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MERGÉ CASE—DECISION No. 55
OF 10 JUNE 1955¹

Nationality—Dual nationality—Right of a United Nations national, possessing also Italian nationality, to claim under paragraph 9 (a) of Article 78 of Peace Treaty—Absence in the Treaty of provisions concerning cases of dual nationality—Law to be applied—General principles of Internal Law governing cases of dual nationality—Test of dominant or effective nationality—Treaty interpretation—Principles of—Intention of the draftsmen—The spirit of the Treaty.

Nationalité — Double nationalité — Droit d'un ressortissant d'une Nation Unie, possédant également la nationalité italienne, de se prévaloir des dispositions de l'article 78, paragraphe 9 a), du Traité de Paix — Absence, dans le Traité, de dispositions concernant le cas de double nationalité — Droit applicable — Principes généraux du droit international régissant le cas de double nationalité — Critères admis par la Commission pour établir la nationalité dominante ou effective — Interprétation des traités — Principes d'interprétation — Intention des rédacteurs — Esprit du Traité.

The Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Prof. José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments,

On the Petition filed by the Agent of the Government of the United States of America on August 28, 1950 *versus* the Government of the Italian Republic in behalf of Mrs. Florence Strunsky Mergé.

I. THE FACTS

On October 26, 1948, the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic on behalf of Mrs. Florence Strunsky Mergé, a national of the United States of America, a claim based upon Article 78 of the Treaty of Peace with Italy for compensation for the loss as a result of the war of a grand piano and other personal property located at Frascati, Italy, and owned by Mrs. Mergé.

As the Italian Ministry of the Treasury had rejected the claim on the grounds that Mrs. Mergé is to be deemed, under Italian law, an Italian national by marriage, the Agent of the United States of America, on August 28, 1950, submitted to this Commission the dispute which had arisen between the two Governments with respect to the claim of Mrs. Mergé.

¹ *Collection of decisions*, vol. III, case No. 3.

Following the Answer of the Italian Agent, the Conciliation Commission issued an Order on September 27, 1951, by which the dispute was limited to the consideration of the problem of Mrs. Mergé's dual nationality, and all other questions regarding the right to compensation were reserved for subsequent consideration.

The following facts relating to the two nationalities, Italian and United States, possessed by Mrs. Mergé are revealed by the record:

Florence Strunsky was born in New York City on April 7, 1909, thereby acquiring United States nationality according to the law of the United States.

On December 21, 1933, at the age of 24, Florence Strunsky married Salvatore Mergé in Rome, Italy. As Mr. Mergé is an Italian national, Florence Strunsky acquired Italian nationality by operation of Italian law.

The United States Department of State issued a passport to Mrs. Mergé, then Miss Strunsky, on March 17, 1931. This passport was renewed on July 11, 1933, to be valid until March 16, 1935.

Mrs. Mergé lived with her husband in Italy during the four years following her marriage until 1937. Her husband was an employee of the Italian Government, working as an interpreter and translator of the Japanese language in the Ministry of Communications. In 1937 he was sent to the Italian Embassy at Tokyo as a translator and interpreter.

Mrs. Mergé accompanied her husband to Tokyo, travelling on Italian passport No. 681688, issued on August 27, 1937 by the Ministry of Foreign Affairs in Rome. The passport was of the type issued by the Italian Government to employees and their families bound for foreign posts.

After her arrival in Japan, Mrs. Mergé on February 21, 1940 was registered, at her request, as a national of the United States at the American Consulate General at Tokyo.

Mrs. Mergé states that, when hostilities ceased between Japan and the United States of America, she refused to be returned to the United States by the United States military authorities, having preferred to remain with her husband.

On December 10, 1948, the American Consulate at Yokohama issued an American passport to Mrs. Mergé, valid only for travel to the United States, with which she travelled to the United States. She remained in the United States for nine months, from December, 1946, until September, 1947. The American passport issued to her at Yokohama and valid originally only for travel to the United States, was validated for travel to Italy, and the Italian Consulate General at New York, on July 31, 1947, granted Mrs. Mergé a visa for Italy as a visitor, valid for three months.

On September 19, 1947, Mrs. Mergé arrived in Italy where she has since resided with her husband.

Immediately after returning to Italy, on October 8, 1947, Mrs. Mergé registered as a United States national at the Consular Section of the American Embassy in Rome. On October 16, 1947, Mrs. Mergé executed an affidavit before an American consular officer at the American Embassy in Rome for the purpose of explaining her protracted residence outside of the United States. In that affidavit she lists her mother and father as her only ties with the United States, and states that she does not pay income taxes to the Government of the United States.

On September 11, 1950 Mrs. Mergé requested and was granted by the Consular Section of the American Embassy at Rome a new American passport to replace the one which had been issued to her on December 10, 1946, by the American Consulate at Yokohama and which had expired. In her application for the new American passport, Mrs. Mergé states that her "legal residence"

is at New York, New York, and that she intends to return to the United States to reside permanently at some indefinite time in the future.

So far as the record indicates, Mrs. Mergé is still residing with her husband in Italy.

II. THE ISSUE

It is not disputed between the Parties that the claimant possesses both nationalities. The issue is not one of choosing one of the two, but rather one of deciding whether in such case the Government of the United States may exercise before the Conciliation Commission the rights granted by the Treaty of peace with reference to the property in Italy of United Nations nationals (Articles 78 and 83).

The Commission, completed by the Third Member, called upon to decide this case, notes that the problem raised has the importance of a question of principle, also because of the frequency with which it is presented, in view of the difference between the municipal laws (conflict between the principles of *jus sanguinis* and *jus soli*; diverse regulation of acquisition and loss of nationality by the woman who marries an alien, cases of automatic reacquisition of original nationality, etc.). The Commission has therefore deemed it advisable to take up the examination of the complex problem of dual nationality in all its aspects.

(1). *Position of the Government of the United States of America:*

(a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of paragraph 9 (a) of Article 78 states:

“United Nations nationals” means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

(b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of United Nations nationals in their property in Italy.

(c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State.

(2). *Position of the Italian Government:*

(a) The text governing cases of dual nationality is not the first sub-paragraph of paragraph 9 (a) of Article 78 but the second sub-paragraph of the same paragraph: only in cases of treatment as enemy can the Italian national who is also a United Nations national request application of Article 78.

(b) A defeated State, even when it is obliged to undergo the imposition of the conqueror, continues to be a sovereign State. From the juridical point of view, the Treaty of Peace is an international convention, not a unilateral

act. In cases of doubt, its interpretation must be that more favourable to the debtor.

(c) There exists a principle of international law, universally recognized and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made.

III. INTERPRETATION OF THE TREATY OF PEACE

(1). *The letter of the Treaty of Peace (Paragraph 9 (a) of Article 78):*

The first problem to be confronted by the Commission is that concerning whether this provision does or does not govern the problem of dual nationality.

(a) *First sub-paragraph of the definition:* "United Nations nationals" means individuals who are nationals of any one of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy."

In reality, the importance of this provision is confined to two points only (1) to explain the phrase, "United Nations nationals", used in the preceding paragraphs of Article 78 itself—doubtless for the sake of brevity, by specifying that by such phrase it is intended to indicate "individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations;" (2) to require possession of such nationality of any of the United Nations on the date of the coming into force of the Treaty of Peace and on September 3, 1943, that is, when the Armistice was signed. Neither one of these two conditions refers to dual nationality.

Can it nevertheless be considered to be implicitly contained in the letter of the text? The same question was discussed during the Venezuelan Arbitrations (1903-1905). One of the claimants, Mrs. Brignone,¹ a widow, possessed dual nationality, Italian and Venezuelan. The Italian Commissioner based his argument on the text of the Protocol. Mrs. Brignone, he stated, is Italian according to Italian Law. It does not matter that she is also Venezuelan. Article 4 of the Protocol of February 13, 1903, speaks of "Italian claims, without exception". To exclude claims of Italian nationals because they simultaneously possess another nationality is to introduce an exception not contemplated by the text and is an infraction of the provisions of the Protocol. The Umpire did not accept this argument, nor did he follow a literal interpretation. He faced openly the problem of dual nationality.

The fact that there exists in the Treaty of Peace which we are discussing an apposite definition of persons who can invoke the benefits of Article 78 obligated its drafters even more to insert explicitly in the text all the cases which it was desired to include within its contents. Therefore, it is clear that, in the first sub-paragraph, no reference, direct or indirect, is made to dual nationality. This is the surest indication that the problem did not enter the minds of the drafters of the Treaty. If it had, it seems most probable that it would have been included in the definition, even more so inasmuch as this legal situation has previously given rise to numerous controversies and arbitrations on the international level.

(b) *Second sub-paragraph of the definition:* If dual nationality is not governed by the first sub-paragraph, is it perhaps governed by the second?

¹ Volume X of these *Reports*, p. 542.

Let us recall that in this second sub-paragraph, the term "United Nations nationals" includes all individuals, corporations or associations which, "under the laws in force in Italy during the war have been treated as enemy".

Notwithstanding every effort of interpretation, one cannot arrive at the conclusion that such paragraph was drawn up with the intention of regulating specifically the dual nationality which interests us. Not only: far from referring concretely to such cases, the paragraph cited is applicable to other, different cases, such as those, above all, concerning corporations owned by United Nations nationals organized in Italy and those of stateless persons, but not to cases in which the Italian nationality of individuals comes into play.

In fact: by the Italian War Law of July 8, 1938, it was established that, for the purpose of such law, he who, being a national of an enemy State, at the same time possessed Italian nationality or that of another State, must be considered to be an enemy national. However, by the new Law of December 16, 1940, which was in force from January 30, 1941, until the end of the war, consideration as enemy nationals was limited to those cases only in which the individual possessed at the same time the nationality of an enemy State and that of another foreign State.

The possibility of application of the provision contained in the law of 1938 lasted only the short time from the beginning of hostilities on June 10, 1940, to January 30, 1941, date on which the new law took effect, but the provision was never applicable to United States nationals as the United States did not enter the war until December 1941. Logically, it is not possible to deduce from this text a general rule to resolve the problem of dual nationality.

(c) *Conclusion from Paragraph 9 (a)*: The conclusion to be reached from what has been said is that neither the first nor the second sub-paragraph of paragraph 9 (a) of Article 78 contains a definition specifically referring to dual nationality and therefore capable of being a governing rule for those cases.

(2). *The spirit of the Treaty of Peace*:

If cases of dual nationality do not appear to be specifically settled by the letter of the Treaty of Peace, is it perhaps possible to infer from the spirit of the Treaty that its drafters intended to protect United Nations nationals even though they possess Italian nationality?

The United Nations nationals expressly protected by the Treaty of Peace certainly are entitled to compensation for property damaged or lost in Italy.

The Commission considers that the provision can not be extended to cases not contemplated in the Treaty.

The clauses of the Treaty must be strictly followed, even when they constitute a derogation from the general rules of international law. Article 78, in fact, constitutes a derogation when it declares the Italian Government responsible, in every case, and without reference to the cause, for the restitution to United Nations nationals in good order of their property and, in the event that that is not possible, for the payment of compensation, free of any type of tax, in the amount of two-thirds of the sum necessary, as of the date of payment, for the purchase of similar property or to make good the loss suffered. And this provision, in all the cases contemplated by the Treaty, is indisputably and undisputedly applicable.

The United Nations obviously could have inserted in the Treaty, in the same manner, a specific rule to govern cases of dual nationality, apart from or even in conflict with the generally recognized rules of international law, and such an obligation would have been legally binding on the Italian Government. However, they did not do so; and it is a universally admitted principle, in international law as in domestic law, that any contractual obligation—

and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed.

(3). *Principle of equality:*

Finally, let us see if the Treaty of Peace between the United Nations and Italy lacks the principle of legal equality and hence can have applied to it no principle of international law which is based on the equality between sovereign States.

To admit this argument it would be necessary that the Treaty of Peace not be a treaty. Prof. Rousseau writes and underlines: "Those between contracting parties at least one of which is not a direct subject of the *Jus Gentium* cannot be classified as treaties" (translated from Spanish) (Rousseau, *Droit International Public*, Paris, 1953, p. 17). Liszt says: "The capacity to conclude treaties derives from sovereignty. Nevertheless, the custom exists of conceding to semi-sovereign States the right to conclude treaties, on condition that they do not have a political character (especially, commercial treaties)" (Liszt, *Derecho Internacional Publico (traduccion espanola)* Barcelona 1929, p. 225). A treaty of peace, essentially political by nature, is subject to this rule.

The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty. Such acceptance, however, as a manifestation of intention, presupposes possession of a personality on the international level as a subject of the *Jus Gentium*. The armistice is only an agreement of a military nature which recognises a situation of fact, leaving the juridical settlement for the subsequent treaty of peace.

Without the consent and the signature of the defeated State a treaty of peace does not exist. It may be a unilateral regulation on the part of the victor, but it is not a treaty of peace, Dupuis says:

Whether one looks at it from the point of view of natural law or from the point of view of positive law, the fact that force intervened to dictate a treaty or a law is unable, of itself, to invalidate the treaty or the law. The State which accepts a treaty under the pressure of force is bound by the consent given. If it agrees reluctantly, it agrees, with full knowledge, in order to avoid the force, in order to avoid a worse evil or in order to obtain some advantage of which a refusal would deprive it. If force has a weight in its decision, it is not the only fact in that decision. If it did not agree, it would remain under a regime of force and of force only . . . The object of treaties is to replace the instability of force with the stability of conventions. (translated from French) (Dupuis, *Recueil des Cours de l'Académie de Droit International de la Haye*, 1924, vol. 2, pp. 346-7).

The inequality of every treaty of peace following a victory exists and is manifested, not in the capacity of the international subjects which conclude it, but rather in the very contents of the treaty. This inequality, consequence of the victory, has been translated into numerous clauses of the Treaty which we are discussing, and likewise could have been manifested—but it was not—by the express regulation of dual nationality within paragraph 9 (a).

IV. PRINCIPLES OF INTERNATIONAL LAW

As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law.

In this connexion two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.

(1). *The Hague Convention of 1930:*

The two principles just mentioned are defined in this Convention: the first (Article 4) within the system of public international law; the second (Article 5) within the system of private international law.

Article 4 (approved in plenary session by 29 votes to 5) is as follows:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

The same Convention, in Article 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such 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 most closely connected.

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system.

Certain of the replies sent by the Governments to the Preparatory Committee of the Hague Conference, charged with drawing up the Bases for Discussion, are interesting and are helpful to our study.

The Government of the United States, in its reply, set forth an instructive historical datum. It concerned a letter dated August 8, 1882, which the then Secretary of State of the United States, Mr. Frelinghuysen sent to a member of Congress, Mr. O'Neill, with regard to a young man born in the United States of German parents and desirous of going to Germany to pursue his studies:

The young man referred to, under the Constitution of the United States, having been born in this country, is, while subject to the jurisdiction of the United States, a citizen of the United States notwithstanding the fact of this father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father's origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he can not claim the rights secured to him by the 14th amendment to the Constitution. It is proper, therefore, that I should add, in the interest of young Mr. J, that it will be perilous for him to visit Germany at present. (143, MS. Dom. Let. 270; Moore, *Digest of International Law*, vol. III, p. 532)

To clarify the concept, there is added in the aforesaid reply the following comment, which connects the letter with the concrete aspect of protection:

In any case, it is considered necessary to view the afore-mentioned statements as referring to the right of the interested parties to the protection of the Government of the United States abroad, rather than as referring to the strictly legal question of their nationality. (translated from Spanish) (*Bases for Discussion of the Preparatory Committee, Reply of the United States of America*, vol. I, p. 27).

The Government of the United States added with reference to the principle of effective nationality:

There exists presently no established rule which permits a determination, in the case of an alien who possesses the nationality of two other States, of which one is the nationality that must be recognized by the United States. . . . There would

appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality. (translated from Spanish) (op. cit., p. 32)

The Italian Government, in its Reply, declared itself in favour of the nationality which is accompanied by habitual residence (op. cit., p. 33)

The Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted.

(2). *Precedents:*

Uniformity of precedents in this field does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.

(a) The principle which bars diplomatic protection of the individual who is a national of the State against which the claim is made was applied by the United States-British Claims Commission established under the Treaty of Washington of May 8, 1871, in the Alexander Case between Great Britain and the United States (Moore, *International Arbitrations*, 1898, vol. III, p. 2529). Instead, the same Commission decided the Halley Case, between the same Powers, in another way (Moore, op. cit., p. 2239).

(b) In the Venezuelan Arbitrations, the British Agent himself, in the Mathison Case,¹ maintained the view that, if a claimant were both a British subject and a Venezuelan national, his claim could not be heard by the Commission (Ralston, *Venezuelan Arbitrations* of 1903, 1904, p. 429 *et seq.*). The principle of effective nationality was instead applied in the following cases: Miliani,² *Italy vs. Venezuela* (Ralston, op. cit., pp. 754-761); Stevenson,³ *Great Britain vs. Venezuela* (Ralston, op. cit., p. 438 *et seq.*); Massiani,⁴ *France vs. Venezuela* (Ralston's *Report* of 1902, Washington, 1906, p. 211, 224).

(c) The case of Baron Canevaro, Italian *jure sanguinis* and Peruvian *jure soli*, is typical of those decided in favour of the effective nationality. The case having been submitted to the Permanent Court of Arbitration at the Hague, the motive which—according to the decision of May 3, 1912⁵—caused the Peruvian nationality to prevail for the purposes of the disputed claim was the previous conduct of Canevaro, who was a candidate for election to the Senate where only Peruvian nationals are admitted and who had requested the Government of Peru, as its national, to grant authorization to perform the functions of Consul General of the Netherlands (*Revue générale de droit international public*, 1913, pp. 328-33).

(d) The Franco-German Mixed Arbitral Tribunal applied the principle of effective nationality in the case of *Mrs. Barthez de Monfort vs. Treuhander* (Decision of July 10, 1926).⁶

(e) The Franco-Mexican Claims Commission (1924-1932) examined the problem of dual nationality in 1928 in the George Pinson Case.⁷ The decision

¹ These *Reports*, vol. IX, p. 485.

² *ibid.*, vol. X, p. 584.

³ *ibid.*, vol. IX, p. 385.

⁴ *ibid.*, vol. X, p. 159.

⁵ *ibid.*, vol. XI, p. 397.

⁶ *Annual Digest*, 1925-1926, case No. 206.

⁷ These *Reports*, vol. V, p. 327.

is based on the fact that the French nationality of Pinson was proved, but not the Mexican nationality, so that, in reality, contrary to Mexico's claim, there did not exist a case of dual nationality.

Nevertheless, it is important to examine the reasoning of the President of the Commission, Mr. Verzijl, who states that the Mexican argument was based on the theory, generally enough admitted in the *jus gentium*, according to which a State is not permitted to take advantage of its right to provide diplomatic protection in the event that the nationals to be protected simultaneously possess the status of nationals of the State against which the right of protection is to be exercised. Mr. Verzijl continues:

While recognizing the well-foundedness of that theory for the cases in which the person in question is effectively considered and treated as a national by each of the two States in the case, and this by virtue of legal rules which do not overstep the bounds set out for them by public or customary international law, I nevertheless believe I must make certain reservations with regard to its admissibility in the case in which one or the other of these two conditions might not be fulfilled. (translated from French) (*La réparation de dommages causés aux étrangers par des mouvements révolutionnaires*. Jurisprudence de la Commission franco-mexicaine des réclamations. 1924-1932, Paris, A. Pedone.)

Although the word "effectively" seems to refer to the principle of effective, in the sense of dominant, nationality, this is not so, because the case which Prof. Verzijl is considering is not that of choosing one of two nationalities but only that of ascertaining that each one of the two contesting States effectively considers and treats the person in question as its national.

(f) The International Court of Justice, in its Advisory Opinion of April 11, 1949, refers to "The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national" (International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1949, p. 186).

The same International Court, in the interval between the meeting of this Commission in Paris and the meeting in Rome, issued a decision in the Nottebohm Case (*Lichtenstein vs. Guatemala*) which is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. (*Reports of Judgments, Advisory Opinions and Orders*, 1955, p. 22, Nottebohm Case).

(3). *Legal literature :*

(a) The institute of International Law, during its meeting at Cambridge in 1931, discussed an excellent report of Professor Borchard. It was entitled "Diplomatic Protection of Citizens Abroad". Its purpose was explained by

Borchard himself: "This report shall be confined to a study of the conditions for protection when a formal international request for damages can be submitted, either through diplomatic channels or before an international tribunal in conformity with the existing or appropriate rules of law" (translated from Spanish) (*Annuaire de l'Institut de droit international*, Session de Cambridge 1931, vol. I, p. 274).

Borchard's proposal was to make a compilation of the existing positive law, so as to avoid uncertainties and controversies. Therefore, he refused (*Annuaire*, 1931, vol. II, p. 203) to accept an amendment of Mr. Politis, supported by Messrs. de la Barra and James Brown Scott, in favour of the admissibility of diplomatic protection whenever there had been a change of nationality, because it meant an innovation. And this faithfulness of Mr. Borchard in adhering to the existing law and in not accepting any innovation was precisely the cause of the suspension of the discussion and its postponement to a later meeting (*Annuaire*, 1931, vol. II, p. 212).

Within the framework of positive law and of simple compilation within which the Yale Professor kept himself, there is to be noted this assertion of his: "It is a well established rule of international law that a person who possesses two nationalities cannot demand that one of the countries of which he is a national appear as defendant before an international tribunal" (translated from Spanish) (*Annuaire*, 1931, vol. I, p. 289).

Of the members of the XIXth Commission consulted by Borchard, only one, Prof. Kraus, proposed a change in wording, formulated as follows: "The protection of international law can be exercised in favour of individuals as well as of legal persons who possess the nationality of the protecting State if, according to the law of the defendant State, they do not simultaneously or exclusively possess the nationality of the latter State" (translated from Spanish) (*Annuaire*, 1931, vol. I, p. 481).

In the plenary discussion (*Annuaire*, 1931 vol. II, pp. 201 *et seq.*), no comment was made on the principle declared in this respect by Mr. Borchard. It should be noted that jurists representing the most varying legal systems in the world participated in the meeting.

(b) The writers of treatises on international law recognize the two principles which we are expounding. Two excellent contemporary authors, Rousseau and Battifo, attest their existence in books of recent publication date.

Rousseau writes: "In case of dual nationality, the claimant State in general refuses to protect a person against a State of which he is simultaneously a national; a claimant is not protected against his own State" (translated from Spanish) (Rousseau, *Droit international public*, Paris, 1953, p. 353).

In the same order of ideas, Battifo says: "Nevertheless, a positive limit is recognized to this liberty of the States (in the field of nationality): States may not exercise diplomatic protection on behalf of their nationals against other States which consider the latter as their own nationals" (translated from Spanish) (Battifo, *Droit international privé*, 2nd edition, Paris, 1955, p. 87).

However, both authors also mention the theory of effective nationality (Rousseau, *op. cit.*, p. 364; Battifo, *op. cit.*, p. 92).

The same theory, on the other hand, has not only been recognised but has also been adopted by jurists of such universal authority as A. de la Pradelle and Basdevant.

La Pradelle defends effective nationality even when the nationality of the defendant State is involved (*Dictionnaire Diplomatique*, under the heading *Nationalité*), and Basdevant, in an interesting comment on the Venezuelan Arbitrations of 1903-1905, emphasizes and explains the idea which predominates in those decisions according to which "the conflict between two nationalities

must be resolved by giving prevalence to the law with which the real nationality of the person in question corresponds" (translated from French) (*Conflits de nationalités dans les arbitrages vénézuéliens, Revue de droit international, 1909, p. 41 et seq.*).

V. CONSIDERATIONS OF LAW

(1). The rules of the Hague Convention of 1930 and the customary law manifested in international precedents and in the legal writings of the authors attest the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases.

The first of these, specifically referring to the scope of diplomatic protection, as a question of public international law, is based on the sovereign equality of the States in the matter of nationality and bars protection in behalf of those who are simultaneously also nationals of the defendant State.

The second of the principles had its origin in *private* international law, in those cases, that is, in which the courts of a third State had to resolve a conflict of nationality Laws. Thus, the principle of effective nationality was created with relation to the individual. But decisions and legal writings, because of its evident justice, quickly transported it to the sphere of *public* international law.

(2). It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

(3). A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949 and the Nottebohm Decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.

(4). The International Court of Justice, in its recent decision in the Nottebohm Case, after having said that "... international law leaves to each State to lay down the rules governing the grant of its own nationality", adds: "On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connexion with the State which assumes the defence of its citizens by means of protection as against other States." ... "Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connexion with the State which has made him its national." (Judgment of April 6, 1955, p. 23.)

For even greater reason, this theory must be understood to be applicable

to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

(5). The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.

(6). The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

(7). It is considered that in this connexion the following principles may serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

(c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

(8). United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of the third State.

(9). In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

VI. DECISION

Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph 6, in relation to paragraph 7 (c), the Commission holds that Mrs. Mergé can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as Mrs. Mergé, for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.

The Italian-United States Conciliation Commission, having noted the statement made during the deliberations by the Italian Representative in the name of his Government, according to which Mrs. Mergé, as an Italian national, will be able to submit a suitable claim to the competent Italian authorities, under domestic law, for the damages in question, even though the time-limit for such claims has expired, unanimously,

DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.

Madrid, June 10, 1955.

The Third Member

JOSÉ DE YANGUAS MESSIA

*The Representative of the
United States of America*

J. MATTURRI

*The Representative of the
Italian Republic*

ANTONIO SORRENTINO
