

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1954

Volume II

*Documents of the sixth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



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NOTE TO THE READER

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RÉGIME OF THE TERRITORIAL SEA

DOCUMENT A/CN.4/77

Troisième rapport de J. P. A. François, rapporteur spécial

[Texte original en français]
[4 février 1954]

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I. — INTRODUCTION

1. Lors de sa troisième session, tenue en 1951, la Commission du droit international a décidé de commencer l'étude de la question du « régime des eaux territoriales », qu'elle avait précédemment choisie en vue de sa codification et à laquelle elle avait donné priorité conformément à une recommandation contenue dans la résolution 374 (IV) de l'Assemblée générale en date du 6 décembre 1950. M. J. P. A. François a été nommé rapporteur spécial pour cette matière. A la quatrième session le rapporteur spécial a présenté un « Rapport sur le régime de la mer territoriale » (A/CN.4/53¹), qui contenait un projet de règlement composé de 23 articles accompagné de commentaires.

2. Prenant ce rapport comme base de discussion, la

Commission a étudié, de sa 164^e à sa 172^e séance², certains aspects du régime de la mer territoriale. Tout d'abord, la Commission a décidé, conformément à la suggestion du rapporteur spécial, d'employer l'expression « mer territoriale » au lieu de l'expression « eaux territoriales », parce que l'on considère parfois que cette dernière comprend également les eaux intérieures.

3. La Commission a ensuite discuté de la question du régime juridique de la mer territoriale ainsi que de son lit et du sous-sol et de l'espace aérien qui est au-dessus d'elle; de la question de la largeur de la mer territoriale; de la question de la ligne de base; et de la question des baies. Elle a exprimé quelques opinions préliminaires sur certaines de ces questions pour orienter le rapporteur spécial.

¹ Voir *Yearbook of the International Law Commission*, 1952, vol. II, p. 25 à 43.

² Voir les comptes rendus de ces séances, *op. cit.*, vol. I, p. 142 à 190.

4. Pour ce qui est de la question de la délimitation de la mer territoriale de deux Etats adjacents, la Commission a décidé de prier les gouvernements de lui fournir des renseignements sur leur pratique à cet égard et de lui communiquer toutes observations qu'ils jugeraient utiles. La Commission a décidé en outre que le rapporteur spécial pourrait se mettre en rapport avec des experts pour chercher à élucider certains aspects techniques du problème.

5. Le rapporteur spécial a été prié de soumettre à la Commission, à l'occasion de sa cinquième session, un nouveau rapport comprenant un projet et des commentaires révisés tenant compte des opinions exprimées au cours de la quatrième session.

6. Le rapporteur spécial a donné suite à cette demande et a soumis un « Deuxième rapport sur le régime de la mer territoriale » (A/CN.4/61³).

7. Le Comité d'experts s'est réuni à La Haye du 14 au 16 avril 1953; il a présenté un rapport relatif à des questions techniques. Les observations y contenues ont déterminé le rapporteur spécial à modifier et à compléter certains articles de son propre projet, modifications qui ont été insérées dans un « Additif au deuxième rapport sur le régime de la mer territoriale » (A/CN.4/61/Add.1, avec Corr.1); le rapport du Comité d'experts y fut joint⁴.

8. La demande que le Secrétaire général avait adressée aux gouvernements concernant leur attitude relative à la délimitation de la mer territoriale de deux Etats adjacents, a donné lieu à un certain nombre de réponses, reproduites dans les documents A/CN.4/71, A/CN.4/71/Add.1 et A/CN.4/71/Add.2⁵.

9. Faute de temps, la Commission du droit international n'a pas été à même de discuter ce problème à sa cinquième session; elle l'a renvoyé à sa sixième session.

10. Le rapporteur spécial a l'honneur de présenter à la Commission un nouveau projet, qui, dans ses grandes lignes, suit celui de 1952; mais il y a inséré les modifications suggérées par les observations des experts. Compte a été également tenu des commentaires des gouvernements ayant trait à la délimitation des mers territoriales entre des Etats adjacents et situés l'un en face de l'autre.

II. — NOUVEAU PROJET DE RÈGLEMENT REVISÉ

CHAPITRE PREMIER

DISPOSITIONS GÉNÉRALES

Article premier

Dénomination de la mer territoriale

(Pour le texte de cet article et le commentaire y relatif, voir A/CN.4/61, art. 1^{er}.)

Article 2

Caractère juridique de la mer territoriale

(Pour le texte de cet article et le commentaire y relatif, voir A/CN.4/61, art. 2.)

Article 3

Caractère juridique de l'espace aérien, du sol et du sous-sol

(Pour le texte de cet article et le commentaire y relatif, voir A/CN.4/61, art. 3.)

CHAPITRE II

ÉTENDUE DE LA MER TERRITORIALE

Article 4

Largeur de la mer territoriale

1. La largeur de la mer territoriale sera de 3 milles marins à partir de la ligne de base de cette mer.

2. Cependant, l'Etat riverain est autorisé à étendre, sous réserve des conditions ci-après énumérées, la mer territoriale jusqu'à une limite de 12 milles au maximum de sa ligne de base :

a) Le libre passage dans toute l'étendue de la mer territoriale est sauvegardé dans les conditions prévues par ce règlement;

b) Des droits exclusifs en faveur des ressortissants de l'Etat riverain en ce qui concerne la pêche ne peuvent être réclamés par l'Etat riverain que jusqu'à une distance de 3 milles marins à partir de la ligne de base de la mer territoriale. Au-delà de cette limite de 3 milles marins la pêche dans la mer territoriale peut être soumise par l'Etat riverain à une réglementation ayant pour seul but la protection des richesses de la mer. Aucune discrimination ne doit être faite au détriment des ressortissants des Etats étrangers. En cas de contestation de la légitimité des mesures prises à cet effet, le différend sera soumis à une procédure internationale de conciliation et, faute d'accord, à l'arbitrage.

Commentaire

(Pour le commentaire relatif à ces dispositions, voir A/CN.4/61, art. 4⁶.)

Article 5

Ligne de base normale

Comme règle générale et sous réserve des dispositions concernant les baies et les îles, l'étendue de la mer territoriale se compte à partir de la laisse de basse mer, longeant la côte, ainsi qu'elle se trouve indiquée sur les cartes à grande échelle en service, reconnues officiellement par l'Etat riverain. Si des

³ Voir *Yearbook of the International Law Commission*, 1953, vol. II.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Il y a lieu d'ajouter aux pays réclamant une extension de la mer territoriale à 12 milles : Ethiopie (1953).

cartes détaillées indiquant la laisse de basse mer n'existent pas, la ligne côtière (ligne de marée haute) servira de ligne de départ.

Commentaire

1) La Sous-Commission II de la Conférence pour la codification du droit international de 1930 avait adopté à cet égard le texte suivant :

« On entend par la laisse de basse mer celle qui a été indiquée sur la carte officielle employée par l'Etat riverain à condition que cette ligne ne s'écarte pas sensiblement de la laisse moyenne des plus basses mers bimensuelles et normales. »

La Sous-Commission avait accompagné cet article de certaines observations ⁷.

2) Le Comité d'experts n'a pas cru devoir se rallier à l'opinion de la Sous-Commission II. Il a estimé qu'il n'y avait pas lieu de craindre que l'omission des dispositions détaillées, arrêtées par la Conférence de 1930, fût de nature à induire les gouvernements à déplacer de façon exagérée les laises de basse mer sur leurs cartes. Aussi le Comité a-t-il proposé le texte suivant :

« Sauf dans les cas où d'autres dispositions seront prévues, la ligne de base, à partir de laquelle est mesurée la mer territoriale, devrait être la laisse de basse mer (longeant la côte) ainsi qu'elle se trouve indiquée sur les cartes à grande échelle en service, reconnues officiellement par l'Etat côtier. Si des cartes détaillées, indiquant la laisse de basse mer, n'existent pas, c'est la ligne côtière (ligne de marée haute) qui devrait servir de ligne de départ. »

3) Le rapporteur spécial a rédigé le texte de l'article 5 en se conformant au point de vue du Comité d'experts. A toutes fins utiles il lui paraît opportun de rappeler que la Cour internationale de Justice, dans son arrêt du 18 décembre 1951 relatif à l'affaire des pêcheries, a reconnu que pour mesurer la largeur de la mer territoriale,

« c'est la laisse de basse mer et non celle de haute mer ou une moyenne entre ces deux laises qui a été généralement adoptée par la pratique des Etats ⁸. »

Article 6

Ligne de base droite

1. Exceptionnellement, la ligne de base peut se détacher de la laisse de basse mer, si les circonstances rendent nécessaires un régime spécial en raison des profondes échancrures ou indentations de la côte ou en raison des îles situées à proximité immédiate de la côte. En ce cas spécial, la méthode de lignes de base reliant des points appropriés de la côte peut être adoptée. Le tracé des lignes de base ne peut s'écarter de façon appréciable de la direction générale de la côte, et les étendues de mer situées en deçà de cette ligne doivent être suffisamment liées aux domaines terrestres pour être soumises au régime des eaux intérieures.

2. En général la longueur maximum admissible pour une « ligne de base droite » sera de 10 milles. Ces lignes de base pourront être tracées, le cas échéant, entre promontoires de la côte ou entre un promontoire et une île, pourvu que cette ligne soit située à moins de 5 milles de la côte, ou enfin entre deux îles, pourvu que ces promontoires et ou ces îles ne soient pas séparés entre eux par une distance de plus de 10 milles. Les lignes de base ne seront pas tirées vers des fonds affleurants à basse mer ni à partir de ceux-ci. Ces lignes séparent les eaux intérieures de la mer territoriale.

3. Dans les cas où les « lignes de base droites » sont permises, l'Etat côtier sera tenu de publier le tracé adopté d'une manière suffisante.

Commentaire

1) La Cour internationale de Justice est d'avis que dans le cas d'une côte profondément découpée d'indentations ou d'échancrures ou bordée par un archipel tel que le « Skjaergaard », en Norvège, la ligne de base se détache de la laisse de basse mer et ne peut être obtenue que par quelque construction géométrique. La Cour s'exprime comme suit à ce sujet :

« On ne peut dès lors persister à présenter la ligne de la laisse de basse mer comme une règle qui oblige à suivre la côte dans toutes ses inflexions. On ne peut pas non plus présenter comme des exceptions à la règle les si nombreuses dérogations qu'appelleraient les accidents d'une côte aussi tourmentée : la règle disparaîtrait devant les exceptions. C'est tout l'ensemble d'une telle côte qui appelle l'application d'une méthode différente : celle de ligne de base se détachant dans une mesure raisonnable de la ligne physique de la côte... Le principe selon lequel la ceinture des eaux territoriales doit suivre la direction générale de la côte permet de fixer certains critères valables pour toute délimitation de la mer territoriale et qui seront dégagés plus loin. La Cour se borne ici à constater que, pour appliquer ce principe, plusieurs Etats ont jugé nécessaire de suivre la méthode des lignes de base droites et qu'ils ne se sont pas heurtés à des objections de principe de la part des autres Etats. Cette méthode consiste à choisir sur la ligne de la laisse de basse mer des points appropriés et à les réunir par des lignes droites. Il en est ainsi, non seulement dans les cas de baies bien caractérisées, mais aussi dans des cas de courbes mineures de la côte, où il ne s'agit que de donner à la ceinture des eaux territoriales une forme plus simple ⁹. »

2) Le rapporteur spécial croit devoir interpréter l'arrêt de la Cour, rendu en ce qui concerne le point en question avec une majorité de 10 voix contre 2, comme l'expression du droit en vigueur; par conséquent, il s'en est inspiré lors de la rédaction de l'article. Il l'a toutefois complété en tenant compte des observations faites à ce sujet par le Comité d'experts. Ce Comité s'est prononcé en faveur d'une longueur maximum d'une ligne de base de 10 milles, et il a ajouté des indications se référant à la leçon de tracer cette ligne. Le rapporteur spécial les a insérées à l'alinéa 2 de l'article. Le Comité a été d'avis

⁷ Voir A/CN.4/61, commentaire à l'article 5.

⁸ C.I.J., Recueil 1951, p. 128.

⁹ Ibid., p. 129 et 130.

que dans plusieurs cas il sera impossible d'établir une direction générale de la côte, et il a déclaré que tout effort en ce sens fera surgir des questions, telles que : l'échelle de la carte à employer dans ce but et la décision quelque peu arbitraire relative à l'étendue de la côte à utiliser dans la recherche de la direction générale. Aussi le Comité a-t-il fixé la longueur maximum de toute ligne de base droite à 10 milles. Il a admis, cependant, que, dans des cas exceptionnels, des lignes plus longues pourront être tracées, à condition toutefois qu'aucun point desdites lignes ne soit situé à plus de 5 milles de la côte. Le Comité s'est déclaré opposé à l'établissement d'une liaison entre la longueur des lignes de base droite et l'étendue de la mer territoriale.

Article 7

Limite extérieure de la mer territoriale

La limite extérieure de la mer territoriale est constituée par la ligne dont tous les points sont à une distance de T milles du point le plus proche de la ligne de base (T étant la largeur de la mer territoriale). Cette ligne est formée par une série continue d'arcs de cercle qui s'entrecoupent, et qui sont tracés avec un rayon de T milles, ayant leurs centres à tous les points de la ligne de base. La limite extérieure de la mer territoriale est composée des arcs de cercle les plus avancés dans la mer.

Commentaire

1) Ce texte a été emprunté au rapport du Comité d'experts. La Sous-Commission II de la Conférence pour la codification du droit international de 1930 avait fait, à l'égard de la limite extérieure, certaines observations¹⁰.

2) On ne saurait nier que si l'on adoptait le système d'après lequel il faudrait suivre les sinuosités de la côte, la limite extérieure pourrait avoir un tracé extrêmement tourmenté et, partant, peu pratique pour la navigation. Il serait possible de remédier à cet inconvénient en adoptant le système des « lignes de base droites » préconisé à l'article 6.

3) Une autre manière d'obtenir une ligne moins irrégulière serait de s'en tenir à la méthode des « arcs de cercle », méthode qui n'aboutit nullement à une ligne suivant exactement toutes les sinuosités de la côte; cependant, quand il s'agit d'une côte droite, la limite extérieure obtenue en appliquant le système des arcs de cercle coïncide avec la ligne tirée parallèlement à la côte. Par contre, s'il s'agit d'une côte profondément découpée d'indentations ou d'échancrures, la méthode aboutit à une ligne beaucoup moins sinueuse et, par suite, beaucoup plus pratique.

4) Dans l'affaire des pêcheries, la Cour internationale de Justice a fait à cet égard des observations déjà reproduites dans A/CN.4/61¹¹.

5) Le Comité d'experts n'a pu se soustraire à l'impression que les observations faites par la Cour inter-

nationale de Justice faisaient preuve d'une opinion erronée en ce qui concerne la portée exacte de la méthode des arcs de cercle. Pour cette raison, les considérants de l'arrêt se rapportant à cette méthode n'ont peut-être pas la même valeur que les autres.

Article 8

Baies

1. Les eaux d'une baie seront considérées comme eaux intérieures si la ligne tirée en travers de l'ouverture n'excède pas 10 milles.

2. On entend par « baie » au sens de l'alinéa premier, une échancrure dont la superficie est égale ou supérieure à la superficie du demi-cercle ayant comme diamètre la ligne tirée entre les points limitant l'entrée de l'échancrure. Si la baie a plus d'une entrée, le demi-cercle sera tracé en prenant comme diamètre la somme des lignes fermant toutes ces entrées. La superficie des îles situées à l'intérieur d'une baie sera comprise dans la superficie totale de celle-ci.

3. Si, par suite de la présence d'îles, une baie comporte plusieurs entrées, des lignes de démarcation pourront être tracées fermant ces ouvertures pourvu qu'aucune de ces lignes n'excède une longueur de 5 milles, à l'exception d'une d'entre elles qui pourra atteindre 10 milles.

4. Si l'entrée de la baie dépasse une largeur de 10 milles, la ligne de démarcation sera tracée à l'intérieur de la baie à l'endroit où la largeur de celle-ci n'excède pas 10 milles. Au cas où plusieurs lignes d'une longueur de 10 milles pourront être tracées, on choisira la ligne enfermant dans la baie la superficie d'eau la plus grande.

Commentaire

1) La Sous-Commission II de la Conférence de 1930 avait fait, au sujet des baies, des observations déjà reproduites dans A/CN.4/61¹². Quant à l'opinion de la Cour internationale de Justice, voir le même document¹³.

2) Le Comité d'experts a étudié le régime des baies avec beaucoup de soin. Il a été d'avis que la ligne délimitant l'entrée de la baie ne devrait pas dépasser 10 milles en largeur, c'est-à-dire deux fois l'horizon visuel par un temps clair pour un observateur se trouvant sur une passerelle à une hauteur de 5 mètres. Dans les cas de grand marnage la laisse de basse mer sera considérée comme ligne côtière pour calculer la ligne d'entrée.

3) D'après le Comité, le critère d'une baie au sens juridique est que sa superficie est égale ou supérieure à la superficie du demi-cercle ayant comme diamètre la ligne tirée entre les points limitant l'entrée de la baie. Il est bien entendu que les baies historiques seront exceptées de cette définition; il serait toutefois hautement désirable de les indiquer comme telles sur les cartes.

¹⁰ Voir A/CN.4/61, le premier paragraphe du texte cité dans le commentaire à l'article 5.

¹¹ Voir *ibid.*, les passages cités dans le commentaire à l'article 5. Voir également C.I.J., *Recueil 1951*, p. 129.

¹² Voir A/CN.4/61, commentaire à l'article 6.

¹³ *Ibid.* Egalement C.I.J., *Recueil 1951*, p. 131.

4) Le Comité a ensuite proposé des règles se référant aux baies ayant plus d'une entrée ainsi qu'aux cas où des îles sont situées à l'intérieur de celles-ci.

5) Le Comité a finalement indiqué de quelle manière la ligne de démarcation entre les eaux territoriales et les eaux intérieures devrait être tracée dans les cas où l'entrée de la baie dépasserait une largeur de 10 milles.

6) Le rapporteur spécial s'est rallié aux suggestions du Comité d'experts.

Article 9

Ports

(Pour le texte de cet article et le commentaire y relatif, voir A/CN.4/61, art. 7.)

Article 10

Rades

(Pour le texte de cet article et le commentaire y relatif, voir A/CN.4/61, art. 8.)

Article 11

Îles

Chaque île comporte une mer territoriale qui lui est propre. Une île est une étendue de terre entourée d'eau, qui se trouve d'une manière permanente au-dessus de la marée haute. Sont assimilées à des îles les agglomérations d'habitation bâties sur pilotis dans la mer.

Commentaire

1) La première phrase de cet article a été emprunté au rapport de la Sous-Commission II de la Conférence de 1930; il était accompagné des observations reproduites dans A/CN.4/61¹⁴.

2) La deuxième phrase a été ajoutée pour tenir compte de villages bâtis sur pilotis en pleine mer existant dans certaines parties du monde, notamment au devant de la côte occidentale de l'île de Sumatra.

Article 12

Groupes d'îles

1. Un minimum de trois îles sera considéré comme un groupe d'îles au sens juridique du terme, à condition qu'elles renferment une portion de la mer, lorsqu'elles sont reliées par des lignes droites n'ayant pas plus de 5 milles de longueur, à l'exception d'une d'entre elles qui pourra atteindre une longueur de 10 milles.

2. Les lignes droites prévues au premier alinéa formeront les lignes de base pour la détermination de la mer territoriale; les eaux renfermées par ces lignes de base et les îles seront considérées comme eaux intérieures.

3. Un groupe d'îles peut également être formé par un chapelet d'îles en conjonction avec une partie

de la ligne côtière continentale. Les règles prévues par le premier et deuxième alinéas du présent article seront alors applicables.

Commentaire

La Sous-Commission II de la Conférence de 1930 avait abandonné l'idée de formuler un texte à ce sujet. Le Comité d'experts s'est efforcé à régler également ce cas. Le rapporteur spécial a formulé l'article en suivant les directives du Comité.

Article 13

Sèches

Des rochers ou fonds, couvrants et découvrants, se trouvant totalement ou partiellement dans la mer territoriale, pourront servir de point de départ pour mesurer la mer territoriale.

Commentaire

1) Une distinction a été faite entre les îles et les sèches. Une île, même située en dehors de la mer territoriale s'étendant devant la côte, comporte toujours une mer territoriale qui lui est propre; une sèche est seulement assimilée à cet égard à une île, quand elle est située partiellement ou totalement dans la mer territoriale s'étendant devant la côte. Une sèche située en dehors de la mer territoriale n'a pas de mer territoriale qui lui est propre. Le rapporteur fait toutefois observer que l'unanimité n'est pas complète à cet égard. Le décret de l'Arabie saoudite en date du 28 mai 1948 fixant l'étendue de la mer territoriale à 6 milles stipule à l'article 4 :

« The inland waters of the Kingdom include the waters above and landward from any shoal not more than twelve nautical miles from the main land or from a Saudi Arabian island. »

2) L'arrêt de la Cour internationale de Justice dans l'affaire des pêcheries contient à cet égard des observations reproduites dans A/CN.4/61¹⁵.

Article 14

Détroits

(Pour le texte de cet article ainsi que les commentaires y afférents, voir A/CN.4/61, art. 11.)

Article 15

Délimitation de la mer territoriale à l'embouchure d'un fleuve

1. Si un fleuve se jette dans la mer sans estuaire, les eaux du fleuve constituent des eaux intérieures jusqu'à une ligne tirée de cap en cap à travers l'embouchure.

2. Si le fleuve se jette dans la mer par un estuaire, les règles applicables aux baies s'appliquent à cet estuaire.

¹⁴ Voir A/CN.4/61, commentaire à l'article 9.

¹⁵ *Ibid.*, commentaire à l'article 5. Voir également *C.I.J.*, *Recueil 1951*, p. 128.

Commentaire

Le rapporteur spécial a emprunté cet article à celui de la Sous-Commission II de la Conférence de 1930; mais, pour tenir compte des observations du Comité d'experts relatives à l'expression « suivant la direction générale de la côte » (voir le paragraphe 2 du commentaire à l'article 6), il a remplacé les termes critiqués par « de cap en cap » (*inter fauces terrarum*).

Article 16

***Délimitation de la mer territoriale
de deux Etats dont les côtes sont situées
en face l'une de l'autre***

1. La frontière internationale entre deux Etats dont les côtes sont situées en face l'une de l'autre à une distance de moins de 2 T milles (T étant la largeur de la mer territoriale) est, en règle générale, la ligne médiane dont chaque point est équidistant des lignes de base des Etats en question. Toute île sera prise en considération lors de l'établissement de cette ligne, à moins que les Etats adjacents n'en aient décidé autrement d'un commun accord. De même, les fonds affleurants à basse mer, situés à moins de T milles d'un seul Etat, seront pris en considération; par contre, ceux situés à moins de T milles de l'un et l'autre Etat n'entreront pas en ligne de compte lors de l'établissement de la ligne médiane.

2. Exceptionnellement, les intérêts de navigation ou de pêche pourront justifier un autre tracé de la frontière, à fixer d'un commun accord entre les parties intéressées.

3. La ligne sera tracée sur les cartes en service à grande échelle.

Commentaire

1) La Conférence pour la codification du droit international de 1930 ne s'était pas occupée de cette question. Le rapporteur spécial a emprunté cet article au rapport du Comité d'experts. La solution donnée semble être celle qui, jusqu'à présent, a été acceptée pour délimiter la frontière entre deux Etats dont les côtes sont situées en face l'une de l'autre à une distance de moins de 2 T milles (voir la réponse du Gouvernement danois, A/CN.4/71, p. 10; du Gouvernement néerlandais, *ibid.*; du Gouvernement suédois, A/CN.4/71/Add.1).

2) La Commission du droit international s'est déjà ralliée à l'application d'un système analogue pour la fixation de la frontière sur un plateau continental contigu au territoire de deux Etats situés l'un en face de l'autre.

Article 17

***Délimitation de la mer territoriale
de deux Etats adjacents***

La ligne de frontière à travers la mer territoriale de deux Etats adjacents, là où elle n'a pas encore été fixée d'une autre manière, sera tracée selon le principe d'équidistance des lignes de côte respectives.

La méthode, suivant laquelle ce principe sera appliqué, fera, dans chaque cas spécial, l'objet d'un accord entre les parties.

Commentaire

1) La Conférence de 1930 n'a pas donné de règle relative à ce cas qui peut être résolu de plusieurs manières.

2) En premier lieu, on pourrait envisager le prolongement vers le large de la frontière de terre jusqu'à l'extrême limite de la mer territoriale. Cette ligne n'est susceptible d'être utilisée que si la frontière terrestre atteint la côte sous un angle droit; si l'angle est aigu, elle devra être écartée.

3) Une deuxième solution serait de tirer une ligne perpendiculairement à la côte au point où la frontière terrestre atteint la mer. Cette méthode est critiquable si la côte présente une courbe dans le voisinage du point où la frontière terrestre touche la mer. Dans ce cas, cette ligne perpendiculaire pourrait rencontrer la côte à un autre point.

4) Une troisième solution consisterait à tirer la ligne perpendiculairement à la direction générale de la côte. L'adoption de cette ligne a été recommandée entre autres par le Gouvernement belge dans sa réponse à la lettre circulaire du Secrétaire général en date du 13 novembre 1952 (A/CN.4/71). Le Gouvernement norvégien a attiré l'attention sur la sentence arbitrale du 23 octobre 1909 entre la Norvège et la Suède, dont l'exposé des motifs contient la phrase suivante: « Le partage doit être fait en traçant une ligne perpendiculairement à la direction générale de la côte » (A/CN.4/71). Le Gouvernement suédois se réfère à la même décision (A/CN.4/71/Add.2).

5) Le Comité d'experts n'a pas cru devoir se rallier à cette méthode de détermination de la frontière. Il était d'avis qu'il serait souvent impossible d'établir une « direction générale de la côte »; le résultat « dépend de l'échelle de la carte à employer dans ce but et de l'étendue de la côte à utiliser dans la recherche ». Puisque, par conséquent, la méthode de la ligne tirée perpendiculairement à la direction générale de la côte manque de précision juridique, la meilleure solution semble être celle de la ligne médiane, proposée par le Comité d'experts, et que le rapporteur spécial a faite sienne. Cette ligne devrait être tracée selon le principe d'équidistance de la côte de part et d'autre de l'aboutissement de la frontière (voir la réponse du Gouvernement français, A/CN.4/71/Add.2). En utilisant cette méthode, la ligne de frontière coïncidera, s'il s'agit d'une côte droite, avec la ligne tirée perpendiculairement à la côte à l'endroit où la frontière terrestre atteint la mer. Si toutefois il s'agit d'une côte courbée ou irrégulière, la ligne tient compte du tracé de la côte tout en évitant les difficultés du problème de la « direction générale de la côte ».

CHAPITRE III

DROIT DE PASSAGE

(Voir A/CN.4/61, art. 14 à 23. Le numérotage des articles pertinents devra être modifié pour les mettre à la suite de ceux proposés au présent rapport.)

REGIME OF THE HIGH SEAS

DOCUMENT A/CN.4/79

Sixième rapport de J. P. A. François, rapporteur spécial

[Texte original en français]

[1^{er} mars 1954]

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I. — INTRODUCTION

1. Au cours de sa première session, en 1949, la Commission du droit international avait élu aux fonctions de rapporteur spécial, chargé d'étudier la question du régime de la haute mer, M. J. P. A. François, qui, lors de la deuxième session, tenue en 1950, a présenté un rapport (A/CN.4/17¹) sur la matière. La Commission était également saisie des réponses de certains gouvernements (A/CN.4/19, 1^{re} partie, sect. C²) à un questionnaire qu'elle leur avait adressé, et elle a examiné cette question pendant sa deuxième session, en prenant pour base de ses discussions le rapport du rapporteur spécial, où se trouvaient exposées les différentes manières susceptibles à son avis d'être étudiées en vue de la codification ou du développement progressif du droit maritime.

2. La Commission a estimé (A/1316, 6^e partie, chap. III³) qu'elle ne pouvait entreprendre une codification du droit maritime sous tous ses aspects et qu'il était nécessaire de choisir les questions susceptibles d'être examinées dans la première phase de ses travaux ayant trait à ce problème. Elle a pensé pouvoir écarter pour le moment toutes les questions mises à l'étude par d'autres organes des Nations Unies ou par des institutions spécialisées, de même que celles qui, en raison de leur nature technique, ne se prêtent pas à une investigation de sa part. Enfin, elle a laissé de côté certaines autres questions dont l'importance restreinte ne lui semblait pas justifier un examen au stade actuel de ses travaux. Les sujets retenus par la Commission étaient les suivants : nationalité du navire, abordage, sauvegarde de la vie humaine en mer, droit d'approche, traite des esclaves, câbles télégraphiques sous-marins, richesses de la mer, droit de poursuite, zones contiguës, pêcheries sédentaires, plateau continental.

3. Le rapporteur spécial a présenté un deuxième rapport sur la matière (A/CN.4/42⁴) qui fut étudiée par la Commission lors de sa troisième session en 1951. Elle examina d'abord les chapitres relatifs au plateau continental et à divers sujets voisins, à savoir la protection des richesses de la mer, les pêcheries sédentaires et les zones contiguës, sujets qui ont été traités dans un rapport final adopté par la Commission lors de sa cinquième session en 1953⁵.

4. A sa troisième session, en 1951, la Commission (A/1858, chap. VII⁶) a approuvé, en ce qui concerne la nationalité des navires, le principe sur lequel étaient basées les conclusions du rapporteur spécial, à savoir que les Etats ne sont pas absolument libres de fixer comme ils l'entendent les conditions régissant cette nationalité, mais doivent respecter certaines règles de droit international en la matière.

¹ Voir *Yearbook of the International Law Commission*, 1950, vol. II.

² *Ibid.*

³ *Ibid.*

⁴ Voir *Yearbook of the International Law Commission*, 1951, vol. II.

⁵ Voir chapitre III du rapport de la Commission sur les travaux de sa cinquième session, *Documents officiels de l'Assemblée générale, huitième session, Supplément n° 9* (A/2456). Le rapport est aussi inclus dans *Yearbook of the International Law Commission*, 1953, vol. II.

⁶ Voir *Yearbook of the International Law Commission*, 1951, vol. II.

5. Au sujet de la compétence pénale en matière d'abordage en haute mer, la Commission a décidé qu'il convenait de préparer le projet d'une règle applicable, en la matière, vu que la nécessité s'en faisait sentir.

6. Après avoir accepté la proposition du rapporteur spécial tendant à inclure dans la codification du régime de la haute mer des règles relatives à la sauvegarde de vie humaine en mer, la Commission l'a chargé de poursuivre l'étude de cette question.

7. La Commission a examiné le droit d'approche des bâtiments de guerre à l'égard des navires de commerce étrangers en haute mer. Le rapporteur spécial l'avait admis seulement dans l'hypothèse où il y a un motif sérieux de penser que le navire de commerce étranger se livre à la piraterie ou au cas où les actes d'ingérence se fondent sur des pouvoirs accordés par traité. Les conventions générales sur la traite des esclaves n'autorisent l'exercice du droit d'approche que dans des zones spéciales et à l'égard de navires d'un tonnage limité. La Commission a estimé qu'en vue de la répression de la traite des esclaves, le droit d'approche devait être admis dans les mêmes conditions que pour la piraterie et que son exercice devait être autorisé sans considération de zone de tonnage.

8. La Commission a prié le rapporteur spécial de traiter d'une façon générale, et sans entrer dans les détails, le problème des câbles sous-marins.

9. Elle a adopté en première lecture les conclusions du rapporteur spécial tendant à compléter les règles relatives au droit de poursuite élaborées en 1930 par la Conférence de codification de La Haye.

10. A sa quatrième session, en 1952, la Commission était saisie d'un troisième rapport du rapporteur spécial (A/CN.4/51⁷); faute de temps elle en a renvoyé l'examen à sa cinquième session (A/2163, chap. V⁸).

11. A sa cinquième session, en 1953, la Commission se trouvait en présence d'un cinquième rapport (A/CN.4/69⁹) du rapporteur spécial sur le régime de la haute mer traitant uniquement du résultat des travaux de la Conférence diplomatique de Bruxelles en 1952 sur la compétence pénale en matière d'abordage en haute mer, mais une fois de plus le manque de temps l'a obligée de renoncer à l'examen dudit problème et elle en a renvoyé l'étude à sa prochaine session. Revenant dans une certaine mesure sur la décision prise lors de sa deuxième session, la Commission a prié le rapporteur spécial de préparer pour sa sixième session un nouveau rapport comprenant les sujets qu'il n'avait pas traités dans ses troisième et cinquième rapports. La Commission a donc repris l'idée de la codification du droit de la haute mer. Elle n'a, cependant, pas eu l'intention d'y inclure des dispositions détaillées relatives à des questions d'ordre technique ni d'empiéter sur le terrain déjà couvert par les études spéciales entreprises par d'autres organes des Nations Unies ou des institutions spécialisées.

⁷ Voir *Yearbook of the International Law Commission*, 1952, vol. II.

⁸ *Ibid.*

⁹ Voir *Yearbook of the International Law Commission*, 1953, vol. II. Le quatrième rapport sur le régime de la haute mer (A/CN.4/60), consacré exclusivement aux problèmes du plateau continental et à des sujets voisins, est inclus dans le même volume.

12. Le rapporteur spécial a donc l'honneur de soumettre à la Commission le présent rapport qui, à l'exception du plateau continental, comprend les sujets relatifs à la haute mer déjà traités dans ses rapports antérieurs.

II. — PROJET D'ARTICLES RELATIFS AU RÉGIME DE LA HAUTE MER

DÉFINITION DE LA HAUTE MER

Article premier

Aux fins des articles suivants on entend par « haute mer » toutes les parties de la mer n'appartenant pas à la mer territoriale ou aux eaux intérieures d'un Etat.

Commentaire

Le règlement relatif à « la mer territoriale » indique ce qu'il faut entendre par cette expression. A ce sujet le rapporteur spécial se permet de se référer à son troisième rapport sur le régime de la mer territoriale (A/CN.4/77¹⁰) où la question a été traitée. Il rappelle que les « eaux intérieures » comprennent les parties de la mer situées à l'intérieur des lignes de base de la mer territoriale.

LIBERTÉ DE LA HAUTE MER

Article 2

La haute mer ne peut être l'objet d'actes de souveraineté ou de domination territoriale de la part des Etats.

Article 3

Les droits de l'Etat riverain sur le plateau continental ne portent pas atteinte au régime des eaux surjacentes en tant que haute mer.

Commentaire

Voir le rapport de la Commission du droit international sur les travaux de sa cinquième session (A/2456¹¹), chapitre III, Projet d'articles relatifs au plateau continental, article 3.

Article 4

1. L'exploration du plateau continental et l'exploitation de ses ressources naturelles ne doivent pas avoir pour conséquence de gêner d'une manière injustifiable la navigation, la pêche ou la production de poisson.

2. Sous réserve des dispositions des paragraphes 1 et 5 du présent article, l'Etat riverain a le droit de construire et d'entretenir sur le plateau continental les installations nécessaires pour l'exploration et

l'exploitation de ses ressources naturelles et d'établir autour de celles-ci, jusqu'à une distance raisonnable, des zones de sécurité et de prendre dans ces zones les mesures nécessaires à la protection de ces installations.

3. Ces installations, tout en étant soumises à la juridiction de l'Etat riverain, n'ont pas le statut d'îles. Elles n'ont pas de mer territoriale qui leur soit propre et leur présence n'influe pas sur la délimitation de la mer territoriale de l'Etat riverain.

4. L'Etat intéressé devra donner dûment avis des installations construites et entretenir les moyens permanents de signalisation nécessaires.

5. Ni ces installations elles-mêmes, ni les zones de sécurité susmentionnées établies autour de celles-ci ne doivent être situées dans des chenaux ou sur des routes maritimes régulières indispensables pour la navigation internationale.

Commentaire

Voir le rapport de la Commission du droit international sur les travaux de sa cinquième session (A/2456¹²), chapitre III, section II, Projet d'articles relatifs au plateau continental, article 6.

Article 5

Sur la haute mer contiguë à sa mer territoriale, l'Etat riverain peut exercer le contrôle nécessaire en vue de prévenir et de réprimer sur son territoire ou dans sa mer territoriale les contraventions à ses lois de police douanière, fiscale ou sanitaire, ou à sa législation en matière d'immigration. Ce contrôle ne pourra être exercé au-delà de 12 milles à partir de la ligne de base qui sert de point de départ pour mesurer la largeur de la mer territoriale.

Commentaire

1) Voir le rapport de la Commission du droit international sur les travaux de sa cinquième session (A/2456¹³), chapitre III, section IV, Zone contiguë.

2) Si la Commission acceptait l'article 4, proposé par le rapporteur spécial dans son troisième rapport sur la mer territoriale (A/CN.4/77), l'article 5 ci-dessus inséré pourrait être supprimé.

NAVIRES DE COMMERCE EN HAUTE MER

Article 6

Un navire est un engin apte à se mouvoir dans les espaces maritimes à l'exclusion de l'espace aérien, avec l'armement et l'équipage qui lui sont propres en vue des services que comporte l'industrie à laquelle il est employé.

Commentaire

Cette définition du navire a été partiellement empruntée à l'ouvrage de M. Gidel, intitulé *Le droit interna-*

¹⁰ Publié dans le présent volume.

¹¹ Voir *Yearbook of the International Law Commission*, 1953, vol. II.

¹² *Ibid.*

¹³ *Ibid.*

tional public de la mer, vol. I, page 70. M. Gidel qualifie les navires d'engins aptes à se mouvoir dans les espaces maritimes à l'exclusion des autres milieux. Une modification de ladite définition s'imposait en raison de l'utilisation récente des navires amphibies destinés à se mouvoir non seulement dans l'eau mais également sur terre, et qui sont néanmoins considérés comme des navires. Ne sont pas assimilés aux navires les docks flottants, les hydravions et en général les îles flottantes, alors que seront considérés comme tels les bateaux phares ainsi que les bateaux dragueurs, pour autant qu'ils sont aptes à la navigation, qu'il s'agisse de bâtiments pourvus de moyens de propulsion ou non. Des doutes peuvent subsister en ce qui concerne les grues flottantes et les épaves. Une autre question qui se pose est celle de savoir à partir de quel moment le navire en construction peut être considéré comme tel.

Article 7

Les navires de commerce naviguant en haute mer sont soumis, à l'exclusion de toute autre autorité, à la juridiction de l'Etat du pavillon.

Commentaire

1) Tout Etat pourra exercer son autorité sur les navires battant son pavillon. L'absence de souveraineté territoriale en haute mer ne permet, en effet, d'appliquer au navire y naviguant que l'ordre juridique de cet Etat. L'explication juridique la plus répandue consiste à considérer le navire en haute mer comme une partie du territoire de cet Etat. Il s'agit de la théorie de la territorialité du navire qui, dans le passé, a reçu une large adhésion. Plusieurs auteurs contemporains l'ont défendue et elle a été soutenue par le Gouvernement des Etats-Unis; la Cour permanente de Justice internationale l'a faite sienne dans l'affaire du Lotus. Toutefois, la plupart des auteurs la rejettent et ont critiqué la Cour pour avoir repris l'idée de l'assimilation du navire au territoire. Le Gouvernement britannique a toujours maintenu l'opinion émise par lord Stowell en 1804 que « le grand principe fondamental du droit maritime britannique est que les navires en haute mer ne font pas partie du territoire de l'Etat ». Selon cette opinion il n'est aucunement besoin, pour expliquer la condition juridique du navire, d'invoquer l'idée de territorialité. Les choses se passent « comme si le navire était territoire de l'Etat du pavillon », mais elles ne se passent pas ainsi « parce que le navire serait territoire de l'Etat du pavillon » (Gidel, *Le droit international public de la mer*, vol. III, p. 241 et 251).

2) Le rapporteur spécial est d'avis que cette controverse est de caractère plutôt académique et qu'il n'y a pas lieu, pour la Commission du droit international, de retenir ce point. Il suffit de poser le principe tel qu'il a été formulé dans l'article proposé.

Article 8

Peuvent être soumis en haute mer à l'exercice du droit de visite et de perquisition de la part des bâtiments publics des Etats, tous navires non autorisés à battre le pavillon d'un Etat. Toutefois, de tels navires ne seront traités comme pirates que s'ils se rendent coupables d'actes de piraterie.

Commentaire

Un certain nombre d'auteurs assimilent le navire sans nationalité au pirate qui peut être traité comme *hostis humani generis*. Toutefois, cette opinion prête le flanc à la critique. Le navire sans nationalité ne doit subir ce traitement que si, en fait, il commet des actes de piraterie. Dans les cas contraires les bâtiments publics pourront exercer à son égard le droit de visite et de perquisition, l'amener dans un de leurs ports en vue d'un contrôle, et lui en refuser l'entrée à des fins de commerce, mais ils ne pourront le traiter comme pirate.

Article 9

Le navire, naviguant sous deux ou plusieurs pavillons, ne pourra se prévaloir, vis-à-vis des Etats tiers, d'aucune de ces nationalités et sera assimilé à un navire sans nationalité.

Commentaire

Certains auteurs sont d'avis qu'un navire naviguant sous deux pavillons, ne pourra se réclamer d'aucun d'eux en vue de sa protection. D'autres, estimant qu'un Etat n'a pas le droit de délivrer une lettre de mer à un navire qui obtiendrait de ce fait une seconde nationalité, déclarent que seule l'attribution de la seconde nationalité est nulle; un certain nombre de traités de commerce contiennent en effet une stipulation suivant laquelle, exception faite du cas de vente judiciaire, les navires de l'une des parties ne sauraient obtenir la nationalité de l'autre sans qu'un certificat de retrait de pavillon ait été présenté. Le rapporteur spécial a cru devoir se prononcer en faveur de la première alternative.

Article 10

Chaque Etat peut établir les conditions sous lesquelles il autorisera un navire à se faire immatriculer sur son territoire et à battre son pavillon. Toutefois, aux fins de reconnaissance de son caractère national par les autres Etats, le navire devra être dans la proportion de 50 pour 100 la propriété :

a) **Soit de nationaux ou de personnes établies sur le territoire dudit Etat;**

b) **Soit d'une société en nom collectif ou en commandite simple, dont la moitié des membres personnellement responsables sont des nationaux ou des personnes établies sur le territoire dudit Etat;**

c) **Soit d'une société par actions constituée conformément à la législation de cet Etat et y ayant son siège.**

Commentaire

1) Le texte de cet article suit de très près celui adopté par la Commission lors de sa troisième session avec une seule voix dissidente¹⁴. Le rapporteur spécial a apporté certaines modifications à la rédaction dudit article; au lieu de parler de personnes « domiciliées » sur le territoire de l'Etat il lui paraît opportun d'exiger que les

¹⁴ Voir compte rendu de la 121^e séance, par. 10 à 102, *Yearbook of the International Law Commission, 1951*, vol. I, p. 327 à 332.

personnes soient « établies » sur le territoire de l'Etat; il semble en effet préférable d'imposer l'établissement de fait sur le territoire et de ne pas se contenter d'un domicile légal.

2) Le rapporteur spécial avait proposé d'exiger comme l'une des conditions requises pour l'acquisition du pavillon que le capitaine eût la nationalité de l'Etat intéressé. Il avait fait observer qu'il s'agissait ici d'une pratique très répandue, notamment si l'on considère le tonnage de la marine marchande des pays qui prescrivent cette condition en le comparant au total mondial. Il avait fait valoir que la nationalité du capitaine était de la plus grande importance pour l'octroi du caractère national à un navire et qu'elle pouvait offrir certaines garanties en ce qui concerne l'application à bord de la législation du pays du pavillon. La majorité de la Commission a toutefois jugé la règle trop vigoureuse; tout en admettant qu'il y avait intérêt à ce que le capitaine possédât la nationalité du pavillon, elle était d'avis qu'il fallait tenir compte du fait que certains pays, à l'heure actuelle, ne disposaient pas d'un personnel suffisant à leur permettre de remplir cette condition¹⁵.

NAVIRES D'ETAT EN HAUTE MER

Article 11

1. Les navires de guerre naviguant en haute mer jouiront en toutes circonstances d'une immunité complète de juridiction de la part d'Etats autres que l'Etat du pavillon.

2. Sous la dénomination de « navire de guerre » on entend des navires appartenant à la marine de guerre de l'Etat. Le Commandant doit être au service de l'Etat. Son nom doit figurer sur la liste des officiers de la flotte militaire et l'équipage doit être soumis aux règles de la discipline militaire.

Commentaire

Le principe consacré par cet article a été généralement adopté. La définition du navire de guerre a été empruntée à la Convention de Genève relative au traitement des prisonniers de guerre, du 12 août 1949.

Article 12

Les yachts d'Etat, navires de surveillance, bateaux-hôpitaux, navires auxiliaires, navires de ravitaillement et autres bâtiments appartenant à un Etat ou exploités par lui et affectés exclusivement à un service gouvernemental et non commercial, sont, en ce qui concerne l'exercice de pouvoirs en haute mer par d'autres Etats que l'Etat du pavillon, assimilés à des navires de guerre.

Commentaire

Cet article a été emprunté à l'article 3 de la Convention internationale pour l'unification de certaines règles concernant les immunités des navires d'Etat, signée à Bruxelles le 10 avril 1926. La question peut se poser

¹⁵ Voir compte rendu de la 121^e séance, par. 103 à 127, *op. cit.*, p. 332 à 334.

de savoir si, relativement à la navigation en haute mer, il y a lieu de faire une distinction entre les navires de guerre et les autres, étant donné que tous ne sont soumis qu'à l'intervention de l'Etat du pavillon. Toutefois, ce principe subit certaines exceptions examinées à l'article suivant du présent règlement. C'est le motif qui a induit le rapporteur spécial à y insérer l'article susmentionné. Il est, en effet, d'avis qu'un navire appartenant ou exploité par l'Etat, mais utilisé pour un service commercial, ne saurait être à l'abri de l'exercice des droits de police prévus par ce règlement. C'est notamment le droit de poursuite qui pourrait avoir une certaine importance à cet égard.

SÉCURITÉ DE LA NAVIGATION

Article 13

Ne peuvent être édictées par aucun Etat des règles qui seront en contradiction avec celles établies d'un commun accord par la majorité des Etats maritimes, au cas où une telle contradiction compromettrait la sauvegarde de la vie humaine en mer.

Commentaire

1) La Commission a déclaré, lors de sa deuxième session, qu'elle attache une grande importance aux règles internationales destinées à prévenir les abordages en mer, et prévues à l'annexe B de l'Acte final de la Conférence de Londres en 1948. Elle a prié le rapporteur spécial d'étudier la question et de s'efforcer de déduire de ces règles les principes que la Commission pourra examiner (A/1316, par. 188¹⁶).

2) La Conférence de 1948 a rédigé un acte final où il est dit ce qui suit :

« A la suite de ces délibérations... la Conférence a élaboré et soumis à la signature et à l'acceptation une Convention internationale pour la sauvegarde de la vie humaine en mer (1948), destinée à remplacer la Convention internationale pour la sauvegarde de la vie humaine en mer (1929)... Les membres de la Conférence avaient également sous les yeux et ont pris comme base de leurs discussions l'actuel règlement international pour prévenir les abordages en mer. La Conférence a estimé désirable de réviser ce règlement et elle a, en conséquence, approuvé les règles internationales pour prévenir les abordages en mer (1948), mais a décidé de ne pas annexer ces règles révisées à la Convention internationale pour la sauvegarde de la vie humaine en mer (1948). La Conférence invite le Gouvernement du Royaume-Uni... lorsqu'un accord équivalant à une unanimité aura été obtenu en faveur de l'acceptation des règles internationales pour prévenir les abordages en mer (1948), à fixer la date à partir de laquelle les règles doivent être appliquées par les Gouvernements qui auront décidé de les accepter¹⁷. »

¹⁶ Voir *Yearbook of the International Law Commission*, 1950, vol. II, p. 384.

¹⁷ *Acte final de la Conférence internationale pour la sauvegarde de la vie humaine en mer, 1948*, Londres, His Majesty's Stationery Office, Cmd. 7492, p. 7.

La date en question est fixée au 1^{er} janvier 1954.

3) Le rapporteur spécial a élaboré, dans son deuxième rapport (A/CN.4/42¹⁸), certains principes qui, à son avis, peuvent être dégagés des règles internationales destinées à prévenir les abordages en mer. La Commission les a examinés pendant sa troisième session¹⁹. Plusieurs de ses membres ont manifesté la crainte que la Commission ne dépasse les limites de sa compétence en abordant l'examen des questions d'ordre technique ici envisagées. Tout en admettant qu'il était désirable d'unifier la réglementation de la sauvegarde de la vie humaine en mer, la Commission était d'avis qu'il ne lui appartenait pas de s'occuper de ce problème et qu'elle devait rattacher ses propres travaux à ceux entrepris par des organismes compétents déjà existants ou qui sont sur le point d'être créés. Selon certains membres cependant ce serait faire œuvre de codification que de prescrire aux Etats de s'abstenir d'édicter des règles en contradiction avec celles établies de concert par les autres Etats maritimes. D'après eux une telle obligation aurait une réelle utilité, sans attribuer pour autant aux principales puissances maritimes des pouvoirs exclusifs en matière de réglementation de la police de la navigation, pouvoirs qui obligerait les autres Etats d'adopter les règles ainsi établies. Il semble nécessaire, cependant, d'éviter que certains Etats, en édictant des règles en contradiction avec celles établies par la majorité des autres Etats maritimes, puissent mettre en péril la sauvegarde de la vie humaine en mer. C'est ce qui justifie aux yeux du rapporteur spécial le projet d'article ci-dessus qu'il soumet à la Commission.

Article 14

Le capitaine d'un navire est tenu autant qu'il peut le faire sans péril sérieux pour son navire, son équipage et ses passagers, de prêter assistance à toute personne trouvée en mer en danger de se perdre. Après un abordage, le capitaine de chacun des navires entrés en collision est tenu, autant qu'il pourra le faire sans danger sérieux pour son navire, son équipage et ses passagers, de prêter assistance à l'autre bâtiment, à son équipage et à ses passagers.

Commentaire

1) La Commission fut d'avis (A/1316, par. 189²⁰) que les principes incorporés à l'article 14 ci-dessus pouvaient être formulés en tenant compte de l'article XI de la Convention de Bruxelles du 23 septembre 1910 pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes ainsi que de l'article 8 de la Convention du même jour pour l'unification de certaines règles en matière d'abordage. Ledit article 8 est libellé comme suit :

« Après un abordage, le capitaine de chacun des navires entrés en collision est tenu autant qu'il peut le faire sans danger sérieux pour son navire, son équi-

page et ses passagers de prêter assistance à l'autre bâtiment, à son équipage et à ses passagers²¹. »

Le premier alinéa de l'article XI de la première Convention est conçu en ces termes :

« Tout capitaine est tenu, autant qu'il peut le faire sans danger sérieux pour son navire, son équipage, ses passagers, de prêter assistance à toute personne, même ennemie, trouvée en mer en danger de se perdre²². »

2) Le rapporteur spécial a rédigé l'article dont il s'agit en tenant compte des dispositions ci-dessus citées.

Article 15

Dans la mesure où l'emploi de signaux divergents est de nature à compromettre la sécurité de la navigation, les Etats sont tenus à prescrire à leurs navires l'emploi en haute mer des signaux utilisés par la majorité des bâtiments participant à la navigation internationale.

Commentaire

1) L'établissement du code international des signaux fut le résultat d'une entente internationale sans que ce code eût été incorporé dans une convention. Le code international préparé par une commission britannique fut publié par le Board of Trade en 1857 (*Commercial Code of Signals for the use of all nations*). Après avoir subi une révision par une commission anglo-française il fut rendu obligatoire aussi pour les bâtiments français (1864). De nouvelles éditions furent publiées en 1900 et en 1934 en consultation avec d'autres puissances maritimes.

2) L'article tel qu'il a été rédigé ici garantit l'unité nécessaire du système de signalisation, sans imposer une trop grande rigidité dans les cas de moindre importance où l'inobservation des règles généralement adoptées ne met pas en péril la sécurité de la navigation internationale.

3) Divers accords touchant aux signaux maritimes furent conclus sous les auspices de la Société des Nations, notamment l'Accord relatif aux signaux maritimes signé à Lisbonne le 23 octobre 1930²³; l'Accord sur les bateaux-feu gardés se trouvant hors de leur poste normal, signé à Lisbonne également le 23 octobre 1930²⁴, l'Accord relatif à un système uniforme de balisage maritime et le règlement y annexé, signé à Genève le 13 mai 1936²⁵. Il ne semble pas que le code ait à s'occuper expressément de ces matières.

CÂBLES SOUS-MARINS ET PIPELINES

Article 16

1. Tout Etat peut poser sur le lit de la haute mer des câbles télégraphiques ou téléphoniques ainsi que des pipelines.

¹⁸ Voir par. 3 du présent rapport.

¹⁹ Voir compte rendu de la 122^e séance, par. 110 à 120, et compte rendu de la 123^e séance, par. 7 à 60, dans *Yearbook of the International Law Commission, 1951*, vol. I, p. 344 et 345, 346 à 349.

²⁰ Voir *Yearbook of the International Law Commission, 1950*, vol. II, p. 384.

²¹ Voir *British and Foreign State Papers*, vol. 103, p. 438.

²² *Ibid.*, p. 446.

²³ Hudson, *International Legislation*, vol. V, p. 792.

²⁴ *Ibid.*, p. 801.

²⁵ *Ibid.*, vol. VII, p. 308.

2. Sous réserve de son droit de prendre des mesures raisonnables pour l'exploration du plateau continental et l'exploitation de ses ressources naturelles, l'Etat riverain ne peut empêcher la pose ou l'entretien de câbles sous-marins.

Article 17

La rupture ou la détérioration d'un câble sous-marin en haute mer, faite volontairement ou par négligence coupable, et qui a pour résultat d'interrompre ou d'entraver en tout ou en partie les communications télégraphiques ou téléphoniques, ainsi que la rupture ou la détérioration dans les mêmes conditions d'un pipeline sous-marin, constituent une infraction passible de sanctions. Cette disposition ne s'applique pas aux ruptures ou détériorations dont les auteurs n'auraient eu que le but légitime de protéger leur vie ou la sécurité de leurs bâtiments, après avoir pris toutes les précautions nécessaires pour éviter ces ruptures ou détériorations.

Article 18

Le propriétaire d'un câble ou d'un pipeline en haute mer qui, par la pose ou la réparation de ce câble ou de ce pipeline, cause la rupture ou la détérioration d'un autre câble ou d'un autre pipeline doit supporter les frais des réparations que cette rupture ou cette détérioration aura rendus nécessaires.

Article 19

Tous les engins de pêche utilisés en chalutant seront construits et maintenus de manière à réduire au minimum tout danger d'accrochage des câbles ou pipelines sous-marins se trouvant au fond de la mer.

Commentaire

1) A sa deuxième session (A/1316, par. 192²⁶) la Commission avait retenu le principe selon lequel tous les Etats ont le droit de poser des câbles sous-marins en haute mer. La Commission avait prié le rapporteur spécial d'étendre la règle aux pipelines ainsi que d'examiner la question des mesures de protection. Dans son deuxième rapport (A/CN.4/42²⁷), le rapporteur spécial avait fait observer que la Convention du 14 mars 1884 relative aux câbles sous-marins n'est plus entièrement satisfaisante et que l'évolution technique rend nécessaire l'adoption de stipulations plus complètes.

2) En 1927, l'Institut de droit international avait adopté certains vœux tendant à compléter la Convention. Le rapporteur spécial s'est borné à emprunter à la Convention de 1884 et aux résolutions de l'Institut quelques dispositions d'ordre général qui lui ont paru propres à être insérées dans la réglementation dont la Commission envisage l'adoption. Lors de sa troisième session, la Commission a étudié ces propositions²⁸; cer-

tains membres exprimèrent l'avis que la réglementation était encore trop détaillée. Le rapporteur spécial a donc réexaminé son projet et il soumet à l'attention de la Commission une nouvelle rédaction abrégée qui contient uniquement les principes les plus importants régissant cette matière.

3) En ce qui concerne le second alinéa de l'article 16, le rapporteur spécial se réfère au rapport de la Commission du droit international sur les travaux de sa cinquième session (A/2456), chapitre III, Projet d'articles relatifs au plateau continental, article 5²⁹.

COMPÉTENCE PÉNALE EN CAS D'ABORDAGE EN HAUTE MER

Article 20

1. Au cas d'abordage ou de tout autre événement de navigation concernant un navire de mer qui est de nature à engager la responsabilité pénale ou disciplinaire du capitaine ou de toute autre personne au service du navire, aucune poursuite ne pourra être intentée que devant les autorités judiciaires ou administratives de l'Etat dont le navire portait le pavillon au moment de l'abordage ou de l'événement de navigation, ou bien de l'Etat dont les personnes dont s'agit sont les nationaux.

2. Aucune saisie ou retenue du navire ne pourra être ordonnée, même pour des mesures d'instruction, par des autorités autres que celles dont le navire portait le pavillon.

Commentaire

1) Le rapporteur spécial a traité cette question d'une façon explicite dans son deuxième rapport (A/CN.4/42³⁰).

2) La Commission avait jugé lors de sa deuxième session³¹ qu'il convenait de ne pas tenir compte pour l'instant des problèmes de droit international privé soulevés par la question de l'abordage. Elle a estimé toutefois qu'il importait de déterminer le tribunal compétent pour connaître des affaires criminelles pouvant surgir à la suite d'un abordage. Après l'affaire du Lotus et en raison de ses répercussions dans le monde entier, la Commission ne saurait garder le silence à ce sujet. Elle a prié le rapporteur spécial d'étudier la question et de lui proposer une solution à sa prochaine session. Lors de la troisième session, le rapporteur spécial, s'inspirant des travaux préparatoires du Comité maritime international, a proposé, dans son deuxième rapport (A/CN.4/42, par. 31³²), l'adoption d'un article libellé comme suit :

« Au cas d'abordage ou de tout autre accident de navigation en haute mer, le capitaine, ainsi que toute autre personne au service du navire qui est entière-

²⁶ Voir *Yearbook of the International Law Commission*, 1950, vol. II, p. 384.

²⁷ Voir par. 3 du présent rapport.

²⁸ Voir compte rendu de la 124^e séance, par. 95 à 108, et compte rendu de la 125^e séance, par. 3 à 36, dans *Yearbook of the International Law Commission*, 1951, vol. I, p. 361 et 362 à 364.

²⁹ Voir *Yearbook of the International Law Commission*, 1953, vol. II.

³⁰ Voir par. 3 du présent rapport.

³¹ Voir compte rendu de la 64^e séance, par. 104 à 113, dans *Yearbook of the International Law Commission*, 1950, vol. I, p. 195 et 196.

³² Voir par. 3 du présent rapport.

ment ou partiellement responsable, ne pourra être poursuivi, à titre pénal ou disciplinaire, que devant les tribunaux de l'Etat dont le navire portait le pavillon au moment de l'abordage ou autre accident de navigation. Aucune saisie ou retenue du navire ne pourra être ordonnée à titre pénal par les autorités d'un autre Etat que celui dont le navire portait le pavillon. »

3) Dans son rapport, le rapporteur spécial avait exposé les arguments qui, à son avis, militaient en faveur d'une pareille disposition. La proposition a fait l'objet d'une assez longue discussion au sein de la Commission³³. Certains membres l'ont chaleureusement appuyée, d'autres qui pensaient que les critiques dirigées contre l'arrêt de la Cour permanente de Justice internationale dans l'affaire du *Lotus*, n'étaient pas fondées, ont formulé des objections. La Commission n'a pu arriver à une conclusion nette à ce sujet et elle a décidé d'ajourner la question jusqu'à la quatrième session. Elle a fait ressortir dans son rapport « qu'il convient de poser une règle en la matière, car la nécessité s'en est fait sentir » (A/1858, par. 80³⁴).

4) Dans son cinquième rapport (A/CN.4/69³⁵), le rapporteur spécial avait observé qu'après un examen minutieux des arguments pour et contre, développés par les membres de la Commission, il ne pouvait que maintenir sa proposition de l'année précédente. A son avis on ne saurait rejeter la règle dont il s'agit pour le seul motif qu'elle ne serait pas conforme aux principes généraux qui régissent en droit international la compétence des Etats dans les affaires pénales. Tout en laissant de côté la question de savoir s'il s'agit en effet d'une divergence portant sur des principes généraux, le rapporteur spécial estime qu'il ne faut pas perdre de vue que la navigation maritime présente un intérêt international de tout premier ordre, et qu'elle peut se prévaloir d'un long passé ainsi que d'une évolution qui lui est propre. Le développement d'un droit coutumier relatif à cette navigation et déviant sur certains points des principes régissant les autres activités du genre humain n'a donc rien d'étonnant. La pratique s'est inspirée de l'intérêt primordial qu'a la navigation maritime de pouvoir accomplir sa tâche sans être entravée par des poursuites judiciaires non justifiées et vexatoires. Il faut aussi confier la juridiction pénale dans les affaires d'abordage en haute mer à des tribunaux qui, dans cette matière très complexe, ont la compétence spécialisée requise pour pouvoir juger en toute connaissance de cause et avec toute l'expérience que le caractère particulier de ces incidents exige. Aussi la coutume s'est-elle établie de ne poursuivre le capitaine ou toute autre personne au service du navire à titre pénal ou disciplinaire pour cause d'abordage en haute mer que devant leurs tribunaux nationaux.

5) Dans son cinquième rapport (A/CN.4/69), le rapporteur spécial a fait mention des conclusions auxquelles la Conférence diplomatique de Bruxelles de 1952 est parvenue à ce sujet. Une convention a été signée à Bruxelles le 10 mai 1952 par les Etats suivants : l'Alle-

magne, la Belgique, le Brésil, le Danemark, l'Espagne, la France, la Grèce, l'Italie, Monaco, Nicaragua, le Royaume-Uni, la Yougoslavie, convention dont le texte se trouve annexé au cinquième rapport.

6) Le rapporteur général propose de s'y conformer et de libeller l'article comme il a été indiqué ci-dessus.

7) La question peut se poser de savoir si, après la Conférence de Bruxelles, il y a encore lieu d'insérer dans le projet une stipulation concernant cette matière. Le rapporteur spécial est d'avis que l'entrée en vigueur d'une convention y relative conclue entre les Etats maritimes ayant l'habitude de participer aux conférences du droit maritime, ne suffira point à protéger les marins contre les dangers des poursuites pénales dont ils peuvent faire l'objet de la part des Etats se tenant à l'écart de pareilles conventions.

8) La Conférence de Bruxelles ne s'est pas bornée à régler les cas d'abordage en haute mer, mais elle a cru que le régime établi par la Convention devait s'appliquer dans un domaine aussi vaste que possible. Elle a notamment prévu son application à la mer territoriale, en n'exceptant que les ports, les rades et les eaux intérieures. Un cas d'abordage rentrant dans cette catégorie et qui de nouveau a donné lieu à des difficultés entre deux Etats, s'est présenté dans les Dardanelles le 4 avril 1953 entre le sous-marin turc *Dumlupinar* et le navire de commerce suédois *Naboland*.

9) Tout en se rendant compte que le présent rapport n'a trait qu'aux abordages en haute mer, le rapporteur spécial tient à attirer l'attention des membres de la Commission sur l'article proposé par la Conférence. Si elle l'estime opportun la Commission pourra, dans sa réglementation relative à la mer territoriale, insérer une stipulation libellée comme suit :

« En cas d'abordage ou de tout autre accident de navigation concernant un navire de mer survenu dans la mer territoriale d'un Etat et qui serait de nature à engager la responsabilité pénale ou disciplinaire du capitaine ou de toute autre personne au service dudit navire, aucune poursuite ne pourra être intentée sauf : 1) devant les autorités de l'Etat dont le navire porte le pavillon au moment de l'abordage ou de l'événement de navigation; 2) devant les autorités de l'Etat dont l'inculpé est un national; 3) devant les autorités de l'Etat riverain.

« Aucune saisie ou retenue du navire ne pourra être ordonnée, même pour des mesures d'instruction, par des autorités autres que celles des Etats susmentionnés. »

10) La Commission voudra peut-être envisager l'établissement d'une instance d'appel contre les décisions des autorités de l'Etat riverain qui pourrait être invoqué au cas où l'Etat dont la personne condamnée est le national refuserait d'accepter la sentence.

POLICE DE LA HAUTE MER

Article 21

Sauf les cas où les actes d'ingérence sont fondés sur des pouvoirs accordés par traités, un bâtiment de guerre, rencontrant en mer un navire de commerce étranger, ne pourra l'arraisonner ni prendre aucune

³³ Voir compte rendu de la 121^e séance, par. 128 à 151, et compte rendu de la 122^e séance, par. 1 à 109, dans *Yearbook of the International Law Commission, 1951*, vol. I, p. 334 à 336 et 336 à 344.

³⁴ Voir *ibid.*, vol. II, p. 140.

³⁵ Voir par. 11 du présent rapport.

autre mesure à son égard, à moins qu'il n'y ait un motif sérieux de penser que ledit navire se livre à la piraterie ou à la traite des esclaves. Lorsque ces soupçons sont mal fondés et à condition que le navire arrêté n'ait commis aucun acte les justifiant, il devra être indemnisé du dommage subi.

Commentaire

Dans le rapport (A/CN.4/42³⁶) qu'il avait soumis à la Commission, lors de sa troisième session, le rapporteur spécial avait étudié, dans des chapitres différents, la question du droit d'approche et celle de la traite des esclaves. Par rapport à la traite des esclaves, il était d'avis que le droit d'approche ne pouvait être exercé que dans une zone spéciale où actuellement la traite existe encore. La Commission a toutefois adopté par 7 voix contre 4 une proposition tendant à ne pas établir de distinction entre le droit d'approche d'un navire soupçonné de piraterie ou d'un navire suspect de se livrer à la traite des esclaves³⁷. Le rapporteur spécial soumet donc un article dans ce sens à l'examen de la Commission.

Article 22

Tous les Etats sont obligés de coopérer afin d'assurer le plus efficacement possible la répression de la traite des esclaves en haute mer. Ils sont tenus de prendre des mesures efficaces pour empêcher le transport des esclaves sur les navires autorisés à arborer leur pavillon et pour prévenir son usurpation à cette fin. Tout esclave qui se réfugie sur un navire de guerre ou un navire marchand sera *ipso facto* affranchi.

Commentaire

1) La Commission a pensé qu'elle ne devait pas se contenter, en ce qui concerne la traite des esclaves, de reconnaître un droit d'approche mais qu'en outre elle devait insérer certaines dispositions qui obligeraient les Etats à coopérer dans la mesure du possible à la suppression de la traite. Le rapporteur spécial avait, dans son deuxième rapport (A/CN.4/42³⁸), proposé à cet effet certaines dispositions qui, cependant, paraissaient trop détaillées à la Commission. M. Yepes avait proposé le texte suivant :

« Tous les Etats sont obligés de coopérer afin d'assurer le plus efficacement possible la répression de la traite des esclaves en haute mer, particulièrement dans les régions où elle existe encore, telles que les côtes de l'océan Indien y compris celles du golfe Persique et de la mer Rouge et les côtes de l'Afrique.

« A cette fin, tous les Etats sont tenus de prendre des mesures efficaces pour prévenir l'usurpation de leur pavillon et pour empêcher le transport des esclaves sur les bâtiments autorisés à arborer leur pavillon.

« Pour rendre effective la répression de la traite

en haute mer et empêcher l'emploi abusif du pavillon d'un Etat, le droit d'approche est reconnu dans les mêmes conditions que pour la poursuite de la piraterie.

« Tout esclave qui se serait réfugié sur un navire de guerre ou un navire marchand sera *ipso facto* affranchi³⁹. »

2) Ce texte traitait dans un seul article du droit d'approche et des devoirs des Etats relatifs à la répression de la traite. Le rapporteur spécial est d'avis qu'il est préférable d'établir une distinction nette entre les deux matières, à savoir d'une part le droit d'approche et d'autre part les obligations des Etats en matière de répression de la traite. Dans le premier cas il s'agit de sauvegarder la liberté de la navigation et d'interdire tout droit de visiter et d'examiner des navires en haute mer, sauf dans les cas nettement déterminés. Dans l'autre, il s'agit d'obliger les Etats à collaborer aux mesures visant à la suppression de la traite. Le rapporteur spécial propose d'inclure cette dernière obligation dans un article séparé (article 22).

3) Comme exemples des cas où les actes d'ingérence se fondent sur des pouvoirs accordés par traité, le rapporteur rappelle les Conventions suivantes : Convention du 6 mai 1882 pour régler la police de la pêche dans la mer du Nord en dehors des eaux territoriales⁴⁰; Convention du 16 novembre 1887 concernant l'abolition du trafic des spiritueux parmi les pêcheurs dans la mer du Nord en dehors des eaux territoriales⁴¹; Convention du 14 mars 1884 concernant la protection des câbles sous-marins⁴²; Convention du 17 juin 1925 concernant le contrôle du commerce international des armes et munitions et des matériels de guerre⁴³ (pas entrée en vigueur).

Article 23

Constituent la piraterie les actes ci-après énumérés, lorsqu'ils sont commis à un endroit situé en dehors de la juridiction territoriale de tout Etat :

1) **Tout acte de violence ou de déprédation perpétré avec l'intention de pillage, de viol, de blessure, de réduction en esclavage, d'emprisonnement ou de mise à mort ou avec l'intention de voler ou de détruire une propriété à des fins d'ordre personnel, sans que l'auteur entende de bonne foi revendiquer un droit et à condition que l'acte dont il s'agit ait été commis en connexion avec une attaque en mer ou venant de la mer ou dans l'air ou partant de l'air. S'il y a connexion entre l'acte dont s'agit et une attaque ayant son point de départ à bord d'un navire, il faut que ce navire ou tout autre bâtiment impliqué soit un bateau pirate ou un navire sans nationalité;**

2) **Tout acte de participation volontaire dans l'exploitation d'un navire, commis en ayant connaissance de faits conférant à ce bâtiment le caractère d'un bateau pirate;**

³⁹ Voir compte rendu de la 124^e séance, par. 74, *ibid.*, p. 359 et 360.

⁴⁰ Martens, *Nouveau recueil général de traités*, 2^e série, vol. IX, p. 556.

⁴¹ *Ibid.*, vol. XIX, p. 414.

⁴² *Ibid.*, vol. XI, p. 281.

⁴³ Hudson, *International Legislation*, vol. III, p. 1634.

³⁶ Voir par. 3 du présent rapport.

³⁷ Voir compte rendu de la 123^e séance, par. 132, dans *Yearbook of the International Law Commission*, 1951, vol. I, p. 354.

³⁸ Voir par. 3 du présent rapport.

3) Toute action visant à inciter à la commission des actes définis aux alinéas 1 ou 2 du présent article ou entreprise avec l'intention de les faciliter.

Article 24

Un bateau pirate est un bâtiment destiné par les personnes sous le contrôle desquelles il se trouve effectivement à commettre l'un des actes dont il est question à la première phrase de l'alinéa 1 de l'article 23 ou tout article similaire, à l'intérieur du territoire d'un Etat par irruption partant de la haute mer, pourvu que, dans chacun de ces cas, le dessein des personnes sous le contrôle desquelles ledit navire se trouve effectivement ne se borne pas strictement à perpétrer de tels actes au préjudice de bateaux ou d'un territoire soumis à la juridiction de l'Etat auquel le navire appartient.

Article 25

Un navire pourra conserver sa nationalité, malgré sa transformation en bateau pirate. La conservation de la nationalité ou sa perte seront déterminées conformément à la loi de l'Etat de laquelle cette nationalité découlait à l'origine.

Article 26

Tout Etat pourra saisir un bateau pirate ou un bateau capturé à la suite d'actes de piraterie et qui serait en possession de pirates ainsi que les choses et les personnes se trouvant à bord dudit bâtiment, à tout endroit non soumis à la juridiction d'un autre Etat.

Article 27

Lorsqu'un navire saisi pour cause de suspicion de piraterie en dehors de la juridiction territoriale de l'Etat qui l'aura appréhendé, n'est ni un bateau pirate ni un bateau capturé à la suite d'actes de piraterie et en possession de pirates et si ledit navire n'est pas susceptible d'être saisi pour d'autres motifs, l'Etat qui l'aura appréhendé sera responsable vis-à-vis de l'Etat auquel le bateau appartiendra de tout dommage causé par la capture.

Article 28

Toute saisie pour cause de piraterie ne pourra être exécutée que pour compte d'un Etat et uniquement par une personne autorisée par cet Etat à agir pour son compte.

Commentaire

La piraterie n'appartient pas aux matières choisies par la Commission lors de sa première session, en 1949, en vue de la codification. Aussi le rapporteur spécial dans son premier rapport sur le régime de la haute mer (A/CN.4/17⁴⁴) n'avait-il pas traité de ce sujet. Après l'élargissement de son mandat par la Commission à l'occasion de sa cinquième session, le rapporteur spécial

est arrivé à la conclusion qu'il est indispensable d'inclure dans son rapport certains principes relatifs à la protection contre les actes de piraterie. Toutefois, il ne saurait être question d'y insérer une réglementation complète de cette matière, le projet de convention, élaboré par la Harvard Law School en 1928 et 1929 et dont M. Joseph W. Bingham fut le rapporteur, ne contenant pas moins de 19 articles. Le rapporteur spécial a cru devoir se borner à évoquer les articles reproduisant les principes les plus importants relatifs à la protection contre la piraterie. Quoiqu'il semble possible de soutenir sur certains points une opinion différente, le rapporteur spécial a préféré présenter ces articles dans la forme où ils se trouvent dans le projet de Harvard Law School. Lesdites stipulations pourront à son avis servir de base à la discussion que la Commission voudra entamer en cette matière. Quant aux commentaires ayant trait à ces articles, le rapporteur spécial se réfère aux applications détaillées jointes au texte du projet américain⁴⁵.

Article 29

1. La poursuite d'un navire étranger pour infraction aux lois et règlements de l'Etat riverain, commencée alors que ledit navire étranger se trouve dans les eaux intérieures ou dans la mer territoriale de cet Etat, pourra être continuée au delà de la mer territoriale, à condition qu'elle n'ait pas été interrompue. Il n'est pas nécessaire que le navire, ordonnant de stopper à un bateau étranger naviguant dans la mer territoriale, s'y trouve également au moment de la réception dudit ordre par le bateau intéressé. Si le navire étranger se trouve dans une zone contiguë à la mer territoriale, la poursuite ne pourra être entamée que pour cause de violation d'intérêts que l'institution de ladite zone avait pour objet de protéger.

2. Le droit de poursuite cesse dès que le navire poursuivi entre dans la mer territoriale du pays auquel il appartient ou dans celle d'une tierce puissance.

3. La poursuite ne sera considérée comme étant commencée qu'à condition que le navire poursuivi se soit assuré par des relèvements, des mesures d'angle ou de toute autre façon, que le bâtiment poursuivi ou l'une de ses embarcations se trouve à l'intérieur des limites de la mer territoriale. Le commencement de la poursuite devra en outre être marqué par l'émission du signal de stopper. L'ordre de stopper devra être donné à une distance permettant au navire intéressé soit de l'entendre, soit d'apercevoir le signal correspondant.

4. La relâche d'un navire arrêté à un endroit se trouvant sous la juridiction d'un Etat et escorté vers un port de cet Etat aux fins d'une action le concernant devant les autorités compétentes ne pourra être exigée du seul fait que ledit navire ait traversé une partie de la haute mer au cours de son voyage.

Commentaire

La réglementation relative au droit de poursuite élaborée par la Conférence de codification de 1930 repro-

⁴⁴ Voir par. 1 du présent rapport.

⁴⁵ *Research in International Law, Harvard Law School 1932*, p. 749 à 872.

duit de façon générale des principes non contestés en droit international; elle contient cependant certains points controversés qui ont été plus particulièrement examinés par la Commission du droit international pendant sa troisième session⁴⁶. Le rapporteur spécial a reproduit les idées adoptées par la Commission.

PÊCHERIES

Article 30

Un Etat dont les ressortissants se livrent à la pêche dans une région quelconque de la haute mer où les ressortissants d'autres Etats ne s'y livrent pas peut réglementer et contrôler la pêche dans cette région en vue d'empêcher une exploitation abusive ou l'épuisement des ressources en poisson. Si les ressortissants de deux ou plusieurs Etats se livrent à la pêche dans une région de la haute mer, les Etats intéressés prendront ces mesures d'un commun accord. Si après l'adoption de ces mesures, des ressortissants d'autres Etats se livrent à la pêche dans cette région et si ces Etats n'acceptent pas ces mesures, l'organisme international prévu à l'article 32 sera saisi de la question, sur requête de l'une des parties intéressées.

Article 31

Dans toute région située à moins de 100 milles de la mer territoriale, l'Etat ou les Etats riverains ont le droit de participer sur un pied d'égalité à toute réglementation, même si leurs ressortissants ne se livrent pas à la pêche dans cette région.

Article 32

Les Etats auront le devoir de reconnaître le caractère obligatoire pour leurs ressortissants de toute réglementation de la pêche dans une région quelconque de la haute mer qu'une autorité internationale, créée dans le cadre de l'Organisation des Nations Unies, aura jugée indispensable pour empêcher une exploitation abusive ou l'épuisement des ressources en poisson de cette région. Cette autorité internationale interviendra à la requête de tout Etat intéressé.

Commentaire

Les articles ci-dessus ont été empruntés au rapport de la Commission sur les travaux de sa cinquième session relatif aux pêcheries (A/2456, par. 94). Quant au commentaire, le rapporteur spécial se permet de renvoyer aux paragraphes 95 à 104 dudit rapport⁴⁷.

PÊCHERIES SÉDENTAIRES

Article 33

Sous réserve des droits acquis des nationaux d'autres Etats, les droits souverains de l'Etat rive-

rain sur son plateau continental s'étendent également aux pêcheries sédentaires.

Commentaire

Voir le rapport de la Commission du droit international sur les travaux de sa cinquième session (A/2456), paragraphe 71⁴⁸.

POLLUTION DES EAUX

Article 34

Tous les Etats seront tenus d'édicter des règles en conformité avec celles établies de concert par la majorité des Etats maritimes et qui visent à éviter la pollution des eaux par les hydrocarbures répandus par les navires.

Commentaire

1) La pollution de la mer par les hydrocarbures répandus par les navires présente de graves inconvénients : infection des ports et des plages, risques d'incendie, menaces à la vie de certaines espèces marines, poissons et oiseaux. Presque tous les Etats maritimes ont établi une réglementation ayant pour objet d'éviter la pollution de leurs eaux par les hydrocarbures. Mais il est clair que ces règlements particuliers sont insuffisants. Les hydrocarbures, évacués en pleine mer, sont susceptibles d'être entraînés vers les côtes par les courants et les vents. Seule une solution internationale pourra être efficace. Sur l'invitation du Gouvernement des Etats-Unis, une conférence préliminaire d'experts s'est réunie à Washington le 8 juin 1926⁴⁹. Elle élaborera un projet de convention⁵⁰ qui ne fut pas favorablement reçu. En 1934, le Gouvernement britannique saisit la Société des Nations de ce problème⁵¹. L'Assemblée déclara que « la question de la pollution des eaux de la mer par les hydrocarbures est de nature à faire l'objet d'une convention internationale »⁵². Un comité spécial d'experts élaborera en octobre 1935 un projet de convention internationale⁵³. Le Conseil décida, le 10 octobre 1936, de convoquer une conférence à ce sujet⁵⁴. Toutefois, celle-ci ne s'était pas réunie avant la guerre mondiale. A l'heure actuelle, de nouvelles tentatives sont en cours en vue d'aboutir à une réglementation de cette matière.

2) La situation actuelle est résumée comme suit dans un article publié le 7 décembre 1953 au *Department of State Bulletin* américain, p. 779, sous la plume de

⁴⁸ *Ibid.*

⁴⁹ Preliminary Conference on Oil Pollution of Navigable Waters, Washington, June 8-16, 1926, Voir *Papers relating to the Foreign Relations of the United States 1926*, vol. I, p. 238.

⁵⁰ *Ibid.*, p. 245.

⁵¹ Voir *Pollution de la mer par les hydrocarbures* (série de publications de la Société des Nations : VIII. Communications et transit. 1935.VIII.5) [S.d.N., n° officiel : A.20.1935.VIII], p. 2.

⁵² Voir *Pollution de la mer par les hydrocarbures* (*op. cit.*, 1935.VIII.7) [S.d.N., n° officiel : C.449.M.235.1935.VIII], p. 2.

⁵³ Voir *Ibid.*, p. 8.

⁵⁴ Société des Nations, *Journal officiel*, XVII^e année, p. 1196 (94^e session du Conseil, 4^e séance, 10/X/1936).

⁴⁶ Voir compte rendu de la 125^e séance, par. 37 à 76, dans *Yearbook of the International Law Commission, 1951*, vol. I, p. 364 à 366.

⁴⁷ Voir *Yearbook of the International Law Commission, 1953*, vol. II.

M. Mann, « Foreign Affairs Officer in the Office of Transport and Communications Policy » :

« En conclusion, il paraît raisonnable de supposer que l'on fait des progrès substantiels en ce qui concerne la prévention de la pollution de l'eau de mer par les hydrocarbures grâce à la mise en œuvre de la législation nationale et locale et à l'action bénévole de certains intérêts privés. Aux Etats-Unis où des résultats appréciables ont été obtenus par ces moyens, on peut mentionner l'installation aux ports de têtes de ligne et dans la plupart des ports principaux, de récipients pour les eaux contaminées par les résidus d'hydrocarbures; mais il semble que les gouvernements de certains autres pays, où le problème est probablement plus urgent, sont convaincus de la nécessité d'une action internationale. Des recommandations actuellement à l'étude envisagent la création de régions ou de zones en haute mer, à l'intérieur desquelles il serait interdit de rejeter des hydrocarbures ou des eaux contaminées. Aucune pression ne s'exerce en vue d'obliger tous les pays à installer des séparateurs. Il y a lieu de noter que l'étude britannique d'ensemble, achevée au mois de juillet dernier, ne recommande d'imposer l'installation de séparateurs qu'aux navires immatriculés dans le Royaume-Uni et utilisant des réservoirs pour les hydrocarbures combustible et l'eau de lestage alternativement; le rapport constate que des pétroliers de haute mer peuvent, sans utiliser des séparateurs, effectuer la séparation de la plus grande partie de l'eau par dépôt dans une cuve à déchets. Certains gouvernements n'ont pas manqué, dans leurs rapports officiels, d'envisager la possibilité d'utiliser le traitement chimique pour prévenir la pollution par les hydrocarbures, mais leurs recommandations indiquent l'utilité de nouvelles études dans ce domaine. Ces diverses études ont fait ressortir le besoin d'installations adéquates pour la réception des résidus d'hydrocarbures dans les ports pétroliers de têtes de ligne, auprès des ateliers de réparation des navires, dans les ports et dans les rades; mais il semble que, dans certains pays, les mesures prises à cet effet soient insuffisantes. »

3) Il y a lieu de compléter les renseignements qui précèdent en résumant brièvement les activités des Nations Unies dans ce domaine. Après l'adoption à la date du 6 mars 1948 par une conférence tenue sous les auspices des Nations Unies de la Convention relative à

la création d'une organisation intergouvernementale consultative de la navigation maritime, le problème fut discuté de nouveau en 1950, 1951 et 1953 par la Commission des transports et des communications et par le Conseil économique et social. Les gouvernements disposant des moyens techniques nécessaires à cet effet furent invités à procéder à des études relatives à la question et à en communiquer les résultats au Secrétaire général des Nations Unies. Celui-ci fut autorisé par la résolution 468 B (XV), adoptée par le Conseil économique et social le 15 avril 1953, à prier les gouvernements des Etats Membres,

« Qui s'intéressent à la question de mettre à sa disposition, aux frais desdits gouvernements, des spécialistes qui seront chargés de coordonner les études et les communications présentées par les gouvernements intéressés et de tirer les conclusions qui s'imposent, pour transmission à l'Organisation intergouvernementale consultative de la navigation maritime, lorsque cette Organisation aura commencé de fonctionner... »

Conformément à ladite résolution, le Secrétaire général s'est mis en rapport avec les gouvernements des Etats Membres dont trois, celui de la France, celui des Pays-Bas et celui du Royaume-Uni, ont accepté en principe de mettre des spécialistes à sa disposition (E/2522, par. 2). Cependant, par une note en date du 6 novembre 1953 (E/2522, par. 3 et annexe), le Gouvernement britannique informa le Secrétaire général de son intention de réunir en 1954 à Londres une conférence diplomatique spéciale des principales puissances maritimes et d'inviter les Nations Unies à s'y faire représenter. Le Gouvernement britannique déclara en outre que la mise en œuvre de tout accord pouvant résulter des travaux de ladite conférence serait assurée par l'Organisation consultative susmentionnée, à partir du moment où elle commencerait à fonctionner. Il exprima également l'avis que, dans ces conditions, « il était inutile de continuer à envisager la convocation de la réunion des spécialistes... » prévue par la résolution 468 B (XV) et le Secrétaire général, dans sa réponse, prit note des réserves ci-dessus résumées du Gouvernement du Royaume-Uni et ajouta que dans ces circonstances il avait proposé que la question de la pollution de l'eau de la mer fut inscrite à l'ordre du jour provisoire de la dix-septième session du Conseil économique et social (E/2522, par. 3, 4 et 7).

DOCUMENT A/CN.4/86

Comments on the draft articles on the continental shelf, fisheries and the contiguous zone adopted by the International Law Commission at its fifth session, transmitted by the Government of Denmark

[Original text: English]

[13 May 1954]

By a note of 28 April 1954, the Permanent Representative of Denmark to the United Nations transmitted to the Secretary-General, with the request that they be brought to the attention of the International Law Commission, the following observations by the Danish Committee to Investigate Matters relating to the Continental Shelf :

At its session on 12 November 1953 the Committee discussed the new draft articles on the continental shelf adopted by the International Law Commission at its fifth session.

The Committee considered that the new draft articles were an improvement upon the previous draft, and especially that the amendments submitted by Denmark

had received a considerable measure of consideration.

In the course of the Committee's discussions it was emphasized that any codification of this new, far-reaching, and highly complex issue would entail great difficulties, not least in view of the fact that it must be formulated in a comparatively brief text of general rules. On the other hand, the establishment of certain basic principles, even if they may be inadequate in some respects, should be preferable to the existing lack of codification which has already caused a substantial amount of international difficulties and disputes.

Consequently the Committee has agreed to recommend to the Government of Denmark to support these draft articles when they come up for discussion by the General Assembly of the United Nations.

The Committee further suggests that in article 2 the word "especially" be inserted after the words "sovereign rights" in order to indicate that the present formulation should not give rise to the negative inference that no rights exist other than the exploration and exploitation of natural resources for which it would be natural to recognize for the coastal State a preferential right in its continental shelf.

During its session on 18 November 1953 the Committee discussed the new draft articles prepared by the International Law Commission covering the basic aspects of the international regulation of fisheries.

The essence of the system embodied in these draft articles is:

(1) States whose nationals engage in fishing in any area of the high seas may regulate and control fishing activities to protect fisheries against waste or extermination (article 1);

(2) A State whose territory is within 100 nautical miles from such areas of the high seas shall be entitled to participate in the regulation, even though the nationals of such State do not carry on fishing in the area (article 2);

(3) An international authority shall be created within the framework of the United Nations to settle disputes and prescribe a general system of regulation for the protection of fishing resources (article 3).

In the course of the Committee's negotiations doubt and uncertainty were expressed about this new proposal which, in the Committee's opinion, is not likely, in its present form, to win support among the States.

However, the Committee is not prepared to recommend that Denmark should reach a final decision on this proposal at the present time. It is agreed that it would be useful to examine the prospects of reaching international agreement for the protection of the important interests involved.

The Committee is therefore inclined to recommend that the Danish Delegation to the General Assembly of the United Nations should advocate continued studies of this matter and that the Delegation should support a resolution or other statement by the General Assembly to that effect. However, the Committee wishes, already at this stage, to submit the following comments to the draft articles—also for the information of the Danish Delegation:

(1) It is assumed that any system of regulation which may be proposed should be binding upon fishermen also

from other countries who may occasionally carry on fishing in the area. This rule, which is not in conformity with the existing international law applying to a group of States which have prescribed regulations, is considered a natural consequence of the new system proposed in the draft articles. The Committee further assumes that in its present formulation article 1 is to be interpreted to mean that systems of regulation must be binding also upon other States, as long as such systems have not been changed by the international authority referred to in article 3.

In the second sentence of article 1 the Committee proposes the words "in any area of the high seas" to be deleted. This will make it clear that the second sentence refers to the same areas as the first sentence, except that two or more States are engaged in such fishing.

Further, in article 1 the Committee would find it desirable to lay down detailed rules for the scope and nature of the control which the regulating States shall be entitled to exercise under this provision over fishermen and fishing vessels from other countries.

(2) At the end of article 1 the Committee would suggest an addition to the effect that disputes shall be submitted to the international authority referred to in article 3 only "unless the States involved have already undertaken to settle such disputes in other ways".

(3) In article 2 it is suggested to calculate the 100 nautical miles from the base lines from which the territorial sea of the coastal state is measured instead of from the outer limit of the territorial sea. This would make the rule clearer since the width of the territorial sea is often in dispute and is defined differently by different States and at different times.

(4) Article 3 contains common provisions for solution of two different problems which, in the opinion of the Committee, should be solved by different means, viz., (a) settlement of disputes arising between States in pursuance of articles 1 and 2, and (b) the general powers of the international authority to prescribe new regulations of fisheries.

In the former case the Committee agrees that a system providing for binding settlement of such disputes should be aimed at, but in its decisions the international authority should, in the Committee's opinion, have regard, as far as possible, to existing international bodies concerned with fisheries and international regulations governing fishing, in cases where a large number of States are members of such bodies or take part in such regulations. On the other hand, with respect to the new general regulations which go beyond the settlement of specific disputes pursuant to articles 1 and 2 of the draft articles, the Committee suggests that the rules drawn up by the international authority should not, *a priori*, be binding upon the States, but merely be regarded as a proposal for consideration and decision by the States and that the matter in dispute should be discussed with the appropriate international bodies before any actions is taken.

Consequently, the Committee proposes to divide article 3 into three paragraphs, viz.,

(1) Binding settlement of disputes pursuant to articles 1 and 2;

(2) Obligation for such international bodies to take into consideration, to the greatest possible extent, any existing international regulations accepted by large groups of States;

(3) Provision, after previous discussions with the appropriate international bodies, for referring general proposals for regulation to the State for consideration and decision.

In view of Denmark's particular interest in the preservation of the fauna of arctic regions, the Committee would suggest that the convention—in conformity with its objectives: to protect and promote the development of the resources of the sea—should apply also to marine mammals, notably seals, and that provisions to that effect be incorporated in the draft.

At a meeting on 24 November 1953 the Committee discussed the provisional draft articles on the Régime of the High Seas prepared by the International Law Commission.

The Committee considers these draft articles as an attempt to cover the existing need for extension of the authority of States over the waters contiguous to their territories, without at the same time extending the territorial sea. The proposed rules, on which no decision will be required at the present time, must be studied carefully and in some detail. The Committee has therefore not found the provisional draft articles ripe for adoption by the States. Hence the Committee has not found it practicable to use the draft articles as a basis for a detailed examination of the many, and often very difficult, problems arising in this connexion, and prefers to await the outcome of renewed deliberations on these problems.

REQUEST OF THE GENERAL ASSEMBLY FOR THE CODIFICATION OF THE PRINCIPLES OF INTERNATIONAL LAW GOVERNING STATE RESPONSIBILITY

DOCUMENT A/CN.4/80

Memorándum presentado por F. V. García Amador

[*Texto original: español*]
[10 de marzo de 1954]

1. La Asamblea General durante su octavo período de sesiones resolvió pedir a la Comisión de Derecho Internacional se sirviera proceder, tan pronto lo considerase oportuno, a la codificación de los principios de derecho internacional que rigen la responsabilidad del Estado. El texto completo de la resolución 799 (VIII) es el siguiente:

“PETICIÓN DE CODIFICACIÓN DE LOS PRINCIPIOS DE DERECHO INTERNACIONAL QUE RIGEN LA RESPONSABILIDAD DEL ESTADO

“*La Asamblea General,*

“*Considerando* que es conveniente, para mantener y desarrollar las relaciones pacíficas entre los Estados, que se codifiquen los principios del derecho internacional que rigen la responsabilidad del Estado,

“*Teniendo en cuenta* que la Comisión de Derecho Internacional en su primer período de sesiones incluyó la “Responsabilidad del Estado” en la lista provisional de materias de derecho internacional seleccionadas para su codificación,

“*Pide* a la Comisión de Derecho Internacional se sirva proceder, tan pronto como lo considere oportuno, a la codificación de los principios del derecho internacional que rigen la responsabilidad del Estado.”

La anterior resolución fué aprobada durante la discusión del informe de la Comisión de Derecho Internacional. Antes de votar sobre el proyecto de resolución presentado por la delegación de Cuba (A/C.6/L.311)¹, la Sexta Comisión votó sobre una cuestión previa de competencia que se había suscitado. El proyecto, con las enmiendas que se examinarán en el párrafo siguiente, fué aprobado por 30 votos contra ninguno y 16 abstenciones².

I. *Carácter de la petición de la Asamblea*

2. En el curso de la discusión del proyecto cubano se planteó la cuestión relativa al carácter o alcance que tendría la petición de la Asamblea General, de acuerdo con los términos en que estaba concebido el proyecto,

¹ *Documentos Oficiales de la Asamblea General, octavo período de sesiones, Anexos, tema 53 del programa.*

² *Documentos Oficiales de la Asamblea General, octavo período de sesiones, Sexta Comisión, 394a. sesión, párrafo 5.*

así como las disposiciones pertinentes del estatuto de la Comisión. En relación con este aspecto del proyecto, el Presidente de la Comisión de Derecho Internacional, en unas observaciones escritas que había formulado con referencia al capítulo III de su informe, sugirió que se sustituyeran las palabras “tan pronto como le resulte posible”, por las palabras “tan pronto como lo considere oportuno”³. Al aceptar esta modificación en el texto original del proyecto, el delegado cubano expresó que lo hacía “de tanto mejor grado cuanto que su intención no había sido imponer a la Comisión de Derecho Internacional la obligación de codificar una materia en un momento que dicha Comisión no considerara oportuno”⁴. Una segunda enmienda, que fué sugerida por el delegado de Nueva Zelandia, consistía en suprimir en la parte dispositiva del proyecto la frase “incluyendo esta materia entre los asuntos a que concede prioridad”. Tampoco tuvo dificultad para aceptar esta última enmienda, por cuanto el propio delegado de Nueva Zelandia manifestó al presentarla que, también en su opinión, “la Asamblea General debería dejar a la Comisión de Derecho Internacional en libertad para establecer como mejor le parezca *el orden en que ejecutará sus tareas*”⁵.

3. Este era, exactamente, el propósito no sólo de las enmiendas, sino también el del proyecto original de la delegación cubana. Al presentarlo, dicha delegación declaró de un modo expreso que, de acuerdo con los términos en que estaba redactado el proyecto, “el mandato de la Asamblea General a la Comisión de Derecho Internacional no implicaría en modo alguno para esta última la obligación de proceder de inmediato a codificar esa materia”⁶.

4. No hay duda, por lo tanto, respecto de cuál es la verdadera naturaleza o alcance de la petición que ha hecho la Asamblea General en su resolución 799 (VIII). Según el párrafo 3 del artículo 18 de su estatuto, la Comisión de Derecho Internacional “deberá conceder prioridad a los asuntos cuyo estudio le haya pedido la

³ *Documentos Oficiales de la Asamblea General, octavo período de sesiones, Anexos, tema 53 del programa, A/C.6/L.324. Observaciones del Presidente de la Comisión de Derecho Internacional referentes al capítulo III del informe: El Régimen de Alta Mar.*

⁴ *Documentos Oficiales de la Asamblea General, octavo período de sesiones, Sexta Comisión, 393a. sesión, párrafo 42.*

⁵ *Ibid.*, párrafos 45-46.

⁶ *Ibid.*, párrafo 40.

Asamblea General". Es evidente, desde luego, que la resolución 799 (VIII) fué adoptada al amparo de esta disposición del estatuto y que, en consecuencia, la Comisión no puede ignorar la petición de la Asamblea. Sin embargo, en el presente caso, se trata de un mandato al que la Comisión deberá dar cumplimiento tan pronto como lo considere oportuno. En otras palabras, la Asamblea ha pedido a la Comisión se sirva proceder a la codificación de los principios de derecho internacional que rigen la responsabilidad del Estado, pero ha dejado a su discreción la *oportunidad* en que ha de realizar esta tarea.

5. Ahora bien, ¿con arreglo a qué criterio la Comisión debe determinar la *oportunidad* de esta codificación? ¿Deberá hacerlo con arreglo al criterio que le da el estatuto para escoger las materias susceptibles de codificación, esto es, el criterio de la *necesidad* y la *conveniencia* de la codificación de una materia? Los antecedentes de la resolución 799 (VIII) no permiten llegar a esta conclusión. No se puede confundir, en efecto, la función y el procedimiento contemplados en los párrafos 1 y 2 del artículo 18 del estatuto, con la situación creada por la resolución 799 (VIII) conforme al párrafo 3 del mismo artículo. En cuanto a lo primero, ya la Comisión ha tomado una acción. En su primer período de sesiones no sólo examinó la cuestión de si la responsabilidad del Estado era una materia susceptible de codificación, sino que la incluyó en la lista provisional de materias de derecho internacional seleccionadas al efecto, por juzgar conveniente y necesaria dicha codificación⁷. Esta selección hecha por la Comisión recibió más tarde la aprobación expresa de la Asamblea General (resolución 373 (IV)). Estos dos antecedentes, por lo tanto, demuestran claramente que la Comisión debe acudir a otro criterio para decidir sobre la oportunidad de esta codificación.

6. De otra parte, al menos en el presente caso, la *oportunidad* en que debe efectuarse una codificación no puede confundirse con su *necesidad* y *conveniencia*. Es decir, tampoco cabe pensar que la Asamblea General, al pedirle a la Comisión que proceda a la codificación de los principios del derecho internacional que rigen la responsabilidad del Estado cuando lo *considere oportuno*, ha querido que la Comisión reconsidere o examine de nuevo la cuestión de si es *necesaria* o *conveniente* dicha codificación. No cabe pensarlo porque la propia resolución 799 (VIII) se funda, precisamente, en el hecho de que la *necesidad* y *conveniencia* de la codificación de esos principios del derecho internacional han

sido ya reconocidas por la Comisión y por la Asamblea General. Además, en otro considerando de la misma resolución la Asamblea declara de un modo expreso que "es conveniente, para mantener y desarrollar las relaciones pacíficas entre los Estados, que se codifiquen los principios del derecho internacional que rigen la responsabilidad del Estado".

7. Este último considerando de la resolución 799 (VIII) es altamente significativo, al extremo de que en él puede hallarse el verdadero criterio con que se debe interpretar su parte dispositiva. En efecto, el hecho de que la Asamblea haya reiterado expresamente la conveniencia de la codificación de estos principios del derecho internacional, tiene necesariamente que interpretarse en el sentido de que la Comisión debe proceder a dicha codificación tan pronto como sus actuales labores se lo permitan. En otras palabras, la Comisión no tiene que interrumpir su programa de trabajo, abandonando o posponiendo el estudio de alguna de las materias que figuren en él. Pero sí debe, en cambio, incluir en dicho programa el tema relativo a la responsabilidad del Estado para estudiarlo cuando tenga la *oportunidad* material de hacerlo. Este es, en nuestra opinión, el propósito que tuvo la Asamblea al aprobar la resolución 799 (VIII): darle un mandato a la Comisión dejando a su discreción las modificaciones que requiera su actual programa de trabajo⁸. Cualquiera otra interpretación no sería consecuente con el hecho de haber reiterado expresamente la Asamblea la *conveniencia* de codificar esta materia. Del mismo modo que no cabe presumir que las peticiones de esta naturaleza autoricen a la Comisión a reconsiderar si una codificación es *necesaria* o *conveniente*, tampoco cabe pensar que la Comisión pueda dejar de realizarla tan pronto se lo permitan sus condiciones de trabajo.

8. Si la Comisión considera correcta esta interpretación de la resolución 799 (VIII) ¿qué método o procedimiento de trabajo pudiera adoptar para dar cumplimiento a esta petición de la Asamblea General? Conforme al artículo 19 de su estatuto, la Comisión aprobará un plan de trabajo adecuado a cada caso. A nuestro entender en el presente caso la cuestión no se reduce al aspecto puramente mecánico de la inclusión del tema en el programa de trabajo de la Comisión, y proceder a su codificación cuando ella pueda hacerlo sin interrumpir o afectar las labores que viene realizando. Este es un aspecto importante, pero no es el único. Hay otro que también es de interés fundamental, y que debe igualmente tener en cuenta la Comisión al adoptar el método o procedimiento adecuado a esta codificación. Nos referimos a los problemas que, en el estado actual del desarrollo del derecho internacional, tienen necesariamente que plantearse y resolverse en relación con la naturaleza y extensión del tema a que se refiere la resolución 799 (VIII). Por vía de ilustración, indicaremos algunos de esos problemas. Esto nos permitirá llegar a algunas conclusiones respecto al plan de trabajo que puede adoptar la Comisión como el más adecuado a esta codificación.

⁷ Solamente uno de sus miembros se opuso a la inclusión del tema en la lista de materias susceptibles de codificación. En su opinión, la Conferencia de 1930 había fracasado totalmente en su intento por codificar la materia, sin que desde entonces la situación hubiera cambiado lo suficiente para justificar la esperanza de que se lograra tener éxito en el presente. Esta opinión, sin embargo, no fue compartida por ningún otro miembro de la Comisión. Por el contrario, todos los que intervinieron en la discusión expresaron sus dudas sobre la significación actual que debía atribuirse a los resultados de la Conferencia de La Haya, coincidiendo en que la importancia del asunto, unido al desarrollo posterior de la materia, justificaban plenamente su inclusión en la lista de materias cuya codificación debía emprender la Comisión de acuerdo con el artículo 18 de su estatuto. *Yearbook of the International Law Commission, 1949*, sexta sesión, párrafos 27-33.

⁸ Prácticamente en la misma situación se encuentra la Comisión respecto de la resolución 685 (VII), sobre «Relaciones e Inmunidades Diplomáticas», cuya codificación deberá realizar *tan pronto le resulte posible*. Véase párrafo 2, *supra*.

II. Naturaleza y extensión de la materia

9. La resolución 799 (VIII) se refiere a los principios del derecho internacional que rigen la responsabilidad del Estado. Si se interpretara esta expresión de acuerdo con la doctrina y la práctica tradicionales, la Comisión no tendría que preocuparse más que de la responsabilidad que directa o indirectamente sea imputable al Estado. No importa quienes hayan sido los autores del acto o la omisión que hubiere ocasionado la lesión, porque solamente el Estado es capaz de incurrir en la responsabilidad internacional que se origina de dicho acto u omisión, así como en el deber, también internacional, de reparar los daños y perjuicios. Sin embargo, en la actualidad la situación no es tan sencilla. La responsabilidad es una de las consecuencias de la violación o inobservancia de una obligación internacional. Por lo tanto, su imputabilidad depende fundamentalmente del sujeto o sujetos de esa obligación. La doctrina y la práctica tradicionales en esta materia se han desarrollado consecuentes con un sistema de derecho internacional dentro del cual el Estado aparece como el único sujeto capaz de tener obligaciones de esa índole⁹. Pero en el sistema contemporáneo el individuo también es sujeto de obligaciones internacionales, lo cual pudiera tener alguna significación en cuanto a la imputabilidad de la responsabilidad que hasta el presente se le ha atribuido en su totalidad al Estado¹⁰. En este sentido, la Comisión debiera reconsiderar la doctrina y la práctica tradicionales a fin de determinar si procede o no introducir algún cambio consecuente con la profunda transformación que se ha operado en la noción de la personalidad internacional.

10. Hay mayores razones para pensar en la necesidad de introducir innovaciones respecto al derecho a reclamar por daños y perjuicios. Para la doctrina y la práctica tradicionales, el Estado es el único sujeto titular de ese derecho; tanto cuando sea él, en su condición de persona jurídica, la entidad lesionada, como cuando lo sea uno de sus nacionales. Este otro principio también arranca de la concepción tradicional relativa a los sujetos del derecho internacional. El individuo tampoco es sujeto de derechos internacionales: lo es solamente el Estado, quien, "al hacerse cargo del caso de sus nacionales, ... hace valer un derecho propio, el derecho a asegurar en la persona de uno de sus nacionales el respectivo por las normas del derecho internacional"¹¹. Como consecuencia de este principio, las personas carentes de nacionalidad se han visto privadas de las normas del derecho internacional destinadas a la protección del extranjero, a pesar de encontrarse dichas personas en esta condición ante el derecho nacional.

⁹ El informe del Magistrado Guerrero explícitamente desarrolló esta idea, considerándola como el concepto fundamental de que debía arrancar la noción de la responsabilidad internacional. *American Journal of International Law* (1926), suplemento especial, vol. 20, pág. 176.

¹⁰ A este respecto el Profesor Lauterpacht ha expresado la opinión de que, «intrínsecamente, nada impide —salvo la doctrina tradicional relativa a los sujetos del derecho internacional— que en la esfera internacional a la responsabilidad del Estado se una la del órgano directamente responsable del acto o la omisión». *International Law and Human Rights*, primera edición (London, Stevens & Sons, Ltd., 1950), pág. 41.

¹¹ *P.C.I.J., Series A/B, No. 76*, pág. 16 (1939).

Un corolario del mismo principio ha sido el de que generalmente sea el Estado, y no la persona natural o jurídica que ha recibido el daño, el que haya determinado la naturaleza y cuantía de la reparación que había de reclamarse.

11. Seguramente se tropezaría con serias dificultades si se pretendiera conservar este principio y sus corolarios, con toda su rigidez tradicional, en una codificación consecuente con ciertos postulados básicos del derecho internacional contemporáneo. El reconocimiento y la protección internacionales de los derechos humanos es un hecho cuyas consecuencias necesariamente han de repercutir en el derecho o capacidad para entablar reclamaciones internacionales. Además, adelantándose a este hecho, ya en la propia práctica esporádicamente se han producido algunas excepciones que demuestran que el Estado no es el único sujeto que puede hallarse investido de ese derecho o de esa capacidad¹². Será necesario, por lo tanto, examinar detenidamente este importantísimo aspecto del tema, y ver en qué forma y condiciones puede reconocerse al individuo o particular interesado un *locus standi* internacional cuando así lo requiera la efectividad de la reclamación.

12. El reconocimiento internacional de los derechos humanos también tiene necesariamente que afectar de algún modo la llamada "norma internacional de justicia" ("*international standard of justice*"), generalmente aceptada por la doctrina y la práctica tradicionales como uno de los criterios básicos para determinar la responsabilidad del Estado por daños causados a los extranjeros. Este criterio ha tropezado a menudo con el principio de la igualdad de nacionales y extranjeros, que ha consagrado la legislación nacional de un gran número de países y que ha sido objeto de ciertas declaraciones y convenios internacionales. Refiriéndose al ejercicio de la protección diplomática, la Conferencia Interamericana de México (1945) expresó a este respecto que la "protección internacional de los derechos esenciales del hombre eliminaría el uso indebido de la protección diplomática de los ciudadanos en el exterior, cuyo ejercicio ha determinado más de una vez la violación del principio de no intervención, y también el de igualdad entre nacionales y extranjeros, en cuanto a

¹² Aludimos al *locus standi* que se reconoció a los particulares ante los tribunales arbitrales que se crearon de conformidad con los artículos 297 y 304 del Tratado de Versalles (*Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other powers, 1910-1923*, Vol. III, Washington, Government Printing Office, página 3329), y especialmente a la situación, mucho más independiente, en que se hallaron ante la Corte Centroamericana de Justicia (*Organization of American States, Tenth Inter-American Conference*, Document 7, Pan American Union, Washington, D.C., 1953, p. 86. Convention for the Constitution of a Central American Court of Justice, signed at Washington December 20, 1907) y el Tribunal de Arbitraje para la Alta Silesia, creado por el Tratado Germanopolaco de 15 de mayo de 1922 (Véase *League of Nations, Protection of minorities in Upper Silesia, 1921-1924*, Nota del Secretario General y Resolución adoptada por el Consejo el 16 de mayo de 1922, C.226. M 167. 1922. La Convención Germano-polonesa figura a continuación). Constituyen también antecedentes que, en cierto sentido, se relacionan con la cuestión específica a que nos estamos refiriendo, la capacidad de los funcionarios internacionales y de otras personas ante los Tribunales Administrativos de la Sociedad de las Naciones y de las Naciones Unidas.

los derechos esenciales del hombre”¹³. No hay duda, en efecto, que la nueva situación jurídica en que se encuentran los derechos o intereses humanos esenciales pudiera ofrecer una solución aceptable para resolver los distintos problemas que se suscitan con motivo del tratamiento que el Estado debe dar al extranjero en los casos a que estamos aludiendo.

13. La Comisión también deberá resolver ciertas cuestiones relacionadas con la extensión o alcance del tema. A este respecto, lo primero que debe hacer es delimitar la responsabilidad del Estado que ha de ser objeto de su estudio. Los antecedentes de la resolución 799 (VIII), tanto como los debates en la Sexta Comisión durante el octavo período de sesiones de la Asamblea General, permiten suponer que la responsabilidad *penal* cae fuera del propósito de la petición de la Asamblea. Además, el estudio de esta responsabilidad cae dentro de otra de las materias que figuran en el programa de la Comisión. Esta nueva tarea se contrae a lo que, en el derecho interno, generalmente llamamos responsabilidad *civil*; esto es, aquélla en que incurre el Estado por la violación o inobservancia de una obligación internacional, cualquiera que sea su origen o clase, y que importa un deber de reparar por parte del Estado. Sin embargo, los nuevos conceptos sobre la responsabilidad *penal* internacional pudieran tener alguna consecuencia sobre algunos de los principios que tradicionalmente han regido la responsabilidad de carácter *civil*. Por ejemplo, a veces esta última se origina o resulta de la violación o inobservancia por parte del Estado de una norma penal. En el derecho internacional contemporáneo ha variado radicalmente el concepto del sujeto de la responsabilidad por la violación o inobservancia de esta clase de normas. Otra situación que también debe tenerse en cuenta es la de que algunos de los hechos que en derecho internacional tradicional eran actos u omisiones pura y simplemente *ilegales*, en el derecho contemporáneo han pasado a ser hechos *punibles*. La responsabilidad *civil* del Estado emergente de estos hechos no revestía carácter delictivo. El estudio de estas situaciones no implicaría, desde luego, un nuevo examen por la Comisión de la responsabilidad penal internacional. Para los fines específicos de la resolución 799 (VIII), bastaría considerar si, en efecto, de éstas o de otras situaciones análogas cabe derivar alguna consecuencia en la determinación de la responsabilidad *civil* del Estado.

14. Independientemente de la cuestión contemplada en el párrafo anterior, existe otra que interesa de un modo más directo a la responsabilidad *civil* del Estado. Nos referimos ahora al hecho de que el derecho internacional contemporáneo ha impuesto al Estado nuevas obligaciones y ha precisado otras que en el derecho tradicional no estaban lo suficientemente definidas para poder imputarle, sin ciertas dificultades, la responsabilidad de su cumplimiento. Basta contemplar, *inter alia*, ciertos instrumentos constitucionales, tales como la Carta de las Naciones Unidas y la de la Organización de los Estados Americanos, para percatarse de este hecho. Como consecuencia del mismo, lógicamente cabe pensar, que se ha ampliado la naturaleza y el

número de actos u omisiones que hacen al Estado internacionalmente responsable. No es necesario destacar la importancia primordial que tiene el examen de esta cuestión. La Comisión no podría realizar con éxito la codificación de los principios del derecho internacional que rigen la materia, si no examina la doctrina y la práctica tradicionales a la luz de las obligaciones que ese ordenamiento jurídico impone hoy al Estado.

15. No es difícil percatarse, además, de que las obligaciones del derecho internacional contemporáneo pueden afectar todos los aspectos de la responsabilidad (civil) del Estado. En esta situación se encuentran, especialmente, las distintas hipótesis de responsabilidad respecto de otro Estado. En este sentido habrá que examinar las diversas hipótesis de responsabilidad por daños causados a la persona y bienes de los extranjeros, sin perjuicio, desde luego, de lo que hemos señalado en los párrafos 10 y 11. Se deberá estudiar también las restantes hipótesis de esa responsabilidad: esto es, cuando se trata de daños causados al Estado mismo, bien por la violación de alguna estipulación contractual, bien por la de otra de las normas del derecho internacional que protegen sus intereses. La Comisión tropezará con menos dificultades en los casos de responsabilidad por daños a los extranjeros, toda vez que respecto de ellos tanto la doctrina como la práctica han llegado a un marcado desarrollo. Tampoco hallará mayores dificultades, por razones obvias de analogía con estos casos, al estudiar la responsabilidad del Estado respecto de ciertas organizaciones internacionales por daños causados a la persona o bienes de sus funcionarios. La Opinión Consultiva de la Corte Internacional de Justicia de 11 de abril de 1949, sobre “Reparación por daños sufridos al servicio de las Naciones Unidas”, constituye, además, una valiosísima contribución al estudio de esta responsabilidad, incluso en cuanto a la que incurre el Estado por los daños que reciba la organización misma.

16. La codificación que contempla la resolución 799 (VIII) se limita a la responsabilidad *del Estado*. Sin embargo, el Estado no es el único sujeto del derecho internacional a quien pueda atribuírsele el deber de reparar daños y perjuicios que resulten de la violación o inobservancia de una obligación internacional. En cierto sentido y en cierta medida, algunas organizaciones internacionales pueden encontrarse en la situación del Estado. Refiriéndose a dichas organizaciones, Bustamante observaba con razón que “si en lo político por obra de sus grandes representaciones colectivas, o en lo administrativo por causa de la dirección o de la acción de algunas de las oficinas de unión internacional, se produce daño voluntario y consciente, no es posible que sus víctimas estén desprovistas de toda acción y de todo remedio, y que eso goce de una absoluta impunidad”¹⁴. La cuestión no carece tampoco de antecedentes prácticos, al menos en cuanto a algunos de sus aspectos específicos¹⁵. Esto no obstante, la Comisión debiera por el momento abstenerse de examinar este

¹⁴ *Derecho Internacional Público* (La Habana, 1936), vol. III, pág. 507.

¹⁵ Aludimos especialmente a la cuestión suscitada por las indemnizaciones que ordenó pagar el Tribunal Administrativo de las Naciones Unidas, y en relación con lo cual la Asamblea General ha solicitado una Opinión Consultiva a la Corte Internacional de Justicia.

¹³ Resolución XL, sobre «Protección Internacional de los Derechos Esenciales del Hombre» (*Documents on American Foreign Relations*, Vol. VII, 1944-1945, p. 729-730).

otro tipo de responsabilidad; pero nada le impide que en el futuro recomiende a la Asamblea General que apruebe su "codificación", como una labor necesariamente complementaria a la codificación de los principios del derecho internacional que rigen la institución de la responsabilidad.

III. Plan de trabajo

17. Volvamos ahora a la cuestión relativa al método o procedimiento de trabajo que la Comisión pudiera adoptar como el más adecuado a esta codificación. Como se indicó en el párrafo 8, la cuestión no se reduce al aspecto puramente mecánico de la inclusión del tema en el programa de trabajo de la Comisión, a fin de que ésta proceda a su codificación cuando pueda hacerlo sin interrumpir o afectar las labores que viene realizando. Hay otro aspecto del fondo que tiene un interés igualmente fundamental, y que se refiere a los problemas que, en el estado actual del desarrollo del derecho internacional, tienen necesariamente que plantearse y resolverse en relación con la naturaleza y extensión de la materia que contempla la resolución 799 (VIII). En los párrafos que anteceden se ha hecho referencia a algunos de estos problemas. Esta mera referencia basta para demostrar que la codificación *actual* de los principios del derecho internacional que rigen la responsabilidad del Estado presenta ciertas peculiaridades, que la Comisión no debiera pasar por alto al tomar una decisión de procedimiento respecto de esta materia. Considerando, pues, los dos aspectos de la cuestión, ¿cuál pudiera ser el plan de trabajo más adecuado para la codificación de dicha materia?

18. Es indudable que las labores en que actualmente se encuentra empeñada la Comisión no le permiten entrar en el examen del fondo de una nueva materia durante su sexto período de sesiones. En el séptimo período de sesiones la situación necesariamente será distinta, puesto que para entonces su programa de trabajo le permitirá dedicar algunas sesiones al examen de nuevas materias, al menos con un carácter general y preliminar. El tema a que se refiere la resolución 799 (VIII) debiera ser una de estas materias. Esta primera

consideración del fondo del tema tendría como objeto primordial examinar los principios *fundamentales* del derecho internacional *tradicional* que rigen la responsabilidad del Estado *a la luz del desarrollo que recientemente ha experimentado ese derecho*, con miras a determinar en qué forma y medida tales principios pueden haber sido afectados como consecuencia de ese desarrollo. Por razones obvias, es muy posible que la Comisión también pueda, en el séptimo período de sesiones, hacer un estudio preliminar de los principios relativos a la responsabilidad del Estado por daños causados en su territorio a la persona o bienes de los extranjeros. En su mayor parte los principios *fundamentales* a que aludimos se refieren a estos casos de responsabilidad. De otra parte, además de ser el capítulo más desarrollado por la doctrina y la práctica, tal vez la Comisión considere lógico y conveniente continuar y terminar la obra que dejó inconclusa, pero muy adelantada, la Sociedad de las Naciones. En todo caso, durante ese período de sesiones la Comisión podrá plantearse y resolver los problemas básicos y generales, y determinar aquellos que serán objeto de examen en el subsiguiente período de sesiones.

19. En su sexto período de sesiones, por consiguiente, la Comisión debe limitarse a tomar una decisión de procedimiento. Esta decisión, sin embargo, le permitirá en el séptimo período de sesiones adelantar notablemente la tarea que le ha encomendado la Asamblea. Si en ese período de sesiones la Comisión cuenta con los antecedentes y cualquier otro trabajo o estudio preparatorio que ella considere necesario o útil para la solución de los problemas a que hemos hecho referencia, es natural que su labor se facilite extraordinariamente.

20. Para concluir, permítasenos agregar que el método o procedimiento que sugerimos a la Comisión no solamente nos parece el plan de trabajo más adecuado a las peculiaridades del tema, sino también el que permitirá atender de la manera más rápida y eficaz a la petición de la Asamblea General. Sin interrumpir su actual programa de trabajo, la Comisión emprendería el estudio preliminar del tema que le permita proceder a la codificación propiamente dicha en sus próximos períodos de sesiones.

NATIONALITY, INCLUDING STATELESSNESS

DOCUMENT A/CN.4/81

Third report on the elimination or reduction of statelessness by Roberto Córdova, Special Rapporteur

[Original Text: English]
[11 March 1954]

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INTRODUCTION

1. The members of the International Law Commission will recall that, during the fifth session of the Commission, in 1953, it was not possible to consider the Special Rapporteur's second report on the elimination or reduction of statelessness (A/CN.4/75)¹, dealing with present statelessness. In order to avoid unnecessary repetition, the present report does not reproduce the reasons and considerations contained in the second report. References are only made to those instances in which the drafts contained in the present report differ from the previous texts or when additional comments appear to be useful. Therefore, the Special Rapporteur hopes that the members of the Commission will kindly refer to the second report (A/CN.4/75) which has been taken as a basis for the present one.

2. The first report on the elimination or reduction of statelessness (A/CN.4/64)² submitted by the present Special Rapporteur was devoted to the elimination or reduction of statelessness in the future, and the Commission has already, on the basis of that report, formulated two draft conventions (A/2456, chapter IV)³.

3. It should be remembered that, as the Special Rapporteur already pointed out in his first report, many countries are confronted with the dilemma of either taking the radical and inhuman action of mass expulsion of thousands of stateless refugees or accepting them as nationals; otherwise these countries would have within their territory an increasing number of persons who are stateless aliens although they may have been assimilated in the course of a long residence in the country.

4. The Special Rapporteur is happy to note that the problem, as stated above, was considered sufficiently important by the members of the Commission to request him to study the question of present statelessness and report his findings. This request was the basis of his above-mentioned second report.

5. As stated above, the Commission was unable to consider the second report during its fifth session, which in the opinion of the Special Rapporteur was fortunate, because he was thereby given time to review the whole subject and to revise and correct his previous draft which had been prepared under very pressing circumstances. This work of revision was carried out in the light of the opinions, observations and comments on the two drafts included in his second report, which several members of the Commission were kind enough to submit in writing to the Special Rapporteur. In this connexion he wishes to express his gratitude to the members of the Commission who so efficiently contributed to his work.

6. As the Special Rapporteur has had the occasion to state in paragraph 8 of his second report, the problem of existing statelessness has so many "grave political, social and even racial aspects" that it should be treated with the utmost care; many countries are indeed confronted with serious difficulties on account of this matter, due to the great number of stateless refugees who now reside within their boundaries.

7. The task of finding juridical solutions for this important problem is much more difficult than to formulate legal rules to prevent statelessness in the future. The reason is obvious. All nations would certainly be more inclined to modify their legislations to avoid cases of statelessness in the future than to change the said legislations with a view to absorbing these great masses of aliens who, in many cases, have not as yet been assimilated by the country where they now live.

8. In the second report, a draft Protocol on the Elimination of Present Statelessness and a draft Convention on certain measures for the Reduction of Present Statelessness were suggested as basis for the deliberations of the Commission. It was intended that the provisions relating to the total elimination of present statelessness would be included in a protocol to be annexed to the draft Convention on the Elimination of Future Statelessness prepared by the Commission at its fifth session (A/2456, chapter IV)⁴.

9. A protocol was suggested because all the articles relating to the elimination of present statelessness followed very closely the articles of the draft Convention on the Elimination of Future Statelessness as approved by the Commission. It is true that the close relation between the two texts made the protocol, as worded in annex I to the second report, appear somewhat unimaginative and mechanical, giving the impression of useless repetition as was stated by a member of the Commission. Therefore, when the Special Rapporteur had the opportunity of devoting more time to the study of this protocol he had this criticism in mind and arrived at a simpler and shorter text, which for all intents and purposes, has the same scope (part I of this report).

10. The objection made by another member of this Commission to the effect that the Protocol on the Elimination of Present Statelessness would apply to persons who, up to its signature, were considered as aliens by the laws of the interested countries is, of course, necessarily true. By definition the Convention would imply that these parties change their present legislation.

11. The protocol deals with three different categories of stateless persons: those who were born in the territory of one of the parties to the protocol before the coming into force of the Convention on the Elimination of Future Statelessness (article 1); those who were born in the territory of a State not a party to the protocol (article 2) and, finally, those who, not having been born in the territory of any of the parties nor having parents possessing the nationality of any of the parties, nevertheless reside in the territory of one of the parties (article 5).

12. In this connexion it is appropriate to point out that a change of legislation would have to be effected by countries strictly applying *jus sanguinis* in the case of the first category of stateless persons dealt with in article 1 of the protocol. The countries strictly applying *jus soli* would have to change their legislation in the case of article 2 of the protocol; that is to say when the stateless person was born in the territory of

¹ Included in *Yearbook of the International Law Commission*, 1953, vol. II.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

a State not a party to the convention nor to the protocol but one of whose parents is a national of such party. Of course, strict *jus soli* countries, parties to the protocol, will have to change their legislation in this case in order to confer their nationality *jure sanguinis* upon such a stateless person. That is exactly the situation covered by article 4 of both draft conventions already approved by the Commission. Therefore, there appears to be nothing new in the situation just described. The very purpose of the proposed instruments is to eliminate or to reduce statelessness, future or present, and they presume in fact the willingness of all parties to make the necessary changes in their own legislation, in order to obtain either the elimination or the reduction of statelessness, present or future.

13. Another argument which has been advanced against the principle adopted by the protocol with regard to presently stateless persons is that in most cases the protocol would be applicable to adult persons having no link whatsoever with the State conferring its nationality and that, no matter how undesirable the stateless person might be, he would nevertheless have to be accepted as a national by the State. This objection is valid; but, unless States are willing to run the risk of accepting a certain number of undesirable stateless persons as their nationals, the purpose of the protocol, the eradication of statelessness, would not be attained. On the other hand, all States are bound to refrain from depriving any of their nationals of their nationality, even if they are criminals or otherwise highly undesirable. Moreover, if the stateless person is undesirable or a criminal, the State will always be able to keep him in confinement. The solution suggested might therefore appear acceptable, especially in view of the fact that the State will have to keep the undesirable or criminal stateless person on its territory whether he remains stateless or becomes a national. In fact States will never be able to deport such a person to any other country. Reference will again be made to this matter when dealing with the alternative protocol based on the ideas of Mr. Lauterpacht and Faris Bey el-Khoury.

14. It has been further argued that, while the draft conventions already approved by the Commission apply to children who, because they grow up in the country whose nationality they receive, will acquire the necessary affinity with that country, the texts now submitted would grant the nationality of a party to adults not possessing the necessary link with the country concerned. This may be so, but, if it is really desired to eliminate present statelessness for the reasons indicated in paragraph 3 above, this drawback will necessarily have to be accepted.

15. It has been suggested that attempts should be made to have stateless persons repatriated or else established in countries where they may find employment and be naturalized as citizens. Mr. Weis, of the Office of the High Commissioner for Refugees, was of the opinion (letter of 29 December 1953) that, as it must be assumed that present statelessness cannot be completely eliminated or even reduced to any great extent, it was most important to provide protection for stateless persons and to improve their legal status.

16. Although he fully agrees that it is necessary to provide for the protection of stateless persons and to improve their status and that this is a foremost

humanitarian endeavour, the Special Rapporteur believes that such action does not fall within the terms of reference of the Commission nor within the scope of his assignment as he was requested to study only the means of eliminating or reducing present statelessness. This is strictly a legal problem while the protection of stateless persons and the improvement of their condition is mainly a social and political task falling within the competence of other organs of the United Nations.

17. Furthermore, it should be pointed out that the United Nations has already given its attention to this matter, and that the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons on 28 July 1951 adopted a Convention relating to the Status of Refugees⁵, which fully covers the subject as far as stateless "refugees" are concerned. A draft protocol circulated to Member States which proposes to extend some of the provisions of the Convention to stateless persons not covered by it, is an additional step in the same direction.

18. The Special Rapporteur, therefore, sees no need to take up this problem, and he believes that any action by the Commission in this respect would unnecessarily duplicate work already undertaken by other organs of the United Nations. It must be said, nevertheless, that the juridical solution of the problem of statelessness, in so far as it endeavours to bestow a nationality on a stateless person, must of necessity involve a certain amount of protection, since it would imply the acquisition of the right of residence, the right of work and similar rights.

19. With regard to the opinion that present statelessness cannot be completely eliminated or even reduced to any great extent, the Special Rapporteur believes that the present international situation warrants the hope that substantial results may be achieved in this field.

20. The Special Rapporteur is not concerned with the extent of the effort that States might be willing to make with a view to eliminating or reducing present statelessness. That is their own political responsibility which bears no relation to that of the Commission nor, of course, to that of the Special Rapporteur who has been called upon to suggest possible juridical means of solving the problem. On the other hand, it should be noted that the mere fact that States have shown their interest in, and preoccupation with, this most pressing problem and that the United Nations has been working, through its different organs, on its solution, constitutes in itself not only a hope but a great stimulus for any effort aimed in this direction. At its coming session the Commission will have before it four different and possible solutions of the question of present statelessness and the Special Rapporteur expresses the wish that the Commission will eventually adopt them, even if they do not constitute a magic formula capable of completely suppressing this deep-rooted evil. Cancer may not be cured altogether but certainly that is not an excuse for not attempting to bring at least some relief to millions of persons who suffer from its terrible consequences and pains.

⁵ *Final Act and Convention relating to the Status of Refugees* (United Nations publications, Sales No.: 1951.IV.4).

21. The Special Rapporteur has given much consideration to the possibility of conferring on stateless persons a kind of "international nationality", as suggested by Mr. Scelle in a letter dated 23 November 1952, to which he appended a very learned study of the matter. This study was transmitted to the Special Rapporteur by its author before its publication in the "Friedenswarte"⁸.

22. The idea is very original and interesting. From the theoretical point of view, there should not be any objection against conferring an international nationality on individuals in order to enable them to enjoy the full benefits of national and international law. Thus the individual would be linked to the international community which, at this stage of the development of international relations, is represented by the United Nations. In order to grant to individuals, within the framework of national legislation, all the rights which the law entitles them to enjoy as nationals, they are not required to be part of any juridical person whatsoever. Similarly, in the case of international law one might think quite logically that it is not necessary for the same individual to be a national of a certain State in order to enjoy the same rights as those persons who belong, in virtue of the link of nationality, to that State. Nevertheless, although from the theoretical point of view the thesis is unassailable, in practice the stateless persons to whom the United Nations might confer their "international nationality" will find themselves in every country in an inferior situation as compared to nationals.

23. One should bear in mind that the United Nations Organization is not a super-State; it has no population or territory of its own over which it may exercise jurisdiction. The populations and the territories of the different States parties to the San Francisco Charter remain under the control and sovereignty of those countries; they have not become the population and the territory of the United Nations Organization. This alone will suffice to leave the stateless persons possessing the "international nationality" in the position of aliens in each and every country, even in those signatories of the Charter who might be willing to grant them hospitality, however generous it might be.

24. There is no doubt that the so-called "international nationality" would meet some of the needs of stateless persons when abroad, but there is no doubt also that this concept would fail to solve the not less important problem of the *capitis diminutio* suffered by stateless persons in the territories where they have to reside. This "international nationality" does not give them full juridical protection as compared to that granted by the State to its own nationals.

25. It must furthermore be borne in mind that the link of nationality implies obligations of the individual towards the State and if, by definition, this "international national" has not the nationality of the State of residence, it follows that, in case of international conflicts involving that State he would be considered as a "citizen of the world" and therefore be placed in a privileged position as compared to nationals. The latter would have the duty to defend their country, while the "international citizen" would not be expected to risk his life or, at least, he might, because of his peculiar

position, be able to avoid submitting himself to the same privations as nationals.

26. It is true that, in this hypothesis, one might think that the obligation of serving in the armed forces of the United Nations could be imposed upon the stateless persons. If so, their duty could be heavier than that of the nationals of the various States Members of the Organization; they would always be called upon to serve everywhere in the world where the United Nations might be compelled to send its collective army. In this case, statelessness would become a profession rather than a juridical status.

27. At the present stage of the political and juridical organization of the world, it is not feasible to grant to stateless persons, in relation to the United Nations, rights similar to those bestowed by the various States upon their nationals.

28. It would also be difficult to organize the coexistence of the two nationalities: international nationality and the nationality of the State. For that purpose, it would be necessary to create an International Federation of States, which necessarily would require the establishment of a federal nationality, that is, a universal nationality for the peoples of all States. It is regrettable that this beautiful dream is still far from reality, but some day, the Special Rapporteur warmly hopes, it will achieve the complete solution of the problem of statelessness and of many other perhaps still more important problems for the wellbeing of mankind.

29. Mr. Lauterpacht, in his letter of 17 September 1953, suggested conferring, subject to certain qualifications, the nationality of a State upon such stateless persons as had resided within its territory for a period of ten years. He said:

"In general I find that perhaps you might consider also the alternative approach which I suggested in Geneva, namely, that States should undertake to confer their nationality upon stateless persons who have had their habitual residence in their territories for a period of ten years provided that such persons or their guardians in case of children) apply for nationality and provided that they fulfil certain conditions not destructive of the purpose of the Convention. Any such Convention would have the merit of simplicity and would embrace most cases of statelessness."

Mr. Lauterpacht's proposal is clearly designed to reduce statelessness, and not to eliminate it altogether, because, in his proposal, the conferment of nationality will only take place subject to certain qualifications. Nevertheless, it opened an entirely new approach to the matter, and the Special Rapporteur was very much impressed by it.

30. Upon the request of the Special Rapporteur, Faris Bey el-Khouri sent a letter dated 2 December 1953, containing a proposal which in the Special Rapporteur's opinion is also really constructive. Therefore, he communicated Faris Bey el-Khouri's suggestion to the other members of the Commission some of whom accepted it warmly. The gist of the proposal is expressed in his letter as follows:

"The Party in whose territory a stateless person resides shall grant to that person a certificate of registration denoting him as 'protected subject' or

⁸ See *Die Friedenswarte*, vol. 52 (1954), p. 142.

'protected citizen'. Such certificate will enable him to enjoy the protection of the State pending the final settlement of his case."

31. This formula needs of course some analysis and elaboration. In the first place, it does not state what would be the obligations of the "protected subject" or "protected citizen", although in the mind of its author it certainly comprehends some rights and obligations, since he refers to the enjoyment by that "protected subject" or "protected citizen" of the protection of the State of residence. Therefore, an attempt should be made to determine the scope of such rights and duties.

32. Secondly, the formula speaks of "protected citizen". The Special Rapporteur thinks that nationality does not, by itself, include the status of citizenship. A citizen is a national who enjoys political rights; but there are many nationals who are not citizens in the sense that they do not enjoy political rights. That is the case with minors in all countries and, in some of them, with women, the mentally incapacitated and convicted criminals.

33. There is another idea contained in the formula which also needs some consideration; that of "the final settlement of the case" of the stateless person. A temporary solution which fails to indicate any procedure or means of settling definitely the situation of the stateless person is, the Special Rapporteur thinks, entirely in contradiction with the purpose of the work entrusted to him by the Commission, and it only postpones the ultimate solution of the problem. Therefore the "temporary nationality" to which Faris Bey el-Khouri refers must be rejected in the opinion of the Special Rapporteur, and replaced by a new form of nationality: a permanent nationality without the rights of citizenship, that is, without political rights, but making no differentiation whatsoever between the nationals of the State of residence and the stateless persons who thus become, to a limited extent, but in a definite way, nationals of that State.

34. The Special Rapporteur, taking as basis the fundamental concepts of Mr. Lauterpacht and Faris Bey el-Khouri, proceeded to draft an Alternative Convention on the Elimination of Present Statelessness (Part III) and also based on the same principles, an Alternative Convention on the Reduction of Present Statelessness (Part IV).

35. He must now refer to a point which he believes to be of the greatest importance, but a very delicate one. Some members might think that the problem of *de facto* statelessness does not fall within the Commission's terms of reference and that, therefore, the Special Rapporteur oversteps his instructions in dealing with this most cruel and inhuman situation. They might think that *de facto* statelessness is not a juridical problem since the persons concerned have not been deprived of their nationality and therefore are not, *stricto sensu* and juridically speaking, stateless. To a certain extent, of course, this contention is valid; but, on the other hand, a right which cannot be exercised is not a positive one, and the Special Rapporteur submits that what human beings are entitled to possess is a positive, an effective, right of nationality.

36. As construed by the Economic and Social Council, this must be the correct meaning of article 15

of the Universal Declaration of Human Rights which states that: "Everyone has the right to a nationality". Indeed in its resolution 116 D (VI) of 1 and 2 March 1948, the Council, referring to stateless persons, not only to juridically stateless persons, but, in general, including all those who cannot enjoy the rights flowing from nationality, very definitely says that such a problem demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an *effective* right to a nationality". It is obvious that *de facto* stateless persons do not have such an effective right to a nationality. Their nationality is utterly ineffective. Therefore, very modestly, but with profound conviction, the Special Rapporteur thinks that the terms of reference of this Commission also include the establishment of juridical means permitting to grant to *de facto* stateless persons an "effective" right to a nationality.

37. *De facto* statelessness is, of course, a *de facto* situation, but the Commission is bound and is also entitled to propose juridical solutions for a *de facto* situation especially as the Universal Declaration of Human Rights, according to the correct interpretation given by the Economic and Social Council, aims at ensuring that every human being has the effective enjoyment of the rights of nationality. It is true that the *de facto* stateless person has a potential nationality but it is not less true that this juridical nationality is an ineffective nationality. It seems to the Special Rapporteur that the most important aspect of this problem of statelessness is not the technical question of nationality only, but the real situation. The juridical solution consists in bestowing upon each individual an effective nationality and the Special Rapporteur has accordingly framed article 4 of the Alternative Convention on Elimination of Present Statelessness. Needless to say that the Commission is not only obliged to deal with juridical statelessness, but is also under the solemn obligation to provide juridical solutions for the situation of thousands of human beings who are in a much worse position than those who only are *de jure* stateless. The Commission should face the fact and propose a legal remedy for acts of States which plunge so many persons in a desperate plight demanding an energetic legal solution such as the one proposed in article 4. The members of the Commission should bear in mind that *de facto* statelessness is much worse than *de jure* statelessness not only quantitatively but also qualitatively, because not only is it true that *de facto* stateless persons constitute by far the largest number of stateless individuals but it is also a fact that their condition is worse than that of the *de jure* stateless. They are not only deprived of the rights which derive from nationality but the mere fact that they are not technically deprived of nationality itself renders them incapable of obtaining a legal remedy under the proposed statute for stateless persons unless the Commission has the courage to face the problem and provides the said legal remedy. The present situation is that *de facto* stateless persons, having a nominal and ineffective nationality, are liable to be and are in fact persecuted and punished by their governments, for political or racial motives only.

38. It seems to the Special Rapporteur that exhaustive comments on each and every article of the two

protocols which form part of this report, are not called for. In the first place the members of the Commission will recall that the two protocols are both based on the principles already examined and adopted by the Commission in its two drafts on the elimination and the reduction of future statelessness. In this paper an effort has been made to apply those same principles, and the precedents in national and international legislation are also the same. Therefore, the legal background of both will be found in the corresponding comments made by the Special Rapporteur in his first report (A/CN.4/64)⁷.

39. With regard to the alternative conventions, the reason for the lack of numerous precedents, either national or international, is obvious. Even if not presenting an entirely new idea, nevertheless, in so far as these conventions do not intend to solve the problem by the conferment of full citizenship upon the stateless person, but of a limited or restricted nationality, they are based on an innovation, a relatively new idea, which has not yet been fully explored. That is why the suggestions made in the alternative conventions (Parts III and IV) are put forward by the Special Rapporteur tentatively, as bases of discussion only, although he himself is in favour of a solution along these lines.

PART I. PROTOCOL TO THE "CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS", FOR THE ELIMINATION OF PRESENT STATELESSNESS

Preamble

Whereas the Convention on the Elimination of Future Statelessness does not apply to existing statelessness;

Whereas there exists a large number of persons afflicted by the evils of statelessness;

Whereas, if the elimination of future statelessness will prevent the suffering of many persons who, otherwise, might eventually find themselves in such an undesirable situation, the elimination of present statelessness will bring relief and justice to thousands of stateless persons who in the present generation are submitted to such hardships and sufferings,

The Contracting Parties

Hereby agree as follows:

Article 1

The Parties shall confer their nationality upon persons who would otherwise be stateless, if they were born in their territory before the coming into force of the Convention on the Elimination of Future Statelessness.

Comment

(1) The above article aims at covering all cases of persons who would remain stateless after the coming into force of the Convention on the Elimination of

Future statelessness. Article 1 of that convention which has already been approved by the Commission⁸ does not apply to persons who were born in the territory of one of the parties before its coming into force; therefore, article 1 of the protocol is intended to apply to all such stateless persons.

(2) The proposed draft of article 1 of the protocol is parallel to article 1 of the convention. It will be noted that in comparison with the previous draft in A/CN.4/75⁹ it tries to avoid the confusion that might arise from the fact that the previous draft referred to "stateless persons" and also included the condition that such a person should not have acquired a nationality at birth. Obviously, if they were stateless persons they had not acquired any nationality at birth.

(3) It should be kept in mind that this article does not refer to persons who, having been born in the territory of one of the parties to the convention and having acquired the nationality of that party either *jure soli* or *jure sanguinis*, lost this nationality before the coming into force of the convention. Cases of this type are covered by article 3 of the protocol. Article 1 refers only to persons, born in the territory of one of the parties, who did not acquire any nationality at birth, that is, persons born before the coming into force of the convention in a strict *jus sanguinis* country to parents of a strict *jus soli* country or to stateless or unknown parents.

(4) Article 1 of the protocol is based exactly on the same principle as article 1 of the convention, i.e., the extension to *jus sanguinis* countries of the juridical principle of the *jus soli*.

Article 2

The legal presumptions set forth in articles 2 and 3 and the provisions of article 4, of the said Convention, shall apply also with regard to article 1 of this Protocol.

Comment

(1) The need for these legal presumptions and provisions here is obvious for the same reason which motivated their inclusion in the conventions for the elimination and reduction of future statelessness. Consequently there is no point in elaborating this matter. In passing, however, the Special Rapporteur wishes to call the attention of the Commission to what he believes to be a mistake in the wording of article 4 of the Convention on the Elimination of Future Statelessness as approved by the Commission. As worded this article might confer double nationality upon a person who is born in the territory of a State which is not a party to the convention but who, nevertheless, acquires at birth, *jure soli*, the nationality of that State. In order to avoid such an undesirable consequence, the original article should have been worded as follows:

"Article 4. Whenever article 1 does not apply on account of a child having been born in the territory of a State which is not a Party to this Convention, it shall acquire the nationality of the Party of which

⁷ See *supra*, footnote 1.

⁸ See para. 2 of the present report.

⁹ See para. 1 of the present report.

one of its parents is a national, *if it would otherwise be stateless*. The nationality of the father shall prevail over that of the mother.”

(2) The Commission will have to decide whether, having still on its agenda the whole subject of nationality including statelessness, it thinks it appropriate to introduce the necessary modifications to this article and also to article 1, paragraph 3, of the Convention on the Reduction of Future Statelessness. This paragraph also needs to be redrafted, because, as now worded, it mistakenly imposes the nationality of one of the parents on the stateless person when this person, upon attaining the age of eighteen, does not retain the nationality of the State of birth, even in the case when the parents have the nationality of a country which is not a party to the convention. The text of this paragraph should be kept in line with the wording of article 4, and say “... the nationality of the Party of which one of its parents is a national” (See below, comment to paragraph 3 of article 1 of the Protocol on the Reduction of Present Statelessness).

Article 3

The Parties shall reinstate into their nationality all persons who have, before the coming into force of the above-mentioned Convention, lost their nationality, thereby becoming stateless, as a consequence of:

(i) **Change in their personal status, such as marriage, termination of marriage, legitimation, recognition or adoption;**

(ii) **Change or loss of the nationality of a spouse or of a parent.**

(iii) **Renunciation;**

(iv) **Application for naturalization in a foreign country, or obtention of an expatriation permit for that purpose;**

(v) **Departure, stay abroad, failure to register or any similar ground;**

(vi) **Deprivation of nationality by way of penalty; or on racial, ethnical, religious or political grounds. The stateless person will in this case have the right to opt for application of article 5.**

Comment

(1) For the sake of simplicity, the above article embodies the provisions of articles 5, 6, 7 and 8 of the draft protocol included in document A/CN.4/75¹⁰. The proposed text is parallel to the provisions of articles 5, 6, 7 and 8 of the Convention on the Elimination of Future Statelessness¹¹. It covers the various causes of statelessness set forth in *A Study of Statelessness*, E/1112 and Add.1, pp. 136-142¹².

(2) It will be observed that this article imposes on States a heavy duty: that of reinstating into their nationality persons who previously were subjects or citizens and who, for some reason or other, have lost their nationality or have been deprived of it. In the

opinion of the Special Rapporteur, this is one of the means to eliminate present statelessness in a large number of cases. This solution might perhaps appear more difficult to implement than a request to the States of residence to grant their nationality to persons presumably not yet sufficiently assimilated. However, if the members of the international community really wish to co-operate in the elimination of present statelessness, they should be prepared to agree also to this course of action and be willing to reinstate these stateless persons as their nationals. This should not be too difficult for States to do, because these stateless persons are, generally speaking and with the exception of the cases of deprivation referred to in sub-paragraph (vi), entirely akin to the rest of the population. Their ties with the fatherland may still be very strong because they may have lost their nationality only for some technical reason.

(3) This solution has admittedly, in the case referred to in sub-paragraph (vi), a different implication from the point of view of the State and from that of the stateless persons themselves. It is suggested here only for the sake of unity of the solution of the problem. In order to minimize the difficulty it has been suggested that these stateless persons be granted the right of option between their old nationality and that of the State of their residence.

Article 4

The Parties to which territory has been transferred, or which otherwise have acquired territory, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory who, due to the change of sovereignty over that territory, are stateless at the time of the coming into force of this Protocol.

Comment

(1) It will be noted that, in drafting this revised text, reference to the right of option is omitted, whereas in the corresponding article of the Convention on the Elimination of Future Statelessness as well as in article 9 of the previous draft included in document A/CN.4/75¹³, it is specifically stated that such a right should be recognized. The explanation of this omission is quite simple: As this protocol refers to present statelessness, it is obvious that persons who are stateless on account of a change of sovereignty, find themselves in that situation for the reason that no such option was granted to them when the transfer of territory took place, or, in case they were given this right, because they failed to avail themselves of it in due time and, therefore, they no longer enjoy it. There is no point in mentioning the right of option, as it was very properly done in the Convention which is intended to deal with the future, because by establishing their residence in the territory they have in fact opted in favour of remaining subject to the jurisdiction of the successor State.

(2) Dr. Weis suggested that the scope of this article

¹⁰ *Ibid.*

¹¹ See para. 2 of the present report.

¹² United Nations publications, Sales No.: 1949.XIV.2.

¹³ See para. 1 of the present report.

be extended to all stateless persons inhabiting the territory regardless of the cause of their statelessness. He also pointed out that past laws and treaties, for instance the minorities treaty with Poland¹⁴, provided in fact that all persons born in or domiciled in the territory and who were not nationals of another State should acquire the nationality of the new State.

(3) The Special Rapporteur, however, thought it appropriate to restrict the scope of the article so that it will be applicable only to those inhabitants who are stateless due to the change of sovereignty, the cases of other stateless persons, who were in that situation prior to the transfer or before the coming into force of this protocol, being covered by articles 1 and 3. If either of these two articles is applied to them, they will certainly acquire a nationality, and if, in addition, article 4 were also to be applied to them, they most likely would acquire another nationality; thus they would have a double nationality, a legal situation which the Commission should endeavour to prevent.

(4) The members of the Commission will be aware of the difference between articles 1 and 4 of this Protocol. Article 1 makes reference, with regard to the application of its provisions, to the date on which the Convention on the Elimination of Future Statelessness will come into force, while article 4 does not refer to that convention and makes application of its provisions dependent on the time of the coming into force of the protocol itself. There is a very obvious reason why article 1 refers to the convention while article 4 takes the protocol as the starting point for the implementation of its provisions. The convention will, as soon as it comes into force, eliminate all cases of statelessness arising in the future either at birth or for any other cause, but all other cases of statelessness already existing at such time, even if derived from similar sources, will not be affected by the provisions of article 1 of the convention. Therefore, the protocol, aiming at the elimination of present statelessness must apply to all stateless persons who were born stateless or who otherwise lost their nationality on some of the grounds referred to in the convention, before its coming into force.

(5) Article 4 of the protocol, which corresponds to article 9 of the convention, deals with an entirely different aspect of the problem. The latter refers to possible occurrence of statelessness in the future due also to future changes of sovereignty over a territory, while article 4 of the protocol applies to cases of statelessness which have arisen from changes of sovereignty over territories which have already taken place. In other words, article 4 of the protocol must be made applicable to cases of statelessness existing precisely at the time of its coming into force and originating from changes of sovereignty over territories having already taken place at that time.

Article 5

When no nationality is acquired by the application of the foregoing articles, each Party shall confer its

nationality upon *de jure* and *de facto* stateless persons residing in its territory, provided further that the latter renounce the ineffective nationality they possess.

Comment

(1) This is indeed what might be called—and in fact it has been so called in Mr. Lauterpacht's aforementioned letter in so far as *de jure* statelessness is concerned—a residual article which intends to make the protocol, with regard to States parties to it, an airtight instrument aimed at the total elimination of statelessness, whether *de jure* or *de facto*. It will be difficult to discover a case of *de jure* statelessness which would not be covered by the preceding articles, but, nevertheless, one might think of some hypothesis, even a remote one, which will not come under the provisions already set forth. For instance, one might envisage the case of a stateless person, resident in the territory of a party but not born there (article 1 would not apply), whose parents were not nationals of any of the parties or were stateless themselves (article 2 of the protocol and article 4 of the convention would not apply), and, finally, who had neither been deprived of his nationality nor lost it (article 3 would not apply).

(2) The special importance, the unique and vast scope of this article, as well as the ideas on which it is based with regard to *de facto* statelessness, have already been explained in the introduction to this report.

Article 6

The provisions of article 10 of the Convention shall apply with regard to this Protocol.

Comment

The usefulness of an agency to act on behalf of stateless persons and of a tribunal competent to act on complaints, as well as that of submitting any disputes arising from the convention or the protocol to the International Court of Justice or to the tribunal, have already been recognized by the Commission. There is therefore no need for additional comments on this point.

PART II. PROTOCOL TO THE "CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS", FOR THE REDUCTION OF PRESENT STATELESSNESS

Preamble

Whereas the Convention on the Reduction of Future Statelessness does not apply to existing statelessness;

Whereas there exists a large number of persons afflicted by the evils of statelessness;

Whereas if the reduction of future statelessness will prevent the suffering of many persons who, otherwise, might eventually find themselves in such an undesirable situation, the reduction of present statelessness will bring relief and justice to thou-

¹⁴ Treaty between the Allied and Associated Powers and Poland (Protection of Minorities). Signed at Versailles, June 28, 1919; Hudson, *International Legislation*, vol. I, p. 283.

sands of stateless persons who in the present generation are submitted to such hardships and sufferings,

The Contracting Parties

Hereby agree as follows:

Article 1

1. The Parties shall confer their nationality upon persons who are stateless at the time of the coming into force of the Convention, provided they were born in their territory.

2. The nationality laws of the Parties may make conferment of such nationality dependent on:

(i) The person being normally resident in the territory concerned for a period which shall not exceed that required for naturalization;

(ii) Application by the person concerned;

(iii) Compliance by the person concerned with such other conditions as are required with regard to acquisition of nationality from all persons born in the Party's territory.

3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person does not acquire the nationality of the State of birth, he shall acquire the nationality of the Party of which one of his parents is a national. The nationality of the father shall prevail over that of the mother.

Comment

(1) Article 1 of this protocol, as suggested above, is parallel to the corresponding article of the Convention already approved by the Commission on the Reduction of Future Statelessness¹⁵. Changes had of course to be made for the purpose of reducing present statelessness.

(2) In the first place, paragraph 1 refers to persons who are already born and provides that the party shall confer its nationality upon them whereas the provisions of the convention as approved are aimed only at persons who will be born in the future. Except for this difference in timing the principle embodied in both texts is the same, i.e., the extension of the *jus soli* to *jus sanguinis* countries.

(3) Paragraph 2 corresponds roughly to article 1, paragraph 2, of the Convention on the Reduction of Future Statelessness; however, a small change in presentation was made and it was also provided that the conferment of nationality may be made dependent on the submission of an application by the person concerned. This condition was added at the suggestion of two distinguished members of the Commission, who were of the opinion that the possibility of option should be left open to the stateless person (Judge Sandström's letter of 19 October 1953, Mr. Pal's letter of 22 December 1953), for there might be cases, particularly with regard to those contemplated in article 3, where the stateless person himself might not wish to become a national of the State in question.

(4) Paragraph 3 is almost identical with the corresponding paragraph of the Convention on the

Reduction of Future Statelessness; the age limit however had necessarily to be omitted, since the stateless person to whom this provision would be applicable might either be a minor or have already attained majority. In essence, this paragraph serves the same purpose as does article 1, paragraph 2, of annex II to the second report (A/CN.4/75)¹⁶, the meaning of which some of the members thought might be clarified; this is indeed so.

(5) As has already been mentioned (comment on article 2 of the Protocol for the Elimination of Present Statelessness), paragraph 3 of article 1 of the draft Convention on the Reduction of Future Statelessness approved by the Commission mistakenly provides that when the stateless person, "on attaining the age of eighteen, does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents". Even in the case when one of his parents has the nationality of a country which is not a party to the convention? Of course not. The parties to this convention have no right to grant to a stateless person the nationality of a State which is not a party to the convention. With regard to this point, paragraph 3 of article 1 of the draft convention should have been drafted in the way its article 4 was worded and should have said: "he (the stateless person who does not retain the nationality of the State of birth on attaining the age of 18) shall acquire the nationality of the Party of which one of his parents is a national". This, of course, is the only correct expression of the Commission's intention.

(6) When drafting article 1, the Special Rapporteur bore in mind the suggestions made by Mr. Pal to the effect that some of the articles of the proposed draft in annex II to the second report (A/CN.4/75) be combined in order to obtain a greater coherence. In passing, it should be pointed out that the same procedure was followed with regard to articles 6, 7 and 8.

(7) In the Convention on the Reduction of Future Statelessness the general principle of the extension of the *jus soli* to *jus sanguinis* countries was qualified in order to ensure some link between the stateless person and the country in which he was born. In the same manner it was deemed necessary to introduce the same qualifications into the present protocol in addition to requiring an application of the persons concerned. The three conditions mentioned in paragraph 2 may be required simultaneously by the national legislation or independently one of the other.

(8) Sub-paragraph (i) of paragraph 2 had to be somewhat modified with regard to the text originally proposed in the second report (A/CN.4/75, annex II, article 1, paragraph 2). This modification had to be introduced in order to reconcile the provisions of this sub-paragraph with the one embodied in article 5. The latter article, which corresponds to article 10 of the previous draft contained in annex II to the second report, recommends sympathetic consideration by the parties of the applications for naturalization submitted by stateless persons who have had their habitual residence in the territory concerned. Paragraph 2 of article 1 of annex II to the second report required, besides birth of the stateless person concerned in the territory, a normal or habitual residence for a period

¹⁵ See para. 2 of the present report.

¹⁶ See para. 1 of the present report.

beginning at birth and extending to the time of submission of the application. Obviously, this condition might involve, in fact, a habitual residence much longer than the period of fifteen years contemplated in article 10 of the previous draft. In other words, according to the old text of article 1, a stateless person who, at the time of filing his application, was 40 years old must, in order to acquire the nationality of the party, have been an habitual resident of the country for a period of 40 years, besides having been born in the territory. This is, of course, in absolute contradiction to the requirement of a 15 years' residence as proposed in former article 10.

Article 2

The legal presumptions set forth in articles 2 and 3, and the provisions of article 4, of the said Convention, shall apply also with regard to article 1 of this Protocol.

Comment

The text of the above article is identical with that of article 2 of the Protocol on the Elimination of Present Statelessness.

Article 3

1. The Parties shall reinstate into their nationality all persons who have, before the coming into force of the Convention on the Reduction of Future Statelessness, lost the nationality of the said Parties, thereby becoming stateless, as a consequence of:

- (i) Change in their personal status, such as marriage, termination of marriage, legitimation, recognition or adoption;**
- (ii) Change or loss of the nationality of a spouse or of a parent;**
- (iii) Renunciation;**
- (iv) Application for naturalization in a foreign country, or obtention of an expatriation permit for that purpose;**
- (v) Departure, stay abroad, failure to register or any other similar ground;**
- (vi) Deprivation of nationality by way of penalty, or on racial, ethnical, religious or political grounds.**

2. The national laws of the Parties may make reinstatement into nationality dependent on:

- (i) Application by the person concerned;**
- (ii) Residence in its territory at the time of the filing of such application.**

Comment

(1) Paragraph 1 of article 3, is similar to article 3 of the draft Protocol on the Elimination of Present Statelessness; therefore, the comments relating thereto also apply in the present case. The only difference is that the right of option now appears in paragraph 2, sub-paragraph (i). Paragraph 1 embodies articles 6,

7 and 8 of Annex to the second report (A/CN.4/75)¹⁷.

(2) The qualifications introduced in paragraph 2 are quite logical, for a certain freedom of choice should be left to the individual concerned and, at the same time, some link between him and the reinstating State ought to exist. Residence is, doubtlessly, a strong and sufficient link.

Article 4

The Parties to which territory has been transferred, or which otherwise have acquired territory, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory who, due to the change of sovereignty over that territory, are stateless at the time of the coming into force of this Protocol.

Comment

The above text is identical with article 4 of the Protocol on the Elimination of Present Statelessness and the relevant comments apply also in this case.

Article 5

The Parties shall examine sympathetically applications for naturalization submitted by persons who are stateless, either *de jure* or *de facto*, and who habitually resident in their territory.

Comment

There is, of course, a great difference between the wording of article 5 of the Protocol on the Elimination of Present Statelessness and the text proposed here which merely aims at reducing present statelessness. In the first case, a so-called "residual article" was needed in order to fill whatever *lacunae* might exist in the preceding articles of the said protocol. The purpose was to cover all cases of stateless persons who would not receive a nationality by application of articles 1-4 of the protocol. But since, by definition, the present protocol is not aimed at the total elimination of present statelessness, there is no need to impose on States the rather heavy burden of conferring their nationality upon all stateless persons resident within their boundaries. Nevertheless, it seems appropriate to transform into a legal obligation the recommendation of the Economic and Social Council in favour of stateless persons, contained in resolution 319 B III (XI) of 16 August 1950 which "invites States to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory". The Economic and Social Council was of course aware of the fact that its recommendation implied a certain discrimination in favour of stateless persons, but it was perfectly justified in taking such action, because all other foreigners, as has already been pointed out, have a nationality and are not, therefore, deprived of the protection of a State.

¹⁷ *Ibid.*

Article 6

The provisions of Article 10 of the Convention shall apply with regard to this Protocol.

Comment

The comments referring to article 6 of the Protocol on the Elimination of Present Statelessness apply also in this case.

PART III. ALTERNATIVE CONVENTION ON THE ELIMINATION OF PRESENT STATELESSNESS

Preamble

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality",

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality",

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between States,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is imperative, by international agreement, to eliminate the evils of statelessness,

Whereas there exists a large number of persons afflicted by statelessness;

The Contracting Parties

Hereby agree as follows:

Article 1

The Party in whose territory a stateless person actually lives shall grant to that person the legal status of "protected national" and shall issue to him a certificate of registration qualifying him as such.

Comment

(1) Article 1 of the Protocol on the Elimination of Present Statelessness is designed to eradicate entirely this evil by granting the nationality of the parties to those persons who otherwise would be stateless, provided they were born in their territory before the coming into force of the Convention on the Elimination of Future Statelessness. In addition, article 3 of the same protocol proposes that the parties reinstate into their nationality all persons who, for some reason or other,

have lost their nationality, thereby becoming stateless. The two articles cover the field entirely and present statelessness would completely disappear through acceptance of the protocol by all States.

(2) However, as doubts might arise as to the likelihood of such acceptance, since this would mean a return to the past and, in many cases, the repudiation by States of what they had legally done according to their own legislation, a step which some States, for political or economic reasons, would not care to take; and since also in many instances the individuals concerned would not be willing to adopt again the nationality of a State which had rejected them, the subject has been approached under an entirely new angle, namely, that instead of looking towards the past, the present situation is recognized and regulated and even taken as a basis for the complete solution of the problem.

(3) A determined attempt should be made to find a more practical solution and, for this reason, it is proposed to eliminate present statelessness entirely by granting to stateless persons the status of "protected nationals" of the recipient State.

(4) They would eventually be assimilated and they would thus be able to avail themselves of the opportunities which the legislation of such State would afford to them to become naturalized citizens (article 2, (iii), below) enjoying political rights on the same footing as other naturalized citizens.

Article 2

The protected nationals mentioned in article 1 shall:

(i) **Enjoy all the rights and privileges to which nationals of the protecting Parties are entitled, with the exception of political rights;**

(ii) **Enjoy the fullest protection of such Parties under national and international law;**

(iii) **Enjoy the right of naturalization as accorded to aliens, subject to the same conditions as required of them;**

(iv) **Be under the same obligations towards the protecting Parties as their nationals.**

Comment

(1) The purpose of this article is twofold: (a) to grant to protected subjects the same rights and privileges and to place them under the same obligations as nationals, and (b) to safeguard the protecting State from an undue influence from aliens who, in many cases, may not be assimilated. It is to be expected that States will not find it too difficult to grant such rights and privileges which, for the most part, are enumerated in the Convention relating to the Status of Refugees adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva in July, 1951¹⁸. As pointed out above, such protected persons would eventually qualify for naturalization in many instances and, should they make use of this

¹⁸ *Final Act and Convention relating to the Status of Refugees*, (United Nations publications, Sales No.: 1951.IV.4).

privilege, the time might come when their condition as protected subjects would disappear; they would thus become citizens in the broadest sense and enjoy equal political rights with other naturalized foreigners in conformity with the relevant legislation.

(2) It will be observed that article 1 of the present draft Convention and article 5 of the Protocol on the Elimination of Present Statelessness are both based on the same principle: that of residence. The fact that these two articles are similar may make it difficult to understand at first sight why the Special Rapporteur has based an entire convention on a principle which already appears in one of the articles of the aforesaid protocol. There is, however, a fundamental difference which he wishes to stress. As pointed out, article 5 of the protocol is merely residual; its provisions will apply only where the preceding articles fail to cover certain exceptional categories of statelessness. It may therefore be assumed that the State of residence will not raise serious objections to conferring its full nationality, including the rights of citizenship, upon stateless persons falling within these exceptional categories. The situation is, on the other hand, entirely different when it is intended to confer, by application of the criterion of residence (see article 4 of the present draft Convention), the nationality of a State upon thousands of either *de jure* or *de facto* stateless persons. In this case the State will be asked to accept as nationals such a large number of perhaps insufficiently assimilated aliens as to raise well-founded doubts with regard to the advisability of granting them full rights of citizenship enabling them to exercise an undue influence on its public affairs. Consequently, while accepting the criterion of residence for the conferment of nationality, it was considered advisable to qualify the newly acquired nationality by providing that the so-called "protected nationals" will not be able to exercise political rights.

(3) Faris Bey el-Khouri mentioned that the practice of recognizing the existence of "protected subjects" has been adopted in the United Kingdom and in other countries. The Special Rapporteur has not been able to obtain the relevant legislative enactments. It is to be hoped that in due course these texts may be examined by the Commission since they will certainly constitute an adequate precedent for the status accorded to stateless persons by the provisions of the present Convention.

(4) In the answers received by the Special Rapporteur to his request for opinions regarding this problem, there was, as already mentioned, a manifest tendency to suggest that he should make an effort towards protecting the stateless persons rather than granting them a definite nationality and, as also already pointed out, the suggestion to protect stateless persons as well as refugees in general does not fall by itself within the Commission's terms of reference nor, of course, within those of the Special Rapporteur; but it should be noted that by regulating from the juridical point of view the situation of persons who are stateless, either *de jure* or *de facto*, the desired protection will automatically be accorded. By the first two protocols for the elimination and reduction of present statelessness (Parts I and II above) the parties would grant to stateless persons all the rights, including the political rights, enjoyed by their own nationals.

(5) The system proposed in the alternative conventions, while at first denying the *de jure* or *de facto* stateless persons' political rights, would nevertheless completely protect them, since these persons would enjoy on the same basis as nationals of the country concerned, those rights which they as stateless individuals had been almost completely missing. That is to say that they would enjoy the right of travelling abroad, the right of being protected by the country granting them the certificate of registration, property rights, the right to work, to trade, to exercise a liberal profession, the right of educating their children under the same conditions as nationals and, if necessary, of obtaining relief, the right to all the social security benefits, the right of appearing before the courts as plaintiffs or defendants, the right of being exempted from expulsion and *refoulement* because of alienage. In other words they would be entirely and completely protected within the State of residence.

(6) As regards protection abroad, there are several examples of such protection accorded by a State to citizens of another State. For instance, under article 104 of the Treaty of Versailles, Poland undertook the diplomatic protection of the citizens of the Free City of Danzig. The League of Nations, acting through a State or through its own officials, undertook the diplomatic protection of the inhabitants of the Saar Basin. It is to be noted that in both cases the protection was granted by virtue of an international agreement. Although nationality is the regular means by which individuals derive benefits from the Law of Nations, the above-mentioned cases might well be considered as proper precedents for the proposed text of article 1.

(7) It is also very important to mention the numerous international agreements concluded within the framework of the League of Nations whereby, under its auspices, the protection of Russian, Armenian, German and Austrian refugees was undertaken, granting them the rights of sojourn, of residence and of obtaining travel documents ("Nansen passports") and defining their legal status, labour conditions, welfare and relief, education, taxation, etc. (*A Study of Statelessness*, E/1112 and E/1112/Add.1, pp. 75-122).¹⁹

(8) Finally, it should be pointed out that the United Nations has given special attention to the protection of refugees and stateless persons and has sponsored the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (see para. 1 of this comment), which embodies and improves the provisions of the above-mentioned instruments adopted under the auspices of the League of Nations. A draft protocol which has already been circulated to Member States proposes to extend to stateless persons some of the provisions of the above convention which aim at improving their status.

Article 3

Descendants of protected nationals shall obtain full citizenship, including political rights, on reaching the age of majority.

¹⁹ United Nations publications, Sales No.: 1949.XIV.2.

Comment

The proposal to grant full rights of citizenship to descendants of protected nationals when they reach the age of majority is based on the consideration that, by that time, they will be sufficiently assimilated and that, therefore, it will not be necessary to require compliance with the ordinary rules of naturalization in order to accord full political rights. On the other hand, such compliance is, of course, expected of adults who, therefore, will have to prove that they have resided in the State for the length of time prescribed in general for aliens seeking to become citizens.

Article 4

The de facto stateless persons actually living in the territory of one of the Parties shall have the same rights as those granted to de jure stateless persons in this Convention, provided that they renounce the ineffective nationality which they possess.

Comment

(1) The special importance and the unique and vast scope of this article, as well as the main ideas on which it is based, have already been partly explained in the introduction to this report.

(2) There are hundreds of thousands of individuals who, on political, economic or racial grounds, had to leave their country of origin of which they were nationals and which in turn, quite frequently, is unwilling to accept them again or to accord them the minimum protection to which they are entitled as human beings. These *de facto* stateless persons have sought refuge in foreign countries and have established there a residence which they perhaps intended to be temporary, or to which the local authorities may have refused a permanent character, but which may have become, in fact, permanent or, at best, indefinite. The recipient countries accepted them for humanitarian reasons and, faced with the dilemma of an inhuman *refoulement* or expulsion to another country (which is not always possible), have resigned themselves to allowing them to stay, postponing *sine die* the final settlement of the problem but always maintaining the threat of some drastic action concerning them.

(3) If the legislation of the recipient countries happens to be based on the *ius soli* principle, the problem will ultimately be solved by the mere passage of time. The stateless persons will eventually die and their children will acquire the nationality of such countries by operation of the law. The situation is quite different in the case where the recipient country follows the *ius sanguinis* principle. In this case, the stateless person and his descendants may forever remain in this condition.

(4) In both these cases resumed action should be taken because, in the first instance, at least one complete generation would have to pass before the problem is solved and, in the second one, it might never be solved unless the Convention on the Elimination of Future Statelessness is adopted by the States concerned.

(5) The most practical and just solution would be

the one suggested in this article, namely, to extend to *de facto* stateless persons the juridical remedies which have been proposed for *de jure* stateless persons, e.g. the granting of the restricted nationality envisaged in articles 1 and 2 of this Convention.

Article 5

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

3. If, within two years of the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

Comment

The need for the adoption of the provisions embodied in article 10 of the Convention on the Elimination of Future Statelessness has already been recognized by the Commission and, therefore, no additional comments on this matter are called for.

PART IV. ALTERNATIVE CONVENTION ON THE REDUCTION OF PRESENT STATELESSNESS

Preamble

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality",

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality",

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between States,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is desirable to reduce statelessness by international agreement, so far as its total elimination is not possible,

Whereas there exists a large number of persons afflicted by statelessness,

The Contracting Parties

Hereby agree as follows:

Article 1

1. **The Party in whose territory a stateless person habitually resides shall grant to that person the legal status of "protected national" and shall issue to him a certificate of registration qualifying him as such.**

2. **The national legislation of the Party may exclude from the application of paragraph 1 only those stateless persons who are undesirable or whose admission as protected subjects might constitute a threat to the internal or external security of the Party.**

Comment

(1) Paragraph 1 of the above article is almost identical to article 1 of the Alternative Convention on the Elimination of Present Statelessness (Part III of this report), the only difference being that that convention referred to actual, physical presence while article 1 of the present draft convention requires the stateless person to maintain an "habitual residence" in the State concerned.

(2) Paragraph 2 formulates two of the several exceptions which might be established with regard to the application of the general rule contained in paragraph 1. The members of the Commission are surely aware that these exceptions might vary *ad infinitum*, according to the different criteria which might be applied by different countries. The Special Rapporteur selected those which appeared to him to be the most reasonable ones and which, in his opinion, were more likely to secure a wide acceptance than the maximum restrictions on the implementation of paragraph 1 which might be introduced by national legislations. He wishes to point out the tentative nature of the exceptions which he proposes; he will welcome any constructive suggestions that may be made.

Article 2

The protected subjects mentioned in article 1 shall:

(i) **Enjoy all the rights and privileges to which nationals of the protecting Parties are entitled, with the exception of political rights;**

(ii) **Enjoy the fullest protection of such Parties under national and international law;**

(iii) **Enjoy the right of naturalization as accorded to aliens, subject to the same conditions as required of them;**

(iv) **Be under the same obligations towards the protecting Parties as their nationals.**

Comment

The above article is identical with article 2 of the Alternative Convention on the Elimination of Present Statelessness. The Special Rapporteur did not deem it convenient to introduce any qualifications or restrictions with regard to the enjoyment of the rights granted to protected subjects, because he fears that, if this were done, the said rights might be curtailed and thus would not be consonant with the minimum standard recommended by the Universal Declaration of Human Rights. Therefore, he urges the Commission to consider this text with all the sympathy which its prospective beneficiaries deserve as human beings who as such are equal in every respect to nationals.

Article 3

Descendants of protected nationals shall obtain full citizenship, including political rights, on reaching the age of majority.

Comment

The text of the above article is identical with article 3 of the Alternative Convention on the Elimination of Present Statelessness.

Article 4

The de facto stateless persons actually living in the territory of one of the Parties shall have the same rights as those granted to de jure stateless persons in this Convention, provided that they renounce the ineffective nationality which they possess.

Comment

The above text is identical with article 4 of the Alternative Convention on the Elimination of Present Statelessness. The Special Rapporteur did not consider it appropriate to include any qualifications restricting the rights of the *de facto* stateless persons, because they constitute by far the great majority of stateless persons and are in even greater need of the help and assistance than *de jure* stateless persons. It would not be in accordance with the humanitarian feelings which guide the Special Rapporteur to restrict in an appreciable manner or otherwise the number or the substance of the rights from which they would benefit under this Convention.

Article 5

1. **The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.**

2. **The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints**

presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

3. If, within two years of the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

Comment

This text is identical to that of article 5 of the Alternative Convention on the Elimination of Present Statelessness.

ANNEX I

PROTOCOL TO THE "CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS", FOR THE ELIMINATION OF PRESENT STATELESSNESS

Whereas the Convention on the Elimination of Future Statelessness does not apply to existing statelessness;

Whereas there exists a large number of persons afflicted by the evils of statelessness;

Whereas, if the elimination of future statelessness will prevent the suffering of many persons who, otherwise, might eventually find themselves in such an undesirable situation, the elimination of present statelessness will bring relief and justice to thousands of stateless persons who in the present generation are submitted to such hardships and sufferings,

The Contracting Parties

Hereby agree as follows:

Article 1

The Parties shall confer their nationality upon persons who would otherwise be stateless, if they were born in their territory before the coming into force of the Convention on the Elimination of Future Statelessness.

Article 2

The legal presumptions set forth in articles 2 and 3 and the provisions of article 4, of the said Convention, shall apply also with regard to article 1 of this Protocol.

Article 3

The Parties shall reinstate into their nationality all persons who have, before the coming into force of the above-mentioned Convention, lost their nationality, thereby becoming stateless, as a consequence of:

(i) Change in their personal status, such as marriage, termination of marriage, legitimation, recognition or adoption;

(ii) Change or loss of the nationality of a spouse or of a parent;

(iii) Renunciation;

PROTOCOL TO THE "CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS" FOR THE REDUCTION OF PRESENT STATELESSNESS

Whereas the Convention on the Reduction of Future Statelessness does not apply to existing statelessness;

Whereas there exists a large number of persons afflicted by the evils of statelessness;

Whereas if the reduction of future statelessness will prevent the suffering of many persons who, otherwise, might eventually find themselves in such an undesirable situation, the reduction of present statelessness will bring relief and justice to thousands of stateless persons who in the present generation are submitted to such hardships and sufferings,

The Contracting Parties

Hereby agree as follows:

Article 1

1. The Parties shall confer their nationality upon persons who are stateless at the time of the coming into force of the Convention, provided they were born in their territory.

2. The nationality laws of the Parties may make conferment of such nationality dependent on:

(i) The person being normally resident in the territory concerned for a period which shall not exceed that required for naturalization;

(ii) Application by the person concerned;

(iii) Compliance by the person concerned with such other conditions as are required with regard to acquisition of nationality from all persons born in the Party's territory.

3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person does not acquire the nationality of the State of birth, he shall acquire the nationality of the Party of which one of his parents is a national. The nationality of the father shall prevail over that of the mother.

Article 2

The legal presumptions set forth in articles 2 and 3 and the provisions of article 4, of the said Convention, shall apply also with regard to article 1 of this Protocol.

Article 3

1. The Parties shall reinstate into their nationality all persons who have, before the coming into force of the Convention on the Reduction of Future Statelessness, lost the nationality of the said Parties, thereby becoming stateless, as a consequence of:

(i) Change in their personal status, such as marriage, termination of marriage, legitimation, recognition or adoption;

(ii) Change or loss of the nationality of a spouse or of a parent;

(iii) Renunciation;

(iv) Application for naturalization in a foreign country, or obtention of an expatriation permit for that purpose;

(v) Departure, stay abroad, failure to register or any similar ground;

(vi) Deprivation of nationality by way of penalty; or on racial, ethnical, religious or political grounds. The stateless persons will in this case have the right to opt for application of article 5.

Article 4

The Parties to which territory has been transferred, or which otherwise have acquired territory, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory who, due to the change of sovereignty over that territory, are stateless at the time of the coming into force of this Protocol.

Article 5

When no nationality is acquired by the application of the foregoing articles, each Party shall confer its nationality upon *de jure* and *de facto* stateless persons residing in its territory, provided further that the latter renounce the ineffective nationality they possess.

Article 6

The provisions of article 10 of the Convention shall apply with regard to this Protocol.

(iv) Application for naturalization in a foreign country, or obtention of an expatriation permit for that purpose;

(v) Departure, stay abroad, failure to register or any other similar ground;

(vi) Deprivation of nationality by way of penalty, or on racial, ethnical, religious or political grounds.

2. The national laws of the Parties may make reinstatement into nationality dependent on;

(i) Application by the person concerned;

(ii) Residence in its territory at the time of the filing of such application.

Article 4

The Parties to which territory has been transferred, or which otherwise have acquired territory, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory who, due to the change of sovereignty over that territory, are stateless at the time of the coming into force of this Protocol.

Article 5

The Parties shall examine sympathetically applications for naturalization submitted by persons who are stateless, either *de jure* or *de facto*, and who are habitually resident in their territory.

Article 6

The provisions of article 10 of the Convention shall apply with regard to this Protocol.

ANNEX II

ALTERNATIVE CONVENTION ON THE ELIMINATION OF PRESENT STATELESSNESS

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality",

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality",

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between States,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is imperative, by international agreement, to eliminate the evils of statelessness,

Whereas there exists a large number of persons afflicted by statelessness,

The Contracting Parties

Hereby agree as follows:

Article 1

The Party in whose territory a stateless person actually lives shall grant to that person the legal status of "protected na-

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Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is desirable to reduce statelessness by international agreement, so far as its total elimination is not possible,

Whereas there exists a large number of persons afflicted by statelessness,

The Contracting Parties

Hereby agree as follows:

Article 1

1. The Party in whose territory a stateless person habitually resides shall grant to that person the legal status of "protected

tional" and shall issue to him a certificate of registration qualifying him as such.

Article 2

The protected nationals mentioned in article 1 shall:

- (i) Enjoy all the rights and privileges to which nationals of the protecting Parties are entitled, with the exception of political rights;
- (ii) Enjoy the fullest protection of such Parties under national and international law;
- (iii) Enjoy the right of naturalization as accorded to aliens, subject to the same conditions as required of them;
- (iv) Be under the same obligations towards the protecting Parties as their nationals.

Article 3

Descendants of protected nationals shall obtain full citizenship, including political rights, on reaching the age of majority.

Article 4

The *de facto* stateless persons actually living in the territory of one of the Parties shall have the same rights as those granted to *de jure* stateless persons in this Convention, provided that they renounce the ineffective nationality which they possess.

Article 5

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

3. If, within two years of the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

national" and shall issue to him a certificate of registration qualifying him as such.

2. The national legislation of the Party may exclude from the application of paragraph 1 only those stateless persons who are undesirable or whose admission as protected subjects might constitute a threat to the internal or external security of the Party.

Article 2

The protected subjects mentioned in article 1 shall:

- (i) Enjoy all the rights and privileges to which nationals of the protecting Parties are entitled, with the exception of political rights;
- (ii) Enjoy the fullest protection of such Parties under national and international law;
- (iii) Enjoy the right of naturalization as accorded to aliens, subject to the same conditions as required of them;
- (iv) Be under the same obligations towards the protecting Parties as their nationals.

Article 3

Descendants of protected nationals shall obtain full citizenship, including political rights, on reaching the age of majority.

Article 4

The *de facto* stateless persons actually living in the territory of one of the Parties shall have the same rights as those granted to *de jure* stateless persons in this Convention, provided that they renounce the ineffective nationality which they possess.

Article 5

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

3. If, within two years of the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

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Report on multiple nationality by Roberto Córdova, Special Rapporteur

[Original text: English]
[22 April 1954]

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INTRODUCTION

1. The Special Rapporteur wishes to begin this report by expressing his profound appreciation, which no doubt is shared by all the members of this Commission, for Judge Manley O. Hudson's contribution towards the accomplishment of its task. It seems also appropriate to pay tribute to Judge Hudson for his lifelong devotion to the study of international law and for the efficiency and usefulness of his teachings which are so exceptionally beneficial to students of the law of nations all over the world.

2. As Special Rapporteur Judge Manley O. Hudson presented to the Commission a Report on Nationality including Statelessness (A/CN.4/50)¹ which included three annexes, the first one being an introductory statement, partly historical and partly analytical, on the subject of "Nationality in General". The excellent analysis of the subject, his logical arrangement of the study and the wealth of information supplied by him in the paper, give to the reader a very clear idea of the problem which confronts the Commission. Therefore, the present Special Rapporteur considers that Judge Hudson's paper is an essential basis for the Commission's discussions and should be referred to in the Commission's future work on this question.

3. The Special Rapporteur had before him the paper entitled "Survey of the problem of multiple nationality" (A/CN.4/84), prepared by the Secretariat of the United Nations. It is also a fundamental document giving abundant additional information on the

matter. He expresses the hope that it will be made available in due time to the members of the Commission, as he considers the present paper merely a continuation of the work already done.²

4. The subject having already been fully explored as regards its background, its implications and the problems involved, the task of the Special Rapporteur is a relatively simple one, namely that of presenting to the Commission a working paper containing bases of discussion on multiple nationality. He did not think it convenient to prepare a draft convention containing articles, because, as the topic has not yet been studied by the Commission, he has been unable to ascertain the opinions of the members and, therefore, he lacks the guidance which is essential for such a work.

5. The Special Rapporteur has already had the opportunity to state in his first report on the elimination or reduction of statelessness that in the general interest of the international community every person should have a nationality, but only one nationality, and that every effort should be made to avoid double or multiple nationality (A/CN.4/64, para. 9).³ Although he is well aware that matters concerning nationality are generally considered as falling within the *domaine réservé* of the States and that, therefore, States have the sovereign right to legislate on nationality as they deem it most advantageous to their particular interests, he strongly believes that this right is not unlimited but subordinated to international law. The reason on which this belief is founded was expounded at length in paragraphs 11 to 17 of his first report and, therefore,

¹ See *Yearbook of the International Law Commission, 1952*, vol. II, p. 3.

² A/CN.4/84 is included in the present volume.

³ See *Yearbook of the International Law Commission, 1953*, vol. II.

he begs the Commission to refer to it, as he does not wish to repeat without necessity the arguments previously presented.

6. Multiple nationality is a constant source of friction between States. It is not a mere theoretical technicality. On the contrary, it gives rise to problems of importance to States as well as to individuals. Among these problems, the question of military service is perhaps the most important one. A man, on reaching a certain age, is required under the legislation of most States to render military service for a length of time. If such a person has two or more nationalities, he will be expected to serve simultaneously in two or more different States, which is both physically impossible and unfair. As he is unable to comply with his obligation towards one of the countries of which he is a national, he will be considered by that country as a deserter and will be subject to prosecution and punishment. It is self-evident that this situation calls for remedial action.

7. Another source of friction caused by multiple nationality is the fact that, at times, States grant diplomatic protection to their nationals in case of illegal acts committed to their detriment by another State. In connexion with this protection serious questions have arisen in the past such as: which State should be the protecting State in case of double nationality? Can such protection be provided by one State against another State which also claims the person concerned as its national? It is not the intention of the Special Rapporteur to supply an answer to these and many other problems that might arise, nor is he expected to do so particularly in view of the fact that some of them have already been solved by arbitral decisions. He merely wishes to emphasize the practical implications of the problem of double nationality.

8. The main source of double nationality is, as in the case of statelessness, the conflict of the principles by virtue of which nationality is acquired at birth. If *jus soli* were exclusively applied in every State of the world, double nationality would never occur. Similarly, if *jus sanguinis* were the only rule applied, a child would not acquire any other nationality than that of his parents, the nationality of the father prevailing. However since both principles co-exist in the world, a child born in a *jus soli* country to *jus sanguinis* parents, acquires a double nationality and becomes the victim of a conflict of laws, unless there is a convention between the two States concerned solving the conflict (which is precisely the object of the efforts of the Commission).

9. Both the above-mentioned principles command the respect of jurists and statesmen. They are indeed equally valid, from the legal point of view, as a basis for conferring nationality, and it is not the desire of the Special Rapporteur to extol the merits or to point out the disadvantages of one of them in comparison with the other. There is of course no practical possibility of asking Governments to renounce definitely one or the other of the two systems.

10. In former days, the main obstacle to the elimination of double nationality, especially in European countries, was the fact that none of the States concerned wanted to release a national from his allegiance and thereby lose a potential soldier. The reluctance of States to free nationals from their obligations connected

with military service has been a particular source of friction between them. The so-called Bancroft treaties, concluded between the United States and some European countries, were aimed precisely at solving this kind of difficulty, as was article 1 of the Inter-American Convention on Nationality signed at Montevideo in 1933 and article 1 of the Protocol relating to Military Obligations in certain Cases of Double Nationality adopted at the 1930 Conference for the codification of international law. As stated, the proportion of cases of double nationality in comparison with the total population is relatively small. Furthermore, the problem of military forces and of the relative strength of the countries concerned is, at present, decreasing in importance, because of the ever stronger trend toward unification and the avoidance of national rivalries, as evidenced by the United Nations and more specifically by the proposed unification of the armies of some European countries which in the past were the main contestants in almost every war.

11. Therefore, the hope that States will be willing to undertake, by international conventions, the obligation to refrain from the application of their nationality laws in those few cases where double nationality may arise, is not unwarranted, for it will solve a vexing problem without seriously impairing the military strength of any country. The consequences of such a solution, that is to say, the loss of a few soldiers, are no longer of great importance, whereas it is still just as important for the individuals concerned to be released from their military obligations towards one of the States of which they are nationals, in order not to be subject to military service in two or more States.

12. As regards double nationality arising from the operation of the law in the case of marriage, adoption, legitimation and naturalization, the problem is of still lesser political importance for the States concerned and, therefore, it might be easier to solve.

13. The Special Rapporteur will not go into details regarding the efforts that have so far been made to suppress double nationality. He merely wishes to point out that there are precedents of action taken by States and by international conferences, and that the question has also been the subject of careful consideration by private organizations. The paper presented by Judge Hudson and the memorandum prepared by the Secretariat give a very able historical account of such efforts and there is no need to duplicate the *exposés* contained therein.

14. In the opinion of the Special Rapporteur, the only possible solution of the problem of multiple nationality consists in depriving an individual possessing several nationalities of all his nationalities but one and consequently to sever his ties of allegiance to all but one of the States concerned. This method is the opposite of the one followed by the Commission in the case of statelessness. In the conventions already approved by the Commission, it was decided to confer only one nationality upon those persons who had none, and care was taken to avoid double nationality. This was a clear indication of the Commission's concern with the problem of double nationality and of its awareness of the evils resulting from it.

15. There is not merely a similarity between the

problem of statelessness and that of multiple nationality; but unquestionably there is a perfect identity as far as the sources of both situations are concerned. Both statelessness and multiple nationality arise from conflicts between laws of nationality and from acts of governments or individuals. In fact, statelessness and multiple nationality at birth, as it has already been pointed out, arise from the conflict between the same two principles, *jus soli* and *jus sanguinis*, and, after birth, either from acts of Governments depriving or conferring nationality, or from acts of the individuals themselves, such as marriage, adoption, or other change in their personal status. Statelessness, future and present, has already been dealt with by the Commission, and it now has to take up multiple nationality in order to propose juridical solutions for its elimination or at least for its reduction.

16. If the causes of multiple nationality are practically the same, *mutatis mutandis*, as those of statelessness, the logical and the easiest method to deal with the former problem would be to solve it in the same manner in which the Commission has solved that of statelessness. To tackle the latter problem, the Commission distinguished between future and present statelessness, applying in each of these categories two different solutions: that of total elimination and that of partial reduction. The question of multiple nationality may also be treated along the same lines. By drying up the sources of multiple nationality completely, one could eliminate it entirely in the future and, on the other hand, by introducing certain qualifications to the principles adopted with a view to total elimination, one could be satisfied with reducing future multiple nationality. The same procedure might be followed with regard to present multiple nationality.

17. In dealing with present multiple nationality, the Special Rapporteur arrived at the conclusion that it would be more practical to follow the principle of "effective nationality" based on residence, instead of that of the extension of *jus soli*, as was done in the case of future statelessness. Doubtlessly, there is a closer link between the State and a person habitually residing in it than between a person born in such a State but no longer residing there and having established his permanent residence elsewhere. In this case the tie is rather tenuous. In this sense, there is a close parallelism between the bases proposed in Part III of this report ("effective nationality") and the suggestions made by the Special Rapporteur in the alternative conventions for elimination or reduction of present statelessness (A/CN.4/81, annex II)⁴ which are both based on the principle of actual residence, as suggested by Mr. Lauterpacht and Faris Bey el-Khoury in letters of 17 September and 2 December 1953, respectively, to the Special Rapporteur.

18. In this connexion, the members of the Commission will find herein as Parts I and II drafts based on general principles corresponding to those governing the already adopted conventions on statelessness, that is, the extension of *jus soli*. The said principles have however been adapted in view of their application to the problem of multiple nationality.

19. Parts III and IV, which deal with present multiple nationality, are based on an entirely different concept, that of the "effective nationality" which, in the opinion of the Special Rapporteur, is closer to reality and perhaps more acceptable to States. Although strictly speaking and from the point of view of logic, it is possible to draft conventions simultaneously embodying the solution of both problems, that of statelessness and that of multiple nationality, since both, as has been said, spring from the same sources, the Special Rapporteur has not attempted to do so. In deciding against the formulation of a convention or conventions dealing simultaneously with statelessness and multiple nationality, he assumed that Governments in general would prefer to deal separately with the two questions so as to be able to accept for example the solutions proposed for statelessness without being forced at the same time either to make reservations or not to sign at all with regard to multiple nationality or vice versa. A definite effort has been made nevertheless to draft the conventions on statelessness and those on multiple nationality in such a manner as to create a co-ordinated whole.

20. During its fifth session, the Commission invited the Special Rapporteur to study, besides the problem of present statelessness, "other aspects of the topic of nationality and to make in this respect such proposals to the Commission as he might deem appropriate" (Report of the International Law Commission covering the work of its fifth session, A/2456, para. 166).⁵ The Economic and Social Council had, on the other hand, asked the International Law Commission, in its resolution 304 D (XI) "to undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women", and the Commission had declared, at its second session, "its willingness to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness'" (Report of the International Law Commission covering the work of its second session, A/1316, paras. 19-20).⁶

21. Therefore, the Special Rapporteur feels that he should explain in a few words his reasons for including in his present work only the subject of multiple nationality, while excluding other aspects of the problem as a whole, especially that of the nationality of married persons. These reasons are as follows. In the first place, the time allowed to the Special Rapporteur was insufficient to deal with the three subjects: present statelessness, multiple nationality and the nationality of married persons; in the second place, he thinks that multiple nationality should be dealt with immediately after the study of statelessness. On the other hand, the question of the nationality of married persons, which calls for a different approach, may be properly taken care of in a separate study. There exists, of course, a certain inter-relation between the three problems; statelessness, multiple nationality, and nationality of married persons, and in dealing with the first two prob-

⁴ A/CN.4/81 is included in the present volume.

⁵ In *Yearbook of the International Law Commission, 1953*, vol. II.

⁶ In *Yearbook of the International Law Commission, 1950*, vol. II, pp. 366-367.

lems, care was taken to include provisions with regard to marriage and dissolution of marriage, with a view to preventing such changes in the personal status from producing statelessness or multiple nationality. It has also been considered premature to deal with the last of the three aspects of nationality since, according to resolution 504 B (XVI) of the Economic and Social Council, the Secretary-General has been asked to circulate among Governments for their comments the text of a draft Convention on the Nationality of Married Persons, which the Commission on the Status of Women will consider at its eighth session.⁷ Moreover, the exclusion of this question from the present study was motivated by the fact that the Commission may, if it so desires, discuss this matter on the basis of the draft convention prepared by Mr. Hudson (A/CN.4/50, annex II, para. 7)⁸ as well as on the above-mentioned draft prepared by the Commission on the Status of Women. Mr. Hudson's draft follows very closely the terms proposed by the Commission on the Status of Women and is, it is believed, a suitable basis for the Commission's work on this aspect of the problem of nationality. The proposal of the Commission on the Status of Women produces neither statelessness nor multiple nationality.

22. Due consideration was given to the question of the nationality of children of diplomatic agents. However, the Special Rapporteur did not think it necessary to include special provisions regarding this matter in the bases of discussion which he submits in this report, in view of the fact that there is general agreement among authors dealing with international law, as well as a general practice of States, to the effect that *jus soli* is not applied to children born abroad to diplomatic agents on official mission. Moreover, the problem has also been considered by international tribunals, which reached the same conclusion. Therefore, there is no need to give further consideration to this question, particularly in view of the fact that in the first Report on the Elimination or Reduction of Statelessness a provision to this effect was included (A/CN.4/64, Part I, Article III),⁹ but the Commission omitted it on the assumption, it seems, that the draft conventions were not intended to codify the principles already accepted by States and embodied in international law, but rather to solve the existing problems which called for new rules (Report of the International Law Commission covering the work of its fifth session, A/2456, paras. 115-162).¹⁰

23. The same situation exists in relation to the imposition of nationality on aliens who have children born in the country or who acquire real property there. This imposition would in most instances cause double nationality, with the exception, of course of the case of a stateless person and, therefore, it seems that a provision forbidding this practice should logically have been incorporated in the bases for discussion; nevertheless,

since decisions of international tribunals state the unlawfulness of such practices and since the object of the draft conventions is to provide juridical means and procedures to deal with existing conflicts of law not already solved, the Special Rapporteur has abstained from introducing any proposal regarding this question. The Commission, nevertheless, will eventually decide if it thinks it proper to include a specific provision envisaging this situation in furtherance of its duty to codify this aspect of the law of nationality.

24. An explanation should also be given with regard to the lack of any reference in the bases of discussion to the diplomatic protection of nationals abroad in cases of multiple nationality and to any other situation similar to that resulting from the obligation of nationals to serve in the army of their own country or countries. This omission is intentional on the part of the Special Rapporteur in spite of his being aware of the fact that in most cases all instruments or drafts which have been suggested or prepared in relation to the problem of multiple nationality either by governments or by private organizations have included provisions concerning these questions. The Special Rapporteur believes, nevertheless, that such provisions have no place in a draft designed only to eliminate or reduce multiple nationality. He thinks that the obligations and rights derived from nationality should be dealt with separately from the problem of the elimination or reduction of multiple nationality. Technically these questions, although related to nationality, are completely different in nature. The rights derived from nationality are, from the point of view of the State, those of requiring the services, whether military or otherwise, of its nationals, the collection of taxes, etc. and the obligations are those of protecting its nationals abroad, and, when they reside in the national territory, of providing them with elementary education, courts of justice, sanitation, etc. The problem of avoiding multiple nationality evidently does not include the enumeration of the rights and duties either of the State towards its nationals or of the nationals towards the State.

PART I. BASES OF DISCUSSION CONCERNING THE ELIMINATION OF FUTURE MULTIPLE NATIONALITY

Basis 1

The Parties shall abstain from conferring their nationality upon persons not born in their territory who would otherwise have multiple nationality. (See article 1 of the draft Convention on the Elimination of Future Statelessness, A/2456, para. 162).¹¹

Comment

(1) This article, *a contrario sensu*, gives predominance to the *jus soli* principle in the sense that it requires the *jus sanguinis* country to abstain from applying its nationality laws in cases where the person concerned was not born in their territory and had already acquired the nationality of the country of birth by virtue of the

⁷ Official Records of the Economic and Social Council, Sixteenth Session, Resolutions, Supplement No. 1 (E/2508), p. 13.

⁸ See Yearbook of the International Law Commission, 1952, vol. II, p. 13.

⁹ In Yearbook of the International Law Commission, 1953, vol. II.

¹⁰ *Ibid.*

¹¹ *Ibid.*

jus soli principle. In other words, if the person acquiring multiple nationality was born in the territory of a *jus soli* country party to the Convention or in the territory of a State not party to the Convention applying the *jus soli* principle, the rule stated in Basis 1 would prevail and the individual concerned would only acquire the nationality of the country of his birth.

(2) The members of the Commission will remember that, in dealing with the elimination of future statelessness, the Commission drafted an article (article 4 of that draft convention) which is concerned with the case of birth in the territory of a State not party to the convention, a situation automatically settled by article 1 above simultaneously with birth in the territory of one of the parties. The only case in which double nationality could occur is that of a person born in the territory of a *jus soli* country of parents belonging to a country which applies the *jus sanguinis* principle, provided both countries are not parties to the convention.

Basis 2

For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered. (See article 3 of the Convention on the Elimination of Future Statelessness, A/2456, para. 162).

Basis 3

1. If the law of a Party entails acquisition of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such acquisition shall be conditional upon loss of another nationality, if any.

2. The change or acquisition of the nationality of a spouse or of a parent shall not entail the acquisition of nationality by the other spouse or by the children unless they lose their previous nationality or nationalities, if any. (See article 5 of the Convention on the Elimination of Future Statelessness, A/2456, para. 162).

Basis 4

Naturalization shall result in loss of the previous nationality, if any, of the person who is naturalized. (See article 6 of the Convention on the Elimination of Future Statelessness, A/2456, para. 162).

Basis 5

1. Treaties providing for transfer of territories shall include provisions for ensuring that, subject to the exercise of the right of option, inhabitants of these territories, nationals of the former State, shall not acquire multiple nationality.

2. In the absence of such provisions, States from which territory is transferred, shall withdraw their nationality from the inhabitants of such territory if

otherwise multiple nationality would arise. (See article 9 of the Convention on the Elimination of Future Statelessness, A/2456, para. 162).

Basis 6

On reaching the age of eighteen, a person shall have the right of option for one of the nationalities that he would have acquired had the present Convention not been applied, provided he loses the nationality acquired by its application. (This basis is entirely new. See comments on Basis 4 of Part III of the present report).

Basis 7

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of persons having multiple nationality before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have two or more nationalities in violation of the provisions of the Convention.

3. If, within two years of the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2. (See article 10 of the Convention on the Elimination of Future Statelessness, A/2456, para. 162).

PART II. BASES OF DISCUSSION CONCERNING THE REDUCTION OF FUTURE MULTIPLE NATIONALITY

Basis 1

1. The Parties shall abstain from conferring their nationality to persons not born in their territory who would otherwise have multiple nationality.

2. The Party which, in accordance with the provisions of paragraph 1, abstained from conferring its nationality upon a child, may confer its nationality upon it provided the child establishes its residence in the territory of the State concerned before reaching the age of eighteen.

Basis 2

Identical with Basis 2 of Part I.

Basis 3

Identical with Basis 3 of Part I.

Basis 4

Identical with Basis 4 of Part I.

Basis 5

Identical with Basis 5 of Part I.

Basis 6

Identical with Basis 6 of Part I.

Basis 7

Identical with Basis 7 of Part I.

PART III. BASES OF DISCUSSION CONCERNING THE ELIMINATION OF PRESENT MULTIPLE NATIONALITY

Basis 1

All persons are entitled to possess one nationality, but one nationality only.

Comment

This basis is a statement of the principle constituting the central theme of this report. Useless to say, the principle is not intended to appear as drafted in a convention. It is only included here as the fundamental introduction to all other provisions which eventually might appear in a convention. If, as it has been pointed out in paragraphs 6-8 of this report, double nationality is an evil and a constant source of friction between States and quite often a hardship to the individuals themselves, it is obvious that the logical remedy would be the suppression of multiple nationality by providing that in cases of multiple nationality only one of them will prevail, the individual being deprived of all others.

Precedents

The concept that persons should have one, but only one nationality is not new and a good deal of thought has been given to it.

(a) In the "Outlines of an International Code" by David Dudley Field,¹² there is a paragraph which states:

"248. Every person has a national character. No person is a member of two nations at the same time, but any nation may extend to a member of another nation, with his consent, the rights and duties of its own members, within its own jurisdiction, in addition to his own national character." (Emphasis added)

¹² Field, *Outlines of an International Code* (1876), pp. 129-140.

The general principle of a single nationality is clearly expressed in the above quotation, although, at the same time, a concession is made to double nationality. It is difficult to understand the need for such a concession.

(b) The Institute of International Law adopted a resolution in Venice, in 1896,¹³ declaring that:

"L'enfant légitime suit la nationalité dont son père était revêtu au jour de la naissance ou au jour où le père est mort." (Emphasis added)

In the above text the adoption of the *jus sanguinis* principle as the only source of nationality has the result that children can have at birth only one nationality, the non-recognition of *jus soli* preventing double nationality.

(c) The International Law Association, in the Report of the Committee on Nationality and Naturalization adopted in Stockholm in 1924, also refers to the problem in the following terms:¹⁴

"(a) Every child born within the territory of a conforming State shall become a national of that State. Provided always that in any case in which the father of such child, being a national of another State, shall within a specified prescribed period register such child as a national of the State to which he belongs, such child shall cease to be a national of such conforming State and shall become a national of the State to which its father belongs." (Emphasis added)

The above text is interesting, because it clearly adopts the principle of a single nationality, rejecting uncompromisingly the possibility of double nationality. The fact that *jus soli* is considered as the original source of nationality, and *jus sanguinis* as the prevailing one in cases of the parents' option is irrelevant for the purposes of this report.

(d) In the draft of a convention communicated to various Governments by the League of Nations Committee of Experts, in 1926, the following provision is made:¹⁵

"Article 5. A person possessing two nationalities may be regarded as its national by each of the States whose nationality he has."

In the opinion of the Special Rapporteur, the above text is an unfortunate one, because it accepts a situation in which a person may simultaneously possess two nationalities. The said text had a decisive influence on the Conference of 1930 for the codification of international law, as will be seen later.

(e) The draft rules prepared by the Kokusaiho-Gakkwai, in 1926, proposed that:¹⁶

"Article 1. Every person should possess one and only one nationality." (Emphasis added)

¹³ *Institut de Droit international, Tableau général des résolutions 1873-1956*, p. 42.

¹⁴ *International Law Association, Report of the 33rd Conference, 1924*, pp. 28-32.

¹⁵ *Conference for the Codification of International Law, Bases of Discussion*, vol. I: Nationality. Annex.

¹⁶ *International Law Association, Report of the 34th Conference, 1926*, pp. 380-381.

"Article 4. A legitimate child acquires the nationality of the State to which its father belongs at the date of its birth.

.....

"Article 5. Notwithstanding the provisions of the foregoing article the nationality of a child which was acquired by the fact of its birth in the territory of a particular State, shall be recognized by all States.

"A person who has acquired the nationality of the territory of his birth under the preceding paragraph, may elect to assume the nationality of his father or of his mother within a fixed term after attaining his majority..."

The Association of International Law of Japan evidently favours the principle of a single nationality, but, at the same time, permits the renunciation of the nationality acquired *jure soli* if at the age of majority, the individual concerned opts for the nationality of his parents, that is to say, he may acquire his nationality *jure sanguinis*.

(f) The Harvard Draft on the Law of Nationality states with regard to this matter that:¹⁷

"Article 10. A person may have the nationality at birth of two or more States, of one or more States *jure soli* and of one or more States *jure sanguinis*."

The Harvard Draft accepts the existence of double and even multiple nationality as a matter of fact, and the comment on the article adds that this situation "will continue to exist unless all States will agree to adopt a single rule for nationality at birth".¹⁸ The fact that the Harvard Draft was merely codifying what it considered to be existing international law explains why this article merely states the prevailing situation. The Harvard Draft did not intend to solve the problem, but only to state it, while the Commission, given its duty to advance international law, should attempt to draft rules which would avoid multiple nationality.

It is indeed very encouraging to note that a body with such a reputation in the juridical field as possessed by the Harvard Law School already in 1929 contemplated the possibility of an agreement between States aiming at the elimination of multiple nationality, which is precisely the object of the present report.

(g) The Conference for the codification of international law held at The Hague in 1930, unfortunately followed the recommendation of the League of Nations Committee of Experts, and adopted in the Convention on Certain Questions Relating to the Conflict of Nationality Laws, a provision recognizing the existence of double nationality.¹⁹

Article 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

The Conference, recognizing the existence of multiple nationality, did nothing to correct this undesirable

situation and, therefore, it is now up to the International Law Commission to take a decision on the matter, as proposed by the Special Rapporteur, in the sense that "persons will be entitled to one and only one nationality".

Basis 2

If, by application of the nationality laws of the Parties, a person has two or more nationalities, such person shall be deprived of all but the effective nationality that he possesses, as hereinafter defined, and his allegiance to all other States shall be deemed to have been severed.

Comment

In Basis 1 it is proposed that persons will be entitled to one and only one nationality. It follows that the next step must be to decide which nationality must prevail in cases of multiple nationality. The only reasonable and practical answer is: the "effective nationality" that such person possesses. The idea of "effective nationality" is not a new one, and, therefore, the adoption of this solution does not present insuperable difficulties.

Precedents

(a) The Permanent Court of Arbitration, in a judgment dated 3 May 1912, applied this principle in the Canevaro case between Italy and Peru.²⁰ The Court stated, *inter alia*, that by virtue of article 34 of the Peruvian Constitution, Canevaro was a Peruvian national by birth since he was born in that country, that he was furthermore Italian in accordance with article 4 of the Italian Civil Code, his father being of that nationality; but that Canevaro had on various occasions acted as a Peruvian national, for instance by being a candidate for election to the Senate, and more particularly by obtaining permission from the Government and Congress of Peru to exercise the functions of Consul General of the Netherlands. The Court, on these grounds, came to the conclusion that the Peruvian Government was entitled to consider Canevaro as a Peruvian national and to deny that he was an Italian claimant. (See also Makarof, *Allgemeine Lehren des Staatsangehörigkeitsrechts*, p. 296, footnote 56).

(b) More recently, a judgment by the Franco-German Arbitral Tribunal, of 10 July 1926, declared that it could not adopt the system of the *lex fori* applied by national courts, but had to follow the general principles of international private law, and the principle of the *nationalité active* was considered by the Tribunal as an adequate basis for the solution of the conflict of laws under consideration. (*Ibid.*, p. 217, footnote 67).

(c) The criterion of "effective nationality" was explored at the 1930 Conference for the codification of international law. Although the Conference did not suppress double nationality and the question of applying the rule of "effective nationality" did not arise in the conventions that were adopted, nevertheless in article 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws as well as in article 1 of

¹⁷ *Research in International Law, Harvard Law School, Nationality, Responsibility of States, Territorial Waters, Drafts of Conventions* (Cambridge, 1929), p. 14.

¹⁸ *Ibid.*, p. 38.

¹⁹ *Acts of the Conference for the Codification of International Law*, Vol. I, Annex 5.

²⁰ James Brown Scott, *The Hague Court Reports* (New York, 1916), pp. 284-296.

the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, the concept of "effective nationality" seems to have been taken into account when reference is made to the "habitual residence" as a determining factor in the application of the said articles.

(d) Article 3 of the statute of the International Court of Justice provides that, for the purposes of membership in the Court, the criterion to be applied in case of double nationality is that of the exercise of civil and political rights. Therefore, without stating it expressly, it clearly accepts the principle of the "effective nationality" which should prevail. Consequently, it is very interesting to quote the said provision:

"Article 3 (2). A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights."

(e) The Statute of the International Law Commission contains also a provision very similar in its wording and identical in its scope to the one quoted above:

"Article 2 (3). In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights."

(f) The Secretariat of the United Nations refers to this question in its very learned and exhaustive "Survey of the Problem of Multiple Nationality" (A/CN.4/84, in particular paras. 365 and 366),²¹ which it was kind enough to prepare for the use of the Special Rapporteur, who gladly takes again this opportunity to express his deep appreciation for this invaluable contribution to his work.

Basis 3

To determine the effective nationality account will be taken of the following circumstances, either jointly or separately:

(a) Residence in the territory of one of the States of which the individual concerned is a national;

(b) In case of residence in the territory of a State of which he is not a national, whether or not this State is a party, the previous and habitual residence in the territory of one of the States of which he is a national;

(c) If the criteria mentioned in the above subparagraphs do not apply, any other circumstances showing a closer link de facto to one of the States of which he is a national, such as:

(i) Military service;

(ii) Exercise of civil and political rights or of political office;

(iii) Language;

(iv) His previous request of diplomatic protection from such State;

(v) Ownership of immovable property.

Precedents

(a) The link of residence is considered as a determining factor of nationality by the draft rules prepared by the Kokusaiho-Gakkwai in 1926:²²

"Article 5. A person who has acquired the nationality of the territory of his birth under the preceding paragraph, may elect to assume the nationality of his father or of his mother within a fixed term after attaining his majority, *provided that he has acquired domicile in the latter country before making such election.*" (Emphasis added)

(b) The draft convention communicated to various Governments by the League of Nations Committee of Experts in 1926,²³ also makes reference to the factor of residence:

"Article 5. A person possessing two nationalities may be regarded as its national by each of the States whose nationality he has. In relation to third States, *his nationality is to be determined by the law in force at his place of domicile if he is domiciled in one of his two countries.*" (Emphasis added)

(c) Article 10 of the Bustamante Code, adopted by the Sixth Inter-American Conference held in Havana in 1928, states that,²⁴ in the case of individuals possessing by origin several of the nationalities of the Contracting Parties, if the question is raised in a State which is not interested in it,

"... the law of that of the nationalities *in issue in which the person concerned has his domicile shall be applied.*" (Emphasis added)

(d) The Draft Convention on Nationality prepared under the auspices of the Harvard Law School in 1929 attaches also a decisive importance to the habitual residence of the person concerned, and it states that:²⁵

"Article 12. A person who has at birth nationality of two or more States shall, upon his attaining the age of twenty-three years, *retain the nationality only of that one of those States in the territory of which he then has his habitual residence; if at that time his habitual residence is in the territory of a State of which he is not a national, such person shall retain the nationality of that one of those States of which he is a national within the territory of which he last had his habitual residence.*" (Emphasis added)

(e) The Convention on Certain Questions Relating to the Conflict of Nationality Laws adopted at The Hague in 1930, provides that:²⁶

"Article 5. Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclu-

²² See *supra*, footnote 16.

²³ See *supra*, footnote 15.

²⁴ James Brown Scott, *The International Conferences of American States 1889-1928* (New York, 1931), p. 328.

²⁵ *Research in International Law, Harvard Law School, Nationality etc.*, Cambridge, 1929, p. 14.

²⁶ See *supra*, footnote 19.

²¹ Included in the present volume.

sively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

It is very interesting to observe that in the above article reference is made, for the first time, to other "circumstances" showing in fact a closer connexion with one of the countries of which he is a national.

(f) It will be remembered that the judgment of the Permanent Court of Arbitration in its decision in the Canevaro case, to which reference has been made above,²⁷ stated that such circumstances (exercise of political rights and request of permission to hold an office) played a decisive role in the determination of Canevaro's nationality.

(g) Returning to The Hague Conference, it will be observed that article 1 of the Protocol Relating to Military Obligations in Certain Cases of Double Nationality²⁸ has a wording similar to that of article 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, and recognizes the importance of habitual residence and that of a close connexion with a State.

"Article 1. A person possessing two or more nationalities *who habitually resides in one of the countries* whose nationality he possesses, *and who is in fact most closely connected with that country*, shall be exempt from all military obligations in the other country or countries." (Emphasis added)

(h) Reference has already been made above²⁹ to the provisions of the Statute of the International Court of Justice and of the Statute of the International Law Commission which consider the exercise of civil and political rights as a suitable criterion for determining the effective nationality in cases of double nationality.

Basis 4

1. On reaching the age of eighteen every person shall have the right to opt for one of the nationalities of which he was deprived by the application of the rule contained in Basis 2. In such case he will be deprived of the nationality which he acquired by virtue of these rules. His decision is final.

2. If the person fails to opt for one of the nationalities concerned, within a period of one year after reaching the age of eighteen, his nationality will continue to be his effective nationality as determined in accordance with the rules contained in Bases 2 and 3.

Comment

(1) Basis 4 deals with the option for one of the nationalities and the consequent renunciation of all other to which a person might have been entitled in the absence of the rule embodied in Basis 2.

²⁷ See *supra*, footnote 20.

²⁸ *Acts of the Conference for the Codification of International Law*, vol. I, Annex 6.

²⁹ See *supra*, Basis 2, precedents.

(2) Although Bases 1 and 2 definitely state that a person may have one and only one nationality, i.e. the "effective nationality", which is to be determined as provided in Basis 3, nevertheless the Special Rapporteur has deemed it appropriate to recognize the right of option by the individual concerned when he reaches the age of eighteen. Sometimes it may happen that a person having one nationality in accordance with Basis 2 would have personal reasons for desiring to be considered as a national of the country whose nationality he has lost by the operation of that Basis. The Special Rapporteur sees no objection to granting the right of option in this case to such a person at the age when he may be called upon to fulfil the most characteristic obligation based on nationality, namely that of military service. The age of eighteen is considered to be more suitable than that of twenty-one or any other age, in view of the fact that in many countries this is also the military age and military service is of course the best possible means of expressing the individual's preference for a country.

(3) Although Bases 1 and 2 provide that a person shall have one and only one nationality and that this will be the "effective nationality", the other nationalities should not be entirely disregarded as potential ones, despite the fact that as a rule the "effective nationality" will prevail. These other nationalities remain latent or dormant and entirely ineffective until the individual himself, implicitly or expressly, opts for one of his potential nationalities, either the effective or the potential one; once this right has been exercised, he will be deemed to have renounced all others.

Precedents

(a) The right of option was widely recognized in the peace treaties and minorities treaties that were concluded after the end of the First World War, as well as in bilateral and multilateral agreements concluded before the war, such as the Bancroft treaties to which reference is made in paragraph 10 of the introduction to the present report.

(b) The draft rules prepared by the Kokusaiho-Gakkwai in 1926 provide in article 5 (which has been quoted above)³⁰ for the right of option by persons who acquire double nationality at birth.

Basis 5

The State for whose nationality a person has opted in pursuance of the provisions of Basis 4, will communicate this fact to the other State or States concerned, which will take action to implement the severance of allegiance following from the exercise of this option.

Comment

This exchange of information is convenient, and it is particularly useful to the State whose nationality has been forfeited, in order that it may make the necessary annotations in its registers, especially in the recruiting

³⁰ See *supra*, Basis 1, precedents.

lists. Thus the person concerned will never be considered as a deserter by the State whose nationality he no longer possesses; he will therefore always be exempt of prosecution and conviction by these States on grounds of desertion.

Basis 6

Identical with Basis 7 of Part I.

PART IV. BASES OF DISCUSSION CONCERNING THE REDUCTION OF PRESENT MULTIPLE NATIONALITY

Basis 1

If, by application of the nationality laws of the Parties, a person has two or more nationalities, such person shall be deprived of all but the effective nationality that he possesses, as hereinafter defined, and his allegiance to all other States shall be deemed to have been severed.

Basis 2

To determine the effective nationality account will be taken of the following circumstances, either jointly or separately:

- (a) Residence in the territory of one of the States of which the individual concerned is a national, for a period of not less than fifteen years;
- (b) Knowledge of the language of the State of residence;
- (c) Ownership of immovable property in the State of residence.

Comment

It will be noted that Basis 2, in requiring the simultaneous fulfilment of some of the requirements enumerated in Basis 3 of Part III, make the application of the principle expressed in Basis 1, which is identical with Basis 2 of Part III, much more difficult. Basis 2 will therefore facilitate reduction of multiple nationality but would not be conducive to its total elimination.

Basis 3

1. On reaching the age of eighteen every person shall have the right to opt for one of the nationalities of which he was deprived by application of the rules contained in Basis 1. In such case he will be deprived of the nationality which he acquired by virtue of these rules. His decision is final.

2. If the person fails to opt for one of the nationalities concerned within a period of one year after reaching the age of eighteen, his nationality will continue to be his effective nationality as determined in accordance with the rules contained in Bases 1 and 2.

Basis 4

The State for whose nationality a person has opted in pursuance of the provisions of Basis 3, will communicate this fact to the other State or States concerned, which will take action to implement the severance of allegiance following from the exercise of this option.

Basis 5

Identical with Basis 7 of Part I.

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Survey of the problem of multiple nationality prepared by the Secretariat

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CHAPTER I

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CHAPTER IV

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Introduction

1. ORIGIN OF THIS STUDY AND ITS LIMITS¹

1. During its first session in 1949, the International Law Commission had before it a memorandum² submitted by the Secretary-General which contained *inter alia* the following remarks concerning the problem of dual or multiple nationality:

"76 ... While the Convention [adopted by the Hague Codification Conference 1930] embodied agreement on such questions as the general principles governing conferment of nationality and the diplomatic protection of persons of dual nationality, no agreement proved possible on important questions of substance such as the removal of the principal causes of double nationality... No serious attempt was made to investigate the possibility of a single criterion for acquisition of nationality by birth. While the Convention recognized the right of persons of dual nationality to renounce one of them, it made such renunciation conditional upon the authorization of the State whose nationality was being surrendered... Of the protocols adopted by the Convention—they all referred to matters of detail—two have entered into force.

"77. It may thus be said that while revealing the potentialities of the international regulation of the subject, the work of the Hague Codification Conference on the question of nationality touched only the fringes of the problem. In an era of economic nationalism and isolation, when freedom of movement across the frontiers tends to become nominal, the urgency of an international regulation of conflicts of nationality laws and statelessness is less apparent... Moreover in an international system in which the fundamental rights and freedoms of the individual are bound to gain increasingly effective recognition, the law of nationality is likely to become once more the subject of remedial codification..."³

2. The Commission discussed the problem of nationality in some detail and decided to select "nationality, including statelessness" as a topic for codification without, however, including it in the list of topics to which it gave priority.⁴

¹ In this study, each of the terms "dual nationality", "double nationality", "plural nationality" and "multiple nationality" may be understood as comprehending any of the others if the context so requires.

² *Survey of international law in relation to the work of codification of the International Law Commission (A/CN.4/Rev.1)* (United Nations publication, Sales No.: 1948. V.1 (1)).

³ *Ibid.*, paras. 76-77.

⁴ Report of the International Law Commission covering its first session, *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20. Also in *Yearbook of the International Law Commission, 1949*, p. 281.

3. During its second session the Secretary-General drew the Commission's attention to resolution 304 D (XI) adopted by the Economic and Social Council on 17 July 1950 in pursuance of a report by the Commission on the Status of Women at its fourth session. The latter Commission had suggested that the Economic and Social Council take appropriate measures to ensure the drafting of a Convention on nationality of married women embodying the following principles:

"(i) There shall be no distinction based on sex as regards nationality, in legislation or in practice.

"(ii) Neither marriage nor its dissolution shall affect the nationality of either spouse. Nothing in such a convention shall preclude the parties to it from making provisions for the voluntary naturalization of aliens married to their nationals."⁵

Consideration was to be given to "the problem of the transmission of nationality to children from either the father or the mother on a basis of equality".⁵

4. When discussing the problem of transmission of nationality to a child under the doctrine of *jus sanguinis*, most members of the Commission on the Status of Women felt that it would be inadvisable to include that principle in a convention on the nationality of married women and the Commission decided to limit itself to requesting the Economic and Social Council to "instruct the appropriate bodies of the United Nations to give consideration to the problem of the transmission of nationality to children from either the father or the mother on the basis of equality."⁶

5. Acting on the aforesaid resolution of the Commission on the Status of Women, the Economic and Social Council on 17 July 1950 adopted resolution 304 D (XI) on the nationality of married women, which proposed that the International Law Commission should

"undertake as soon as possible the drafting of a Convention to embody the principles recommended by the Commission on the Status of Women."

The International Law Commission deemed it appropriate to

"entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'Nationality including Statelessness'".⁷

6. Again, at its 13th session in August 1951 the Economic and Social Council expressed the hope

⁵ Document E/1712, para. 37.

⁶ *Ibid.*, para. 34.

⁷ Report of the International Law Commission covering its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, paras. 19 and 20. Also in *Yearbook of the International Law Commission, 1950*, vol. II, p. 367.

(resolution 385 F (XIII) on "Nationality of married women") that

"the International Law Commission will endeavour to complete the drafting of this convention as soon as practicable."

7. Also in 1951 the International Law Commission was apprised of a resolution adopted by the Economic and Social Council (319 B III (XI)) requesting it to prepare

"at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness";

and it decided to initiate work on "Nationality, including Statelessness" and to appoint Mr. Manley O. Hudson Special Rapporteur on this subject.⁸

8. The Special Rapporteur submitted a "Report on Nationality including Statelessness"⁹ to the Commission at its fourth session. The following documents prepared by the Secretariat were also available to the Commission: "The problem of Statelessness" (A/CN.4/56); "Nationality of Married Women" (E/CN.6/126/Rev.1 and E/CN.6/129/Rev.1); "A study of Statelessness" (E/1112 and Add.1).

9. As regards the nationality of married women, the Special Rapporteur's report contained a working paper together with a draft Convention on Nationality of Married Persons¹⁰ which followed closely the terms proposed by the Commission on the Status of Women. He suggested that the International Law Commission should comply with the request to draft a convention embodying these terms. He added:

"It would seem to be unnecessary for the International Law Commission to express any views concerning these principles, or to analyse the consequences of their application, e.g., on the transmission of nationality *jure sanguinis* to children".¹¹

10. The Commission, however, came to the conclusion¹²

"that the question of married women could not but be considered in the context, and as an integral part, of the whole subject of nationality including statelessness. Furthermore, it did not see fit to confine itself to the drafting of a text of a convention to embody principles which it had not itself studied and approved."

11. The problem of statelessness was dealt with in Annex III of the Special Rapporteur's report (A/CN.4/50), while Annex I of this document on "Nationality in general" contains in paragraph 5 a brief survey of the

problem of multiple nationality. The survey lists some of the causes of double or multiple nationality, mentions the difficulties it may create for the States and the persons concerned, analyses the provisions dealing with the problem contained in certain bilateral and multilateral treaties, and recalls that the Hague Codification Conference was unable to eliminate multiple nationality. The survey referred to also reproduced the principles applicable in cases of multiple nationality which were embodied in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.

12. When Mr. Manley O. Hudson asked to be relieved of his functions as Special Rapporteur on the topic of "Nationality, including statelessness", the Commission elected Mr. Roberto Córdova to succeed him.¹³

13. In his report submitted to the Commission at its fifth session, Mr. Córdova made it clear that the Commission had not expected him to study the subject of nationality in general,¹⁴ and that his report would cover only the question of statelessness.

14. At the Commission's request (A/CN.4/SR.225, para. 75), the Special Rapporteur, in the course of the Commission's fifth session presented a second report on the "Elimination or Reduction of Statelessness".¹⁵

15. During its fifth session the International Law Commission also invited its Special Rapporteur

"to study the other aspects of the topic of nationality and to make in this respect such proposals to the Commission as he might deem appropriate."¹⁶

16. Acquisition of nationality by birth or by other means, multiple nationality, loss of nationality through deprivation or otherwise, and statelessness are some of the principal aspects of the problem as a whole. The present study will deal only with double or multiple nationality, but in so doing it will have to take into account methods of acquisition of nationality which constitute one of the main causes of double nationality. On the other hand, the problem of nationality of married persons will not be studied in detail, because the draft convention adopted by the Commission on the Status of Women is still under consideration by Governments.¹⁷

2. POLITICAL AND JURIDICAL ASPECTS OF NATIONALITY

17. The problem of nationality arises from the division of the world into sovereign States. No State exists if one of the following elements is lacking: a territory, a people living there and owing allegiance to the entity called the State, a government capable of

⁸ Report of the International Law Commission covering the work of its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*, para. 85. Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 140.

⁹ *Yearbook of the International Law Commission, 1952*, vol. II, document A/CN.4/50.

¹⁰ *Ibid.*, Annex II.

¹¹ *Ibid.*, para. 6.

¹² Report of the International Law Commission covering the work of its fourth session, *Official Records of the General Assembly, Seventh Session, Supplement No. 9 (A/2163)*, para. 30. Also in *Yearbook of the International Law Commission, 1952*, vol. II, p. 67.

¹³ *Ibid.*, paras. 33-34; *ibid.*, p. 68.

¹⁴ *Yearbook of the International Law Commission, 1953*, vol. II, document A/CN.4/64, para. 2 and *Yearbook of the International Law Commission, 1952*, vol. I, p. 252, paras. 17 and 18.

¹⁵ *Yearbook of the International Law Commission, 1953*, vol. II, document A/CN.4/75.

¹⁶ Report of the International Law Commission covering the work of its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, para. 166. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹⁷ See para. 3 above.

enforcing law and order on the territory over which it exercises jurisdiction. On this point there seems to be unanimity among the authors dealing with international law. Thus, Mr. Georges Scelle¹⁸ considers that the State is composed of three elements, namely, "the community of the State, the territory of the State and the machinery of government". The "community of the State" is

"a community of communities, an aggregate of families, associations or societies, occupational, religious and cultural groups and administrative units into which the national community is territorially sub-divided."¹⁹

This conglomeration of individuals and groups will constitute a State only if

"...the sense of what they have in common is sufficiently developed to give a certain homogeneity and a certain economic and physical cohesion to the whole but the 'community' factor essential for the cohesion and dynamism of the State is psychological homogeneity, the 'collective soul' of the nation."¹⁹

Inside the territorial limits of a given State there may be living side by side several different nationalities or ethnic groups, but whatever the constitutional or administrative structure of a State, international law, according to Professor Scelle, knows only "those who govern described as 'representatives', and 'nationals' (national subjects who are protected)".¹⁹

18. Applied to the individual the word "nationality" has, according to Professor Scelle, a special juridical implication. It means

"the link between subjects of law whether individuals or groups (juristic persons, in the classic legal sense) and a State's legal system from which they derive their status."

19. For Oppenheim

"A State proper—in contradistinction to colonies and Dominions—is in existence when a people is settled in a country under its own sovereign Government. The conditions which must obtain for the existence of a State are therefore four: There must, first, be a *people*... There must, secondly, be a *country* in which the people has settled down... There must, thirdly, be a *Government*—that is one or more persons who are the representatives of the people... There must, fourthly and lastly, be a *sovereign Government*... an authority which is independent of any other earthly authority."²⁰

"State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State."²¹

As for the individuals concerned,

"nationality is the link between them and the Law of Nations. It is through the medium of their nationality that individuals can normally enjoy benefits

from the existence of the Law of Nations. This is a fact which has consequences over the whole area of International Law."²²

"Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen";²³ and from this principle flow certain rights for the citizen and for the State of which he is a subject.

20. For Makarov,²⁴ "nationality" has existed as long as there have been States, because "during all periods of the history of mankind, States, whatever may have been their form, had a personal substratum: people belonging to the State [Staatsvolk] have always been a sociological prerequisite of existence of the State itself, and this prerequisite had to be also juridically defined".

21. It is obvious, therefore, that nationality has not only a juridical but also a political connotation. Since States could not exist without people who live on their territories, they will want to exercise jurisdiction over such people. They will, in the first place, determine authoritatively who are and who are not their nationals. Nationals of a State have certain rights and duties which flow from this status and which do not belong to aliens, and these rights and duties are the object of legislation, either of constitutional or ordinary law. This has been particularly so since the end of the eighteenth and the beginning of the nineteenth centuries, when the division of the population into various classes or groups, each invested with certain rights and the object of certain definite duties, began to disappear, largely as a consequence of the industrial revolution and the social upheaval and reconstruction brought in its wake. It is from this period onwards that nationality, as the condition for the exercise of certain rights and of the obligation to fulfil certain duties towards the national community, gained considerably in importance. France was the first nation, or one of the first, to legislate in detail on this matter. Indeed, as a consequence of the Revolution, French citizens acquired the right of participating in the legislative power through their elected representatives, and it became, therefore, imperative to determine by law the persons who, in their capacity as French nationals, were entitled to exercise political rights. The French example has had a profound influence on other nations, and this world-wide evolution made it necessary to determine those persons upon whom the fulfilment of certain duties, such as military service, was incumbent. In France the decrees of 24 February and 24 August 1793 introduced a "réquisition permanente" of all Frenchmen, and the law of 19 Fructidor An VI introduced regular conscription of French citizens.²⁵ Economic freedom, on the other hand, led to a greater mobility of populations, to currents of immigration and emigration which could not leave Governments indifferent to their economic, demographic and political consequences. Finally, during that same period, the idea of the "Nation", of the "Nation State", gained ever greater political significance; so much so that the world today is divided into a number of more or less homogeneous "Nation States". Because

¹⁸ *Manuel de droit international public* (Paris, Domat-Montchrestien, 1948), pp. 81 ff.

¹⁹ *Ibid.*, p. 82 ff.

²⁰ *International Law*, vol. 1, Seventh Edition by H. Lauterpacht (London, Longmans, Green and Co., 1948), pp. 114-115.

²¹ *Ibid.*, p. 407.

²² *Ibid.*, p. 583.

²³ *Ibid.*, pp. 585-586.

²⁴ A. N. Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (Stuttgart, W. Kohlhammer, 1947), p. 17.

²⁵ For a more detailed analysis of these developments see Makarov, *op. cit.*, pp. 17 ff.

of this evolution, the possession of a "nationality" increased in importance for each individual.

22. In view of the considerations outlined above, it seems hardly surprising that most States have promulgated detailed legislation determining who are their nationals. Article 1 of the French Code de la nationalité, for instance, declares:

"The law shall determine which persons at birth possess French nationality as their nationality of origin. French nationality is acquired, or is lost, after birth through the operation of law or pursuant to a decision made by the constituted authorities in accordance with the procedure prescribed by law."

The Code then contains a number of provisions dealing with the acquisition of French nationality by birth, by law, by naturalization, and by reintegration, as well as provisions concerning deprivation and/or loss of French nationality. Provisions relating to the same subjects are to be found in most nationality laws.

23. From the juridical point of view, nationality may be considered as the legal relationship between the State and the individual, and also as part of the individual's status from which flow certain rights and duties. In the French tradition, nationality is considered the link which unites an individual to a certain State,²⁶ and this link has been considered by a number of authors as the result of a bilateral contract between each individual citizen and the State to which he owes allegiance. It may be appropriate to recall that Roman law distinguished between three kinds of status, the *status libertatis*, the *status civitatis* and the *status familiae*. The *status civitatis* was the legal situation of free Roman citizens; similarly, modern legal theory considers nationality as an element of the personal status of the individual.²⁷

24. Nationality, therefore, has a political and a juridical content; but, as may be inferred from the preceding brief summary, the political content is paramount, the legal content being a consequence of, and subject to, the political nature of this problem. Whether nationality be considered as a contractual relationship between the State and the individual or as an element of the individual's status, the rules governing it will be determined mainly by political considerations and necessities, such as the need to attract or discourage immigration, the ethnical composition of the population, the economic situation of the territory concerned, and many others. According to these and similar considerations, each State will fashion its own nationality laws as far as they concern acquisition, loss and deprivation of nationality. The other aspect, that concerning nationality as an element of the personal status of the individual concerned and his rights as a citizen flowing therefrom, will again depend on political considerations. Given this predominantly political content of

²⁶ See, for instance, among many others, J. P. Niboyet, *Traité de droit international privé français* (Paris, Recueil Sirey, 1943), Tome I, p. 77: "La nationalité est le lien politique entre un individu et un Etat."

²⁷ See for instance, Louis Lucas, *Les conflits de nationalités, Recueil des cours de l'Académie de droit international*, 1938, II, p. 5: "La nationalité, c'est le lien juridique qui unit l'individu à l'Etat... C'est donc considéré par rapport à la personne physique... un élément de son statut: l'élément qui révèle que telle personne est rattachée à telle souveraineté."

the concept of nationality, there are no, or very few, general principles of international law applying to the matter. Legislation on this subject remains, for the most part, within the domestic jurisdiction of each State.

3. THE EXCLUSIVE COMPETENCE OF STATES TO DETERMINE WHO ARE THEIR NATIONALS AS A SOURCE OF CONFLICTS

25. The right of States to view nationality as being essentially within their domestic jurisdiction may be considered to be a principle of international law, and it will be discussed in Section 4 hereafter. Thus, in his opening speech to the First Committee of the Conference for the Codification of International Law,²⁸ the Chairman, Mr. Politis, stated *inter alia*:

"The delicacy of our task lies in the fact that nationality from whatever standpoint it be viewed, is, by nature, essentially a political problem. It is a matter that comes within the exclusive jurisdiction of each State, since, under International Law, States are at liberty to settle nationality questions in the manner they consider most consonant with their own security and development."

On a previous occasion, Mr. Rundstein, the Rapporteur of the Sub-Committee of the Committee of Experts for the progressive codification of international law²⁹ had declared:

"There can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States. It is indeed the sphere in which the principles of sovereignty find their most definite application... There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to, the jurisdiction referred to above."

26. Finally, the Rapporteur of the Conference's First Committee, Mr. J. Gustavo Guerrero,³⁰ made it clear that the Committee "asserted the general principle that each State has exclusive competence to determine under its laws who are its nationals, and that these laws should be recognized by other States".³¹

27. These principles were embodied in article I of the Convention on Certain Questions relating to the Conflicts of Nationality laws³² in the following terms:

"It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States..."

²⁸ *Acts of the Conference for the Codification of International Law*, vol. II: Minutes of the First Committee, Publications of the League of Nations, V. *Legal*, 1930.V.15., p. 13.

²⁹ *Committee of Experts for the Progressive Codification of International Law*, Report to the Council of the League of Nations, Publications of the League of Nations, V. *Legal*, 1927.V.1., p. 9.

³⁰ *Acts of the Conference for the Codification of International Law*, vol. II; Minutes of the First Committee, Publications of the League of Nations. V. *Legal*, 1930.V.15., Annex. V, at p. 306.

³¹ The limitations on this principle will be discussed at a later stage.

³² *Acts of the Conference for the Codification of International Law*, vol. I: Plenary Meetings, Publications of the League of Nations, V. *Legal*, 1930.V.14., Annex 5, p. 81.

28. The Harvard Research in International Law, in its comments on the draft convention which it had prepared with "the object of placing before the representatives of the various governments at the First Conference on Codification of International Law the collective views of a group of Americans specially interested in the development of International Law",³³ remarked:

"The development of International Law has not been such as to prescribe for states the conditions on which they may confer their nationality upon natural persons. In general each state has the power to confer its nationality, and whether or not it has done so in a given case, depends on its own national law."³⁴

29. These principles were expressed as follows in article 2 of the draft convention prepared by the Harvard Research in International Law:

"Except as otherwise provided in this convention, each state may determine by its law who are its nationals, subject to the provisions of any special treaty to which the state may be a party; but under international law the power of a state to confer its nationality is not unlimited."³⁴

30. Undoubtedly, the discretionary or almost discretionary power of States to legislate in the field of nationality without taking into account legislation on the same subject existing in other States is a source of conflicts of law with sometimes unpleasant consequences for the individual concerned. Nationality at birth may be acquired either by application of the *jus soli* or the *jus sanguinis* principles or by applying a combination of both. A child born in Great Britain of French parents acquires British and French nationality, French law being based on *jus sanguinis* and British law on *jus soli*. Marriage may also be a source of double nationality if the wife automatically acquires the husband's nationality while retaining her original citizenship by virtue of the law of her country of origin. Legitimation of children born out of wedlock may lead to the same result and so may adoption. But differences in legislation are not the only sources of double nationality. It may also occur, for instance, in cases where identical provisions in the laws of two States attribute legal effects as to nationality to certain manifestations of the will of the person concerned. An example is the *Carlier case* of 1881.^{34a} In conformity with the identical provisions of articles 9 and 10 of the French and Belgian civil codes at that time in force, Carlier, a French and Belgian citizen, had opted in Belgium for Belgian nationality. The exercise of this right did not entail loss of French nationality since, according to the former article 10 of the French civil code, "Tout enfant né d'un Français en pays étranger est Français."

31. Mr. Marc Ancel³⁵ summarized the problem in the following passage from a report presented to the Congrès international de droit comparé at The Hague in 1937:

"This state of affairs [the ever more frequent occurrence of multiple nationality and statelessness] is attributable to many different political, geographical, demographic and legal factors one or more of which may predominate in any given case. The conflict actually arises from the fact that nationality... is usually treated by the legislator only in its purely national aspects, and often even from a purely particularist standpoint. In municipal law cases of statelessness have been multiplied without hesitation; similarly, in the legislation of certain countries, not only has no attempt been made to prevent cases of multiple nationality arising but in some instances double nationality has even been openly recognized and made an explicit rule of their positive law... In our view, at least two types of multiple nationality should be distinguished: the first, the most common and almost the only type, is double nationality permitted or recognized from the strictly national standpoint."

The second type suggested by Mr. Ancel is double nationality regulated by means of a multilateral convention and in conformity with the interest of "the general community of the peoples."³⁶

4. LIMITS OF THE EXCLUSIVE COMPETENCE OF STATES

32. The desirability of imposing limitations upon the discretionary powers of States to legislate in the field of nationality has been generally admitted, and efforts have been made to define such limitations as are recognized by international law. The results have been of little practical effect, although they are indicative of the fact that States acknowledge that a solution of the problems resulting from conflicting nationality laws would be beneficial to the international community as a whole.

33. A detailed survey of the problem of the limitations on the discretionary legislative power of States with regard to nationality is to be found in Makarov's monograph.³⁷ Use has been made of the data contained in that work in the ensuing paragraphs of the present survey.

(a) *The principle*

34. Nationality belonged, and still appears to belong, to the "domaine réservé". Limitations upon the discretionary power of States to legislate on the matter were defined in 1923 by the Permanent Court of International Justice in its Advisory Opinion on the Tunis and Morocco Nationality Decrees.³⁸ The Court declared:

"The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations. Thus in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."^{38a}

³³ Harvard Law School, *Research in International Law: Special Supplement to American Journal of International Law*, vol. 23 (1929), p. 9.

³⁴ *Ibid.*, p. 24.

^{34a} See also below, p. 83.

³⁵ "*Les conflits de nationalités*", printed in *Journal du Droit International* [Clunet], vol. 64 (1937), pp. 19 ff.

³⁶ *Ibid.*, p. 22.

³⁷ *Op. cit.*, pp. 58-150.

³⁸ *P.C.I.J.*, Series B, No. 4.

^{38a} *Ibid.*, p. 24.

(b) *Limitations imposed by international law on the principle of absolute competence*

(i) *Prohibition of legislation on nationality of subjects of other States*

35. It follows from the above principle that States must respect the competence of all other States to regulate by their laws the nationality of their own subjects. Niboyet, for instance, formulated the rule as follows:

“The rule that each State shall determine for and by itself who are its own nationals may be regarded as part of the law of nations. It follows reciprocally as a necessary corollary that no State may presume to decide who are the nationals of other States.”³⁹

Makarov claims that the rule has not always been respected.⁴⁰ Thus, the United States Immigration Act of 1924 contained in Section 12 the following principle:⁴¹

“For the purposes this Act nationality shall be determined by country of birth, treating as separate countries the colonies, dependencies, or self-governing dominions, for which separate enumeration was made in the United States census of 1890”.

Again, during World War I the British Nationality and Status of Aliens Act 1918, Sec. 7A(3) declared that if a certificate of naturalization is revoked

“the former holder thereof shall be regarded as an alien and as a subject of the State to which he belonged at the time the certificate was granted.”

Similar provisions are also to be found in the French Law of 7 April 1915 (*loi autorisant le gouvernement à rapporter les décrets de naturalisation obtenus d'anciens sujets des puissances en guerre avec la France, complétée par la loi du 18 juin 1917*).⁴² Obviously, however, such laws promulgated for purely political reasons, or with a view to achieving certain administrative aims would only fictitiously confer their nationality of origin on the persons concerned, who, in fact, would become stateless.

(ii) *Prohibition of the “abus de droit”*

36. A certain number of authors have introduced the theory of the *abus de droit* in this content. States, while having discretionary competence to legislate in this field, must not abuse it. Thus, Niboyet⁴³ declares that international law might intervene in certain exceptional circumstances when a State abuses its rights. Such an abuse of sovereign rights would be committed by a State imposing its nationality on everyone residing on its territory. Makarov⁴⁴ quotes a message delivered on 9 November 1920 by the Swiss Government to the Swiss Parliament, on the occasion of the debate on revision of Article 44 of the Federal Constitution, in which it is stated that the competence of States to legislate on matters concerning nationality is limited only by the principle of good faith.

The Harvard Research in International Law, in its

³⁹ *Op. cit.*, vol. I, p. 83.

⁴⁰ *Op. cit.*, pp. 61 ff.

⁴¹ Quoted by Makarov, *op. cit.*, p. 65.

⁴² The British, French, and other laws are quoted by Makarov, *op. cit.*, pp. 66-67.

⁴³ *Op. cit.*, p. 59.

⁴⁴ *Op. cit.*, p. 72.

Comment on article 2 of the proposed draft convention quotes examples of what should be considered as an *abus de droit*, although the comment itself does not use that expression. Thus, the Comment declares that no State has the right to naturalize persons “who have never been within its territory”;⁴⁵ nor has a State authority to confer its nationality on “all persons in the world holding a particular religious faith or belonging to a particular race”.⁴⁵

In practice, the principle was invoked by the Agent of the United States with regard to a provision of the Mexican Constitution of 1857 according to which aliens owning property in Mexico, or having children of Mexican nationality, became Mexicans unless they declared that they wished to maintain their former citizenship. The Agent stated, *inter alia*:

“It is proper to suggest the doubt whether Mexico could find warrant in the law of nations for legislation which should have the effect of naturalizing without their consent the citizens of other States.”⁴⁶

(iii) *Right to expatriate and to change nationality*

37. The right to expatriation and to change nationality has long been recognized as an inherent right of the human person at least by certain countries, including the United States. Makarov⁴⁷ cites an opinion of July 1859 of the Attorney-General of the United States declaring “natural reason and justice... writers of known wisdom, and... the practice of civilized nations” were “opposed to the doctrine of perpetual allegiance”. Among many further instances of the acceptance of this principle, it may be noted that Article 15 of the Universal Declaration of Human Rights, proclaimed on 10 December 1948 by the General Assembly of the United Nations, declares that “No one... shall be denied the right to change his nationality”.

(iv) *Limitations on deprivation of nationality*

38. Deprivation of nationality by unilateral action of the State has been considered as a violation of an accepted principle of international law, since such deprivations, especially if applied on a large scale, will or may entail mass emigrations and, consequently, they may not only impose undue hardship on human beings, but also inundate foreign States with aliens. However, the principle is not respected by most modern legislation and it cannot be considered as an accepted tenet of international law.

(v) *Limitations in connexion with changes of sovereignty*

39. The opinion is widely held that, in case of change of sovereignty over a territory by annexation, or its voluntary cession by one State to another, the annexing State is obliged to grant its nationality to the inhabitants of the territory concerned who were citizens of the ceding State, at least if they have, at the time of annexation, their permanent residence in the ceded territory. In most instances these questions are settled by treaty between the States concerned, which also frequently grant a right of option to the inhabitants.

⁴⁵ *Op. cit.*, p. 26.

⁴⁶ For this and other examples see Makarov, *op. cit.*, pp. 76-77.

⁴⁷ *Op. cit.*, p. 78.

(c) *Limitations resulting from multilateral or bilateral conventions*

40. It is obvious that States may limit their discretionary power to legislate on nationality by internationally binding conventions either multilateral or bilateral. The general problem of the limits imposed upon the discretionary power of States to legislate on nationality was discussed at the Conference for the Codification of International Law held at The Hague in 1930.

(i) *The Hague Conference*

41. In the report which the Sub-Committee submitted to the Committee of Experts for the Progressive Codification of International Law,⁴⁸ the Rapporteur, Mr. Rundstein, formulated the principles involved as follows:

“There can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States... There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to, the jurisdiction referred to above... But, while maintaining the thesis that questions of nationality belong, *in principle*, to the exclusive jurisdiction of individual States, it is admitted that this thesis is neither inflexible nor self-evident. Questions of nationality are often regulated by international conventions, which proves that the supposed exclusivity of jurisdiction may be abrogated at the will of individual States.”

The Rapporteur then explained that the political interests of the various States were too divergent to justify the assertion that an *opinio necessitatis* existed which would create or impose rules for settling all conflicts arising from the diversity of laws, or justify the attempt to unify national laws and create a single world law. Nevertheless, questionnaire No. 1⁴⁹ submitted to Governments for their comments, after recalling the principle of exclusive legislative competence of States as regards nationality, contained questions as to whether there existed, in the opinion of the Governments, restrictions on these principles; as to whether the right of States to legislate in this field was subject to no restrictions; and as to whether a State was under an obligation to recognize the effects of the legislation promulgated by other States on this matter. Replies from Governments generally emphasized the exclusive competence of States to legislate with regard to their own nationals, but some Governments agreed that this competence was subject to certain limits. Thus, the Belgian Government,⁵⁰ after stating that, in law, there was no limit on the right of the State to legislate in the matter of nationality, added:

“In practice, account should be taken of certain principles called by some ‘*jus gentium*’ and by others

‘*comitas gentium*’. These principles are as follows: All persons must possess a *nationality*... They must possess *only one nationality*... They must be able to *change their nationality freely*, perpetual allegiance being contrary to human freedom.”

While Bulgaria⁵¹ declared that

“The right of every State to legislate in this matter is limited only by the necessities of common courtesy and justice”,

Finland⁵² expressed the opinion that restrictions resulted from “general principles of law”. The British Government⁵³ emphasized that “the right of the State to use its discretion in legislating with regard to nationality may be restricted by duties which it owes to other States”; and the Government of the United States declared⁵⁴ that it had

“proceeded upon the theory... that there are certain grounds... upon which a State may properly clothe individuals with its nationality... The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States.”

These and other replies were taken into consideration in the formulation of the Basis of discussion No. 1 and in the Observations relating thereto. The Preparatory Committee summarized the prevailing opinion of Governments concerning such limitations as follows:⁵⁵

“Some Governments consider that international law to-day imposes certain limitations upon the exercise of its rights in this matter by the particular State; others confine themselves to stating that such limitations are desirable; others, again, say nothing on the point. It does not seem possible at present to formulate limitations fully and precisely.”

In the final text adopted by the Conference, which became article I of the Convention on Certain Questions relating to the Conflict of Nationality Laws, it is stated that the law of each individual State on nationality

“shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”⁵⁶

(ii) *Bilateral and multilateral conventions*

42. It will suffice in the present context to recall that numerous conventions regulating questions of nationality have been concluded. Some, such as the famous “Bancroft treaties”, deal with the avoidance of double nationality in cases of naturalization and resumption; others with the military obligations of persons having double nationality, such as the treaty between France and Paraguay of August 1927; others, again, with the nationality of persons permanently residing in

⁴⁸ *Committee of Experts for the Progressive Codification of International Law*, Report to the Council of the League of Nations, Publications of the League of Nations, V. *Legal*, 1927.V.I., p. 9.

⁴⁹ *Conference for the Codification of International Law, Bases of Discussion*, vol. I: Nationality, Publications of the League of Nations, V. *Legal*, 1929.V.I., p. 13.

⁵⁰ *Ibid.*, p. 14.

⁵¹ *Ibid.*, p. 14.

⁵² *Ibid.*, p. 16.

⁵³ *Ibid.*, p. 17.

⁵⁴ *Ibid.*, p. 16.

⁵⁵ *Ibid.*, p. 20.

⁵⁶ *Acts of the Conference for the Codification of International Law*, vol. I: Plenary Meetings, Publications of the League of Nations, V. *Legal*, 1930.V.I., Annex 5, p. 81.

ceded territories, such as the Treaty of Versailles. Others purport to settle questions of nationality in general, for example the Convention of Rio de Janeiro of August 1906, the *Codigo Bustamente* of 1926, and the Conventions adopted during The Hague Codification Conference of 1930. These and other relevant agreements will be analysed with regard to the problem of multiple nationality in Chapter III of this study.

(d) *Summary of limitations on the discretionary power of States to legislate on nationality*

43. Makarov⁵⁷ concluded that there existed only two limitations upon the discretionary power of States to legislate on nationality: the prohibition against naturalizing persons against their will, and the duty of annexing States to grant their nationality to the inhabitants of the annexed territory. It would seem, however, that certain other rules may be considered as having been accepted by a considerable number of States. They refer to the right of expatriation and to the corresponding right to change one's nationality, to the duty of States to recognize the validity of nationality laws promulgated by other countries, and to certain rules regarding conflicts, as stated in The Hague Conventions. These undoubtedly appear to limit the rights of the States which accepted them to legislate in a manner which would be contrary to their provisions or would tend to render their enforcement impossible. Finally, there may be mentioned the rules applying to children born to persons enjoying diplomatic immunity in the country where the birth occurs, to children born to *consuls de carrière*, and to foundlings, as well as the rules applying in cases of legitimation, recognition, adoption and marriage, all of which constitute limitations upon the discretionary power of States to legislate in the field of nationality. These, as well as the rules resulting from the Protocol relating to Military Obligations in Certain Cases of Double Nationality,⁵⁸ and from the Protocol relating to a Certain Case of Statelessness,⁵⁹ will be more closely examined, in so far as they have a bearing on the problem of double nationality, in Chapter III of this study.

5. ARRANGEMENT OF THIS STUDY

44. The foregoing exposé has endeavoured to point out certain important aspects of the nationality problem as a whole. The essentially political nature of the problem has been underlined, as well as the fact flowing therefrom that nationality laws are shaped in accordance with the political and economic interests of the States concerned, their social structures and the aims they pursue; while it has been found that considerations relating to general principles play a comparatively minor role in the relevant provisions of municipal laws.

45. It has also been shown that the international community, before and after the wars of 1914-1918 and 1939-1945, took certain steps to check the consequences arising from the legal anarchy in this field; and particular reference has been made to the results achieved by the Conference for the Codification of International Law held at The Hague in 1930 under the auspices of the League of Nations, and by the proceedings of the International Law Commission of the United Nations.

46. These introductory sections referred to the present state of the question of nationality in general, without taking specially into account the problem of multiple nationality. It is the main purpose of the present study to elucidate this problem, to outline the solutions so far applied to it as well as to conflicts of law arising from it, and to make suggestions tending towards further progress in this field and towards the progressive codification of generally acknowledged rules regarding it.

47. The present survey is divided into five chapters. Chapter I contains an analysis of some national laws in Europe, the Americas and Asia, from the standpoint of the question of double nationality. On the basis of this analysis the principal causes of double nationality are defined; and these causes, the conflicts of law arising therefrom, and the solutions applied thereto on a national basis are studied in Chapter II. Chapter III briefly surveys international attempts to solve the conflicts of laws arising from the existence of multiple nationality and efforts directed to the elimination of multiple nationality by means of conventions. Proposals towards these ends made by private organizations are also mentioned. Chapter IV contains suggestions for the elimination of future cases of multiple nationality and for the reduction of present cases. A final chapter, Chapter V, endeavours to provide a synthesis of the problem of multiple nationality at the present time and of its possible solutions.

CHAPTER I

Survey of some national laws with regard to multiple nationality

47 bis. This Chapter contains a summary of some important nationality laws. They have been selected because they indicate legislative trends prevailing in this field and also because they show that dual nationality is the unavoidable consequence of lack of international co-ordination by municipal legal systems. This is not to say, however, that other national laws are of lesser importance than those summarized here. Whether *jus soli* or *jus sanguinis* predominates, or whether — as in most countries — these methods of attributing nationality at birth are jointly applied, dual nationality will arise from conflicting nationality rules applicable to the same person. It is, therefore, sufficient for the purpose of this survey to show by some examples that this is indeed the case, and to indicate through their analysis how, in given circumstances, dual nationality is the product of provisions drafted with a view to meeting needs of a political, demographic or economic nature and without particular regard to this specific problem.

⁵⁷ *Op. cit.*

⁵⁸ *Acts of the Conference for the Codification of International Law*, vol. I: Plenary Meetings, Publications of the League of Nations, V. *Legal*. 1930.V.14, Annex 6, pp. 95 ff.

⁵⁹ *Ibid.*, Annex 7, pp. 105 ff.

I. IN EUROPE

A. LAWS BASED PRINCIPALLY ON *JUS SANGUINIS*1. *The French Code de la nationalité*
(Ordonnance du 19 octobre 1945)

48. The French system will be considered first because France was, as a consequence of the Revolution of 1789, among the first countries to replace customary rules by legislative enactments. The French example has, moreover, exercised a profound influence on the legislative practice of other countries in this sphere.

49. Until the comparatively recent period mentioned above, the *jus soli* principle seems to have prevailed in France. Naturalization was governed in part by the provisions of two ordinances, the first of which was enacted in 1302, the second in 1498; and in part by the terms of a "declaration" promulgated in 1720.⁶⁰

50. A new system was introduced by the Constitution of 3 September 1791, which distinguished between nationality, on the one hand, and the status of "active citizen" (*citoyen actif*) on the other hand. To be an "active citizen", and thereby entitled to exercise political rights, possession of French nationality was a necessary although not a sufficient qualification.

51. Thouret, the Rapporteur of the draft Constitution of 1791, has given the following explanation for the introduction of the relevant provisions in this instrument.⁶¹

"The following articles on the status of citizens were required to complete your work; every society must determine the attributes by which it can recognize its members. Since, moreover, you have decreed that an active citizen must be *French or become French*, it is necessary to decide what is meant by being, by becoming and by ceasing to be French."

52. At a later stage, provisions relating to nationality were incorporated in the Civil Code, because, *inter alia*, it had been decided that aliens should have the same "civil rights" as those granted to French citizens by the State to which the alien concerned belonged. This rule has been maintained, and article 11 of the present Civil Code states it as follows:

"Art. 11. An alien shall enjoy in France the same civil rights as are or shall be granted to French citizens by the treaties of the country to which the alien belongs."

To carry the rule into effect, it became necessary to determine who were French citizens and who were aliens.

53. The Code Napoléon replaced the *jus soli* principle by *jus sanguinis* in the stipulation that children born to Frenchmen resident in France or abroad are

French, and that children born to aliens residing in France have the right to opt for their father's nationality. The Code Napoléon also regulates the loss of French nationality by reason of naturalization in a foreign country or acceptance of political or military appointments from foreign Governments; and, finally it governs the re-acquisition of French nationality.

54. The French example has, as stated, exercised considerable influence on the legislative practices of other countries, such as Spain and Portugal, whose laws have, in their turn, influenced Latin American constitutions and codes.

55. Provisions on nationality remained as part of the French Civil Code until the law of 10 August 1927, abrogated by the Ordinance of 19 October 1945, known as the Code de la nationalité française, which codifies all provisions concerning French nationality. The Code is subdivided into titles of which title II concerning acquisition of French nationality by birth and title III concerning acquisition for other reasons are of special interest in the context of multiple nationality and will be analysed below.

56. The French system, although based on the principle of *jus sanguinis*, applies *jus soli* in certain cases, and it may therefore be regarded as a mixed system with *jus sanguinis* predominating. Whether it is preferable to give predominance to one or the other of these principles is not a juridical but a purely political question. It is, in fact, a matter of political expediency, irrelevant to the present investigation.

(a) *Attribution of French nationality at birth by reason of consanguinity*

57. Article 17 (1) of the Code de la nationalité stipulates: "Est Français: 1° L'enfant légitime né d'un père français." This means not only that children born in France to a French father acquire French nationality, but also that the rule of consanguinity applies to children born abroad to a French parent. Similar rules adopted by numerous countries are the first and most frequent cause of double nationality arising from *jus sanguinis* legislation applied to persons born in countries where *jus soli* pertains. Even if the father, after the birth of his French children, were to lose his French nationality, the descendants born before that change in the father's status would, in principle, remain French, and their children, although they may never see France, would retain that nationality. Here, therefore, is a second and not infrequent cause of double nationality.

58. Also French by consanguinity (article 18) are the legitimate child of a mother who is French and a father who is stateless or whose nationality is unknown, and (art. 19) the legitimate child of a French mother and an alien father. Such persons may, however, *if born outside France*, repudiate the French nationality during the six months before they attain the age of majority. Therefore, if born in France, such persons would retain French nationality even if that of the father were also transmitted *jure sanguinis*.

59. As for illegitimate children, they are French "lorsque celui des parents à l'égard duquel la filiation a été d'abord établi est Français" (article 17); "lorsque celui des parents à l'égard duquel la filiation a été

⁶⁰ Quoted by Makarov, *op. cit.*, p. 107, footnote 172. See, however, on this point Niboyet, *op. cit.*, p. 152, who maintains that *jus sanguinis* may have played some part long before the Revolution of 1789.

⁶¹ See Makarov, *op. cit.*, p. 107 and footnote 176.

établie en second lieu, est Français, si l'autre parent n'a pas de nationalité" (article 18); and "lorsque celui de ses parents à l'égard duquel la filiation a été établie en second lieu, est Français, si l'autre parent est de nationalité étrangère" (article 19). Such children also may, if born outside France, repudiate French nationality in the six months before they attain the age of majority.

60. The following are, therefore, definitely French by consanguinity:

- (a) The legitimate child of a French father;
- (b) The legitimate child born to a French mother and to a father who is stateless or whose nationality is unknown;
- (c) The legitimate child of a French mother and an alien father, if born in France;
- (d) A child born out of wedlock, if the parent with regard to whom consanguinity was first established is French;
- (e) A child born out of wedlock in France, first, when the parent with regard to whom consanguinity was established in the second place is French, if the other parent has no nationality, or, secondly when the parent with regard to whom consanguinity was established in the second place is French, if the other parent is an alien.

61. The following are French, and, provided they were not born in France, may repudiate their French nationality:

- (a) Legitimate children of a French mother and an alien father;
- (b) An illegitimate child, if the parent with regard to whom consanguinity has been established in the second place is French and the other of foreign nationality;
- (c) An illegitimate minor who is French by reason of his mother's nationality, and who has been subsequently legitimated by the marriage of the parents, if the father is an alien (article 20).

62. Cases of double nationality which may arise from these various provisions may be summarized as follows:

(a) *Under article 17*

- (i) The legitimate child of a French father born in countries applying the *jus soli* principle will have his father's French nationality and that of the country of his birth;
- (ii) Similarly, the illegitimate child of a French citizen born in a country applying *jus soli*, provided consanguinity was first established with regard to that parent.

(b) *Under article 18*

- (i) The legitimate child of a French mother, the father being stateless or of unknown nationality at the time of the child's birth, if the child is born in a country applying *jus soli*;
- (ii) The same applies to an illegitimate child, if affiliation is established with regard to a French parent, while the parent with regard to whom consanguinity was first established is of unknown nationality or

stateless, and the child is born in a country applying *jus soli*.

French nationality in these cases will be definitive, and double nationality will result unless France or the foreign country concerned releases the person from its allegiance. French laws offer, however, certain possibilities of remedial action which will be discussed later.

(c) *Under article 19*

Children to whom the provisions of this article apply (legitimate or born out of wedlock, one of the parents being French, the other having another nationality) will have double nationality unless they repudiate their French nationality in the manner prescribed by law before reaching majority. But this right belongs only to children not born in France, those born in France to a French mother and a foreign father remaining French without the right of repudiation.

(d) *Under article 20*

The same applies to a legitimated child whose father is a foreigner and whose mother is French, always provided the child was born outside French territory.

(b) *Attribution of French nationality by virtue of jus soli*

The following are French according to *jus soli*:

- 63. (a) A child born in France whose parents are unknown (article 21);
- (b) A foundling found in France, unless and until it is established that he was born elsewhere (article 22);
- (c) If born in France, a legitimate child of a (foreign) father, himself born in France (article 23);
- (d) If born in France, a legitimate child whose mother was also born in France: but in this case the person concerned may repudiate French nationality during the six months prior to attaining his majority (article 24);
- (e) The rule under (d) also applies to an illegitimate child if the parent with regard to whom affiliation was established in the second place was also born in France.

64. Double nationality may occur in the cases discussed in paragraph 63:

Under article 23

- (i) If the father of a legitimate child, although himself born in France, possesses the nationality of a foreign country transmissible *jure sanguinis*;
- (ii) If the parent of an illegitimate child with regard to whom affiliation was established in the first place, although born in France, possesses another nationality transmissible *jure sanguinis*.

(c) *Acquisition of French nationality by reason of affiliation*

65. Article 34 stipulates that an illegitimate child legitimated during his minority will acquire French nationality provided the father is French. Two conditions must be fulfilled for the application of this provision:

- (i) The child must be a minor according to French law at the time of legitimation;

(ii) The child must be an alien at the time of legitimation.

Although, in view of other provisions of the Code which it is not necessary to analyse in the present context, the hypothesis of article 34 can hardly arise in practice, it may be noted that if the child were born in a *jus soli* country, he would acquire a second nationality through legitimation by his French father.

66. Article 35 establishes another case of acquisition of French nationality, that of "legitimation by adoption" (*légitimation adoptive*), which according to article 368 of the Civil Code applies to children adopted while under five years of age, if they were abandoned by their natural parents, or if their natural parents were unknown or dead. Double nationality may occur if a child who becomes French by adoption was born in a *jus soli* country.

67. Other forms of adoption do not lead to the acquisition of French nationality by the adopted person, unless he claims French nationality and has his residence in France at the time of the request (article 55). Double nationality may occur if the adopted person was born in a *jus soli* country and remained a national thereof after obtaining French citizenship.

(d) *Acquisition of French nationality by marriage*

68. A foreign woman who marries a Frenchman becomes French, unless she refuses French nationality before celebration of the marriage (article 38). Double nationality may arise if the woman, while retaining her original nationality, omits to make the declaration of renunciation of French nationality prior to the celebration, as prescribed by article 38.

(e) *Acquisition of French nationality by reason of birth and residence in France*

69. An individual born in France to foreign parents will become French, if he has continuously resided on French territory since his sixteenth year and is still resident there at the age of majority (article 44). He may, however, repudiate French nationality six months before reaching majority (article 45). It is clear that double nationality may result if such an individual's parents were nationals of a *jus sanguinis* country. In order to prevent statelessness, repudiation of the French nationality is permitted only if the individual concerned can prove he has by affiliation an alien nationality and has, if so prescribed in his country of origin, satisfied his military obligations there (article 47).

70. An individual born in France to parents who are aliens becomes French if he voluntarily enters into French military service in Tunisia or Morocco, conditions of residence being the same as those described in paragraph 69. Double nationality may occur if the parents' foreign nationality is transmitted *jure sanguinis*.

71. In addition an individual becomes French if he has in Tunisia or Morocco passed before a recruiting board without expressly objecting against this procedure by pleading his foreign nationality. Conditions of residence are similar to those stated above. Double nationality may occur under the conditions mentioned in paragraph 70.

(f) *Acquisition of French nationality by declaration (déclaration de nationalité)*

72. A minor born in France to foreign parents may claim French nationality by a declaration made before the competent authorities (article 52), provided that, at the time the declaration is made, he has had his residence in France for a continuous period of at least five years. Double nationality may occur if the foreign nationality of the parents is transmissible to their children *jure sanguinis*. This provision may also be invoked by children born in France to foreign diplomats or *consuls de carrière* (article 51).

73. It has already been noted that an adopted foreign child can also claim French nationality (see paragraph 67 above).

(g) *Acquisition of French nationality by virtue of decisions taken by public authorities*

(i) *Naturalization (articles 60-71)*

74. Foreigners fulfilling certain conditions of residence and "assimilation" prescribed by the Code may, if they request it, become naturalized French citizens. Since the law does not require these persons to relinquish their former nationality before or after obtaining French nationality, cases of double nationality may occur.

(ii) *Reinstatement (articles 72-77)*

75. All Frenchmen who have lost their French nationality can obtain reinstatement. Certain exceptions irrelevant to the present enquiry are established by article 75 of the Code.

(h) *Remedies against dual or multiple nationality provided by French law*

76. The Code provides a number of remedies against double nationality. These refer to the following cases:

(i) *Loss of French nationality by acquisition of a foreign citizenship*

77. Article 87 stipulates that Frenchmen who voluntarily acquire a foreign nationality lose their French citizenship. Frenchmen of military age form exceptions to this rule, and in their case double nationality may occur.

(ii) *Repudiation*

78. Frenchmen who exercise the right of repudiation (articles 19, 24, 25), which has been mentioned above (paragraphs 59-61), lose their nationality.

(iii) *Legitimation*

79. An illegitimate child who has acquired French nationality through acquisition of this status by his mother, loses it if he is legitimated by virtue of a subsequent marriage of his mother with an alien (article 93).

(iv) *Marriage*

80. A French woman marrying an alien may renounce her nationality, provided she acquires by her marriage the nationality of her husband (article 94). Also, a foreign woman marrying a Frenchman may

refuse French nationality provided she retains her nationality of origin (article 38).

(v) *Long residence abroad*

81. Frenchmen who have their habitual residence abroad, and whose ancestors have lived outside French territory for more than fifty years, may be considered as having lost their French nationality, unless their ancestors have preserved "la possession d'état de Français" (article 95). The meaning of this expression is not quite clear. Niboyet⁶² is of the opinion that this is a question of fact which refers not to the "nomen" nor to the "tractatus", but to the "fama", and that it is one which the court has to decide in each individual instance.

(vi) *Effective foreign nationality*

82. A Frenchman who in fact behaves and acts like a citizen of a foreign country, the nationality of which he possesses, may lose his French nationality by executive decree if the Government so decides. The decree may be made applicable to his wife and children if they also have a foreign nationality (article 96).

(vii) *Service with a foreign Government*

83. The same remedy may be applied in the case of a Frenchman who accepts employment in a foreign

Government service, or serves in a foreign army, and does not relinquish his employment or service within six months of being ordered to do so by the French Government (article 97).

(viii) *Release upon request*

84. A French citizen, even a minor, if he is also a foreign national, may, upon his request, be released by the French Government from his French nationality (article 91).

(ix) *International conventions*

85. Article 2 of the Code declares that "Provisions relating to nationality contained in international treaties or agreements which have been duly ratified and published are to be applied, even if contrary to the provisions of domestic French legislation".

86. In this context the Franco-Belgian Convention of 12 September 1928 may be mentioned. The Convention provided for the release from their military obligations in France of persons having French and Belgian nationality, provided they had served in the Belgian Army. A subsequent law of 30 August 1929 declared that French citizens released under the provisions of that Convention from their military obligations in France should lose their French nationality.

⁶² *Op. cit.*, p. 435.

(i) *Synopsis I of French system and cases of double nationality resulting therefrom*

A. CAUSE OF DOUBLE NATIONALITY

(a) *Article 17(1) and (2)*

- (i) Legitimate child of French father born in *jus soli* country;
- (ii) Illegitimate child of French parent with regard to whom affiliation was established in the first place, if such child was born in *jus soli* country.

(b) *Article 18(1) and (2)*

- (i) Legitimate child of French mother and of father who is stateless or of unknown nationality, if child was born in *jus soli* country;
- (ii) Illegitimate child of French parent with regard to whom affiliation was established in the second place, if the other parent is stateless or of unknown nationality and if the child was born in *jus soli* country.

(c) *Article 19(1) and (2)*

- (i) Legitimate child of French mother and alien father, if father's nationality is transmissible *jure sanguinis*, or if such child is born in *jus soli* country;

B. REMEDIES PROVIDED BY CODE

(a) *Article 91*

May be released by the French Government upon his request;

(b) *Article 96*

May be released by initiative of the French Government if his behaviour indicates that he considers himself to be a citizen of the country of his second nationality;

(c) *Article 97*

May be released by initiative of the French Government if he refuses to relinquish employment with a foreign service or service in foreign army;

(d) *Article 95*

Loses French nationality if habitually resident abroad, provided his ancestors lived outside France for more than fifty years and if he and his ancestors have lost for more than three generations "la possession d'état de français".

Remedies as indicated before under articles 91, 96, 97 and 95.

Idem.

- (i) Possibility of repudiation of French nationality by the person concerned if born outside France (art. 19) or
- (ii) as indicated under articles 91, 96, 97 and 95;

A. CAUSES OF DOUBLE NATIONALITY (*continued*)

- (ii) Illegitimate child of French parent with regard to whom affiliation was established in the second place, if first parent is an alien whose nationality is transmissible *jure sanguinis*, or if the child was born in a *jus soli* country.
- (d) *Article 23*
- (i) Legitimate child born in France to (alien) father who was himself born in France and whose nationality is transmitted *jure sanguinis*;
- (ii) Illegitimate child born in France of (alien) parent himself born in France with regard to whom affiliation was established in the first place, if foreign nationality is transmitted to child *jure sanguinis*.
- (e) *Article 24*
- (i) Legitimate child born in France to (alien) mother who was herself born in France, if nationality of mother is transmitted *jure sanguinis*;
- (ii) An illegitimate child born in France to (alien) parent with regard to whom affiliation was established in the second place, if foreign nationality is transmitted *jure sanguinis*.
- (f) *Article 34*
- (i) An illegitimate child legitimated while still a minor by a French father, if born in *jus soli* country of which he retains nationality despite legitimation.
- (g) *Article 35*
- (i) A child acquiring French nationality by virtue of "adoptive legitimation" if he also has another nationality.
- (h) *Article 55*
- (i) A child adopted by French citizen obtains French nationality on his request if he also has a foreign nationality.
- (i) *Article 64*
- (i) A foreigner naturalized pursuant to his adoption by a French citizen if he retains his original nationality.
- (j) *Article 37*
- (i) A foreign woman marrying a French citizen acquires French nationality. Double nationality arises if she retains her nationality of origin while acquiring French nationality.
- (k) *Article 44*
- (i) A person born in France to foreign parents, if he reaches the age of majority after having his habitual residence in France for at least five years prior to that date, will acquire French nationality. Double nationality will occur if the nationality of parents is also transmitted *jure sanguinis*.
- (l) *Article 48*
- (i) A person born in France to foreign parents acquires French nationality if he voluntarily serves in the French Army in Tunisia or Morocco, provided he had his habitual residence in France at the time of his voluntary engagement as well as five years prior to that date. Double nationality will occur if the parents' nationality is transmitted *jure sanguinis*.
- (m) *Article 49*
- (i) A person born in France to foreign parents who has appeared before a recruitment board in Tunisia or Morocco without pleading his foreign nationality will become French under the conditions of residence stated in the immediately preceding section (article 48, above).

B. REMEDIES PROVIDED BY CODE (*continued*)

- (ii) *Idem*.
- (i) Articles 91, 96, 97;
- (ii) *Idem*.
- Articles 91, 96, 97 or by exercise of right of repudiation.
- Idem*.
- As indicated under Articles 91, 96, 97.
- Idem*.
- Idem*.
- Idem*.
- (i) *Article 38*
- If she retains her nationality of origin she may decline French nationality.
- (ii) She might lose French nationality by application of articles 91, 96, 97 if these cases should arise.
- (i) *Article 45*
- He may decline French nationality during a period of six months prior to his majority, if he proves that he has a foreign nationality *jure sanguinis* (article 31).
- (i) Articles 91, 96, 97 summarized above.
- (i) *Article 49*
- Dual nationality will be avoided by pleading foreign nationality;
- (ii) Articles 91, 96, 97 as summarized above.

A. CAUSES OF DOUBLE NATIONALITY (*continued*)(n) *Articles 52 and 53*

- (i) A minor born in France to foreign parents may claim French nationality either personally, if he is 18 or through his legal guardians, if he is less than 18 years. Conditions of residence as stated under article 8 above. Double nationality may occur if the nationality of parents is transmitted *jure sanguinis*.

(o) *Articles 60-71*

- (i) Naturalization may be a source of double nationality, since the Code does not require release from the nationality of origin prior to or after naturalization.

(p) *Articles 72-77*

- (i) Reinstatement may be a cause of double nationality should the individual concerned retain the nationality acquired after the loss of the original French one.

B. REMEDIES PROVIDED BY CODE (*continued*)

- (i) *Articles 91, 96, 97.*

- (i) Exceptionally *Article 91.*
(ii) *Articles 96, 97.*

- (i) Exceptionally *Article 91.*
(ii) *Articles 96, 97.*

(j) *Synopsis II of French system*

with regard to application of (a) *jus sanguinis*, (b) *jus soli*, (c) *mixed jus sanguinis and jus soli*.

*Jus sanguinis*1. *Article 17(1) and (2)*

- (i) Legitimate child born to French parent;
(ii) Illegitimate child, if parent with regard to whom affiliation was established in the first place is French.

2. *Article 18(1) and (2)*

- (i) Legitimate child of French mother, father stateless or nationality unknown;
(ii) Illegitimate child, if parent with regard to whom nationality was established in the second place is French, and if the other parent's nationality is unknown or if he or she is stateless.

3. *Article 19(1) and (2)*

- (i) Legitimate child of French mother and alien father;
(ii) Illegitimate child, if the parent with regard to whom affiliation was established in the second place is French, the other being a foreigner.

4. *Article 34*

Legitimated child of French father.

5. *Article 84*

- (i) Legitimate minor child of naturalized parents;
(ii) Illegitimate child of naturalized parents.

6. *Article 84*

5 above also applies to children of persons who have re-acquired French nationality by reinstatement.

*Jus soli*1. *Article 21*

Child born in France of unknown parents.

2. *Article 22*

Foundling found in French territory.

3. *Article 44*

Person born in France to foreign parents when attaining majority.

4. *Article 48*

Person born in France to foreign parents who is voluntarily serving in French Army in Tunisia or Morocco.

5. *Article 49*

Person born in France to foreign parents if he appears before recruitment board in Tunisia or Morocco without pleading that he is a foreigner.

6. *Article 52*

A minor born in France to foreign parents may claim French nationality.

*Jus sanguinis and jus soli*1. *Article 23(1) and (2)*

- (i) Legitimate child born in France to alien father himself born in France;
(ii) Illegitimate child born in France, if parent (alien) with regard to whom affiliation was established in the first place was also born in France.

4. *Article 24(1) and (2)*

- (i) Legitimate child born in France to foreign mother herself born in France;
(ii) Illegitimate child born in France, if foreign parent with regard to whom affiliation was established in the second place was himself born in France.

(k) *Concluding remarks*

87. As may be seen from the preceding summary, the French system, as codified in the law of 19 October 1945, appears to be a considered attempt by the legislature to reconcile political necessities with justice and fairness towards the individuals concerned.

88. France, as a country with a comparatively low birth-rate surrounded by neighbours whose populations increase rapidly, has an obvious interest in maintaining the link between the mother country and the emigrant even over a lengthy period of time. She will also wish to assimilate rapidly aliens who may settle, even for a comparatively short period, on French territory. *Jus sanguinis*, as the predominant feature of the French law, allows the achievement of such ends. *Jus soli* enters into the picture for the most part only in the interests of the individual concerned. Such is undoubtedly the case when the law attributes French nationality to the foundling found in France and to children of unknown parents. There may be criticism of the provisions which attribute the mother's nationality to the child of a foreign father and a French mother. Avoidable cases of double nationality may thus arise. The same consequences may follow when a child born in France to foreign parents becomes French on reaching majority unless he declines French nationality. It must be stated, however, that this provision favours the descendants of stateless persons, who otherwise might have had no country in which to settle: and it may be added that the conditions to be fulfilled in these cases, as to birth in the country and prolonged residence, are such that these persons may justifiably be considered as having become French by assimilation. The same considerations apply to the provisions enabling minors born in France of foreign parents to claim French nationality if they so wish. In this case, however, it is the act of the alien child or of his legal guardians which will result in the child acquiring French citizenship. The provision operates, therefore, to the alien's advantage. The provisions concerning acquisition of French nationality through military service in Morocco or Tunisia also leave it to the alien to decide whether or not he wishes to become a French national; and it may be asserted that these various stipulations of the law are beneficial to the alien concerned as well as being in the interest of the country.

89. Double nationality can, in general, be eliminated under the Code, provided the French administration agrees. Such agreement is not required in those cases where the law enables the individual concerned to renounce French nationality by a manifestation of his will. Normally, requests to be released will be granted if it is felt that the ties of the individual concerned with France are no longer such as to justify retention of French nationality. Such is undoubtedly the case when a Frenchman becomes naturalized abroad or accepts service with an alien government despite being ordered to relinquish such service.

90. French law undoubtedly creates many situations from which double nationality may arise. But it is evident that double nationality cannot be eliminated by the unilateral action of a single State. Coordinated measures in this field by the community of States will be necessary to achieve this desideratum.

91. In addition to the French legislation, it may be useful to study certain other continental European nationality laws. In view of the detailed analysis of the French one, which may be considered as a prototype of nationality laws, with *jus sanguinis* as the predominant principle, it may, however, suffice to show that similar laws prevail generally in Europe, and to indicate what legislative precautions, if any, have been taken with a view to preventing the occurrence of cases of double nationality.

2. *The German law on nationality*(a) *Introductory remarks*

92. The principal enactment on nationality in force in Germany is the law of 22 July 1913. It has undergone a number of amendments, particularly during the period from 1933 to 1945. After 1945 certain provisions introduced by the National-Socialist Government were abolished; and those concerning the acquisition and loss of German nationality through marriage were amended as a consequence of article 3 of the Constitution of the Federal Republic of Germany⁶³ which establishes the principle that "men and women have equal rights".⁶⁴ It would appear, therefore, that German women no longer lose German nationality by marriage to an alien, and that foreign women no longer acquire German citizenship *ipso facto* by marriage to a German national, as was the case under the original Act of 22 July 1913.

93. The period of National-Socialist domination has, however, left, even after the defeat of the Third Reich, certain unsolved problems which might be briefly mentioned, because the measures referred to have a bearing on the present investigation.

94. In 1938 Germany annexed the Republic of Austria,⁶⁵ and, generally speaking, former Austrian citizens became German nationals. Further annexations of territory took place before and after the beginning of the war of 1939-1945. Numerous inhabitants of the territories concerned, who were "ethnically" Germans, according to the views of the former German Government, were collectively naturalized; others were naturalized subject to repeal by the German authorities; others became "Protégés of the German Reich" (*Schutzangehörige*); others again were citizens of the "Protectorate" (Czechoslovakia). Certain States agreed to an exchange of populations with Germany, the exchanged citizens obtaining German nationality and vice versa. Service in the German Army or in assimilated organizations also involved the acquisition of German nationality, under certain conditions, even without the consent of the persons concerned. One of the problems to be solved in this connexion is that of the validity, under the present German law, of German nationality conferred in violation of general

⁶³ Basic Law for the Federal Republic of Germany of 23 May 1949, printed in *Yearbook on Human Rights for 1949*, pp. 79 ff.

⁶⁴ *Ibid.*, p. 79.

⁶⁵ The German law on Nationality of 22 July 1913 became applicable in the territory of the Austrian Republic on 1 July 1939 by virtue of an executive decree of 30 June 1939 (second decree concerning German nationality in Austria), quoted by Makarov, *op cit.*, p. 51, footnote 122.

principles of international law (e.g. German citizenship imposed on inhabitants of territories under *occupatio bellica*). After Germany's defeat, the annexed territories resumed their separate identity and their inhabitants will normally have regained their former citizenship. But the question may be asked whether, from the point of view of German law, they will automatically lose their German nationality, particularly those to whom the liberated country refused the right to return.⁶⁶ These and other related questions stemming from the period of National-Socialist domination in Germany and in Europe may have to be settled in the future peace treaties with Germany or by other international instruments. In the meantime they may give rise to double or multiple nationality or to statelessness and create serious problems for the individuals concerned.⁶⁷ The present study is, however, more concerned with the general structure of the German legislation on nationality than with the particular aspects resulting from the upheaval brought about in this and many other spheres by the accession to power of National-Socialism and by the war of 1939-1945.

It is the German fundamental law on nationality of 22 July 1913 which will be analysed below.

(b) *How German citizenship is obtained*

95. Article 3 of the law indicates in general how German citizenship is obtained: It states that citizenship in a "federal state" may be obtained by birth (art. 4), by legitimation (art. 5), by marriage (art. 6),⁶⁸ by assumption in the case of a German (arts. 7, 14 and 16),⁶⁹ and by naturalization in the case of a foreigner (arts. 8 and 16).

96. To these grounds of acquisition of German citizenship, Part IV of the law (articles 33 and 34) adds the following:

"Article 33 Direct Reichs-citizenship is granted:

"1. To a foreigner who has taken up his residence in a protectorate (Schutz-Gebiet) or to a national of such a protectorate;

"2. To a former German who has not taken up his residence in Germany. The same applies to the descendants of a former German or to his adoptive child.

"Article 34 Direct Reichs-citizenship may on application be granted to a foreigner who is employed in the Reichs-service and has his official residence abroad provided he receives a salary from the Reichs-

⁶⁶ In this connexion it may be recalled that Article 16 (1) of the Basic Law for the Federal Republic of Germany stipulates:

"No one may be deprived of his German citizenship. A person may be deprived of citizenship only on the basis of a law and against his will, only if he is not thereby rendered stateless" (*Yearbook on Human Rights for 1949*, p. 81).

⁶⁷ The section on German nationality of the present study is based on *Deutsches Staatsangehörigkeitsrecht* by Franz Massfeller, edition of 1953. This book contains a useful summary of German legislation and regulations on nationality.

⁶⁸ It has already been stated in paragraph 92 above that the provisions of article 6 no longer appear to be applicable.

⁶⁹ This provision has become obsolete, an executive decree of 5 February 1934 having abolished citizenship in federal states in favour of direct Reichs-citizenship alone. Massfeller, *op. cit.*, p. 39.

treasury; it may also be granted to him if he does not receive such a salary."

(i) *German citizenship obtained jure sanguinis*

97. German citizenship is acquired *jure sanguinis*

(1) *By virtue of article 4 which stipulates:*

(a) That the legitimate child of a German is German by birth;

(b) That the illegitimate child of a German woman has his mother's citizenship.

(2) *By virtue of article 5 which declares:*

(a) That legitimation by a German, if valid according to German law, bestows the father's citizenship on the child.

(3) *By virtue of article 16 (2) which extends naturalization or reintegration (assumption) to*

(a) The wife (irrelevant in the context);

(b) Those children whose legal representation rests by reason of parental tutelage in the person who has assumed citizenship or become naturalized.

(ii) *German citizenship obtained jure soli*

98. The German law applies *jus soli* by attributing German nationality to a child found on German territory (article 4 (2)).

(iii) *German nationality obtained by naturalization*

(a) *Naturalization of former citizens*

99. Former German citizens may regain their German nationality provided the Minister of the Interior agrees (Decree 5 February 1934):

1. By virtue of article 9 (1), if they request it. This applies also to their children and grandchildren, and to adopted children of a citizen of the State, unless the applicant is a citizen of a foreign State;

2. By virtue of article 10, which grants a right of naturalization to the widow or divorced wife of a foreigner, provided she was a German citizen at the time of marriage;

3. By virtue of article 11, which grants a right of naturalization upon their application to former Germans who have lost their German nationality by expatriation during minority, provided the individuals concerned have taken up residence in Germany. This provision may be considered as a protection against statelessness for such persons;

4. By virtue of article 13, which enables the Government to naturalize a former German citizen who has not taken up residence in Germany;

5. By virtue of article 13, which enables the Government to naturalize the descendant of a former German or an adoptive child of a former German;

6. By virtue of article 14, which grants German citizenship in case of appointment to a position in "the direct or indirect service of the State or in the service of religious societies recognized by one of the federal states".⁷⁰

⁷⁰ The provisions quoted above may be compared with those of the French Code dealing with "reinstatement" of former citizens (articles 72-77). In French law a "reinstated" citizen is considered as having never lost his nationality

(b) *Naturalization of foreigners (general rules)*

100. Foreigners may obtain German citizenship by naturalization:

1. By virtue of article 8 which enables the German Government to naturalize a foreign applicant under certain conditions including residence;
2. By virtue of article 9 (2), which enables the German Government to naturalize foreigners born in Germany, provided they have maintained a continuous residence there up to the end of their twenty-first year.⁷¹

(c) *Naturalization of foreigners (special cases)*

101. Foreigners may obtain German citizenship by entering the service of the German Government or by serving in the German Army:

1. By virtue of article 12, a foreigner who has served for one year at least in the German Army or Navy may be naturalized under conditions set out in the law;
2. By virtue of article 14, an appointment to a position in the direct or indirect service of the State (land) or of subordinate collectivities counts as naturalization, unless a reservation to the contrary is made in the letter of appointment;⁷²
3. By virtue of article 15, appointment to the Reichs-service of a foreigner if he resides in Germany, or, if the residence is abroad, provided he draws a salary paid by the Reichs-treasury, counts as naturalization. If no such salary is received, naturalization may be granted.

(c) *Provisions from which dual or multiple nationality may arise*

102. The German law contains a number of provisions which might lead to the occurrence of double nationality. These may be summarized as follows:

(i) *As a consequence of jus sanguinis*

1. By virtue of article 4, which bestows German citizenship on the legitimate child of a German father or on the illegitimate child of a German mother. Such children if born outside Germany in a *jus soli* country, would have double nationality;

i.e., he acquires immediately the right to exercise in full all political and civil rights attaching to French citizenship by birth. Naturalized French citizens, on the other hand, are subject to certain legal disabilities for a limited period.

⁷¹ This condition is different from the cases dealt with by articles 44, 45 and 31 of the French Code discussed above (para. 69), inasmuch as the alien concerned is considered to be French unless he expressly declines this nationality, the right to do so depending on whether he possesses a foreign nationality by affiliation. The French law, therefore, prevents the occurrence of statelessness in these cases by the application of the *jus soli* principle. The German law leaves the initiative entirely to the individual concerned who may become stateless by failure to apply for German citizenship during the period prescribed by the law.

⁷² It should, however, be noted that the Law on German civil servants of 26 January 1937, quoted by Massfeller (*op. cit.*, p. 43) makes appointment to a position in the civil service in principle conditional upon possession of the German nationality.

2. By virtue of article 5, which grants German citizenship to the legitimated child of a German father. Such child, if born abroad in a *jus soli* country, would have double nationality.

(ii) *As a consequence of naturalization*

1. If the children, grandchildren or adoptive children of a former German citizen who re-acquires German citizenship by virtue of article 9 (1) retain their foreign nationality, double nationality will arise;
2. The widow of a foreigner who, by virtue of article 10, is re-instated in her German nationality of origin will have double nationality if she also retains her foreign citizenship;
3. A former German who retains his foreign nationality and acquires, by virtue of article 11, German citizenship after having taken up residence in Germany will have double nationality;
4. The same applies to former Germans, their descendants and/or adoptive children, naturalized upon their request, by virtue of Article 13.
5. Naturalization as a consequence of appointment to a position in the direct or indirect service of the State, municipalities etc. (articles 14-16 and 34), will produce double nationality if the appointees retain their former citizenship;
6. Double nationality will also occur by virtue of article 25, which enables the German Government to authorize a German national to retain his German citizenship, although he has neither his domicile nor his residence in Germany, and has acquired a foreign citizenship.

(d) *Provisions which may or will prevent dual or multiple nationality from occurring*

103. Provisions preventing the occurrence of double nationality are found in those sections of the law of 22 July 1913 which deal with loss of German nationality. These provisions are summarized below.

(i) *Loss of German nationality by virtue of the will of the person concerned*

104. Certain provisions of the German law make the loss of German nationality subject to the will of the person concerned. These are as follows:

1. The wife of a German can be released from German nationality upon the request of her husband and with her consent (article 18);
2. With regard to children, release may be obtained if the parents request release for themselves (article 19) or, in the case of orphans, if the competent tribunal concurs (article 19).

Release will not, however, be granted to a German still subject to military obligations (article 22). It cannot be refused on other grounds in times of peace (article 22, paragraph 2). It can be repealed if the person concerned maintains his habitual residence in Germany for more than a year after release had been granted.

(ii) *Loss by operation of law*

105. 1. Naturalization of a German in a foreign country will normally entail loss of German citi-

zenship (article 25), provided the individual concerned has neither his domicile nor his habitual residence in Germany, and if he has not been authorized in writing to retain German citizenship;

2. A German of military age domiciled outside Germany will lose German citizenship after completing his thirty-first year, if by that time he has not obtained a decision of the authorities concerning his military status; if a deserter, he loses citizenship within two years after the publication of the decision declaring him such;
3. A decision of the competent authority may deprive a German of his nationality if, in time of war, he refuses to obey an official request to return to Germany or if, without the permission of his Government, he accepts service with a foreign State and refuses to resign his appointment when requested to do so by the competent authority (articles 27-28).

(iii) *International treaties*

106. Germany has concluded a number of bilateral treaties with the object of preventing the occurrence of double nationality. Some of these will be discussed later in greater detail. It may be mentioned, however, that article 36 of the law of 22 July 1913 expressly maintains the validity of certain conventions concluded by individual federal states with foreign States prior to the entering into force of the afore-mentioned law. The provision refers to the so-called "Bancroft treaties", which dealt with the loss of German or United States citizenship, as the case might be, by nationals of one of the contracting States naturalized in the other. Such individuals, if they returned to their country of origin and remained there for more than two years, lost their acquired citizenship and regained their nationality of origin.⁷³

(e) *Concluding remarks*

107. Saving clauses against the occurrence of double nationality are, as has been seen, less elaborate in German than in French law. They consist mainly of provisions for the automatic loss of German citizenship by a German naturalized abroad, provided he has not obtained authority to retain his German nationality. Like the French Code de la Nationalité, the German law is based on the *jus sanguinis* principle, with the *jus soli* operating in certain circumstances. While according to German law, a foreigner appointed to an official position in the service of the German State counts as a naturalized citizen, or must be naturalized upon his request, such a provision does not exist in French law. French law does, however, authorize without residence conditions the naturalization of aliens who have served in the French armies during the war or rendered "exceptional services" to France (article 64). Such foreigners may be freed from the legal disability preventing the appointment of naturalized Frenchmen to public office for five years following the date of the naturalization decree (articles 82-83).

3. *The Swedish Citizenship Act of 22 June 1950*

(a) *Introductory remarks*

108. A further example of European legislation following the *jus sanguinis* principle which it may be useful to review briefly is the Swedish Citizenship Act of 22 June 1950, which contains a number of provisions designed to prevent double nationality.⁷⁴

(b) *How Swedish citizenship is obtained*

(i) *Acquisition jure sanguinis*

109. The Swedish Act, like the two laws previously examined, but with certain exceptions, applies the *jus sanguinis* principle.

1. A child whose father is a Swedish citizen is Swedish, so is the child of a Swedish mother and a stateless father; and also the child born out of wedlock of a Swedish mother (article 1 (1-3));
2. Legitimation through subsequent marriage of a Swedish citizen with an alien woman confers Swedish citizenship upon their child born out of wedlock prior to the marriage.

(ii) *Acquisition jure soli*

110. The *jus soli* principle is applied by Swedish law in circumstances which have already been studied when the relevant provisions of the French Code were analysed:

1. A foundling found in Sweden is deemed to be a Swedish citizen unless and until the contrary is proved (article 1 (3));
2. An alien born in Sweden and domiciled there uninterruptedly until completion of his twenty-first year becomes Swedish if he applies for Swedish citizenship not later than his twenty-third birthday.⁷⁵ For a stateless alien, or for one who loses his other citizenship by becoming a Swedish national, such a declaration can be made upon attaining eighteen years.

(iii) *Acquisition through resumption*

111. Resumption of Swedish nationality is governed by article 4, which stipulates that a Swedish born person domiciled in Sweden until completion of his eighteenth year, who thereafter loses his citizenship, may subsequently re-acquire it upon request after two years of residence in Sweden.

(iv) *Acquisition through naturalization*

112. 1. Naturalization may be granted to an alien over eighteen years old after seven years of residence, provided various other conditions are fulfilled (article 6);
2. The unmarried children of a naturalized Swede may be granted Swedish citizenship

⁷⁴ It should be noted that the laws of the two other Scandinavian States, Denmark and Norway, contain similar provisions.

⁷⁵ Under the corresponding provision of the French Code (article 44) French citizenship is automatically acquired on majority unless expressly declined. The conditions of residence (five years prior to completion of the twenty-first year) are less severe than the Swedish ones.

⁷³ The Bancroft treaties concluded with Germany have been abrogated by article 289 of the Treaty of Versailles.

by a decision of the King in Council, provided they are under eighteen years of age (article 6).

(v) *Acquisition by marriage*

113. It may be noted that the Swedish Act of 1950 does not contain any specific provision regarding loss of Swedish nationality by a Swedish woman marrying an alien, whether or not she thereby acquires her husband's citizenship; nor does the law say anything about acquisition of Swedish nationality by an alien woman becoming the spouse of a Swedish citizen. It may, however, be inferred from article 18 of the Act (transitional provisions) that while under the law in force before 22 June 1950 the Swedish woman followed the condition of her husband, i.e., she lost her Swedish nationality by marriage to an alien or if her Swedish husband lost his nationality, this is no longer the case. A Swedish woman's nationality is, therefore, not affected by her marriage to an alien or by her Swedish husband's change of status during the marriage; and an alien woman marrying a Swede will be able to acquire Swedish citizenship only through naturalization in accordance with the provisions briefly summarized above.

(c) *Cases of dual or multiple nationality under Swedish law*

114. Swedish law takes great care to prevent the occurrence of double nationality. Indeed, it would appear that this problem may arise in a few cases only, e.g., when a Swedish woman marries an alien whose nationality she obtains by virtue of her marriage. But even in that case Swedish nationality, as will be seen, is lost by prolonged residence of the Swedish citizen abroad. Double nationality might also occur when the illegitimate child of a Swedish citizen and an alien woman obtains the Swedish nationality of the father by the subsequent marriage of his parents, if, as is the case under French law for instance, the child would have the mother's nationality and be able to retain it. Double nationality might also be the consequence of the provision of article 3 whereby an alien born in Sweden and domiciled there until his twenty-first year may acquire Swedish nationality upon his request.

(d) *Provisions preventing dual or multiple nationality*

115. Provisions of this kind appear to be among the guiding principles applied by the Swedish legislator in drafting the Act of 22 June 1950. They may be summarized as follows:

1. A legitimate child born in Sweden to an alien father and a Swedish mother acquires only Swedish nationality, if he does not obtain his father's citizenship by birth or if the father is a stateless person;
2. By virtue of article 6, it may be made a condition of the acquisition of Swedish citizenship that the applicant for naturalization shall submit proof that an expatriation consent has been granted by the applicant's government.
3. By virtue of article 7, Swedish citizenship is lost by naturalization in a foreign country, by acceptance of appointment to a public office in a foreign country carrying with it acquisition of the citi-

zenship concerned, or by naturalization of the parents if the child also acquires the foreign nationality;

4. By virtue of article 8 a Swedish citizen born abroad who has not been domiciled in Sweden before his twentieth year will lose Swedish citizenship unless he is specifically authorized to retain it;
5. Finally, a Swedish national who desires to become a citizen of a foreign State may, in accordance with the provisions of article 9, be released from his Swedish nationality.

4. *The Nationality Law of the USSR of 1938*

116. The Soviet Citizenship law of 1938 as reproduced by *Izvestia* of 24 August 1938, No. 198, consists of eight articles indicating who is a Soviet citizen, how Soviet citizenship is acquired, and how it may be lost. It establishes, in accordance with article 1, a single "Union citizenship" for the citizens of the USSR, i.e., all citizens of a Republic belonging to the Union are also citizens of the USSR.

(a) *Citizenship by origin*

117. All persons who on 7 November 1917 were citizens of the "former Russian Empire" and who have not lost Soviet citizenship are citizens by origin (art. 2 (a)). It appears evident, although the law does not say so *expressis verbis*, that the same will apply to the descendants of such persons. This may be inferred from article 2 (b) which recognizes as Soviet citizens those who have acquired Soviet citizenship in a manner established by law.

118. Marriage does not affect Soviet citizenship, so that a Soviet woman marrying an alien and thereby acquiring the husband's nationality would have double nationality.

(b) *Naturalization*

1. *Naturalization of aliens in the USSR*

119. Foreigners will be naturalized, upon their request, either by the Presidium of the Supreme Council of the USSR or by the Presidium of the Supreme Council of the Union Republic in which they reside (article 3). Foreign minor children under fourteen years of age will become naturalized if both parents acquire citizenship of the USSR by naturalization. Children between the ages of fourteen and eighteen must give their consent. Persons over eighteen must themselves apply for naturalization (article 6).

2. *Loss of Soviet citizenship upon request of the citizen concerned*

120. Article 4 stipulates that Soviet citizens may be de-naturalized with the permission of the Supreme Council of the USSR. This provision would seem to indicate that Soviet citizens may obtain an expatriation permit.

(c) *Jus soli*

121. Soviet law appears not to apply the *jus soli* principle, even in cases where other nationality laws,

such as the French or German ones, have recourse to it in the interests of the person concerned. This appears to result from article 8, by virtue of which persons residing on Soviet territory who, under the provisions of the law, are not Soviet citizens and who cannot prove foreign citizenship, are considered to be stateless. Thus, a child born to stateless parents residing in the USSR would appear to follow his parents' status in this respect.

B. LEGISLATION BASED PRINCIPALLY ON JUS SOLI

1. *The British Nationality Act, 1948*

(a) *General remarks*

122. As has been seen in the preceding sections of this study, *jus sanguinis* is predominant in Europe. The most noteworthy exception is the British system based on the *jus soli* principle. However, J. Mervyn Jones⁷⁶ has expressed the opinion that this question may not be free from doubt. He wrote:

"Allegiance is a different legal idea from nationality, and some erroneous thinking has resulted from a tendency to confuse the two ideas.Much original research remains to be done into the history of allegiance, particularly with a view to tracing the two strands of *jus soli* and *jus sanguinis* in our law; but I believe I have shown here that the tendency, which I have mentioned above, to assume that the *jus soli* is the true common law rule, requires far more serious and critical examination than it has hitherto received."

123. For the purpose of the present inquiry, however, it will not be necessary to go more deeply into the matter for, compared with the European continental systems so far examined, the British system may well be classified as among those which, predominantly, apply the *jus soli* principle.

(b) *How British nationality is obtained*

124. The British Nationality Act, 1948, distinguishes between "British Nationality" and "citizenship of the United Kingdom and Colonies". British nationality is obtained:

(a) By virtue of citizenship;

(b) By continuance of certain citizens of Eire as British subjects.

125. Citizenship of the United Kingdom and Colonies is obtained:

(a) By birth;

(b) By descent;

(c) By registration;

(d) By naturalization;

(e) By incorporation of territory.

126. British nationality belongs, in accordance with section 1 of the Act, to every person who is a citizen of the United Kingdom and Colonies or a citizen of Canada, Australia, New Zealand, the Union of South Africa, India, Pakistan, Southern Rhodesia and Ceylon. According to this section, therefore, citizens of the

above-mentioned countries possess at the same time the nationality of their country of origin and British nationality. Although the countries concerned have a legal personality distinct from that of the United Kingdom and its immediate dependencies, they belong to the British Commonwealth of Nations. For the purpose of the present enquiry, their nationals' status as "Commonwealth citizens" and nationals of their country of origin will not be considered as conferring upon them a "double nationality."

127. Citizens of the Republic of Ireland may retain British nationality (section 2) if they give notice in writing to the Secretary of State claiming to remain a British subject on any of the grounds enumerated in section 2 of part 1 of the Act. If such a person also retained the nationality of the Republic of Ireland a case of double nationality would occur. It should be noted in this connexion that the Ireland Act, 1949, declares in section 2 that the Republic of Ireland is not a foreign country.⁷⁷ The fact that the Republic of Ireland is not part of His Majesty's dominions is declared in section 3 not to affect the operation of, *inter alia*, "the British Nationality Act, 1948 (and in particular, and without prejudice to the generality of the preceding words, sections two, three and six thereof)".^{77a} Section 5 of the Ireland Act makes provisions as to the operation of the British Nationality Act, 1948, and, in particular, determines in sub-section 1 (b) (i-iii) the persons who shall be deemed to have ceased to be British subjects on the coming into force of the British Nationality Act, 1948.^{77b} On the other hand, section 23(1) of the Irish Nationality and Citizenship Act No.13 of 1935 enacts that whenever a convention made between the Republic of Ireland and the Government of any other country provides for the enjoyment in such country by citizens of the Republic of the rights and privileges of citizens of such other country similar rights will be granted in every such case to citizens of such other countries.^{77c}

(i) *Application of the jus soli principle*

128. That British law predominantly applies the *jus soli* principle may be inferred from section 4 of the Act, by virtue of which "every person born within the United Kingdom and colonies after the commencement of this Act" is a citizen of the United Kingdom by birth. Exceptions to this general principle are stated in section 4 (a) and (b), and they apply to envoys of foreign sovereign Powers accredited to His Majesty and to children of enemy aliens born in a place then under occupation by the enemy.

129. A mixture of *jus soli* and *jus sanguinis* exists in the case of British citizens by descent,⁷⁸ in so far

⁷⁷ *Halsbury's Statutes of England*, second edition, vol. 28, Continuation Volume, 1948-49 (London, Butterworth & Co., 1951), p. 446.

^{77a} *Ibid.*, p. 447.

^{77b} *Ibid.*, pp. 168-169.

^{77c} United Nations Legislatives Series, *Laws Concerning Nationality* (New York, 1954), pp. 256-257.

⁷⁸ Under section 23, a person born out of wedlock and legitimated by the subsequent marriage of the parents will, for the purposes of determining his possession of British nationality, be treated as if he had been born legitimate. For a posthumous child it is the nationality of the father at the time of death that is taken into account in determining whether the child is a British national or not.

⁷⁶ J. Mervyn Jones, *British Nationality Law and Practice* (Oxford, Clarendon Press, 1947), Preface, pp. ix and x.

as they are not born in the United Kingdom, its Colonies, or the countries mentioned in paragraph 125 above. Section 5 of the Act provides that if the father of such a person is a citizen of the United Kingdom by descent only (i.e., if the father himself was not born in one of the countries conferring British nationality by birth) such a person shall not be a citizen of the United Kingdom. The same section, however, stipulates a number of exceptions to this rule, such as birth in certain territories (protectorates, mandates etc.), registration of the birth at a United Kingdom consulate within one year of its occurrence, the father being in the service of His Majesty's Government in the United Kingdom, or the person concerned being born in one of the countries enumerated in paragraph 125 above and not becoming a citizen thereof by birth.

130. Citizens of the countries mentioned in paragraph 125 above and citizens of Ireland may also, upon application, be registered as citizens of the United Kingdom under the conditions prescribed by section 6 of the Act. Minor children of citizens born abroad or in any colony, protectorate or United Kingdom trust territory may also be registered as citizens of the United Kingdom and Colonies (sections 7 and 8).

(ii) *Naturalization*

131. Naturalization as a British citizen is obtained, on application by the alien concerned, under the conditions set forth in section 10 of the Act. Neither section 10 nor the Second Schedule to the Act requires that the alien concerned must prove loss of his former citizenship either before or after naturalization.

(iii) *Marriage*

132. The British Nationality Act contains in section 14 a provision relating to the nationality of married women. British women who, before the coming into force of the Act, ceased on their marriage to be British subjects, shall be deemed to have been British subjects until immediately before the commencement of the Act. In order to retain their nationality they must now make a "declaration of retention of British nationality". The Act contains in Section 6 (1) provisions relating to the acquisition of British citizenship by an alien woman through her marriage to a British subject. Such alien women, on making application therefore to the Secretary of State and on taking an oath of allegiance, are entitled to be registered as citizens of the United Kingdom and Colonies, provided they have not renounced, or have not been deprived of, citizenship of the United Kingdom and Colonies under the relevant provisions of the Act.

(c) *Provisions which may or will prevent dual or multiple nationality from occurring*

133. Under section 19 of the Act, any citizen of the United Kingdom and Colonies who is also a citizen of one of the countries enumerated in paragraph 125 above, or of Eire, or a national of a foreign country, may make a declaration of renunciation of citizenship of the United Kingdom and Colonies, in which case he will lose that citizenship. In this instance the avoidance of double nationality depends on the declared will of the person concerned. On the other hand, the Secretary of State, may by Order under section 20,

deprive a naturalized citizen of his citizenship if such person has been ordinarily resident abroad for a continuous period of seven years, unless such person has been in the service of the British Government, or of an international organization of which the Government "of any part of his Majesty's dominions" was a member, or unless he registers annually at a United Kingdom consulate his intention to retain his citizenship. This provision leaves it to the appreciation of the competent authorities whether a naturalized citizen who manifestly has no intention of maintaining his ties with his adoptive country is to be deprived of his British nationality; and it may be assumed that the authority will be exercised in a case where such a naturalized subject has become by naturalization or otherwise the citizen of another country. Reasonable precautions against abuse of this authority are taken in section 20 subsections 5-7 of the Act, as well as in section 21.

21. The Secretary of State must be "satisfied that it is not conducive to the public good that that person should continue to be a citizen of the United Kingdom and Colonies"; the Secretary of State must give to such a person notice in writing informing him of the grounds on which it is proposed to make an order depriving him of his British nationality; and in certain cases the person may apply for an enquiry and the question may then be referred to a committee of inquiry the chairman of which must be a person possessing judicial experience.

(d) *Provisions which may lead to dual or multiple nationality*

134. Like the other laws examined in the course of this study, the British Nationality Act, 1948, provides no water-tight guarantee against the occurrence of double nationality. The main circumstances in which it may arise are summarized below.

(a) Under section 4 of the Act, persons born in the United Kingdom are, generally speaking, citizens of the country. Double nationality will therefore occur:

- (1) If a child is born in Great Britain to an alien (e.g., a French citizen) whose nationality law follows the *jus sanguinis* principle;
- (2) Under section 5 a person whose father is a citizen of the United Kingdom and Colonies has British nationality. Double nationality will therefore occur if such person is born in a non-British country applying the *jus soli* principle. His children will, however, lose British citizenship, unless they are born in certain territories or countries specified in subsection 5 (1) (a) or the birth has been registered at a United Kingdom consulate (section 5 (1) (b)). Under such circumstances British citizenship appears to be indefinitely transmissible.
- (3) British women who retain their nationality by virtue of a declaration of retention when marrying an alien whose nationality they acquire will have double nationality.
- (4) The same applies to an alien woman who, while retaining her nationality of origin, is, by virtue of her marriage to a British citizen, registered as a citizen of the United Kingdom and Colonies under section 6 (2) of the Act.

- (5) A person born out of wedlock and legitimated by the subsequent marriage of his parents, if born in a non-British country whose nationality he acquires by birth, will have double nationality if he also becomes a British citizen by virtue of section 23 of the Act.
- (6) British citizens by naturalization will have double nationality if they do not lose their original citizenship upon becoming British subjects. The same will apply to a British citizen naturalized in a foreign country.

II. THE AMERICAS

135. Having thus summarily analysed some of the European nationality laws, it may be useful to consider a few examples from legislation in force in the American hemisphere, and in the first place the United States Immigration and Nationality Act of 1952.^{78a}

1. United States Public Law 414 of 27 June 1952

(a) General remarks

136. The United States law on the subject of nationality, like that of many other States, shows clearly that nationality legislation is very much a matter of political expediency.

137. Until recently a country of massive immigration, the United States has consistently and predominantly applied the *jus soli* principle. It has facilitated immigration and the subsequent naturalization of aliens; but, gradually, with the increase of the native population, it has restricted these facilities and has tried to limit them, as far as possible, to individuals considered desirable with regard to the aims pursued by United States authorities in relation to the general composition of the country's population. Double nationality has always been frowned upon by United States policy-makers, and a number of legislative measures have been taken to prevent its occurrence, especially as regards naturalized aliens, and also in respect of children born in the United States of foreign parents.

138. This inquiry is not concerned with the evolution of United States legislative policy with regard to nationality in general: it deals only with the problem of multiple nationality and with the state of the question under legislation in force at the present time. The following paragraphs contain, therefore, a summary analysis of the relevant provisions of United States Public Law 414 of 27 June 1952.

(b) How United States citizenship is obtained

(i) Acquisition jure soli

139. Section 301 (a) enumerates those persons who acquire United States citizenship by birth:

1. A person born in the United States, and subject to the jurisdiction thereof (this would appear to include all persons born in territories subject to the jurisdiction of the United States, with the exception of those whose parents have the benefit of diplomatic immunities and privileges);

2. A person born in the United States to a member of certain aboriginal tribes;
3. A person born outside the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom had a residence in the United States or one of its outlying possessions prior to the birth of such person.
4. A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States and has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national but not a citizen of the United States;⁷⁹
5. A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States and has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;
6. A person of unknown parentage found in the United States while under the age of 5 years, until shown, prior to his attaining the age of 21 years, not to have been born in the United States;
7. A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than 10 years, at least five of which were after attaining the age of fourteen years.⁸⁰

(ii) Acquisition jure sanguinis

140. *Jus sanguinis* therefore, applies in the cases mentioned in paragraph 139, sub-paragraphs 3-7 above, i.e., to persons born outside the United States and its outlying possessions to parents one or both of whom are citizens of the United States. Such persons might therefore have double nationality.

141. The law contains in sections 302-307 provisions relating to:

- (a) Persons born in Puerto Rico on or after 11 April 1899;
- (b) Persons born in the Canal Zone or Republic of Panama on or after 26 February 1904;
- (c) Persons born in Alaska on or after 30 March 1867;
- (d) Persons born in Hawaii;
- (e) Persons living in and born in the Virgin Islands;

⁷⁹ Section 101 (a) (22) (Definitions) declares that the term "National of the United States" refers to (a) citizens or (b) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States. According to the Harvard Research (*op. cit.*, page 23) the "tie of allegiance" is a term in general use to denote the sum of the obligations of a natural person to the state to which he belongs".

⁸⁰ Section 191 (a) (29) defines "Outlying possessions of the United States" as meaning "American Samoa and Swains Island". According to the same provision, American citizens by birth under Section 301 (7) may lose their nationality under conditions which will be discussed later.

^{78a} Public Law 414—82d Congress, 2d Session: 66 Stat. 163.

(f) Persons living in and born in Guam. It appears unnecessary to reproduce these provisions here in greater detail.

142. According to section 309 (a), the provisions of sub-sections (3), (4), (5) and (7) of section 301 (a) quoted in paragraph 139 above "apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation"; and, according to section 309 (c), "a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year". In the case of such illegitimate children, therefore, *jus sanguinis* applies provided the conditions as stated are fulfilled.

(iii) *Acquisition by naturalization*

143. Acquisition of United States nationality by naturalization is dealt with in section 310-348 of the Act.

144. It may be noted that, in accordance with section 311, persons otherwise fulfilling the conditions for naturalization cannot be denied the right to become naturalized citizens because of race or sex or because such persons are married. The conditions required by the law for naturalization of an alien as a United States citizen refer to the following points:

(a) The petitioner must fulfil certain conditions as to understanding the English language, and the history, principles and form of government of the United States;

(b) The petitioner must not be opposed to government or law and must not favour totalitarian forms of government;

(c) The petitioner must not be a deserter from the armed forces of the United States;

(d) The petitioner must conform to requirements laid down by the law concerning residence, good moral character, attachment to the principles of the Constitution, and favourable disposition to the United States.

145. Naturalization of persons whose spouses are citizens of the United States is facilitated inasmuch as the period of continuous residence in the United States prior to naturalization is reduced.

146. Children may acquire United States citizenship automatically if certain conditions are fulfilled:

(a) A child born outside the United States to parents one of whom was a United States citizen and has never ceased to be so, will be automatically naturalized if the alien parent is naturalized, provided such naturalization takes place while the child is under the age of sixteen and provided the child begins residing permanently within the United States while under the age of sixteen (section 320). This provision does not apply to adopted children;

(b) Children born outside the United States of alien parents will automatically acquire citizenship

(i) If both parents are naturalized;

(ii) If the surviving parent is naturalized;

(iii) In case of legal separation, if the parent having legal custody is naturalized and, if the child is born out of wedlock, provided the mother is naturalized and the parenthood has not been established by legitimation;

(iv) If such child is legally and permanently residing in the United States and is under sixteen years of age.

147. Section 324 of the Act facilitates the re-acquisition of United States citizenship by persons who have lost it through marriage to an alien prior to 22 September 1922; section 325 refers to the naturalization of nationals who are not citizens of the United States, i.e., of persons owing permanent allegiance to the United States;⁸¹ section 327 facilitates the naturalization of former citizens who have lost United States nationality by entering the armed forces of foreign countries during World War II; section 328 refers to naturalization through service in the armed forces of the United States; section 329 refers to naturalization through active duty service in the armed forces during World War I or II; section 330 refers to "constructive residence through service on certain United States vessels", and, finally, section 331 refers to the naturalization of enemy aliens under specified conditions and procedures.

(c) *Provisions aiming at the prevention of dual or multiple nationality*

148. There can hardly be any doubt that American law and practice are unfavourably disposed towards the retention of one or more alien nationalities by persons who are also citizens of the United States. The political and legal doctrine held by the United States in this respect was expounded in great detail in a communication from the United States Government, dated 16 March 1929, in reply to the schedule of points submitted by the Preparatory Committee of the Conference for the Codification of International Law held at The Hague in 1930 under the auspices of the League of Nations.⁸² This communication, after stating,⁸³ that "the United States does not recognize the existence of dual nationality in the cases of persons of alien origin obtained naturalization as citizens of the United States" quoted *inter alia* an Instruction⁸⁴ of 8 July 1859, from Secretary of State Cass to Mr. Wright, United States Minister to Prussia, which stated:

"The moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth."

The same communication also affirmed the hostility of the United States to the doctrine of perpetual allegiance and recognized the right to expatriation as applying also to persons who were citizens of the United States by birth.⁸⁵

⁸¹ Under section 101 (a) (21) "national" means a person owing permanent allegiance to a State and under section 101 (a) (31) "permanent" refers to a relationship of a continuing or lasting nature, which may, however, be dissolved at the instance of the United States or of the individual concerned.

⁸² *Conference for the Codification of International Law, Bases of Discussion*, vol. I: Nationality, Publications of the League of Nations, V. Legal, 1929.V.1, pp. 145-162.

⁸³ *Ibid.*, p. 147.

⁸⁴ *Ibid.*, p. 150.

⁸⁵ *Ibid.*, p. 151.

149. This attitude appears to have been persistently maintained, and the law under consideration contains numerous provisions aiming at the prevention of dual nationality. Section 350 refers expressly to "Dual Nationals; Divestiture of Nationality". It stipulates that a person who acquired at birth the nationality of the United States and of a foreign State, and who has voluntarily sought or claimed benefits deriving from the nationality of any foreign State, shall lose his United States nationality if, at any time after attaining the age of twenty-two years, he has a continuous residence for three years in the foreign State of which he is a national. Loss of United States nationality can be avoided by the individual concerned under conditions specified in section 350.

150. Other provisions of the Act for the avoidance of dual nationality may be summarized as follows (section 349):

(a) A person who is a national of the United States by birth or naturalization will lose United States nationality by obtaining naturalization upon his application in a foreign State. Children of United States citizens naturalized abroad, however, will not lose their citizenship if they establish a permanent residence in the United States prior to attaining the age of twenty-five;

(b) A person taking an oath of allegiance to, or making an affirmation or another formal declaration of allegiance to, a foreign State;

(c) A person who, unless specifically authorized, enters or serves in the armed forces of a foreign State;

(d) A person who accepts an office, post or employment under the Government of a foreign State;

(e) A person who votes in a political election in a foreign State or participates in an election or plebiscite to determine the sovereignty over foreign territory;

(f) A person who makes a formal renunciation of United States nationality either abroad before an authorized representative of the United States Government or in the United States.

151. The following provisions apply only to the loss of United States nationality by naturalized citizens: under section 352 a naturalized citizen will lose his United States nationality if he resides for a continuous period of three years in the State of which he had formerly been a national or for five years in any other State or States. The Act provides certain exceptions to these provisions.

152. Attention should also be drawn to section 357 which recognizes that the law cannot supersede treaties or conventions to which the United States is a party. It states that no woman

"who was a national of the United States shall be deemed to have lost her nationality solely by reason of her marriage to an alien on or after September 22, 1922, or to an alien racially ineligible to citizenship on or after March 3, 1931, or, in the case of a woman who was a United States citizen at birth, through residence abroad following such marriage, notwithstanding the provisions of any existing treaty or convention".

(d) *Provisions which may lead to dual or multiple nationality*

153. It may be inferred from the preceding analysis that, under the Act referred to, dual nationality can arise from comparatively few of its provisions. It is not surprising that this should be so in view of the United States policy on this matter. It is also evident, however, that the United States legislature cannot prevent foreign States from attributing *jure sanguinis* their citizenship to children of their nationals born in the United States or from refusing to recognize by their own laws naturalization in the United States of their own citizens. As has been indicated above (paragraph 149), section 350 of the Act attempts to forestall consequences which may be undesirable from the point of view of the United States and which result from the unavoidable existence of cases of double nationality, by stipulating that such persons should cease to be United States citizens if they voluntarily sought or claimed benefits deriving from the second nationality concerned and resided in that State for a certain period.

154. Besides the case of children born to aliens residing in the United States at the time of birth whose nationality is transmitted to their descendants *jure sanguinis*, dual nationality may arise under the provisions of the Act in respect of following categories:

- (1) A woman who was a United States citizen at birth and who acquires, by marriage to an alien, her husband's nationality whether she continues to reside in the United States or follows her spouse to his country (section 357);
- (2) Children born to United States citizens outside the United States of parents who were both citizens of the United States, should such children also acquire by birth the nationality of the State where they were born (section 301 (a) (3));
- (3) Children born outside the United States to parents one of whom possesses United States citizenship and, if such children acquire also the nationality of their State of birth (section 301 (a) (4));
- (4) A person of unknown parentage found in the United States while under the age of five, if it is shown after he attains the age of twenty-one that he was not born in the United States but in a country the nationality of which he has retained;
- (5) Persons born outside the geographical limits of the United States to parents one of whom is an alien and the other a United States citizen who had been present in the United States during the period prescribed in section 301 (a) (7), if such a person also retains the nationality of the country where he was born;
- (6) An illegitimate child born to a United States citizen in a foreign country, and retaining its nationality, if the paternity of such child is established by legitimation while the child is under twenty-one years of age (section 309 (a));
- (7) A child born out of wedlock in a foreign country of which he is a national by birth, if he retains the nationality status of his American mother (section 309 (c));
- (8) Persons naturalized in the United States whose

nationality of origin is not lost by naturalization in a foreign country;

- (9) Children of United States citizens naturalized abroad who acquire the foreign citizenship of their parents through naturalization, do not lose their United States citizenship while under the age of twenty-one unless they fail to enter the United States and to establish a permanent residence there before the age of twenty-five (section 349 (a) (1)).

2. *Mexico: Nationality and Naturalization Act of 5 January 1934 as amended by Decrees of 18 September 1939, 30 December 1940 and 28 December 1949*

(a) *General remarks*

155. Mexico belongs to the group of States applying predominantly the *jus soli* principle. Among the pertinent texts, the law of 5 January 1934 contains a number of provisions aiming at the prevention of dual or multiple nationality. It is evident, however, that Mexican legislation cannot supersede the effects of laws applied by other States to persons whom they consider to be their nationals, although at the same time they may be Mexicans according to Mexican law. A brief analysis of Mexican legislation on nationality will be given in the following paragraphs.

(b) *How Mexican nationality is obtained*

(i) *Nationality obtained at birth*

156. While applying predominantly the *jus soli* principle, certain provisions of the law of Mexico, as of most other States, admit *jus sanguinis* in certain instances where this may be considered to be in the interests of the person concerned. Thus by virtue of *jus soli* in accordance with article I, "Persons born within the territorial limits of the Republic, irrespective of the nationality of their parents" are Mexican by birth, as are persons "born on board Mexican war or merchant vessels or aircraft". In this latter instance the text of the law does not specify whether it applies irrespective of the fact that the merchant vessel or aircraft is, at the moment of birth, in foreign territorial waters, flying over foreign territory, or stationed in a foreign port or airport. It may, therefore be presumed that the law applies irrespective of the location of the vessel or aircraft at the time of the birth.

157. *Jus sanguinis* applies, in accordance with article 1(II), to "persons born in foreign countries of Mexican parents; of a Mexican father and alien mother; of a Mexican mother and unknown father".

158. According to article 55 an infant "found in Mexican territory is presumed to have been born in Mexico; this presumption is rebuttable".

159. Mexican law also attributes Mexican nationality to children born in Mexico to consuls de carrière and to other foreign officials while on mission in Mexico who do not enjoy diplomatic immunity. Such children may, however, renounce their Mexican nationality upon attaining majority, provided they have also retained their parents' nationality (article 54).

(ii) *Marriage*

160. A foreign woman who marries a Mexican citizen may obtain Mexican nationality (article 2 (II), provided she applies for it and submits with her request, in accordance with article 17, a declaration expressly disclaiming her original nationality and "all subjection, obedience and allegiance to any foreign government, more particularly to the government of which [she] has hitherto been a subject". She must also expressly renounce the right to possess or use any title of nobility conferred on her by any foreign government (article 18).

161. However, a Mexican woman marrying an alien does not lose her nationality by reason only of her marriage (article 4).

(iii) *Naturalization*

162. An alien fulfilling certain residence and other conditions may obtain a certificate of naturalization from the Ministry of Foreign Affairs. Such alien must submit with his petition the declaration mentioned in paragraph 160 above by which he expressly renounces his former nationality.

Acquisition of Mexican nationality by an alien entitles his wife to be naturalized, provided she has her domicile in Mexico and applies for naturalization in the manner described above.

(c) *Provisions intended to prevent dual or multiple nationality*

163. As stated above, Mexican law contains a number of provisions which will prevent dual nationality from occurring in so far as this depends on the will of the Mexican legislator.

(i) *Provisions applying to Mexicans by birth as well as to Mexicans by naturalization*

164. In accordance with the provisions of article 3, Mexicans who voluntarily acquire a foreign nationality lose their Mexican citizenship. In certain circumstances, e.g., if the foreign nationality was acquired by operation of law by residence in a foreign country, as a prerequisite to obtaining work etc., the Minister of Foreign Affairs has discretionary power to decide whether such acquisition was "voluntary" or not.

165. Mexican nationality is lost, furthermore, by citizens accepting or employing titles of nobility implying allegiance to a foreign State.

(ii) *Provisions applying to naturalized citizens only*

166. Naturalized Mexicans lose their citizenship if they reside continuously for five years in their country of origin and if they represent themselves "as an alien in any public instrument" or obtain and use a foreign passport. They may, however, regain their Mexican citizenship by a simplified procedure. Loss of citizenship affects only the person who has been deprived of it.

(iii) *Renunciation of Mexican nationality*

167. Article 53 enables a Mexican citizen by birth who also possesses by birth the nationality of a foreign State to renounce his Mexican nationality by a formal declaration addressed to the Ministry of Foreign Affairs, provided the person concerned has attained the age of

majority, is regarded as a national by another State, and is domiciled abroad.

(d) *Provisions from which dual or multiple nationality may arise*

168. Despite the precautions taken by the Mexican legislature against the occurrence of dual nationality, this may exist either because Mexican law cannot prevent it or as a consequence of certain of its provisions. These cases may be summarized as follows:

169. (a) A Mexican citizen by birth who also acquires by birth a foreign nationality and does not, or is not in a position to, renounce his non-Mexican citizenship, will have dual nationality;
- (b) Children of Mexican parents, or of a Mexican father and an alien mother, or of a Mexican mother and an unknown father, if born in foreign countries which grant their nationality *jure soli*, may have dual nationality, unless they renounce their Mexican nationality in accordance with article 53 of the law;
- (c) Children of consuls de carrière or of foreign officials on mission in Mexico who do not renounce their Mexican citizenship upon attaining majority in accordance with article 55, will, if they have acquired by birth the nationality of their parents, retain the dual nationality, which they possess until reaching that age;
- (d) A Mexican woman who marries an alien and thereby acquires her husband's nationality will have double nationality unless she renounces her Mexican nationality in accordance with article 53 of the law.

3. *Nationality provisions in the Constitution of Uruguay*

(a) *General remarks*

170. Like other Latin American legislative provisions concerning nationality, those of Uruguay are incorporated in the Constitution of the Republic which distinguishes between natural citizenship and legal citizenship. Natural citizenship is an inalienable right which appears to be indefinitely transmissible by descent, provided the incumbents take up residence in Uruguay and register in the Civil Register. The so-called legal citizenship, but not natural citizenship, can be acquired by foreigners through naturalization.

(b) *How Uruguayan nationality is obtained*

(i) *Birth*

171. Uruguayan law applies predominantly the *jus soli* principle, since, in accordance with article 74, "All men and women born at any place within the territory of the Republic are 'natural' citizens". The *jus sanguinis* principle comes into play when children are born to Uruguayan parents in a foreign country, since, according to the same provision (article 74) "Children of Uruguayan fathers or mothers are also 'natural' citizens, wherever they may have been born" provided they reside in the country and register with the appropriate authorities.

(ii) *Naturalization*

172. Unlike other laws, which consider naturalization as a favour to be bestowed or withheld at the discretion of the Government concerned, article 75 of the Uruguayan Constitution grants a legal right to naturalization to aliens fulfilling certain conditions of residence, of good conduct, of property and so on. The Uruguayan law appears not to attach any other condition to the exercise of this right, nor does it seem to require the naturalized citizen to renounce his former nationality upon becoming a Uruguayan citizen. A foreign woman will acquire Uruguayan legal citizenship, not by her marriage to a Uruguayan national, but through naturalization in Uruguay after three years of habitual residence in the Republic. So will an alien man marrying a woman possessing Uruguayan citizenship (this may be inferred from article 75 A of the Constitution).

(c) *Loss of citizenship*

173. Only legal citizenship is lost by naturalization in a foreign country, whereas nationality, which belongs only to 'natural' citizens, is not lost even by naturalization in another country, it being sufficient for the purpose of regaining the rights of citizenship to take up residence in the Republic and register in the Civil Register (article 81 of the Constitution).

(d) *Occurrence of dual or multiple nationality*

174. As may be seen from the foregoing summary, the Uruguayan legislature does not appear to object to dual nationality. Indeed no provisions aiming at preventing it are contained in the relevant legal texts, with the exception of the second paragraph of article 81, by virtue of which "legal citizenship is lost by any other form of subsequent naturalization". This would appear to apply to Uruguayan citizens by naturalization only, since 'natural' citizens, even if naturalized abroad, regain citizenship by taking up residence in the Republic.

4. *Brazilian nationality*⁸⁶

(a) *General remarks*

175. Like the other American laws summarized above, the Brazilian law of 18 September 1949 is based predominantly on the *jus soli* principle. It is concerned with the acquisition, loss and recovery of Brazilian nationality. Dual nationality is not frowned upon by the Brazilian legislature and provisions aiming at its prevention are to be found mainly under article 22 which enumerates grounds for the loss of Brazilian nationality.

(b) *How Brazilian nationality is obtained*

(i) *Birth*

176. Brazil applies the *jus soli* principle. This is evident from article 1 of the law which declares that all persons "born in Brazil, except to alien parents resident in Brazil in the service of their country" are Brazilian citizens. However even such persons may, if one of the parents is a Brazilian national, opt for Brazilian nationality, as provided in article 129 (II) of the Federal Constitution of 1946.

⁸⁶ *Diario Oficial* of the United States of Brazil No. 2176 of 19 September 1949: *Act No. 818, of 18 September 1949, to govern the acquisition, loss and recovery of nationality and the loss of political rights.*

177. A right to opt for Brazilian nationality is also granted by article 1 (II) of the law of 1949 to persons born abroad of Brazilian parents, provided they come to reside in Brazil and opt for Brazilian nationality within four years of attaining majority.

(ii) *Naturalization*

178. Naturalization may be granted by decree of the President of the Republic to foreigners who have had their residence in the country for a minimum period of five years and who fulfil certain other conditions, such as good conduct, knowledge of the Portuguese language, and so on (article 7). Naturalization does not lead to acquisition of Brazilian nationality by the spouse or children of the naturalized person (article 20). It would appear, therefore, that separate proceedings must be initiated for the naturalization of such persons.

(c) *Loss of Brazilian nationality*

179. A Brazilian citizen loses his nationality by voluntary naturalization in a foreign country, by accepting from a foreign government any commission, employment or pension without permission of the President of the Republic, and, in the case of naturalized citizens, if the naturalization is cancelled by judicial sentence on account of activities against the national interest (article 22). Brazilian nationality may, however, be recovered by those who lose it by becoming naturalized in a foreign country, provided the former Brazilian national did not acquire a foreign citizenship for the purpose of evading obligations to which he would be liable as a Brazilian. He must also renounce any commission, employment or pension he may have obtained from a foreign government.

(d) *Dual or multiple nationality under Brazilian law*

180. It would appear from the legislation analysed above that Brazilian law provides no particular safeguards against cases of dual nationality which may occur in many instances, e.g., in the cases of children born to alien parents residing in Brazil; children born to Brazilian parents in a country the nationality of which they have acquired, by being born there, provided they take up residence in Brazil; alien children born in Brazil to parents resident there in the service of their Government, if such children exercise the right to opt for Brazilian citizenship granted to them by article 2 of the law; naturalized Brazilian citizens who have not renounced their nationality or origin; Brazilian women acquiring the foreign nationality of their husbands by marriage and not by naturalization; and so on.

181. The main preventive measure against dual nationality contained in the law is article 22 which stipulates the loss of Brazilian nationality by voluntary acquisition of an alien citizenship. Even this provision may lose its effect if the former Brazilian national, while retaining his foreign citizenship, recovers Brazilian nationality under the terms of article 36, analysed above.

III. IN ASIA

182. It will be appropriate in the context of this survey to study briefly some of the nationality laws at present in force in Asia. Some Asian States, such as China and Thailand, base their nationality legislation on principles which obtain also in other regions of the

world. In both of these States *jus sanguinis* predominates and certain provisions of the laws are intended to prevent dual nationality. These provisions deal extensively with the effect of marriage on the nationality of the spouse and they contain detailed rules concerning naturalization, loss and resumption of nationality. Others are States such as India and Burma, which became fully independent after the Second World War. The problem of citizenship, therefore, had to be solved by their legislatures. Both have been influenced by legislation enacted by the former administering Power, but whereas the Indian Constitution of January 1950 contains provisions referring to acquisition and loss of Indian nationality, the Burma Independence Act of 1947 indicates only who ceases to be a British subject and who may after the date of enactment become a Burmese citizen.

1. *Thai Nationality Act of 31 January 1952 (B.E. 2495) as amended by Nationality Act No. 2 of 24 January 1953 (B.E. 2496)*

(a) *General remarks*

183. The nationality law of Thailand is based on the *jus sanguinis* principle. Like several of the laws summarized in the preceding sections of this Chapter, it contains provisions relating to the acquisition of Thai nationality by birth, marriage, naturalization and resumption. Other provisions refer to the loss of Thai nationality, and others again are concerned with the prevention of dual citizenship. They do not differ substantially from enactments in other countries and may, therefore, be analysed very briefly in the following paragraphs.

(b) *How Thai nationality is obtained*

(i) *Birth*

184. The *jus sanguinis* principle governs the acquisition of Thai nationality at birth. Indeed, section 7 of the law as amended attributes citizenship to "persons born of Thai fathers, whether born in the Kingdom or outside"; to persons born abroad of a Thai mother, if the father is stateless or unknown; and to persons born in the Kingdom to a Thai mother. However, children born in the Kingdom to a Thai mother but to an alien father lose their Thai nationality if "identity-cards are delivered to them in accordance with the Alien Registration Act" (section 16 bis). Such children may also lose their Thai nationality by living for a continuous period of over ten years after reaching majority in the father's country, provided they possess the father's nationality or have committed acts considered contrary to Thai interests (section 16).

(ii) *Marriage*

185. Alien women marrying Thai citizens acquire Thai nationality (section 8), and Thai women lose their nationality if, by becoming the spouse of an alien, they obtain the husband's nationality and have declared their intention to the Marriage Registrar of renouncing their Thai citizenship.

(iii) *Naturalization*

186. Aliens who have had their domicile in Thailand for a minimum of ten years may be naturalized, provided they fulfil the various conditions laid down by section 9

of the law. Children of naturalized citizens of Thailand may themselves become Thai citizens if they were of age when the father was naturalized. Thai nationality may be granted to them even although they have not been domiciled in Thailand for the period of 10 years specified in section 9 (section 10).

(c) *Loss of Thai nationality*

187. As has already been stated above (paragraph 185) a Thai woman, marrying an alien whose citizenship she thereby acquires, may lose her nationality by renouncing it (section 13). Persons born in Thailand to an alien father, who wish to acquire the father's nationality, may renounce their Thai citizenship, provided they submit an application to this effect between the ages of twenty and twenty-one (section 14). Furthermore, in accordance with section 15, persons having dual nationality may renounce their Thai citizenship if so authorized after application to the competent Minister, and persons born in Thailand to an alien father may also, as stated in paragraph 184 above, be deprived of that nationality under the conditions laid down by law.

188. Naturalization may be revoked, *inter alia* if there is evidence to show that the naturalized person still keeps his former nationality (section 18 (2)), or if the individual concerned has lived abroad for not less than seven years without maintaining a domicile in Thailand (section 18 (5)) or if he has maintained citizenship of a country at war with Thailand (section 18 (6)). A Thai loses his nationality by becoming naturalized in another country. Revocation may be extended to the wife and children of the individual concerned.

(d) *Resumption of Thai nationality*

189. Resumption of Thai nationality is a right (section 20)

1. If the applicant is a Thai woman whose marriage to an alien has been dissolved;
2. If the applicant was Thai by birth and lost his nationality during minority provided his application is made within two years of the date when he reached the age of majority.

(e) *Cases of dual or multiple nationality under Thai law*

190. Except in the case of loss of Thai nationality by a Thai citizen as a result of naturalization abroad, which automatically prevents such a person from possessing dual nationality (section 17), the law makes the loss of Thai nationality dependent on a manifestation of the will of the person concerned or on an act of the Thai Government. Thai law, therefore, offers no guarantee against the occurrence of dual nationality which might, consequently, exist with regard to the following categories:

(a) A person born to a Thai father outside the Kingdom in a country whose nationality is acquired *jure soli* (section 7 (1));

(b) A person born outside the Kingdom to a Thai mother and an unknown father (section 7 (2)), provided such person also acquires the nationality of the country of birth;

(c) A person born in the Kingdom to a Thai mother, if such person also acquires the father's nationality and is not registered as an alien in accordance with section 16 *bis*;

(d) An alien woman marrying a Thai, if she retains her nationality of origin (section 8);

(e) A naturalized foreigner who retains his nationality of origin, unless, as stated in section 18 (2), his naturalization is revoked for this reason;

(f) A Thai woman who has resumed her Thai nationality after the dissolution of her marriage to an alien, if she retains citizenship of her former husband's country (section 20 (1));

(g) A child born to a Thai woman outside the Kingdom in a country whose nationality is obtained *jure soli*;

(h) A person having dual nationality by birth who does not avail himself of his right to renounce Thai nationality, or does not obtain permission to do so;

(i) A Thai who, while still a minor, loses his nationality as a result of the naturalization of his father, if he is authorized by the Minister to resume his nationality of origin in accordance with section 20 without renouncing his acquired one.

191. Since, according to section 20, resumption of Thai nationality depends on a discretionary decision of the competent Minister, it may be assumed that permission will in general be refused if the persons applying therefore do not, at the same time, renounce or lose their acquired nationality.

2. *The Constitution of India (26 January 1950)*

(a) *General remarks*

192. Provisions concerning Indian nationality are embodied in the Constitution, which also contains special regulations concerning persons migrating to India from Pakistan and vice versa. These provisions, which refer to a peculiar and, presumably, transitory situation resulting from the separation of the subcontinent into two independent countries, will not be analysed here. It may, indeed, be presumed that once the populations concerned have been settled in the territory where they wish to reside permanently, new laws will be enacted and agreements concluded by the Governments concerned, with a view to settling outstanding problems regarding their respective citizens' nationality.

193. In contrast with Thai law, Indian law applies the *jus soli* principle.

(b) *How Indian nationality is acquired*

(i) *Birth*

194. Persons who were born on Indian territory are Indian citizens by birth, provided they have their domicile in the country (article 5a). Also Indian by birth are descendants of Indian parents or grandparents, who, while resident outside India, have been registered as Indian citizens with the appropriate Indian authorities abroad (article 8). Furthermore, persons either of whose parents were born in India or persons who were resident in India for at least five years prior to the entering into force of the Constitution are Indian citizens by birth, provided they have their domicile in India (article 5 (b) and (c)).

(ii) *Marriage, naturalization etc.*

195. The Indian Constitution contains no provisions concerning the acquisition of Indian citizenship by marriage or naturalization.

(c) *Loss of Indian nationality*

196. Only article 9 refers to this question. It stipulates that Indians who have *voluntarily*⁸⁷ acquired the citizenship of a foreign State lose their Indian nationality.

(d) *Cases of dual or multiple nationality under the Indian Constitution*

197. It is obvious that the provisions incorporated in the Constitution leave open numerous possibilities for the occurrence of dual nationality. Thus, any person born in India is Indian although he may also possess a second nationality *jure sanguinis*. A descendant of Indian parents or grandparents, born outside India but registered as an Indian citizen, will have dual nationality if he also possesses the nationality of his country of birth. This may be an important matter, since many Indians living outside India (for instance, in South Africa) may in this way acquire dual nationality, that of their country of birth and that of India.

198. In view of article 11 of the Constitution, which empowers Parliament "to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship", it would be premature, in the absence of more specific enactments, to draw far-reaching conclusions from the Constitution which clearly is merely the framework for future legislation on this important matter.

3. *Burma Independence Act, 1947*(a) *General remarks*

199. This Act delimits those categories of persons who, with the separation of Burma from the British Commonwealth of Nations, cease to be British subjects, and it indicates those who may become Burmese citizens. It does not provide for such matters as naturalization, marriage, nationality of aliens (non-British and non-Burmese) born in Burma, loss of Burmese nationality, or problems of a similar nature. It would appear, therefore, that this Act constitutes the framework in which the Burmese legislature will insert more detailed provisions concerning this important problem.

(b) *Who is and who ceases to be a Burmese citizen under the provisions of the Act*

200. Section 2 (1) of the Act stipulates that the persons specified in the First Schedule, being British subjects, shall "on the appointed day cease to be British subjects". According to the First Schedule, such persons are:

(i) Persons born in Burma or any person whose father or grandfather was born there;

(ii) Women who were aliens at birth and became British subjects by reason only of their marriage to the persons mentioned under subparagraph (i);

(iii) Persons born on a ship registered as Burmese.

(c) *Exceptions to these rules*(i) *Exceptions under the Act*

201. The Act establishes certain exceptions to the principle summarized in paragraph 200 above. These are:

(a) A woman married to a British subject before the appointed day will retain British citizenship, unless her husband ceases to be a British subject;

(b) Persons resident immediately before the appointed day in one of the British territories listed in section 2 (2) may, by a declaration within a specified period, elect to remain British subjects, and in that case they will be deemed never to have become Burmese citizens;

(c) A person who ceases on the appointed day to be a British subject, but was not resident in one of the British territories referred to in section 2 (2) of the Act, and who "neither becomes nor becomes qualified to become" a citizen of Burma, shall, however, have the right of election stipulated in section 2 (2) as described in sub-paragraph (b) above.

(d) The right to elect Burmese or British citizenship granted to persons described in sub-paragraph (c) above will also belong to such persons residing in "any part of his Majesty's dominions not mentioned in section 2 (2)".

(ii) *Exceptions under the Schedule*

202. The Schedule as well as the Act provides exceptions to the principle that any person born in Burma or whose father or paternal grandfather was born in Burma and any alien woman who has become a British subject by reason only of her marriage cease to be British subjects on the appointed day. These exceptions are:

(a) Any person born outside Burma in British territories specified in section 2 (1) of the Schedule, provided his father or grandfather was at some time before the appointed day a British subject;

(b) Any person who has become, or whose father or grandfather had become, a British subject by naturalization or by annexation of a territory outside Burma.

(d) *Provisions of the Act and of the Schedule from which dual or multiple nationality might result*

203. It appears from the foregoing analysis that the Act and Schedule make provision only for Burmese who are also or were at some time before the Act came into force British citizens. No conclusion, therefore, can be drawn from these texts as to the probable form which future Burmese nationality legislation will take or as to the solution which the Burmese legislature is likely to adopt with regard to the particular problem of dual citizenship.

4. *The Chinese law of nationality of 5 February 1929*(a) *General remarks*

204. Chinese legislation has followed the *jus sanguinis* principle, and the provisions of the relevant law are comparable to the nationality laws of European countries. Chinese law refers to the acquisition of nationality by birth, marriage or naturalization, to the loss of Chinese citizenship; and to the manner in which it may be resumed. For the purpose of the present enquiry, therefore, it may be sufficient to analyse this law very briefly.

(b) *How Chinese nationality is obtained*(i) *Birth*

205. Since Chinese law applies the *jus sanguinis*

⁸⁷ Emphasis added.

principle, Chinese nationality is obtained by birth in the following cases (article 1):

- (a) By a child whose father is a Chinese national;
- (b) By a *posthumous* child of a Chinese father;
- (c) By a child whose mother is Chinese, if the father is unknown or stateless;
- (d) By a legitimated child of a Chinese national;
- (e) By a child recognized by his Chinese mother, if the father is unknown or refuses to recognize the child.

(ii) *Marriage*

206. Marriage to a Chinese national bestows on an alien woman her husband's citizenship only if she does not retain her original citizenship.

(iii) *Naturalization*

207. Stateless persons and aliens in general may obtain Chinese citizenship by naturalization, provided they fulfil the various conditions laid down in the relevant provisions of the law, one of which is an uninterrupted domicile in China for at least five years, prior to the acquisition of Chinese citizenship. Naturalization will be facilitated in certain special cases enumerated in the law, for example, in the cases of aliens marrying a Chinese woman; aliens born in China; and the wife and minor children of a naturalized citizen. In this latter instance, however, naturalization will be granted only if the "law of the native country of his wife and children is not in conflict with such naturalization".

(c) *Loss of Chinese nationality*

208. Loss of Chinese nationality is incurred in the following cases :

- (a) A Chinese woman married to an alien may be allowed to renounce her Chinese citizenship;
- (b) An illegitimate child recognized by an alien father;
- (c) An illegitimate child not recognized by his father, or whose father is of unknown nationality, if his alien mother has recognized the child;
- (d) A Chinese who becomes naturalized in a foreign country may be authorized to renounce his Chinese citizenship.

(d) *Resumption of Chinese nationality*

209. Chinese law enables a number of categories of former Chinese citizens who have lost their nationality to recover it under certain conditions. The following are the categories of persons concerned:

- (a) A Chinese woman who had renounced her nationality because of her marriage to an alien, after the dissolution of the marriage;
- (b) A Chinese citizen who had renounced his nationality because of his naturalization by a foreign State, provided he takes up residence in China and is of good moral character. This does not apply to former Chinese citizens by naturalization.

(e) *Provisions from which dual or multiple nationality may arise*

210. It will be inferred from the preceding analysis that Chinese law takes certain precautions against the

occurrence of dual nationality. Nevertheless this condition will exist in the following cases:

- (a) A child born outside China to a Chinese national, if the child also acquires the nationality of the country of birth;
- (b) A child born posthumously to a Chinese father in a country the nationality of which is acquired by birth;
- (c) A child born to a Chinese woman and an unknown or stateless father outside China, provided the nationality of the country of birth is also acquired;
- (d) An illegitimate child born outside China to a Chinese father who recognizes the child, provided the child also has the nationality of his country of birth;
- (e) An illegitimate child recognized only by his Chinese mother, or one whose father is unknown, if the child is born outside China in a country the nationality of which is acquired by birth;
- (f) An alien who becomes the adopted son of a Chinese national and who retains his original citizenship;
- (g) A naturalized alien retaining his nationality of origin;
- (h) A Chinese woman who has renounced her nationality by reason of her marriage with an alien, if she recovers Chinese nationality after the dissolution of the marriage without losing her former husband's citizenship;
- (i) A Chinese citizen who, after renouncing Chinese nationality by reason of his naturalization in a foreign State, recovers it without losing his acquired citizenship.

IV. CONCLUDING REMARKS TO CHAPTER I

211. It may be inferred from the preceding analysis of various nationality laws that, whatever the provisions are, whether they are based on *jus sanguinis* or *jus soli* or a mixture of both, and whether or not the legislator has taken particular precautions, the existence of dual nationality is unavoidable under the present circumstances. As long as Governments maintain the principle stated in The Hague Convention of 1930 that "It is for each State to determine under its own laws who are its nationals", dual or multiple nationality is bound to arise. As for married women, dual nationality is a consequence of modern trends towards the legal equality of the sexes. Nor is it to be expected or even to be hoped that in the near future Governments will be eager to abandon the principle that legislation on nationality belongs to the *domaine réservé*. Present conditions would seem to indicate that States will wish to increase rather than relax their hold on their citizens. But even if all States were to adopt identical laws on nationality—it suffices to mention here the famous *Carlier case*⁸⁸—dual nationality would not necessarily be eliminated.

212. Dual nationality, is therefore, in the main, the consequence of conflicts of laws. To solve such conflicts, certain rules have been devised and adopted, either nationally or internationally: to analyse these rules and to indicate which solutions they envisage is the object of the following Chapter.

⁸⁸ See below, para. 214 and footnote.

Chapter II

Conflicts of laws and their solution on a national basis

I. THE MAIN CAUSES OF POSITIVE CONFLICTS OF LAWS

(1) *Indirect causes*

213. One of the main indirect causes of double nationality is the generally accepted principle of practically absolute State sovereignty in this field. If each State is entitled to determine under its own laws who are its nationals, subject only to the tenuous limitations imposed by international law discussed in the introduction to this study, then, indeed, Governments are free for various reasons to claim as their nationals persons who are also citizens of other countries. Among many others, Professor Pierre Louis-Lucas⁸⁹ is of opinion that there are two main indirect causes of multiple nationality: firstly, that there does not exist a uniform world régime apportioning individuals among various sovereign States; and, in the second place, that none of the various régimes is confined to an exclusive and distinct domain of application. If, indeed, citizenship could be obtained only as a result of the application of a unified system adopted by all States, cases of dual nationality could hardly occur. Nor would they be likely to arise if each of the many conflicting systems were limited in its application to a reserved domain, so to speak, each individual being a citizen only of the State with the strongest claim to his allegiance. Since this is not the case, and since the numerous systems under which citizenship is attributed are competitive, indirect causes of dual or even multiple nationality must inevitably exist.

(2) *Direct causes*

214. According to Professor Louis-Lucas,⁹⁰ there are three main direct causes of dual or multiple nationality:

(a) The primary and most important one is the "difference in inspiration" of domestic laws on nationality, some of which are based on *jus sanguinis*, others on *jus soli*. Thus a child born to parents from a *jus sanguinis* country in a State which applies *jus soli* will necessarily have dual nationality at birth, e.g., a child born to French parents in the United States.

(b) But conflicts are also possible between countries whose legislation is based on the same principles, for instance, if their laws admit a combination of *jus sanguinis* and *jus soli*. Examples of conflicts of this nature can be inferred from the laws analysed in Chapter I above. Thus, a child born in France to a British father and a French mother will have dual nationality.

(c) Finally, conflicts may also occur where legislation and regulations are identical. The *Carlier case* of 1881 is an example of this kind. At that time both French and Belgian law stipulated that a child acquires by birth his father's nationality. But they also provided that, if the father were an alien, the child, if a resident of the country of birth, could claim citizenship there. Car-

lier, born in Belgium to French parents, was French in accordance with the provisions of the French Civil Code. However, being born in Belgium he was allowed to opt for the Belgian nationality according to Belgian law, without losing his French citizenship by doing so. Had he been born in France to Belgian parents he might have opted for French citizenship without losing Belgian nationality. The conflict⁹¹ was due neither to a difference in the two sets of legislation nor to conflicting rules of application, but to the rigour with which both countries applied these identical rules.

215. Oppenheim outlines the main causes of positive conflicts of nationality as follows:⁹²

"As the Law of Nations has at present no generally binding rules concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation and cession, and as the Municipal Laws of the different States differ in many points concerning this matter, the necessary consequence is that an individual may possess more than one nationality as easily as none at all... Double nationality may be produced by every mode of acquiring nationality. Even birth can invest a child with double nationality... Double nationality can likewise be the result of marriage... Legitimation of illegitimate children can produce the same effect... Naturalization in the narrower sense of the term is frequently a cause of double nationality."

216. Makarov⁹³ explains that, since the discretionary power of States in the field of nationality is extremely wide, overlapping competence of several States concerning the same individual will in many instances exist, and sovereign States will be able to stipulate conflicting rules regarding acquisition and loss of nationality. As a consequence, the same individual may fulfil the conditions required by different States for possession of their respective citizenships. These are, according to Makarov, the main causes of the frequent occurrence of dual or multiple nationality. This divergence of legislative rules is, however, not the only cause of this phenomenon. Even where States pass identical legislation, conflicts may arise, especially if the law attributes to the manifestation of the will of the individual concerned certain legal consequences with respect to his nationality. Such a manifestation will produce legal effects only on the territory of the State where it occurred. As far as concerns the other State (with identical legislation) it will be irrelevant.

217. Marc Ancel⁹⁴ and Niboyet,⁹⁵ as well as other authors, explain in a similar manner the causes of dual nationality. Although, therefore, agreement on this point appears to be widespread, such is not the case with respect to the solution of conflicts of this nature

⁹¹ Carlier was listed as French and registered as such by the French military authorities. He was, therefore, considered a deserter in France, where he failed to comply with his military obligations. The conflict was later resolved by the so-called "Convention Carlier" of 30 July 1891, which stipulated that individuals possessing French and Belgian nationality were to be considered as having complied with their military obligations in both countries by serving in the Army of one of them.

⁹² *Op. cit.*, pp. 606-607.

⁹³ *Op. cit.*, pp. 278 ff.

⁹⁴ *Op. cit.*, pp. 19 ff.

⁹⁵ *Op. cit.*, pp. 522 ff.

⁸⁹ *Op. cit.*, pp. 6-7.

⁹⁰ *Ibid.*, pp. 7-10.

on a national basis. In the following section the solutions applied by various States or suggested by different authors will be briefly described.

II. SOLUTIONS OF POSITIVE CONFLICTS ON A NATIONAL BASIS

1. *When the person concerned is a national of the country exercising jurisdiction*

218. The general principle is that the *lex fori* prevails where questions have to be solved regarding the nationality of an individual claiming or possessing dual citizenship, when one of the nationalities claimed is that of the country concerned. As will be seen later, this principle was recognized in the course of the preparatory stages of The Hague Codification Conference of 1930. The first part of Point II of the Questionnaire entitled "Case of a person possessing two nationalities" is formulated as follows:

"The question may arise before the authorities and courts of a State which attributes its nationality to the person concerned. The first sentence of Article 5 of the preliminary draft drawn up in 1926 in the course of the discussions of the Committee of Experts for the Codification of International Law recognises the right of each State to apply exclusively its own law."⁹⁶

The consensus of opinion of the Governments consulted was unanimously in favour of adopting this principle. The Danish Government, however, added that modifications of this principle might nevertheless be useful or necessary. As finally adopted by The Hague Conference the principle was embodied in articles 2-4 of the Convention on Certain Questions relating to the Conflict of Nationality Laws.

219. The validity of these principles is recognized by the jurisprudence of many States,⁹⁷ and also by a majority of authors. A Venezuelan-American Mixed Claims Commission formulated the principle as follows:

"If this question of citizenship were brought before a court of Venezuela, it could not be decided otherwise than according to the Venezuelan Constitution, because only this law would have authority in that case to decide whether the above mentioned women ought to be regarded or not as citizens of Venezuela, and for the same reason, if it were raised before a court of the United States, it should have to be decided in accordance with the law of 1855".⁹⁸

220. It is obvious that, in practice, this principle may have serious consequences for the individuals concerned. Thus, a child born in France to an alien father and a French mother will be French, and, if the father's nationality also is acquired *jure sanguinis*, the individual concerned may be called upon to serve in the armies of both countries.⁹⁹

221. A further consequence of the principle is that connected questions have also to be solved by the *lex fori*. For instance, according to article 19 of the French Code de la nationalité, a child of an alien father and a French mother is French. He may, however, if born outside France, renounce his French nationality during the six months preceding his attaining the age of majority. If he wishes to exercise his right, the question is raised of the age at which he reaches majority, and it will be judged in France according to French law and not in accordance with the law of his father's country whose nationality he also possesses by descent.

222. It appears hardly possible to describe the principle outlined above as a "solution" of the conflict. While it underlines the rights of States and their sovereignty in this field, it does nothing to solve the problem of dual nationality as such but rather "organizes"¹⁰⁰ this legal situation in a manner which does not curtail the rights of the Governments involved.

223. It is, therefore, hardly surprising that criticism of the principle has been voiced from time to time and that even judicial authorities have not always conformed to it. Makarov cites a number of examples of such judicial decisions.¹⁰¹ Thus, the Swiss Federal Court, in a judgement dated 9 November 1934 concerning the guardianship of a person possessing dual nationality, stated that the rule according to which a person having nationality must be treated in each of the countries concerned as if he were its national, is to be applied only within certain limits. In cases involving guardianship of a person who claims or possesses dual nationality and is domiciled in one of the countries concerned, the fact of the domicile has to be taken into account, unless there exist specific rules dealing with this point in the other State, because guardianship is best regulated in the country where the person concerned usually lives. The same author also mentions a judgement of the Court of Appeal of Santiago of 17 July 1907 which declared that legislation on nationality must be interpreted even by the Court of the *lex fori* in accordance with general rules of international law, and that in the case under consideration Spanish nationality was to be preferred to Chilean.^{101a} In a judgement of 15 May/12 September 1908 the Chilean Supreme Court decided that Chilean legislative provisions on nationality were of an optional nature and that, consequently, a person having dual nationality might rightfully make a choice between them, even if one of the nationalities in question was that of Chile, and that such choice was legally binding on Chilean courts of law. On the strength of this principle it is recognized that the person concerned, who possessed British and Chilean nationality, was entitled to opt for the former.^{101a}

224. The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws also stipulates in article 4 that diplomatic protection shall not be afforded by a State to one of its nationals "against

different States try to solve this particular aspect of the question, as will be seen later.

¹⁰⁰ See Marc Ancel, *op. cit.*, p. 23: "Domestic laws, as we have seen, organize the conflict sometimes. More often they are satisfied with not preventing it." The meaning of this passage is not entirely clear.

¹⁰¹ *Op. cit.*, pp. 285 ff.

^{101a} *Ibid.*, p. 286.

⁹⁶ *Conference for the Codification of International Law, Bases of Discussion*, vol. I: Nationality, Publications of the League of Nations, V. Legal, 1929.V.I., p. 22.

⁹⁷ Makarov, *op. cit.*, p. 282, footnote 16, cites a great number of them.

⁹⁸ Quoted by Makarov, *op. cit.*, p. 283, footnote 17.

⁹⁹ However, a number of conventions concluded between

a State whose nationality such person also possesses". This again is a principle very widely recognized by Governments and may be considered to be a rule of international law. J. Mervyn Jones¹⁰² describes as follows the practice of the British Government in this respect:

"Where an applicant is of dual nationality there was formerly a practice that a passport should not be issued by a British Consul in the country of his second allegiance, but this practice is now obsolete. If the applicant is in the United Kingdom, a passport will not be refused on the ground of the applicant's dual nationality... If a British passport is issued to a dual national it does not generally bear a special endorsement, but the applicant is warned that if, by the laws of any foreign state, he is deemed to be a subject or citizen of that state, he will not be protected within that state."

225. While the replies of Governments to the request for information were not unanimously in favour of this principle, the rule as adopted by the Conference for the Codification of International Law appears to reflect clearly the view of the majority, namely, that diplomatic protection shall not be given by one State to an individual against a country of which he also is a national. The following rules seem, therefore, to be widely applied with regard to persons having dual nationality:

(a) That in cases involving the nationality status of a person claiming or possessing dual nationality, the *lex fori* will prevail, provided the person concerned is a national of the country exercising jurisdiction;

(b) That no State may afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

2. When the person concerned is an alien

226. The question is of a more complex nature when the person claiming or possessing dual nationality is not a national of the country exercising jurisdiction. The courts of these States may have to decide which of several nationalities they will recognize. Numerous and often divergent solutions are applied by various legislative systems, contained in treaties concluded between States or suggested by various learned authors.

(a) Solutions based on general considerations

(i) Application of the law of domicile or residence

227. Certain authors are of opinion that if an alien claiming or possessing the nationality of several States habitually resides in a country of which he is not a citizen, the law of his domicile should be substituted for the national law normally applicable. Thus, Niboyet¹⁰³ wrote:

"It might of course be maintained that this conflict can be resolved by holding that the two foreign nationalities, no political interest being involved, cancel out and that no account can be taken of them because they would have to be applied simultaneously. In such a case the national law on

personal status would be set aside, the law of domicile being substituted for it."

228. This solution, which would undoubtedly facilitate the task of the courts in the country of the *forum* and avoid the often delicate problem of applying the principles of a foreign legal system, may entail consequences for the persons involved too serious to be entirely acceptable.¹⁰⁴

(ii) Option of nationality by the alien concerned

229. Another solution proposed by a number of authors would leave it to the individual concerned to opt for one of the nationalities he possesses and, provided he proves that he does in fact possess this citizenship, his decision would be considered as binding for the authorities of the State exercising jurisdiction if he is not a national thereof. This solution was suggested by Great Britain at The Hague Codification Conference. In its reply to Point II No. 3, reproduced by the Preparatory Committee, the British Government stated:

"An individual of double nationality is, while in the territory of a third State, entitled, so far as he himself is concerned, to regard himself as of either nationality."¹⁰⁵

South Africa¹⁰⁶ expressed itself similarly; and so did Australia, New Zealand and India. But Belgium,¹⁰⁷ for instance, was not inclined to adopt this solution. The Belgian Government felt that it would encourage duplicity and fraud; that the person concerned might run the risk of losing one of his nationalities; and that "a choice made as before a third State does not bind the two countries of which the person concerned is a national. No solution of the question of double nationality can therefore be found in this method."¹⁰⁷

230. The main objection which may be raised against this solution is that to leave such option to the person concerned may lead to contradictory choices based entirely on reasons of expediency. By residing consecutively in several States of which he was not a national, he might, whenever expedient, choose, among his various nationalities the one most likely to be conducive to a satisfactory solution so far as he himself was concerned, of the matter at that moment under consideration. Far from introducing stability into his nationality status, this solution would perpetuate and impliedly approve a situation of uncertainty as to the nationality of such individuals.

(iii) Application of the law nearest to that resulting from application of the *lex fori*

230 *bis*. It has been further suggested that the authorities of the State seized of the problem should select from among the nationality laws which might be applicable to the person concerned the one which most

¹⁰⁴ For instance, a person may come of age in his own country at twenty-one, but in the country of the *forum* he might come of age at eighteen. He might then be allowed to dispose of his property under the *lex fori* by acts which might be considered null and void by the courts of the country of which he is a citizen.

¹⁰⁵ Conference for the Codification of International Law, *Bases of Discussion*, vol. I: Nationality, Publications of the League of Nations, V. Legal, 1929.V.I., p. 33.

¹⁰⁶ *Ibid.*, p. 30.

¹⁰⁷ *Ibid.*, p. 31.

¹⁰² *Op. cit.*, 290-291.

¹⁰³ *Op. cit.*, pp. 535-536.

closely approximates to that which would result from the application of the *lex fori*. It will not always be possible to find among the nationality laws applicable to the individual concerned one which will closely or even remotely approximate to the law of the third State concerned, and this objection alone is enough to lead to the rejection of this solution.

(iv) *Application of the law of the State to which the alien concerned is attached both by nationality and by domicile or residence*

230 *ter*. Other authors favour the application to the person having dual nationality of the nationality law of the State of which he is a citizen and where he has his domicile or, failing that, his residence. This solution would appear to be practicable in all instances where the individual concerned has in fact his domicile or residence in one of the States of which he is a national. In other cases it could not be applied. Moreover, the definition of "domicile" and "residence" varies, so that, even when the principle is applicable, the decision of the court might differ according to the country where it is located. Therefore, it would appear that domicile or residence in one of the States of which the individual concerned is a national can be only a subsidiary element of appreciation in determining which of his several nationality laws should be applied.

(v) *The date of acquisition of the nationalities claimed*

231. It has also been proposed to base the answer to the question of which nationality law to apply to an individual possessing several citizenships on the date of acquisition of these nationalities. Some favour the nationality at birth, contending that the individual concerned has an inalienable right to possess it; others express preference for the nationality acquired later, by naturalization, for instance, because the person concerned has by his expatriation shown his detachment from the nationality of origin. But this solution could not be applied in all those cases where two or more nationalities are acquired by birth, and the argument in its favour would not necessarily apply if, for example, a second nationality had been acquired by the mere fact of marriage or, in the case of an infant, by virtue of the naturalization of his parents.

(vi) *The effective nationality*

232. The effective nationality (*nationalité active*) was recommended by several delegations to The Hague Codification Conference as the solution least open to objection, although not applicable in all instances. The Court of the State seized of the matter would take into consideration not only the domicile but all other circumstances which would indicate the individual's real attachment, such as the holding of public office, compliance with military obligations, the language spoken, constant submission to the laws of one of the countries concerned in the accomplishment of juridical acts, and so on. The question would therefore, become one of fact rather than of legal theory, and would lead in most cases to an equitable and uniform solution.

233. Makarov¹⁰⁸ quotes the *Canevaro* case^{108a} in

which the Permanent Court of Arbitration, in an Award dated 3 May 1912, applied this principle. The Tribunal stated *inter alia* that, by virtue of article 34 of the Peruvian Constitution, Canevaro was a Peruvian national by birth, since he was born in that country; that he was also Italian, in accordance with article 4 of the Italian Civil Code, since his father was of that nationality; but that Canevaro had on various occasions acted as a Peruvian national, for instance, by being a candidate for election to the Senate, and more particularly by obtaining permission from the Government and Congress of Peru to exercise the functions of Consul General of the Netherlands. On these grounds, the Tribunal came to the conclusion that the Peruvian Government was entitled to consider Canevaro as a Peruvian national and to deny that he was an Italian claimant ["et de lui dénier la qualité de réclamant italien"]

234. More recently, an Award of the Franco-German Mixed Arbitral Tribunal, dated 10 July 1926,¹⁰⁹ declared that it could not adopt the system of the *lex fori* applied by national courts, but had to follow the general principles of private international law: and the principle of the effective nationality was considered by the Tribunal as an adequate basis for the solution of the conflict of law under consideration.

235. The principle was also adopted, as will be seen in the next Chapter, by The Hague Codification Conference, although with certain limitations.

(vii) *Cumulative effect of all nationalities claimed or possessed*

236. Some authors such as Louis-Lucas,¹¹⁰ mention the possibility of the court applying without discrimination the nationality laws of all countries of which the individual concerned is a national. This suggestion is based on the assumption that the foreign judge has no competence to make his own choice among them. "He must respect them all, sanction all rights, all obligations, which are proved to arise from a nationality which in fact belongs to the individual concerned", Louis-Lucas stated, but he added that this solution is not the real answer to the problem, since it would give rise to too many practical difficulties.

(b) *Solutions of special cases by convention or otherwise*

237. The solutions so far mentioned are all based on the assumption that the third State concerned is not limited by treaty in its choice among the various nationalities claimed or possessed by an individual in accordance with generally recognized principles of law. In many instances, however, States do not have this freedom of choice because of the existence of international agreements concluded with the country or countries of which the individual concerned is a national. If, for example such a person is the national of a State which has obtained by treaty or otherwise certain rights of settlement in favour of its citizens, such rights cannot be denied on the ground that the person is also a national of another State which has not concluded any convention relating thereto. The Anglo-

¹⁰⁸ *Op. cit.*, p. 296, footnote 56.

^{108a} The Award is printed in Scott, *The Hague Court Reports* (First Series), pp. 285 ff.

¹⁰⁹ Also quoted by Makarov, *op. cit.*, p. 297, footnote 57.

¹¹⁰ *Op. cit.*, p. 24.

German Mixed Arbitral Tribunal, formed after World War I, in a decision of 26 April/10 May 1922, granted to a person possessing British and German nationality the right to bring a claim under article 296 of the Treaty of Versailles. The Tribunal stated:

"The creditor had become a British national and... he has acquired the right to claim under art. 296... it is immaterial whether he has or has not lost his German nationality."¹¹¹

A similar decision was reached on 29 October 1924 by the Franco-German Mixed Arbitral Tribunal which attributed French nationality to a person possessing both French and Turkish citizenship.¹¹²

238. Niboyet¹¹³ distinguished between cases where French political interests are involved and others where, for instance, two foreign States are bound by a treaty concerning the nationality of their respective subjects. If no political interests of France are involved, the question might be solved in different ways, depending on the particular facts, so that one nationality might be recognized as appropriate to the individual concerned in one set of circumstances, his second nationality prevailing in another. If France is bound by treaty to one of the countries of which the person is a national, and there exists no such treaty with the other, the law of the former must prevail. In the case of two foreign States being under treaty obligations regarding the nationality of their respective subjects, the French authorities must recognize the nationality resulting from the agreement between the two foreign States.

3. Concluding remarks

239. As may be inferred from the preceding sections, no general solution of conflicts of laws has so far been evolved, with the exception of the tentative and limited proposals adopted by The Hague Conference for the Codification of International Law of 1930 which will be discussed in the next chapter. This is the logical consequence of the principle that legislation on nationality falls mainly within the *domaine réservé* of States. A distinction might, however, be made between those cases where the person concerned is also a national of the country exercising jurisdiction and those where he is an alien. It would appear that a general rule applicable to this second hypothesis, such as the principle of the effective nationality, would be acceptable to a majority of countries, and that its adoption might now be suggested.¹¹⁴ Although such a rule would not do away with dual nationality as such, it would facilitate equitable and uniform decisions in a great number of cases not settled by bilateral or multilateral treaties, and this in itself might be beneficial both to the States and to the individuals concerned.

Chapter III

Attempts to solve conflicts of laws on an international basis

1. Some examples of bilateral conventions

(a) Conventions settling one or more specific questions

240. When new States are formed by the secession of part of the territory of an existing one, the relevant treaty sometimes contains provisions concerning the nationality of the inhabitants of the seceding territory. One example of this is that of Burma which has been discussed above (paragraphs 199-203). Sometimes such provisions are made retroactive, as in the case of the American War of Independence. The United States Supreme Court, in a judgement dated 23 February 1808, assumed that the peace treaty of 1783 between the United States and Great Britain did not create but recognized the independence of the former, and, consequently, the Supreme Court granted retroactive force to the nationality laws of New Jersey, although these laws had been promulgated prior to the recognition of independence.¹¹⁵

241. Argentina and Spain settled the nationality questions concerning their respective citizens by a convention of 21 September 1863, article 7 of which stipulates that the High Contracting Parties, in order to determine the nationality of their respective citizens, shall observe in each country the relevant provisions of the Constitution and laws of that country.¹¹⁶ This treaty, by recognizing the *lex fori* principle constitutes a restriction on the unlimited application of *jus sanguinis*.

242. A similar agreement is contained in the exchange of notes between El Salvador and Spain of 15 June 1866,¹¹⁷ which contains the following stipulation:

"His Excellency the President of El Salvador has directed me to declare in his name... that he agrees that to determine the nationality of the children of Spaniards born in the territory of the Republic of El Salvador, and of the children of Salvadoreans born in Spain and her dominions, the provisions contained in their respective Constitutions and laws at present in force shall be observed".

243. Certain treaties give preference to one of the several nationalities possessed by the individuals concerned, without depriving them of any of these nationalities. Thus France and Argentina concluded a convention dated 26 January 1927 which stipulated with regard to individuals having dual French and Argentine nationality that such

"persons born on the territory of the Argentine Republic have discharged in France the obligations of military service in peace times that they would incur under the French law so long as they should

¹¹¹ Quoted by Makarov, *op. cit.*, p. 299, footnote 61.

¹¹² *Ibid.*, footnote 62.

¹¹³ *Op. cit.*, pp. 531 ff.

¹¹⁴ See also para. 232 above and para. 362 below.

¹¹⁵ *Mollvaine v. Coxés Lessec*, 4 Cranch 209; cited by Makarov, *op. cit.*, p. 178, footnote 7.

¹¹⁶ *Ibid.*, p. 134 and footnote 308.

¹¹⁷ See *A Collection of Nationality Laws of Various Countries as contained in Constitutions, Statutes and Treaties*, edited by R. W. Flournoy and M. O. Hudson (New York, Oxford University Press, 1929), p. 659.

have discharged the obligations placed upon them by the Argentine military law".¹¹⁸

244. Similar arrangements were agreed upon by France and Peru (16 March 1927) and by France and Paraguay (30 August 1927).^{118*} All these treaties contain a provision which states:

"The provision in this convention does not in any way alter the juridical status of the persons mentioned in the foregoing articles with regard to nationality."¹¹⁹

245. The same aim of avoiding dual military obligations was pursued by the so-called "Carlier Convention" concluded between France and Belgium on 30 July 1891, and replaced by the Franco-Belgian Convention of 12 September 1928. The latter stipulates that persons of French and Belgian nationality shall not be included in recruiting lists before reaching the full age of twenty-two.

246. Other conventions aim at regulating the question of dual nationality in general without, however, amending the respective nationality laws of the countries concerned. Two such conventions, namely those between Argentina and Spain and between El Salvador and Spain, have been mentioned above (paragraphs 241-242).

247. Other treaties deal with certain questions resulting from the naturalization by one of the contracting parties of the citizens of the other. An example of an agreement of this kind is the Franco-Swiss Convention, signed at Paris on 23 July 1879, which settled the nationality of children whose parents have become Swiss by naturalization. Such persons "shall have the choice in the course of their twenty-second year between the two nationalities, Swiss and French. They shall be regarded as Frenchmen until they have decided for the Swiss nationality."¹²⁰

(b) *The Bancroft treaties*

248. The most famous of the treaties which deal with the consequences of naturalization without, however, materially modifying the laws of the countries concerned, are the so-called "Bancroft treaties" concluded in 1868 between the United States on the one hand, and the North German Union and a number of other German States on the other hand. Although they have been abrogated as far as Germany is concerned by virtue of article 289 of the Treaty of Versailles, which abolishes all bilateral treaties between Germany and each of the Allied and Associated Powers, it may be worthwhile to summarize them here. The treaty with the North German Union stipulated *inter alia*:

"Article I. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States for five years, shall be held by the North German Confederation to be American citizens and shall be treated as such."¹²¹

A similar provision applied to American citizens naturalized in the North German Confederation. On the other hand, article IV contained provisions relating to such naturalized citizens returning for a certain period to their country of origin. It declared:

"If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States."

The same stipulation applied *mutatis mutandis* to American citizens naturalized in North Germany and returning to the United States.

249. The treaty does not supply any answer as to the questions whether such naturalized citizens have, by their naturalization, lost their original nationality, or whether they automatically re-acquire their former citizenship if they lose the second one in accordance with article IV quoted above.^{121*} No doubt this question had to be solved by each of the contracting States by the application of its own legislation, each State being free to determine who were and who were not its nationals.

250. Similar agreements were concluded between the United States and Bavaria, Hesse and Wurtemberg.

251. The Bancroft treaties have served as a basis for conventions concluded between the United States and other countries. A treaty signed at Brussels on 16 November 1868 between the United States and Belgium differs from the above in so far as it contains in article IV a provision which will avoid dual nationality in the case of persons of Belgian or United States nationality who lose their acquired citizenship through return to their home country. The provision reads in part, as follows:

"Citizens of the United States naturalized in Belgium shall be considered by Belgium as citizens of the United States when they shall have recovered their character as citizens of the United States according to the laws of the United States."¹²²

252. It will be inferred from this stipulation, which, *mutatis mutandis*, applied to Belgians, that citizens of the contracting parties lose their nationality of origin by naturalization in the other State, since they must recover it under their respective laws before they can again be considered by the other State as nationals of their country of origin. Dual nationality will thus have been avoided.

253. In a treaty concluded on 26 May 1869 between the United States, on the one hand, and Norway and Sweden, on the other, it was stipulated that a citizen of one of the contracting parties naturalized by the other must make an application to be restored to his former nationality if he wishes to recover it, after he has once more established residence in his country of origin, the Government of which may "receive him again as a citizen on such conditions as the said government may think proper".¹²³ A Protocol to this convention adds that a Swede or a Norwegian

¹¹⁸ *Ibid.*, p. 704.

^{118*} *Ibid.*, p. 704, footnote 2.

¹¹⁹ *Ibid.*, p. 705.

¹²⁰ *Ibid.*, p. 674.

¹²¹ *Ibid.*, pp. 660-661.

^{121*} See, however, para. 99 above, which summarizes the provisions of the law of 1913 with regard to the re-acquisition of German nationality by former German citizens.

¹²² Flournoy and Hudson, *op. cit.*, p. 667.

¹²³ *Ibid.*, p. 668.

naturalized in the United States who renews his residence in Sweden or Norway without the intention of returning to America "shall be held by the Government of the United States to have renounced his American citizenship". While dual nationality seems, therefore, to be avoided by this treaty, statelessness can be the consequence of the application of its article III, combined with the relevant provision of the Protocol.

(c) *Treaties regulating nationality in general*

254. While the Bancroft treaties and other similar instruments aim mainly at avoiding dual nationality, others again have the purpose of settling nationality questions in general between the contracting parties. An example of treaties of this kind is the Convention signed at Managua between Italy and Nicaragua on 20 September 1917.¹²⁴ Article I of this treaty stipulates that Italians residing in Nicaragua and Nicaraguans residing in Italy shall retain their respective citizenships and transmit them in accordance with the laws of their respective countries. This article, therefore, recognizes *ius sanguinis* as a guiding principle without changing the laws of the two countries. Other provisions however modify the respective laws of the contracting parties. Thus, the child born in Nicaragua of an Italian father who was not himself born in that country has the right to opt for the nationality of his country of birth within a year of his coming of age. The same applies *mutatis mutandis* to children born in Italy to Nicaraguan fathers. This right of option, which potentially avoids dual nationality, did not exist in the Italian nationality law of 1912 which was then in force. The Nicaraguan law admitted the option, but without the time-limit. Article IV deals with the naturalization of citizens of the contracting parties. Such citizens, after residing for two consecutive years within their country of origin, may be restored to their original citizenship. However, the Governments may invalidate this reinstatement during the six months following the completion of the two years' residence, Statelessness may arise from this provision. Other treaties, quoted by Makarov,¹²⁵ specifically aim at avoiding dual nationality. Thus the Treaty of Commerce signed between Germany and Honduras on 12 December 1887 stipulates that children of emigrants may maintain their nationality acquired *jure sanguinis*, provided they have complied with their military obligations in the country of origin of their parents within one year after coming of age. Otherwise this nationality is lost, but the citizenship obtained *jure soli* is retained. The descendants of such persons, however, acquire *ipso facto* the nationality of the country of birth. The Franco-Belgian Convention signed at Paris on 12 September 1928¹²⁶ aims at the prevention of dual nationality of Belgian women marrying French citizens or French women marrying Belgian citizens. In principle this convention stipulates the application of the respective national laws, with the proviso, however, that a French woman acquires by marriage celebrated in Belgium the status of a Belgian citizen, unless she declares within six months from the date of marriage her desire to retain French nationality. Dual nationality of such French citizens is avoided by this provision.

(d) *Peace treaties containing nationality provisions, in particular those of Versailles, St. Germain etc.*

255. Modern democratic tendencies have influenced the thinking of law and treaty-makers and have inclined them to take into account the will of the people concerned when changes of nationality occur as a consequence of modifications of the boundaries of States. Most treaties dealing with these matters contain provisions granting a right of option to the inhabitants of these territories. Thus, the Treaty of Frankfurt of 10 May 1871 between France and Germany granted to Alsatian citizens wishing to retain their French citizenship a right of option to this effect. In more recent times, the treaties concluded after World War I contained provisions concerning nationality as well as military service. Thus, article 278 of the Treaty of Versailles¹²⁷ obliged Germany to recognize the foreign nationality acquired by German citizens under the laws of the Allied and Associated Powers and to regard such persons "as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin". This provision, therefore, aimed at eliminating the dual nationality of former Germans by obliging Germany to renounce all claims to the allegiance of such persons.

256. Article 4 of the Treaty concluded at Versailles with the new State of Poland obliged that country to recognize as Polish citizens persons of German, Austrian, Hungarian or Russian nationality who were born on the territory of the newly created Polish State, but such persons had an option to renounce Polish citizenship within two years after the coming into force of the treaty.

257. The Treaty of St. Germain, signed on 10 September 1919,¹²⁸ contained similar provisions. According to article 64, Austria admitted as Austrian nationals all persons who, at the date of the coming into force of the treaty, possessed rights of citizenship within Austrian territory and who were not nationals of any other State, as well as (article 65) all individuals born on Austrian territory who were not born nationals of another State. Article 230 imposed on Austria the same obligation as was assumed by Germany in virtue of article 278 of the Treaty of Versailles, namely to recognize any new nationality acquired by her nationals under the laws of the Allied and Associated Powers and to liberate such persons from their allegiance to their country of origin.

258. Article 4 of the Treaty concluded at St. Germain with the Serb-Croat-Slovene State¹²⁹ bestowed rights of citizenship in the newly created Serb-Croat-Slovene State to persons of Austrian Hungarian or Bulgarian nationality who were born in the territory of that State to parents habitually resident or possessing rights of citizenship there. The right of option granted to Polish citizens by virtue of article 4 of the Treaty concluded at Versailles with Poland (see paragraph 256 above), was also accorded to such persons by the new Serb-Croat-Slovene State. Furthermore all persons born in that territory who had no other nationality became *ipso facto* citizens (article 6).

¹²⁴ *Ibid.*, pp. 686-688.

¹²⁵ *Op. cit.*, p. 140.

¹²⁶ Flournoy and Hudson, *op. cit.*, p. 706-7.

¹²⁷ *Ibid.*, p. 646.

¹²⁸ *Ibid.*, p. 647.

¹²⁹ *Ibid.*

259. Arrangements identical to those summarized above were included in the Treaty with Czechoslovakia signed on 10 September 1919 at St. Germain.¹³⁰ On the other hand, articles 51 and 52 of the Treaty of Neuilly of 27 November 1919¹³¹ contained no provision for option, and obliged Bulgaria to recognize as its nationals persons who were habitually resident in that country at the time of the coming into force of the treaty or who were born in Bulgaria, provided they were not nationals of another State.

260. Articles 4 and 6 of the Treaty of Paris concluded on 9 December 1919 with Rumania¹³² are identical to articles 4 and 6 of the treaties concluded with Czechoslovakia and the Serb-Croat-Slovene State (see paragraphs 258-259). The Treaty of Trianon, signed on 4 June 1920 with Hungary,¹³³ on the other hand declared that all persons possessing Hungarian citizenship at the date of its coming into force, as well as persons born in that territory, provided they were not nationals of another country, would *ipso facto* be considered as Hungarians. Hungary also recognized naturalization of her nationals under the laws of the Allied and Associated Powers (article 213).

261. The treaties concluded after the First World War between the Allies and their opponents, as well as with the successor States of the latter, attempted, as may be seen from the preceding paragraphs, to avoid cases of dual nationality arising as an aftermath of the political upheaval created by that world-wide conflict. Two main categories of provisions were included for that purpose:

1. A clause obliging the former enemy States and/or their successors to recognize as their nationals persons born on their territories or having rights of citizenship there, provided they were not nationals of another State; and
2. Provisions obliging the former enemies to recognize naturalization obtained by their citizens in accordance with the laws of the Allied and Associated Powers. Such individuals were considered as having, in consequence, severed their allegiance to their country of origin. This latter provision had the effect, in the case of Germany, of prohibiting the application to such naturalized citizens of the Allied and Associated Powers of article 25 of the so-called "Delbruck Law", which enabled German nationals to acquire a foreign citizenship by naturalization without thereby losing German nationality.

(e) *Conventions aiming at the elimination of multiple nationality concluded pursuant to the Treaty of Versailles*

262. While these various treaties laid down principles aiming to prevent the acquisition of dual nationality as a consequence of territorial upheavals following World War I, many extremely complicated problems had still to be settled between the German Reich and its neighbours. Attempts to arrive at acceptable solutions were made in a number of conventions, which cannot

be analysed in detail in the framework of the present study. All of them aimed at avoiding multiple nationality. Attention is drawn to the following:¹³⁴

1. The German Belgian Convention of 11 September 1922, relating to a right of option for German citizenship by persons who obtained Belgian nationality by virtue of article 36 of the Treaty of Versailles;
2. An agreement of 10 April 1922, concluded between Denmark and Germany concerning the application of articles 112 and 113 of the Treaty of Versailles, which accorded a right of option for Danish or German nationality, to persons born in the territories which became Danish by virtue of a plebiscite organized in execution of the relevant provisions of the Treaty of Versailles;
3. The Convention concluded between Germany and the State of Danzig concerning the application of articles 105-106 of the Treaty of Versailles, by virtue of which German citizens residing in the territory of that State lost German citizenship but could, within two years after the coming into force of the treaty, opt for German nationality;
4. The Treaty concluded on 8 May 1924/10 February 1925 between Germany and Lithuania, concerning the application of articles 8-10 of the Memel Convention of 8 May 1924, which stipulated *inter alia* that persons over 18 years of age, domiciled in the territories concerned since January 1920 acquired Lithuanian citizenship, unless they opted for German nationality within eighteen months after the ratification of the said convention;
5. The Convention between Germany and Poland of 30 August 1924 on nationality and option. Article 91 (3) accorded a right of option for German citizenship to persons over eighteen years of age domiciled in the territories ceded to Poland; and article 91 (4) bestowed the same right on Poles domiciled in Germany;
6. A similar agreement between Germany and Poland, dated 15 May 1922, concerning Upper Silesia;
7. The Treaty on nationality concluded on 29 June 1920 between Germany and Czechoslovakia. This treaty provided for the execution of article 3 of a Treaty on minorities, signed on 10 September 1919 between the Principal Allied and Associated Powers and Czechoslovakia, which recognized as nationals of the latter, German, Austrian and Hungarian citizens domiciled in the territory of that State on the date of the coming into force of the treaty. These persons, provided they were over eighteen years of age, had the right to opt for the nationality of their former home-countries. Article 4 of the treaty on minorities granted the same rights to German, Austrian and Hungarian citizens born on that territory of parents who had been domiciled or who had a right of settlement (*Heimatrecht*) there, even if no longer domiciled on the said territories or if they had lost their right of settlement on the day of the coming into force of the treaty. Such persons could renounce Czechoslovak citizen-

¹³⁰ *Ibid.*, p. 648.

¹³¹ *Ibid.*, pp. 648-649.

¹³² *Ibid.*, p. 649.

¹³³ *Ibid.*, pp. 649-650.

¹³⁴ Reproduced by Franz Massfeller, *op. cit.* Part. II.

ship within two years of the coming into force of the treaty.

263. All the conventions, treaties and agreements listed in paragraph 262 above aimed at avoiding cases of double or multiple nationality arising from the territorial changes following World War I. The method employed consisted in attributing to the populations involved the nationality of the successor State by operation of law and at the same time bestowing a right of option in favour of the original nationality on certain categories of these persons. From these provisions, combined with those of the various peace treaties, it may be concluded that cases of double nationality were eliminated because :

1. The inhabitants of the successor State acquired either *jure soli* or *jure sanguinis* the nationality of that State and lost their former one;
2. Those who exercised the right of option granted to them lost the nationality of the successor State and recovered their original one;
3. Naturalization by one of the Allied and Associated Powers led to the loss by the individual concerned of his former nationality.

Nevertheless, many litigious cases arose. They were submitted to and decided by Mixed Arbitral Tribunals set up after the war.

2. Multilateral Conventions

(a) Latin American Conventions

264. Efforts to cope with problems of dual nationality have been made on various occasions and, apart from The Hague Codification Conference of 1930, the results of which will be discussed later, Latin American countries have concluded a number of conventions which will now be summarily analysed. One of the first to deserve mention is the Convention signed at Rio de Janeiro on 13 August 1906.¹³⁵ Its provisions are based on the principles of the Bancroft treaties. Thus, article I establishes a presumption to the effect that a person naturalized by one of the contracting parties who had taken up residence again in his native country for more than two years (article II) will thereby have expressed the intention of resuming his original citizenship and renouncing that acquired by naturalization. The conferment of dual nationality by one of the contracting States on naturalized citizens of the other was thereby eliminated.

265. A further important step was taken by Latin American countries in the Convention signed at Havana on 20 February 1928, the so-called "Bustamente Code."¹³⁶ After declaring in article 9 (Title I, Chapter I, Nationality and Naturalization) that

"Each contracting party shall apply its own law for the determination of the nationality of origin of any individual... and of its acquisition, loss and recuperation thereafter, either within or without its territory, whenever one of the nationalities in controversy is that of the said State",

the Code establishes certain rules of conflict to be applied by the contracting parties. In the case of individuals possessing by origin several of the nationalities of the contracting parties, if the question is raised in a State which is not interested in it, the

"law of that of the nationalities in issue in which the person concerned has his domicile shall be applied" (article 10).

In the absence of such a domicile, the *lex fori* will govern (article 11). In questions concerning "individual acquisition of a new nationality" (article 12) and in cases of loss or resumption of nationality (articles 14-15), the laws of the nationality concerned will apply.

266. The Code, therefore, rather than attempting to eliminate dual nationality, lays down rules concerning the law which is to be applied by the contracting States in each of the situations envisaged.

267. Two further agreements concerning nationality questions were elaborated by the Seventh International Conference of American States, namely, the Convention on Nationality¹³⁷ and the Convention on the Nationality of Women.¹³⁸ Articles 1 and 5 of the former determine the effects of naturalization, which "carries with it the loss of the nationality of origin" (article 1) and "confers nationality solely on the naturalized individual". Article 6 stipulates that neither marriage nor its dissolution "affects the nationality of the husband or wife or of their children".

268. The Convention on the Nationality of Women contains only one substantive provision which determines that in the contracting States

"There will be no distinction based on sex as regards nationality in their legislation or in their practice".

(b) The Hague Conventions of 12 April 1930

269. The most important attempt to agree on principles governing nationality was undoubtedly the Conference for the Codification of International Law held at The Hague in 1930 under the auspices of the League of Nations. In a resolution adopted by the Assembly of the League on 22 September 1924,¹³⁹ the Council was requested to convene a Committee of Experts with a view to preparing, *inter alia*,

"a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment".

Nationality was first among the subjects adopted for this purpose by the Committee of Experts. It kept this place in the report submitted to the Council by the Foreign Minister of Poland, M. Zaleski, in June 1927. There can, therefore, hardly be any doubt that international codification of the law of nationality appeared to be "desirable and realisable" to the Governments concerned. But, in practice, the draft elaborated by Mr. Rundstein, Rap-

¹³⁷ *American Journal of International Law*, Supplement, vol. 28 (1934), pp. 63-64.

¹³⁸ *Ibid.*, pp. 61-62.

¹³⁹ *Committee of Experts for the Progressive Codification of International Law*, Report to the Council of the League of Nations, Publications of the League of Nations, V. *Legal*, 1927.V.1., p. 8.

¹³⁵ Flournoy and Hudson, *op. cit.*, p. 645.

¹³⁶ Reproduced in Harvard Research, *op. cit.*, pp. 114-115.

porteur of the Sub-Committee on Nationality avoided any definite answer to controversial questions of principle, and so in fact did the Conference itself.

270. In the Report submitted by Mr. Rundstein and approved by M. de Magalhaes,¹⁴⁰ the problem of dual nationality was mentioned in several connexions :

(a) It was stated that " international law has in practice established for the solution of two categories of conflict of nationality law rules which are almost universally recognised and adopted";^{140a} and these rules were described in the Report as follows :

" A. In cases in which a conflict of nationality arises out of divergencies in laws based respectively on the principles of *jus soli* and of *jus sanguinis*, the law which must be applied, to the exclusion of the other, must depend upon the domicile or mere place of residence of the person whose nationality is in dispute between the two States. That is to say, if a territorial authority claims that its *jus soli* must prevail over the *jus sanguinis* of the other State, the latter cannot claim recognition of its jurisdiction within the territorial limits of the State which applies the criterion of birth."^{140b}

Several exceptions, however, to this general rule were stated :

(i) " Such jurisdiction is excluded in matters of personal status and in matters of real property."^{140c}

(ii) "It is generally recognised that, in cases of double nationality, the diplomatic protection of the State of which a person is a national in virtue of *jus soli* may not be exercised on behalf of that person on the territory of another State which claims him as its national in virtue of *jus sanguinis*; and, *vice versa*, the diplomatic protection of the country of origin (*ex jure sanguinis*) may not be exercised on the territory of the country of birth of any person whose nationality is there governed by the principle of *jus soli*;"^{140d}

(iii) The principle of extritoriality, by virtue of which it would be " necessary to provide that the territorial law of nationality shall not apply to children born in a territory where their fathers enjoy privileges and immunities arising out of ex-territoriality, or where they exercise public duties on behalf of a foreign government";^{140e}

(iv) " Even if the father does not enjoy diplomatic immunities and privileges, it would be fair to apply the principle of ex-territoriality to the children of consuls who are members of a regular consular service, of consular officials and, generally speaking, to the children of all foreign officials who do not possess diplomatic status, if they have taken up their temporary residence in a country enforcing *jus soli* in order to carry out an official mission recognised and permitted by the government of that country."^{140f}

¹⁴⁰ *Ibid.*, pp. 9-21. Mr. Rundstein later submitted a Supplementary Note, *ibid.*, pp. 22-24. M. Schucking submitted Observations regarding this Report, *ibid.*, p. 25, to which Mr. Rundstein replied, *ibid.*, p. 26.

^{140a} *Ibid.*, p. 10

^{140b} *Ibid.*

^{140c} *Ibid.*

^{140d} *Ibid.*

^{140e} *Ibid.*, p. 11.

^{140f} *Ibid.*, p. 12.

271. A second category of problems to which Mr. Rundstein felt that solutions capable of reducing or even eliminating conflicts of nationality might be found, concerned the questions of the acquisition, change, loss and resumption of nationality. Thus, in the case of foundlings and children born to parents of unknown nationality, *jus soli* should apply unless proof justifying the application of *jus sanguinis* could be found. In all other cases of acquisition of nationality *modo originario*, Mr. Rundstein declared that no general principles had so far been evolved by international law, but he suggested that if dual nationality resulted from the concurrent application of *jus sanguinis* and *jus soli*, an option should be allowed for the *jus soli* nationality, excluding its operation where it was contrary to the law of the country of origin, or, alternatively, a rule allowing repudiation of a nationality acquired by birth in a *jus soli* country should be permitted. Mr. Rundstein was, however, not very hopeful that these principles could find universal application, and he suggested a rule for the solution of conflicts arising from subsisting divergencies of national laws. This rule was to the effect that, in a third State called upon to decide upon the validity of one of two nationalities,

" The principle of alternative nationality might be adopted, making the decision dependent upon one only of the two factors determining nationality, namely, that of domicile in one of the two countries, or — in the case of a person who is domiciled in neither of the two countries of which he is a national — the last domicile."^{140g}

272. As for dual nationality resulting from naturalization, if the State of origin did not release the individual from his allegiance, the Rapporteur thought that the following principles might be universally adopted to avoid its occurrence :

1. Naturalization to be granted only upon proof that the applicant has been released from his original allegiance;
2. Such proof is not required if the country of origin adheres to the principle of perpetual allegiance, or if the applicant proves that refusal to grant release from such allegiance as based on unreasonable grounds; and
3. Renunciation by the naturalizing State of the right to extend diplomatic protection to the naturalized citizen as against the State of which he was formerly a national, if release was refused on the grounds stated in (2) above.

273. As for resumption of nationality by persons who have lost their original citizenship by reason of acquiring another, the Rapporteur thought that no rules concerning such resumption would be universally acceptable with regard to minors or persons who have renounced a foreign nationality which they obtained by naturalization.

274. In the case of a child who acquired his father's nationality by legitimation, Mr. Rundstein proposed that such acquisition should be permissible only where

" the law of the State to which the child belonged

^{140g} *Ibid.*, p. 14.

before regards legitimation by a foreigner as a special ground of loss of nationality".^{140b}

This rule was also to be applied *mutatis mutandis* in cases of recognition of illegitimate children.

275. The propositions summarized above were incorporated in the preliminary draft convention, as amended as a result of discussion by the Committee of Experts and submitted by Mr. Rundstein on 26 January 1926.

276. In its first report¹⁴¹ submitted to the Council, the Preparatory Committee for the Codification Conference, which had met in Geneva at the beginning of 1929, examined the replies made by Governments to the request for information which had been addressed to them, and drew up Bases of discussion for the use of the proposed conference. The Preparatory Committee considered these Bases not as proposals, but as the result of its study of the Government replies and of its endeavour to harmonize the views therein expressed. The Bases were accompanied by Observations of the Committee, containing the Committee's explanations regarding them.

277. The Bases of discussion and the pertinent replies of governments are, as far as dual nationality is concerned, presented in "Point II. Case of a person possessing two nationalities", and they comprise Bases of discussion Nos. 3-5. Right of option in case of double nationality forms the subject of Basis of discussion No. 15; the effect of legitimation is the subject of Bases Nos. 20 and 20 *bis*, the effect of adoption that of Basis No. 21; naturalization that of Bases Nos. 6 and 6 *bis*; and the effects of naturalization upon the nationality of minors that of Bases Nos. 7-9.

278. The request for information addressed to Governments distinguished three cases regarding persons possessing double nationality, the first of which referred to the right of each State to apply exclusively its own law if the individual concerned possessed the nationality of that State. There was no substantial disagreement on this principle and Basis of discussion No. 3 was drafted as follows:

"A person having two nationalities may be considered as its national by each of the two States whose nationality he possesses."¹⁴²

279. The second question submitted to Governments concerned the right of diplomatic protection exercisable on behalf of a person having dual nationality, and in particular whether such protection may be exercised

"as against a State of which the person concerned has been a national since his birth, or as against a State of which he is a national through naturalization, or in which he is domiciled or on behalf of which he is or has been charged with political functions. Or, finally, is the admissibility or inadmissibility of the exercise of diplomatic protection as between the two States governed by other considerations capable of being formulated?"^{142a}

280. The replies received were not in absolute agreement with one another:

(a) Some excluded any exercise of diplomatic protection in the case in question. For instance, the German Government stated that "the right of diplomatic protection cannot in any case be exercised on behalf of a person with double nationality by one of the States concerned as against the other";^{142b}

(b) Other replies excluded diplomatic protection only where it would be exercised against the State in which the person concerned is habitually resident;

(c) Others, such as Belgium, would have given the exclusive right of protection to that of the two States where the individual concerned had his residence. The reply of the Belgian Government stated:

"the person in question can only *actively exercise* the nationality of the country in which he actually and habitually resides. By settling in one of the two countries he has, to a certain extent, spontaneously *manifested* his preference for that country, and hence that country alone should extend its protection to him";^{142c}

(d) Other States admitted the right of protection under all circumstances. Thus, Denmark was of opinion that

"the exercise of such protection would in many cases be equitable... In short, it is doubtful whether a State should be required in advance to relinquish the right to intervene, if necessary, on behalf of one of its subjects."^{142d}

281. As a result, Basis of discussion No. 4 was formulated as follows:

"A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses. Alternative: Add to the above text the words: 'If he is habitually resident in the latter State.'"^{142e}

282. The third request for information addressed to Governments concerned the case where the question of dual nationality is raised in a third State. The following hypotheses were considered:

(a) Whether preference should be given to the nationality which corresponds with the domicile of the person concerned; or

(b) To the nationality which corresponds with the person's habitual residence; or

(c) To the nationality last acquired; or

(d) Whether account should be taken of the person's own choice; or

(e) Whether preference should be given to the one most closely resembling the law of the third State itself; or

(f) Whether some other element of the case should determine which nationality is to prevail.^{142f}

283. Most of these points have already been discussed in some detail in Chapter II of the present study.

^{140b} *Ibid.*, p. 18.

¹⁴¹ *Conference for the Codification of International Law, Bases of Discussion*, vol. I: Nationality, Publications of the League of Nations, *V. Legal, 1929.V.1.*, pp. 5-6.

¹⁴² *Ibid.*, p. 25.

^{142a} *Ibid.*

^{142b} *Ibid.*

^{142c} *Ibid.*, p. 26.

^{142d} *Ibid.*

^{142e} *Ibid.*, p. 30.

^{142f} *Ibid.*

It will, therefore, suffice here to note that the Observations of the Preparatory Committee¹⁴³ expressed the view that the replies on this point were somewhat divergent, but that these divergences seemed capable of reconciliation

“ if it is agreed that there would be advantages in possessing on the point in question a fixed rule which would henceforth be generally accepted ”.

284. The Observations also made reference to the necessity of distinguishing between the case where the application of the law of nationality is necessary to determine an individual's personal status and where it is a question of one of the other consequences of nationality. In the former hypothesis it was deemed necessary to have an objective criterion independent of arbitrary choice. Several of these were listed:

1. The criterion of habitual residence in one of the two States concerned in preference to that of domicile;
2. Failing habitual residence, the State with which the person was in fact more intimately connected.
3. For purposes other than personal status, the person's own choice might be the determining factor.

285. Consequently, Basis of discussion No. 5 was framed as follows :

“ Within a third State : (a) as regards the application of a person's national law to determine questions of his personal status, preference is to be given to the nationality of the State in which the person concerned is habitually resident or, in the absence of such habitual residence, to the nationality which appears from the circumstances of the case to be the person's effective nationality : (b) for all other purposes, the person concerned is entitled to choose which nationality is to prevail; such choice, once made, is final.”^{143a}

286. The next point considered by the Preparatory Committee in connexion with dual nationality was the effect of naturalization on the nationality of origin of the individual concerned. In order to avoid the occurrence of double nationality in such cases, it appeared necessary to the Committee to agree that, by naturalization in a foreign State, the former nationality or nationalities of the naturalized person should automatically disappear.

287. However, then, as now, there was not complete unanimity on this point. The request for information addressed to the Governments on the occasion of The Hague Conference propounded the following hypothetical questions in this respect (Point III. Loss of Nationality by Naturalization Abroad and the Expatriation Permit):^{143b}

1. (a) Does loss of nationality result directly from naturalization in the foreign country; or (b) is it the authorization to renounce the former nationality which causes that nationality to be lost, and, if so, how and at what date?
2. Is there an exact correspondence between the loss of the former nationality and the acquisition of the new one by naturalization, especially as regards the date?
3. If such correspondence does not exist, is it desirable to establish it by international convention?

288. The replies received from Governments indicated the existence of great diversity among the various legal systems. Thus, the United States held¹⁴⁴ that, according to statutory provisions then in force, loss of original nationality resulted directly and unconditionally from naturalization in a foreign country. France¹⁴⁵ shared this point of view, subject, however, to restrictions concerning the fulfilment of military obligations by the individual concerned. Hungary¹⁴⁶ declared that its nationality could only be lost “ by release from allegiance, by decision of the proper authority, by absence, by legitimation and by marriage ”.

289. In its Observations on this point, the Preparatory Committee declared *inter alia*:

“ An important advance would be made if States agreed to recognise that, in principle, the voluntary acquisition of foreign nationality should involve the loss of the former nationality.”¹⁴⁶

In the case of persons not satisfying the requirements prescribed by law for loss of a State's nationality as a consequence of acquiring a foreign one, the system of expatriation permits was still held to be useful.

290. Basis of discussion No. 6 formulated the point as follows :

“ In principle, a person who on his own application acquires a foreign nationality thereby loses his former nationality. The legislation of a State may nevertheless make the loss of its nationality conditional upon the fulfilment of particular legal requirements regarding the legal capacity of the person naturalized, his place of residence, or his obligation of service towards the State; in the case of persons not satisfying these requirements, the State's legislation may make the loss of its nationality conditional upon the grant of an authorization.”¹⁴⁶

291. In case the above Bases of discussion were not adopted, the Committee proposed tentatively Basis No. 6 *bis*, according to which

“ a release from allegiance (expatriation permit) does not entail loss of nationality until a foreign nationality is acquired.”¹⁴⁶

292. The effect of the naturalization of the parents upon the nationality of their minor children is relevant for the purpose of the present study only so far as concerns rules regulating the avoidance of dual nationality of such children through acquisition of a new citizenship by their parents. The Observations¹⁴⁷ of the Preparatory Committee made it clear that it is generally recognized that naturalization of the parents involves that of unmarried minors living with their parents. Certain legal systems, however, recognize this principle only with certain exceptions. Consequently, Basis of discussion No. 7 was formulated as follows :

“ Naturalization of parents involves that of their children who are minors and not married, but this shall not affect any exceptions to this rule at present contained in the law of each State.”

¹⁴⁴ *Ibid.*, p. 38.

¹⁴⁵ *Ibid.*, p. 39.

¹⁴⁶ *Ibid.*, p. 44.

¹⁴⁷ *Ibid.*, p. 50.

¹⁴³ *Ibid.*, p. 35.

^{143a} *Ibid.*, p. 36.

293. The question was also raised whether minors should lose their nationality of origin as a result of the naturalization of their parents. Certain legal systems make the loss of nationality conditional upon the *voluntary* acquisition of a new one. The Committee felt that children should lose their former nationality by naturalization only if, in that case, the parents also lost theirs. Consequently, Basis of discussion No. 8 stated the principle involved as follows :

“ Naturalization of the parents causes children who are minors and not married to lose their former nationality if the children thereby acquire their parents’ new nationality and the parents themselves lose their former nationality in consequence of the naturalization.

“ A State may exclude the application of the preceding provision in the case of children of its nationals who become naturalized abroad if such children continue to reside in the State.”¹⁴⁷

294. To prevent children of parents naturalized abroad from becoming stateless, Basis of discussion No. 9 added :

“ When naturalization of the parents does not extend to children who are minors, the latter retain their former nationality.”¹⁴⁷

295. The application of *jus soli* to children of foreign officials on official mission in countries applying that principle was dealt with under Point V. Some countries wished to limit the rule that *jus soli* should not apply to such children, at least not automatically, to those born to persons enjoying diplomatic privileges and immunities. Others wanted to extend it to the children of all foreign officials, provided they were exercising official functions on behalf of a foreign Government. Some, finally, were in favour of granting such children the right to opt for the nationality of their country of birth.

296. Basis of discussion No. 10¹⁴⁸ was, therefore, formulated as follows :

“ Rules of law which make nationality depend upon the place of birth do not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs. The child will, however, be entitled to claim to come within the provisions of the law of the country to the extent and under the conditions prescribed by that law.

“ The same principle shall apply : (1) to the children of consuls by profession; (2) to the children of other persons of foreign nationality exercising official functions in the name of a foreign government.”

297. The case of children born to parents merely passing through foreign territories showed the great divergences existing among the various legal systems. *Jus sanguinis* countries considered that no problem was involved for them; certain *jus soli* countries granted their nationality to such children if other factors (e.g., residence during a certain time) accompany birth on that territory; others, while making the acquisition of nationality conditional only upon birth on their territory, tended to avoid dual nationality by granting a possibility of option to the individual concerned. The point was not, therefore, retained for discussion.

298. Point X dealt with the right of option in case of double nationality. The replies to the request for information showed a substantial divergence of views:^{148a}

(a) Certain countries thought that the solution of the problem of dual nationality consisted in granting to the person concerned an opportunity of renouncing one nationality;

(b) Others considered that the right to renounce should apply only to the nationality acquired *jure soli*;

(c) Others pointed to the dangers which might arise from the granting of such right of option to the person concerned;

(d) Others thought that, if double nationality were regarded as a serious inconvenience, not only should the right of option be recognized, but the person concerned should have the duty to opt under the conditions laid down by law;

(e) Others, finally, doubted the possibility of settling the question by a general provision.

299. Consequently, Basis of discussion No. 15 was formulated as follows :

“ Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person of double nationality may, with the authorisation of the Government concerned, renounce one of his two nationalities. The authorisation may not be refused if the person has his habitual residence abroad and satisfies the conditions necessary to cause loss of his former nationality to result from his being naturalized abroad.”^{148b}

300. Point XIV deals with the effect of legitimation upon nationality. An illegitimate child may have acquired a nationality at birth and may obtain, through legitimation, the nationality of the parent concerned. In that event he would have dual nationality, unless he lose his original one.

301. The replies received from Governments showed a measure of agreement to exist with regard to the proposition that legitimation should confer the father’s nationality upon the child. There was less agreement as to the effect of recognition. Basis of discussion No. 20, therefore, took account only of legitimation, and it was formulated as follows :

“ Legitimation by the father of an illegitimate child who is a minor and does not already possess the father’s nationality gives the child the father’s nationality and causes it to lose a nationality which it would previously have acquired by descent from its mother.”^{148c}

302. Adoption, a less serious and less frequent problem, was dealt with in Basis of discussion No. 21, which stated :

“ In countries of which the legal system admits loss of nationality as the result of adoption, this result shall be conditional upon the adopted child acquiring the nationality of the adoptive parent.”^{148d}

This negative formulation had been proposed because Governments hesitated to bind themselves as regards the

^{148a} *Ibid.*, pp. 80 ff.

^{148b} *Ibid.*, p. 87.

^{148c} *Ibid.*, p. 111.

^{148d} *Ibid.*, p. 116.

¹⁴⁸ *Ibid.*, p. 56.

acquisition of nationality as a consequence of adoption. It may, however, be inferred that it was the opinion of the Preparatory Committee that the original nationality should be lost if a person obtained by adoption the nationality of the adoptive parent.

303. The Bases of discussion submitted to The Hague Codification Conference as summarized above did no more than outline a system tending towards the elimination of dual nationality, or, at least tending to diminish its effects. In Basis of discussion No. 3 the principle is maintained that each State determines who are its nationals and that, consequently, a person having two or more citizenships may be considered as its national by each of the States concerned. But the proposals subsequently endeavour to limit the effects of such dual nationality by determining that one of the States of which the individual concerned is a national may not afford diplomatic protection to such a person against the other (Basis of discussion No. 4), and by indicating which of the two nationalities should be given preference within a third State, if the problem arises there (Basis of discussion No. 5). Finally, such persons should have, in accordance with Basis of discussion No. 15, the right, under certain conditions, to renounce one of his nationalities; and *jus soli* should not apply automatically to children or foreign agents (Basis of discussion No. 10). Much more far-reaching are the proposals concerning the effects of voluntary acquisition of a foreign nationality, which also recommend the loss of the nationality of origin in such cases (Basis of discussion No. 6) for minor children naturalized with their parents who obtain their parents' new nationality. Legitimation and adoption were treated in a similar manner (Bases Nos. 20, 20 *bis* and 21).

304. Other proposals concerned the effects of marriage and of the dissolution of marriage upon the nationality of the wife. Others, again, dealt with the avoidance of statelessness. They are omitted here for the reasons stated in the introductory part of this survey.

305. Despite the fact that they were not far-reaching and that they in no way attempted to eradicate double nationality in the very frequent cases where more than one citizenship is obtained by birth, these proposals were discussed very extensively and in great detail at the meetings of the First Committee.¹⁴⁹ During the discussion two States, Finland and Sweden, made proposals designed to reduce the cases of multi-nationality¹⁵⁰ acquired at birth. These proposals were combined in the following amendment:

" If a person possessing, from birth, the nationality of two or more States, has been habitually resident in one of them up to an age to be determined by the law of the other State but not exceeding 23 years, he shall lose the nationality of the latter. That State, however, may grant him the right to retain its nationality, if he has, beyond all doubt, manifested his attachment to the State in question.

" The provision of the preceding paragraph does not apply to a married woman, if her husband is not liable to lose his nationality under the terms of this provision. "

¹⁴⁹ *Acts of the Conference for the Codification of International Law*, vol. II: Minutes of the First Committee, Publications of the League of Nations, *V. Legal, 1930.V.15*.

¹⁵⁰ *Ibid.*, pp. 284, 294.

306. The amendment was not adopted. The principal agreement reached bears the title: " Convention on Certain Questions relating to the Conflict of Nationality Laws." ¹⁵¹ The Convention is divided into six chapters, the first of which lays down certain guiding principles. Thus, article 3 determines that, with regard to multiple nationality,

" a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses ".

307. Article 4 reproduces the proposals of the Preparatory Committee with regard to diplomatic protection, and article 5, with slight amendments, re-states those concerning the nationality which is to prevail if the question is raised in a third State. Article 6, also with slight drafting changes, re-formulates those concerning the right to renounce one of the nationalities involved which is to be granted to a person possessing two nationalities acquired without any voluntary act on his part.

308. Chapter II deals with expatriation permits, chapter III with the nationality of married women, and chapter IV with the nationality of children. Article 12 reproduces in substance the provisions proposed by the Preparatory Committee with regard to children born to officials while on a mission abroad. Article 13 re-states the rules concerning the effects of naturalization of the parents on the nationality of minor children. Article 16 deals with the effects of legitimation, and article 17 (chapter IV) with those of adoption, in the manner suggested by the proposals of the Preparatory Committee.

309. One of the additional protocols adopted, the Protocol relating to Military Obligations in Certain Cases of Double Nationality,¹⁵² aims at averting consequences prejudicial to the individual possessing dual nationality with regard to his military obligations under the laws of the States concerned. The convention lays down that :

(a) Persons of dual nationality residing in one of the countries concerned with which they are in fact most closely connected, shall be exempt from military obligations in the other country or countries (article 1);

(b) If, under the law of one of these States, such persons have the right to renounce that nationality, they shall be exempt there from military service during their minority (article 2);

(c) If a person has lost the nationality of one State and has acquired that of another one he shall be exempt from military obligations in the former (article 3).

310. The Conference also made certain recommendations with regard to the problem of multiple nationality,¹⁵³ including the following :

" III

" The Conference is unanimously of the opinion... that States should, in the exercise of their power of

¹⁵¹ *Acts of the Conference for the Codification of International Law*, vol. I: Plenary Meetings, Publications of the League of Nations, *V. Legal, 1930.V.14*, pp. 81 ff.

¹⁵² *Ibid.*, pp. 95 ff.

¹⁵³ *Ibid.*, pp. 163-165.

regulating questions of nationality, make every effort to reduce so far as possible cases of dual nationality...

“ IV

“ The Conference recommends that States should adopt legislation designed to facilitate, in the case of persons possessing two or more nationalities at birth, the renunciation of the nationality of the countries in which they are not resident, without subjecting such renunciation to unnecessary conditions.

“ V

“ It is desirable that States should apply the principle that the acquisition of a foreign nationality through naturalisation involves the loss of the previous nationality.

“ It is also desirable that, pending the complete realisation of the above principle, States before conferring their nationality by naturalisation should endeavour to ascertain that the person concerned has fulfilled, or is in a position to fulfil, the conditions required by the law of his country for the loss of its nationality.”

311. The Hague Conventions, perhaps because of their limited scope, have exercised a certain influence on nationality legislation in many countries. They have done no more than outline a basic legal theory in the matter, and one may say that the general principles they lay down confirm rather than limit the discretionary power of States to legislate in the field of nationality and, thereby, to determine who are and who are not their nationals and how citizenship is obtained, lost and recovered in each of them.

3. *Proposals of non-governmental organizations and/or institutions to eliminate multiple nationality*

312. The problem of dual nationality had for a long time, even before The Hague Codification Conference, occupied the minds of distinguished scholars and it has been studied by private organizations interested in the development of international law. Resolutions aiming at a solution of the problems resulting from multiple nationality have been published by conferences of such private organizations. To complete this survey, some of the more important results of these conferences and studies are summarized below.

(a) *Outlines of an international code by David Dudley Field*¹⁵⁴

312 *bis*. As early as 1876 David Dudley Field published the outlines of an international code which contained detailed rules concerning nationality, some of which also referred to the problem of dual citizenship. The draft gives preference to the *jus sanguinis* principle. It suggests that a legitimate child, wherever born, shall be a member of the nation of which its father at the time of its birth was a national (article 250). It also lays down that “ no person is a member of two nations at the same time ”, and that a second nationality may only be attributed by another nation to a person with his

consent (article 248). The *jus soli* principle applies to a legitimate child born in the territory of a State where his father was born who does not have the nationality of that State (article 251). An illegitimate child acquires his mother's nationality; but, if he is recognized by the father, the latter's nationality prevails (articles 252-254). Naturalization and the right to expatriation are admitted (article 266), and the former involves loss of the original nationality (articles 268-272).

(b) *Resolutions of the Institute of International Law, Venice, 1896*¹⁵⁵

313. The suggestions made to Governments in the resolutions adopted in 1896 by the Institute of International Law follow closely those summarized in paragraph 312 *bis* above. They also would apply *jus sanguinis* to legitimate children who would acquire the father's nationality. So, too, would illegitimate children recognized by the father during their minority, but, if the mother were the first to recognize them, they would acquire her nationality and would retain it even if subsequently recognized by the father. Nationality *jure soli* would be attributed in the second generation to children born to an alien father himself born in the territory concerned, subject, however, to certain conditions of residence. Naturalization of the father would imply that of minor children, who would, however, retain the right to opt for their former nationality within one year of reaching the age of majority. Naturalization could be granted only if the applicant had been released from his original allegiance or if, at least, he had advised his country of origin of his intention and, as the case might be, complied with his military obligations.

(c) *Report of the Committee on Nationality and Naturalization, adopted by the International Law Association, Stockholm, 9 September 1924*¹⁵⁶

314. Contrary to the proposals summarized above, the International Law Association gave preference to the *jus soli* principle. It also devised two sets of rules — a model statute to be incorporated into municipal law, and certain contractual provisions to be recommended for insertion in an international convention, the latter being rules of conflict.

315. All municipal laws should, according to these proposals, attribute their nationality *jure soli*, unless the father, being a national of another State, has, within a specified period, registered the child as the national of the State to which he belongs, the child having the right to opt for the *jus soli* citizenship within one year after attaining the age of twenty-one. Legitimation should not affect the nationality of the legitimated person, unless such person was stateless before legitimation. Naturalization was to be conferred upon request of the applicant only, and it entailed that of his minor children.

316. The rules of conflict to be inserted into an international convention would prescribe that a person having dual nationality who resided on the territory of one of the States concerned would be treated as the

¹⁵⁴ Reproduced by Harvard Research, *op. cit.*, pp. 115-117.

¹⁵⁵ Reproduced *ibid.*, p. 118.

¹⁵⁶ Reproduced *ibid.*, pp. 119-121.

national of that State only; and, if he resided within the territory of a third State, the principle of effective nationality was to apply to such a person.

(d) *Draft rules prepared by the Kokusaiho Gakkwai in conjunction with the Japanese Branch of the International Law Association*¹⁵⁷

317. This organization suggested in article 1 of its draft that, as a general principle, every person should possess one and only one nationality. To implement this principle, it prescribed that residence alone, however permanent, should not be considered as a ground for attribution of the nationality of the State concerned (article 3). Consequently, *jus sanguinis* would apply to legitimate children, who would acquire at birth the father's nationality; and the same would apply in the case of legitimated children who, before legitimation, would have the mother's citizenship (article 4). However, nationality obtained *jure soli* was to be recognized by all States, the person concerned having the right to opt for the father's or mother's nationality within a fixed period after attaining majority, provided he had established residence in the State concerned (article 5). Freedom to change nationality was recognized (article 2), subject to conditions which might be imposed by the State of which the individual concerned was a national before his naturalization. Naturalization of the husband was to be extended automatically to the wife, unless she declared her intention to retain her former nationality, and to the minor children (who would acquire the citizenship of the mother, if she alone were naturalized). Such naturalized children had the right to opt for their nationality of origin within a fixed period after attaining majority (article 7).

(e) *Resolutions adopted by the Institute of International Law, Stockholm, 1928*¹⁵⁸

318. These resolutions added, *inter alia*, to those adopted by the Institute in Cambridge (1895) and Venice (1896) a general principle prohibiting the enactment of rules entailing dual nationality, provided other States applied identical provisions. Naturalization was to be granted only upon application of the individual concerned. It could, however, be imposed after a certain period of residence in the State concerned, the person in question retaining the right to opt for his nationality of origin.

(f) *Proposals by the Harvard Law School, Research in International Law*¹⁵⁹

319. On 1 April 1929 the Harvard Research in International Law published a draft convention on The Law of Nationality. The reasons for this work and its purpose are stated in the "Introductory Comment"¹⁶⁰ which includes the following passage:

"Nationality has no positive, immutable meaning. On the contrary its meaning and impact have changed with the changing character of States... It may acquire a new meaning in the future as the result of further changes in the character of human society and

developments in international organization. Nationality always connotes, however, membership of some kind in the society of a state or nation . . . The accompanying draft convention is based upon the assumption that States, while retaining their power to shape their own nationality laws to fit their peculiar situations and needs, will be willing to make certain changes and concessions with a view to removing some of the existing conflicts and to preventing, so far as possible, cases of double nationality and of no nationality. Therefore, the draft, while in some of its provisions it declares what is believed to be existing international law, is not limited to a statement of existing law and attempts to formulate certain provisions which, if adopted, would make new law."¹⁶⁰

320. With regard to dual nationality, the suggestions contained in the draft are of a limited nature. In article 3, *jus soli* as well as *jus sanguinis* are recognized as a juridical means of conferring nationality at birth upon a person; all other means are, however, excluded. *Jus sanguinis* and *jus soli* were held by the Comment to be legitimate grounds for the acquisition of nationality at birth. It follows therefrom that the existence of dual nationality at birth is admitted by the authors of the draft convention, and the corresponding rule is expressed as follows in article 10:

"A person may have the nationality at birth of two or more states, of one or more states *jure soli* and of one or more states *jure sanguinis*."^{160a}

321. The reasons for the adoption of this principle are stated in the Comment to article 3:

"Though the convention has been drafted with a view to abolishing dual nationality where practicable, it must be realized that the complete elimination of dual nationality at birth would require the adoption of a uniform rule and the consequent elimination of either *jus soli* or *jus sanguinis*. In view of the historical antecedents of the two bases and the fact that each is now embedded in the laws and constitutions of many states, the elimination of either seems impracticable at the present time."¹⁶¹

The Comment further states that seventeen nationality laws are based solely on *jus sanguinis*, two equally upon *jus soli* and *jus sanguinis*, twenty-five principally upon *jus sanguinis* but partly upon *jus soli*, and twenty-six principally upon *jus soli* and partly upon *jus sanguinis*. "Therefore", the Comment adds,

"it is apparent that international law has not adopted either system to the exclusion of the other. Nor does there seem to be in the existing international law any provision for preferring one to the other as the basis of nationality."¹⁶²

This statement would appear to apply also to the present-day situation.

322. In the Comment to article 10, the text of which is reproduced in paragraph 320 above, it is suggested that if it were possible to adopt a single rule for the attribution of nationality at birth, the one proposed by Vattel might be acceptable, namely, that

¹⁵⁷ Reproduced *ibid.*, pp. 123-124.

¹⁵⁸ Reproduced *ibid.*, pp. 125-126.

¹⁵⁹ *Ibid.*, pp. 22-79.

¹⁶⁰ *Ibid.*, pp. 21-22.

^{160a} *Ibid.*, p. 38.

¹⁶¹ *Ibid.*, p. 28.

¹⁶² *Ibid.*, p. 29.

" by the law of nature alone, children follow the condition of their fathers... But I suppose that the father has not entirely quitted his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become a member of another society, at least as a perpetual inhabitant and his children will be members of it also ".¹⁶³

323. The principle suggested by Vattel has been embodied in article 4 of the draft convention.¹⁶⁴ the purpose of which is to limit the application of *jus sanguinis* to a certain period of time. The article declares, indeed, that nationality at birth (*jure sanguinis*) may not be conferred

" upon a person born in the territory of another state, beyond the second generation of persons born and continuously maintaining an habitual residence therein, if such person has the nationality of such other state ".

324. The rule thus proposed did not state the existing international law but suggested

" a change in the existing law which will reconcile the interests of the states whose nationals have emigrated and the interests of the states to which they have immigrated."¹⁶⁵

325. Article 5¹⁶⁶ admits without limitation, except for children born to aliens who enjoy diplomatic immunity, the principle of *jus soli*; and article 6¹⁶⁷ suggests that States should provide a procedure whereby a child born to an alien official not having diplomatic immunity may be divested during minority of the nationality acquired by birth in an alien country through the application of appropriate procedures promulgated by the State of birth.

326. Article 8¹⁶⁸ proposes that illegitimate children should follow the mother's nationality (*jure sanguinis*), but, if subsequently legitimated by an alien father during minority, they should obtain the father's citizenship unless they reside, at the time of legitimation, in the territory of the State of which the mother only is a national.

327. The purpose of article 11¹⁶⁹ of the draft is to avoid the consequences of dual nationality with regard to the military obligations of the individual concerned in both States of which he is a national. Such a person

" shall not be subject to the obligation of military or other national service in one of these states while he has his habitual residence in the territory of another of these states ".

It may be asked whether this provision provides an effective guarantee against the evil it aims to avoid. Such persons may, for instance, be obliged to give up habitual residence in one of the States concerned and take up residence in a third State while they are still subject to military obligations. They might then be compelled, despite that rule, to comply with their

military duties in both States of which they are nationals.

328. Article 12,¹⁷⁰ however, would, in most cases, avoid the consequences stated above by introducing the principle of effective nationality. According to this provision dual nationality obtained at birth would subsist only up to the age of twenty-three. At that time the individual concerned would retain only the nationality of the State where he then had his habitual residence, and, if at such time he resided in a country of which he was not a national, he would retain citizenship only of that one of those States of which he was a national where he last had his habitual residence. The article does not deal with the case of an individual with two or more nationalities but with no " habitual " residence in one of the States concerned.

329. Article 13¹⁷¹ determines that naturalization by a foreign State shall entail loss of the nationality of origin; and article 14¹⁷² prescribes that " a state may not naturalize an alien who has his habitual residence within the territory of another state ". Minors may be naturalized as a consequence of the naturalization of the parents (article 15): an alien of full age, however, may not be naturalized without his consent.¹⁷³ Article 16¹⁷⁴ confers upon the State of origin the right to re-impose its nationality upon a former citizen naturalized by a foreign country, provided the individual concerned has established a permanent residence in his country of origin. The nationality acquired by naturalization would thereupon be lost.

330. Other provisions of the Harvard Research draft deal with fraudulently procured certificates of naturalization (article 17), annexations of territories and their consequences with regard to the nationality of the inhabitants (article 18), the retention of their nationality of origin by women marrying an alien (article 19), and the right of re-entry into the territory of the State of which an individual is or was a national (article 20). Article 21 authorizes the conclusion of special agreements by States parties to the convention, and article 22 contains an arbitration clause.

331. The system recommended by the Harvard Research draft, if adopted, would doubtless have the effect of reducing the number of cases of dual nationality. While admitting dual nationality at birth, it

(a) *Limits to the second generation the transmissibility of nationality jure sanguinis* to persons born outside their home country whose family has continuously maintained residence abroad;

(b) *Excludes from jus soli* children of foreign officials having diplomatic immunity, and suggests for children of other foreign agents that a procedure be provided by which they may be divested of the nationality obtained *jure soli*;

(c) *Avoids dual nationality in the case of legitimated children* by conferring upon them the nationality of the mother or of the father only, as the case may be;

¹⁶³ Vattel, *Law of Nations* (Chitty's edition), p. 102; Harvard Research, *op. cit.*, pp. 38-39.

¹⁶⁴ *Ibid.*, p. 30.

¹⁶⁵ *Ibid.*, p. 31.

¹⁶⁶ *Ibid.*, p. 32.

¹⁶⁷ *Ibid.*, p. 33.

¹⁶⁸ *Ibid.*, p. 35.

¹⁶⁹ *Ibid.*, p. 40.

¹⁷⁰ *Ibid.*, p. 41.

¹⁷¹ *Ibid.*, pp. 44-45.

¹⁷² *Ibid.*, p. 51.

¹⁷³ *Ibid.*, p. 53.

¹⁷⁴ *Ibid.*, p. 55.

(d) *Reduces existing cases* by introducing the principle of effective nationality by virtue of which one of the two nationalities possessed would be extinguished upon the individual concerned attaining the age of twenty-three;

(e) *Eliminates dual nationality* in case of naturalization, and in the case of resumption of the original nationality by a citizen who had been naturalized abroad and has taken up, after naturalization, his permanent residence in the country of origin.

Chapter IV

Discussion of procedures which would eliminate dual and multiple nationality

1. Elimination of future cases

(a) General remarks

332. The problem of multiple nationality and the disadvantages it entails from the point of view of States as well as from that of the individuals concerned has occupied the minds of scholars, statesmen and legislators for a considerable time. Numerous proposals to eliminate dual nationality or to limit its effects, some of which have been reviewed in the course of this survey, have been elaborated and discussed in legal literature, in meetings of private organizations and at international conferences. Some progress has been made in this field, especially as a result of The Hague Codification Conference and the Conventions, Protocols and Recommendations it adopted. However, the question is far from being solved, and, presumably, it will not be settled as long as nationality is considered to be a problem properly belonging to the *domaine réservé* of sovereign States. In studying appropriate solutions, it is hardly possible to refer to generally accepted principles of international or even municipal law,¹⁷⁵ with the exception, perhaps, of the Universal Declaration of Human Rights which proclaims in article 15, "as a common standard of achievement" to be attained, that

"(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."¹⁷⁶

333. These principles do no more than state in general terms the proposition that possession of a nationality and the faculty to change it are human rights. They leave open the question of dual nationality, although they imply that the exercise of the right to *change* nationality must be conducive to renunciation by the individual concerned of the nationality he wishes to give up. Clearly, however, it is technically possible to devise rules which would, if generally adopted, lead to the elimination of future cases of dual nationality. Such rules must comprise common principles of legislation referring to such matters as

¹⁷⁵ One can hardly say that either "*jus sanguinis*" or "*jus soli*" is a "general principle" accepted by international law. They are, at most, convenient rules of thumb for the attribution of nationality at birth in accordance with the policies adopted by States in this field.

¹⁷⁶ It is appropriate to recall, however, that the Declaration is not juridically binding upon States.

acquisition of nationality at birth, naturalization, nationality of married persons, legitimation and adoption.

334. A number of authors have made suggestions concerning the elimination of dual nationality by the adoption of common principles. Thus Professor Pierre Louis-Lucas¹⁷⁷ would give preference, in connexion with the acquisition of nationality at birth, to the *jus sanguinis* principle because "the legal nationality must find its ultimate origin in the sociological nationality". Normally preference should be given to the father's nationality; and only if this cannot be ascertained should that of the mother prevail. These rules would also apply to legitimated, illegitimate and adoptive children. *Jus soli* would intervene only in two ways: as a secondary principle; when its application appears preferable to that of *jus sanguinis*, for instance, in the case of a person born in a foreign country where his family has been established for two generations; and as a subsidiary criterion, when it is impossible to ascertain the nationality *jure sanguinis*. A change of nationality would be admitted in Professor Louis-Lucas' system by way of naturalization, resumption of nationality or marriage, but in each of these hypotheses the other nationality would automatically be lost.

335. Mr. Marc Ancel,¹⁷⁸ on the other hand, did not believe that dual nationality would be entirely eliminated, and he suggested instead that certain rules of conflict might be adopted and applied by States in such a situation. He agrees with the majority of authors that, if the case is raised in one of the countries concerned, the law of that State must necessarily prevail, unless Governments are willing to limit their exclusive competence by permitting their nationals to claim effectively, even on their territory, the possession of a second nationality. He proposes to define the notion of the "State concerned" by ruling that this conception would apply only if the individual possesses the nationality of that State by virtue of a law enacted prior to the conflict. It would also apply to matters within the jurisdictional competence of the tribunals of that State, which implies that international judicial organs would retain their competence to decide the conflict objectively, if it were raised before them, in the same way as a judge of a third country. In order to reduce the number of conflicts as far as practicable, a wide right of option or of renunciation would be granted to the individuals concerned. In a third country, the author would prefer, for cases of nationality obtained at birth, that the effective nationality should prevail; and, in the case of acquisition of a second nationality by a manifestation of the will of the individual, that this latter citizenship should alone be taken into consideration by the body before which the matter is raised.

336. In a recently published study on the problem of dual nationality and its solution in a particular country (Switzerland),¹⁷⁹ the author, while stating that dual nationality is, at present, an undeniable fact, suggests certain rules of conflict to be applied to such

¹⁷⁷ *Op. cit.*, p. 62.

¹⁷⁸ *Op. cit.*, pp. 37-40.

¹⁷⁹ Frédéric-Henri Hool. *Les effets de la double nationalité en droit suisse* (Neuchâtel, Griffon, 1949), pp. 9-16.

situations. He gives preference to the principle of effective nationality, because it is susceptible of universal application. He therefore recommends that, if the individual concerned is domiciled in one of the countries of which he is a national, the law of that State should prevail until such time as the individual establishes a domicile in the second State of which he is a national. If he is domiciled in a third State, the effective nationality should prevail and should be determined by taking into account a number of factors, such as the language spoken, the country where military service was performed, the passport carried, and so on. If the person concerned had several *domiciles*, or none at all, the *habitual residence* should be taken into account.

(b) *Discussion of rules aiming at the elimination of dual and multiple nationality*

337. The foregoing review has clearly shown that, because of the diversity of municipal laws, dual nationality is not likely to be eliminated in the near future by agreement among a majority of States. Such agreement would, indeed, suppose the adoption of a convention or conventions embodying common principles in a field where States, for seemingly valid reasons, wish to uphold the principle of national sovereignty. The purpose, therefore, of discussing in the following sections rules which would achieve the elimination and/or reduction of multiple nationality is to outline the *technical* possibility of achieving this aim by the adoption of common rules and procedures in this field by the international community of States. Either *jus sanguinis* or *jus soli*, if universally applied, would, in fact, eliminate multiple nationality. There is, however, little likelihood that a majority of States would be inclined to adopt exclusively either one or the other of these rules as the basis of their nationality laws; but it seems not entirely improbable that they might agree to universal application of the principle of effective nationality which, while admitting dual nationality until the individual concerned has reached the age of majority, would eliminate it thereafter. In the following sections solutions based on these rules will be briefly discussed.

(i) *Acquisition of nationality at birth, or by legitimation or recognition*

338. The main cause of the problem is, of course, the diversity of rules resulting in the acquisition of more than one nationality at birth by individuals fulfilling the conditions prescribed for such acquisition by several municipal laws. Thus, according to article 19 of the French Code de la Nationalité, a child born in France to a French mother and an alien father is French, even if the child also acquires the father's nationality; a child born in Great Britain to foreign parents whose nationality he obtains at birth *jure sanguinis* will also be a citizen of the United Kingdom, in accordance with the provisions of section 4 of the British Nationality Act, 1948. In this latter example, two conflicting rules, *jus sanguinis* and *jus soli*, are at the root of this anomalous situation.

339. As repeatedly stressed in this survey, neither conventional nor customary international law provides a remedy. Thus, in accordance with article I of The Hague Convention, each State determines under its own laws who are its nationals, other States being under an obligation to recognize the relevant enactments.

340. It follows that the elimination of dual nationality could be achieved, by the adoption of a common rule for the attribution of nationality at birth, whether based on *jus sanguinis* or *jus soli*. Nevertheless, whatever the rule adopted, its rigid enforcement might lead to undue hardship or anomalies, and some exceptions should therefore also be universally recognized.

341. Thus, if *jus sanguinis* were selected as the guiding principle, the following restrictions on its application might, for instance, be accepted:

(a) If the person concerned has been born in a country of which he is not a national *jure sanguinis* and has been a resident of that country for a certain period, he should have the right to opt for the nationality of his country of birth, after the age of twenty-one;

(b) The exercise of this option would entail the loss of the nationality acquired *jure sanguinis*;

(c) Normally the child would follow his father's nationality with the right to opt for that of the mother upon attaining the age of majority, provided certain conditions of residence in the country concerned were fulfilled. If born in the country of which his mother is a national, however, he would acquire the mother's citizenship with the right to opt for that of the father upon attaining the age of majority, provided he has been living in the country concerned for a certain period prior to that date;

(d) Foundlings, children of stateless persons, and persons whose nationality cannot be ascertained, would acquire the nationality of the country of birth, in order to avoid statelessness;

(e) Nationality should not be transmitted *jure sanguinis* beyond the second generation.

342. An international convention dealing with the question of dual nationality on this basis might state in its first article the guiding principle, namely, that nationality at birth is acquired *jure sanguinis*. Dealing with legitimate children, it would declare that a child acquires his father's nationality. In order to take into account the principles embodied in the draft convention on Nationality of Married Women regarding the transmission of nationality to children from either the father or the mother, on the basis of equality,¹⁸⁰ a provision might be added to the effect that the child would obtain at birth the nationality of the mother, provided the parents have at that time their habitual residence in the country of which the mother is a citizen.

343. Similar rules would obtain *mutatis mutandis* in the case of a child born out of wedlock. Such persons would at birth acquire the mother's nationality. However, if subsequently recognized by the father, or legitimated by the marriage of the parents, they might retroactively acquire the father's nationality, unless at the relevant period the parents have their habitual residence in the country of which the mother is a national.

344. A right of option might be granted to persons in the situation described above. By exercising it when reaching the age of twenty-one, they would renounce

¹⁸⁰ See para. 4 above, and document E/1712, para. 34.

the nationality acquired *jure sanguinis* in favour of citizenship of the country of birth. This right could be exercised only if the individual concerned had his habitual residence in the country of birth for at least one year prior to attaining the age of majority.

345. These provisions might be completed by stipulating that renunciation of the nationality acquired *jure sanguinis* would entail automatic acquisition of the *jus soli* citizenship, and that if this right were not exercised the *jus sanguinis* nationality would be retained, unless changed by way of naturalization in some other country. It might also be useful to add that, according to the above principles, nationality will not be transmitted *jure sanguinis* beyond the second generation of persons born and continuously maintaining an habitual residence in a State of which they are not nationals. Such persons would have the nationality of their country of birth.

346. Finally, the usual rules concerning the nationality of foundlings might be incorporated in such a convention. The rules applying to a legitimate child could be made applicable to a foundling subsequently recognized or legitimated by the parents.

347. The principles shortly summarized above would, if adopted by a sufficient number of States, eliminate both double nationality caused by acquisition at birth of more than one citizenship and statelessness, since every person would acquire at birth one, and only one, nationality. In this way account would be taken of the views expressed, for instance, by the Belgian Government in its reply to Questionnaire No. 1 submitted to Governments prior to the convening of The Hague Conference of 1930.¹⁸¹

348. In some cases anomalies and hardships might be avoided by granting to the person concerned, under certain well defined conditions, the right to renounce a nationality obtained *jure sanguinis* and to acquire that of the country of birth. Normally, indeed, a person raised and educated in the country of his birth will have stronger ties with that country than with the one of which his parents are nationals. An opportunity would thus be given to such persons to express by a manifestation of their will the preference they may wish to give to one of the two nationalities which they possess either by tradition or by birth.

349. Complete realization of the desiderata expressed by the Commission on the Status of Women with regard to "the transmission of nationality to children from either the father or the mother on the basis of equality", would encounter major difficulties.¹⁸² Normally, if only for practical reasons, a child will follow the nationality of the father. To grant the right to choose the nationality of the mother, as well as the right to opt for the nationality of the country of birth, would bestow on such persons three potential citizenships, and by doing so, further increase the uncertainty of their nationality status until they reach the age of majority.¹⁸³ An undesirable element of nationalistic competition might thus be introduced into the family. Nothing would prevent States on

the other hand, from granting naturalization facilities to an individual whose mother has continuously maintained citizenship of the country concerned from the time of the child's birth until the date of the application for naturalization. It seemed, however, normal to bestow the nationality of the mother on a child born to her in her own country, even if the father possessed a different citizenship.

350. It might be argued that, by the method proposed here, an element of uncertainty would be introduced into the status of a person born in a country other than that of which his parents are nationals. But this uncertainty ceases to exist at the age of majority, that is to say, when the individual concerned begins to exercise his full political and civil rights in his capacity as a member of a national community. Prior to that period he will not normally have to make far-reaching decisions involving his allegiance to one of the countries concerned; and should he be compelled to do so, he is most likely to retain, when the time to opt comes, the citizenship of the country towards which allegiance was thus expressed. It may be added that uncertainty as to nationality status is much greater under present conditions, where dual nationality can be retained throughout a person's life and may even be transmitted to his descendants. The solution here suggested would not allow such a situation to arise. Finally, it may be recalled that a number of Governments at the occasion of the examination of Point X of the Bases of discussion drawn up for The Hague Codification Conference, felt that to grant to the individuals concerned a right to opt would be a proper means of solving the problem of dual nationality.¹⁸⁴ Thus, the Union of South Africa stated :

"Under the Union Act No. 18 of 1926, the exercise by a person of an option of adopting one nationality is achieved by declaring alienage, the effect of which is to divest himself of his British nationality."¹⁸⁵

Belgium¹⁸⁶ cited article 18 (I), paragraph 2, of the law of 15 May 1922 which enables a person who acquired a foreign nationality by operation of law to make a declaration renouncing Belgian citizenship. The Belgian Government added :

"If this system were extended and could be applied to the case of all persons possessing double nationality, the difficulties now experienced would disappear."

The Danish Government¹⁸⁷ was of opinion that

"when a person possesses special qualifications, for example birth in conjunction with sojourn, entitling him to nationality in the country of birth, he should be given the option of renouncing that right in due course if he possesses the nationality of another State".

351. While other examples could be drawn from the same source, it will be sufficient to recall that a number of recent nationality laws recognize a right of option in cases of dual nationality. The above-quoted

¹⁸¹ See para. 41 above.

¹⁸² See para. 4 above, and document E/1712, para. 34.

¹⁸³ But nothing would prevent states from extending the right to opt (described in para. 348), to include the mother's nationality, if this were considered a desirable solution.

¹⁸⁴ See para. 289, sub-para. (a) above.

¹⁸⁵ *Conference for the Codification of International Law, Bases of Discussion, vol. I: Nationality, Publications of the League of Nations, V. Legal, 1929.V.I., p. 80.*

¹⁸⁶ *Ibid.*, p. 82.

¹⁸⁷ *Ibid.*

provisions of the Code de la Nationalité française¹⁸⁸ might be mentioned in this connexion, as well as section 19 of the British Nationality Act, 1948, which enables persons of dual nationality to make a declaration of renunciation registrable by the Secretary of State, whereupon "that person shall cease to be a citizen of the United Kingdom and Colonies". It may also be recalled that section 350 of Public Law 414 of the United States deprives of United States citizenship a person who acquired at birth both the nationality of the United States and that of a foreign State if such a person has "voluntarily sought or claimed benefits of the nationality of any foreign state".

352. The same result, namely, the elimination of dual nationality, may also be achieved by universal adoption of rules based on the *jus soli* instead of the *jus sanguinis*. Its rigid implementation, also, should be limited by certain qualifications and conditions. In particular, the parents of a child born while they are resident in a foreign country should have the right to register the child as a national of their own State, but this right should not extend beyond the second generation. The child himself should be allowed (but again, not beyond the second generation) to renounce the citizenship obtained at birth *jure soli* in favour of that of one of the parents, or that of the parents bestowed on him by registration, and thus to re-acquire that of the country of birth. Similar provisions would apply, *mutatis mutandis*, in cases of recognition or legitimation.

353. A convention based on the universal application of *jus soli* might, therefore, declare that nationality is acquired at birth by virtue of that principle. It would give to parents who were not nationals of the country where the birth occurred the right to register the child as a national of the father's State within a short period after the birth. This right of registration would not be granted if the child was born in the country of which the mother is a citizen. A child registered as a national of the country of his parents or parent as the case might be, would have the right to opt for his country of birth after the age of twenty-one, provided he had habitually resided in the country for which he intends to opt for at least one year before his twenty-first birthday. He would lose the nationality derived from his parents or parent as from the day the option is validly exercised and produces the legal effects attaching thereto. If no registration has taken place, a right to opt for the nationality of one of the parents might be granted, provided the individual concerned had habitually resided for a certain period in the State where the option is being exercised.

(ii) Marriage

354. For reasons mentioned in the introduction the question of the nationality of married women will not be treated in detail. It may be sufficient to state that an international convention might rule that marriage does not confer the nationality of the spouse, and that the persons concerned retain their nationality of origin. It might be added that if a married woman wishes to acquire her husband's nationality she will have to apply for naturalization, which might be granted under less rigidly severe conditions than usual with respect, say, to

the duration of continuous residence. For the sake of equality one might also envisage that the same provisions with regard to naturalization in the wife's State would apply to the husband.

(iii) Naturalization

355. It is a widely recognized principle that every person has the right to change his nationality and, consequently, that States have the right to bestow citizenship on aliens by naturalization. To avoid dual nationality, it will suffice to state in a convention that naturalization entails loss of the nationality of origin, the naturalizing State being under an obligation to inform the State of origin of the naturalized citizen when the naturalization has become effective. Naturalization of the parents should entail that of their minor children living with them in their adopted country, the children having a right to opt for their nationality of origin upon reaching majority, provided they have lived in the country concerned for at least one year before they reach that age. The exercise of this right should automatically lead to the loss of the nationality acquired through the naturalization of the parents. Although it would be contrary to the ideal rule that no one should be deprived of his nationality against his will, provision might be made to ensure the loss of the nationality acquired by naturalization, if the individual concerned settles in his country of origin, with no intention of returning to his adopted country, provided he thereby re-acquires his original citizenship. A slightly amended version of the Harvard Research draft might be a useful basis for the relevant provisions of an international convention.

356. Naturalization, if granted to a person upon his request, is, in the majority of cases, a deliberate choice between two different countries, and an individual can hardly express in stronger and clearer terms a preference for one of them. That in why naturalization in a foreign State should entail loss of the previous nationality under all circumstances. Agreement on this point appears to be fairly widespread, and it should not, therefore, be impossible to incorporate the relevant provisions in an international convention aiming at the elimination of dual nationality.

357. It has been argued, particularly by the United States and by the Latin American Republics, that if a naturalized citizen settles again in his country of origin, without intending to take up residence within a certain period in the State of which he is a citizen by naturalization, he thereby manifests his will to re-acquire his nationality of origin. Consequently, the citizenship obtained by naturalization should be lost. This theory has found practical expression in the Bancroft treaties, and it is incorporated in section 352 of United States Public Law 414. Its application was also recommended by the Harvard Research draft. The theory may be opposed on the ground that nationality is a vital element of a person's status and that he should not be deprived of it by the unilateral action of the State. Provided a naturalized citizen complies with all obligations imposed on citizens of the country concerned, when living abroad, it could be argued that there is no real justification for depriving him of his acquired nationality, even if he returns to his country of origin. It might be contended that, to be justified, such deprivation ought to be pre-

¹⁸⁸ See, for instance, para. 61 above.

ceded by a judicial or quasi-judicial procedure to ascertain the relevant facts, and that deprivation, if justified, should not be capable of being effected through the more or less arbitrary incidence of time limits, or through administrative action which is not subject to judicial control. Attention may be drawn in this connexion to section 20 of the British Nationality Act, 1948, which deals with "deprivation of citizenship" and enables the person concerned to apply, before the relevant order becomes effective, for an inquiry to be carried out by a committee of inquiry whose Chairman must be a person "possessing judicial experience" (section 20 (7)). The French Code de la Nationalité also prescribes that an executive decree depriving an individual of French nationality acquired by naturalization, for instance, on the ground of a conviction for acts directed against the internal or external security of the State (article 98 (1)), becomes effective only with the concurrence of the Conseil d'Etat, the individual concerned being informed and authorized to present his side of the case if he deems fit (articles 121 and 122).

358. Naturalization provisions of an international convention might, therefore, stipulate that naturalization should entail the loss of the prior nationality. Minors naturalized with their parents might be granted a right to opt in favour of their nationality of origin. Loss of nationality acquired by naturalization, through residence in the country of origin or in any other country, should be admitted only as a consequence of specified acts or omissions ascertained by a judicial or quasi-judicial procedure. It would not appear justifiable to impose on the State of origin the obligation to grant its nationality to the individual concerned. Cases of statelessness may thus occur, but in view of their presumably limited number, they would not normally affect the well-being of the international community.

(iv) Adoption

359. Children, if adopted when still under age, should acquire the nationality of the adoptive parents or parent concerned, provided the adoption is valid according to the law of the country of which the child is a national at the time of adoption, and meets the legal requirements of the State of which the adopting parent or parents are nationals. Such children would thereby lose their nationality of origin. This provision is in keeping with the principle that adoption should lead to the assimilation of the adopted person as a member of the adopting family.

360. The provisions outlined in the preceding paragraphs would, whether *jus sanguinis* or *jus soli* is selected as the guiding principle for the acquisition of nationality by birth, prevent the future occurrence of dual or multiple nationality of the citizens of the contracting States. It might be objected that their incorporation into municipal legislation would introduce a lack of certainty as to the nationality status of the persons who would obtain the right to opt for one of several nationalities when they reach a certain age; but this uncertainty exists in an even greater degree under present conditions where persons may legally possess two or more nationalities. The only difference between such a person and persons who have not acquired two or more nationalities at birth would be that the former would have, during a limited and short period of time, the right to opt for

one of the nationalities they would in any event have acquired under the conflicting systems of law at present prevailing.

(c) Agreement on common principles of interpretation and compulsory arbitration of litigious cases

361. Incorporation of the rules outlined in the present chapter into municipal legal systems would no doubt diminish conflicts of laws; but the rules of application and interpretation of the respective laws might differ in municipal systems, and these differences might lead to conflicts. A number of definitions clarifying the meaning of the various provisions might, therefore, be agreed upon. Such definitions, in interpretative rules, might, for instance, delimit the meaning of the following terms, *inter alia*: "nationality"; "national"; "naturalization"; "age of majority"; "legitimation"; "recognition"; "competent authorities"; "habitual residence"; and indeed, any other terms of art used in the instrument.

1. Reduction of present cases of dual or multiple nationality

(a) General remarks

362. It is possible to envisage procedures by which the number of dual nationality cases would be gradually reduced. Such procedures would

1. Grant a right to the person concerned voluntarily to renounce one of his nationalities in favour of the other;
2. Introduce common criteria for the determination of effective nationality; and
3. Recognize the principle of extinctive prescription.

(b) The right of option

363. Individuals possessing dual nationality are subject to the sometimes conflicting rules of two States, with the corresponding rights and duties. Normally they will have been brought up in one of the States concerned, and they will have stronger ties with that State than with the other. Nevertheless, they may, for reasons of their own, prefer the nationality of the other State of which they are nationals. They may, therefore, wish to renounce one of these nationalities, and the right to do so might be granted to them.

364. The relevant articles of an international convention should provide that States shall grant to those of their nationals who also possess the nationality of another State the right to opt in favour of the other nationality within five years after the coming into force of the convention. It would appear necessary to establish a time-limit for the exercise of the right to opt, in order to dispel within a reasonable period any uncertainty as to the nationality status of the individuals concerned. It may be recalled that article 6 of the Convention on Certain Questions relating to the Conflict of Nationality Laws accorded to a person possessing two nationalities "acquired without any voluntary act on his part" the right to renounce one of them "with the authorization of the State whose nationality he desires to surrender". Such a serious limitation on the right to opt seems unnecessary if it is desired to reduce the number of cases

of dual nationality, and it might prevent the individuals concerned from taking the appropriate action. Attention may be drawn in this respect to article 12 of the Harvard Research draft, which provided that the person concerned, on reaching the age of twenty-three, should automatically lose the nationality of the State in which he did not habitually reside, and that, if he resided outside the territory of the States of which he was a national, he should retain the nationality only of the State of which he was a national *and* where he had his last habitual residence. The article was based on the assumption that the occurrence of dual nationality was inevitable, and its object was to afford a means by which dual nationality might be ended. It might be objected that this provision leaves no scope for the exercise of a free choice by the individual concerned, a freedom which would be granted by the provisions discussed above. Should such a person, however, fail to exercise the right to opt within the period specified, it would then appear reasonable to deprive him of one of the nationalities he possesses, and to establish a legal presumption to the effect that he wishes to retain only his effective nationality.

(c) *The effective nationality*

365. Among the numerous criteria proposed as a suitable rule of conflict in cases of plural nationality, many authors found that of the effective nationality to be the most suitable. It was also recognized as a rule of international law in article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws adopted at The Hague in 1930, which defined it as follows :

“ a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”¹⁸⁹

366. The conclusion that an individual is more closely connected with one State than with another might be determined by taking into consideration facts other than the habitual residence, such as the language spoken by the individual concerned, the exercise of political voting rights, the acceptance and/or effective exercise of official functions, and so on. A rule of this kind adopted by the contracting States would facilitate the determination of the nationality which should prevail, with the consequent loss of the other or others. Should the individual concerned fail to opt in accordance with the right granted to him, the principle of effective nationality would apply.

(d) *Extinctive prescription*

367. The rule outlined in paragraphs 365 and 366 above would apply extinctive prescription to existing cases of multiple nationality. Combined with the right to opt, it would not appear to impose excessive hardship on persons who now possess dual or multiple nationality.

368. The provisions outlined above omit reference to such subsidiary questions as birth on a merchant vessel, birth while the parents were merely passing through the territory of a foreign State, liability for criminal acts committed before the individual lost the nationality of the State where the crime was committed, problems of military service and others. For the purpose of this study it would not appear necessary to investigate these matters.

369. Whether agreement can be reached on an international convention or conventions embodying the principles discussed in this Chapter depends on the willingness of States to limit their sovereign right to legislate in the field of nationality, and on whether they consider dual nationality as a serious enough evil to justify such limitations. Some progress towards the elimination of this legal anomaly might, however, be realizable even at the present time. It would appear that no serious objection could be raised against granting to an individual who possesses several nationalities a right to opt for one of the nationalities concerned at the time when he reaches the age of reason, or against stipulating that the effective nationality should prevail if the right of option is not exercised within a reasonable period. It might also be feasible to adopt common rules of conflict in this field, and to agree to submit to the International Court of Justice those cases which could not be solved to the satisfaction of the States concerned by the application of these rules.

Chapter V

Conclusions

1. *Summary*

370. In the introduction, the foregoing survey endeavoured to show the origin and its magnitude of the problem of plural nationality, and to indicate remedial action which might be taken by agreement between States to remove this cause of friction from the international scene. The political and juridical aspects of nationality were briefly summarized; and the exclusive competence of Governments to determine who are their nationals appeared as one of the principal sources of conflicts. However, even at the present stage of development of international law, this competence is not unlimited. States cannot effectively legislate concerning the nationality of the subjects of other States, such action being *ultra vires*; they must not attribute their nationality to a child born to persons temporarily resident on their territory while on diplomatic mission; and they are obliged to grant it to the inhabitants of territories which come under their sovereignty through conquest or any other means of affecting boundary modifications. Deprivation of nationality is not considered with favour by international lawyers, and some efforts have been made to take account of the wishes of individuals regarding their nationality status. Thus, the right to expatriate and to change nationality has been recognized by article 15 of the Universal Declaration of Human Rights, which also stresses the right of every person to a nationality. Efforts to solve the problem of dual nationality through bilateral or multilateral conventions were also briefly reviewed in the Introduction to this survey.

¹⁸⁹ *Acts of the Conference for the Codification of International Law*, vol. I, Plenary Meetings, Publications of the League of Nations, V. *Legal*, 1930.V.14., Annex 5, at p. 81.

371. By the analysis of various municipal nationality laws, an attempt was made in Chapter I to indicate how, by the indiscriminate application of the *jus soli* or *jus sanguinis* principle or a combination of both, dual nationality is bound to occur as consequence of the lack of international co-ordination in this field. Examples were drawn from Europe, the Americas and Asia. They show that the legal techniques for determining nationality are based on similar premises, implemented by each State without regard to the legislation of other countries in this field. All municipal laws attribute nationality at birth either on the basis of *jus soli* or of *jus sanguinis*. A majority admit predominantly one of these rules, applying the other in certain circumstances. Most laws recognize, at least implicitly, the fact of dual nationality, but consider the individuals concerned as if they had only one citizenship, a rule that has also been incorporated in article 3 of The Hague Convention which stipulates that

“ a person having two or more nationalities may be regarded as its national by each of the States whose nationality such person also possesses ”.

In article 4 of the same Convention a further consequence of this principle is noted, namely, that

“ A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

372. Dual nationality is thus a legal situation regulated to some extent not only by municipal legislation but also by international law; but the national laws here surveyed indicate that States are conscious of the anomalous situation of persons having more than one nationality. Certain laws seek a remedy by divesting the individual concerned of his original nationality if he has voluntarily sought or claimed benefits derived from possession of the nationality of a foreign State (see, e.g., section 350 of Public Law 414 of the United States). Others, such as the British Nationality Act, 1948, permit a “ declaration of renunciation ” by virtue of which citizenship may be lost. Others, like the French Code de la Nationalité, grant a right to repudiate citizenship in circumstances defined by law. Others, like the Swedish Citizenship Act of 1950, try to prevent the occurrence of dual nationality by appropriate provisions, so far as it can be done without international legislative co-ordination. The situations envisaged by these laws, and the solutions adopted, vary with the objectives of the respective national policies with regard to a vast number of considerations, such as immigration and emigration, economics, social questions, ethnological composition of populations, and so on. The net result is that, under present circumstances dual nationality through the acquisition of several nationalities at birth cannot be avoided. It is, therefore, recognized and to some extent controlled by the majority of municipal systems of law.

373. According to modern tendencies, marriage should not by itself entail loss of the nationality of origin or be a reason for automatically acquiring the husband's citizenship. A number of recent nationality laws have implemented this principle, at least with regard to loss by a spouse of the nationality of origin. A British woman marrying an alien may retain her nationality by making an appropriate declaration. A French woman who marries a foreigner will remain a French citizen unless she makes a declaration, before celebration of the mar-

riage, renouncing French citizenship. A new cause of dual nationality has thus been introduced, for, while the right of women to retain their nationality of origin tends to be more and more generally recognized, States will normally continue to attribute the nationality of the husband to an alien woman who marries one of their subjects. Although there may be no objection to a woman married to a foreigner retaining her nationality of origin; it might be possible to reach an agreement to the effect that such persons should be able to acquire the husband's citizenship only by way of naturalization, with the consequent loss of the nationality of origin. Perhaps the conditions imposed for naturalization might be less severe in such cases than they are in general.

374. The right of expatriation is now recognized by most States, although with certain restrictions in respect of individuals subject to military obligations; and in most municipal laws loss of the nationality of origin is the consequence of naturalization by a foreign State upon request of the individual concerned. A frequent cause of dual nationality is thus eliminated. However, in view of the circumstance that naturalization of the parents normally entails that of their minor children, a number of municipal laws grant to such persons facilities for the resumption of their nationality of origin. Dual nationality may occur in this way as it may in the case of a woman by the same procedure re-acquiring her former nationality when her marriage is dissolved.

375. The present lack of international co-ordination of municipal legislation in the field of nationality occasions numerous conflicts of law. Their direct and indirect causes, and the solutions applied, have been studied in Chapter II. If the person concerned is also a national of the country exercising jurisdiction, the solution internationally recognized is that incorporated in article 4 of The Hague Convention, quoted in paragraph 371 above, that is to say, the application of the *lex fori*. But this solution has not been accepted entirely without challenge, and several instances have been noted (see paragraph 223 above) where courts have decided against its application in particular circumstances.

376. No such generally recognized answer to the problem exists where the question is raised in a third State. Among the numerous solutions suggested, preference is frequently given to the principle of effective nationality which has also been embodied in article 5 of The Hague Convention, although in a somewhat attenuated form. Its text is reproduced in paragraph 365 above. Certain authors recommend, on the contrary, that the individual involved should be authorized in such cases to make a choice among his various nationalities, while others would apply cumulatively the laws of all the States concerned, and others again the applicable nationality law which approximates most closely to that which would result from the application of the *lex fori*.

377. Since methods for the solution of conflicts envisaged by municipal legislation offer no clear-cut answer to the problems raised by the existence of dual nationality, States, private organizations and learned authors have endeavoured to pave the way for international agreement on the subject. These attempts are studied in Chapter III. The solutions proposed range from settling specific aspects, such as the nationality of the inhabitants of territories ceded as a consequence of war, to general settlements of nationality questions

among two or more States. The Treaties of Versailles, St. Germain, Neuilly and Trianon, as well as the agreements concluded by Germany with her neighbours, have been summarized in relation to the provisions referring to the nationality of the inhabitants of territories which changed hands after World War I. Other agreements dealing with the problem of military service by dual nationals were also mentioned. This problem was specifically discussed during The Hague Codification Conference of 1930. A Protocol relating to Military Obligations in Certain Cases of Double Nationality¹⁹⁰ was signed which embodied three important principles, namely, that a person possessing more than one nationality and residing in one of the States concerned should be exempt from all military obligations in the other country or countries (article 1); that if such persons had the right to renounce the nationality of one of the States concerned, they should be exempt from military service in such State during minority, that is to say, until they reach the age when renunciation can be validly effected (article 2); that such persons, if they have lost the nationality of a State under the law of that State and acquired another nationality, shall be exempt from military obligations in the former State (article 3). Some bilateral treaties mentioned in the present study consider on the other hand, that military duties discharged in peace-time in one of the countries concerned exempt the dual national from military obligations in the other. Such is the solution adopted in the agreements concluded between France and a number of South-American Republics.

378. With regard to the effects of naturalization and resumption of the nationality of origin, particular attention was drawn to the so-called Bancroft treaties; and a number of other agreements attempting to settle nationality questions in general were also analysed. Among multilateral agreements, the Bustamente Code, which contains rules of conflict, and other Latin American treaties dealing with dual nationality were briefly mentioned, and The Hague Conventions, Protocols and Recommendations were studied in greater detail. Finally, solutions suggested by private organizations, in particular the Harvard Research draft articles, were also analysed.

379. These surveys made it clear that none of the solutions adopted so far offers a satisfactory answer to the problem of dual nationality as a whole. In Chapter IV, therefore, a general solution was outlined and discussed. Although it is evident that a satisfactory answer can be found only by agreement among the great majority of States, theoretically and technically there exists no great difficulty in drafting rules which would achieve the result of eliminating dual nationality. It would suffice if a common principle were accepted for the attribution of nationality at birth (either *jus soli* or *jus sanguinis*), limited in its application by well defined exceptions in order to avoid unnecessary hardships and anomalous situations, and if corresponding rules were applied *mutatis mutandis* to legitimation, recognition and adoption. Loss of nationality in case of naturalization or resumption of the nationality of origin on the request of the person concerned should be made a generally prevailing principle. It might also be stipu-

lated that married women should retain their nationality of origin, while facilities for acquiring that of the husband might be granted to them, such acquisition entailing loss of the nationality of origin.

2. Possibility and desirability of eliminating dual or multiple nationality

380. This survey has demonstrated that dual nationality is the inevitable outcome of the diversity of municipal legislation and that it would be vain to hope for the elimination of this legal anomaly without generally accepted international agreement. But it has also been shown that such elimination, at least as far as it can be achieved without major encroachments on national sovereignty, is considered to be desirable by a number of States. The Hague Conventions, on the other hand, appear to indicate that the area of international agreement in the field of dual nationality is still comparatively insignificant. It relates to the following points:

1. A person having more than one nationality may be regarded as its national by each of the States concerned;
2. A State may not afford diplomatic protection to one of its nationals against another State whose nationality such person also possesses;
3. Within a third State, the effective nationality should prevail when nationality laws conflict, and the person concerned should be treated as if he had only one nationality;
4. A right to renounce one of the nationalities may be granted to a person possessing plural nationality. The exercise of this right cannot be refused in case the person concerned, resident abroad, fulfils the conditions laid down for renunciation in the law of the State whose nationality he desires to surrender;
5. Expatriation permits should not entail loss of the nationality concerned without prior acquisition of another;
6. A child born to diplomatic agents on official duty in *jus soli* countries should not automatically acquire the nationality of such countries. A child born to *consuls de carrière* or other foreign officials on official mission should be permitted to relinquish the nationality of the State where he was born if he acquired dual nationality at birth.

381. The provisions contained in the Protocol relating to Military Obligations in Certain Cases of Double Nationality refer, as indicated in paragraph 376 above, only to this particular aspect of the problem. The Conference added to these agreements Recommendations to the effect that States should make every effort to reduce cases of dual nationality¹⁹¹ and should take steps towards the conclusion of an international settlement of conflicts arising from dual nationality. The Conference also recommended that facilities should be granted to persons possessing several nationalities to renounce those of the countries in which they are not resident, and that naturalization upon request of the person concerned should entail the loss of the nationality of origin.

¹⁹⁰ *Ibid.*, Annex 6, at pp. 95 ff.

¹⁹¹ See *ibid.*, pp. 163-165.

382. No significant progress has been made since The Hague Conference towards a complete settlement of the problem. Whether this can be achieved is not a juridical but a political question. That it is still considered to be desirable has been shown by this study. This was again underlined recently by the Special Rapporteur of the International Law Commission, Mr. Robert Córdova, in paragraph 9 of his "Report on the Elimination or Reduction of Statelessness" (A/CN.4/64).

383. His view is shared by many authors. Thus, Frédéric-Henri Hool¹⁹² wrote that, from the point of view of "international order", it is desirable that each person should possess a nationality, but only one, and that dual nationality is an anomaly and the source of numerous conflicts and difficulties. Oppenheim¹⁹³ stated :

" The position of such 'mixed subjects' is awkward on account of the fact that two different States claim them as subjects, and therefore claim their allegiance. In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals."

384. Pierre Louis-Lucas¹⁹⁴ formulated certain rules the adoption of which would, in his view, eliminate conflicts of nationalities. They are based on the principle that the individual should always have a nationality but never more than one.

385. A slightly different view is, however, expressed in the Comment to article 10 of the Harvard Research draft convention on nationality, which reads as follows :

" The existence of dual nationality at birth in cases of children born in one country of parents who are nationals of another, may, indeed, notwithstanding obvious disadvantages, be regarded as having some advantages. Persons born in countries of which their parents are not nationals are in a peculiar position and there may be some advantages in a system under which they may, within certain limitations, be able to choose between the nationality of the country of birth and that of the parents.¹⁹⁵"

¹⁹² *Op. cit.*, p. 2.

¹⁹³ *Op. cit.*, p. 608.

¹⁹⁴ *Op. cit.*, p. 61.

¹⁹⁵ *Op. cit.*, pp. 39-40.

386. In concluding this study, a few remarks concerning the magnitude of the problem, and the possible effect of its solution by international agreement on national sovereignty, may be appropriate.

387. Dual nationality affects a comparatively small number of persons, mainly the children of individuals who have emigrated under the pressure of political, economic or social situations beyond their control, or simply because they find it convenient to do so. It is reasonable to assume that such situations will not cease to arise in the foreseeable future, and that dual nationality will, therefore, continue to exist. It may also be surmised that the persons concerned will gradually lose touch with their countries of origin, and that the ties of allegiance maintained by their descendants with those countries will, at best, be tenuous. It may therefore be asked whether States can in fact uphold these ties by enforcing legislation designed for that purpose, and by attempting to obtain by compulsion an allegiance which the individual concerned is unwilling to give. After all, as the Introductory Comment to the Law of Nationality published by the Harvard Research remarked :

" Nationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of states... It may acquire a new meaning in the future as the result of further changes in the character of human society and developments in international organization." ¹⁹⁶

388. The effect on the sovereignty of States of an international agreement designed to eliminate dual nationality would not appear to be such as to constitute a decisive argument against adoption of common principles of law, or, at least, of rules of conflict, such as the principle of effective nationality, and the scope within which States would remain free to determine under their own laws who are their nationals. One may, therefore, hope that efforts will continue to be made to achieve this end, and that, with the natural growth of the international community, the greater unification of the world by constant technical progress and better understanding among people, the problem will gradually find a juridical solution in the not too distant future.

¹⁹⁶ *Ibid.*, p. 21.

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

DOCUMENT A/CN.4/85

Troisième rapport de J. Spiropoulos, rapporteur spécial

[Texte original en français]
[30 avril 1954]

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PREMIERE PARTIE

OBSERVATIONS GÉNÉRALES

1. En soumettant le présent rapport à la Commission du droit international le rapporteur spécial croit opportun de formuler quelques brèves observations.

2. D'après son statut, la Commission du droit international (art. 16, alin. j), devra réexaminer son projet de code à la lumière des observations des gouvernements et, ensuite, en élaborer le texte final.

3. Les réponses des gouvernements intéressant la Commission ont été publiées par le Secrétariat dans le document A/2162 et Add.1¹ intitulé « Observations des gouvernements relatives au projet de code des crimes contre la paix et la sécurité de l'humanité et à la question de la définition de l'agression ». On y trouve les réponses des Etats suivants : Bolivie, Chili, Costa-Rica, Danemark, Egypte, France, Inde, Indonésie, Irak, Pays-Bas, Nicaragua, Union soviétique, Yougoslavie et Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, soit 14 réponses en tout.

4. Toutefois, ces réponses ne comprennent pas toutes des « observations » se référant aux dispositions du projet de code. Leur examen permet de constater ce qui suit : le Gouvernement bolivien ne formule pas

d'observations à proprement parler mais se borne à transmettre au Secrétaire général des Nations Unies « à toutes fins utiles », une étude préparée par M. Emanuel Duran P., professeur de droit pénal et doyen de la Faculté de droit de l'Université Saint-François-Xavier, de Sucre. Le Gouvernement du Chili se déclare d'accord avec le projet établi par la Commission et estime qu'il pourra être approuvé sans amendement ni addition. Les réponses des Gouvernements du Danemark, de la France, de l'Inde, de l'Indonésie, du Nicaragua et de l'Union soviétique ne contiennent pas de références au projet de code, bien que quelques-unes d'entre elles commentent d'une manière plus ou moins détaillée la question de la définition de l'agression.

5. Seules les réponses des Gouvernements du Costa-Rica, d'Egypte, d'Irak, des Pays-Bas, de Yougoslavie et du Royaume-Uni présentent des observations critiques relatives aux articles du projet de code, d'une ampleur inégale d'ailleurs.

6. Le nombre si limité de ces réponses pourrait, à première vue, induire à penser que la revision du projet de code à la lumière des observations des gouvernements ne se heurterait pas à de sérieuses difficultés. Pareille conclusion serait cependant erronée; la comparaison desdites observations entre elles révéla, en effet, qu'elles arrivent à des solutions très souvent diamétralement opposées.

7. En principe, lorsqu'un raisonnement est partagé par plusieurs gouvernements, le rapporteur spécial s'en

¹ Documents officiels de l'Assemblée générale, septième session, Annexes, point 54 de l'ordre du jour.

est inspiré en vue de la revision de la disposition en question dans le sens indiqué. Par contre, lorsqu'il s'est trouvé en présence d'observations essentiellement divergentes, le rapporteur spécial a tenté de maintenir le texte adopté par la Commission du droit international, à moins que la force de telle ou telle argumentation ne lui ait paru imposer une modification du texte original.

8. Quant à la disposition de la matière dont il s'agit, le rapporteur spécial a cru opportun de commencer, pour chacun des textes en question, par la reproduction de l'article tel qu'il a été adopté par la Commission du droit international lors de sa troisième session² suivi par un exposé succinct des observations des gouvernements. Viennent ensuite ses propres commentaires y relatifs et pour terminer, s'il y a lieu, le texte que le rapporteur spécial propose à la Commission comme rédaction définitive du projet de code.

9. Quant aux observations des gouvernements, le rapporteur spécial aurait préféré, au lieu de se borner à les exposer succinctement, les reproduire *in extenso*, ce qui aurait épargné aux membres de la Commission le soin de recourir au texte même des réponses pertinentes. Mais il a été obligé de se conformer à des instructions de l'Assemblée générale qui lui prescrivait d'éviter, autant que possible, des citations de textes antérieurement publiés par l'Organisation des Nations Unies.

10. A un moment donné, le rapporteur spécial avait même envisagé à cette fin la possibilité de renvoyer tout simplement au document A/2162 et Add.1 quant aux observations des gouvernements. Cependant, cette méthode l'aurait obligé de mentionner les réponses des gouvernements dans la partie du texte consacré à ses commentaires personnels y relatifs, ce qui n'aurait pu se faire qu'au détriment de la clarté de son exposé.

11. Qu'il lui soit enfin permis de mentionner que l'étude du professeur Emanuel Duran P. (Bolivie) communiquée par la délégation permanente de la Bolivie au Secrétaire général ne constitue pas une réponse gouvernementale; néanmoins le rapporteur spécial l'a placée sur le même plan que les réponses émanant directement des gouvernements, puisque cette étude a été transmise au Secrétaire général des Nations Unies par un gouvernement et qu'elle a été publiée par le Secrétaire général dans le même document que les réponses des autres gouvernements.

12. En terminant ses observations générales, le rapporteur spécial désire attirer l'attention de la Commission sur le fait que le climat de l'Assemblée générale des Nations Unies n'est plus aussi favorable au code qu'il l'était à l'époque où elle avait chargé la Commission de le rédiger. Il appartient à la Commission du droit international d'en tirer les conclusions qui lui paraîtront opportunes lorsqu'elle établira le texte définitif du projet de code.

² Voir le rapport de la Commission sur les travaux de sa troisième session, *Documents officiels de l'Assemblée générale, sixième session, Supplément n° 9 (A/1858)*, par. 59. Le texte anglais du rapport se trouve aussi dans *Yearbook of the International Law Commission, 1951*, vol. II.

SECONDE PARTIE

OBSERVATIONS ET PROPOSITIONS RELATIVES AU PROJET DE CODE

I. — Titre du projet de code

a) Texte adopté par la Commission

« Crimes contre la paix et la sécurité de l'humanité. »

b) Observations des gouvernements

Le professeur Emanuel Duran P. (Bolivie) pense qu'il conviendrait de substituer le titre suivant à celui reproduit ci-dessus : « Crimes contre la paix, la sécurité et l'intégrité de l'humanité », parce que les actes prévus au paragraphe 9 de l'article 2 du projet constitueraient avant tout des atteintes à l'intégrité de l'humanité.

Le Gouvernement des Pays-Bas exprime l'avis que le titre du projet de code pourrait prêter à équivoque puisque l'expression « Crimes contre la sécurité de l'humanité » doit être interprétée comme visant les crimes contre l'humanité et les crimes traditionnels de guerre. La terminologie employée dans ce titre étant, cependant, d'un usage courant, le Gouvernement des Pays-Bas ne propose aucune modification.

c) Commentaires du rapporteur spécial

Pour les raisons mentionnées par le Gouvernement des Pays-Bas et parce que le titre du projet a été adopté par l'Assemblée générale elle-même, le rapporteur spécial suggère qu'aucun changement n'y soit apporté.

II. — Article 1^{er} du projet de code

a) Texte adopté par la Commission

« Les crimes contre la paix et la sécurité de l'humanité définis dans le présent code sont des crimes de droit international, et les individus qui en sont responsables pourront être punis. »

b) Observations des gouvernements

Le professeur Emanuel Duran P. (Bolivie) indique qu'il y aurait intérêt à souligner que les crimes prévus au projet de code constituent des « crimes de droit commun international » qui ne sauraient être considérés comme délits politiques.

Le Gouvernement de la Yougoslavie désire qu'il soit stipulé explicitement que le fait pour un crime de n'être pas punissable en vertu de la législation nationale du pays auquel appartient son auteur ne dégage pas la responsabilité de ce dernier en droit international.

Le Gouvernement du Royaume-Uni critique la rédaction de l'article 1^{er} et en particulier l'usage des mots « pourront être punis », cette dernière expression lui semblant ambiguë.

c) Commentaires du rapporteur spécial

Le rapporteur spécial ne croit pas qu'il soit opportun de modifier la structure de l'article 1^{er} qui doit évidemment être lu en connexion avec le début de l'article 2 conçu comme suit : « Les actes suivants sont des crimes contre la paix et la sécurité de l'humanité... »

Le rapporteur spécial ne pense pas qu'il soit nécessaire de mentionner explicitement que le fait pour un crime de n'être pas punissable en vertu de la législation nationale du pays auquel appartient son auteur ne dégage pas la responsabilité de ce dernier en droit international (suggestion yougoslave), étant donné qu'il est dit expressément à l'article 1^{er} que les individus, ayant commis l'un quelconque des crimes prévus au projet de code, *sont responsables et pourront être punis*.

Quant à la remarque du Gouvernement du Royaume-Uni d'après laquelle l'expression « les individus qui en sont responsables pourront être punis » semble superflue et que, en particulier, l'expression « pourront être punis » est ambiguë, on pourrait, peut-être, supprimer la phrase en question.

d) Propositions du rapporteur spécial

Il est proposé de formuler l'article 1^{er} comme suit :

« Les crimes contre la paix et la sécurité de l'humanité définis dans le présent code sont des crimes de droit international engageant la responsabilité pénale des individus qui les auront perpétrés. »

III. — Article 2, paragraphe 1, du projet de code

a) Texte adopté par la Commission

« Les actes suivants sont des crimes contre la paix et la sécurité de l'humanité :

« 1) Tout acte d'agression, y compris l'emploi, par les autorités d'un Etat, de la force armée contre un autre Etat à des fins autres que la légitime défense nationale ou collective ou, soit l'exécution d'une décision, soit l'application d'une recommandation d'un organe compétent des Nations Unies. »

b) Observations des gouvernements

Le professeur Emanuel Duran P. (*Bolivie*) exprime l'avis que l'expression « y compris » est superflue car, d'après lui, le plus grand de tous les actes d'agression est précisément caractérisé par l'emploi de la force armée contre un autre Etat. Les mots « y compris » devraient, à son avis, être remplacés par le mot « principalement ». Au surplus, la notion de « légitime défense nationale ou collective » ainsi que les conditions requises pour la recevabilité de l'excuse de la légitime défense devraient être précisées.

Le Gouvernement du *Royaume-Uni* exprime l'avis que ce paragraphe ne devrait contenir que les mots « tout acte d'agression », tout le reste à partir du mot « agression » devant être supprimé. Il préconise cette suppression parce qu'il considère qu'une définition satisfaisante de l'agression est extrêmement difficile à établir; il estime, d'autre part, que le texte proposé par la Commission du droit international ne couvre que certains aspects du problème et, enfin, qu'il utilise des termes ayant, eux-mêmes, besoin d'être définis.

c) Commentaires du rapporteur spécial

Le rapporteur spécial ne mentionne, dans ce qui précède, que les observations des gouvernements se référant au texte de l'article 2, paragraphe 1, tel qu'il a été adopté par la Commission du droit international, laissant de côté le point de savoir si le terme « agression » contenu dans ce texte doit ou non être défini, question qui sera traitée ci-après.

Si la Commission voulait renoncer à une définition de l'agression, elle pourrait, ainsi que le suggère le Gouvernement britannique, se borner à dire tout simplement : « tout acte d'agression ». Dans ce cas, les mots « y compris l'emploi, par les autorités d'un Etat, de la force armée contre un autre Etat » ne semblent pas nécessaires, étant donné que la notion d'agression employée dans la même phrase se réfère tout particulièrement à l'usage de la force qui constitue la forme principale de l'agression. Il paraît de même superflu d'insérer les mots « à des fins autres que la légitime défense nationale ou collective, ou, soit l'exécution d'une décision, soit l'application d'une recommandation d'un organe compétent des Nations Unies », car il est de toute évidence que les cas de légitime défense et d'exécution d'une décision ou de la mise en œuvre d'une recommandation d'un organe compétent des Nations Unies ne sauraient jamais constituer — en bonne logique — une « agression », à savoir un crime de droit international.

d) Propositions du rapporteur spécial

Il est proposé de formuler comme suit le paragraphe 1^{er} de l'article 2 :

« 1) Tout acte d'agression. »

IV. — Question spéciale : définition de l'agression

Le texte élaboré par la Commission du droit international ne contient aucune définition spécifique de la notion d'agression. Mais à la suite de la discussion du rapport de la Commission sur le sujet « Question de la définition de l'agression »³, l'Assemblée générale a adopté la résolution 599 (VI) dans laquelle il est dit que

« si l'existence du crime d'agression peut être déduite des circonstances propres à chaque cas particulier, il n'en est pas moins possible et souhaitable, en vue d'assurer la paix et la sécurité internationales et de développer le droit pénal international, de définir l'agression par ses éléments constitutifs ».

Au surplus, les Etats Membres des Nations Unies furent invités par la même résolution

« lorsqu'ils adresseront au Secrétaire général leurs observations sur le Projet de code, à formuler en particulier leur point de vue concernant le problème de la définition de l'agression ».

La Commission du droit international devra donc examiner le point de savoir si elle est obligée d'incorporer dans le texte définitif du projet de code une définition de la notion de l'agression. Il convient de noter à cet égard que, sur l'initiative de l'Assemblée générale [résolution 688 (VII)], la question de la définition de l'agression a été étudiée par un Comité spécial qui a élaboré un rapport⁴ et que le rapport de ce Comité ainsi que les observations des gouvernements y relatives seront examinés à l'occasion de la neuvième session de l'Assemblée générale des Nations Unies.

Il convient également de prendre acte de ce qu'un certain nombre de gouvernements, dans leurs observa-

³ *Ibid.*, chap. III.

⁴ Rapport du Comité spécial pour la question de la définition de l'agression, *Documents officiels de l'Assemblée générale, neuvième session, Supplément n° 11 (A/2638)*.

tions sur le projet de code, se sont prononcés en faveur d'une définition de l'agression et ont en même temps exprimé leurs idées sur les méthodes à suivre par la Commission du droit international dans sa tentative éventuelle de la définir (voir les observations des Gouvernements du Costa-Rica, de l'Égypte, de la France, de l'Indonésie, de l'Irak et de la Yougoslavie).

L'examen de la question de l'agression étant à l'ordre du jour de l'Assemblée générale elle-même la question pourrait se poser de savoir s'il est opportun pour la Commission du droit international de s'occuper de cette matière lors de sa présente session. Peut-être serait-il préférable d'attendre le résultat des travaux de l'Assemblée générale à ce sujet. Il est, d'autre part, indéniable que l'élaboration éventuelle d'une définition de l'agression par la Commission serait d'une grande utilité pour les travaux futurs de l'Assemblée générale dans ce domaine.

Laissant, dans ces conditions, à la Commission le soin de décider si elle désire entreprendre l'élaboration de ladite définition, le rapporteur spécial se borne à indiquer que le rapport du Comité spécial susmentionné ainsi que les observations des gouvernements relatives au projet de code pourraient servir de base aux travaux éventuels de la Commission ayant trait à ces matières.

V. — Article 2, paragraphe 2, du projet de code

a) Texte adopté par la Commission

« 2) Toute menace, par les autorités d'un Etat, de recourir à un acte d'agression contre un autre Etat. »

b) Observations des gouvernements

Le Gouvernement des Pays-Bas ne veut retenir que la menace *immédiate* de recourir à la force armée. Il exclut expressément la nation de l'agression dite « économique et idéologique » et suggère l'adoption d'une définition de l'agression insérée à la fin de ses observations relatives à l'article 2, paragraphe premier, du projet de code.

Le Gouvernement du Royaume-Uni, tout en admettant que l'inclusion du paragraphe 2 dans le projet de code n'est pas susceptible de soulever des objections de principe, se sert de ce paragraphe pour faire ressortir les risques que comporte une définition de l'agression et en particulier une définition partielle à l'instar de celle contenue dans le projet de code.

c) Commentaires du rapporteur spécial

La notion de « menace *immédiate* » mentionnée par le Gouvernement des Pays-Bas s'approche de celle d'agression *imminente* sans cependant coïncider avec elle. Est-ce uniquement une menace « immédiate » qui doit être caractérisée comme un crime contre la paix et la sécurité de l'humanité ? Le texte de la Commission ne permet pas de résoudre ce problème. Peut-être serait-il opportun de ne pas modifier cette rédaction, laissant au tribunal qui pourrait appliquer le code le soin de déterminer, sur la base des circonstances de l'espèce, si la menace émanant d'un Etat déterminé constitue ou non un crime international.

VI. — Article 2, paragraphe 3, du projet de code

a) Texte adopté par la Commission

« 3) Le fait, pour les autorités d'un Etat, de préparer l'emploi de la force armée contre un autre Etat à des fins autres que la légitime défense nationale ou collective ou soit l'exécution d'une décision, soit l'application d'une recommandation d'un organe compétent des Nations Unies. »

b) Observations des gouvernements

Le Gouvernement des Pays-Bas propose de rédiger le paragraphe 3 comme suit :

« Le fait, pour les autorités d'un Etat, de préparer une agression. »

Le Gouvernement de la Yougoslavie suggère de maintenir au paragraphe 3 les mots « les faits d'arrêter des plans » afin d'insister davantage sur la prévention de la préparation de l'agression⁵.

Le Gouvernement du Royaume-Uni caractérise l'emploi de l'expression « force armée » à la deuxième ligne comme particulièrement dangereuse. De plus, étant donné que « le fait d'arrêter des plans n'est incriminable que s'il résulte des actes de préparation véritables » on pourrait, d'après ce Gouvernement, se demander « à quel moment le fait d'arrêter des plans devient une préparation ». Il est, dans cet ordre d'idées, à craindre qu'un Etat mal intentionné prétende « qu'en entamant de simples consultations en vue d'arrêter éventuellement des mesures de défense communes, un groupe d'Etats fait plus qu'élaborer des plans, il se livre à des actes de préparations véritables ».

Pour les raisons ci-dessus mentionnées, le Gouvernement du Royaume-Uni suggère la rédaction suivante du paragraphe 3 :

« Le fait, pour les autorités d'un Etat, de préparer l'emploi de l'agression »,
ou simplement :

« Le fait, pour les autorités d'un Etat, de préparer l'agression. »

c) Commentaires du rapporteur spécial

Lorsqu'on entend, ainsi que semble le désirer la Commission, caractériser comme crime international aussi la *préparation* de l'agression on ne voit pas pourquoi on doit se borner à mentionner seulement l'emploi de la force armée contre un autre Etat. Il semble plus logique au rapporteur spécial de parler, de façon générale, de la préparation de l'agression.

Pour ce qui est de la suggestion yougoslave, elle paraît justifiée.

d) Propositions du rapporteur spécial

Il est proposé de rédiger comme suit le paragraphe 3 de l'article 2 :

« 3) Le fait, pour les autorités d'un Etat, de préparer l'agression contre un autre Etat. »

⁵ Par. 7, alin. b, de la « lettre (datée le 18 juin 1952) du représentant permanent de la Yougoslavie auprès de l'Organisation des Nations Unies concernant le projet de code des crimes contre la paix et la sécurité de l'humanité », au document A/2162 et Add.1. Voir par. 3 du présent rapport.

VII. — Article 2, paragraphe 4, du projet de code

a) Texte adopté par la Commission

« 4) L'incursion sur le territoire d'un Etat, en provenance du territoire d'un autre Etat, de bandes armées agissant à des fins politiques. »

b) Observations des gouvernements

Le Gouvernement de la Yougoslavie désire plus de clarté dans la rédaction de ce paragraphe afin d'établir de façon précise et la responsabilité individuelle des membres des bandes et celle des autorités de l'Etat qui tolèrent ces bandes ou les organisent.

Les critiques du Gouvernement du Royaume-Uni se référant au texte de la Commission dont il s'agit sont les mêmes que celles du Gouvernement yougoslave citées ci-dessus. Il désire d'une part que la Commission précise que la responsabilité du crime incombe aux membres des bandes armées coupables d'incursion et d'autre part qu'elle établisse par une disposition expresse la responsabilité de l'Etat sur le territoire duquel s'organisent ces bandes.

c) Commentaires du rapporteur spécial

Les observations des Gouvernements de la Yougoslavie et du Royaume-Uni semblent devoir imposer une modification du texte adopté par la Commission dans le sens qu'elles indiquent.

d) Propositions du rapporteur spécial

Il est proposé de formuler comme suit le paragraphe 4 de l'article 2 :

« 4) Le fait, pour les autorités d'un Etat, de tolérer, d'encourager ou d'organiser des bandes armées destinées à faire des incursions sur le territoire d'un autre Etat ou de tolérer que des bandes armées se servent du territoire du premier de ces Etats comme base d'opération ou comme point de départ pour des incursions sur le territoire d'un autre Etat, ainsi que la participation directe à l'incursion. »

VIII. — Article 2, paragraphes 5 et 6, du projet de code

a) Texte adopté par la Commission

« 5) Le fait, pour les autorités d'un Etat, d'entreprendre ou d'encourager des activités visant à fomenter la guerre civile dans un autre Etat, ou le fait, pour les autorités d'un Etat, de tolérer des activités organisées visant à fomenter la guerre civile dans un autre Etat.

« 6) Le fait, pour les autorités d'un Etat, d'entreprendre ou d'encourager des activités terroristes dans un autre Etat, ou le fait, pour les autorités d'un Etat, de tolérer des activités organisées calculées en vue de perpétrer des actes terroristes dans un autre Etat. »

b) Observations des gouvernements

Le professeur Emanuel Duran P. (Bolivie) désire que la Commission caractérise comme crime le fait, pour les autorités d'un Etat, de fomenter ou d'encourager la constitution de « cinquièmes colonnes » ou une « infiltration illicite ».

Le Gouvernement du Royaume-Uni relève que les expressions « activités terroristes » et « actes terro-

ristes » ne sont pas définies, et il exprime la crainte que les paragraphes 5 et 6, tels qu'adoptés par la Commission, ne puissent permettre à des Etats de mauvaise foi d'attaquer les actes et la politique des Etats voisins.

c) Commentaires du rapporteur spécial

Le texte des deux paragraphes en question ayant été établi après un examen très minutieux de la part de la Commission, le rapporteur spécial a des doutes quant à l'opportunité de le modifier. En ce qui concerne la « cinquième colonne », il y aurait, d'après le rapporteur spécial, crime international uniquement si le fait d'encourager ou de fomenter leur formation constituait un acte préparatif d'agression. L'existence d'une cinquième colonne, en tant que telle, ne lui semble pas devoir être caractérisée comme un fait criminel. Mêmes observations pour ce qui est de « l'infiltration illicite ». D'ailleurs, le terme « infiltration illicite » n'a aucun contenu précis. Enfin, quant aux craintes exprimées par le Gouvernement du Royaume-Uni, le rapporteur spécial ne voit pas comment définir les notions « activités terroristes » et « actes terroristes ». On se heurterait, en l'occurrence, aux mêmes difficultés que soulève la définition de la notion d'agression.

IX. — Article 2, paragraphe 7, du projet de code

a) Texte adopté par la Commission

« 7) Les actes commis par les autorités d'un Etat en violation des obligations qui incombent à cet Etat en vertu d'un traité destiné à assurer la paix et la sécurité internationales au moyen de restrictions ou de limitations aux armements, à la préparation militaire ou aux fortifications, ou d'autres restrictions de même nature. »

b) Observations des gouvernements

Le Gouvernement du Royaume-Uni exprime l'avis que seules les violations graves des traités en question sauraient être considérées comme criminelles; il se demande s'il n'est pas préférable de renoncer au paragraphe 7 et de laisser à des conventions futures concernant la limitation des armements le soin de prévoir les sanctions à imposer en cas de violation.

c) Commentaires du rapporteur spécial

La Commission pourrait soit supprimer le paragraphe 7, soit le rédiger de façon à prévoir la responsabilité pénale uniquement pour les violations graves des obligations en question.

d) Propositions du rapporteur spécial

Il est proposé de rédiger comme suit le paragraphe 7 :

« 7) Les actes commis par les autorités d'un Etat et qui constituent une violation grave d'obligations incombant à cet Etat en vertu d'un traité destiné à assurer la paix et la sécurité internationales au moyen de restrictions aux armements, à la préparation militaire, ou aux fortifications, ou d'autres restrictions de même nature. »

X. — Article 2, paragraphe 8, du projet de code

a) Texte adopté par la Commission

« 8) Les actes des autorités d'un Etat qui aboutissent à l'annexion, contrairement au droit international

d'un territoire appartenant à un autre Etat ou d'un territoire soumis à un régime international. »

b) *Observations des gouvernements*

Le professeur Emanuel Duran P. (*Bolivie*) désire que la Commission qualifie aussi de crime international l'annexion d'un territoire effectuée *contrairement à la volonté de ses habitants*.

Le Gouvernement du *Royaume-Uni*, sans soulever d'objection de principe contre l'idée exprimée au paragraphe 8, manifeste des doutes quant à la nécessité de son maintien, étant donné que toute annexion implique nécessairement un ou plusieurs des actes déjà définis aux paragraphes 1 à 6. De plus ce gouvernement critique l'expression « aboutissent » dans le texte de la Commission.

c) *Commentaires du rapporteur spécial*

Le texte de la Commission paraissant satisfaisant, le rapporteur spécial ne propose aucun changement.

XI. — *Article 2, paragraphes 9 et 10, du projet de code*

a) *Texte adopté par la Commission*

« 9) Les actes commis par les autorités d'un Etat ou par des particuliers dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel, y compris :

« i) Le meurtre de membres du groupe;

« ii) L'atteinte grave à l'intégrité physique ou mentale de membres du groupe;

« iii) La soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;

« iv) Les mesures visant à entraver les naissances au sein du groupe;

« v) Le transfert forcé d'enfants du groupe à un autre groupe.

« 10) Les actes inhumains commis par les autorités d'un Etat ou par des particuliers contre des éléments de la population civile, tels que l'assassinat, l'extermination, la réduction en esclavage, la déportation, ou les persécutions pour des motifs politiques, raciaux, religieux ou culturels, lorsque ces actes sont commis au cours de l'exécution ou à l'occasion des crimes définis dans le présent article. »

b) *Observations des gouvernements*

Le professeur Emanuel Duran P. (*Bolivie*) désire que la Commission caractérise comme crime « le fait de soumettre des membres d'un groupe à des conditions d'existence qui ne leur permettent pas de mener une vie normale au sein de la communauté nationale et qui sont incompatibles avec le libre développement de leurs activités et de leur individualité ».

Le Gouvernement des *Pays-Bas* demande la suppression des mots « motifs culturels » au paragraphe 10 afin que ce texte ne s'écarte pas de celui du statut de Nuremberg.

D'après le Gouvernement de la *Yougoslavie* les crimes contre l'humanité énumérés au paragraphe 10 doivent être punis indépendamment du fait qu'ils aient ou non été commis au cours de l'exécution ou à l'occasion

d'autres crimes définis à l'article 2 pourvu qu'ils soient perpétrés « d'une manière systématique ».

c) *Commentaires du rapporteur spécial*

Les observations des gouvernements se contredisent et ne permettent pas au rapporteur spécial de suggérer une modification dans un sens déterminé du texte adopté par la Commission.

XII. — *Article 2, paragraphe 11, du projet de code*

a) *Texte adopté par la Commission*

« 11) Les actes commis en violation des lois et coutumes de la guerre. »

b) *Observations des gouvernements*

Le Gouvernement de la *Yougoslavie* désire que les violations des lois et coutumes de la guerre soient considérées comme des crimes contre la paix et la sécurité de l'humanité quelle que soit la nature du conflit armé.

c) *Commentaires du rapporteur spécial*

Il ne ressort pas de l'observation du Gouvernement yougoslave à quelle sorte de conflit se réfèrent les mots « conflit armé ». En parlant « des lois et coutumes de la guerre », le rapporteur spécial pense aux cas où, d'après le droit international, ces lois et coutumes sont applicables. Ce n'est en effet que dans cette hypothèse que leur violation est concevable. Si donc, dans un conflit armé, les lois et coutumes de la guerre sont applicables, leur violation constitue, selon le projet de code, un crime de droit international. Le projet de code ne peut, cependant, déterminer la nature des conflits armés à l'occasion desquels les lois et coutumes en question seront applicables. Le projet de code ne pourra, non plus, élargir le domaine de leur applicabilité.

XIII. — *Article 2, paragraphe 12, du projet de code*

a) *Texte adopté par la Commission*

« 12) Les actes qui constituent :

« i) Le complot en vue de commettre l'un quelconque des crimes définis aux paragraphes précédents du présent article;

« ii) L'incitation directe à commettre l'un quelconque des crimes définis aux paragraphes précédents du présent article;

« iii) La tentative de commettre l'un quelconque des crimes définis aux paragraphes précédents du présent article; ou

« iv) La complicité dans l'un quelconque des crimes définis aux paragraphes précédents du présent article. »

b) *Observations des gouvernements*

Le Gouvernement des *Pays-Bas* désire faire la distinction suivante : en ce qui concerne les « crimes contre la paix » (art. 2, par. 1 à 8) la notion de « complot » doit être celle qui ressort des jugements de Nuremberg, qui l'ont limitée aux cas où l'accusé exerçait des fonctions de direction. De même « l'invitation directe » devrait être limitée à l'incitation directe à un acte d'agression au sens du paragraphe 1 de l'article 2. Enfin, rien ne semblerait justifier, d'après le Gouvernement

néerlandais, la répression des « tentatives » dans ce cas et il en serait de même en ce qui concerne la notion de complicité qui ne se trouve pas dans les jugements de Nuremberg.

Ce gouvernement estime, par contre, que les quatre cas prévus au paragraphe 12 de l'article 2, pour autant qu'ils se réfèrent au génocide et aux crimes contre l'humanité (art. 2, par. 9 et 10) et aux crimes commis en violation des lois et coutumes de la guerre (art. 2, par. 11) doivent être maintenus tels quels.

Le Gouvernement du *Royaume-Uni*, tout en reconnaissant que le paragraphe 12 est judicieux en son principe, craint qu'il ne risque de donner lieu à de sérieuses difficultés en pratique. Qu'est-ce au juste, par exemple, une « tentative » de menace d'agression ou une « tentative » de préparation de l'emploi de la force armée contre un autre Etat?

c) *Commentaires du rapporteur spécial*

Dans son premier rapport sur le projet de code, le rapporteur spécial a introduit les crimes prévus au paragraphe 12 de l'article 2 en suivant l'exemple de la Convention pour la prévention et la répression du crime de génocide (A/CN.4/25, chap. V)⁶. L'introduction de ces crimes dans le projet de code n'était pas de nature à créer des difficultés quant au texte que le rapporteur spécial a eu l'honneur de soumettre à la Commission. Cependant, la Commission, dans la version qu'elle adopta, a énuméré des crimes tels que la « menace » de recourir à l'agression, le fait de « préparer » l'emploi de la force armée contre un autre Etat, le fait « d'encourager » des activités visant à fomenter la guerre civile, etc. Dans ces conditions, les critiques du Gouvernement du *Royaume-Uni* quant à l'opportunité du maintien du paragraphe 12, tel qu'il se trouve dans le projet de code, ne manquent pas de logique.

Le rapporteur spécial est d'avis que les solutions suivantes pourraient être envisagées :

i) Il serait possible, tout d'abord, de laisser subsister le texte du paragraphe 12 tel qu'il est. Il y aurait certes, ainsi que le relève le Gouvernement du *Royaume-Uni*, des difficultés dans l'application de ce paragraphe, mais ce serait aux juges de les aplanir par une interprétation raisonnable.

ii) Une autre solution consisterait à maintenir le paragraphe 12 tel qu'il est et d'indiquer qu'il ne s'applique que pour autant qu'il est compatible avec la définition des crimes prévus aux paragraphes 1-11.

iii) Une solution radicale serait d'omettre complètement le paragraphe 12. Elle aurait pour conséquence que le code ne caractériserait pas comme punissables des actes déclarés tels par d'autres conventions internationales. Ainsi, par exemple, les notions de « complot » et de « complicité » sont punissables d'après l'article 6 du statut du tribunal de Nuremberg. Les notions d' « incitation », de « tentative » et de « complicité » se trouvent dans la Convention pour la prévention et la répression du crime de génocide (art. III).

⁶ A/CN.4/25 est inclus dans *Yearbook of the International Law Commission, 1950*, vol. II. La Convention pour la prévention et la répression du crime de génocide est reproduite au volume 78 du *Recueil des Traités*, publié par l'ONU, sous le numéro 1021, p. 279.

Les notions d' « incitation » et de « tentative » se trouvent également dans les législations internes de plusieurs pays touchant les crimes de guerre.

iv) Une dernière solution — celle-ci moins radicale que celle mentionnée sous iii) — consisterait à indiquer au paragraphe 12 auxquels des crimes définis aux paragraphes 1 à 11 les notions de complot, d'incitation, de tentative et de complicité sont applicables. Cette dernière solution nous semble être la meilleure.

XIV. — *Article 3 du projet de code*

a) *Texte adopté par la Commission*

« Le fait que l'auteur a agi en qualité de chef d'Etat ou de gouvernant ne l'exonère pas de la responsabilité encourue pour avoir commis l'un des crimes définis dans le présent code. »

b) *Observations des gouvernements*

Le Gouvernement de l'*Egypte* reproche à cet article d'être en contradiction flagrante avec les principes reconnus du droit constitutionnel et voit, en ce fait, un obstacle à son acceptation par beaucoup d'Etats, notamment les Etats monarchiques.

Le Gouvernement des *Pays-Bas* ne saisit pas le sens exact du terme « gouvernants » et se demande si l'insertion de l'article 3 est vraiment nécessaire.

Le Gouvernement de la *Yougoslavie* ne pense pas que le texte adopté par la Commission soit satisfaisant puisqu'il prévoit seulement que le fait que l'auteur a agi en qualité de chef d'Etat ou de gouvernant ne dégage pas sa responsabilité, alors qu'en réalité ce fait devrait constituer une circonstance aggravante.

Le Gouvernement du *Royaume-Uni*, rappelant que la mention des chefs d'Etat avait donné lieu à de grandes difficultés lors de la rédaction de la Convention sur le génocide, suggère que le texte soit réexaminé à la lumière desdites discussions.

c) *Commentaires du rapporteur spécial*

Les doutes exprimés par les Gouvernements d'*Egypte* et du *Royaume-Uni* quant à l'opportunité de maintenir le terme « chef d'Etat » dans le texte définitif nous semblent justifiés. Il est vrai que les chefs d'Etat sont mentionnés expressément à l'article 7 du statut du tribunal de Nuremberg; cependant, lors de l'élaboration de la Convention pour la prévention et la répression du crime de génocide, plusieurs délégations ont attiré l'attention de la Sixième Commission de l'Assemblée générale sur le fait que la référence aux chefs d'Etat dans la Convention, rendra impossible sa ratification par les Etats monarchiques. En effet, l'expression « des gouvernants », utilisée dans le texte français original, qui, à l'origine, avait été traduit en anglais par les mots *heads of State* fut plus tard remplacée par l'expression *constitutionally responsible rulers* à cause du danger que le terme *heads of State* rendrait internationalement responsables aussi des chefs d'Etat constitutionnels ou irresponsables d'après le droit interne de leurs pays⁷.

Quant à l'observation du Gouvernement des *Pays-*

⁷ Documents officiels de l'Assemblée générale, troisième session, première partie, Sixième Commission, 92^e, 93^e, 95^e et 96^e séances.

Bas d'après laquelle le sens du terme « gouvernants » ne serait pas clair, le rapporteur spécial renvoie à la discussion qui a eu lieu à ce sujet à la Sixième Commission de l'Assemblée générale au cours de sa troisième session en 1948⁸. En effet, l'expression « gouvernants » a donné lieu à des doutes quant à sa portée exacte. Cependant, il ressort de la lecture des débats que le mot « gouvernants » vise « ceux qui ont la responsabilité effective du pouvoir » (explication du délégué français; voir comptes rendus analytiques de la 93^e séance, p. 315). Etant donné que le sens du mot « gouvernants » ne saurait plus donner lieu à des doutes et étant donné le fait que ce même terme est employé par la Convention sur le génocide, le rapporteur spécial ne voit pas de raisons pour l'écartier du texte définitif à adopter par la Commission.

Quant aux réserves formulées par le Gouvernement des Pays-Bas se référant à l'utilité de l'article 3, le rapporteur spécial se permet de souligner que la Commission a cru devoir insérer cet article dans le projet de code pour ne laisser subsister aucun doute sur le fait que toute personne exerçant une fonction publique, si haute placée qu'elle soit, est pénalement responsable en droit international. La Commission n'a suivi, sur ce point, que l'exemple du statut du tribunal de Nuremberg (A/CN.4/SR.110, par. 1 à 29⁹).

Pour ce qui est, enfin, de l'observation du Gouvernement yougoslave d'après laquelle il serait souhaitable de considérer le fait que l'auteur d'un des crimes prévus au projet de code a agi en qualité de « chef d'Etat » ou de gouvernant « constitue une circonstance aggravante », le rapporteur spécial a des doutes quant à l'opportunité d'introduire au projet de code un principe pareil.

d) Propositions du rapporteur spécial

Il est proposé de formuler comme suit l'article 3 :

« Le fait que l'auteur d'un des crimes définis dans le présent code a agi en qualité de gouvernant ne l'exonère pas de sa responsabilité en droit international. »

XV. — Article 4 du projet de code

a) Texte adopté par la Commission

« Le fait qu'une personne accusée d'un des crimes définis dans le présent code a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité en droit international si elle a eu moralement la faculté de choisir. »

b) Observations des gouvernements

Le professeur Emanuel Duran P. (Bolivie) suggère à la Commission de préciser sans ambiguïté que, lorsqu'il s'agit d'un crime commis en vertu d'une loi ou sur l'ordre d'une autorité, la légalité de l'acte ne constitue pas une excuse.

Le Gouvernement de l'Égypte estime que le terme « moralement » est trop vague et pourrait donner lieu à des divergences de vues quant à son sens exact. Selon ce gouvernement, il serait possible d'adopter une formule, dépourvue d'ambiguïté, telle que, « le fait qu'une

personne a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité en droit international si elle avait la possibilité, dans les circonstances existantes, d'agir contrairement à cet ordre ».

Le Gouvernement des Pays-Bas suggère d'insérer après les mots « responsabilité en droit international » les mots « si elle pouvait avoir connaissance du caractère criminel de l'acte ». Cet article ne saurait, d'après ce gouvernement, être appliqué que dans le cas où l'accusé savait ou était en mesure de savoir que l'ordre donné violait le droit international.

Le Gouvernement de la Yougoslavie pense que l'insertion d'une disposition subordonnant la responsabilité de l'auteur d'un tel crime à la preuve qu'il avait eu moralement la faculté de choisir aura un effet déplorable tant pour la prévention de ces crimes que pour l'application effective du code par les tribunaux. Il faudrait donc, d'après ce gouvernement, modifier la dernière partie de cet article dans le sens de l'article 8 du statut du tribunal de Nuremberg et lui donner la rédaction suivante : « mais peut être considéré comme un motif de diminution de la peine si le tribunal le juge opportun ».

Le Gouvernement du Royaume-Uni, prenant en considération que tout, dans cet article, tourne autour de la signification exacte de l'expression « si elle a eu moralement la faculté de choisir », se demande si l'article ne devrait pas comprendre une partie du texte du commentaire actuel, par exemple, la toute dernière phrase de ce commentaire, bien qu'elle contienne, elle aussi, des termes (telle l'expression « avait la possibilité ») dont le sens dans le contexte peut donner lieu à diverses interprétations.

c) Commentaires du rapporteur spécial

Pour ce qui est de la question de savoir s'il faut dire, dans l'article 4, expressément que les prescriptions de la loi ne justifient pas les crimes prévus au projet de code, le rapporteur spécial se borne à rappeler que lors de la discussion du texte de la Convention pour la prévention et la répression du crime de génocide, une proposition analogue de l'Union soviétique¹⁰ a été rejetée par l'Assemblée générale¹¹.

Quant au principe lui-même établi par l'article 4, les gouvernements qui se sont prononcés sur ce point ont exprimé des opinions contradictoires. Tandis que le Gouvernement yougoslave désire revenir à la formule du statut du tribunal de Nuremberg qui n'admet l'ordre d'un supérieur hiérarchique que comme un motif de *diminution de la peine* (voir aussi l'étude du professeur Emanuel Duran P., dans A/2162 et Add. 1), les Gouvernements d'Égypte, des Pays-Bas et du Royaume-Uni acceptent le principe adopté par la Commission. (Cependant les Gouvernements d'Égypte et du Royaume-Uni proposent de substituer au terme « moralement » une expression plus précise.) Le Gouvernement des Pays-Bas en particulier n'accepte, en l'occurrence, la responsabilité de la personne accusée d'un des crimes prévus au projet

¹⁰ A/C.6/215/Rev.1, art. V. Voir *Documents officiels de l'Assemblée générale, troisième session, première partie, Sixième Commission, Annexes aux comptes rendus analytiques des séances*, p. 17.

¹¹ *Ibid.*, Sixième Commission, 93^e séance, p. 313.

⁸ *Ibid.*, 93^e séance.

⁹ Voir *Yearbook of the International Law Commission*, 1951, vol. I, p. 238 et 239.

de code que lorsque l'inculpé « pouvait avoir connaissance du caractère criminel de l'acte ».

Etant donné les divergences de vues susmentionnées, le rapporteur spécial s'abstient de suggérer à la Commission de modifier le principe qu'elle a adopté. Il pense, cependant, qu'une modification du texte dans le sens indiqué par les Gouvernements de l'Égypte et du Royaume-Uni contribuerait à rendre plus claire la portée du principe adopté.

d) *Propositions du rapporteur spécial*

Il est proposé de formuler comme suit l'article 4 :

« *Le fait qu'une personne accusée d'un des crimes définis dans le présent code a agi sur l'ordre de son gouvernement ou d'un supérieur hiérarchique ne dégage pas sa responsabilité en droit international si elle avait la possibilité, dans les circonstances existantes, de ne pas se conformer à l'ordre.* »

XVI. — *Article 5 du projet de code*

a) *Texte adopté par la Commission*

« La peine pour tout crime défini dans le présent code sera déterminée par le tribunal compétent pour juger l'accusé, compte tenu de la gravité du crime. »

b) *Observations des gouvernements*

Le professeur Emanuel Duran P. (*Bolivie*) estime que pour respecter le principe généralement admis *nulla poena sine lege* il faudrait stipuler dans un article distinct du code que le tribunal compétent sera habilité à prononcer la peine la plus appropriée, en tenant compte, non seulement de la gravité du crime commis, mais encore de la personnalité de son auteur.

Le Gouvernement du *Costa-Rica* est d'avis que si la rédaction de cet article n'était pas modifiée, le code serait exposé aux mêmes critiques que celles formulées contre le tribunal de Nuremberg qui s'est vu obligé de déterminer et d'appliquer des peines qui n'avaient pas été fixées auparavant par une règle de loi positive. Il est vrai que la Commission dit qu'elle a tenu compte du principe généralement admis *nulla poena sine lege*, mais la vérité est que ce postulat du droit pénal suppose que la peine applicable à chaque catégorie d'infraction ait été expressément fixée d'avance.

Le Gouvernement d'*Égypte*, voyant dans l'article en question une délégation au tribunal compétent pour déterminer la peine pour chaque crime, estime que cette délégation est non seulement une dérogation au principe *nulla poena sine lege*, mais constitue aussi un véritable danger, vu que l'appréciation des juges pourrait être influencée par diverses circonstances non nécessairement d'ordre juridique. Aussi le Gouvernement de l'*Égypte* estime-t-il qu'il est préférable d'essayer de déterminer une peine adéquate à chaque crime avec, s'il le faut, un minimum et un maximum.

D'après le Gouvernement de la *Yougoslavie*, l'article 5 devrait préciser que le tribunal peut prononcer toute peine, y compris la peine de mort.

Le Gouvernement du *Royaume-Uni* considère cet article tout à fait hors de propos dans le contexte du projet de code. Dans la mesure où les divers crimes mentionnés par le code constituent des crimes ou viendraient à être considérés comme tels au regard de la

législation interne des divers pays, il appartiendra aux législateurs de ces pays de déterminer la peine correspondant à chaque crime. Dans la mesure où la question du châtement et des peines à imposer est régie par une convention internationale, il appartiendra à la convention de prescrire les peines à appliquer. Aux yeux du Gouvernement du Royaume-Uni, il serait plus judicieux d'omettre l'article 5.

c) *Commentaires du rapporteur spécial*

Parmi les observations qui précèdent celles du professeur Emanuel Duran P. (*Bolivie*), du Gouvernement du *Costa-Rica* et du Gouvernement du *Royaume-Uni* reprochent au texte adopté par la Commission de n'avoir pas tenu compte du principe *nulla poena sine lege*. Ces critiques nous semblent justifiées. Par ailleurs, l'article 5, pour les raisons mentionnées dans les observations du Gouvernement du *Royaume-Uni*, semble en effet hors de propos dans le contexte du projet de code. Dans ces conditions, le rapporteur spécial n'hésite pas à suggérer la suppression de l'article.

XVII. — *Propositions de certains gouvernements tendant à insérer au projet de code d'autres crimes que ceux déjà définis par celui-ci*

a) *Propositions des gouvernements*

Deux gouvernements proposent d'élargir la liste des crimes établis par la Commission du droit international.

Ainsi le Gouvernement *irakien* propose d'ajouter à l'article 2 un paragraphe 13 rédigé comme suit :

« Le fait pour un Etat de ne pas respecter et mettre en œuvre les résolutions de l'Assemblée générale et du Conseil de sécurité destinées à maintenir la paix et à prévenir les tensions internationales ».

De son côté, le Gouvernement *yougoslave* estime que, parmi les crimes énumérés au projet de code, devraient figurer entre autres : le blocus économique et d'autres formes analogues de pression économique, la propagande belliciste, l'appartenance à des organisations criminelles et les crimes par omission, c'est-à-dire les crimes engageant la responsabilité des personnes qui n'ont pas empêché que soit commis l'un des crimes définis dans le code alors qu'elles en avaient la possibilité.

b) *Commentaires du rapporteur spécial*

Les observations ci-dessus résumées des Gouvernements de l'*Irak* et de la *Yougoslavie* méritent l'attention de la Commission en raison de leur importance.

Pour ce qui est de la proposition du Gouvernement de l'*Irak* visant à caractériser comme crime international le fait pour un Etat de ne pas respecter et mettre en œuvre les résolutions de l'Assemblée générale et du Conseil de sécurité destinées à maintenir la paix et à prévenir les tensions internationales, il convient de mentionner qu'il ne paraît pas logique d'établir des sanctions pénales pour la non-observation de recommandations soit de l'Assemblée générale, soit du Conseil de sécurité qui, en tant que « recommandations », ne créent, en principe, pas d'obligations juridiques.

La situation juridique n'est pas la même lorsqu'il s'agit de *décisions*. Il se peut que l'inactivité d'un gouvernement dans de pareils cas puisse être caractérisée

comme un crime contre la paix engageant sa responsabilité pénale.

Pour ce qui est des propositions du Gouvernement yougoslave, le rapporteur spécial se permet de faire les remarques suivantes :

Il doute que la qualification du blocus économique et d'autres formes analogues de pression économique de « crimes internationaux » engageant la responsabilité pénale puisse trouver l'assentiment de beaucoup de gouvernements. La notion du « blocus économique » est plutôt vague et englobe des situations tellement diverses qu'il ne paraît guère opportun d'en faire l'objet d'un crime international. D'ailleurs, ainsi que le mentionne le Gouvernement du Royaume-Uni dans ses observations, le code « ne peut traiter que d'actes qui ne sont pas simplement illégaux ou contraires au droit international, mais qui ont également un caractère criminel, c'est-à-dire qui comportent un élément inhérent de criminalité ».

Relativement à la « propagande belliciste », le rapporteur spécial rappelle que la question de la propagande a été discutée à l'occasion de l'élaboration de la Convention pour la prévention et la répression du crime de génocide¹² et que l'Assemblée générale a refusé de

qualifier de crime international la propagande en faveur du crime de génocide¹³.

En ce qui concerne, enfin, l'idée de l'appartenance à des organisations criminelles, le rapporteur spécial ne croit pas que le simple fait d'appartenir à une organisation criminelle devrait être qualifiée de crime international. Ce ne serait, à son avis, que l'activité des membres de l'organisation qui devrait être punissable.

Il lui reste à dire deux mots à propos de l'idée exprimée par le Gouvernement yougoslave visant à caractériser aussi comme crime international l'omission d'agir, c'est-à-dire l'abstention d'agir des personnes « qui n'ont pas fait le nécessaire pour empêcher que soit commis l'un des crimes définis dans le code alors qu'elles en avaient la possibilité ». Le rapporteur spécial a toute sympathie pour cette idée, d'autant plus que dans son premier rapport (A/CN.4/25¹⁴) sur le projet de code il avait suggéré l'adoption du principe dont il s'agit. Cependant, puisque la Commission n'a pas cru opportun de le suivre, il hésite à revenir sur la question et laisse en l'occurrence à la Commission le soin d'en prendre l'initiative.

¹² A/C.6/215/Rev.1, art. IV, alin. f. Voir *Ibid.*, Sixième Commission, Annexes aux comptes rendus analytiques des séances, p. 17.

¹³ *Ibid.* Sixième Commission, 87^e séance, p. 253.

¹⁴ Voir *Yearbook of the International Law Commission*, 1950, vol. II.

LAW OF TREATIES

DOCUMENT A/CN.4/87*

Second report by H. Lauterpacht, Special Rapporteur

[Original text: English]
[8 July 1954]

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I. INTRODUCTION

At its fifth session, held in Geneva in 1953, the International Law Commission decided to request the Special Rapporteur on the Law of Treaties to continue his work on the subject and to present a further report for discussion at the next session together with his first report submitted in 1953.¹ While the Special Rapporteur has made progress in his study of what will be Part II of the complete report on the Law of Treaties, namely operation and implementation of treaties, he now submits a further report supplementary to and, in some respect, modifying certain articles and the comment of the report submitted in 1953. This covers the following articles: article 1 (essential requirements of a treaty); article 6 (ratification); article 7 (accession); article 9 (reservations); article 16 (consistency with prior treaty obligation).

II. TEXT OF REVISED ARTICLES WITH COMMENTS

ARTICLE 1

Essential requirements of a treaty

1. This article of the Special Rapporteur's first report² runs as follows:

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

* Incorporating document A/CN.4/87/Corr.1.

¹ A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

² *Ibid.*

2. In the light of further study the Special Rapporteur submits for consideration of the Commission the question whether it may not be desirable to add either in the article itself or in the accompanying comment some such statement of the law as follows:

In the absence of evidence to the contrary, an instrument finally accepted by both parties in the customary form of an international undertaking and registered with the United Nations in accordance with Article 102 of the Charter shall be deemed to be an instrument creating legal rights and obligations.

3. This aspect of the definition of a treaty is covered by paragraph 4 of the relevant comment to article 1 of the first report. At the end of this part of the comment the Special Rapporteur stated as follows: "The circumstance that it [the instrument] has been registered with the United Nations, by one or more of the parties, as an international treaty or engagement is not decisive for determining this question [i.e. whether the instrument is intended to create legal rights and obligations] — although the fact of its registration as the result of joint action by the parties raises a strong presumption in that direction." The Special Rapporteur now believes that this passage requires reconsideration in the light of the amendment as formulated above. This is so for the reason that unless some such rule is adopted, the legal nature — and the binding character — of a large number of instruments may remain uncertain.

4. In the first instance, as already stated in the first report, the fact that the extent of the application of the instrument is left in some respects to the appreciation of the parties and that, as the result, the scope of the obligation is indefinite and elastic, is not a decisive factor for denying that there is in existence a legal duty

to be fulfilled in good faith. This is so even if, in what must be regarded as the typical case in treaties of this nature, the instrument contains no provisions, or purely nominal provisions, for the settlement of disputes arising out of the application or the interpretation of the treaty. A number of instruments will illustrate this aspect of the problem :

5. Thus article 6 of the Agreement of 27 April 1951 between the United States of America and Denmark covering the defence of Greenland (*U.N.T.S.*, 94 (1951), p. 45) provides that " the Government of the United States of America agrees to cooperate to the fullest degree with the Government of the Kingdom of Denmark and its authorities in Greenland in carrying out operations under this Agreement ", and that " every effort will be made to avoid any contact between United States personnel and the local population which the Danish authorities do not consider desirable for the conduct of operations under this Agreement ". The reference to " every effort " being made by the American authorities in circumstances which the Danish authorities " consider desirable " are indefinite and elastic. It is not believed, however, that they derogate from the legal nature of the obligations thus undertaken.³

6. The same applies to instruments such as the Preliminary Agreement between the United States of America and Czechoslovakia of 11 July 1942 relating to the principles applying to mutual aid in the prosecution of the war against aggression (*U.N.T.S.*, 90 (1951), p. 258). On the face of it, the agreement is non-committal. In article I the Government of the United States of America binds itself to supply the Provisional Government of Czechoslovakia with such defence articles, defence services and defence information as the President of the United States of America shall authorize to be transferred or provided — a, *prima facie*, nominal obligation. In article 11 the Provisional Government of Czechoslovakia undertakes to continue to contribute to the defence of the United States of America and the strengthening thereof and to provide such articles, ser-

vices, facilities and information as it may be in the position to supply. While other parts of the Agreement incorporate clear legal obligations in the matter of the transfer, payment and return of the goods supplied by the United States, article 7 seems to formulate what is no more than a principle of policy. It lays down that the final determination of the benefits to be provided to the United States of America by the Provisional Government of Czechoslovakia in return for the aid furnished under the Act of Congress of 11 March 1941, shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of the world. Notwithstanding the vague and indefinite formulation of those provisions, they are not such as to render impossible their interpretation, by reference to the overriding principle of good faith, by an arbitral or judicial body proceeding on the basis of law. The widest possible latitude of appreciation was implied in the Advisory Opinion of the Permanent Court of International Justice given in 1931 in deciding whether the customs union between Germany and Austria endangered or alienated Austrian independence (*Series A/B*, No. 41). This fact did not deprive the relevant provisions of the Treaty of St. Germain and of the Geneva Protocol of 1922 of their character as binding treaty obligations.

7. The recent series of mutual defence assistance agreements between the United States of America and some other countries provides, to a more conspicuous degree, another example of instruments of that character. Thus article 1 of the Mutual Defense Assistance Agreement between the United States of America and France of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 172) provides " that each Government, consistently with the principle that economic recovery is essential to international peace and security and must be given clear priority, will make or continue to make available to the other, and to such other governments as the parties hereto may in each case agree upon, such equipment, materials, services or other military assistance as the Government furnishing such assistance may authorize and in accordance with such terms and conditions as may be agreed ". The Agreement also provides, in article 2, for the obligation of the French Government to facilitate the production and the transfer to the Government of the United States of raw and semi-processed materials required by the United States as a result of deficiencies or potential deficiencies of its own resources; and it provides, in article 3, for such security measures " as may be agreed in each case between the two Governments in order to prevent the disclosure or compromise of classified military articles, services or information ".⁴

³ This is also probably the position with respect to various types of agreement of an economic nature such as the Agreement concerning the exchange of commodities between Denmark and Poland of 7 December 1949 (*U.N.T.S.*, 81 (1951), p. 22). While some provisions of that Agreement admit of elasticity of interpretation, such as the provision that the parties shall grant to each other as *favourable treatment as possible* in the issue of import and export authorization so as to facilitate the development of reciprocal exchanges, other clauses are of a definite nature, such as the obligation of the two Governments to authorize the export of goods specified in the schedule to the Agreement. Similar considerations apply to such instruments as the Exchange of notes constituting an agreement between the Netherlands and Luxembourg regarding the placement of Netherlands agricultural workers in Luxembourg of 17 and 25 August 1950 (*U.N.T.S.*, 81 (1951), p. 14). While the notes contain a number of provisions of a somewhat vague character such as that " in principle, the entire territory of the Grand Duchy shall be available for permanent or temporary settlement by Netherlands agricultural workers ", or that the Luxembourg authorities shall provide Netherlands agricultural workers with all information that might be useful to them, other provisions are couched in terms of clear legal obligations such as that the Netherlands agricultural workers and their families shall receive in Luxembourg for equal work and performance remuneration equal to that customary in Luxembourg for workers of the same category in the same district, or that Netherlands agricultural workers shall be entitled to make transfers each month of their surplus wages and savings.

⁴ Similar provisions are contained in the Mutual Defense Assistance Agreement with Luxembourg of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 188); with the Netherlands of 27 January 1950 (*ibid.*, p. 220); with Norway of 27 January 1950 (*ibid.*, p. 242); and with the United Kingdom of 27 January 1950 (*ibid.*, p. 262). The same applies to the Exchange of notes constituting an agreement between the United States of America and Italy relating to mutual defense assistance of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 146). In that Agreement the two Governments undertook to take appropriate measures, consistent with security, to keep the public informed of operations under the Agreement. They also agreed to take security measures, to be agreed upon in the future, in order to prevent disclosure or compromise of classified military articles, services or information. An annex to the Agreement

In a sense these provisions, which leave for future agreement the determination of the extent of the substantive obligations of the parties, are no more than *pacta de contrahendo*. They are further weakened by qualifications such as that the amount of assistance shall be such as the Government in question shall authorize. Nevertheless, it would not be accurate to maintain that an instrument of that character is no more than a pious statement of intention as distinguished from an assumption of binding legal obligations.

8. Neither is the legal nature of the instrument affected by its designation as a declaration of policy, especially if it is described as an agreement and if in other respects it imposes ascertainable obligations upon the parties. This applies, for instance, to the Declaration by the French Republic constituting an agreement on commercial policy and related matters of 28 May 1946 (*U.N.T.S.*, 84 (1951), p. 152). While the Declaration opens with the statement that "the Government of the United States of America and the Provisional Government of the French Republic, having concluded comprehensive discussion on commercial policy and related matters, find themselves in full agreement on the general principles which they desire to see established to achieve the liberation and expansion of international trade, which they deem to be essential to the realization of worldwide prosperity and lasting peace", and continues that "the two Governments have agreed that important benefits would accrue to both countries from a substantial expansion of French exports to the United States", it contains definite clauses on such matters as the obligation of the French Government to accord to American nationals who have suffered damage to their properties in France, through causes originating in the war, compensation equal to that payable to French nationals having the same types and extent of losses.

9. The same considerations apply to purely administrative agreements which, having regard to their nature and subject matter, leave a considerable measure of discretion to the authorities in question. Thus article 19 of the Agreement of 12 July and 28 August 1948 between the Post Office of the United Kingdom of Great Britain and Northern Ireland and the Shereefian Post and Telegraph Administration for the exchange of money orders (*U.N.T.S.*, 90 (1951), p. 84) provides as follows (*ibid.*, p. 94): "Each of the two Administrations may, in extraordinary circumstances which would be of a nature to justify the measure, suspend temporarily or definitely the Money Order service on condition of giving immediate notice thereof (if necessary by telegraph) to the other Administration. The Administration of the United Kingdom may also in case of abuse by the transmission of large sums of money as Money Orders raise the rate of commission charged." There is no warrant for the suggestion that instruments of that nature do not, on account of either the large measure of discretion inherent in their application or of their purely administrative character, exhibit the essential characteristics of an international treaty.

10. As will be seen presently (see paragraph 14), there are types of treaties which raise the same prob-

makes provision for privileges and immunities to the missions of the two States.

lem, namely, whether an instrument cast in the usual forms of an international undertaking — i.e. an instrument signed and formally accepted by the parties or a unilateral declaration having the same effect — constitutes a treaty conferring legal rights and imposing legal obligations. The same problem arises occasionally in the sphere of the private law of contract when courts are called upon to determine whether an instrument creates legal rights and duties. It was stated in the following terms by Lord Justice Atkin in *Rose & Frank Co. v J. R. Crompton Bros. Ltd.*:⁵ "To create a contract there must be a common intention of the parties to enter into legal obligations . . . Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises."

11. The difficulties inherent in the problem are shown in the statement that "the intention of the parties to enter into legal obligations . . . may be negatived impliedly by the nature of the agreed promise or promises." The Special Rapporteur does not consider that that formulation can be of assistance in determining whether what on the face of it appears to be a treaty is in fact a treaty, namely, whether it creates legal rights and obligations. While in the sphere of private law the informality and variety of private arrangements may permit an inquiry into the question whether the nature of the promise is such as to create legal rights and obligations, it is believed that with regard to formal international compacts such intention must be implied from the fact of the formality of the instrument unless there is cogent and conclusive evidence to the contrary. Undoubtedly, the legal rights and obligations do not extend further than is warranted by the terms of the treaty. The fact that the instrument is a treaty does not imply an intention of the parties to endow it with the fullest possible measure of effectiveness. They may intend its effectiveness to be drastically limited. But, subject to that consideration which must be evidenced by the terms of the treaty and any other available evidence, the guiding assumption is that the instrument creates legal rights and obligations. Any measure of discretion and freedom of appreciation, however wide, which it leaves to the parties must be exercised in accordance with the legal principle of good faith. Although the parties may have intended a treaty to mean little, no assumption is permissible that they intended it to mean nothing and that the instrument concluded in the form of a treaty — with the concomitant solemnity, formality, publicity and constitutional and other safeguards — is not a treaty.

12. In particular, there is probably no warrant for the suggestion⁶ that an instrument is not a treaty unless it contains provisions for the compulsory judicial or arbitral settlement of disputes as to its interpretation or

⁵ [1923] 2 K. B. 261, at p. 293. In *Balfour v. Balfour* ([1919] 2 K.B. 571) he said: "[such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon."

⁶ For an elaboration of which see the article by Mr. Fawcett in the *British Year Book of International Law*, 30 (1953), pp. 381 ff.

application. While most multilateral treaties of a general character and many other treaties contain clauses of this nature, this is not the case in many treaties which clearly create legal rights and obligations. The legal nature of rules of customary international law does not depend upon the existence of a compulsory machinery for their arbitral or judicial ascertainment. There is no reason for more stringent requirements in this respect in the matter of treaties.

13. While in his first report the Special Rapporteur did not regard the question of registration with the United Nations as decisive, he now considers that that view requires modification — but no more — in accordance with the text as proposed above in paragraph 1. He continues to believe that the mere fact of registration is not *decisive*. In particular, it cannot be admitted that the Secretary-General can be entrusted with the function of giving, by complying with the request for registration, the complexion of a legal instrument to something which otherwise would not possess that character. However, although the fact of registration is not decisive — what is decisive is the formality of a written instrument couched in the traditional terms of a treaty obligation — registration constitutes an addition to those essential requirements of form which make of an instrument a treaty. It may be a matter for consideration whether weight ought to be attached in this connexion to the protest of one of the parties against registration, on the ground that the instrument does not constitute a treaty or an international agreement creating legal rights and obligations.

14. The Special Rapporteur has devoted further study to — and has to some extent modified his view on — this question for the reason that, in his opinion, the codification of the law of treaties ought to provide an opportunity not for devitalising such legal element as is contained in international instruments but for salvaging from them any existing element of legal obligation. There are, in addition to the types of instrument referred to above, other categories of treaties whose legal importance and beneficence may be jeopardized unless that principle is adopted. Thus the numerous agreements between the United Nations and the specialized agencies, as well as the agreements of the specialized agencies *inter se*, have been regarded by some as purely administrative arrangements of co-ordination⁷ devoid of legal character. It is not believed

⁷ It will be noted that in some cases the obligations in question although described as co-operation go substantially beyond mere co-operation. This applies, for instance, to article 6 of the Agreement between the United Nations and the International Labour Organisation which provides that "the International Labour Organisation agrees to co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security." (*U.N.T.S.*, 1 (1946-1947), p. 192.) In some cases the obligation is of a declaratory nature as in the case of article 6 of the Agreement between the United Nations and the International Monetary Fund which provides as follows: "The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due

that that view is substantiated either by their content or form. The same applies to the numerous inter-State treaties for cultural co-operations;⁸ for technical assistance;⁹ for co-operation between Governments and public international organizations of a humanitarian character, such as the Agreement of 19 July 1950 between the United Nations International Children's Emergency Fund and the Government of the Republic of China concerning the activities of the former in China;¹⁰ and agreements relating to military co-operation

regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter." (*U.N.T.S.*, 16 (1948), p. 332.)

⁸ Such as the Cultural Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Netherlands Government of 7 July 1948 (*U.N.T.S.*, 82 (1951), p. 260). Of these conventions, which often provide for ratification, there is a great number. To the same category belong instruments such as the Agreement between the United States of America and France relating to the financing of certain educational exchange programmes of 22 October 1948 (*U.N.T.S.*, 84 (1951), p. 174). The legal character of the provisions of such agreements is illustrated by article 1 of the above Agreement. It provides as follows: "There shall be established a Commission to be known as the United States Educational Commission for France (hereinafter designated "The Commission"), which shall be recognized by the Government of the United States of America and the Government of the French Republic as an organization created and established to facilitate the administration of an educational program financed by funds made available in accordance with the Memorandum of Understanding dated May 28, 1946 and the supplement thereto. Except as hereinafter provided, the Commission shall be exempt from the domestic and local laws of the United States of America as they relate to the use and expenditure of currencies and credits for currencies for the purposes set forth in the present agreement. The funds shall enjoy on the part of the Government of the French Republic the exemption and immunities accorded to the property of a foreign government." The Agreement between Thailand and the United States of America of July 1950 (*U.N.T.S.*, 81 (1951), p. 62) providing for the establishment of a foundation, to be known as the United States Educational Foundation in Thailand, contains specific obligations such as that the funds of the Foundation shall be regarded in Thailand as the property of a foreign Government. The Exchange of notes constituting an agreement of 21 June 1949 between the United States of America and Mexico relating to anthropological research and investigation (*U.N.T.S.*, 89 (1951), p. 4) provides for detailed obligations concerning the supply of services of officials and scholars, payment of salaries, publication of results of research, communication of data, customs facilities and the like. The same applies to a similar agreement between the United States of America and Peru of 17 and 25 March 1949 (*ibid.*, p. 16).

⁹ Such as the Basic Agreement between the United Nations, the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and France for the provision of technical assistance of 20 March 1951 (*U.N.T.S.*, 82 (1951), p. 174); the Basic Agreement between the United Nations, the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and Colombia for the provision of technical assistance of 24 November 1950 (*U.N.T.S.*, 81 (1951), p. 190); the Basic Agreement between the United Nations and the Government of Thailand for the provision of technical assistance of 11 June 1951 (*U.N.T.S.*, 90 (1951), p. 46).

¹⁰ *U.N.T.S.*, 94 (1951), p. 22. The Agreement lays down obligations governing the distribution of supplies, maintenance by the Government of accounting and statistical records, access to records, immunities of various kinds, and settlement of disputes by reference "for appropriate action" to the Programme Committee of the Executive Board of the Interna-

by way of establishment of military missions and otherwise.¹¹

ARTICLE 6

Ratification

1. Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof.

2. In the absence of ratification a treaty is not binding upon a contracting party unless:

(a) The treaty in effect provides otherwise by laying down, without reference to ratification, that it shall enter into force upon signature or upon any other date or upon a specified event other than ratification;

(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification;

(c) The treaty is in the form of an exchange of notes or an agreement between government departments;

(d) The attendant circumstances or the practice of the contracting parties concerned indicate the intention to assume a binding obligation without the necessity of ratification.

Alternative paragraph 2 :

2. Confirmation of the treaty by way of ratification is required only when the treaty so provides. *However, in the absence of express provisions to the contrary, ratification is in any case necessary with regard to treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned.*

tional Children's Emergency Fund. The legal nature of the Agreement is not impaired by some unorthodox provisions such as that relating to the duration of the agreement. Thus article 9 lays down that "it shall remain in force at least until any supplies furnished by the Fund are finally consumed or used, plus a reasonable period for the completion of an orderly liquidation of all Fund activities in the Republic of China."

¹¹ Thus the Agreement between the United States of America and Haiti of 14 April 1949 relating to a naval mission to Haiti (*U.N.T.S.*, 80 (1951), p. 38), in addition to the detailed provisions concerning the personnel, duties, rank, pay and allowances of the mission to be provided by Haiti, contains other obligations of Haiti such as the undertaking not to engage the services of a mission of any other foreign government for duties connected with the coastguard of Haiti except by the mutual agreement of the two Governments. To similar effect are such instruments as the Agreement between the United States of America and Ecuador relating to a military mission to Ecuador of 29 June 1944 (*ibid.*, p. 284); the Agreement of 6 March 1950 between the United States of America and Honduras for the establishment of a United States Air Force mission to Honduras (*ibid.*, p. 52); the Agreement between the United States of America and Honduras of 6 March 1950 for the establishment of a United States army mission to Honduras (*ibid.*, p. 72); the Agreement between the United States of America and Argentina of 6 October 1948 concerning a military advisory mission to Argentina (*ibid.*, p. 92); the Agreement between the United States of America and Brazil relating to a military advisory mission to Brazil of 29 July 1948 (*ibid.*, p. 112).

The passage italicized constitutes an addition to the previous Report.¹²

1. The Special Rapporteur attaches importance to stating that the submission of two alternative drafts on the question is intended, to some extent, to express his view that the practical difference between the adoption of the one or the other solution is not considerable. According to one solution, which has the merit of simplicity, confirmation — through ratification — of a signed treaty is not required as a condition of its validity unless there is a clause expressly providing for ratification. According to the other solution ratification is an essential condition of the assumption of a valid treaty obligation unless the treaty either expressly provides to the contrary or unless such provision is to be implied from the previous practice of the parties, from the fact that it is concluded in the form of an exchange of notes or an agreement between government departments, or from other "attendant circumstances" — a potentially wide range of exceptions. These exceptions are so wide — in particular in view of the large number of treaties concluded by way of exchanges of notes and interdepartmental agreements — that their effect is to bring about a close approximation of the two alternative solutions. Moreover, the practical importance of the question is rigidly limited by the fact that treaties either expressly provide for ratification or expressly or by implication dispense with it. Reasons have been given in the first report why a codification of the subject — one way or the other — is nevertheless of importance.

2. While the Special Rapporteur is still of the view that there is a slight preponderance of considerations in favour of the requirement of ratification unless dispensed with expressly or by implication, he feels it necessary to draw repeated attention to the fact — already emphasized in the first report — that the most recent practice shows an increasing number of treaties which come into force without ratification. My attention has been drawn to statistical data, more detailed than those given in the first report, which reveal that tendency in a conspicuous manner. Thus it appears¹³ that while about one-half of the instruments registered in the League of Nations Treaty Series came into force by ratification, this has been the case only with regard to one-fourth of the instruments registered in the United Nations Treaty Series. With this there is connected the fact that while about 40 per cent of the instruments registered with the League of Nations were described as "treaties" or "conventions", this has been the case only with regard to 15 per cent of the instruments registered with the United Nations. This latter development may be of significance inasmuch as it is only in the case of "treaties" and "conventions" that ratification constitutes the normal method of bringing them into force.¹⁴ On the other hand, while in the case of the League of Nations about 30 per cent of the registered instruments were in the form of agreements, the percentage in the case of the United Nations is about 45 per

¹² A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

¹³ See article by Hans Blix in the *British Year Book of International Law*, 30 (1953), pp. 352 ff.

¹⁴ Thus of the "treaties" in the League of Nations Treaty Series only one was not ratified. All "treaties" in the United Nations Treaty Series were ratified.

cent — again a significant change seeing that ratification in case of agreements is not as normal a course of bringing into force as in the case of “treaties” or “conventions”.¹⁵ Moreover, it appears that a large number of instruments are now being brought into force not by ordinary ratification, but by exchanges of “notes of approval” — a method not referred to in the first report.

3. It may be asked whether, in view of this tendency as revealed by these figures, it is not desirable to formulate what may be described as the residuary rule in the matter — i.e. the rule for the small residuum of cases in which the treaty is in effect silent on the subject — by reference to the fact that ratification now takes place only in a relatively small minority of cases. It would appear legitimate to draw some such inference from what seems to be a clear trend. On the other hand, it is submitted that this is not an inescapable inference from that practice. For the only cogent deduction from that practice is that in an increasing number of cases Governments attach importance to treaties — however designated — entering into force without ratification. It does not follow that they consider the irrelevance of ratification to be the presumptive rule to which, in the absence of provisions to the contrary, they must be deemed to have submitted themselves. There is still room for the view that the general importance of the interests of States regulated by treaty requires that the presumptive — the residuary — rule must be based on the normal requirement of ratification.

4. For this reason the Commission may consider whether, even if it arrives at the conclusion that the presumption of non-ratification is the residuary rule, it should not qualify it in turn by laying down that that rule does not apply in relation to treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned — such as instruments involving cession or exchange of territory, changes in the internal law of the parties, financial obligation of an extensive character, and obligations of assistance in case of war. In such cases the necessity of ratification may properly be regarded as part of the residuary rule. It is, of course, open to the parties to displace that residuary rule by an express provision by virtue of which the treaty enters into force upon signature and without ratification. The Special Rapporteur has considered it necessary to add this qualification to the alternative residuary rule in case that rule should recommend itself to the Commission.

5. That qualification clearly complicates the residuary rule. However, this may be a case in which simplicity of the rule cannot constitute the decisive factor. A balance must be struck between the tendency to informality and expeditiousness in the conclusion of treaties and the residuary requirement of ratification which may be regarded as dictated by imperative con-

siderations of constitutionality and democratic principles. Some countries continue to attach importance to these considerations as may be seen from the categorical language of article 5 of the Pan-American Convention on Treaties of 20 February 1928, which provides that “treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself”.¹⁶ Although that treaty was ratified, by 1 January 1951, only by seven Governments, it must be regarded as evidence of regional practice. On the other hand, the practice of some States, as given recent expression, seems to favour the view that unless the treaty expressly provides for ratification its signature binds the parties. Thus the French Government, in a memorandum submitted on 10 January 1953 to the Secretariat of the United Nations stated as follows: “Certains traités ne prévoient pas qu’une ratification devra suivre la signature. Dans ce cas la signature, si elle est donnée sans condition (une signature *ad referendum* est une signature sous condition), engage définitivement l’Etat.”¹⁷ It must be assumed that this statement is to be read subject to article 27 of the Constitution of 1946 which provides that treaties relating to international organization, commerce, financial obligations, the position of French subjects abroad, treaties providing for cession, exchange or acquisition of territory “ne sont définitifs qu’après avoir été ratifiés en vertu d’une loi”.¹⁸ This provision of the Constitution is given effect by means of legislation authorizing the Executive to proceed to ratification by virtue of which the treaty becomes internationally binding. This means apparently that, notwithstanding the statement in the French memorandum referred to above, treaties which do not provide for ratification must nevertheless be ratified, in order to become binding, if they fall within one of the categories of treaties enumerated in article 27. Moreover, it would appear that it would be *ultra vires* of the French Government to conclude a treaty of that description as entering into force upon signature. Similarly, article 60 of the amended Constitution of the Netherlands provides as follows: “Agreements with other Powers and with organizations based on international law shall be concluded by or by authority of the King. *If required by such agreements* they shall be ratified by the King.”¹⁹ There are authoritative statements to the effect that this is also the view of the United Kingdom. Thus the Secretary of State for Commonwealth Relations stated on 11 March 1953 in the House of Lords (*House of Lords Debates*, vol. 180, col. 1284) that “there is never any necessity for ratification unless an agreement so provides.” Here again, in so far as by virtue of constitutional convention certain treaties require the previous approval of Parliament (see paragraph 9 of the comment to article II of the Special Rapporteur’s first report on the Law of Treaties) it would appear that with regard to such treaties ratification is required if the treaty is silent on the subject. Occasionally, in this respect, the position may not be free of

¹⁵ In the League of Nations Treaty Series 40 per cent of “agreements” were ratified. In the United Nations Treaty Series 15 per cent of “agreements” were ratified.

¹⁶ Printed in Hudson, *International Legislation*, vol. IV, pp. 2378 ff., at p. 2380.

¹⁷ Printed in “Laws and Practices Concerning the Conclusion of Treaties”, *United Nations Legislative Series* (1952), p. 48.

¹⁸ See, for example, Preuss in *American Journal of International Law*, 44 (1950), pp. 641 ff.

¹⁹ See van Panhuys in *American Journal of International Law*, 47 (1953), p. 537, at p. 538 (italics added).

doubt. Thus the Exchange of notes constituting an agreement of 15 and 22 February 1949 between the United Kingdom and the Union of South Africa confirms "the arrangement that His Majesty's Government in the United Kingdom should transfer to His Majesty's Government in the Union of South Africa the rights, title and interests which they formerly possessed in Marion Island and Prince Edward Island". Note is taken of the fact that the national flag of the Union of South Africa was raised on these islands on specified dates and that consequently His Majesty's Government "regard the transfer as complete as from those dates" (*U.N.T.S.*, 93 (1951, p. 76). A similar Exchange of notes, providing for the transfer to Australia of the Heard and MacDonal Islands was signed on 19 December 1950 (*ibid.*, p. 82). There is no provision for ratification in these instruments. In view of the constitutional rule requiring parliamentary consent for cession of British territory, it may be difficult to imply from the terms of these instruments a dispensation from the requirement of ratification.

6. In this connexion there must constantly be borne in mind the close relation between the question of the residuary rule in the matter of ratification and the problem of constitutional limitations upon the treaty-making power. A substantial strain is already imposed by the rule that notwithstanding the disregard of constitutional limitations a treaty which the contracting party in question expressly accepts as binding without ratification is either binding or, as suggested in the first report (article 11), may in certain circumstances impose obligations upon the State. To say that such result may follow — in disregard of constitutional limitations — as the result of mere silence, is to strain to the breaking point a rule which is controversial in itself. This is the reason why the qualifications now added to the alternative residuary rule include the exception covering constitutional limitations.

7. The additional complication now introduced by the Special Rapporteur into the alternative residuary rule B adds emphasis to his preference for rule A. At the same time he submits, once more, that the practical importance of the subject is severely limited seeing that by far the greater number of treaties contain express provisions on the subject; that the practical difference between the two rules, as qualified in this report is small; that no vital interest of States is involved in the adoption of either rule; and that the removal of doubts on the subject, through the adoption of a definite residuary rule, is feasible and desirable. The necessity for a codified rule cannot properly be judged either by the relative importance — political or other — of the rule in question or by the probable frequency of its application.

8. In connexion with the subject matter of this article it would be useful if, in its report on the subject, the Commission could draw attention to the necessity of clarifying one aspect of the practice of the Secretariat of the United Nations with regard to registration of treaties, especially of exchanges of notes. It has been customary for the Secretariat to append in a footnote on the opening page of the registered instrument a statement to the effect that it entered into force on a specified date. While in some cases such statement is clearly substantiated by a reference to the relevant article or articles of the instrument, in others it is not

clear what is the source of the information given. Thus, for instance, in the case of exchanges of notes the footnote merely states that the instruments entered into force on the date (or dates) of the signature of the notes in question. It would be useful to know what is the source of the statement in question. It may perhaps be assumed that the Secretariat, in making the statement, is relying on a source of information other than the implication that exchanges of notes belong to a type of instrument which, by its nature, does not require ratification and that it therefore enters into force as a result of signature. However, the question when the absence of the requirement of ratification may be implied from the terms or the nature of the instrument is difficult to answer and it is arguable that the burden of a decision on the subject cannot properly be put on the organs of the United Nations. Admittedly in some cases such implication is obvious. Thus it is clear that a treaty requires ratification if it contains a clause permitting denunciation "from year to year as from the date of exchange of ratifications", or, as is the case in various declarations of the acceptance of the optional clause of Article 36 of the Statute of the International Court of Justice, when it confers jurisdiction upon the Court in disputes "which may arise after the ratification of the declaration concerning any situation or fact arising after such ratification". On the other hand, it is not certain that dispensation from ratification can be implied from a clause which lays down that a treaty shall be operative as from a stated date or that its provisions shall continue for a stated period of years as from the date of the signing of the agreement. Article 10 of the Agreement between the Governments of the United Kingdom and South Africa concerning the avoidance of double taxation of 14 October 1946 provides (*U.N.T.S.*, 86 (1951), p. 64), that "the present Agreement shall come into force on the date on which the last of all such things shall have been done in the United Kingdom and the Union as are necessary to give the Agreement the form of law in the United Kingdom and the Union respectively". A footnote appended on p. 52 states that the treaty "came into force on 13 February 1947 in accordance with the provisions of article X". It is not clear to what extent the provision as quoted implies that the treaty can be regarded as having entered into force without ratification. It seems proper that the report of the Commission should draw attention to the desirability of a clarification of this aspect of the matter.

ARTICLE 7

Accession

1. A State or organization of States may accede to a treaty, which it has not signed or ratified, by formally declaring in a written instrument that the treaty is binding upon it.

2. Accession is admissible only subject to the provisions of the treaty. *In case a decision is required, in pursuance of this paragraph, as to the accession, or conditions thereof, of any State, such decision shall, unless otherwise expressly provided by the treaty, be effected by a majority of two-thirds of the States which are parties to the treaty at the time at which the request for accession is made.*

1. The additional, italicized, part of paragraph 2 as proposed and the observations which follow are in accordance with the original article 7 of the first report²⁰ and of the comment thereon (paragraphs 4-7 of the comment). However, the addition as formulated is intended to render the views there expressed more specific. It is also now considered appropriate, in view of the importance of the question involved, to give them the form of an express clause in article 7. While in the comment to article 7 doubts were expressed as to the application of the rule of unanimity to any decision required under that article, these doubts found no expression in the body of the article. The rule of unanimous consent of the existing parties to accession, or its conditions, by another State has the appearance of a rule of juridical logic and any derogation from it, if such derogation is considered desirable, ought probably to be given the form of a clear exception from the rule of unanimity. In some cases, unless the matter is deemed to be governed by the implied rule of unanimity, treaties normally contain no provisions on the subject. Thus, to refer to a recent instrument, article 10 of the International Convention for the permanent control of outbreak areas of the red locust of 22 February 1949 between Belgium, the United Kingdom, South Africa and Southern Rhodesia, provides as follows: "Any Government which is not a signatory to the present Convention may be invited by the Council to accede thereto, subject to such conditions as the Contracting Governments may determine" (*U.N.T.S.*, 93 (1951), p. 138). Similarly, article 31 of the Agreement between the United Kingdom, Belgium, France, Luxembourg, the Netherlands and the United States of America for the establishment of an International Authority for the Ruhr of 28 April 1949 (*U.N.T.S.*, 83 (1951), p. 106) provides that as soon as a German Government has been established it may accede to the agreement by executing an instrument containing such undertakings with respect to the assumption of the responsibilities of the German Government under the agreement and such other provisions as may be agreed by the signatory Governments. The General Agreement on Tariffs and Trade of 30 October 1947 provides, in article 33, for accession on terms to be agreed between the acceding Government and the contracting parties (*U.N.T.S.*, 55 (1950), p. 284). It is arguable that, as these conventions do not refer to *unanimous* consent, a decision which falls short of unanimity is sufficient. The Special Rapporteur does not regard that argument to be of a cogent character. Moreover, that interpretation fails to make provision for the kind of majority, if any, required.

2. For these reasons, assuming that the Commission shares the Special Rapporteur's view as to the essential shortcomings of the rule of unanimity in this connexion, it seems desirable to complete paragraph 2 of article 7 by the adoption of the rule as formulated. Admittedly that rule is open to the objection that it is somewhat mechanical inasmuch as it takes no account of the relevant importance of the contracting parties. However, that defect is inherent in the existing machinery of the conclusion of multilateral treaties. It can be remedied either by express provisions of the treaty or by some

such solution as is outlined below (article 16, paragraph 16 of the comment) in connexion with the revision of multilateral treaties. In any case, it is believed that, as a general rule, doubts ought to be resolved in the direction of the widest possible application of the treaty — provided that a substantial number of signatories so desire.

3. The rule as here formulated seems to be in accordance with the recent practice of multilateral conventions as to admission of new members of international organizations. Thus the Convention on International Civil Aviation of 7 December 1944 provides, in article 93, that States other than those referred to in the Convention shall be admitted to participation by means of a four-fifth vote of the Assembly and on such conditions (apparently by the same or a less exacting majority) as the Assembly may prescribe (*U.N.T.S.*, 15 (1948), p. 358). The Constitution of the Food and Agriculture Organization of 16 October 1945 lays down, in article 2, that additional members may be admitted by a vote concurred in by a two-thirds majority of all the members of the Conference (*American Journal of International Law*, 40 (1946), Supplement, p. 76). The Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 lays down, in article 2, that States not members of the United Nations may be admitted, upon the recommendation of the Executive Board, by a two-thirds majority vote of the General Conference (*U.N.T.S.*, 4 (1947), p. 280). To the same effect are the Constitution of the International Labour Organisation of 7 November 1945 (*U.N.T.S.*, 2 (1947), p. 18); of the Universal Postal Union of 5 July 1947 (*U.K. Treaty Series*, No. 57 (1949)); of the World Meteorological Organization of 11 October 1947; of the International Telecommunications Union of 2 October 1947; and of the Intergovernmental Maritime Consultative Organization (*United Nations Maritime Conference, 19 February-6 March 1948, Final Act and Related Documents*, United Nations publication, 1948. VIII. 2, p. 29). The Constitution of the World Health Organization of 26 July 1946 (*U.N.T.S.*, 14 (1948), p. 186) requires a simple majority. The same principle underlies the constitutions of international organizations which provide for admission by a decision of one of their organs whose decisions do not, according to the constitutions, require unanimity. This is the position, for instance, with regard to the Articles of Agreement of the International Bank for Reconstruction and Development of 27 December 1945 (*U.N.T.S.*, 2 (1947), p. 134).

4. It will be noted that the rule as formulated refers to the consent not of the original signatories of the treaty but of the States which are the contracting parties at the time when the request for accession is made. This means that the contracting parties which are entitled to take a decision on the subject include those — and those only — which have validly acceded to the treaty in accordance with its provisions.²¹

²¹ This principle would apparently apply to such provisions as that of article 5 of the Convention between the United States of America and Costa Rica for the establishment of an Inter-American Tropical Tuna Commission of 31 May 1949 (*U.N.T.S.*, 80 (1951), p. 12). That article lays down that any Government, whose nationals participate in the fisheries covered by the Convention, desiring to adhere, shall

²⁰ A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

ARTICLE 9

Reservations

I

Unless otherwise provided by the treaty, a signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by reservations not agreed to by all parties to the treaty.

II

Alternative Proposals de lege ferenda (as in the first report)²²

1. The italicized passage, which has been added, is not intended as any substantial modification of the original draft. It expresses a qualification which, whether explicitly stated or not, underlies most of the other articles of the first report, namely, that the parties may, subject to any overriding principles of general international law (see article 15 of the first report), adopt conventional rules appropriate to the nature and the circumstances of any particular treaty. In fact, the main purpose of the qualifying passage is to draw attention to the alternative proposals *de lege ferenda* as formulated in the first report. This is so mainly having regard to the fact that the unanimity rule which the article as formulated adopts, with some hesitation though in conformity with the view previously expressed by the Commission as to the *lex lata*,²³ is unsatisfactory in many respects.

2. It is believed that, however unsatisfactory and however far short of universal acceptance a rule of international law may be, it is the function of the Commission to state that rule—even if only as a preliminary to a formulation of a more satisfactory solution *de lege ferenda*. In his first report, the Special Rapporteur has given reasons why the unanimity rule which the Commission—rightly, it is believed—found to be the existing rule, cannot be regarded as satisfactory. However, although open to objections of various kinds, that rule nevertheless represents the existing law. The fact that it is not unanimously accepted does not mean that it is not generally accepted and that, as such, it cannot be described as the rule of international law on the subject. If unanimity of acceptance, as distinguished from generality, were to be regarded as an essential

address a communication to that effect to each of the high contracting parties and that, upon receiving the unanimous consent of the parties to adherence, such Government shall deposit with the Government of the United States of America an instrument of adherence. It must be assumed that the high contracting parties referred to above include those who have adhered in the meantime.

²² A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

²³ In his interesting memorandum on the subject, submitted in August 1953, Mr. Yepes considers that the view of the Commission as to the *lex lata* cannot be sustained (*ibid.*, A/CN.4/L.46). However, what is believed to be relevant is that the Special Rapporteur, though after some hesitation, did in fact associate himself with the view of the Commission as to the *lex lata*.

hall-mark of rules of international law, the scope of the law would be reduced to the barest minimum.

3. Nevertheless, although the Commission can, in the view of the Special Rapporteur, properly adhere to its statement of the existing law on the subject as formulated in its report on reservations in 1951,²⁴ it cannot stop there. It is a matter for reflection that while the International Court of Justice, whose function it is to *apply* existing law, in its advisory opinion on the question of Reservations to the Convention on Genocide,²⁵ devoted itself mainly to the *development* of the law in this sphere by laying down the novel principle of compatibility of reservations with the purpose of the treaty, the International Law Commission whose task is both to codify and develop international law, limited itself substantially to a statement of existing law. This was so notwithstanding the fact that the General Assembly requested the Commission to examine the subject from the point of view of both codification and development. In view of this the Special Rapporteur submits that the satisfactory fulfilment of the task of the Commission in this respect requires that it should devote attention to the elaboration of other solutions. These solutions can be conceived either as replacing the existing rule or as solutions alternative, at the option of the parties, to the existing rule which may continue to be the residuary binding principle in case the parties fail to adopt any alternative rule such as those formulated in this report.

4. Thus it will be necessary for the Commission to decide which course it will finally adopt in its codification of the law of treaties, namely, whether to formulate one of the alternative solutions as a replacement of the existing law as formulated by it in its report in 1951, or whether to re-affirm that rule as the main residuary rule and to recommend any of the alternative solutions to be adopted by the parties according to the circumstances of any particular treaty. If the Commission adopts that latter course, its task will be considerably simplified. The Special Rapporteur expresses no preference for either solution seeing that the practical difference between them is distinctly limited. For even if the traditional rule of unanimity—admittedly unsatisfactory—is maintained, it is a rule which the parties can discard at will by selecting any of the alternative solutions. They would be bound by the unanimity rule only if they were to fail to provide for other alternatives. What the codification of the subject can usefully do is, by annexing to the main residuary rule a number of model alternative solutions, to remove the danger of the parties being bound by the residuary rule as the result of mere inadvertence. There will be no excuse for such inadvertence if the alternative solutions are clearly set out in a code of the law of treaties and if, as the result, they can be presumed to be present to the minds of the parties when engaged in drafting the final clauses of the treaty.

5. From this point of view it may be useful to bring to the attention of the Commission the discussions which took place in 1954 within the Commission on

²⁴ See Chapter II of the Commission's report on its third session, *Yearbook of the International Law Commission 1951*, vol. II, p. 125.

²⁵ *I.C.J. Reports 1951*, p. 15.

Human Rights in the matter of reservations to the proposed Covenant of Human Rights. While Chile and Uruguay proposed that "no State Party to this Covenant may make reservations in respect of its provisions" (Commission on Human Rights, tenth session, document E/CN.4/L.354, 25 March 1954), the U.S.S.R. advanced a proposal in the opposite direction — a proposal giving any State the right to formulate reservations irrespective of the attitude of the other parties. The proposal (*ibid.*, document E/CN.4/L.349, 22 March 1954) ran as follows: "Any State may, either at the time of signature of the present Covenant followed by acceptance, i.e. ratification, or at the time of acceptance, make reservations with regard to any of the provisions contained therein. If reservations are made the Covenant shall, in relations between the States which have made the reservations and all other States Parties to the Covenant, be deemed to be in force in respect of all its provisions except those with regard to which the reservations have been made." The proposal put forward by China, Egypt, Lebanon and the Philippines (*ibid.*, document E/CN.4/L.351, 24 March 1954) combined, in a novel fashion, the so-called Pan-American system with the principle of compatibility as enunciated by the Court. It reads as follows:

"1. Any State, at the time of its signature subsequently confirmed by ratification, or at the time of its ratification or acceptance, may make any reservation compatible with the object and purpose of the Covenant.

"2. Any State Party may object to any reservation on the ground that it is incompatible with the object and purpose of the Covenant.

"3. Should there be a dispute as to whether or not a particular reservation is compatible with the object and purpose of the Covenant, and it cannot be settled by special agreement between the States concerned, the dispute may be referred to the International Court of Justice by the reserving State or by any State Party objecting to the reservation.

"4. Unless a settlement is reached in accordance with paragraph 3, any State Party objecting to the reservation may consider that the reserving State is not a party to the Covenant, while any State Party which accepts the reservation may consider that the reserving State is a party to the Covenant.

"5. Any State making a reservation in accordance with paragraph 1, or objecting to a reservation in accordance with paragraph 2, may at any time withdraw the reservation or objection by a communication to that effect addressed to the Secretary-General of the United Nations."

The detailed proposals put forward by the United Kingdom are of special interest inasmuch as they emanate from a Government which before the International Court of Justice, in the case of Reservations to the Convention on Genocide,²⁶ relied conspicuously on the unanimity rule. These proposals are in accordance with the alternative drafts A and B as formulated in the first report submitted by the Special Rapporteur in 1953. They follow the lines of the solution foreshadowed by the

Government of the United Kingdom at the General Assembly in 1952 and elaborated in greater detail by Sir Gerald Fitzmaurice in the *International and Comparative Law Quarterly*, vol. 2 (1952), pp. 1-26. They read as follows (*ibid.*, document E/CN.4/L.345, 18 March 1954):

"1. Any State may, on depositing its instrument of acceptance to this Covenant, make a reservation to the extent that any law in force in its territory is in conflict with, or to the extent that its law does not give effect to a particular provision of Part III of this Covenant. Any reservation made shall be accompanied by a statement of the law or laws to which it relates.

"2. As soon as the period of two years mentioned in Article 70 (3) has elapsed, the Secretary-General of the United Nations shall, subject to paragraph 5 of this Article, circulate a copy of all reservations received by him to all States which have by the date of circulation deposited an instrument of acceptance with or without reservation.

"3. Copies of reservations received after the expiry of the period mentioned in Article 70 (3) shall, subject to paragraph 5 of this Article, forthwith be circulated by the Secretary-General to all States which, by the date of circulation, have deposited an instrument of acceptance with or without reservation or, if on that date the Covenant has entered into force, to all States parties thereto.

"4. A reservation shall be deemed to be accepted if not less than two-thirds of the States to whom copies have been circulated in accordance with this Article accept or do not object to it within a period of three months following the date of circulation.

"5. If an instrument of acceptance accompanied by a reservation to any part of this Covenant not mentioned in paragraph 1 of this Article is deposited by any State, the Secretary-General shall invite such State to withdraw the reservation. Unless and until the reservation is withdrawn, the instrument of acceptance shall be without effect and the procedure provided in this Article shall not be followed with respect to such instrument or the reservation or reservations accompanying it.

"6. Any State making a reservation in accordance with this Article may withdraw that reservation either by a notice addressed to the Secretary-General; such notice shall take effect on the date of its receipt; and in whole or in part at any time after its acceptance, a copy of such notice shall be circulated by the Secretary-General to all States parties hereto."

Subsequently the following paragraph was added to the foregoing text (*ibid.*, document E/CN.4/L.345/Add. 1, 24 March 1954):

"7. It is understood that, in order to achieve the application to the fullest extent of the provisions of this Covenant, any State making a reservation in accordance with this article should take, as soon as may be practicable, such steps as will enable it to withdraw the reservation either in whole or in part."

8. The Commission on Human Rights, without declaring itself in favour of any solution, decided to sub-

²⁶ *Ibid.*

mit the various proposals to the General Assembly for a final decision. While the General Assembly may find it necessary, with regard to the particular instrument before it, to take a decision in favour of one particular system in the matter of reservations, no such determination is incumbent upon the International Law Commission. As already suggested, it may properly consider that after formulating the main residuary rule binding upon the parties in case (and only in case) they have failed to provide for a different solution, its task will be fulfilled if it formulates the various alternative solutions as outlined in this report, or, if the Commission so desires, any other methods. For the fact, which the Commission is not at liberty to disregard, is that, according to the circumstances of the various treaties, the recent practice of Governments has variously followed the different methods outlined in the report. Thus the Agreement of 25 February 1953 on German External Debts (*Cmd. 8781 (1953)*) follows closely the principle of unanimity. It lays down in article 38 as follows: "Any Government which deposits an instrument of ratification or a notification of approval or an instrument of accession to the present Agreement other than in accordance with the terms of its invitation or subject to any other reservation or qualification shall not be deemed to be a Party to the Agreement until such reservation or qualification has been withdrawn or has been accepted by all the Parties thereto." On the other hand, the Convention of 1951 on the Legal Status of Stateless Persons allows reservations, regardless of the subsequent consent of the other contracting parties, but excludes them altogether with regard to some specified subjects, such as absence of non-discrimination (article 3), freedom of religion (article 4), free access to court (article 16, para. 1), prohibition of expulsion to countries of persecution (article 33), and the final clauses of the convention. The Convention on Declaration of Death of Missing Persons, concluded about the same time (6 April 1951), follows the so-called Pan-American system. It provides, in article 19, that if a contracting party does not accept a reservation made by another State, it may within ninety days of the receipt of notification thereof, notify the Secretary-General that it considers the accession of the State making the reservation as not having entered into force between that State and itself; for in that case the convention is to be considered as not having entered into force between the two States in question. These examples, which show the continuing variety of practice on the subject, suggest that it is neither necessary nor desirable to aim at a uniform solution of the problem. What is both necessary and desirable is that the codification of the law of treaties shall contain a clear rule for the cases in which the parties have made no provision on the subject.

9. It will be noted that neither the first report nor the present additional report refers to the so-called "federal clause" or the "colonial clause" — a subject which has given rise to considerable discussion. Essentially, the federal and colonial clauses constitute reservations; to that extent they are governed by the rules and principles bearing on that matter. However, their importance is such that they warrant separate treatment. This belongs, more conveniently, to that part of the report which will cover the operation and implementation of treaties.

ARTICLE 16

Consistency with prior treaty obligations

1. A bilateral or multilateral treaty, or any provision of a treaty, is void if its performance involves a breach of a treaty obligation, previously undertaken by one or more of the contracting parties.

2. A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty.

3. The above provisions apply only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or substantially to impair an essential aspect of its original purpose.

4. The rule formulated above does not apply to subsequent multilateral treaties, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest. *Neither does it apply to treaties revising multilateral conventions in accordance with their provisions or, in the absence of some provisions, by a substantial majority of the parties to the revised convention.*

1. The following changes, which have been italicized and which are the subject of this comment, have been introduced in article 16 of the original report:

(a) The contention of the principal provision of paragraph 1 has been clarified so as to make it cover both unilateral and multilateral subsequent treaties;

(b) A further clarification has now been introduced in this paragraph in the sense that the invalidity of the subsequent treaty may extend to some of its provisions only as distinguished from the treaty as a whole — a recognition of the principle of severability which is of special importance in connexion with the subject matter of this article;

(c) The present version of paragraph 3 of article 16 now qualifies the rule of the invalidity of the inconsistent subsequent treaty, namely that the serious impairment of the original purpose of the prior treaty must extend to an essential aspect of that original purpose;

(d) In paragraph 4 the reference to the Charter of the United Nations has been omitted in order to avoid too narrow a reference to multilateral treaties which permit of an exception to the general principle enunciated in the article;

(e) In the same paragraph, in relation to subsequent multilateral treaties generally, the principle has been introduced that such multilateral treaties are valid if they constitute a revision of the prior treaty accomplished either in accordance with its original terms or by a substantial majority of the parties thereto.

2. While the changes now introduced into article 16 represent some alterations of substance, they are intended mainly to clarify and to supplement the original object of that Article. Their object is also to draw attention

to the fact the question of the co-existence and the conflict of multilateral treaties raises problems other — and in some respects more important — than that of the validity or otherwise of the subsequent treaty inconsistent with treaty obligations previously undertaken. These problems include those of interpretation of the prior and subsequent treaties and of termination²⁷ — or degree of termination — of the prior treaty in the light of the subsequent instrument. Above all, there arise in this connexion complicated problems of legislative technique as the result of the co-existence of multilateral treaties unavoidably covering the same subject matter, of regional agreements, and of constitutions of international institutions — based on treaty — with overlapping spheres of activity. With regard to these questions, the issue of invalidity of the subsequent treaty or of its individual provisions is not of primary significance. Although this aspect of the problem falls more conveniently within the part of the report concerned with the operation and implementation of treaties, it is of importance that the codification of the law of treaties should, at every stage, draw attention to the wide ramifications of this aspect. In particular, it has a direct bearing upon the question of the revision of multilateral conventions. Any revision of a multilateral convention amounts to the conclusion of a new treaty which, even if it merely adds to the obligations of the revised treaty, creates a new set of obligations potentially inconsistent with the latter. The question arises whether, in the absence of express provisions regulating the process of revision, the second treaty — however otherwise justified, reasonable and beneficent — is void on account of inconsistency with the prior treaty. This and similar questions affect the whole process of so-called international legislation — including that covered

²⁷ *As between the same parties* the question of inconsistency of the prior and subsequent treaties is not relevant to the question of the validity of the latter. Here—but only here—the maxim *lex posterior derogat priori* fully applies. To the extent of inconsistency the subsequent treaty abrogates the former treaty. The degree of the inconsistency is a question of interpretation. See, for example, Hackworth, *Digest of International Law* 5 (1943), pp. 306-507, on the controversy between the United States and Turkey concerning the implied abrogation of the Treaty of Commerce and Navigation of 1930 between the United States and the Ottoman Empire by the Treaty of 28 October 1931. It will be noted that in the case of the *Free Zones of Upper Savoy and the District of Gex* the Permanent Court of International Justice was called upon to decide whether article 435, paragraph 2, of the Treaty of Versailles “has abrogated or is intended to lead to the abrogation” of the provisions of the Treaty of Paris of 1815 regarding the regime of the Free Zones of Upper Savoy and the District of Gex (*P.C.I.J.*, Series A/B, No. 46). While in the *Mavrommatis* case the Court considered that a Protocol annexed to the Peace Treaty of Lausanne overruled the provisions of the mandate for Palestine (Series A, No. 2, p. 30), it held in the case of *Minority Schools in Upper Silesia* that the contracting parties could not validly abrogate or modify in one part of the Convention, the protection afforded by a decision of the Conference of Ambassadors and embodied in a preceding part of the same Convention (Series A, No. 15). There may be circumstances in which two parties may properly cancel a treaty to which a third State is a party. Thus Article 8 of the Treaty of Peace and Friendship of 31 July 1950 between the Governments of India and Nepal (*U.N.T.S.*, 94 (1951), p. 8) provides as follows: “So far as matters dealt with herein are concerned, this Treaty cancels all previous Treaties, agreements, and engagements entered into on behalf of India between the British Government and the Government of Nepal.”

by the codification of international law — and a further detailed examination of the problem seems to be indicated.

3. In the first instance, it has seemed desirable to clarify the first paragraph of article 16 by stating expressly that the main principle there formulated applies both to subsequent bilateral and multilateral treaties. The contrary principle is adopted in the Havana Convention on Treaties of 1928 which provides in article 18 that “two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States”.²⁸ The Governments participating in The Hague Codification Conference of 1930 were conscious of the implications of the question. However, the final recommendation of the Conference on the subject was inconclusive. It stated that “in the future, States should be guided as far as possible by the provisions of the Acts of the First Conference for the Codification of International Law in any special conventions which they may conclude among themselves”.²⁹ The Report of the Drafting Committee added a further element of uncertainty by contriving, in one passage, to give expression to — and, apparently, approve of — two contradictory considerations. It referred to the concern felt in the Committee on Nationality “as to how far it would be possible for two States to conclude between themselves special agreements which were not entirely in accordance with the principles contained in the instruments adopted by the Conference”.³⁰ It proceeded to express the view that “doubtless nothing prevents the conclusion of such agreements, provided they affect only the relations between the States parties thereto”.³¹ The Committee then added to the inconclusiveness of its statement by putting on record its opinion that it would not be desirable to adopt a rule expressly permitting States to avoid the obligations of the Convention by allowing them to conclude agreements of this nature and that this was the reason for the recommendations referred to above.

4. It would thus appear that the solution adopted by The Hague Conference was essentially in the nature of a diplomatic formula, contradictory in itself, which left on one side the principal issue. No such course is open to the International Law Commission in its codification of the law of treaties. The problem is admittedly of pronounced complexity. Can it be said that any *inter se* agreement affects only the relations of the parties thereto? If a number of States are parties to a general convention whose provisions are designed to eliminate statelessness, can those States validly conclude *inter se* an agreement departing from these provisions? If a number of States are parties to a general treaty providing for full freedom of air navigation in respect of all the “freedoms of the air”, can they subsequently validly conclude *inter se* an agreement limiting the operation of that principle? If some States are parties to general

²⁸ Printed in Hudson, *International Legislation*, vol. IV, pp. 2378, ff., at p. 2383.

²⁹ *Acts of the Conference for the Codification of International Law*, vol. I, *Plenary Meetings*, Publications of the League of Nations, V. *Legal*, 1932.V.14., p. 171.

³⁰ *Ibid.*, p. 68.

³¹ *Ibid.*

conventions which prohibit forced labour, or traffic in slaves, or white slave traffic, or the right to have recourse to force, or absolute freedom to produce and import narcotic drugs, can these States validly conclude *inter se* a convention which limits the operation of the principal convention? Can a number of States parties to the Geneva Conventions on Prisoners of War or on the Treatment of Civilians subsequently agree *inter se* that, contrary to the provisions of these Conventions, in any war in which they may be engaged, reprisals shall be admissible against prisoners of war or that all or some of the safeguards provided for the civilian population shall not apply? The same question can be asked in respect of a convention which codifies the law of treaties. In this case, however, a negative answer does not suggest itself as readily as with regard to the other questions. It might not seem improper, when a general convention on treaties provides for the requirements of ratification as a condition of the validity of a treaty, that some of the parties should in a subsequent treaty *inter se* dispense with that requirement. The same applies to the requirement of written form as a condition of the validity of a treaty. But are the parties to a general convention on treaties equally at liberty to provide *inter se* that, unlike the general treaty, treaties imposed by force or treaties inconsistent with general international law shall be valid?

5. Possible questions of this character are probably as many as there are multilateral conventions. The fundamental difficulty arises out of the consideration that it is of the essence of multilateral conventions that, as a rule, they do not, in respect of the subjects covered by them, regulate matters which affect only the relations between the States parties thereto. If five States parties to any of the conventions referred to above adopt as between themselves provisions and principles contrary to — or perhaps only differing from — those of the general conventions they may fairly be said to affect by their action all parties to the general convention. It is in the general and particular interest of all parties to these conventions that all other parties to the convention adhere *among themselves* to the provisions and principles of that convention. The latter may otherwise have no meaning or purpose — even if that general interest has no other object than that of securing uniformity for the sake of certainty and smoothness of international intercourse. For this reason it would appear that once States have become parties to a multilateral treaty of a legislative character, none of the questions covered by it affects only a limited number of the contracting parties; all contracting parties are affected. In fact, in conventions of this type the main interest of some parties, whose participation in the convention is no more than declaratory of a practice which they have followed as a matter of course, may be that *other* parties should individually or *inter se* abide by the purpose and the rules of the convention. For their purpose is not the regulation of a contractual *quid pro quo*. In such convention the object is not to give or receive a specific tangible consideration for benefits received: the decisive consideration is the general observance of the convention. This is the position with regard to most — or perhaps all — multilateral conventions.³² This being so, the prohibition of *inter se* arrangements inconsistent with the previous treaty obligations applies to all multilateral

treaties unless, in accordance with paragraph 4 of article 16, the *subsequent* inconsistent treaty belongs to the exceptional category of enactments of a fundamental character or unless it is concluded in the general international interest and is of such a nature as properly to override previous undertakings. In view both of the actual increase of the practice of multilateral treaties and its possible extension as the result of the growing integration of international society, the time seems to be ripe for the authoritative affirmation of the principle that parties to a multilateral treaty cannot legitimately claim the right to avoid its obligations through the device of concluding a bilateral or multilateral arrangement *inter se*.

6. While, for these reasons, the Special Rapporteur has deemed it necessary to clarify paragraph 1 of article 16 by extending its principal provision to both bilateral and multilateral treaties, the fact must be taken into consideration that international practice shows numerous instances of subsequent *inter se* agreements and that such agreements are necessary and desirable. The Covenant of the League of Nations provided for — and encouraged — regional agreements. So does the Charter of the United Nations. The Universal Postal Convention of 1952 authorizes, in article 9 (*U.N.T.S.*, 169 (1953), p. 25), the establishment of limited unions — subject to the restriction that they do not introduce conditions less favourable to the public than those laid down by the Convention and Regulations of the Universal Postal Union. Similar latitude is provided for in article 42 of the International Telecommunication Union. The Convention of 1934 for the Protection of Industrial Property and the Convention of 1928 for the Protection of Literary and Artistic Works permit, in articles 15³³ and 20³⁴ respectively, *inter se* arrangements provided that they are not inconsistent with the provisions of those conventions. In some cases the authorization extends specifically to conventions already concluded. Thus the Safety of Life at Sea Convention of 1948 lays down that matters falling within the provisions of that Convention but governed by the International Telecommunications Convention shall be governed by the latter as supplemented by the Safety of Life at Sea Convention. The same principle has been made applicable in the relations between the International Telecommunications Convention and the International Civil Aviation Convention as well as between the International Sanitary Regulations and the International Civil Aviation Convention. Above all, upon analysis, those treaties which terminate an existing multilateral treaty and provide for the continuation of such prior treaty between and in relation to those States who do not become parties to the new treaty, amount to what is called an *inter se* arrangement. Such treaties, which may or may not be inconsistent with a previous

³² In this respect the Special Rapporteur has felt compelled to adopt a view differing from that expressed in the Harvard Research draft on treaties which limits the multilateral conventions in question to conventions of a fundamental character such as the Covenant of the League of Nations or the Statute of the Permanent Court of International Justice. See *American Journal of International Law*, 29 (1935), Supplement, pp. 1016 ff., especially at p. 1018.

³³ *L.N.I.S.*, vol. 192, pp. 17 ff., at p. 43.

³⁴ Printed in Hudson, *International Legislation*, vol. IV, pp. 2463 ff., at pp. 2475-2476.

treaty in *pari materia* between the same parties, constitute a prominent and constant feature of international practice. This takes place through provisions such as that of article 27 (1) of the Convention for the Protection of Literary and Artistic Works of 2 June 1948 which reads as follows: "The present Convention shall replace in the relations between the countries of the Union the Convention of Berne of 9 September 1886, and the acts by which it has been successively revised. The acts previously in effect shall remain applicable in the relations with the countries which shall not have ratified the present Convention."³⁵ The Hague Convention for the Pacific Settlement of International Disputes provided that it shall replace as between the Contracting Parties the corresponding convention of 1897. Similar provisions were incorporated in the Sanitary Convention of 21 June 1926. The Geneva Conventions of 1948 include analogous provisions in relations to the Geneva Convention of 1929 which, in turn, made similar reference to the provisions of The Hague Convention No. IV in so far as they bore on the treatment of prisoners of war.

7. Two factors would thus seem to emerge from the preceding observations. The first is that successive treaties which are concluded between some of the parties to the previous treaty and which cover the same subject and, to that extent, are potentially mutually inconsistent, are a frequent and necessary occurrence. The second is that any such subsequent treaty, although concluded only as between some States, as a rule affects, in some way, the former treaty and all the parties thereto. The question is whether it affects them so vitally and so adversely as to bring into play the general principle of the invalidity of the subsequent inconsistent treaty. This problem, in turn, resolves itself into two questions: the first is whether the subsequent multilateral treaty is in fact inconsistent with the prior multilateral treaty. This is a question of considerable difficulty which can be decided only by reference to the character and the purpose of the two treaties. In the nature of things, although the decision must somehow be made, it cannot be made, with any assurance, in advance and by reference to any abstract standard. Very often, an inconsistency — a conflict — will, upon closer scrutiny, prove to be no more than a divergence or variation with regard to the scope of the treaty and the method of its application. Often the departure, though apparent, is not such as to affect the true purpose of the prior treaty — especially in the light of an actual assessment of the relative importance of the interests involved. Thus, from this point of view, there is no conflict — even if the resulting situation amounts to more than mere overlapping — as the result of the fact that the various Trusteeship Agreements cover such subjects, regulated in other conventions, as traffic in arms, slavery and forced labour; or that the Convention of 1951 relating to the Legal Status of Refugees or the Conventions of 1949 on Prisoners of War and the Treatment of Civilians regulate questions which form the subject matter of various international labour conventions with regard to such matters as labour legislation and social security; or that, while some conventions between the same

contracting parties aim at the relaxation of restrictions of the freedom of movement of goods or persons, others introduce specific limitations by reference to public health (as in the case, referred to above, of the International Sanitary Regulations and the International Civil Aviation Convention).

8. In all these matters the ensuing problem — and the correct method of approach — ought not to be conceived so much in terms of any invalidity of the subsequent treaty or its particular provisions as of deciding which, in all the circumstances, must prevail. For there is little substance in the suggestion that, in pure logic, if a provision is made to yield to a provision of another treaty it is, *pro tanto*, invalid. For that provision may be otherwise — i.e., in relation to other treaties and generally — fully valid and operative. This being so, unless the inconsistency is so gross, irreparable and raising the issue of good faith as to call urgently for the application of the principle and of the sanction of invalidity, the problem is one of resolving the conflict by application of principles appropriate to the case. Such principles may be found in the application of the maxim *lex specialis derogat generali* or in an inquiry into the degree of generality or hierarchical order of the treaties in question. It cannot be found in the application of a rule of thumb.³⁶ It must, more properly, be sought in the provision of some organs of international advice and assistance equipped with an up-to-date knowledge of existing treaties in the same way as parliamentary draftsmen in national legislatures among whose principal qualifications is a thorough and ready familiarity with the large mass of statutory law of their country. It must further be sought in a consistent practice of consultation between and with the various specialized agencies within whose province any particular multilateral convention may fall. The Administrative Committee on Co-ordination of the United Nations and the Specialized Agencies has made far-reaching recommendations to that effect.³⁷ In many cases the problem may be solved by the conclusion of more general — consolidatory — treaties aiming at the removal of inconsistencies between treaties as in the case of the United Nations Convention on Road Traffic of 19 September 1949³⁸ (which attempted to remove the inconsistencies between the Washington Convention of 6 October 1930 on the Regulation of Automotive Traffic³⁹ and the Paris Convention of 24 April 1926 on Motor Traffic⁴⁰) or in the case of the Universal Copyright Convention of 1952^{40a} (which, partially, attempted to achieve the same object as between the Berne and Inter-American Conventions for the Protec-

³⁶ An illuminating survey of these possible principles is contained in an article by Dr. Jenks entitled "The Conflict of Law-Making Treaties", in *British Year Book of International Law* (1953), pp. 401 ff. See also the valuable contribution by Dr. Aufrecht in *Cornell Law Quarterly*, 37 (1952), pp. 655-700.

³⁷ See Jenks, "Co-ordination in International Organization: An Introductory Survey", in *British Year Book of International Law*, 28 (1951), pp. 75 and 84; *ibid.* 30 (1953), pp. 401 ff.; and in *Recueil des Cours* of The Hague Academy, 77 (1950), pp. 189-293.

³⁸ *U.N.T.S.*, 125 (1952), pp. 22 ff.

³⁹ Hudson, *International Legislation*, vol. V, pp. 786 ff.

⁴⁰ *Ibid.*, vol. III, pp. 1859 ff.

^{40a} *Cmd.* 8912 (1952).

³⁵ *Ibid.*, p. 2479.

tion of Literary and Artistic Works).⁴¹ Last — but not least — there remains recourse to judicial settlement for determining, in relation to any particular conflict, either the priority or, in extreme cases, the voidance of any particular inconsistent obligation. It is clear that in such cases the task confronting a judicial body is of an exacting nature. Inasmuch as on occasion it may amount to assigning the same treaties and provisions a hierarchical priority of importance by reference to the character and objects of the treaties in question, it may tend to assume the complexion of legislative activity. However, the performance of such tasks may be unavoidable in some cases. It may be aided by a codification, on the lines suggested, of this aspect of the law of treaties.

9. At the same time it is of importance not to exaggerate the importance of conflict. On occasion, the apparent conflict resolves itself, upon analysis, into no more than an assumption of additional obligations. Thus, for instance, it was widely maintained for a time that there existed a conflict between the obligations of the Pact of Paris, which prohibited war as an instrument of national policy, and the provisions of the Covenant of the League of Nations which allowed war in certain contingencies (such as the failure of the Council to make a valid recommendation or a valid finding that a dispute fell within the domestic jurisdiction of a State). There was in fact no such conflict. There merely existed an additional obligation under the Pact of Paris — an obligation clearly not inconsistent with the Covenant. Neither was there a conflict when, in addition to the obligation to submit disputes to the Council of the League of Nations, the parties became bound by special treaties of conciliation and other means of pacific settlement — a contingency which in any case does not arise under Chapter VI of the Charter of the United Nations owing to the elastic nature of its provisions. The same applies to the multiplicity of obligations of judicial settlement — as when parties to the optional clause of Article 36 of the Statute of the International Court of Justice are also bound by other obligations of judicial settlement. In such cases it is probably for the body first seized with the dispute to determine which obligation enjoys precedence. The co-existence of multilateral conventions in cognate fields must unavoidably cause a great deal of overlapping and divergence. When the International Law Commission approaches in due course the question of the operation and implementation of treaties it will be necessary, in the light of recent authoritative research on the subject, to consider constructive proposals in the field of legislative technique in this matter. However, as a rule the problem is in many cases of a less drastic nature than that arising from obvious or deliberate inconsistency which renders relevant the principle of the invalidity of the subsequent treaty. This applies even to such widely acknowledged instances of inconsistency of treaties as occurred in the case of the Convention of 1919 for the Regulation of Aerial Navigation and the Havana Commercial Aviation Convention of 1928.⁴²

⁴¹ The Special Rapporteur is indebted to Dr. Jenks for these examples: *British Year Book of International Law*, 30 (1953), pp. 401 ff.

⁴² See Warner in *Air Law Review*, 1932, p. 225.

10. In this connexion there arises the question of what weight must be given to the provisions of treaties affirming that they are not intended to conflict with other — specified or unspecified — treaties. Thus article 7 of the North Atlantic Treaty of 4 April 1949 (*U.N.T.S.*, 34 (1949), p. 248) provides as follows: "This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations." Article 10 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947 (*U.N.T.S.*, 21 (1948), p. 101) provides that "none of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations."⁴³ The Agreement between the United Nations and the Universal Postal Union of 15 November 1948 provides in article 6 (*U.N.T.S.*, 19 (1948), p. 224) that "as regards the Members of the United Nations, the Union agrees that in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related Agreements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations." Similar provisions were inserted in the various and numerous treaties of friendship and pacific settlement between members of the League of Nations providing for neutrality of the parties in case of any — usually defensive — war in which they may become engaged. These treaties provided, having regard to the obligations of article 16 of the Covenant, that they were not intended to conflict with the obligations of the Covenant.⁴⁴ These treaties included the Locarno Treaty of Mutual Guarantee of 16 October 1925 (article 7). Provisions of this nature were also found in treaties of a technical character such as the Barcelona Statute of 1921 concerning navigable waterways of international interest, the Geneva Statute of 1921 concerning railways, and the convention of the same year relating to transit of electric power. What effect is to be attributed to such declarations of compatibility? It may be said that they are no more than declaratory

⁴³ Provisions of this character are to be found in a variety of recent treaties. Thus the Mutual Defense Assistance Agreements between the United States of America and other States (see above, article 1, para. 7) provide that the financing of any assistance under these agreements shall be consistent with the obligations of the contracting Governments under the Charter of the United Nations and of the North Atlantic Treaty. The Treaty of Friendship between Thailand and the Philippines of 14 June 1949 lays down, in article 2 (*U.N.T.S.*, 81 (1951), p. 54), that the undertaking to settle disputes between the parties by various pacific means, including reference to the International Court of Justice, "shall not affect the application of the Charter of the United Nations." The Convention between the United States of America and Costa Rica for the establishment of an Inter-American Tropical Tuna Commission of 31 May 1949 (*U.N.T.S.*, 80 (1951), p. 4) provides in article 4 (*ibid.*, p. 10) that "nothing in this Convention shall be construed to modify any existing treaty or convention with regard to the fisheries of the eastern Pacific Ocean previously concluded by a High Contracting Party, nor to preclude a High Contracting Party from entering into treaties or conventions with other States regarding these fisheries, the terms of which are not incompatible with the present Convention."

⁴⁴ For an enumeration and discussion of some of these treaties, from this point of view, see Rousseau, *Principes généraux de droit international public*, vol. 1 (1944), pp. 774-776, 789-792.

of the general presumption — which is a principle of interpretation — that the parties to a convention do not intend to undertake obligations conflicting with their duties under previous treaties. It may be argued, on the other hand, that such declarations of compatibility are no more than a form of words which cannot do away with the fact that the subsequent treaty cannot be performed without violating the provisions of the prior treaty. An inconsistent treaty cannot, it may be said, be made consistent with the prior treaty by the simple device of the parties affirming that it is so. However, the better view is probably that such declaration of compatibility is not devoid of effect and that it serves a useful purpose. It amounts to a clear expression of intention that the subsequent treaty should not be operative in case it should in fact, in any particular instance, conflict with the prior treaty. To that extent the presumption that the parties do not intend the subsequent treaty to be inconsistent with the first receives a considerable accession of strength as the result of an express provision to the effect that no conflict is intended.⁴⁵

11. Having regard to the general tendency of international practice, as expressed in article 16, to treat the subsequent inconsistent treaty as void only if no other solution can reasonably be adopted, the Special Rapporteur has deemed it desirable to clarify the first paragraph of that article by adding the words “*or any provision of a treaty*”. The object of that addition is to incorporate expressly in the article the principle of severability, that is to say, the principle that, as a rule, the voidance resulting from the absence of any of the conditions of the validity of a treaty need not affect the treaty as a whole; it may, and as a rule does, affect only the relevant provision. The principle of severability applies generally to the whole subject of treaties and will be examined in the appropriate parts of this report, in particular in connexion with the application and the termination of treaties. However, it has been considered convenient to give to it express formulation in the present article which is concerned largely with multilateral treaties. In relation to these the principle of severability is of special importance.

12. The reasons for the change introduced in paragraph 3 — namely, the substitution of the words “essential aspect of its original purpose” for the words “original purpose” — appear from the preceding sections of this comment. The fact that the subsequent treaty alters *some* aspect of the original purpose of the prior treaty need not be decisive. The decisive question must be whether it contravenes an essential aspect of that treaty.

13. In paragraph 14 the words “such as the Charter of the United Nations” have been omitted as suggesting too narrow a scope of multilateral treaties which, although inconsistent with previous obligations, are nevertheless valid (i.e., which in effect may override

previous treaties). There may be other multilateral treaties of such generality and importance that they may properly be attributed that effect. Thus, for instance, if a general air navigation convention effectively securing “the freedoms of the air” were to come into existence that convention might properly claim validity even if inconsistent with the previous treaty obligations of the parties; it might do so to the point of releasing the parties thereto from previous treaty obligations. This is to some extent recognized in various bilateral treaties in which the parties agree that in the event of their becoming parties to a general air convention the bilateral treaty should be amended accordingly. Thus article 14 of the Agreement of 29 October 1948 between the Netherlands and the Argentine of 29 October 1948 concerning regular air services provides as follows: “If the two Contracting Parties should ratify or accede to a multilateral air transport convention, then this Agreement and its annex shall be amended so as to conform with the provisions of the said convention as from the date on which it enters into force between them” (*U.N.T.S.*, 95 (1951), p. 57). Article 14 of the Agreement of 8 December 1949 between the Netherlands and Egypt concerning the establishment of scheduled air services is to the same effect (*ibid.*, p. 141). So is article 14 of the Agreement of 11 March 1950 between Norway and Egypt for the establishment of scheduled air services (*ibid.*, p. 184). So are many other treaties in this sphere.⁴⁶ The adoption of some such principle may also assist in solving the difficulties raised by treaties incorporating the most-favoured-nation clause and the subsequent desire of the parties to participate in general treaties providing for a comprehensive economic régime in the direction of liberalizing international commercial relations. It is clear that, in view of the general practice of giving an unconditional interpretation to the most-favoured-nation clause, the participation in such general treaties would become illusory or impossible if the benefits of such treaties had to be extended to States refusing to take part in the general treaty. For this reason there may be room for extending the principle now introduced in paragraph 4 to economic multilateral treaties of general character concluded in what may fairly be regarded as the overriding international interest. In fact some such solution has been suggested by writers who have devoted close study to the subject.⁴⁷

14. The Special Rapporteur deems it necessary to draw attention to the wide implications of the principle as now proposed in paragraph 4 of article 16. In so far as that principle sanctions and treats as valid departure from the terms of a binding treaty as the result

⁴⁵ Thus article 13 of the Agreement concerning air communications between Poland and Bulgaria of 16 May 1949 (*U.N.T.S.*, 84 (1951), p. 338) provides as follows: “1. The present Agreement shall be ratified by the two Contracting Parties and shall come into force on the date of the exchange of the instruments of ratification. . . . It annuls and replaces all previous Polish-Bulgarian agreements and arrangements concerning air communications. 2. Should the two Contracting Parties ratify or adhere to a multilateral aviation convention, the present Agreement and its annex shall be amended so as to conform to the provisions of that convention as soon as it has entered into force, as between the two Parties.”

⁴⁷ See, for example, Ito, *La clause de la nation la plus favorisée* (1930).

⁴⁵ This same principle is occasionally expressed in connexion with the provisions of the same instrument. Thus the Agreement of 27 February 1953 on German External Debts (Cmd. 8781 (1953)) lays down, in article 27, that “in the event of any inconsistency between the provisions of the present Agreement and the provisions of any of the Annexes thereto, the provisions of the Agreement shall prevail” (*ibid.*, p. 19).

of the conclusion of a multilateral treaty of a sufficient degree of significance and generality, it amounts to an interference with the legal rights of States without their consent. To that extent it amounts to a pronounced measure of international legislation in the literal sense. That consequence is probably unavoidable in a progressive and developing international society. However, it is of importance to realize the implications of that aspect of the codification of the law of treaties.

15. The same considerations apply to the addition now introduced at the end of paragraph 4 of article 16. The rule as now formulated provides that the general principle of the voidance of the subsequent incompatible treaty does not apply to treaties revising multilateral conventions in accordance with the provisions of these conventions or, in the absence of such provisions, by a substantial majority of the parties to the original convention. To some extent this rule overlaps with that expressed in the first sentence of paragraph 4 which refers, in the same sense, to "subsequent multilateral treaties, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest." However, the multilateral treaties referred to in the paragraph now added cover also multilateral treaties falling short of the stringent requirements of the first sentence. As stated above, any revision of a treaty, unless extending to matters of minor importance, is more or less inconsistent with the original treaty. If the revision of the prior treaty does not impair, in the words of paragraph 3, "an essential aspect of its original purpose" then, under the principle there stated, there is no question of the subsequent treaty being void. However, this will not always be the case. It is for this reason that the provision now added seems to be necessary. There is a substantial body of practice which is based on that principle. Thus article 14 of the Postal Convention of 1930 (and, substantially, article 15 of the Universal Postal Convention of 1947) provide for the possibility of a repeal, by a majority vote, of Acts of the preceding Congress of the Union. The revised Convention was, as from the date fixed by the Congress, binding on all members except those withdrawing from the Union.

Under article 17 of the Articles of Agreement of the International Monetary Fund (*U.N.T.S.*, 2 (1947), p. 98) amendments to most⁴⁸ articles of the Agreement require the concurrence of three-fifths of the members having four-fifths of the total voting power and are binding for all members within the time prescribed in the Agreement. Article 8 of the Articles of Agreement of the International Bank for Reconstruction and Development (*U.N.T.S.*, 2 (1947), pp. 184-186) is to similar effect. The provisions of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (*U.N.T.S.*, 33 (1949), pp. 262 ff.) go in the same direction.

16. The amendment as proposed refrains from specifying in detail the kind of majority required for revision. While a detailed regulation of that aspect of the matter is possible — and indicated — in particular conventions, such as the Postal Union or the Monetary Fund, an article in the codification of the law of treaties must leave room for elasticity in this respect. A purely numerical majority — even if qualified by a requirement of two-thirds — may on occasion provide no more than a nominal solution.⁴⁹ Possibly a definition of what constitutes a "substantial majority" might include, as one of the relevant factors, a system of weighting votes such as that expressed in the Universal Postal Convention or in similar instruments. However that may be, the revision of multilateral treaties constitutes one of the most important aspects of the international legislative process and attention must be given to it either in connexion with the present article 16 or in some other part of the codification of the law of treaties.

⁴⁸ This does not apply to some articles, namely, those requiring unanimous consent for amendments modifying the right to withdraw from the Fund and the provisions relating to the quota of a member and the par value of its currency.

⁴⁹ Thus the United States, Great Britain and France consider as invalid the Belgrade Convention of 1948 relating to the Danube and revising the Convention of 1921 although that Convention was agreed upon by seven out of the ten States participating in the Conference of 1948. However, as Italy, Belgium and Greece, who were parties to the Convention of 1921, were not — contrary to article 42 of that Convention — invited to participate in the Conference of 1948, it appears that the revision was not accomplished by a majority of the original signatories.

REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/2693

Report of the International Law Commission covering the work of its sixth session, 3 June-28 July 1954

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Chapter I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its sixth session at Unesco House in Paris, France, from 3 June to 28 July 1954. The work of the Commission during the session is related in the present report which is submitted to the General Assembly.

I. Membership and Attendance

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Gilberto Amado	Brazil
Mr. Roberto Córdova	Mexico
Mr. Douglas L. Edmonds	United States of America
Mr. J. P. A. François	Netherlands
Mr. F. V. García-Amador	Cuba
Mr. Shuhsi Hsu	China

Faris Bey el-Khoury	Syria	
Mr. S. B. Krylov	Union of Soviet Socialist Republics	
Mr. H. Lauterpacht	United Kingdom of Great Britain and Northern Ireland	
Mr. Radhabinod Pal	India	
Mr. Carlos Salamanca	Bolivia	
Mr. A. E. F. Sandström	Sweden	
Mr. Georges Scelle	France	
Mr. Jean Spiropoulos	Greece	
Mr. Jaroslav Zourek	Czechoslovakia	

3. The members listed above were elected by the General Assembly at its eighth session, with the exception of Mr. Edmonds who, on 28 June 1954, was elected by the Commission, in conformity with article 11 of its Statute, to fill the vacancy caused by the resignation of Mr. John J. Parker. The term of office of the members is three years from 1 January 1954.

4. All the members of the Commission were present at the sixth session except Mr. S. B. Krylov who for reasons of health was unable to attend. Mr. Spiropoulos attended the meetings from 6 June to 17 July, Mr. Scelle from the beginning of the session to 21 July. Mr. Zourek was present from 21 June and Mr. Edmonds from 5 July, both to the end of the session.

II. Officers

5. At its meeting on 3 June 1954, the Commission elected the following officers :

Chairman : Mr. A. E. F. Sandström;
First Vice-Chairman : Mr. Roberto Córdova;
Second Vice-Chairman : Mr. Radhabinod Pal;
Rapporteur : Mr. J. P. A. François.

6. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, represented the Secretary-General and acted as Secretary of the Commission.

III. Agenda

7. The Commission adopted an agenda for the sixth session consisting of the following items :

- (1) Filling of casual vacancy in the Commission;
- (2) Régime of the territorial sea;
- (3) Régime of the high seas;
- (4) Draft code of offences against the peace and security of mankind;
- (5) Nationality, including statelessness;
- (6) Law of treaties;
- (7) Question of codifying the topic "Diplomatic intercourse and immunities";
- (8) Request of the General Assembly for the codification of the principles of international law governing State responsibility;
- (9) Control and limitation of documentation;
- (10) Date and place of the seventh session;
- (11) Other business.

8. In the course of the session the Commission held forty-one meetings. It considered the items on the agenda, with the exception of the régime of the high seas (item 3) and the law of treaties (item 6). The sixth report on the régime of the high seas (A/CN.4/79) submitted by Mr. François, Special Rapporteur, as well as the two reports on the law of treaties (A/CN.4/63 and A/CN.4/87) submitted by Mr. Lauterpacht, Special Rapporteur, were held over for consideration at the next session.

9. The work on the questions dealt with by the Commission is summarized in chapters II to V of the present report.

Chapter II

NATIONALITY INCLUDING STATELESSNESS

PART ONE

Future statelessness

10. At its fifth session in 1953, the International Law Commission proposed a draft Convention on the Elimination of Future Statelessness and a draft Con-

vention on the Reduction of Future Statelessness which were transmitted to Governments for comments.¹ The Governments of the following fifteen countries replied with detailed comments : Australia, Belgium, Canada, Costa Rica, Denmark, Egypt, Honduras, India, Lebanon, the Netherlands, Norway, Philippines, Sweden, the United Kingdom and the United States of America (A/CN.4/82 and Add.1 to 8). In addition a number of organizations interested in the question of statelessness submitted comments which were also taken into consideration by the Commission.

11. At its sixth session in 1954, during its 242nd to 245th, 250th, 251st, 271st, 273rd to 276th and 280th meetings, the Commission discussed the observations of Governments and redrafted some of the articles in the light of their comments.

12. The most common observation made by Governments was that some provisions of their legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation.

13. For easy comparison, the text of both draft conventions, as now revised, is reproduced below in parallel columns. Passages which vary from the 1953 text are reproduced in italics. Most of the changes originate in suggestions made by Governments and members of the Commission. In addition certain drafting changes were made. The final clauses in articles 12 to 18 did not appear in the drafts of 1953.

14. Several Governments in their comments declared themselves in favour of the reduction convention, while others expressed no preference for either convention or declared that they had no objections to the principles underlying each of the conventions. The Commission was of the opinion that it should, in view of these comments, submit both draft conventions to the General Assembly, which could consider the question whether preference should be given to the draft Convention on the Elimination of Future Statelessness or to the draft Convention on the Reduction of Future Statelessness.

15. Article 1, paragraph 2, of the reduction convention, in its revised form, expressed more accurately than did the earlier text the Commission's intention that the person concerned should have the possibility to decide upon his nationality at an age when he will usually be called up for military service in the armed forces of the State of which he proposes to become a national.

16. Article 1, paragraph 3, of the reduction convention was, in several respects, revised. The 1953 draft read as follows :

¹ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, pp. 27-29. For the sake of brevity, the two conventions are here referred to as, respectively, the "elimination convention" and the "reduction convention".

"3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents. The nationality of the father shall prevail over that of the mother."

As the convention cannot make provision for cases where the parent has the nationality of a State not a Party to the convention, a new clause was added expressly stipulating that the person concerned acquires his parent's nationality only "if such parent has the nationality of one of the Parties". The phrase "such Party (*i.e.*, that of which the parent is a national) may make the acquisition of its nationality dependent on the person having been normally resident in its territory" was inserted to take into account an observation of one of the Governments. As the country of birth may, under paragraph 2, require residence as a condition of the acquisition of its nationality, it was considered proper that the parent's country should be free to stipulate an analogous condition.

17. Article 4 of both draft conventions deals with the case of a person not born in the territory of one of the Parties. In this case, it is obvious that article 1 of the elimination convention, and article 1, paragraph 1, of the reduction convention will not be applicable. No substantive change was made in the 1953 text, but it is felt that the new text is both clearer and more accurate. The phrase "if otherwise stateless" was introduced in the light of an observation of one Government because the article is, of course, meant to cover those cases, and only those cases, in which a person, because not born in the territory of a Party, is stateless. If a person, even though born in a State not a Party to the convention, acquires that State's nationality the article will not operate since he is not stateless.

18. Article 7 (old article 6), paragraph 3, of the reduction convention was substantially modified in view of the attitude of a number of Governments which are reluctant to waive the power to deprive a person of nationality if, by some positive act, such as departure or stay abroad, or by some omission such as failure to register, he implicitly displays a lack of attachment to his country. The Commission, keeping in mind that the main and only purpose of the draft convention is to reduce statelessness as much as possible, decided to restrict the possibility of depriving a person of nationality on such grounds to the case of a *naturalized* person if he resides in his country of origin for so long

² Mr. Edmonds abstained from voting on the draft conventions, as well as on the part of the report accompanying the drafts, for reasons explained at the Commission's 275th meeting (A/CN.4/SR.275). Mr. Zourek declared that he was voting against the draft conventions and the commentary relating to them for reasons of principle which he had given in the course of the discussions at the Commission's fifth session, and which he had summarized during the sixth session at the Commission's 275th meeting.

that under the law of his adoptive country he may be considered to have severed his connexion with that country.

19. Under article 8 (old article 7) of the elimination convention it is not permissible for a State to deprive a person of his nationality on any grounds whatsoever (whether by way of penalty or otherwise) if he would thereby become stateless.

20. In keeping with the difference in objective between the two draft conventions, the elimination convention allows no exceptions to the rule, but article 8 (old article 7), paragraph 1, of the reduction convention allows two exceptions: firstly, in the circumstances described in article 7, paragraph 3; and, secondly, if in disregard of his Government's direction the person enters or remains in the service of a foreign country. In these cases he may be deprived of his nationality even though he may as a consequence become stateless.

21. Article 8 (old article 7), paragraph 2, of the reduction convention as now redrafted, no longer provides that the deprivation order may only be made by a judicial authority; in view of an observation by one Government, it does not specify what authority is competent to make such an order but provides that an appeal to the courts must be possible.

22. The prohibition against deprivation of nationality on racial, ethnic, religious and political grounds contained in article 8 of the 1953 draft is now reproduced in article 9.

23. In article 11, paragraph 1, of both draft conventions, which corresponds with article 10, paragraph 1, of the 1953 draft, the words "when it deems appropriate" were added to stress that the proposed agency should have authority to decide in what cases its intervention is justified and also what cases may properly be referred to the special tribunal proposed to be established.

24. *Article 11, paragraphs 2 to 4*: The corresponding provision as drafted in 1953 (article 10) contained a paragraph 4 under which disputes between States concerning the interpretation — or application — of the conventions were to be referred either to the International Court of Justice or to the special tribunal mentioned in paragraph 2 of the article. This alternative jurisdiction might conceivably have produced conflicts. Accordingly, the Commission decided to vest jurisdiction concerning such disputes in the special tribunal (article 11, paragraph 2). The Commission considered it necessary, however, to make provision for the adjudication of such disputes by the International Court of Justice in case they should not be referred to the special tribunal (article 11, paragraph 4).

25. The texts of both draft conventions, as adopted² by the Commission at its present session, are reproduced below:

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS*Preamble*

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality",

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality",

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between States,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is imperative, by international agreement, to eliminate the evils of statelessness,

The Contracting Parties

Hereby agree as follows:

Article 1

A person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory *he* is born,

Article 2

For the purpose of article 1, a foundling, so long as *his* place of birth is unknown, shall be presumed to have been born in the territory of the Party in which *he* is found.

Article 3

For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the ter-

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS*Preamble*

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality",

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality",

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between States,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many States has increasingly tended to the progressive elimination of statelessness,

Whereas it is desirable to reduce statelessness, by international agreement, so far as its total elimination is not possible,

The Contracting Parties

Hereby agree as follows:

Article 1

1. A person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory *he* is born.

2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen years and on the condition that on attaining that age *he* does not opt for and acquire another nationality.

3. If, in consequence of the operation of paragraph 2, a person on attaining the age of eighteen years would become stateless, *he* shall acquire the nationality of one of his parents, if such parent has the nationality of one of the Parties. Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory. The nationality of the father shall prevail over that of the mother.

Article 2

For the purpose of article 1, a foundling, so long as *his* place of birth is unknown, shall be presumed to have been born in the territory of the Party in which *he* is found.

Article 3

For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the

ritory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered.

Article 4

If a child is not born in the territory of a State which is a Party to this Convention he shall, if otherwise stateless, acquire the nationality of the Party of which one of his parents is a national. The nationality of the father shall prevail over that of the mother.

Article 5

If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon acquisition of another nationality.

Article 6

(previous article 5, paragraph 2)

The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

Article 7

(previous article 6)

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

2. *A person who seeks naturalization in a foreign country or who obtains an expatriation permit for that purpose shall not lose his nationality unless he acquires the nationality of that foreign country.*

3. *A person shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.*

Article 8

(previous article 7)

A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless.

territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered.

Article 4

If a child is not born in the territory of a State which is a Party to this Convention he shall, if otherwise stateless, acquire the nationality of the Party of which one of his parents is a national. Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory. The nationality of the father shall prevail over that of the mother.

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If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon acquisition of another nationality.

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The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

Article 7

(previous article 6)

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

2. *A person who seeks naturalization in a foreign country or who obtains an expatriation permit for that purpose shall not lose his nationality unless he acquires the nationality of that foreign country.*

3. *A natural-born national shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or on any other similar ground. A naturalized person may lose his nationality on account of residence in his country of origin for the period specified by the law of the Party which granted the naturalization.*

Article 8

(previous article 7)

1. *A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless, except on the ground mentioned in article 7, paragraph 3, or on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State.*

Article 9

(previous article 8)

A Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

Article 10

(previous article 9)

1. *Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.*

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

Article 11

(previous article 10)

1. *The Parties undertake to establish, within the framework of the United Nations, an agency to act, when it deems appropriate, on behalf of stateless persons before Governments or before the tribunal referred to in paragraph 2.*

2. *The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide any dispute between them concerning the interpretation or application of this Convention and to decide complaints presented by the agency referred to in paragraph 1 on behalf of a person claiming to have been denied nationality in violation of the provisions of the Convention.*

3. *If, within two years after the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been established by the Parties, any of the Parties shall have the right to request the General Assembly to establish such agency or tribunal.*

4. *The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall, if not referred to the tribunal provided for in paragraph 2, be submitted to the International Court of Justice.*

Article 12

1. *The present Convention, having been approved by the General Assembly, shall until . . . (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member*

2. *In the cases to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which shall provide for recourse to judicial authority.*

Article 9

(previous article 8)

A Party may not deprive any person or group of their nationality on racial, ethnic, religious or political grounds.

Article 10

(previous article 9)

1. *Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.*

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

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2. *The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide any dispute between them concerning the interpretation or application of this Convention and to decide complaints presented by the agency referred to in paragraph 1 on behalf of a person claiming to have been denied nationality in violation of the provisions of the Convention.*

3. *If, within two years after the entry into force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been established by the Parties, any of the Parties shall have the right to request the General Assembly to establish such agency or tribunal.*

4. *The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall, if not referred to the tribunal provided for in paragraph 2, be submitted to the International Court of Justice.*

Article 12

1. *The present Convention, having been approved by the General Assembly, shall until . . . (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member*

State to which an invitation to sign is addressed by the General Assembly.

2. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. After . . . (the above date) the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 13

1. At the time of signature, ratification or accession any State may make a reservation permitting it to postpone, for a period not exceeding two years, the application of the Convention pending the enactment of necessary legislation.

2. No other reservations to the present Convention shall be admissible.

Article 14

1. The present Convention shall enter into force on the ninetieth day following the date of the deposit of the . . . (e.g., third or sixth) instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention subsequently to the latter date, the Convention shall enter into force on the ninetieth day following the deposit of the instrument of ratification or accession by that State.

Article 15

Any Party to the present Convention may denounce it at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the said Party one year after the date of its receipt by the Secretary-General.

Article 16

1. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States referred to in article 12 of the following particulars:

- (a) Signatures, ratifications and accessions under article 12;
- (b) Reservations under article 13;
- (c) The date upon which the present Convention enters into force in pursuance of article 14;
- (d) Denunciations under article 15.

Article 17

1. The present Convention shall be deposited with the Secretariat of the United Nations.

2. A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States referred to in article 12.

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Article 17

1. The present Convention shall be deposited with the Secretariat of the United Nations.

2. A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States referred to in article 12.

Article 18

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

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PART TWO

Present statelessness

26. At its fifth session, the Commission requested Mr. Roberto Córdova, the Special Rapporteur, to inquire further into the question of present statelessness and to prepare a report for its sixth session (A/2456, paragraph 123).

27. The relevant report, entitled "Third Report on the Elimination or Reduction of Statelessness" (A/CN.4/81), contains four draft international instruments: a Protocol for the Elimination of Present Statelessness attached to the draft Convention on the Elimination of Future Statelessness, a Protocol for the Reduction of Present Statelessness attached to the draft Convention on the Reduction of Future Statelessness, an Alternative Convention on the Elimination of Present Statelessness and an Alternative Convention on the Reduction of Present Statelessness.

28. The Commission discussed the report at its 246th to 250th, 275th, 276th and 280th meetings.

29. The Commission considered that it was not feasible to suggest measures for the total and immediate elimination of present statelessness. The Special Rapporteur accordingly withdrew the draft Protocol for the Elimination of Present Statelessness and the Alternative Convention for the Elimination of Present Statelessness. The Commission also considered that the solutions offered by the draft Protocol on the Reduction of Present Statelessness, under which the provisions of the draft Convention for the Reduction of Future Statelessness were to be applicable to present statelessness, would not be acceptable. Hence the Special Rapporteur also withdrew this draft Protocol. In the course of the discussion (A/CN.4/SR.246) Mr. Lauterpacht submitted certain proposals for the reduction of present statelessness. The texts actually before the Commission were therefore Mr. Lauterpacht's proposals and the Alternative Convention on the Reduction of Present Statelessness prepared by the Special Rapporteur. It decided to accept the Special Rapporteur's draft as the basis of its discussion.

30. The Special Rapporteur amended his draft in the course of the discussion, to some extent taking into account Mr. Lauterpacht's proposals.

31. In formulating its proposals relating to present statelessness, the Commission considered that present statelessness could only be reduced if stateless persons acquired a nationality which would normally be that of the country of residence. Since, however, the acquisition of nationality is in all countries governed by certain statutory conditions including residence qualifications, the Commission considered that for the purpose of improving the condition of statelessness it

would be desirable that stateless persons should be given the special status of "protected person" in their country of residence prior to the acquisition of a nationality. Stateless persons possessing this status would have all civil rights accorded to nationals with the exception of political rights, and would also be entitled to the diplomatic protection of the Government of the country of residence; the protecting State might impose on them the same obligations as it imposed on nationals.

32. The Commission welcomed the resolution of the Economic and Social Council endorsing the principles underlying the work of the Commission for the elimination or reduction of statelessness (resolution 526 B (XVII)) and also the decision of the Council to convene a conference of plenipotentiaries to review and adopt a protocol relating to the status of stateless persons by which certain provisions of the Convention relating to the Status of Refugees of 28 July 1951 would become applicable to stateless persons (resolution 526 A (XVII)).

33. The Commission considered the question of the relation of its work on present statelessness to the subject of the forthcoming conference of plenipotentiaries. It was of the opinion that, while the object of that conference was the regulation of the status of stateless persons by international agreement, the Commission was itself primarily concerned with the reduction of present statelessness.

34. In considering the problem of present statelessness, the Commission was aware of the fact that stateless persons who are refugees as defined in the Statute of the Office of the United Nations High Commissioner for Refugees receive international protection by the United Nations through the High Commissioner. The suggestions contained in the present report are without prejudice to the question of granting international protection by an international agency, as distinguished from diplomatic protection by States, to stateless persons pending their acquisition of a nationality.

35. The Special Rapporteur also proposed that *de facto* stateless persons should be assimilated to *de jure* stateless persons as regards the right to the status of "protected person" and the right to naturalization, provided that they renounced the ineffective nationality they possessed. This proposal was rejected by the Commission.

36. In view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that 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.

37. The suggestions adopted³ by the Commission are reproduced below with some comments.

Article 1

1. A State in whose territory a stateless person is resident shall, on his application, grant him the legal status of "protected person".

2. If a stateless person constitutes a danger to public order or to national security, he may be excluded from the benefit of the provisions of paragraph 1.

Comment

The Commission considers that, for the purpose of reducing statelessness, stateless persons should have an opportunity to acquire an effective nationality; this is provided for in article V. However, it considered that, subject only to the proviso contained in paragraph 2, a stateless person should, pending the acquisition of a nationality, be granted certain rights which for most practical purposes would give him the status of a national.

Article 2

1. A person possessing the status of "protected person" under article 1, paragraph 1, shall be entitled to the rights enjoyed by the nationals of the protecting State with the exception of political rights. He shall also be entitled to the diplomatic protection of the protecting State.

2. The protecting State may impose on him the same obligations as upon its nationals.

Comment

The obligations referred to in paragraph 2 of this article include those of military service.

Article 3

Whenever the status of "protected person" has been granted to a stateless person, his minor children and, on her application, his wife, shall acquire the said status, provided that they are stateless and resident in the territory of the protecting State.

Comment

This suggestion follows the rule in force in many countries concerning the effect of naturalization on the wife and children of a naturalized person.

³ Mr. Edmonds abstained from voting on the suggestions and on the part of the report relating to them, for reasons explained at the Commission's 276th meeting (A/CN.4/SR.276). Mr. François declared that, in voting for the suggestions, he wished to enter a reservation in respect of article V, to which he was opposed for the reasons he had stated during the 276th meeting. Mr. Sandström abstained from voting on the suggestions for reasons stated at the same meeting. Mr. Zourek voted against the suggestions and against the part of the report relating thereto for reasons of principle stated in the course of the discussions and in connexion with the vote taken on the draft conventions for the elimination or reduction of future statelessness, as well as for the reasons explained at the 276th meeting.

Article 4

A child who possesses the status of "protected person", shall, on attaining the age of majority, acquire ipso facto the nationality of the protecting State, provided that he is resident in the territory of that State.

Article 5

States shall grant their nationality to any stateless person who fulfils the conditions which their legislation prescribes for the naturalization of aliens.

Comment

The purpose of article V is that stateless persons who fulfil the statutory conditions governing naturalization, including application and a prescribed period of residence, should be granted nationality as of right. The Commission felt that stateless persons should in this respect receive more favourable treatment than ordinary aliens in the matter of naturalization seeing that the latter, before being naturalized, have nevertheless a nationality, whereas stateless persons have none.

Article 6

A person to whom the status of "protected person" is granted by a State shall not lose the benefit of the said status unless:

(a) He acquires the nationality of that or of another State;

(b) Another State Party hereto grants him the status of "protected person" in conformity with article 1;

(c) He resides abroad for five years without the authorization of the protecting State.

Article 7

There shall apply to any convention concluded on this subject the provisions of the conventions on the elimination and reduction of future statelessness concerning the interpretation and application of their terms, including the provisions for the creation of an agency to act on behalf of persons claiming to have been wrongfully denied nationality.

PART THREE

Other aspects of the subject of nationality

38. At its 252nd meeting, the Commission held a general discussion on the subject of multiple nationality on which the Special Rapporteur had submitted a report (A/CN.4/83) and the Secretariat a memorandum (A/CN.4/84). Different views were expressed on this problem and on the desirability of dealing with it. Several members expressed the opinion that the Commission should content itself with the work it had done so far in the field of nationality.

39. The Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality.

40. The Special Rapporteur expressed before the Commission his appreciation of the valuable assistance rendered by Dr. P. Weis, legal adviser to the Office of the United Nations High Commissioner for Refugees, to him and his predecessor, Mr. M. O. Hudson, in the work on the topic "Nationality, including statelessness".

Chapter III

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

41. By resolution 177 (II) of 21 November 1947, the General Assembly decided:

"To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly",

and directed the Commission to:

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(b) Prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded on the principles mentioned in sub-paragraph (a) above."

The Commission's report to the General Assembly at the latter's fifth session in 1950⁴ contained the formulation of the Nürnberg principles. By resolution 488 (V) of 12 December 1950, the General Assembly asked the Governments of Member States to comment on the formulation, and requested the Commission:

"In preparing the draft Code of Offences against the Peace and Security of Mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by Governments."

42. The preparation of a draft Code of Offences against the Peace and Security of Mankind was given preliminary consideration by the Commission at its first session, in 1949, when the Commission appointed Mr. J. Spiropoulos Special Rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

43. The Special Rapporteur's report to the second session in 1950 (A/CN.4/25) was taken as the basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and 2) to its questionnaire. In the light of the debate, a drafting committee prepared a provisional text (A/CN.4/R.6) which was referred, without discussion, to the Special Rapporteur, who was requested to continue his research and to submit a new report to the Commission at its third session in 1951.

44. The Special Rapporteur's report to the third session (A/CN.4/44) contained a revised draft and also a digest of the relevant observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also considered the observations received from Governments (A/CN.4/45 and Corr. 1, and Add.1 and 2) on this formulation. After debating these comments at its 89th to 92nd, 106th to 111th, 129th and 133rd meetings, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind which was submitted to the General Assembly in the Commission's report on its third session.⁵

45. The question of the draft Code was included in the provisional agenda of the sixth session of the General Assembly, but was, by a decision of the Assembly at its 342nd plenary meeting on 13 November 1951, postponed until the seventh session.

46. By a circular letter to the Governments of the Member States, dated 17 December 1951, the Secretary-General drew their attention to the draft Code and invited their comments thereon. Comments were received from fourteen Governments and were reproduced in documents A/2162 and Add.1. The Secretary-General also included the question of the draft Code in the provisional agenda of the seventh session of the General Assembly. The item was, however, by a decision taken by the General Assembly at its 382nd plenary meeting on 17 October 1952, omitted from the final agenda of the seventh session on the understanding that the matter would continue to be considered by the International Law Commission.

47. The Commission again took up the matter at its fifth session in 1953 and decided to request the Special Rapporteur to undertake a further study of the question and to prepare a new report for submission at the sixth session.

48. The Special Rapporteur's report to the sixth session, entitled "Third Report relating to a draft Code of Offences against the Peace and Security of Mankind" (A/CN.4/85), discussed the observations received from Governments and, in the light of those observations, proposed certain changes in the text of the draft Code previously adopted by the Commission. The comments submitted by the Government of Belgium (A/2162/Add.2) were received too late to be discussed in the Special Rapporteur's report but were taken into consideration by the Commission.

⁴ See *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316).

⁵ *Ibid.*, *Sixth Session, Supplement No. 9* (A/1858).

49. The Commission considered the draft Code at its 266th to 271st, 276th and 280th meetings, and decided to make certain revisions in the previously adopted text. The revised provisions are set forth below with some brief comments. The full text of the draft Code as revised by the Commission is reproduced at the end of this chapter. For commentaries on those provisions of the draft Code which were not modified by the Commission, see paragraph 59 of the Commission's report on its third session (A/1858).

50. Apart from making certain drafting changes, the Commission decided to modify the previous text of the draft Code in the following respects.

Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

Comment

The Commission decided to replace the words "shall be punishable" in the previous text by the words "shall be punished" in order to emphasize the obligation to punish the perpetrators of international crimes. Since the question of establishing an international criminal court is under consideration by the General Assembly, the Commission did not specify whether persons accused of crimes under international law should be tried by national courts or by an international tribunal.

In conformity with a decision taken by the Commission at its third session (see the Commission's report on that session, A/1858, paragraph 58 (c)) the article deals only with the criminal responsibility of individuals.

Article 2, paragraph 4

The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

Comment

The text previously adopted by the Commission read as follows :

"The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose."

The Commission adopted the new text as it was of the opinion that the scope of the article should be widened.

Article 2, paragraph 9

The intervention by the authorities of a State in the internal or external affairs of another State,

by means of coercive measures of an economic or political character, in order to force its will and thereby obtain advantages of any kind.

Comment

This paragraph is entirely new. Not every kind of political or economic pressure is necessarily a crime according to this paragraph. It applies only to cases where the coercive measures constitute a real intervention in the internal or external affairs of another State.

Article 2, paragraph 11

(previously paragraph 10)

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

Comment

The text previously adopted by the Commission read as follows :

"Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article."

This text corresponded in substance to article 6, paragraph (c), of the Charter of the International Military Tribunal at Nürnberg. It was, however, wider in scope than the said paragraph in two respects: it prohibited also inhuman acts committed on cultural grounds and, furthermore, it characterized as crimes under international law not only inhuman acts committed in connexion with crimes against peace or war crimes, as defined in that Charter, but also such acts committed in connexion with all other offences defined in article 2 of the draft Code.

The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connexion with other offences defined in the draft Code. On the other hand, in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

Comment

The text previously adopted read as follows :

“ The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.”

Since some Governments had criticized the expression “ moral choice ”, the Commission decided to replace it by the wording of the new text above.

51. In addition, the Commission decided to omit article 5 of the previous text as it felt that, at the present stage, the draft Code should simply define certain acts as international crimes and lay down certain general principles regarding criminal liability under international law. The Commission considered that the question of penalties could more conveniently be dealt with at a later stage, after it had been decided how the Code was to become operative.

52. With reference to a suggestion made by one Government, the Commission confirms that the terms of article 2, paragraph 12 (old paragraph 11), should be construed as covering not only the acts referred to in The Hague Conventions of 1907 but also any act which violates the rules and customs of war prevailing at the time of its commission.

53. In their observations on the draft Code, several Governments expressed the fear that the application of article 2, paragraph 13 (old paragraph 12), might give rise to difficulties. The Commission, although not overlooking the possibility of such difficulties, decided not to modify the wording of the paragraph as it felt that a court applying the Code would overcome such difficulties by means of a reasonable interpretation.

54. The full text of the draft Code as adopted⁶ by the Commission at its present session is reproduced below :

Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

Article 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

⁶ Mr. Edmonds abstained from voting for reasons stated by him at the 276th meeting (A/CN.4/SR.276). Mr. Lauterpacht abstained from voting and, in particular, recorded his dissent from paragraphs 5 and 9 of article 2 and from article 4, for reasons stated at the 271st meeting (A/CN.4/SR.271). Mr. Pal abstained from voting for the reasons stated in the course of the discussions (A/CN.4/SR.276). Mr. Sandström declared that, in voting for the draft Code, he wished to enter a reservation in respect of paragraph 9 of article 2 for the reasons stated at the 280th meeting (A/CN.4/SR.280).

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, com-

mitted against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

Chapter IV

REGIME OF THE TERRITORIAL SEA

I. Introduction

55. At its third session in 1951 the International Law Commission decided to initiate work on the topic "régime of territorial waters" which it had selected for codification and to which it had given priority pursuant to a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949. Mr. J. P. A. François was appointed Special Rapporteur on this topic.

56. The Commission was greatly assisted by the work done at the Conference for the Codification of International Law held at The Hague in March and April 1930, which had amongst other subjects considered the régime of the territorial sea. Owing to differences of opinion concerning the extent of the territorial sea, it had proved impossible to conclude a convention relating to this question; nevertheless, the reports and preparatory studies of that Conference were a valuable basis on which the Commission has largely relied.

57. At the fourth session of the Commission in 1952, the Special Rapporteur submitted a "Report on

the Régime of the Territorial Sea" (A/CN.4/53) which contained a draft regulation consisting of twenty-three articles, with annotations.

58. The Commission took the Special Rapporteur's report as the basis of discussion and considered certain aspects of the régime of the territorial sea from its 164th to its 172nd meetings.

59. During its fourth session in 1952, the Commission considered the question of the juridical status of the territorial sea; the breadth of the territorial sea; the question of base lines; and bays. To guide the Special Rapporteur, it expressed certain preliminary opinions on some of these questions.

60. So far as the question of the delimitation of the territorial sea of two adjacent States is concerned, the Commission decided to ask Governments for particulars concerning their practice and for any observations which they might consider useful. The Commission also decided that the Special Rapporteur should be free to consult with experts with a view to elucidating certain technical questions.

61. The Special Rapporteur was asked to submit at the fifth session a further report containing a draft regulation and comments revised in the light of opinions expressed at the fourth session.

62. In compliance with this request, the Special Rapporteur, on 19 February 1953, submitted a "Second Report on the Régime of the Territorial Sea" (A/CN.4/61).

63. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur. Its members were:

Professor L. E. G. Asplund (Geographic Survey Department, Stockholm);

Mr. S. Whittmore Boggs (Special Adviser on Geography, Department of State, Washington, D.C.);

Mr. P. R. V. Couillault (Ingénieur en Chef du Service central hydrographique, Paris);

Commander R. H. Kennedy, O.B.E., R.N. (Retd.) (Hydrographic Department, Admiralty, London), accompanied by Mr. R. C. Shawyer (Administrative Officer, Admiralty, London);

Vice-Admiral A. S. Pinke (Retd.) (Royal Netherlands Navy, The Hague).

The group of experts submitted a report on technical questions. In the light of their comments, the Special Rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1) in which the report of the experts appear as an annex.

64. The Secretary-General's inquiry addressed to Governments concerning their attitude to the delimitation of the territorial sea of two adjacent States elicited a number of replies which are reproduced in documents A/CN.4/71 and Add.1 and 2.

65. Owing to lack of time the Commission was unable to discuss the topic at its fifth session and referred it to the sixth session.

66. At its sixth session the Special Rapporteur submitted a further revised draft regulation (A/CN.4/77)

in which he made certain changes in the light of the observations of the experts. He also took into account the comments received from Governments concerning the delimitation of the territorial sea between adjacent States the coasts of which face each other.

67. At its sixth session, the Commission considered the report at its 252nd to 265th, 271st to 273rd, 277th to 281st meetings. It adopted a number of draft articles, with comments, which are to be submitted to Governments in conformity with the provisions of its Statute.

68. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made :

(1) That a uniform limit (three, four, six or twelve miles) should be adopted;

(2) That the breadth of the territorial sea should be fixed at three miles subject to the right of the coastal State to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal State to extend this limit to twelve miles, provided that it observes the following conditions :

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal State may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal State may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

(4) That it should be admitted that the breadth of the territorial sea may be fixed by each State at a distance between three to twelve miles;

(5) That a uniform limit should be adopted for all States whose coasts abut on the same sea or for all States in a particular region;

(6) That the limit should vary from State to State in keeping with the special circumstances and historic rights peculiar to each;

(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf;

(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal State is entitled to fix the breadth of its own territorial sea in accordance with its needs;

(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.

69. The Commission realized that each of these solutions would meet with the opposition of some States. However, agreement will be impossible unless States are prepared to make concessions.

70. That being so, the Commission would be greatly assisted in its task if the Governments could state,

in their comments on these draft articles, what is their attitude concerning the questions of the breadth of the territorial sea and suggest how it could be solved. The Commission hopes that the replies of Governments will enable it to formulate concrete proposals concerning this matter.

71. The Commission felt that, pending the receipt of the replies of the Governments, certain other questions should be held over, including that of bays and groups of islands, for these questions are connected with the question of the breadth of the territorial sea.

72. The text of the provisional articles concerning the régime of the territorial sea, as adopted⁷ by the Commission is reproduced below.

II. Provisional articles concerning the Régime of the Territorial Sea

CHAPTER I

GENERAL

Article 1

Juridical status of the territorial sea

1. The sovereignty of a State extends to a belt of sea adjacent to its coast and described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these regulations and other rules of international law.

Comment

Paragraph 1 emphasizes the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which it exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies of the Governments in connexion with The Hague Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. This is also the view underlying some multilateral conventions — such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944 — which treat territorial waters in the same way as other parts of State territory.

The Commission preferred the term "territorial sea" to "territorial waters". It is of the opinion that the term "territorial waters" lends itself to confusion for

⁷ Mr. Edmonds abstained from voting upon the articles and the part of the report relating to them for the reasons stated at the 281st meeting (A/CN.4/SR.281). Mr. Lauterpacht, in voting for the articles and the chapter of the report relating to them, dissented from the comment to article 5 (straight base lines) and from article 17 (right of passage) for reasons given in the course of the discussions. Mr. Sandström declared that, in voting for the draft articles, he wished to enter a reservation in respect of the provisions of articles 5 for the reasons he had stated at the 281st meeting (A/CN.4/SR.281). Mr. Zourek stated that he voted against the articles and against the commentary accompanying them for the reasons explained in the course of the discussions at the sixth session of the Commission.

the reason that it may be used to describe both internal waters only, and internal and territorial waters taken together. For the same reason, the Codification Conference also expressed a preference for the term "territorial sea". Although not universally accepted, this term is becoming more and more prevalent.

Clearly, the coastal State's sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law. The reason why this is expressly mentioned in paragraph 2 is that the Commission wished to convey beyond any possible doubt that, while recognizing the State's sovereignty over the territorial sea, it did not endorse the idea of an unlimited sovereignty which has at times been claimed to be a quality implied in sovereignty.

This draft sets forth the specific limitations imposed by international law on the exercise of sovereignty in the territorial sea. These provisions should not, however, be regarded as exhaustive. Events which occur in the territorial sea and which have a legal import are also governed by the general rules of international law which cannot be codified in this draft as applying to the territorial sea in particular. For this reason, the "other rules of international law" are mentioned in addition to the provisions of this draft.

It may happen that, by reason of some special, geographical or other, relationship between two States, rights in the territorial sea are granted to one of them in excess of the rights recognized in this draft. It is not the intention of the Commission to limit any more extensive rights of passage or other rights enjoyed by States by virtue of custom or treaty.

Article 2

Juridical status of the air space over the territorial sea and of its bed and subsoil

The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil.

Comment

This article reproduces, subject to purely stylistic changes, the provisions of the 1930 regulation. It may be said to form part of positive law. Since the present draft regulations deal exclusively with the territorial sea, the Commission did not consider the conditions in which sovereignty over the air space, sea-bed and subsoil in question is exercised.

CHAPTER II

LIMITS OF THE TERRITORIAL SEA

Article 3

Breadth of the territorial sea
(Postponed)

Article 4

Normal base line

Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth

of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn which show the low-water line, the shore-line (high-water line) shall be used.

Comment

The Commission considered that, according to the international law in force, the extent of the territorial sea is measured, as a general rule, from the low-water line along the coast, but that, in certain cases, it is permissible under international law to employ base lines independent of the low-water mark. This is the Commission's interpretation of the judgment of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway.

The traditional expression "low-water mark" may have different meanings; there is no uniform standard by which States in practice determine this line. The Commission considers that it is permissible to adopt as the base line the low-water mark as indicated on the largest-scale official charts of the coastal State. The Commission considers that the omission of detailed provisions such as were prepared by the 1930 Conference is hardly likely to induce Governments to shift the low-water lines on their charts unreasonably.

In the absence of detailed charts indicating the low-water line, the only practical solution would seem to be to employ the shore-line (high-water line) as the base line.

Article 5

Straight base lines

1. As an exception, where this is justified for historical reasons or where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

2. As a general rule, the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals.

3. The coastal State shall give due publicity to the straight base lines drawn by it.

Comment

The International Court of Justice considers that where the coast is deeply indented or cut into, or where it is bordered by an archipelago such as the *skjaergaard* in Norway, the base line becomes independent of the low-water mark and can only be determined by means of a geometric construction. The Court said :

“ In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions. . . .”

“ The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial water.⁸ ”

The Commission interprets the Court's judgement, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; accordingly, it took this judgment as the basis in drafting the article. Since, however, it is of the opinion that the rules recommended by the experts who met at The Hague in 1953 add certain desirable particulars to the general method advised by the Court, it has endorsed the experts' recommendations in a slightly modified form.

The Commission considers that these additions represent a progressive development of international law, and that they cannot be regarded as binding until approved by States.

Article 6

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the near-

est point of the base line equal to the breadth of the territorial sea.

Comment

This is the method of determining the outer limit recommended by the group of experts; it had been in use already before 1930. By means of this method one obtains a line which in the case of deeply indented coasts departs from the line which follows the sinuosity of the coast. It is undeniable that the latter would often be so tortuous as to be unusable for the purpose of shipping.

The line all the points of which are at a distance of T miles from the nearest point on the coast (T being the breadth of the territorial sea) may be obtained by means of a continuous series of arcs of circles drawn with a radius of T miles from all points on the coast line. The outer limit of the territorial sea is formed by the most seaward arcs. In the case of a deeply indented coast, this line although undulating will form less of a zigzag than if it followed all the sinuosities of the coast because circles drawn from those points on the coast where the coast line is most irregular will not usually affect the outer limit of the seaward arcs. In the case of a straight coast, or if the straight base line method is followed, the arcs of circle method produces the same results as the strictly parallel line.

The Commission considers that the arcs of circle method is to be recommended because it is likely to facilitate navigation. In any case, the Commission feels that States should be free to use this method without running the risk of being charged with a violation of international law by reason of the fact that the line does not follow all the sinuosities of the coast.

Article 7

Bays

(Postponed)

Article 8

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Comment

This article is consistent with the positive law now in force.

The waters of a port up to a line drawn between the outermost installations form part of the inland waters of the coastal State. This draft regulation does not contain provisions relating to the régime of ports for it deals exclusively with the territorial sea. The important question of the régime of ports is to be considered at a later stage in the Commission's work.

Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) are assimilated to harbour works.

⁸ I.C.J. Reports, 1951, pp. 129-130.

*Article 9**Roadsteads*

Roadsteads which are used for the loading, unloading and anchoring of vessels and which are situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea. The coastal State must give due publicity to the limits of such roadsteads.

Comment

Apart from stylistic changes this article reproduces the 1930 text. The Commission considers that roadsteads situated outside the territorial sea should not be treated as inland waters. While appreciating that the coastal State must be able to exercise special supervisory and police rights in the roadsteads, the Commission thought it excessive to treat them as part of inland waters for otherwise the innocent passage of merchantmen through them might conceivably be prohibited.

The fact that these waters are held to be part of the territorial sea constitutes sufficient protection for the rights of the State.

The Commission considers that the article as it now stands reproduces the international law in force.

*Article 10**Islands*

Every island has its own territorial sea. An island is an area of land surrounded by water which in normal circumstances is permanently above high-water mark.

Comment

This article applies both to islands situated in the high seas and to islands in the territorial sea. In the case of the latter their own territorial sea coincides partly with the territorial sea of the coast. The presence of the island will cause an outward bulge in the outer limit of the territorial sea. The same idea can be expressed in the following form: islands, wholly or partly situated in the territorial sea, will be taken into consideration for the purpose of determining the outer limit of the territorial sea.

It is an essential condition that an island, to qualify for that name, must be an area of land which apart from abnormal circumstances is permanently above high-water mark. Accordingly, the following are not considered islands and have no territorial sea:

(i) Elevations which emerge at low tide only. Even if an installation is built on such an elevation and if that installation (*e.g.*, a lighthouse) is permanently above water level, the term island as defined in this article cannot be applied to such an elevation;

(ii) Technical installations built on the sea-bed, such as installations used for the exploitation of the continental shelf. As is evident from the Commission's report on its fifth session (A/2456) it is nevertheless proposed that a safety zone around such installations

should be recognized in view of their great vulnerability. The Commission does not think that a similar measure is required in the case of lighthouses.

*Article 11**Groups of islands*

(Postponed)

*Article 12**Drying rocks and shoals*

Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea.

Comment

Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals, however, which are situated outside the territorial sea have no territorial sea of their own.

The Commission considers that the above article expresses the international law in force.

It was said that the terms of article 5 (under which base lines are not drawn to or from drying rocks and shoals) might perhaps not be compatible with article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of base lines is concerned, and in particular in the case of shallow waters off the coast, the distance between base lines and the coast might conceivably be far in excess of that intended to be laid down by the method of these base lines.

*Article 13**Delimitation of the territorial sea in straits*

1. In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on the other parts of the coast.

2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 15.

3. If the breadth of the straits exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

4. Paragraph 1 and the first sentence of paragraph 3 of this article shall be applicable to straits which join two parts of the high seas and which have only one coastal State in cases in which the breadth of the straits is greater than twice the breadth of that State's territorial sea. If as a consequence of this delimitation an area of sea not more than two mile across is entirely enclosed in the territorial sea, such area may be declared by the coastal State to form part of its territorial sea.

Comment

Within the straits with which this article deals the belts of sea along the coast constitute territorial sea in the same way as on any other part of the coast.

Where the width throughout the straits exceeds the sum of the breadth of the two belts of territorial sea, there is a channel of high sea through the strait. On the other hand, if the width throughout the strait is less than twice the breadth of the two belts of territorial sea, the waters of the strait will be territorial waters. Other cases may arise: at certain places the width of the strait is greater than, while elsewhere it is equal to or less than, the total breadth of the two belts of territorial sea. In these cases portions of the high sea may be surrounded by territorial sea. It was thought that there was no valid reason why these enclosed portions of sea — which may be quite large in area — should not be treated as the high seas. This view is confirmed by the consideration that in such circumstances the stretch of sea between the two coasts might be treated as two straits separated by open sea. If such areas are very small, however, practical reasons justify their assimilation to territorial sea; but it is proposed in the article to confine such exceptions to "enclaves" of sea not more than two nautical miles in width; this distance was chosen by the Commission in reliance on the precedent of the 1930 Conference, though it is not claimed that this is now an existing rule of positive law.

If both shores belong to the same State, the issue of a delimitation of territorial waters can only arise if the strait is more than twice as broad as the territorial sea. In this case the rule set forth in paragraph 1 will apply. The question of enclaves dealt with in paragraph 3 may crop up in this situation too, in which case the enclave (if not more than two miles in breadth) may be treated as territorial sea.

Article 14

Delimitation of the territorial sea at the mouth of a river

(Postponed)

Article 15

Delimitation of the territorial sea of two States the coasts of which are opposite each other

The boundary of the territorial sea between two States the coasts of which are opposite each other at a distance less than twice the breadth of the territorial sea is, in the absence of agreement of

those States, or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

Comment

The delimitation of the territorial sea between two States the coasts of which are opposite each other was one of the principal tasks of the group of experts which met at the Commission's request at The Hague in April 1953. The experts made the following recommendation:

"An international boundary between countries the coasts of which are opposite each other at a distance of less than 2 T mile (T being the breadth of the territorial sea) should as a general rule be the median line, every point of which is equidistant from the base lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line. The line should be laid down on charts of the largest scale possible, especially if any part of the body of water is narrow and relatively tortuous."

The Commission had considered this proposal in connexion with the delimitation of the continental shelf between two States in cases where the same continental shelf is contiguous to the territory of two or more States. The Commission took the view that the boundary of the continental shelf should be drawn according to the same principles as those to be adopted for the delimitation of the territorial sea. The Commission endorsed the proposals of the experts and took them as the basis of draft article 7, paragraph 1, concerning the continental shelf. It felt, however, that the provision should not be too detailed but should retain a certain latitude. Accordingly, it disregarded certain details mentioned by the experts. (On this question, see paragraph 82 of the Commission's report on its fifth session (A/2456).)

The Commission felt it should follow this precedent in respect of the delimitation of the territorial sea and adopted an article which follows very closely the provisions of draft article 7, paragraph 1, relating to the continental shelf (A/2456, paragraph 62).

The Commission's draft articles relating to the continental shelf contain a general arbitration clause (A/2456, paragraph 62, article 8), which provides that disputes which may arise between States concerning the interpretation or application of the articles in question should be submitted to arbitration at the request of any of the Parties. As mentioned in paragraph 86 of document A/2456, the clause also covers boundary disputes connected with draft article 7 relating to the continental shelf.

It is realized that some provision for arbitration is also needed for the purposes of the application of article 15 above concerning the limits of the territorial sea. Since the Commission has decided to hold over for the time being all provisions relating to the application of the articles relating to the territorial sea, it did not draft an article comparable to draft article 8 concerning the continental shelf.

Article 16

Delimitation of the territorial sea of two adjacent States

The boundary of the territorial sea between two adjacent States is drawn, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

Comment

The situation described in this article may be regulated in various ways.

Firstly, it may be possible to consider extending outwards towards the sea the land frontier up to the outer limit of the territorial sea. This line can only be used if the angle between the land frontier and the coast is a right angle; if the angle is an acute angle it is inapplicable.

Another solution would be to draw a line at right angles to the coast at the intersection of the land frontier and the coast line. This method is open to criticism if the coast line curves in the vicinity of the intersection. In this case the line drawn at right angles might meet the coast at another point.

A third solution would be to adopt as a demarcation line the geographical parallel of the point at which the land boundary meets the coast. However, that solution is not applicable in all cases.

A fourth solution might be provided by a line drawn at right angles to the general direction of the coastline. The adoption of this line was recommended by, *inter alia*, the Belgian Government, in reply to the circular letter of the Secretary-General dated 13 November 1952 (A/CN.4/71, pages 4 and 5). The Norwegian Government drew attention to the arbitration award of 23 October 1909, in a dispute between Norway and Sweden, where the statement of reasons contains the following sentence: "The delimitation shall be made by tracing a line perpendicularly to the general direction of the coast" (A/CN.4/71, page 14). The Swedish Government referred to the same decision (A/CN.4/71/Add.1, page 3).

The group of experts was unable to support this last method of drawing the boundary line. It agreed that it was often impracticable to establish any "general direction of the coast" and the result would depend on the "scale of the charts used for the purpose and . . . how much coast shall be utilized in attempting to determine any general direction whatever". Consequently, since the method of drawing a line at right

angles to the general direction of the coastline is too vague for the purposes of the law, the best solution seems to be the median line which the committee of experts suggested. Such a line should be drawn according to the principle of equidistance from the respective coastlines (see the reply of the French Government, A/CN.4/71/Add.2, pages 2 and 3). Where the coast is straight, a line drawn according to this method will coincide with one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account while avoiding the difficulties of the problem of the general direction of the coast.

The Commission had already expressed support for the opinion of the experts in the matter of the delimitation of the continental shelf between two adjacent States (see A/2456, draft article 7, paragraph 2, relating to the continental shelf).

It followed the same method in the matter of the delimitation of the territorial sea. The observation made at the end of the comment on article 15 also applies to this article.

CHAPTER III

RIGHTS OF PASSAGE

Article 17

Meaning of the right of passage

1. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.

2. Passage is not innocent if a vessel makes use of the territorial sea of a coastal State for the purpose of committing any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect.

3. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

Comment

This article follows the lines of the regulation proposed by Sub-Committee II of the 1930 Conference, but the Commission considered that "fiscal interests" — a term which according to the 1930 comments should be interpreted very broadly as including all matters relating to customs and to export, import and transit prohibitions — could be included in the more general expression "such other of its interests as the territorial sea is intended to protect". This expression comprises, *inter alia*, questions relating to immigration, customs and health as well as the interests enumerated in article 21.

This chapter applies only in time of peace; rights of passage in time of war are reserved.

No provision in this chapter is meant to affect the rights and obligations of Members of the United Nations under the Charter.

SECTION A : VESSELS OTHER THAN WARSHIPS

Article 18

Rights of innocent passage through the territorial sea

Subject to the provisions of these regulations, vessels of all States shall enjoy the right of innocent passage through the territorial sea.

Comment

This article lays down that the vessels of all States have the right of innocent passage through the territorial sea. It reiterates a principle recognized by international law and confirmed by the 1930 Conference.

The conditions governing the exercise of this right are set forth in the articles which follow. Some members of the Commission argued that, since the coastal State has sovereignty in the territorial sea, it would be more logical to specify the duties of coastal States with respect to innocent passage and not to make those duties appear as exceptions to a right of passage of other States. The Commission preferred to follow the method recommended by the 1930 Conference in order to stress the importance it attaches to the right of passage.

Article 19

Duties of the coastal State

1. The coastal State is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other States.

2. The coastal State is bound to give due publicity to any dangers to navigation of which it has knowledge.

Comment

This article confirms the principles which were upheld by the International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case between the United Kingdom and Albania.

Article 20

Right of protection of the coastal State

1. The coastal State may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that that is necessary for the maintenance of public order and security. In this case the coastal State is bound to give due publicity to the suspension.

Comment

In the same way as article 5 drafted by Subcommittee II of the 1930 Conference, this article gives the coastal State the right to verify, if necessary, the innocent character of the passage and to take the steps necessary to protect itself against any act prejudicial to its security, public order, customs interests, import, export and transit prohibitions, and so forth. In exceptional cases even a temporary suspension of the right of passage is permissible, if compelling reasons connected with public order or general security so require. Although it is arguable that this power was in any case implied in paragraph 1 of the article, the Commission considered it desirable to mention it expressly in paragraph 2 which specifies that only a temporary suspension in definite areas is permissible. The Commission is of the opinion that the article states the international law in force.

Article 21

Duties of foreign vessels during their passage

Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with these regulations and other rules of international law and, in particular, as regards:

(a) **The safety of traffic and the protection of channels and buoys;**

(b) **The protection of the waters of the coastal State against pollution of any kind caused by vessels;**

(c) **The protection of the products of the territorial sea;**

(d) **The rights of fishing, hunting and analogous rights belonging to the coastal State.**

Comment

International law has long recognized the right of the coastal State to enact in the general interest of navigation special regulations applicable to vessels exercising the right of passage through the territorial sea. The principal powers which international law has hitherto recognized as belonging to the coastal State for this purpose are defined in this article.

The corresponding article drafted by Subcommittee II of the 1930 Conference contained a second paragraph reading :

“The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.”

By omitting this paragraph, the Commission did not mean to imply that it does not contain a general rule valid in international law. Nevertheless, the Commission considers that certain cases may occur in which special rights granted by one State to another specified State may be fully justified by the special relationship between those two States; in the absence of treaty provisions to the contrary, the grant of such rights cannot be invoked by other States as a ground for claiming similar treatment. The Commission prefers, therefore, that this question should continue to be governed by the general rules of law.

Article 22

Charges to be levied upon foreign vessels

1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel.

Comment

The object of this article is to exclude any charges in respect of general services to navigation (light or conservancy dues) and to allow payment to be demanded only for special services rendered to the vessel (pilotage, towage, etc.). The article states the international law now in force.

As a general rule these charges are applicable on a footing of equality. For reasons analogous to those given for the omission of a second paragraph from article 21, the Commission did not reproduce the words "these charges shall be levied without discrimination" which occurred in the corresponding article drafted by the 1930 Conference.

Article 23

Arrest on board a foreign vessel

1. A coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the vessel; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its ter-

ritorial sea, or passing through the territorial sea after leaving the inland waters.

3. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.

Comment

This article enumerates the cases in which the coastal State may stop a foreign vessel passing through its territorial sea for the purpose of arresting persons or conducting an investigation in connexion with a criminal offence committed on board the vessel during that particular passage. In such a case a conflict of interest occurs: on the one hand, there are the interests of shipping which should suffer as little interference as possible; and on the other there are the interests of the coastal State which wishes to enforce its criminal law throughout its territory. Without prejudice to the coastal State's power to hand the offenders over to its tribunals (if it can arrest them), its power to arrest persons on board ships which are merely passing through the territorial sea may only be exercised in the cases expressly enumerated in the article.

The coastal State has no authority to stop a foreign vessel passing through the territorial sea, without entering inland waters, merely because some person happens to be on board who is wanted by the judicial authorities of that State in connexion with some punishable act committed elsewhere than on board the ship. *A fortiori*, a request for extradition addressed to the coastal State by reason of an offence committed abroad cannot be considered as a valid reason for stopping the vessel.

In the case of a vessel lying in the territorial sea, the jurisdiction of the coastal State will be regulated by the State's own municipal law and will necessarily be more extensive than in the case of vessels which are simply passing through the territorial sea along the coast. The same observation applies to vessels which have been in one of the ports or navigable waterways of the coastal State; if, for instance, a vessel anchored in a port, or had contact with the land, or took on passengers, the powers of the coastal State would be greater. The coastal State, however, must always do its utmost to interfere as little as possible with navigation. The inconvenience caused to navigation by the stopping of a large liner outward bound in order to arrest a person alleged to have committed some minor offence on land can scarcely be regarded as of less importance than the interest which the State may have in securing the arrest of the offender. Similarly, the judicial authorities of the coastal State should, as far as possible, refrain from arresting any of the officers or crew of the vessel if their absence would make it impossible for the voyage to continue.

Accordingly, the proposed article does not attempt to solve conflicts of jurisdiction between the coastal State and the flag State in the matter of criminal law, nor does it in any way prejudice their respective rights. The Commission realizes that it would be desirable to codify the law relating to these matters. It appreciates that it is important to determine what tribunal is competent to deal with any criminal proceedings to which collisions in the territorial sea may give rise. The fact

that, in keeping with the example of the 1930 Conference, the Commission nevertheless did not formulate express rules concerning this matter, is to be explained by the consideration that in this very broad field the Commission's task must inevitably be limited. Again, the Commission did not deal with the matter of collisions because, since 1952, a convention relating to the subject has been in existence and this convention has not yet been ratified by a considerable number of States; the convention in question is entitled "International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation" and was signed at Brussels on 10 May 1952. The Commission proposes, however, to study this topic later.

Article 24

Arrest of vessels for the purpose of exercising civil jurisdiction

1. A coastal State may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal State.

2. The above provisions are without prejudice to the right of the coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, passing through the territorial sea after leaving the inland waters of the State, for the purpose of any civil proceedings.

Comment

In this article the Commission adopted a rule analogous to that governing the exercise of criminal jurisdiction. A vessel which is only navigating the territorial sea without touching the inland waters of the coastal State may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board or of levying execution against or arresting the vessel itself, except as a result of events occurring in the waters of the coastal State during the voyage in question, as for example, a collision, salvage, etc., or in respect of obligations incurred for the purpose of the voyage.

The article does not attempt to provide a general solution for conflicts of jurisdiction in private law between the coastal State and the flag State. Questions of this kind will have to be settled in accordance with the general principles of private international law and cannot be dealt with by the Commission at this stage of its work. Hence, questions of competence with regard to liability under civil law for collisions in the territorial sea are not covered by this article. Two conventions materially affecting questions of civil jurisdiction were drawn up at the Brussels Conference referred to in the comment to the previous article,

namely, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision and the International Convention for the Unification of Certain rules relating to the Arrest of Sea-going Ships, both dated 10 May 1952. The sole purpose of the article adopted by the Commission is to prohibit the arrest of a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction, except in certain clearly defined cases.

Article 25

Government vessels operated for commercial purposes

The rules contained in the preceding articles of this chapter shall also apply to government vessels operated for commercial purposes.

Comment

The Commission followed the rules of the Brussels Convention of 1926 concerning the immunity of State-owned vessels; it considers that these rules follow the preponderant practice of States, and has therefore formulated this article accordingly.

SECTION B : WARSHIPS

Article 26

Passage

1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.

2. The coastal State has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances envisaged in article 20.

3. Submarines shall navigate on the surface.

4. There must be no interference with the passage of warships through straits used for international navigation between two parts of the high seas.

Comment

To state that the coastal State will authorize the innocent passage of foreign warships through its territorial sea is but to recognize the existing practice. The above provision is also in conformity with the practice which, without laying down any strict and absolute rule, leaves to the State the power, in exceptional cases, to prohibit the passage of foreign warships through its territorial sea. Hence the coastal State has the right to regulate the conditions of passage. In this respect the terms of article 20, relating to merchantmen, also apply to warships.

The right of passage does not imply that warships are entitled, without special authorization, to stop or anchor in the territorial sea. The Commission did not consider it necessary to insert an express stipulation to this effect for article 17, paragraph 3, applies equally to warships.

The Commission took the view that passage should be granted to warships without prior authorization or notification. Some members of the Commission held, however, that, under the international law in force, the passage of foreign warships through the territorial sea was a mere concession and hence subject to the consent of the coastal State.

The right of the coastal State to restrict passage is more limited in the case of passage through straits. The International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case says :

“ It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”⁹

In inserting paragraph 4, the Commission relied on that judgment.

Article 27

Non-observance of the regulations

1. Warships shall be bound, when passing through the territorial sea, to respect the laws and regulations of the coastal State.

2. If any warship does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.

Comment

The terms of paragraph 1 do not mean that the extraterritoriality of warships is limited in any way during the passage through the territorial sea. The object of the provision is only to emphasize that while the warship is in the territorial sea of the coastal State the vessel must comply with the laws and regulations of that State concerning navigation, security, health questions, water pollution and the like.

Chapter V

OTHER DECISIONS

I. Codification of the topic “Diplomatic intercourse and immunities”

73. In pursuance of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of the topic “Diplomatic intercourse and immunities” and to treat it as a priority topic, the Commission decided to ini-

tiate work on this subject. It appointed Mr. A. E. F. Sandström as Special Rapporteur.

II. Request of the General Assembly for the codification of the principles of international law governing State responsibility

74. The Commission took note of General Assembly resolution 799 (VIII) of 7 December 1953 requesting it to undertake, as soon as it considered it advisable, the codification of the principles of international law governing State responsibility. A memorandum on the question (A/CN.4/80) was submitted by one of the members, Mr. F. V. García-Amador. In view of the Commission's heavy agenda, it was decided not to begin work on the subject for the time being.

III. Control and limitation of documentation

75. The Commission took note of General Assembly resolution 789 (VIII) of 9 December 1953 regarding the control and limitation of the documentation of the United Nations.

IV. Spanish interpretation

76. On the proposal of Mr. Roberto Córdova, the Commission adopted the following resolution :

“ *The International Law Commission,*

“ *Taking into consideration* that the Spanish language, according to resolution 247 (III) adopted by the General Assembly on 7 December 1948, has become a working language of the General Assembly, and

“ *Taking also into consideration* that three of the members of the International Law Commission are nationals of Spanish-speaking countries,

“ *Resolves* to request the Secretary-General of the United Nations to make the necessary arrangements to ensure that, beginning with the forthcoming session of 1955, there will be also simultaneous interpretation from and into Spanish.”

V. Co-operation with Inter-American bodies

77. On the proposal of Mr. F. V. García-Amador, the Commission adopted the following resolution :

“ *The International Law Commission,*

“ *Considering* that according to article 26 of its Statute, adopted by resolution 174 (II) of the General Assembly,

“ ‘The advisability of consultation by the International Law Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized,’ and

“ *Considering* that the Inter-American Council of Jurists and the Tenth Inter-American Conference have taken steps towards the implementation of the foregoing provision,

⁹ I.C.J. Reports, 1949, p. 28.

"Resolves to ask the Secretary-General to take such steps as he may deem appropriate in order to establish a closer co-operation between the International Law Commission and the Inter-American bodies whose task is the development and codification of international law."

VI. Representation at the General Assembly

78. The Commission decided that it should be represented at the ninth session of the General Assem-

bly by its Chairman, Mr. A. E. F. Sandström, for purposes of consultation.

VII. Date and place of the seventh session of the Commission

79. The Commission decided, after consulting the Secretary-General in accordance with the terms of article 12 of its Statute and receiving the views of the latter, to hold its next session in Geneva, Switzerland, for a period of ten weeks beginning on 20 April 1955.

ANNEX

Comments by Governments on the draft Convention on the Elimination of Future Statelessness and on the draft Convention on the Reduction of Future Statelessness, both prepared by the International Law Commission at the fifth session in 1953¹⁰

1. Australia

LETTER FROM THE PERMANENT DELEGATION OF AUSTRALIA TO THE UNITED NATIONS

[Original: English]
[30 June 1954]

Article 1. The Australian Nationality and Citizenship Act confers Australian citizenship (and therefore British nationality) at birth upon persons born in Australia, which for this purpose includes all the Territories, other than Trust Territories. The only exceptions to this rule are:

(i) Children born here whose fathers are the diplomatic representatives of other countries. This exception had always existed in the common law of England until the statutory provision was made and it is universally accepted in the international sphere;

(ii) Children born of enemy-alien fathers in enemy-occupied territory. This has had no practical significance in Australia.

Article 2. The Australian Act has no corresponding provision but there would seem to be no serious objection to such provision being made, subject to safeguards, ensuring that we would be able to demand proof that a person claiming to have acquired citizenship under this heading was in fact a foundling.

Article 3. The Act provides that birth on a ship or aircraft shall be equivalent to birth in the country in which the ship or aircraft is registered. This is in effect identical with article 3.

Article 4. A child born outside Australia in wedlock of an Australian father, or out of wedlock to an Australian mother becomes an Australian citizen upon registration of the birth at an Australian Consulate. This meets the objects of article 4.

Article 5. 1. Changes in personal status, such as marriage and the other matters mentioned in article 5, paragraph 1, have not of themselves any effect upon the Australian citizenship of the person concerned.

2. The loss of Australian citizenship by a spouse does not of itself entail loss of citizenship by the other spouse. So far as children are concerned our Act generally observes the principle of article 5, paragraph 2, but the Minister in depriving a person of Australian citizenship has power to direct that that person's children also shall cease to be Australians, whether they have another nationality or not. We have here a conflict

of two principles—the desirability of avoiding statelessness and of ensuring that young children should have the same national status as their responsible parent. It is the Australian Government's view that each case of this kind requires individual consideration, and that the Minister should therefore retain the discretionary power which he already has, to direct that the children shall cease to be Australian citizens or remain such, according to circumstances. If such deprivation were to result in the child being stateless this would weigh heavily in favour of the child being allowed to retain Australian citizenship.

Article 6. 1. The only case in which Australian citizenship may be renounced by a person not already having another nationality is that where a person became an Australian citizen involuntarily whilst still a minor, through the naturalization of his or her parents; upon reaching twenty-one years of age such a person may renounce Australian citizenship whether or not he has another nationality. Again there is a conflict of principles—however desirable it may be to avoid statelessness, it is also desirable that anyone who was involuntarily naturalized as a child should not be forced to retain Australian citizenship against his will when he reaches manhood. Again the practical implications are very slight—more so because it is obviously unlikely that anyone would renounce Australian citizenship if he or she had no other nationality and no opportunity of acquiring one. The view of the Australian Government is that the existing law should stand.

2. The Act accords with article 6, paragraph 2.

3. The Act runs counter to article 6, paragraph 3, in that naturalized or registered Australian citizens who remain absent from Australia for over seven years without giving notice of intention to retain Australian citizenship automatically cease to be citizens. The notice is expected to be given annually but the Minister liberally administers a discretionary power to permit notice to be given at such other intervals, during the seven years, as he thinks fit. The Australian Government's view is that it is undesirable in principle that any person who remains absent from Australia for so long, without retaining the very slight interest in Australian citizenship required to give annual notice of intention to retain it, should retain it. It will be a rare case in which the person concerned thus becomes stateless—usually he will be found to have returned to the country of his birth to retire on savings made in Australia, and he will usually still have, or will have taken steps to reacquire, the citizenship of his native country. Experience during and after the last war showed that such people will regain interest in Australian citizenship and British nationality only when war or some other emergency makes it expedient. Embarrassing problems can arise for overseas posts if Australian

¹⁰ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*.

citizenship is retained indefinitely by such people, and the existing law on the point was introduced as recently as 1949 to eliminate such problems.

Article 7. The Act empowers the Minister to deprive any person of Australian citizenship who acquired that status by naturalization or registration and who has been disloyal, became naturalized by fraud, was not of good character when granted naturalization or has been sentenced to imprisonment for twelve months or more within five years after naturalization. This power of deprivation is not limited to persons who have another nationality, and in this respect the Act conflicts with both of the alternative articles. The Australian Government's view is that the power should not be limited as contemplated by the article. It will be observed that deprivation can be effected only in very grave circumstances. In addition the Minister must give the person concerned an opportunity to appeal to a special judicial committee appointed by the Governor General, before making an order of deprivation (except in the case where a court of law imposes a sentence of twelve months' imprisonment or longer, within five years after naturalization). It would appear to be out of the question that a person should be able to escape deprivation solely because he has no other nationality in addition to Australian citizenship.

Article 8. Our Act is in accordance with this article.

Article 9. In the event of this article having any application in Australia at some future time, its principles would be observed, as far as can be foreseen.

Article 10. There would be no objection to this article so far as Australia is concerned.

Unless, therefore, article 5, paragraph 2, article 6, paragraphs 1 and 3, and article 7 are altered to give effect to the Australian comments on these articles, the Australian Government, in the event of the conventions being adopted by the General Assembly, could only consider ratifying them if variations can be and are made to the articles mentioned to meet Australian objections.

2. Belgium

LETTER FROM THE MINISTRY FOR FOREIGN AFFAIRS OF BELGIUM

[Original: French]
[22 February 1954]

It appears difficult to accept the principle laid down in article 1 of the drafts whereby a child who would otherwise be stateless acquires at birth the nationality of the State in whose territory he is born.

The Belgian Legislature had adopted this principle in 1909 when it enacted a provision to the effect that a child born in Belgium of parents not possessing a specified nationality was to be a Belgian national. The application of the principle proved disappointing. The attitude of a large number of persons born of parents who had allegedly lost their nationality showed quite clearly, especially during the 1914-1918 War, that such loss of nationality was purely a matter of form.

Moreover, it seems hardly conceivable that a State, by allowing the automatic acquisition of its nationality, should endorse measures—often arbitrary measures—whereby foreign Governments deprive persons of nationality.

It would be more appropriate to offer a child who is within the terms of article 1 the opportunity of *acquiring* the nationality of the country in whose territory he was born, by means of an option subject to certain residence qualifications and to the production of satisfactory evidence of suitability by the applicant.

Article 2 of the two drafts does not call for comments.

There are also no comments on article 3, which lays down expressly the still quite vague principles concerning the territoriality of ships and aircraft.

Article 4 gives rise to certain reservations, for the principle of the *jus sanguinis materni* appears to be highly debatable so far as the nationality of *legitimate* children is concerned.

A child whose father is stateless and whose mother possesses a specified nationality should have the possibility either of acquiring by option the mother's nationality or of following the father's status if the latter voluntarily acquires a nationality.

Article 5, paragraph 1, of the two drafts gives rise to reservations with respect to the nationality of children born out of wedlock who are recognized.

If, for the reasons mentioned in the comments on article 1 of the drafts, the benefit of *jus soli* ought not to be extended to the legitimate child of a stateless person, *a fortiori* a child born out of wedlock who has not been recognized and who *jure soli* possesses a specified nationality should follow the status of the person with respect to whom relationship is duly proved by recognition, even though as a consequence he loses the nationality which he possessed as an unrecognized illegitimate child without acquiring a new one. Here again, the child should have the possibility either of acquiring by option the nationality of his country of birth or of benefiting by the collective effect of the naturalization of the person with respect to whom relationship is proved.

For article 7 of the drafts only the minimum formula is acceptable.

Moreover, in exceptional cases, the Parties should be empowered to deprive their nationals of nationality, subject to the safeguards mentioned, but it should not be stipulated that such nationals must have entered or continued voluntarily in the service of a foreign country "*in disregard of an express prohibition of their State*".

There are no objections to article 8 except that the term "political grounds" should be more clearly defined, for, if activities designed to overthrow the State or its institutions are involved, such grounds could obviously give rise to proceedings for deprivation of nationality.

Article 10 provides for the establishment of an agency to act on behalf of stateless persons before an arbitral tribunal.

It should be pointed out in connexion with the proposed agency that political refugees, many of whom are in fact, if not in law, stateless, enjoy the protection of the United Nations High Commissioner for Refugees.

Furthermore, the granting of nationality is a matter for the exclusive jurisdiction of the State and cannot depend on decisions by a supra-national tribunal.

Accordingly, the establishment of a new agency within the framework of the United Nations does not appear desirable, especially if it is considered that its function would involve virtual intervention in a matter which, by its very nature, is essentially within the domestic jurisdiction of a State, which is expressly safeguarded by a provision of the United Nations Charter (Article 2, paragraph 7).

3. Canada

NOTE FROM THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS OF CANADA

[Original: English]
[1 June 1954]

Although Canadian legislation contains provisions for loss and deprivation of citizenship, which in some instances might result in statelessness, there have been changes in the legislation leading to a reduction in the causes of statelessness, with particular reference to married women and minor children.

Whilst agreeing that the reduction of statelessness is a commendable goal, nevertheless, it is considered that there exist cases in which deprivation of citizenship is not unwarranted or unjustified. For this reason Canada could not accept article 7 of the draft Convention on the Elimination of Future Statelessness which is considered to be much too broad.

With the exception of articles 4, 6 and 7 the articles of the proposed Convention on the Reduction of Future Statelessness present no problems with regard to contemporary Canadian legislation.

Article 4. The first three articles of the Convention aim at the extension as far as possible of the rule of *jus soli* in the acquisition of nationality. As the Convention, however, would apply in this respect only between the parties to it, article 4 attempts to supplement the coverage of the three preceding articles by attempting to extend the rule of the *jus sanguinis* to persons born in the territory of the States which would not be parties to this Convention. The principle would not present any difficulty, provided it included certain qualifications.

According to Canadian legislation a person born out of Canada acquires the Canadian nationality of his father only if the birth be properly declared to a representative of the Canadian Government. Moreover, the child acquires the Canadian nationality of his mother only if he be born out of wedlock. It is not felt that these qualifications which attach to the *jus sanguinis* in Canadian law would result in the foreign-born children of Canadian citizens becoming stateless. This would occur only if they were born in countries where the *jus soli* would not apply to offspring of foreigners. It is thought that there would be few countries where such would be the law. In any event, statelessness in such countries would result from indifference or negligence on the part of the parents. In this regard it should be noted that in special cases the period of two years within which registration must normally be made, may be extended. In the circumstances, it is considered, that article 4, as drafted, would imply an unnecessary and undue extension of the principle of the *jus sanguinis*.

Article 6. In cases where another nationality has not been acquired, mere renunciation does not carry loss of Canadian citizenship. However, provision exists whereby revocation of citizenship may follow upon renunciation.

Paragraph 3 runs counter to Canadian legislation inasmuch as it opposes loss of nationality on the mere grounds of "departure, stay abroad, failure to register or any other similar ground when statelessness is to ensue". The Canadian Citizenship Act provides for the loss of Canadian nationality by a naturalized citizen in cases of prolonged absence from Canada when substantial connexion has not been maintained. It is not considered that the provisions are unreasonable since they provide for loss of Canadian citizenship only in cases where marked indifference towards such citizenship has been manifested and where presumably the persons involved would be more interested in acquiring another nationality.

Article 7. Paragraph 1 of this article in its present form would not be acceptable to the Canadian Government since Canadian legislation includes other grounds for deprivation of nationality by way of penalty.

The existing Canadian legislation regards the following acts as grounds for revocation of citizenship:

- (a) Renunciation;
- (b) Foreign naturalization or allegiance;
- (c) Prolonged absence;
- (d) Trade with an enemy;
- (e) Fraudulent naturalization;
- (f) Disaffection or disloyalty.

Of these (a) (b) (c) and (e) are not considered to be deprivation by way of penalty. In renunciation and foreign naturaliza-

tion of allegiance, the person concerned has voluntarily manifested a desire to divest himself of his previous citizenship; in the case of prolonged absence, except in extenuating circumstances for which provision is made, the behaviour of a naturalized citizen implies renunciation; in the case of fraudulent naturalization, revocation does not constitute a penalty, but a mere statement of the fact that naturalization, having been vitiated by fraud is null and void; "trade with an enemy" would fall within the article as presently worded; "disaffection or disloyalty" might or might not. It is not thought that statelessness should be avoided at all costs and the Canadian Government would be reluctant to abandon its right to deprive disloyal, naturalized citizens of their Canadian nationality by way of penalty.

Paragraph 2 of article 7 would raise a further difficulty in that it requires that "the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law". Revocation in Canada follows due process of law but is not pronounced by a judicial authority. It is ordered by the Governor-in-Council as the constitutional authority entrusted with the exercise of royal prerogatives, of which revocation of citizenship is one.

4. Costa Rica

COMMENTS TRANSMITTED BY A LETTER FROM THE PERMANENT DELEGATION OF COSTA RICA TO THE UNITED NATIONS, DATED 26 JANUARY 1954

[Original: Spanish]

The background of the subject has been duly examined, and the reports by Mr. Hudson, assisted by Dr. Kernó, studied, together with the well documented report submitted by Dr. Córdova as special rapporteur. In addition, careful thought has been given to the weighty opinion of the commission, which approved both draft conventions for submission to Governments for their comments, after some members of the Commission had expressed the opinion that the problem of statelessness could only be solved by the adoption of the draft Convention on the Elimination of Future Statelessness, while others felt that the draft Convention on the Reduction of Future Statelessness at present offered the practicable solution of the problem.

Likewise, the Commission's view that it is essential to eliminate or to reduce future statelessness by international agreement appears very reasonable, as does its opinion that one of the two draft conventions ought eventually to become part of international law. Accordingly, the two draft conventions were transmitted to the Economic and Social Council.

After studying the two draft Conventions—that referring to the "elimination of future statelessness", and that dealing with the "reduction of future statelessness"—this Office considers the latter more suitable, because it contains a better explanation of the ideas underlying the principles set forth in articles 1 and 7 of both drafts.

The recommended Convention contains provisions relating to nationality acquired at birth, presumptions, birth on ships, special conditions in a number of States, renunciation of nationality, penalties; racial, religious and political grounds; transfer of territories, changes in personal status, special agencies and doubtful cases.

The efforts made along the lines described reflect a profoundly humanitarian spirit, are furthering one of the fundamental principles of the Universal Declaration of Human Rights and tend to remove difficulties between States.

The establishment of the proposed special agency to act on behalf of stateless persons, and the establishment of a tribunal, within the framework of the United Nations, to decide upon complaints presented by the said agency are also desirable steps.

The second draft Convention, therefore, forms a sound basis for dealing with the problem, though, of course, when once it becomes operative some of its provisions may require adjustment in the light of experience and of new principles of international law.

5. Denmark

LETTER FROM THE MINISTRY FOR FOREIGN AFFAIRS OF DENMARK

[Original: English]
[23 April 1954]

Article 1 of both draft Conventions. Article 1 of the draft Convention on the Elimination of Future Statelessness and paragraph 1 of article 1 of the draft Convention on the Reduction of Future Statelessness establish the principle of *jus soli* for persons who would otherwise become stateless; this principle is at variance with Danish law on nationality which adheres to the principle of *jus sanguinis* from which only one exception has been made, viz., Act of 27 May 1950, article 1, paragraph 2, which lays down that a legitimate child born in the State of Denmark whose mother is Danish shall acquire Danish nationality by birth if the child's father is stateless or if the child does not by birth acquire the father's nationality.

Provisions similar to those laid down in paragraph 2 of article 1 of the draft Convention on the Reduction of Future Statelessness making the preservation of nationality dependent on certain conditions are not prescribed in connexion with paragraph 2 of article 1 of the Danish Nationality Act; consequently, there are no provisions granting a child the nationality of one of his parents if he loses his nationality; cf. paragraph 3 of the draft Convention on the Reduction of Future Statelessness which, incidentally, goes beyond the principle of descent established in Danish law in that it does not distinguish between children born in or out of wedlock.

Article 2 of both draft Conventions. As a founding acquires the nationality of the State in whose territory it is found, this provision, in conjunction with article 1, is in conformity with the rules laid down in paragraph 2 of article 1 of the Danish Nationality Act.

Article 3 of both draft Conventions. The Danish Nationality Act contains no provisions on birth on ships and aircraft, but birth on a Danish ship or aircraft cannot invariably be expected to involve the same status as birth in Danish territory, as each case will be decided on its own merits. On the other hand, a child born on a foreign ship or aircraft may acquire the same status as children born in Danish territory if, for instance, such ship or aircraft is *en route* between various parts of Denmark.

Article 4 of both draft Conventions. This article, like paragraph 3 of article 1 of the draft Convention on the Reduction of Future Statelessness, lays down a principle of descent which goes beyond Danish law or nationality.

Article 5 of both draft Conventions. The Danish Nationality Act provides that a person shall not normally lose his Danish nationality except in connexion with simultaneous acquisition of a foreign nationality. Similarly, the loss of the nationality of a parent referred to in paragraph 2 of this article does not normally entail the loss of the children's Danish nationality unless they acquire another nationality at the same time. The only exception to this rule is paragraph 2 of article 8 of the Danish Nationality Act, which lays down that if a person loses his or her nationality in pursuance of paragraph 1 of the article (birth and residence abroad until twenty-second year) the children of such person shall also lose their Danish nationality if they acquire it through him or her. Such loss shall become effective even if it renders the children stateless.

Article 6 of both draft Conventions. Paragraphs 1 and 2 of this article are in conformity with the rules laid down by the Danish Nationality Act, article 9 (on renunciation) and article 7 (on loss) of Danish nationality through acquisition of another nationality, but paragraph 3 of the draft Conventions goes beyond Danish law, cf. article 8 of the Danish Nationality Act under which a person may lose his Danish nationality even if that renders him stateless.

Article 7 of both Conventions. Danish law on nationality does not contain any rules on deprivation of nationality by way of penalty and is thus in conformity with the principle laid down by this article.

Article 8 of both Conventions. Under Danish law on nationality a person cannot be deprived of his nationality on the grounds referred to in this article; hence, article 8 is in conformity with the principles of law adhered to in Denmark.

Article 9 of both Conventions. The rules embodied in this article are in conformity with the principles to which the State of Denmark has adhered and will probably continue to adhere in such cases.

Article 10 of both Conventions. The Danish authorities have no objection to the provisions of this article.

From the above comments it will be understood that the provisions of the draft Conventions deviate, in essential respects, from the existing Danish legislation on nationality. Hence, the draft Conventions cannot be accepted by the Danish authorities without quite substantial reservations, unless they are amended considerably in the course of further treatment.

In regard to the question of amending the Danish legislation on nationality with a view to adapting it to conventions based on the two drafts submitted, attention is invited to the fact that the Danish Nationality Act of 27 May 1950 was drafted in collaboration with the other Scandinavian countries. Hence, amendments of that Act would—at least as far as more important amendments are concerned—probably presuppose corresponding and simultaneous amendments of the Norwegian and Swedish nationality laws.

In view of the comparatively recent detailed consideration given to Scandinavian laws on nationality, the Danish authorities feel that far-reaching amendments of these laws are not very likely to be effected in the next few years.

6. Egypt

NOTE FROM THE PERMANENT DELEGATION OF EGYPT
TO THE UNITED NATIONS

[Original: English]
[2 July 1954]

1. Article 1 of both draft Conventions. The Egyptian Government does not accept the provisions of article 1 in both draft Conventions. Whereas that article permits a child, who otherwise would be stateless, to acquire at birth the nationality of the State in whose territory it is born, Egyptian Law No. 160 of 1950, stipulates that acquisition of Egyptian nationality is dependent upon normal residence in Egypt until the age of twenty-one, and compliance with other conditions referred to in articles 4 and 5 of that law.

Furthermore, Egypt is suffering from an over-population problem. The increase in population is not at par with the growth of economic resources. The adoption of the principles laid down in article 1 of both draft Conventions would, therefore, aggravate the situation causing a decline in the social and economic standards of living in Egypt.

According to current Egyptian laws, acquisition of Egyptian nationality is limited to cases where economic, cultural or artistic gains accrue therefrom.

The Egyptian Law of 1950, in its article 2, paragraph 4, considers, however, a child born in Egypt of two unknown parents to be Egyptian.

The Egyptian Government considers that the actual provisions of its present law of nationality has thus eliminated one of the most common reasons of statelessness and does not, therefore, deem it necessary to change any of its provisions which were primarily drawn up to safeguard the vital interests of its inhabitants.

2. *Article 2 of both draft Conventions.* Article 2 of both draft Conventions is in conformity with the principles laid down by article 2 of the Egyptian Law of 1950.

3. *Article 3 of both draft Conventions.* For reasons similar to those expressed in paragraph 1 above, the provisions of this article are not acceptable to the Egyptian Government.

4. *Article 5 of both draft Conventions.* Provisions of this article are not in accordance with principles provided by the Egyptian Law on nationality.

5. *Article 6 of both draft Conventions.* The Egyptian Nationality Law contains similar provisions aiming at eliminating statelessness with the exception of one case—that of a foreign wife who acquires Egyptian nationality by marriage and upon termination of that marriage loses her Egyptian nationality if her residence is normally established abroad.

The *ratio legis* of this exception lies in the desire of the Egyptian Government to prevent cases of fraud. Moreover, it has been observed that such a wife who is not willing to reside in Egypt and establish her normal residency abroad must have considerable interest in doing so and presumably might have regained her nationality of origin.

On the other hand, the married woman does not lose her Egyptian nationality if she normally resides in Egypt after termination of her marriage.

6. *Article 7 of both draft Conventions.* Whereas article 7 of the draft Convention on the Elimination of Future Statelessness is inconsistent with the Egyptian Law of nationality, article 7 of the draft Convention on the Reduction of Future Statelessness is partly in conformity with its provisions.

The Egyptian Law does not require any judicial pronouncement before nationality is lost although executive decisions in this respect are subject to judicial review by Egyptian courts.

The Egyptian Government does not approve of any limitation to be imposed upon its right of deprivation of nationality as a punishment because it considers the State the most competent authority to decide on acts which threaten its internal security or its economic and social structure.

7. *Article 10 of both draft Conventions.* The Egyptian Government may approve the establishment, within the framework of the United Nations, of an agency to act on behalf of stateless persons, but does not approve the establishment of a tribunal to decide upon complaints by individuals claiming to have been denied nationality.

It is the view of the Egyptian Government that granting nationality is a matter for the exclusive jurisdiction of the States within the framework of its own domestic legislation and based upon consideration of its best interest and security. Therefore domestic courts would be the competent organs to supervise the State action in this matter.

The Egyptian Government has no further comments on other articles of both draft Conventions.

Taking into consideration the above-mentioned remarks, the Egyptian Government cannot, therefore, accept the two draft Conventions in their present text; and reserves the right to present further comments, as it deems necessary, when the final draft convention is completed and submitted to the Egyptian Government.

7. Honduras

LETTER FROM THE DEPARTMENT OF FOREIGN AFFAIRS OF HONDURAS

[Original: Spanish]
[15 January 1954]

The Honduran Government accepts without reservation the preambles to the two draft Conventions, which are based on a binding moral principle expressed in the Universal Declaration of Human Rights in the words: "Everyone has the right to a nationality." The Economic and Social Council recognizes that this right should be effectively guaranteed.

The Honduran Government accepts without reservation article 1 of the draft Convention on the Elimination of Future Statelessness.

In my Government's opinion a new paragraph should be added to article 1 of the draft Convention on the Reduction of Future Statelessness, in order to prevent the statelessness of a person who does not normally reside in the country before attaining the age of eighteen. This paragraph would read as follows:

"4. If the person does not normally reside in the State before attaining the age of eighteen he shall acquire his father's nationality or, failing that, his mother's nationality."

My Government approves article 3 of both draft Conventions providing that birth on a vessel or an aircraft shall be deemed to have taken place within the territory of the State whose flag the vessel flies. It accepts this article in the light of the Commission's decision that the best solution in this case was to adopt the simple test of the flag of the vessel and of the registration of the aircraft, in view of the relative infrequency of birth on vessels or aircraft.

It also approves without reservation article 4 of both draft Conventions.

It has no objections to article 5 of both Conventions. My Government does not object to article 6, paragraphs 1 and 2 of the drafts but objects to paragraph 3 of that article which provides that "persons shall not lose their nationality so as to become stateless on the ground of departure, stay abroad, failure to register or on any other similar ground". My Government is of the opinion that departure, stay abroad, failure to register or any other similar ground should be a ground for loss of nationality, but only in the case of naturalized persons who in this way acquire a new nationality and return to their former country for a certain time or indefinitely, or settle in another State without registering with the appropriate authorities of the State of which they claim to be naturalized citizens after the expiration of a time-limit laid down under the national law. The Honduran Government is in favour of this paragraph being amended accordingly, with the addition of a further paragraph. The new text might read as follows:

"... except in the case of naturalized persons who may lose their nationality after being absent from the country for more than five consecutive years if they fail to register abroad or their conduct is such that they deserve to be deprived of their naturalization.

"4. Naturalized persons who lose their nationality in this way shall recover that of their country of origin."

My Government has no comment to make on article 7 of the Convention on the Elimination of Future Statelessness but considers that this article should refer specifically to nationality at birth. The new paragraph 4 added to article 6 would be applied to naturalized persons.

My Government also agrees with article 7 of the Convention on the Reduction of Future Statelessness, but considers in connexion with paragraph 2 that the Government authorities acting in accordance with the law should be entitled to deprive

a person of nationality. Such an amendment would mean adding another sentence to paragraph 2.

In accordance with its traditional policy and that of the Republic throughout its history, my Government is able to accept without any modifications article 8 of both drafts. It sincerely believes that other Governments guided by the same democratic principles will accept it wholeheartedly without any reservations limiting its application.

My Government agrees with articles 8 and 9 of the drafts.

My Government approves paragraphs 1, 2 and 4 of article 10. It suggests, however, that in order to achieve the purposes mentioned in those paragraphs the following sentence should be added to paragraph 3:

"...and if none of the Contracting Parties request it, the General Assembly shall proceed to set them up."

8. India

NOTE FROM THE MINISTER FOR EXTERNAL AFFAIRS OF INDIA

[Original: English]
[2 April 1954]

The Minister for External Affairs...has the honour to say that pending enactment of the Citizenship Law of India, it is not possible for the Government of India to offer any useful comments on the draft Conventions in question, since statelessness is a problem which is intimately connected with laws of nationality and citizenship.

9. Lebanon

LETTER FROM THE MINISTER FOR FOREIGN AFFAIRS OF LEBANON

[Original: French]
[18 May 1954]

Article 1 of both drafts is in line with the general principles of Lebanese legislation on nationality and hence does not call for any comment.

Article 2 of both drafts is simply the natural sequence to article 1 and does not call for any comment, except perhaps that it may be desirable to define what is meant in law by the term "child".

Article 3 of both drafts is also in conformity with Lebanese legislation.

Articles 4 and 5, too, are in keeping with Lebanese law which provides that "a person born of a Lebanese father is a Lebanese national", and that "if a Lebanese woman marries an alien she shall lose her nationality on condition that the legislation of the State of which her husband is a national confers his nationality upon her, failing which she shall retain her Lebanese nationality."

Article 6, paragraphs 1 and 2, call for no comment. As regards article 6, paragraph 3, of both drafts, which provides that "Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or any other similar ground", the Lebanese Government would be prepared to adopt it if the "stay abroad"—the cause of the loss of nationality—should exceed the time limit stipulated in the legislation of the contracting State of which the individual concerned is a national.

Article 7 of the draft Convention on the Elimination of Future Statelessness states that "the Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless." On the other hand, article 7, paragraph 1, of the draft Convention on the Reduction of Future Statelessness provides that "the Parties shall not deprive

their nationals of nationality by way of penalty if such deprivation renders them stateless, except on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State".

The Lebanese Government cannot concur with the terms of the first of these drafts; while it can, on the other hand, agree to those of the second draft, for they are in keeping with its own legislation, it feels bound nevertheless to point out that there is one case in which Lebanese legislation does not require an express prohibition, viz. where a Lebanese national accepts an official appointment in Lebanon in the service of a foreign Government without prior permission.

Moreover, article 7, paragraph 2, of this second draft Convention provides: "In the case to which paragraph 1 above refers, the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law", whereas under Lebanese law an order to deprive a person of Lebanese nationality is made by the Council of Ministers.

Articles 8, 9 and 10, common to both drafts, do not call for any comments.

10. Netherlands

COMMENTS TRANSMITTED BY A LETTER FROM THE PERMANENT DELEGATION OF THE NETHERLANDS TO THE UNITED NATIONS

[Original: English]
[1 June 1954]

General comments

The Netherlands Government, convinced of the necessity of eliminating or drastically reducing statelessness, are of the opinion that both draft conventions on future statelessness as contained in chapter IV of the report of the International Law Commission covering the work of its fifth session form an excellent contribution towards the solution of this problem, which has been pressing for such a long time.

The Netherlands Government, therefore, are in general agreement with the principles and major objectives of the said draft Conventions.

The Netherlands Government would, however, express a preference for the draft Convention on the Reduction of Future Statelessness (hereinafter to be referred to as "second draft") on grounds which will be further explained in their comments on the preamble and the articles of the draft Conventions. Notwithstanding this preference, they have thought it useful to include in their comments a number of suggestions regarding possible amendments of the text of the draft Convention on the Elimination of Future Statelessness (hereinafter to be referred to as "first draft"), in so far as, in their opinion, the wider objectives of this draft make such amendments necessary.

As regards the final sentence of paragraph 121 of the report of the International Law Commission: "In due course and after receiving the comments of Governments, the Commission will consider whether and in what form it should submit to the General Assembly one or more final draft conventions and what course of action it should recommend", the Netherlands Government, though they do not favour the idea of more than one final draft convention being eventually opened for signature—as this procedure would not be conducive to the uniformity of law—do not object to more than one draft convention being submitted to the General Assembly, leaving it to the Assembly to decide which draft will be adopted. They wish to point out, however, that should the General Assembly eventually decide to recommend the first draft for signature and ratification by the Members of the United Nations, it would be difficult for the Netherlands Government to comply with such recommendation, in view of the existing nationality legislation in the Netherlands.

*Comments on the preamble and the articles
of the two draft Conventions*

Preamble. As regards the preamble of the conventions, the Netherlands Government have no remarks to make.

Article 1. The Netherlands Government prefer the text of article 1 of the second draft, for three reasons:

(1) As regards the acquisition of Netherlands nationality, Netherlands legislation, as a rule, is based on the principle of *jus sanguinis*. Though in order to avoid statelessness certain exceptions can be made to the principle of *jus sanguinis*, it should be observed that there may be cases in which the application of article 1 of the first draft would result in the acquisition of Netherlands nationality by persons who—the parents being non-Netherlanders—are born in the Netherlands as a result of purely accidental circumstances and then leave this country after so short a time that there is no link whatever with the Netherlands.

In the opinion of the Netherlands Government, paragraphs 2 and 3 of article 1 of the second draft constitute an adequate guarantee that in the future statelessness will only occur in exceptional cases.

(2) In practice, article 1 of the first draft could induce a State in whose territory stateless children have been born to discriminate in its legislation against these subjects who have been more or less forced upon that State, in so far as they have hardly any link with it. For instance, it could be easily imagined that—as is the case in various countries adhering to the principle of *jus soli*—the right to vote and the right to freedom of assembly and association are withheld from subjects who have no connexion with the State either by residence or by any other links. Thus, though, in its literal sense, the text of article 1 of the first draft protects the stateless person to a greater extent than does the text of article 1 of the second draft, the first may in practice lead to a devaluation of his status. It should be observed in this connexion that it has not been laid down in the draft Conventions which minimum rights a subject must possess.

(3) Acceptance of article 1 of the first draft might induce States not to admit refugees into their territories, which would be undesirable on humanitarian grounds.

In considering their position with regard to this article the Netherlands Government have proceeded on the assumption that article 1 of the second draft should be taken to mean that the person concerned shall provisionally acquire the nationality of the Party in whose territory he is born, which acquisition shall be confirmed as soon as he attains the age of eighteen, the nationality being lost if he shifts his normal residence to another country before reaching that age.

Article 2. In the explanatory comment on this article in the report of the International Law Commission it is pointed out that this provision, especially within the system of the first draft, is not quite conclusive from a purely theoretical point of view. It may be imagined that a foundling, found in the territory of one of the Contracting Parties, is subsequently discovered actually to have been born in the territory of a State which does not recognize the principle of *jus soli*, while the nationality of the parents is not known. In that case, if the latter State is not a party to the convention, the present wording of article 2 might leave room for statelessness, because the child cannot profit by the provision of article 4 of the two draft Conventions.

The Netherlands Government realize that the case referred to above will present itself in very exceptional circumstances only, but in view of the object of the first draft, viz., to eliminate every conceivable possibility of statelessness, they would nevertheless suggest to add to article 2 a second paragraph to be worded in the following terms:

“In the case that, its place of birth being known, it would otherwise be stateless, the foundling shall, for the purpose

of article 1, be deemed to have been born in the territory of the Party in which it is found.”

Article 3. The Netherlands Government deem it a happy solution to assume, for the purpose of article 1, that in all cases in which birth has taken place on a vessel or an aircraft, it shall be deemed to have taken place within the territory of the State whose flag the vessel flies, irrespective of the State where the aircraft is registered.

Article 4. According to the explanatory comment on this article in the report of the International Law Commission, it is the intention that the provision of his article shall extend to children born in no-man's-land or in territories the sovereignty of which is undetermined or divided, therefore, the Netherlands Government are of the opinion that the word “not” in the third line of article 4 should be omitted, it should be placed in the second line after the word “child”.

Article 5. For the reasons set forth in their comments on article 7, the Netherlands Government deem it desirable to extend the scope of the provision contained in paragraph 2. In their opinion this could be achieved by inserting this provision as a separate article.

Article 6. The Netherlands Government are in general agreement with the provisions of this article.

Article 7. As regards this article, the Netherlands Government likewise prefer the second draft as the stringent provision that States are not allowed to deprive their nationals of their nationality by way of penalty, if such deprivation renders them stateless, is qualified by providing that an exception can be made in case such nationals voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State. Further the Netherlands Government hold the view that the expression “by way of penalty” implies an unintended restriction of the article; therefore the Government would suggest to delete these words. This also applies to the second draft, as in many countries—and certainly in the Netherlands—deprivation of nationality on the ground of entering or continuing in the service of a foreign State is not considered a punitive measure but rather the logical result of the fact that the person concerned has evinced a degree of loyalty to a foreign State which is incompatible with his original nationality.

Accordingly Netherlands nationality is lost at the moment the person concerned enters the service of a foreign State without the consent of the competent authorities. At the moment the Netherlands Government are considering a proposal to the effect that when a person enters the service of a foreign State he shall lose his Netherlands nationality only in cases in which this is expressly declared by the Netherlands authorities concerned. In this system the decision whether or not the person concerned will lose his Netherlands nationality does not depend on juridical factors; it is rather a matter of policy and therefore intervention of a court does not fit in with the proposed system. If this system should be adopted the number of cases of Netherlanders becoming stateless as a result of entering the service of a foreign State would be very small; therefore it is in accordance with the spirit of the proposals of the International Law Commission.

If in the first paragraph of article 7 of the second draft the words “by way of penalty” are deleted, the Netherlands Government recommend that in connexion with the foregoing the second paragraph of article 7 be worded as follows:

“In the case that a person will be deprived of his nationality on the aforementioned ground by way of penalty, the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law.”

Moreover the Netherlands Government are of the opinion that deprivation of nationality in virtue of article 7 should not entail loss of nationality by the members of the family of the person concerned. A similar guarantee has been laid down in paragraph 2 of article 5 of the two drafts. Therefore the

Netherlands Government deem it desirable to insert paragraph 2 of article 5 as a separate article in the two conventions, so that this provision shall apply not only to loss of nationality as a consequence of change of personal status but to all cases of loss of nationality dealt with in the conventions. This new article could be inserted at the end of the conventions.

As regards the explanatory comment in the report of the International Law Commission on article 7 concerning the legal effects of withdrawal or annulment of naturalization on account of fraud in obtaining it, the Netherlands Government are of the opinion that it is advisable to make full provision for this case in the two conventions.

Article 8. The Netherlands Government entirely concur in the explanation of the International Law Commission to this article.

Article 9. Though the Netherlands Government recognize the existence of a principle of international law according to which the inhabitants of a territory as referred to in this article, as a rule, have the right of option, they share the opinion of the International Law Commission, as expressed in its explanatory comment on this article that the present conventions are not the appropriate place for dealing with this principle. They understand from the explanatory comment, however, that the provision concerning the right of option was inserted for the sole purpose of avoiding the impression that, by not inserting this right, the existence thereof was being ignored. For the purpose of reflecting this more clearly in the text of the convention the Netherlands Government would suggest to insert in paragraph 1 after the word "option", the words "as far as recognized under international law". They are of the opinion that in this way it is clearly expressed that in this respect the convention does not add anything to existing international law.

Article 10. In general, the Netherlands Government agree to the provisions of this article concerning the settlement of disputes and complaints which might arise in connexion with the interpretation or application of the convention. They realize that article 10 for the greater part contains only directives which will have to be elaborated after the convention has come into force.

The Netherlands Government entirely concur in the view of the International Law Commission laid down in paragraph 158 of its report, viz., that the fact that the tribunal referred to in paragraph 2 of article 10 should be accessible to individuals acting through an agency does not affect the question to what extent individuals in general can be subject of rights and obligations arising from international law. For the establishment of that tribunal by the convention is exclusively envisaged in view of considerations of a practical nature applying to this special case, viz., that in this case persons are concerned who claim to have been denied nationality in violation of the provisions of the convention and who, consequently, cannot call upon any State to accord them diplomatic protection or any other form of protection based on international law.

Finally, the Netherlands Government wish to note for the sake of good order that in the English text of the final sentence of paragraph 157 of the report of the International Law Commission the word "established" seems to have been omitted before "in accordance with paragraph 2". It is assumed that both in the English and in the French text the object of referring to paragraph 2 of article 10 is to specify the tribunal.

11. Norway

LETTER FROM THE PERMANENT DELEGATION OF NORWAY
TO THE UNITED NATIONS

[Original: English]
[6 April 1954]

The Norwegian Government is in agreement with the objectives underlying the drafts prepared by the International Law

Commission and would regard their acceptance as multilateral conventions by a large number of States as a great step forward. The system established by the drafts is, however, in various respects not in conformity with Norway's nationality legislation in force at present. The following observations relate to the latter aspect of the matter.

I

Draft Convention on the Elimination of Future Statelessness

Article 1. According to article 1 of the Norwegian Nationality Act a child born in Norwegian territory will in any case acquire Norwegian nationality if the *mother* is Norwegian and the child would otherwise be stateless. Are *both* parents stateless, the child will, however, also become stateless. Consequently the Nationality Act would have to be amended before Norway could adhere to the convention.

Article 3. As a general rule birth on board a Norwegian ship is, according to Norwegian law, assimilated with birth in Norwegian territory as far as acquisition of nationality is concerned. Exceptions may be found, for instance when the birth has taken place while the ship was staying in a foreign port or during the passage of the territorial waters of another country. In such cases it might not be warranted to assimilate the birth with birth in Norwegian territory and it is doubtful whether any circumstances could warrant the adoption of a categorical rule such as the one contained in the draft.

Article 4. According to article 1 of the Norwegian Nationality Act, a child born to a Norwegian unmarried woman will acquire Norwegian nationality regardless of the place of birth. If the child is born to married parents outside Norway and if the father is an alien (or stateless), there is no similar rule even if the mother is Norwegian and the child would otherwise become stateless. The same applies to a child born out of wedlock to a Norwegian father if the mother is not Norwegian. Thus an amendment to the Nationality Act would have to precede Norway's adherence to the convention. In addition it should be noted that, according to the Norwegian conception of right and the system of the Nationality Act, the nationality of the *mother* should prevail in case of a child born out of wedlock. From a Norwegian point of view, therefore, the provision contained in the last sentence of article 4 is not sufficiently flexible.

Article 5. The provision contained in paragraph 2 is not in conformity with our Nationality Act in so far as loss of nationality according to article 8 of the Nationality Act entails loss of nationality by the children even if they thereby become stateless. For the contents of article 8 reference is made to the observations on article 6, paragraph 3, of the draft (see below).

Article 6. The provision contained in paragraph 3 is in conflict with article 8 of the Norwegian Nationality Act, which prescribes that a Norwegian *born in a foreign country* loses his Norwegian nationality when he reaches twenty-two years of age if he has never previously resided in Norway or sojourned in the country under circumstances pointing to solidarity with Norway. Whether the consequence of the loss of nationality is that he will become stateless or not, is an irrelevant factor.

II

Draft Convention on the Reduction of Future Statelessness

Article 1, paragraphs 2 and 3 are not in conformity with the Norwegian Nationality Act which—except in the case mentioned in article 8—does not recognize loss of Norwegian nationality unless the person concerned acquires the nationality of another country. The provision, therefore, would make it necessary to amend the law. As regards the last sentence of

paragraph 3, reference is made to the comments made on article 4 of the preceding draft convention (see I).

For comments on articles which both drafts have in common reference is made to the comments to particular articles of the preceding draft (see I).

Provisions in the draft which have not been singled out for comment are considered not to be in conflict with Norwegian legislation. No comments are offered with regard to such provisions.

As will appear from the preceding comments, Norway's position with regard to the question of adherence to the draft will have to be influenced by the possibility of effecting the necessary changes in the Nationality Act. Considering the important humanitarian aspects of the matter and the importance of demonstrating some liberality in the international co-operation aimed at relieving statelessness, the Norwegian Government will not be adverse to the idea of seeking to effect the necessary changes in the law provided there is some prospect of general adherence to one of the draft Conventions on the part of Governments. It should be noted, however, that the Norwegian Nationality Act of 8 December 1950 (No. 3) was the result of Nordic co-operation in the legal field and that the Nationality Acts of Norway, Denmark and Sweden are in the main identical. From the point of view of Nordic uniformity of law it must be considered unfortunate to amend the Norwegian law if similar changes are not made in the Danish and Swedish laws.

12. Philippines

LETTER FROM THE PHILIPPINE MISSION TO THE UNITED NATIONS

[Original: English]
[25 February 1954]

The provisions of the two draft Conventions, the first on the Elimination of Future Statelessness, and the second on the Reduction of Future Statelessness, do not contravene any applicable laws of the Philippines, with the exception of paragraph 1 of article 6 of both drafts, which provides that "Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality". This provision conflicts with section 1 (2) of Commonwealth Act No. 63, as amended by Republic Act No. 106, which prescribes that Philippine citizenship may be lost, among other ways, "by express renunciation of citizenship". Such loss of citizenship on the part of Filipino citizens is not conditioned on the acquisition or possession of another. However, adherence to the rule expressed in the draft Conventions as regards the effect of renunciation of citizenship would not prejudice national interest and would, on the contrary, uphold the policy expressed in the draft Conventions to avoid or reduce statelessness.

An examination of the two draft Conventions shows that they are similarly worded except as regards articles 1 and 7. The additional provisions in article 1 of the second draft (on the reduction of future statelessness) are more in consonance with the principle of citizenship adopted by the Philippine Constitution to abandon the rule of *jus soli* and to emphasize the *jus sanguinis* doctrine. Likewise, the additional provisions in article 7 of the second draft give a Member State sufficient leeway to provide for forfeiture of citizenship on the part of its nationals by way of penalty.

With reference to article 6, paragraph 3 of the draft Conventions, it should be added that section 18 (b) of Commonwealth Act No. 473, otherwise known as the Naturalization Law, provides that a certificate of naturalization may be cancelled if the person naturalized shall, within five years next following the issuance of said certificate, return to his native country or

to some foreign country and establish his permanent residence there.

Of the two draft Conventions, the Philippine Government believes that the one on the Reduction of Future Statelessness is preferable because it appears as the logical step toward the ultimate goal of eliminating statelessness and, therefore, presents an easier basis for agreement.

13. Sweden

LETTER FROM THE MINISTRY FOR FOREIGN AFFAIRS OF SWEDEN

[Original: English]
[3 May 1954]

The present Swedish Citizenship Act, promulgated on 22 June 1950 and in force as from 1 January 1951, replaced a previous Act of 1924 on the same topic. The new Swedish legislation on citizenship is the result of a close co-operation between Sweden, Denmark and Norway. When comparing the contents of the Swedish Citizenship Act now in force and that of the two draft Conventions in question, the Swedish Government have found that the draft Conventions are substantially incompatible with, and are more far-reaching than, the rules contained in the Swedish Citizenship Act. The Swedish Government, which do not deem it feasible at the present time to consider a modification of the said legislation so recently adopted, cannot thus accept the two draft Conventions in their actual tenor without making such extensive reservations as to render a Swedish adherence thereto purposeless.

14. United Kingdom of Great Britain and Northern Ireland

NOTE VERBALE FROM THE UNITED KINGDOM DELEGATION
TO THE UNITED NATIONS

[Original: English]
[12 March 1954]

Her Majesty's Government are in favour not only of the reduction of statelessness but of its elimination so far as they may be possible by international agreement. Their preference as between article 1 of the draft Convention on the Elimination of Future Statelessness and article 1 of the draft Convention on the Reduction of Future Statelessness is for the former, not only on this general ground but because the provision of the former article seems to them simpler and free from the complications which under the alternative article might arise in determining the actual status of individuals—and in particular those under eighteen years of age—coming within its scope.

As regard article 1 of the draft Convention on the Reduction of Future Statelessness, Her Majesty's Government have no objection in principle to the general scheme of the article, but they observe that since the first paragraph of this article would require the admission to a limited extent of the principle of the *jus soli* by countries whose nationality law is not based on that principle, it has been thought right in paragraph 2 of the article to provide in effect that the retention of nationality so acquired may be dependent upon the degree of connexion which the person concerned has maintained with the country whose nationality is conferred upon him. It seems to Her Majesty's Government that it would be equitable that some similar discretion should be allowed under paragraph 3 to those countries which, as that paragraph stands, are being asked to accept the obligation of applying the *jus sanguinis* without any regard to the degree of the connexion between them and the person concerned.

The same consideration arises as regards article 4 of both draft Conventions.

A further comment which Her Majesty's Government would wish to offer at this stage is in respect of article 10 of both draft Conventions. Her Majesty's Government recognize that the question whether action taken in a particular case by a State Party to a convention on this subject is in accordance with the provisions of the convention will not always, and may not even often, be of interest to another State Party (though they would point out that there will be some cases in which another State, e.g., the State where the person is resident at the time, may have a direct interest in the consequences of such action). They do not think, however, that this consideration would justify the setting up of the elaborate organization suggested under this article and the giving of a right to the individual to set this machinery in motion. They would point out that the issues raised before the suggested tribunal might be far from simple, e.g., the question of the meaning of such terms as "normally resident" in article 1 or "political grounds" in article 8, and they doubt whether it is desirable to institute a tribunal with power to determine such questions in cases which, by reason of the circumstances in which they arise, cannot be submitted to the International Court of Justice, within whose province the authoritative determination of such questions lies.

Her Majesty's Government have no other comments to offer on the other articles of the draft Conventions. They wish, however, to stress the desirability of including a suitable form of territorial application article in the convention, so as to permit the extension of the convention to any or all of the territories for whose international relations Member States are responsible, after due consultation for the purpose of ascertaining the wishes of the Governments of those territories. Her Majesty's Government accordingly propose the insertion of an additional article in the final version of the convention on the following lines:

"Any State may at the time of its ratification or thereafter declare by notification addressed to the Secretary-General that the present Convention shall extend to all or any of the territories for whose international relations it is responsible."

15. United States of America

NOTE FROM THE UNITED STATES MISSION TO THE UNITED NATIONS

[Original: English]
[20 April 1954]

This Government realizes the hardships resulting to many people from statelessness and the importance for Governments to amend their laws to eliminate or reduce as far as possible the amount of statelessness which results from the operation of such laws. However, there is a question whether such elimination or reduction can best be accomplished through the medium of an international convention, concluded within the framework of the United Nations or through appropriate legislative action of individual Governments taken pursuant to a recommendation of some organ of the United Nations.

So far as this Government is concerned, there are very few instances in its laws in which loss of American nationality results in a person becoming stateless. Where expatriation results from acts committed abroad, the nature of the act will, in some instances, such as naturalization, taking an oath of allegiance, or accepting a position for which nationality in a foreign state is a prerequisite, automatically bring about the acquisition of another nationality. Other acts of expatriation, such as military service and voting, are such as would normally be performed only by persons having also the nationality of the State in which the act was performed. While there are cases where expatriation may result in statelessness, these, for the most part, are cases affecting persons who remain in the United States, such as conviction by United States courts of

treason or desertion from military service, and consequently do not create any international problem. In addition, these cases are few in number.

So far as stateless persons admitted to the United States for permanent residence are concerned, they are eligible for naturalization upon compliance with the statutory requirements to the same extent as other aliens. Consequently, the present United States laws do not, to any great extent, add to the number of stateless persons, and do, in fact, aid in the reduction of statelessness by giving to stateless persons the same opportunity for naturalization as is given to other permanently resident aliens.

As of possible usefulness, this Government, although questioning the desirability of dealing with this subject by convention, presents the following discussion of the extent to which the provisions of the conventions conform to existing United States law:

Article 1. Since the United States follows the principle of the *jus soli*, the first article of the first convention is in conformity with existing United States law. The corresponding article of the second convention is concerned with countries following the principle of *jus sanguinis* and is not of particular concern to the United States. It is noted, however, that it does recognize the father as having a superior right over the mother to transmit nationality. This seems at variance with the principle of non-discrimination based on sex which has been recognized and supported by the United States in other organs of the United Nations.

Article 2. Assuming the presumption of birth in the territory in which found to be a rebuttable one, this is in accord with United States legislation.

Article 3. United States law does not recognize birth on a vessel or airplane of United States registry as conferring United States nationality. A provision of this type is open to serious possibilities of abuse.

Article 4. It is noted that the article as drafted would confer dual nationality on children who acquired at birth the nationality of a State which was not a party to the convention. In this respect it would seem to have the effect of increasing dual nationality. It also perpetuates the discrimination referred to in article 1. The effect, so far as the United States is concerned, would seem to be that if it did become a party to the convention, article 1 would apply, and, if it did not, article 4 would be applicable as between the parties. In either event the child would be an American citizen, but in the second contingency, the convention would insure his acquiring a second nationality as well. Moreover, if the parents are nationals of States not parties to the convention, the child might still be stateless. This article would seem to require re-examination.

Article 5. This article appears to present no inconsistency with existing United States nationality legislation. United States law provides for loss of nationality only through the performance of certain voluntary acts. A mere change in personal status is not considered such a voluntary act. Neither does the loss of nationality by one spouse affect the nationality of the other or of their children.

Article 6. The first paragraph of this article is not in accordance with existing United States law, which provides for the loss of nationality by making a formal renunciation of American citizenship before a diplomatic or consular officer. Such loss is in no way dependent upon whether the person renouncing has or acquires another nationality. The second paragraph appears to deal with a situation which does not obtain in the United States and for that reason would not appear to be open to any objection on its part. Since the United States regards expatriation as a natural and inherent right of all people, there is no provision in its law for the issuance of expatriation permits. The third paragraph of this

article would be at variance with the long-standing provision in United States laws for the loss of citizenship in certain cases through protracted residence abroad for specified periods.

Article 7. This article, as it appears in either convention, is inconsistent with United States laws, which in several instances provide for deprivation of nationality "by way of penalty", regardless of whether such deprivation renders the individual stateless. As examples, there may be cited treason, desertion and draft evasion. With regard to the second paragraph of article 7 in the draft Convention on the Reduction of Future Statelessness, there is nothing in United States law which requires a judicial pronouncement before nationality is lost, although procedures have been established whereby persons who have been held administratively to have lost nationality may have the administrative determination reviewed by the courts.

Article 8. This probably presents no inconsistency with United States law, although it is not entirely clear what the term "political" is intended to cover. If it is intended to cover offences such as treason or desertion from military service, it would be objectionable from the standpoint of the United States.

Article 9. In connexion with acquisitions of new territory in the past, the United States has invariably made provision for the acquisition of United States nationality by the inhabitants.

Article 10. This article appears objectionable from the viewpoint of the United States. Since this Government considers that the question of determining who are American nationals is one of purely domestic concern, it would not be willing to delegate to an international tribunal the power to over-rule a decision made by it that a particular individual did not have American nationality.

LIST OF OTHER DOCUMENTS RELATING TO THE WORK OF THE SIXTH SESSION OF THE COMMISSION NOT REPRODUCED IN THIS VOLUME

<i>Document No.</i>	<i>Title</i>	<i>Observations and references to other sources</i>
A/CN.4/78 and Corr.1	Provisional Agenda	Incorporated in footnote 4 to the summary record of the 242nd meeting
A/CN.4/82 and Add.1-8	Nationality Including Statelessness—Comments by Governments on the Draft Convention on the Elimination of Future Statelessness and on the Draft Convention on the Reduction of Future Statelessness	Incorporated in A/2693 (Annex)
A/CN.4/88	Report of the International Law Commission covering the work of its sixth session	<i>Official Record of the General Assembly, Ninth Session, Supplement No. 9</i> (A/2693). Also printed in the present volume as document A/2693
A/CN.4/L.47	Agenda for the two hundred and forty-first meeting	Incorporated in the table of contents of the summary record of the 241st meeting
A/CN.4/L.48	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter I: Introduction	Incorporated with drafting changes in A/2693, Chapter I. Drafting changes are indicated in the summary record of the 280th meeting
A/CN.4/L.48/Add.1	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter III: Draft Code of Offences against the Peace and Security of Mankind	<i>Ibid.</i> , Chapter III. Drafting changes are indicated in the summary records of the 276th and 280th meetings
A/CN.4/L.48/Add.2	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter II: Nationality, Including Statelessness—Part One	<i>Ibid.</i> , Chapter II, Part One. Drafting changes are indicated in the summary record of the 280th meeting
A/CN.4/L.48/Add.3	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter II: Nationality, Including Statelessness—Part Two	<i>Ibid.</i> , Chapter II, Part Two. Drafting changes are indicated in the summary records of the 275th, 276th and 280th meetings
A/CN.4/L.48/Add.4	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter IV: Régime of the Territorial Sea	<i>Ibid.</i> , Chapter IV. Drafting changes are indicated in the summary records of the 277th-281st meetings
A/CN.4/L.48/Add.5	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter II: Nationality, Including Statelessness—Part Three	<i>Ibid.</i> , Chapter II, Part Three. Drafting changes are indicated in the summary record of the 280th meeting
A/CN.4/L.48/Add.6	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter V: Other Decisions	<i>Ibid.</i> , Chapter V. Drafting changes are indicated in the summary record of the 281st meeting
A/CN.4/L.49	Draft of Report of the International Law Commission Covering the Work of its Sixth Session—Chapter II: Nationality, Including Statelessness—Part Two—Amendments proposed by Mr. Córdova	Incorporated in the summary record of the 275th meeting, footnote 4
A/CN.4/SR.241 through A/CN.4/SR.281	Summary records of the 241st to 281st meetings	Printed in vol. I of the present publication
A/2807	Report of the International Law Commission on the work of its sixth session; report of the Sixth Committee	<i>Official Records of the General Assembly, Ninth Session, Annexes</i> , agenda item 49

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