as 1907 by the five Central American Republics in the International Court of Justice which was set up at that time and which had lasted until 1917. Under the Statute of that Court, the individual had the right to summon a State before the Court even if he were not supported by his own State. It was only right that a tribute should be paid to the little Central American Republics which had never hesitated to accept the most advanced principles of international law. Consequently, if in 1953, the Commission did not accept a principle which had been recognized by American international law as long ago as 1907, it would be 50 years behind the times.

77. It was essential that the Commission be practical, and aim at the convention securing as wide acceptance as possible. He agreed, too, that the proposals made by Mr. Córdova and Mr. Hsu might be combined, but suggested that the United Nations commission proposed by Mr. Hsu should have more specific powers.

78. He pointed out that the Latin-American Republics had always favoured international arbitration; in that respect, the American Treaty on Pacific Settlement of 30 April 1948, the Treaty of Bogotá,[8] was comprehensive. It included for example, an article in which States undertook to abstain from the threat of war or other form of coercion; another article made compulsory the referral to the International Court of disputes not otherwise settled. The Treaty of Bogotá also regulated in a scientific manner the problem of the field of competence reserved to the State since, contrary to article 2, paragraph 7, of the United Nations Charter, it did not grant the State discretion to decide by itself whether or not a question fell within a reserved field. Article VII of the same Treaty directly concerned the question the Commission was at present dealing with. By the terms of that article, recourse to an international tribunal — an arbitral tribunal, for instance, or the Hague Court — was not permitted unless the parties had already exhausted every recourse provided for by the domestic legislation of the State against which action was being taken. That rule of the exhaustion of all recourse against the competent local authorities was another of those principles of American international law which ought to be taken into account if members wished the American republics to accept the Convention they were at present engaged in drafting. In his opinion, stateless persons also should be compelled to exhaust all legal means at their disposal in the States concerned before being permitted to have recourse to an arbitral tribunal or to the United Nations Commission proposed by Mr. Hsu.

79. He therefore proposed an additional paragraph, to read as follows:

"No proceedings may take place before the tribunal established by this Convention until the persons concerned have exhausted the remedial procedure of the competent local courts of the State in question".

The meeting rose at 12.55 p.m.

[8] Pan American Union, *Law and Treaty Series*, No. 24, p. 21.

224th MEETING

Monday, 27 July 1953, at 2.45 p.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris