UNITED NATIONS

GENERAL ASSEMBLY

GENERAL

A/1785
6 March 1951

ORIGINAL: ENGLISH

RESOLUTIONS OF THE INTERNATIONAL LAW ASSOCIATION CONCERNING NATIONALITY AND STATELESSNESS, THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW, AND THE ILLEGAL USE OF FORCE

Note by the Secretary-General

At the request of the Permanent Delegation of Denmark to the United Nations, the Secretary-General has the honour to transmit to the Members of the United Nations the following resolutions adopted by the closing session of the 44th Conference of the International Law Association in Copenhagen on 2 September 1950.

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I. Resolution

concerning nationality and statelessness as passed at the closing session of the 44th Conference of the International Law Association in Copenhagen on 2 September 1950 and settled by the Executive Council at its meeting in London on 27 October 1950.

"This Conference requests the Executive Council to bring the reports of Mr. Mervyn Jones,[1] and of the American Committee,[2] and the substance of the discussion thereon,[3] to the notice of the Secretary-General of the United Nations for the information of the organs and commissions of that Organization to which they may be of interest."

1/ The report of Mr. Mervyn Jones is appended to this document as Annex 1.

2/ The report of the American Branch of the International Law Association is appended to this document as Annex 2.

3. The substance of the discussion which took place at the Conference on Monday 28 August 1950 is not yet available, but will be forthcoming in due course.

/II. Resolution

II. Resolution

concerning development and codification of international law as passed at the closing session of the 44th Conference of the International Law Association in Copenhagen on 2 September 1950 and settled by the Executive Council at its meeting in London on 27 October 1950.

"That the report[4] and recommendations of the American Branch Committee adopted by the Conference be approved and transmitted to the Secretary-General of the United Nations for the information of the organs and members of the United Nations."

4/ The report of the American Branch of the International Law Association is appended to this document as Annex 3.

/III. Resolution

III. Resolution

concerning illegal use of force as passed at the closing session of the 44th Conference of the International Law Association in Copenhagen on 2 September 1950.

"Whereas the settlement of disputes by peaceful means and the prevention of illegal use of force are fundamental requisites of a legal order,

"Whereas the United Nations have been created as a legal organization amcrgst the rations and peoples,

"Whereas these principles are incorporated in the Charter of the United Nations, therefore be it resolved that the International Law Association re-affirms its conviction that the illegal use of force must be opposed by all necessary means if the rule of law is to survive."

ANNEX 1

THE INTERNATIONAL LAW ASSOCIATION

COPENHAGEN CONFERENCE,
1950

COMMITTEE ON NATIONALITY AND STATELESSNESS

By resolution of the Executive Council at its meeting on 16 October 1948, a Committee was set upoon this question. The following gentlemen were appointed or subsequently co-opted to it:

Dr. Per Federspiel, Chairman.
Dr. F. R. Bienenfeld
R. Y. Jennings
J. Mervyn Jones, Rapporteur
Dr. Alex Makarov
Dr. Marc Paschoud
Prof. A. de La Pradelle
Prof. Max Sorensen
Dr. Georges Thélin

Mr. J. Mervyn Jones has written the following report on the basis set out in note[1/]. It was circulated in draft among the members of the Committee, a number of whom made suggestions to its learned author which were duly considered.

Signed on behalf of the Committee.

3, Paper Buildings
Temple, London E.C. 14.
May, 1950.

PER FEDERSPIEL, Chairman.
J. MERVYN JONES, Rapporteur.
ARTHUR JAFFE) Hon.
W. HARVEY MOORE) Secretaries.

1/ On the basis of minutes of the Executive Council of 16 October 1948 and 8 July 1949, as conveyed to him by the Honorary Secretary-General the Rapporteur understands, and has agreed to act as Rapporteur on the assumption, that (a) the Protection of Children is excluded from the scope of this Report, (b) the title "Nationality and Statelessness" is interpreted as meaning that only that aspect of nationality law is to be investigated which has a bearing on Statelessness.

/REPORT ON

REPORT ON NATIONALITY AND STATELESSNESS

By J. Mervyn Jones, Barrister-at-law

1. The purpose of this Report is to consider how far, and by what means, the existing rules of international law require amendment with the object of mitigating the evils of statelessness, and, if possible, abolishing it altogether. This is a problem which has occupied the attention of writers and governments since the end of the First World War. It was the subject of a Report presented to the Association in 1924. The matter was also discussed at The Hague Codification Conference 1930, when certain protocols dealing with particular aspects of it were signed. In addition the Secretary-General of the United Nations in February and May, 1949, laid before the Economic and Social Council a "Study of the Position of Stateless persons" (E/1112 and E/1112/Add.1) containing recommendations with a view (a) to the improvement of the status of stateless persons and (b) the elimination of statelessness. In August, 1949, the Economic and Social Council passed certain resolutions on the subject a copy of which (E/1517) is annexed to this Report.

2. Before the outbreak of the First World War the problem of statelessness was comparatively non-existent. On the occasions when it arose it was due to the accidental operation of nationality legislation under which (as States do not pursue a common legislative policy in the matter) nationality might (a) not be acquired at birth under any system of law, and (b) be lost after birth under one system of law and not acquired under another. Examples of (a) were cases of a child born in a country almost exclusively governed by the jus sanguinis and so failing to acquire the nationality of that country jure soli whilst also, for some reason or other, failing, under the law of his father's nationality, to acquire a nationality jure sanguinis. Examples of (b) were cases of loss of nationality by a declaration of alienage or, in the case of a woman, by marriage, whilst at the same time no new nationality was acquired.

Statelessness arising from these causes was the subject of study by writers but was not dealt with by international agreement until 1930, when, for example, statelessness of married women was the subject of special provisions. It is a matter for consideration whether statelessness of this type - arising from defects in nationality legislation as such, can be dealt with by any further measures along the lines of the 1930 agreements.

/3. After

3. After the First World War, however, statelessness on a very large scale was produced, not as a result of any defects in the principles of nationality legislation as such, but as a result of a deliberate policy on the part of some governments of depriving, arbitrarily and not on the grounds of any common law offence (de droit commun), persons of their nationality on political or racial or religious grounds. Certain measures were taken and arrangements made under the aegis of the League of Nations to deal with such cases.

4. There are, therefore, two types of statelessness (a) that caused by the normal operation of nationality laws ("lacunae legis") (b) that caused by a totalitarian State policy of mass denationalization.

5. Since the end of the Second World War the problem of statelessness has acquired a new significance owing to a marked tendency to attempt to ensure by international convention direct protection of the individual through international law, and, in particular, as a result of the Universal Declaration on Human Rights adopted by the General Assembly on 10 December 1948. Article 15 of this Declaration provides as follows:

> "Everyone has the right to a nationality.
>
> "No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality."

The word "right" here does not mean on actual right existing at present under any system of positive law, whether national or international; still less any right enforceable in any court. It is a declaration that everyone should possess a nationality: a principle already accepted as long ago as 1930 when the preamble to the Convention concerning certain questions relating to the conflict of Nationality Laws declared; "it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality." The Universal Declaration of Human Rights does not carry the actual state of international law any further in this respect. This is clear from the text of the operative part of the Declaration by which indeed all its Articles are governed. It provides that the General Assembly proclaims the Declaration "as a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international to secure their universal and effective recognition and observance."[1]

1/ Underscoring Rapporteur's.

/6. It is

6. It is to be noted that Article 15, while giving a right to nationality, does not impose any duty on the individual in this respect. For this reason the proposal contained in the Secretary-General's Report (Document E/1112 of 1 February 1949) that there should be adopted some general rule that an individual cannot lose his nationality without acquiring a new one seems to be misconceived (the more limited and reasonable rule that he cannot renounce his nationality without acquiring a new one is discussed below (paragraph 19); it is doubtful however whether even this is acceptable).

7. It is also necessary to correct the false impression (probably created by Article 15) that statelessness is always, and in all circumstances, an unmitigated disadvantage to the individual. A political refugee, for example, who is stateless avoids by reason of his statelessness the possibility of being deported to his country of origin (and this notwithstanding the theoretical rule that his country of origin is under an obligation to receive him back), military service etc.

8. Nationality is in principle a matter within the domestic jurisdiction, and only a much closer political union between the States of the world than exists at present is likely to alter this situation. Statelessness is to some extent an inevitable consequence of this principle, and to some extent a consequence of deliberate choice on the part of the individual. Such a deliberate choice is invariably a symptom of political tension between the individual and his home State; his reasons for his choice are "ideological" and must be respected.

9. Similarly, from the point of view of the individual (though not of other States) even statelessness created by totalitarian mass denationalization may not necessarily be an evil. Article 15 of the Declaration of Human Rights is based purely on the concept of the individual in international law, and does not take into consideration the question of reconciling this concept with state rights. It is probable that this consideration limits the extent to which a substantial improvement of the condition of stateless persons can be carried out by modifying the principles governing nationality legislation, and that a final solution of the problem can only be achieved by dealing by special convention with those cases of statelessness which ineluctably arise even after all feasible amendments of these principles have been agreed upon.

/10. On the

10. On the other hand, it must be noted that the right to nationality can under no circumstances become an absolute duty for the individual to possess a nationality. In fact, with the exception of countries, if any such exist, under whose laws nationality cannot be lost, nationality laws do not hinder the individuals they consider as nationals from becoming stateless by committing offences, by "disloyalty" or for staying abroad without "animus revertendi". Therefore, those individuals who wish to become stateless for some personal reason will always have the possibility to do so.

Furthermore, it should be pointed out that persons who seek to become stateless and for whom statelessness appears to be an advantage are mainly refugees whose paramount desire is to sever every link connecting them with their country of origin, and who would therefore not object to becoming nationals of another country. If every State recognized the right of its nationals to change their nationality according to Article 15 of the Declaration, the appeal of statelessness would dwindle and probably even completely disappear.

For these reasons, the present Report, whose aim it is to prevent cases of statelessness from arising, and to put forward various legislative measures to this end, cannot take into consideration the situation of a few rare refugees who wish to become stateless for personal reasons, and who will never be prevented from doing so.

11. In as much as Article 15 merely states a general principle, but does not specify the means by which it is to be carried out in practice, it is obvious in this connexion that the question for examination is how far the existing rules accepted in international law and practice with regard to nationality requiring modification or amendment. Nationality is acquired either (a) at birth or (b) later. The question of statelessness will be considered under these two broad headings.

(a) Statelessness at birth

12. Many examples exist of persons who are born stateless. X is born on the territory of State A. He is stateless either because:

(i) he is a foundling, and the law of State A only confers its nationality upon persons of whom it can be proved that they were born there, and in addition he does not acquire nationality by descent (because of course, his parentage is unknown); or

/(ii) the law of

(ii) the law of State A is based on the jus sanguinis according to which X does not qualify for its nationality; this is particularly the case when an individual who is a national of a country applying strictly the jus soli goes into a country the law of which is founded upon the jus sanguinis because the child born to him there will acquire no nationality; the nationality of his parents will not be transmitted to him, for he is not born on the territory of the country of which they originate, and, on the other hand, he will not acquire the nationality of the country on the soil of which he was born because his parents are not nationals of that country and are regarded there as foreigners; or

(iii) the law of State A is based on a mixture of the jus soli and the jus sanguinis and, although X qualifies under the jus soli, he lacks the additional qualifications specified under the jus sanguinis.

13. Under this heading, as the examples given show, the question is which of the States under whose laws X can hypothetically (but does not in fact) acquire a nationality should be required to modify its legislation so as to give effect to the principle promulgated in the first sentence of Article 15 of the Declaration? In other words in a situation where a person never possessed a nationality (the situation under consideration) in what sense can that person be said to have a "right" to a nationality? Does he at birth possess this "right" as against all states so as to be entitled to demand it of any? Clearly not. The mere fact that a person is born stateless does not prove that the nationality legislation of all States is in violation of human rights. Is it then possible to assert that such a fact proves that the nationality legislation of the State with which at the time of his birth he is most closely connected is defective in this sense? But what should the text of close connexion be for this purpose? The answer to this question must surely depend on the circumstances of his birth. Such a connexion might be created by:

(a) the place of his birth

(b) his parentage.

14. It cannot be asserted as a general proposition whether (a) or (b) creates a closer connexion. Thus a child might be born in a country through which his mother is in transit for another destination or on holiday; he may be born on a foreign merchantman in port or passing through territorial waters, in an aircraft in flight

/over the

over the territory or temporarily in an airport. He may be born there as a result of the flight of his mother from justice in an adjoining State, or with a party of refugees from persecution, famine, hostile operations, etc. Should (a) prevail over (b) in such cases? The argument in these particular instances would be in favour of the prevalence of (b). Conversely if a child is illegitimate, should his mother's nationality be chosen as the test rather than (a)? A child may be born on the high seas in a merchant vessel in which case rule (a) cannot apply, or it may be a foundling in which case rule (b) cannot apply.

15. Thus it will be seen that the problem of statelessness at birth is the problem which rule should prevail: the jus soli or the jus sanguinis. There is no intrinsic justice in either rule, and the circumstances may be such that it may be more just to apply one rule than another. As a matter of theory, therefore, it is a question of choosing for general application to all cases one rule against the other, because a rule which is incapable of general application is of no juridical value.

16. Many arguments of principle and convenience point to the general adoption of the jus soli (together with a fixed rule as to the exceptional cases of birth on the high seas or in the air) as the theoretical solution because:

(a) it is simpler and easier to apply. All that is required is proof of the place of birth. There may be cases in which a person has difficulty in producing such proof but a stateless person is in no worse position than anyone else in this respect. The exceptional case of the foundling can be dealt with by a presumption of law that he is deemed to be born on the territory of the State where he is found (a presumption almost certainly in accord with the facts in nearly all cases, and already adopted by Article 14 of The Hague Convention 1930).

(b) On the other hand if the jus sanguinis were made universal it would involve an enquiry into the exact contents of the jus sanguinis: i.e. exactly what rules in the matter of nationality by descent should be applied. It would also involve difficult investigations into questions of fact and of law. It would not be enough to say the child should always have the nationality of the father because the father may be (i) of dual or multiple nationality; and this necessitates rules as to the choice of law in such a case, (ii) stateless, and this means rules attributing to the father a nationality.

/for the

for the purposes of the application of the jus sanguinis,

(iii) unknown; and this means adopting rules referring to the nationality of the mother. If she is stateless, or of dual or multiple nationality, the possibilities of solving the problem along the lines of the jus sanguinis are exhausted. It is plain that quite apart from the infinite complexities involved in its application to particular cases the jus sanguinis can never become the basis of a uniform rule to avoid statelessness at birth because (a) the extent of the jus sanguinis varies in different countries, and in some (e.g. the United Kingdom) is subject to the observance of certain formalities, and in others to additional requirements as to the parents residing in the country of their nationality (USA Law of 1940), (b) many cases will necessarily fall outside the rule even if extended to the fullest degree, i.e., even if a system of uncontrolled jus sanguinis is adopted (which is hardly conceivable in any event).

17. The above purely theoretical approach did not commend itself to the Committee, as it was realized that the formulation of a uniform rule in the abstract for all States took no account of the fact that their nationality legislation is necessarily based on considerations which vary from country to country, and that mutual concessions are inevitable if any progress is to be made in this field. Further it must be observed that, in so far as The Hague Codification Conference dealt with statelessness at birth, it was by adopting rules extending generally the jus soli where it is the case of a child:

(i) both of whose parents are unknown or who is a foundling (Article 14 of the Convention)

(ii) both of whose parents are stateless or are of unknown nationality (Article 15 of the Convention)

(iii) of a mother possessing the nationality of the State in whose territory the child is born, the father being stateless or of unknown nationality. (Article 1 of the Protocol relating to a certain case of Statelessness)1/

1/ It may be noted that, just as there are cases where it is impossible to apply the jus sanguinis (because parentage is unknown) so there may be cases where no jus soli can apply (birth on the high seas; though the jus soli can in such case up to a point be extended by analogy as e.g. law of the United Kingdom).

The Convention and the Protocol are in force between a number of States: the fact that they are not more widely in force does not encourage the hope that independently of general concessions a fresh international agreement can be concluded extended the principles of the jus soli generally to cases of statelessness at birth. Such concessions would involve on the one hand the adoption by jus sanguinis countries of the rule that a person born in their territory is a national unless he acquired some other nationality at birth; on the other hand jus soli countries which broadly speaking only grant their nationality to children of their nationals born abroad in case of option or if they later settle down in their country of origin with their parents, would adopt the rule that the children of their nationals born abroad acquire the nationality of their parents unless they acquire at birth the nationality of the State where they were born.

(b) Statelessness arising after birth

18. Statelessness may arise after birth:

(i) By the action of X himself.

(ii) By the action of the State of which X is a national.

In the first category are the following acts by which X may lose his nationality and not acquire another:

(a) Marriage

(b) Declaration of alienage

(c) Non-compliance with formalities required for asserting his title to nationality.

If X is a minor there are three cases on which he may lose his nationality not by his own act but by the act of another person:

(a) Naturalization

(b) Legitimation

(c) Adoption

In such cases X although he loses his own nationality may not acquire any other.

The cases in which statelessness may arise as a result of the action of the State are the following:

(a) Revocation of certificates of naturalization

(b) Provisions in treaties of cession restricting the acquisition of the nationality of the cessionary State by persons resident in the ceded area.

(c) Deprivation of nationality

(i) on political,

(i) on political, racial, or religious grounds

(ii) on the sole ground of emigration and failure to return when requested.

(iii) because X has entered the service of a foreign government or its armed forces.

(iv) because X has committed certain offences defined by law.

(v) because X has resided abroad for a prolonged period.

(vi) for no published reason other than general "disloyalty", without proof, or judicial or other enquiry.

It is proposed to examine these cases in detail.

19. (i) Statelessness resulting from the action of the de cujus.

(a) Marriage. This has been one of the commonest causes of statelessness. A woman on marriage to an alien was deemed to become an alien herself; and although she lost her own nationality she did not acquire the nationality of her husband. Articles 8 to 11 of the Hague Convention 1940 lay down rules which, if generally adopted, would avoid statelessness under this head.

(b) Declaration of alienage

The de cujus may, under the laws of several countries repudiate his nationality. In some cases the law requires that this right can only be exercised if the de cujus possesses another nationality. In other cases he may exercise this right without being the national of another State; in such cases statelessness will arise. The remedy for such cases is the adoption of a uniform rule that a person may not repudiate his nationality unless he possesses another one. Prima facie this would involve a restriction on the liberty of the individual. Would it be contrary to Article 15 of the Universal Declaration (which states that "no one shall be denied the right to change his nationality")? It is believed not, on the ground that the words "change his nationality" refers to the right to choose a new nationality by naturalization, etc. In short provided the right to choose a new nationality is not interfered with (and, this right can be exercised before repudicating his old nationality) the de cujus cannot complain of such a restriction. Yet the idea of a compulsory retention of nationality by a person who has lost all sense of allegiance to his country seems repugnant in principle

/even if

even if statelessness should result. It is a possible view that this is an inevitable case of statelessness, and that no remedy is possible which denies the "right of expatriation".

(c) Non-compliance with formalities for asserting title to nationality. It is a condition of acquisition of nationality in some cases jure sanguinis that the birth of a child whose parent is a national should be registered[1/] or that the child should make a declaration at majority.

In the case of a child born in a country where the jus soli does not apply, failure to comply with such formalities will result in statelessness.

It is reasonable in principle that where persons are born abroad some evidence of attachment to the mother country should be required, and, if statelessness results, either the child or his parents are at fault. Nevertheless it is for consideration whether States should not examine their legislation under this head to ascertain whether amendments are possible.

Minors

Cases have been mentioned above where a minor may become stateless as a result of (a) naturalization; (b) legitimation or (c) adoption. All these cases are covered respectively by Articles 13, 16 and 17 of The Hague Convention 1930.

20. (ii) Statelessness resulting from the action of the State

(a) Revocation of certificates of naturalization.

The laws of some states enable certificates of naturalization to be revoked if they have been obtained by fraud or false representation. It is difficult to see why any state should alter its law on this point as naturalization is always a matter of discretion, and if the facts are wrongly stated discretion cannot be properly exercised. Persons who render themselves stateless in this manner have only themselves to blame. They must either make a fresh application or seek naturalization elsewhere. It is desirable that states should reach agreement on the grounds for revocation of certificates of naturalization and that cases should be defined in which it is possible to agree that a certificate should not be revoked if the result would be to create statelessness. A possible case of this kind is prolonged residence abroad. It is doubtful, however, whether all grounds can be placed in this class, as

1/ Under the law of the United Kingdom this must be done within a year of the birth, but may be done with special permission later; this is the only condition of acquisition of nationality jure sanguinis.

/the absorption

the absorption of foreign elements in any State involves considerations which may over-ride even the undesirability of creating statelessness.

(b) Provisions in treaties of cession restricting the acquisition of nationality by persons resident in the ceded area.

The ordinary international usage should be observed that on cession persons should have the right to opt for the nationality of the cessionary state or emigrate. This principle is of long standing and might be codified.

(c) Deprivation of nationality

(i) On political, racial or religious grounds

This is undoubtedly the commonest source of statelessness and is an abuse of the power of the State. Provisions in municipal laws which enable a person to be "arbitrarily deprived of his nationality" should be abrogated.

(ii) On the sole ground of emigration and failure to return when requested.

This appears to be in the same category as (i)

(iii) Because X has entered the service of a foreign Government or its armed forces.

This is tantamount not merely to repudiating one's original allegiance but positively adhering to another State whether actually acquiring its nationality or not. Even if statelessness results it seems impossible to require States to abolish a provision of this kind.

(iv) Commission of offences defined by law.

States could examine their laws under this head.

(v) Residence abroad for a prolonged period.

See comment on (iv).

(vi) General "disloyalty" without grounds assigned and without conviction for a criminal offence.

Provision should be made for adequate enquiry but quite apart from this point, such a ground is dangerous as it may be used as a cloak for deprivation on political grounds.

A general comment on the above six classes is that the effects of statelessness ought to be mitigated so that it does not extend to the wife and children of the person concerned. The Rapporteur has not

/however

however attempted to analyze in which cases this should or should not be so, as many practical difficulties may be envisaged in this connexion (especially under (iii) and (v)).

Conclusions as to the elimination of statelessness

21. (a) Statelessness at birth

In the present state of affairs, which excludes the general adoption of an International Code of Nationality Law the only practicable solution is on lines which respects, as far as possible, the special features of both existing systems the jus soli and the jus sanguinis (see paragraph 17).

(b) Statelessness arising later

(i) The provisions of The Hague Convention regarding nationality and marriage are adequate so far as statelessness arising from marriage is concerned. The same is true of all cases of statelessness of minors arising on adoption, legitimation or naturalization. A substantial advance would be made if more States of the world became parties to these Conventions than is the case at present.

(ii) Consideration should be given to the adoption of a general rule disallowing declarations of alienage unless the de cujus is the national of another State at the time when he makes the declaration.

(iii) Statelessness arising from non-compliance with formalities requires further study; it is believed, however, that little can be done in this field.

(iv) The grounds on which certificates of naturalization may be revoked should be the subject of general agreement.

(v) Treaties of cession should contain a provision entitling residents of the ceded areas to opt in favour of the nationality of the cessionary State or to leave the country.

(vi) States should not in general deprive persons of their nationality except for the commission of offences under common law, or for entering into the service of a foreign State, or because they have obtained naturalization by fraud. To allow deprivation on grounds

of "disloyalty" or "treason" obviously leaves a loophole for deprivation on political, racial, or religious grounds. Nevertheless deprivation of nationality in the case of naturalized persons cannot, where defined grounds exist, be described as illegitimate. This is clear if we consider the case of a dual national.

Improvement of the status of stateless persons

22. Even if action is taken on the above lines to eliminate statelessness it is clear that some cases of statelessness will still arise. It is, however, impossible to avoid some anomalies under any system of law and although it is theoretically possible to abolish statelessness at birth no arrangement can be devised (unless violent breaches in the principles of nationality legislation are agreed to) which will eliminate entirely statelessness arising later. Nationality acquired by naturalization can never be placed in entirely the same category as nationality by birth, nor is it possible to regard nationality purely and simply as a matter of convenience for the individual. The rights of the individual, however widely conceived, must be balanced against the legitimate right of States to determine their policy in the matter of immigration and the absorption of foreign elements. It would be unwise, even if it were of any practical value (which it is not) for the Association to lay down[1/] general rules of naturalization (whether in the matter of acquisition or loss of nationality) essentially a topic on which the policies of States must inevitably differ according to their economic situation and their position in the world. For this reason it is not recommended in this Report that any special facilities for naturalization should be granted to stateless persons, as the principles on which naturalization is granted in different countries are clearly unaffected by the question whether or not the applicant already possesses a nationality. The same considerations which justify the rules as to a certain period of residence, good character etc., apply in the case of a stateless person as in the case of an alien possessing a nationality. It would seem in any event unjust to discriminate in favour of the former as against the latter, who may be and frequently is just as eager to become naturalized quickly. In the course of time

1/ Though, as pointed out above it may reasonably suggest States should aim at as large a measure of agreement as is possible regarding the grounds on which naturalization may be revoked.

the stateless person himself can apply for naturalization both for himself and his children; in some cases his children will acquire nationality by birth in the country of his residence.

23. Members of the Committee have been reminded by Dr. Bienenfeld that there exists a class of persons who have been described as "de facto stateless". (The Secretary-General's Report uses this expression). These persons still possess their original nationality, but do not in practice (chiefly for political reasons) enjoy the protection of their own Government (quite frequently because they themselves neither desire nor invoke it). They fall into two groups:

(i) those who do not wish to sever the political tie between themselves and their State of origin and hope one day to be fully reinstated in the enjoyment of political and civil rights in their native countries.

(ii) those who do not desire the protection of their State of origin and would prefer to sever completely the political tie connecting them with it.

An example of the first group is the Spanish Republicans, and of the second the German Jews. Non-Communist Poles probably also fall under the second group.

24. To the Rapporteur it seems to be only confusing the issue to call these persons de facto stateless, and such an expression is misleading. They are not, in fact or in law, stateless; they are persons who still have a nationality but do not enjoy either the protection of their own State or the other normal privileges of their nationality. In many cases they are refugees. Refugees may or may not be stateless. If they are stateless their condition falls to be considered not only as refugees but as stateless persons. If they are not stateless their condition falls to be considered only as refugees. Various arrangements, dating back before the Second World War, and culminating in the IRO, have been made which include a definition of their status. Their position falls outside the scope of this Report which deals only with nationality and statelessness.[1/]

Observations on method

25. With regard to the method to be followed in achieving any reforms the Committee was generally agreed that an International Code of Nationality Law was impracticable because the two main systems of nationality are too deeply rooted

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1/ See, however, the note appended to this report.

in the legislation of the States concerned. Another view was expressed, namely, that regional arrangements between countries sharing a common legal system (e.g. the Scandinavian States) might ameliorate the situation. In the opinion of the Rapporteur it is precisely as between countries with unduly divergent legal systems that agreement is required (i.e. between the jus soli and jus sanguinis countries).

It was felt that the only possible line of advance was that adopted at The Hague Codification Conference 1930 of special conventions to remedy particular weaknesses in the law. In this connexion model Conventions of the type drawn up in 1947 by the International Union of Child Welfare may be mentioned.[1/]

26. Finally it may be suggested that no effective solution of the problem of statelessness is possible along the lines of modifying existing nationality legislation. A more hopeful approach, it may be said, would be to examine the functions of nationality in international law and consider some alternative means for providing these functions. If the problem were divorced in this manner from projects of reforming nationality legislation it would be possible to consider not only the stateless person but the refugee and in some measure a situation might be created in which statelessness would not be important. The Rapporteur is not without sympathy for this point of view (which has already, so far as refugees are concerned, received a measure of concrete support in international Conventions)[2/] but observes:

(a) Some privileges would still be reserved for nationals certainly under municipal law and probably under international law (e.g. under treaties specifically mentioning "nationals").

(b) In practice this would merely mean transferring critical or reforming energy from one set of rules of international law to another.

(c) The number of rules which would require modification (e.g. those concerning nationality of claims, privileges under commercial treaties)

1/ These Conventions include two alternative texts one based on the jus soli and the other on the jus sanguinis. See the pamphlet published by the Union in 1950 entitled "Stateless Children" which contains a useful comparative study of nationality laws.

2/ Possibly a permanent institution similar to IRO under the United Nations could assume the functions of a normal protecting State, but there are many practical difficulties.

/would be

would be found to be so great that in the end the whole system of international law (which presupposes as a fundamental axium separate States and distinct nationalities) would be brought in issue.

For these amongst other reasons the Rapporteur has not pursued this line of enquiry.

27. In conclusion the Rapporteur ventures to express the view that statelessness, although an evil, is not of such dimensions as to justify the creation of other evils in order to remedy it, that to some extent it is ineradicable, and that the proportions which it has reached in modern times must, on the supposition that international law and justice are to survive, be regarded as a transient phenomenon. In the long run the remedy lies not in juridical solutions, but in the renascence of a truly international community.

Note on Paragraph 23 of the Report

Dr. Bienenfeld, whilst on all other points concurring in this Report, observes that there are many "de facto stateless" persons who are not refugees, who have been granted permanent residence in various countries, and who are in possession of official documents issued by IRO and various governments stating that they are stateless. He is therefore of the opinion that the Association should take note of the position of these persons, and in particular he suggests that de facto stateless persons should be treated as stateless, and enjoy the same protection as that accorded to stateless persons. He adds that on the other hand some rules which would apply to de jure stateless persons cannot apply to de facto stateless persons, especially the rules providing for a certificate of renunciation of nationality when applying for nationality of the country of residence.

The Rapporteur takes leave to add that this opinion is not shared by other members of the Committee. His own objection to the expression "de facto stateless persons" is not based only on considerations of verbal accuracy.[1/] It is misleading to deal as a problem of statelessness, with situations which do not arise from any defect in nationality legislation or in international law, and strictly speaking are not legal problems at all. The Rapporteur is unable to appreciate why other States which have not contributed to such situations, and whose laws already enable "de facto stateless persons" to become naturalized if

1/ A better expression is "None-protected".

/they so

they so desire, should be under any obligation, moral or legal, to undertake radical alterations in their legislation not based on any discernible principles. For these reasons he considers that the appropriate analogy is not that of stateless persons but of refugees, the essence of the matter being that the actual predicament in which both refugees and de facto stateless persons find themselves is due to the fact that they do not wish to receive, and their countries of origin do not wish to grant them, the usual benefits of nationality and citizenship in those countries, or of protection in other countries. The Rapporteur submits therefore that the question of de facto statelessness raises quite different issues, belongs to a different class, and should be the subject of different solutions from these applicable to de jure statelessness.

J. Mervyn Jones, Rapporteur.

ANNEX

(referred to on page 7, Section 1.)

Resolution of the Economic and Social Council of 8 August, 1949.

The Economic and Social Council

Having considered the study relating to the question of displaced persons, refugees and stateless persons[1] prepared by the Secretary-General, and the resolution on the nationality of married women adopted by the Council at its present sessions;[2]

Taking note of the recommendations contained therein for improving the status of refugees and stateless persons and for the elimination of statelessness;

Decides to appoint an ad hoc Committee consisting of representatives of nine Governments, who shall possess special competence in this field, and who, taking into account comments made during the discussions at the ninth session of the Council on the subject, in particular as to the distinction between displaced persons, refugees and stateless persons, shall:

(a) consider the desirability of preparing a revised and consolidated convention relating to the international statutes of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention;

1/ See documents E/1112 and E/1112/Add.1.

2/ See document E/1503, page 2.

(b) consider

(b) consider means of eliminating the problem of statelessness, including the desirability of requesting the International Law Commission to prepare a study and make recommendations on this subject:

(c) make any other suggestion they deem suitable for the solution of these problems, taking into consideration the recommendations of the Secretary-General referred to above.

Invites the Secretary-General to submit the report of the Committee to Governments for comments and subsequently to the Economic and Social Council at an early session, accompanied by any such comments.

Note

An Ad Hoc Committee of the Economic and Social Council consisting of members of Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, Turkey, the UK, the USSR, the United States and Venezuela, met between 16 January and 16 February 1950, holding thirty-two meetings, and its Report (Doc. E/161) is dated 17 February, 1950. The representatives of Poland and USSR took no part in the work of the Committee, owing to the dispute regarding Chinese representation.

ANNEX 2

AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

NATIONALITY AND STATELESSNESS

I. INTRODUCTION

It will be impossible in this report to undertake a thorough and comprehensive discussion of the laws of all, or even of the principal States in the family of nations. Such a discussion, to be authoritative, could hardly be prepared by any one person or group of persons in a single State, and even if it should be undertaken it would occupy many volumes. In this report, however, an attempt will be made to show the most essential provisions in the laws of the principal States governing acquisition and loss of nationality. This will be followed by a discussion of the problem of statelessness, with reference particularly to the draft convention concerning refugees prepared by the Ad Hoc Committee of the United Nations.[1/]

Consideration of the nationality laws of the various States concerning acquisition and loss of nationality is difficult for various reasons. In the first place, laws concerning acquisition of nationality are based in the various States upon two separate and distinct principles, jus soli, under which the nationality of a State is acquired through the fact of birth within its territory and jurisdiction, regardless of the nationality or race of the parents, and jus sanguinis, under which the nationality is acquired through one or both parents, regardless of the place of birth. Both of these rules are subject to various qualifications in the several States.

Another difficulty arises from the numerous changes in recent years in nationality laws, especially in those of the United States and most of the European States. Such changes have been due principally to changing conditions in the various States, some of them arising out of the two World Wars. Some have been due to changes in a number of States concerning the status of married women. In the United States the latter change was embodied in the Cable Act of 22 September 1922, the principles of which were carried over into the Nationality Act of 14 October 1940, which was comprehensive in scope and replaced previous laws on the subject. An amendment to this Act is now being undertaken by the appropriate

1/ Ad Hoc Committee on statelessness and related problems.

committees of the Congress.

Mention may also be made of the uncertainty as to the meaning of certain terms in the nationality laws of various States, or in their English translations. For example, the term, "rights of citizenship" seems to mean nationality itself in some laws, while in other laws it has a more limited meaning, referring to certain rights within the State, such as the right of suffrage. In this connexion it may be noted that the Bolivian Constitution of 1880 distinguishes, in Articles 31-35, between "Bolivians," that is, Bolivian nationals and "citizens" of Bolivia. The provision in Section 1993 of the Revised Statutes of the United States that "the rights of citizenship shall not descend to children whose fathers never resided in the United States" clearly referred to citizenship in the broader sense, that is, nationality.

In the following discussion attention will be given first to laws of the various American Republics and of the United Kingdom and the British Dominions concerning acquisition of nationality at birth, second the laws of the continental European States and third the laws of China and Japan concerning the same subject.

II. DISCUSSION

A. Laws of the American Republics, the United Kingdom and the British Dominions concerning acquisition of nationality at birth

The laws of these States are based primarily upon jus soli, although they contain also various provisions embodying the principles of jus sanguinis. The meaning of the provision of the Fourteenth Amendment to the Constitution of the United States that "all persons born within the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside" was discussed at considerable length in the opinion of the Supreme Court in United States v. Wong Kim Ark, 169 U.S. 649, in which it was held that a person born in the United States of Chinese parents had acquired citizenship of the United States under that provision. Mr. Justice Gray in rendering the opinion said in effect that the United States, upon its separation from the United Kingdom had taken over the Common Law provision under which British nationality was acquired through the fact of birth within British territory and jurisdiction, as stated in Calvin's case, 7 Coke 1. The existing law of the United States concerning acquisition of citizenship in the cases of children born outside of the United States and its outlying possessions of parents one or both of whom are citizens of the United States is found in Sub-sections (c), (e), (g) and (h) of Section 201,

Nationality Act of 1940. The most important change effected by this section is found in Sub-section (g) which relates to a person born outside of the United States and its outlying possessions to parents only one of whom has citizenship of the United States, the other being an alien. It requires that the citizen parent must have resided ten years in the United States or one of its possessions, at least five of which must have been subsequent to attainment of the age of 16 years. The provisos to this sub-section contain strict provisions concerning loss of nationality in these cases as a result of protracted residence abroad. This sub-section serves to reduce greatly the number of persons born abroad who are citizens of the United States in name only, and thus incidentally reduces the number of cases of dual nationality.

The British Nationality Act, 1948 (11 and 12 Geo. 6 Ch. 56) also contains, in Section 5, provisions to prevent the indefinite extension of British nationality upon children born abroad.

The laws of Latin American Republics contain very strict limitations upon acquisition of their citizenship jure sanguinis. They provide that children born abroad to their citizens must, in order to acquire citizenship, take up their residence within their respective territories. Obviously these provisions also have the effect of reducing greatly the number of dual nationality cases.

B. Laws of Continental European States concerning acquisition of nationality at birth

While the laws of these States are based primarily upon jus sanguinis, they contain certain provisions based upon jus soli. Since great numbers of persons have emigrated from these States to countries of the Western Hemisphere, in which the rule of jus soli predominates, innumerable cases of dual nationality have resulted. Attempts have been made in the laws of several of these States to reduce the numbers of such dual nationality cases. Thus the laws of Denmark, Norway and Sweden, dated respectively 18 April 1925, 8 August 1924 and 23 May 1924 provide that persons born abroad whose fathers have retained their nationality acquire such nationality at birth, but lose it unless they take up their residence in their fathers' countries before the completion of 22 years of age. These laws also contain provisions to the effect that persons born within the respective countries acquire their nationality unless such persons, upon reaching a specified age, produce satisfactory evidence that they have "the rights of citizenship in another country." In the case of Denmark the age is 19, while in the cases of Norway and

/Sweden

Sweden it is 22 years.

The Greek law of 29 October 1856, as amended by a Law of 13 September 1926, after providing that a person born of a Greek father acquired Greek nationality, further provided that any persons born and resident in Greece who has no foreign nationality, is ~~Greek~~. ~~It~~ will be noted that this is one attempt to prevent statelessness.

Article 3 of the Italian law of 13 June 1912, confers Italian nationality upon persons born in Italy of alien parents only in case the latter have resided in Italy at least ten years. This provision is also subject to certain other conditions.

The Czechoslovak citizenship law of 13 July 1949, provides in Section 1 that children born of Czechoslovak parents, either in Czechoslovakia or abroad, acquire Czechoslovak citizenship at birth. It further provides that "a child born abroad whose father or mother is a State citizen while the other parent is a foreigner, acquires State citizenship if a Regional National Committee grants its consent to such acquisition upon an application of the parent who is a citizen. Application may be made within a year of the birth."

The law of Russia (USSR) of 29 October 1924 confers, by Section 4, Russian citizenship upon the children both of whose parents are Russian citizens, "no matter where such persons were born." Section 35 of the Code of Laws on Marriage, Family and Guardianship of the RSFRR of 19 November 1926 provides that if one parent has Soviet nationality, the other being an alien, "the nationality of the child shall be determined by agreement of the parents." (For the full text and discussion of this law see Soviet Civil Law by Vladimir Gvorski, University of Michigan Law School 1949).

The Spanish law is interesting, in that it seems to base acquisition of nationality at birth equally upon jus soli and jus sanguinis. Article I of the Constitution of 30 June 1876 provides in part as follows:

"Article I, the following are Spaniards:

"I. Persons born in Spanish territory.

"II. The children of Spanish parents, although born outside Spain."

(to the same effect see also Article XVII, Civil Law of 1889).

C. Laws of China and Japan concerning acquisition of nationality at birth

Article I, law of Japan of 16 March 1899 as amended by the law of 1 December 1924, confers Japanese nationality upon a legitimate child of a Japanese father,

/regardless

regardless of place of birth. Article 4 of the same law provides as follows:

"Article 4. If neither the father nor the mother of a child born in Japan can be ascertained, or if they have no nationality, the child is regarded as a Japanese."

Article 1 of the Chinese law of 5 February 1929 closely resembles the Japanese law just mentioned.

D. Loss of nationality

At the present time the laws of nearly all States provide for the loss of their nationality in the cases of their nationals who obtain naturalization in foreign States. The old rule of indissoluble allegiance, which was formerly maintained by nearly all States, has been largely abandoned, mainly as a result of the strong stand taken by the Government of the United States in the year 1868. The Act of 27 July 1868, subsequently embodied in Section 1999 of the Revised Statutes proclaims that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness."

The above declaration was followed by the conclusion of the so-called Bancroft Treaties with the North German Union and the other German States, in which natives of those countries naturalized in the United States were recognized as citizens of the latter only. These treaties were followed by treaties with Great Britain and various other States. It should be observed, however, that most of these treaties contain provisions to the effect that naturalized citizens of either country who resume residence of a permanent character in their native countries would be regarded as having "renounced" their naturalization, that is, as having lost the nationality acquired through naturalization. While these provisions resulted in some cases of statelessness, at least de jure, they were undoubtedly justified, in view of the extensive abuse of naturalization in past years. It should not be difficult for the persons concerned to recover the nationality of their countries of origin.

It is not practicable within the scope of this report to discuss the other provisions of the various States governing loss of nationality. It may be mentioned, however, that most of them contain provisions for loss of nationality as a result of entry into the service, civil or military, of foreign governments. The United States Neutrality Act of 1940 also provides, in Section 401, for loss of

nationality as a result of the taking of a foreign oath of allegiance, voting in a political election in a foreign State, making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign State, deserting the military or naval service of the United States in time of war and committing an act of treason against, or attempting by force to overthrow or bearing arms against the United States. Loss of nationality in the two cases last mentioned are conditioned upon conviction by a court martial or other court of competent jurisdiction.

Section 404 of the Act just mentioned provides for loss of nationality by a naturalized citizen as a result of residence of three years in the foreign State of which he was formerly a national, unless such persons show by satisfactory evidence that he comes within certain specified exceptions, including representation of commercial, religious or other organizations of specified classes.

The above provisions, of course, render the persons upon whom they operate stateless unless they have at the time the nationality of foreign States or acquire such nationality as a result of loss of United States nationality.

Article 6 of the Bulgarian Citizenship Law of 19 March 1948 provides for loss of Bulgarian citizenship through "acquisition of another citizenship with the permission of the Minister of Justice"; Articles 8, 9 and 18 of the same law read as follows:

"Article 8. The following persons may be deprived of Bulgarian citizenship:

(a) Those who leave unlawfully the limits of the country;

(b) Those who being abroad do not join the ranks of the Bulgarian army in the event of mobilization, unless they have a lawful excuse;

(c) Those who without the authorization of the Government enter the service of a foreign State or join the ranks of a foreign army;

(d) Those who living abroad do not return to the country within two months on being invited to do so;

(e) Those living abroad who by their deeds discredit the Bulgarian State or place in jeopardy its security or interests."

"Article 9. The deprivation of citizenship of one of the spouses does not entail loss of Bulgarian citizenship of the other spouse or of the infant children."

"Article 18. Deprivation of Bulgarian citizenship takes place by decision of the council of Ministers on report of the Minister of Justice.

/Bulgarian

Bulgarian citizenship is restituted to a person deprived such citizenship in the same manner."

No doubt the Bulgarian Council of Ministers exercises a wide discretion and considers political expediency as well as the generally recognized principles of nationality in determining whether individuals should be deprived of Bulgarian citizenship - under the above-quoted provisions.

Section 7 of the Czechoslovak Citizenship Law of 13 July 1949 resembles to a considerable extent the provisions of the Bulgarian law just mentioned. The Czechoslovak law also contains a provision reading as follows:

"(2) A person having another State citizenship may also be deprived of State citizenship by the Minister of Interior."

Articles 16 and 17 of the Hungarian Citizenship Law of 30 December 1948 also contain provisions resembling those found in the Bulgarian law.

Provisions similar to those contained in the Bulgarian law are also found in Articles 14, 15 and 16 of the Yugoslav Citizenship Law of 23 August 1945. Attention is also called to the second Article of the Yugoslav law which reads as follows:

"Article 2. Yugoslav citizenship excludes simultaneous citizenship of any other nation (drzava).

"In regard to Yugoslav citizenship, the domestic legal rules and international treaties are applicable."

The first paragraph of the Article just quoted can hardly mean anything more than that the question whether an individual should be treated by Yugoslavian authorities as a Yugoslavian citizen is determined by Yugoslavian law. Obviously, the provision could not prevent the persons born in a country of the Western Hemisphere or in the United Kingdom or one of the British Dominions from having the nationality of such countries.

Provisions concerning the laws of French nationality, which are quite elaborate, are found in the Code of French Nationality of 19 October 1945. The provisions concerning voluntary renunciation of French citizenship have been made very strict, apparently for the purpose of safeguarding the interests of France in case of war. The provisions in question are found in Title IV.

E. Statelessness

As already indicated, the nationality laws of various States operate in such a way as to cause numerous cases of individuals who are either born without any

nationality or, having acquired the nationality of a State at birth, have lost it. It is not likely that provisions of nationality laws having this result will be materially changed at any time in the forseeable future. Each State in the family of nations naturally looks first to the preservation of its own interests in the shaping of its nationality laws, although it is possible that some States may be persuaded that it would be in accordance with their national interests, as well as the dictates of humanity and justice, to make some changes in their laws, just as the North German Union and the other German States were induced to enter into the Bancroft Treaties referred to above. Such a thing as uniformity in the nationality laws of all countries is impossible to accomplish, even if it could be shown to be in the long run desirable. As one star differs from another in magnitude, so States differ not only in magnitude but in the character of their populations, the nature of their governments and the position in which they are placed. It remains true, however, that much may be done toward remedying the existing conflicts between nationality laws, particularly through agreements concerning termination of dual nationality, in accordance with the choice of residence by the persons concerned after attainment of the age of majority. What is still more important, much may be done towards relieving the situation of stateless persons, whose unfortunate status resulted in most cases, not from any fault of their own, but from the débâcle caused by the two world wars, in fact, much has already been done in this direction. Reference is made to the work of the Ad Hoc Committee on Statelessness and Related Problems of the United Nations Economic and Social Council, which met at Lake Success, New York, 16 January - 16 February 1950. The Study on the Position of Stateless Persons submitted 1 February 1949 (E/1112) covers 158 pages and contains a mine of information on this important and difficult subject. The same is true of the Draft Report prepared by the Headquarters Committee, the Rapporteur being Mr. J. Mervyn Jones, Barrister-at-Law, which covers 26 pages and contains valuable suggestions.

Of particular interest in the above connexion are the draft resolution and draft Convention found in the Report of the Ad Hoc Committee on statelessness and related problems.

Without undertaking to give a detailed and comprehensive view of the Convention just mentioned, it may be observed that its general object is to give aid to "refugees," who are stateless, de facto aid if not de jure, that is, to see that they have a recognized status in the various countries in which they may be

/found

found or to which they may go, and that they are treated as human beings entitled to justice, rather than as outcasts.

As pointed out in the comments on the draft convention, one of the difficulties experienced by stateless persons is found in the fact that they are unable to obtain the advantages of reciprocity which persons having nationality may enjoy under treaties between the States of which they are nationals and other States. The draft convention meets this difficulty by giving to refugees, in some cases, national treatment and in other cases most favoured nation treatment.

While the draft convention appears to be excellent in the main, it might be desirable to make some changes of phraseology in certain articles. For example, it might be desirable to change Articles 3 and 4 to read somewhat as follows:

"Article 3. Non-discrimination. The Contracting States shall not discriminate against a refugee on account of his race, religion, or country of origin, or because he is a refugee, whether or not he has the nationality of any State."

"Article 4. Exemption from reciprocity. Where rights and favours are accorded by a State to aliens subject to reciprocity, such State shall not refuse such rights and favours to refugees, merely because they are stateless."

While all the articles in the draft convention appear in general to be desirable, special mention is made of the following:

Article 11 - Access to Courts; Article 12 - Wage-Earning Employment; Article 13 - Self-Employment; Article 15 - Rationing; Article 18 - Public Relief; Article 19 - Labour legislation and social security; Article 20 - Administrative assistance; Article 21 - Freedom of Movement; Article 23 - Travel Documents; Articles 27 and 28, both of which relate to expulsion; and Article 29 - Naturalization.

Article 29 reads as follows:

"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

It is suggested that there be added to the end of Article 29 the words, "and the period of residence required." There is no apparent reason why the period of residence in the various naturalization laws should not be reduced for the benefit

of stateless persons. The object of the residence requirements are: first to enable the aliens to become assimilated with the population of the country in which they seek naturalization and acquainted with its laws and customs, and second, to divorce them from their prior political connexions and allegiance. The ground last mentioned does not exist in the cases of stateless persons, who owe no political allegiance.

III. CONCLUSION

It is to be hoped that the Governments of the United States and other countries of the Western Hemisphere will be persuaded to become parties to the proposed convention, whether or not they find it necessary to recommend some changes or to make some reservations on account of limitations in their respective constitutions. It is believed that general adoption of such a convention will serve to benefit not only the individuals to whom it applies but the various States which become parties to it, since stateless persons are not only entitled to human compassion and assistance, but, unless their condition is remedied they are likely to become subject to subversive propaganda.1/

Richard W. Flournoy, Chairman
William W. Bishop
Henry F. Butler
George A. Finch
Arthur K. Kuhn
John Maktos
Catheryn Seckler-Hudson
Lester H. Woolsey

Committee on Nationality and Statelessness of the American Branch of the International Law Association.

1/ For discussions of the Nationality Laws of the United States see the books by the late Frederick Van Dyne entitled Citizenship of the United States and Law of Naturalization of the United States; Moore's International Law Digest, Vol. III; Hackworth's International Law Digest, Vol. III; Louella M. Gettys, Citizenship of the United States; Report of Nationality, Research in International Law, Harvard Law School. For texts of nationality laws, treaties etc., in effect in the year 1929 and bibliographies concerning the same see Flournoy and Hudson, a Collection of Nationality Laws of Various Countries as Contained in Constitutions. Statutes and Treaties Reference is made also to Milton R. Konvitz, The Alien and the Asiatic in American Law and Catheryn Seckler-Hudson, Statelessness with Special Reference to the United States.

/Lester H.

Lester H. Woolsey, George A. Finch and Henry F. Butler agree to the above Report as a whole, but do not wish to commit themselves as favouring the proposed convention on refugees proposed by the International Refugee Organization, and as to that they say that they reserve their views, for the reason that they have not had sufficient time to make a careful study of it.

ANNEX 3

American Branch of the International Law Association

DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW

1. The stage of planning and of debate as to the meaning of codification is now past. An organ has been created by the United Nations to carry on the work of development and codification of international law; and a Statute has been provided by which this organ must be guided in its work. It is from this viewpoint that consideration of future work must now be considered.

Establishment of the International Law Commission

2. At its Prague Conference in 1947, the International Law Association recommended that the General Assembly of the United Nations should set up a standing Committee for Restatement of Public International Law, to consist of seven persons, none of them representatives of governments, six of them to be appointed on the recommendation of the International Court of Justice, and the seventh to be the Assistant Secretary-General in charge of the Legal Department of the Secretariat. This Committee, after thorough study, would prepare a comprehensive programme and invite distinguished jurists to serve as rapporteurs and advisers for specific topics. The results of their work would be published, but would have only persuasive effect and would not be regarded as establishing legally binding obligations upon States. In some degree these suggestions were put into effect by the General Assembly when, by its resolution of 21 November 1947,[1/] it created the International Law Commission.

3. The United States and China proposed, on 12 May 1947, a permanent Commission (A/AC.10/14). At that time there was a debate as to whether the Commission should be composed of experts or of government representatives, and it appeared to be admitted that the latter would not be so much needed if codification were done stricto sensu. The proposal provided for election in the same way as Judges of the Court, thus permitting nomination by governments; and it called for members to serve a term of three years as a full-time job and at a good salary.

1/ Resolution 174 (II).

/In the

In the Sixth Committee, however, the debate favoured part-time experts, since it was believed that eminent lawyers would not be willing to give full time to this work. It was also objected that fifteen full-time members would prove costly. As finally adopted in the resolution of the General Assembly, an International Law Commission of fifteen members was created. Election in the same manner as for Judges of the Court was modified to permit election by the General Assembly alone. Rapporteurs must come from the Commission itself. The Commission is to study what is referred to it by the General Assembly, and may also consider proposals by members, by United Nations organs, by specialized agencies and by official bodies established by international agencies to encourage the codification and development of international law. The International Law Commission is to make a preliminary study of chosen subjects and report to the General Assembly, which has the responsibility of deciding whether to proceed with the proposal. The Commission may consult with United Nations organs, with scientific bodies and experts, and with national or international organizations, whether official or not. The Statute of the Commission (A/CN.4/4) was approved by the General Assembly on 21 November 1947. Members were elected by the General Assembly on 3 November 1948; and the first meeting of the Commission was held at Lake Success, 12 April - 9 June 1949.

Personnel

4. Under the method of selection provided, members of the International Law Commission are not entirely the independent experts favoured in the 1947 Report of the International Law Association, nor are they the full-time, well-paid experts desired by Professor Jessup. The actual choice of members is by political vote in the General Assembly, and is affected by geographic distribution and other considerations. Of those chosen, a few were competent and independent experts in the field, called in for this work only; others were representatives of their States at the United Nations, for whom participation in the International Law Commission was simply one item among many of work to be done in connexion with the United Nations. Such persons might or might not be competent; in any case, they had many other tasks to perform and could not devote full time to the work of the International Law Commission. There were occasions, indeed, when sessions of the International Law Commission were interrupted because some

/of its

of its members had to attend meetings of other organs. It is to be hoped that at the next elections (autumn of 1950) the General Assembly will choose more persons who are both competent and able to devote full time to the work of the International Law Commission.

5. In connexion with the above situation, another problem arises as to staff and financing. Members of the International Law Commission are paid a per diem of $20, and those who live and work regularly at United Nations Headquarters find their financial situation better than that of other members who must take time out from their usual activities to come to meetings of the Commission. Most of them would doubtless be able to earn as much per hour as they received per day. It is a real sacrifice, and one deserving praise, for such a person to subtract two months from his productive earnings to serve with the Commission. It is especially difficult for the rapporteur who must devote much time to basic study and prepare a draft for discussion. The Report of the International Law Commission (Par. 42) called attention to this situation, and the 1949 General Assembly appropriated $1,500 for each rapporteur, but did not otherwise increase allowances.

6. The United Nations has hundreds of experts in various commissions, and if all were to be paid according to their merits, the costs to the United Nations would be very great. No staff can be provided for the International Law Commission, since each of the other United Nations commissions would likewise expect to have a staff of its own. Consequently the Secretariat is called upon to do the actual work. This, it is believed, is an appropriate arrangement; indeed, the Secretariat would prefer to do the preparatory and staff work for the Commission, except that its staff is limited. The Legal Department contains, or could obtain, qualified experts for doing this work, and convenience would be greater in every respect if the work were centralized in this fashion. It would simplify matters and expedite action if the preliminary base of discussion could be prepared by the Secretariat which at present prepares only background papers. It has the time and resources to do such work; the Commission has not. The preparatory work would be done in consultation with the rapporteur, and the Commission would have final authority and be free to do whatever it might wish.

/7. If this

7. If this arrangement were to work effectively, the staff of the Legal Department would need to be increased, and the work should be done within the Division for the Development and Codification of International Law.

Development and Codification

8. The sharpness of the long controverted differentiation between codification and legislation has been somewhat dulled by the discussion in United Nations bodies. A Secretariat memorandum (A/AC.10/7), put under the heading of "development" of international law: Methods for encouraging international legislation; for developing customary international law; and for developing international law through the judicial process. Under the heading of "codification" draft conventions and scientific restatement were included. While it was necessary to consider codification and development separately, it soon became apparent in the committee discussions that the distinction between them was not very clear, not was it regarded as strictly scientific. It was observed that the General Assembly had not clarified this distinction and had merely suggested an order of procedure by putting the word "eventual" before "codification". The Report of the International Law Commission (A/AC.10/51) pointed out that it made the distinction merely for convenience, and not on the basis of its correctness. This attitude was followed by the Sixth Committee and the General Assembly, and is now found stated in Article 15 of the Statute (A/CN.4/4) adopted for the International Law Commission.

9. It appears then that draft conventions must be prepared by the International Law Commission upon approval by the General Assembly, for submission to States in the case of "progressive development" but this procedure is not required for "codification". The former involves new law which must be approved by sovereign States; but codification is merely a restatement of existing law.

10. The Secretariat prepared a "Survey of International Law" (A/CN.4/1/Rev.1). It is an open secret that the principal collaborator in the making of this document was a member of the International Law Association, Dr. H. Lauterpacht. In the first part of the Survey, this problem is discussed in reference to past experience and with regard to the procedure agreed upon. It is there noted that the "existence of agreement" among States is not adequate criterion for choice of a topic; the criterion is rather when ...

The very lack of agreement then, may render study of a topic necessary. The test of the choice of topics is, therefore, not the possibility of adoption; the General Assembly may or may not submit a draft convention for ratification, and the recommendation of the International Law Commission may stand merely on its own weight as a scientific statement.

11. The view of the Survey of international law, while in accordance with the Statute of the Commission, is thus that new questions of international law are covered by "development", while codification embraces the entire field of international law, a far-away objective which can, however, be achieved in successive steps. The observation is made that the discouragement concerning the making of law by conventions following The Hague Conference of 1930 is obviated since the present procedure allows for study and statement of the law, which is worth while whether ratified by States or not. The agreement is thus sidetracked that codification by convention, and especially when the convention is not adopted, is derogatory to the authority of customary international law. Article 20 of the Statute evades any limitation to the mere function of registration of existing law; so long as the International Law Commission distinguishes between the lex lata and the lex ferenda there can be no objection to a constructive approach in the development of international law.

12. It is believed that this approach to the problem is consistent in general terms with the position taken by the International Law Association in 1947, and should be approved. States are not yet willing to be bound by new rules of law unless they have consented to these rules in a treaty ratified by themselves; in the "development" of new international law, then, draft conventions must be prepared, approved by the General Assembly, and by it submitted for ratification by States. On the other hand, even as regards development, and much more as regards codification, mere statement by so authoritative a body as the International Law Commission would be of great value.

13. The International Law Commission must study the procedure by which its recommendations are to be given effect. In connexion with this, the International Law Commission might consider the proposal that acceptance of a draft convention is to be assumed on the part of each Member State, unless within a given period of time that State formally gives notice of its unwillingness

/to accept

to accept it. There are many problems concerned with this proposal, among them the constitutional difficulties in each state. On the other hand, this procedure would leave each State completely free to reject the convention if it wishes to do so. The chief result of the change would be to shift the burden of action to the State. Such a procedure, if it could be put into a shape acceptable to States, would represent a large advance in the present defective process of international legislation.

Topics to be studied

14. A list of some twenty-five topics was submitted by the Secretariat, from which fourteen were provisionally chosen by the Commission. Topics connected with the law of war were definitely excluded. Of the fourteen, three were given priority. These are: Regime of the high seas (to which the General Assembly added territorial waters), with J.P.A. Francois as rapporteur; arbitral procedure, with G. Scelle as rapporteur; the law of treaties, with J. L. Brierly as rapporteur. In addition, study was undertaken of certain topics referred to the International Law Commission by the General Assembly. Mr. Jean Spiropoulos was asked to report on formulation of Nürnberg Principles and a draft code of offences against the peace and security of mankind. Mr. Alfaro and Mr. Sandström are to report on an international criminal jurisdiction. The Chairman (M. O. Hudson) agreed to prepare a paper on ways and means of making the evidences of customary international laws more readily available. Finally, Mr. Yepes is to submit a working paper on the law of asylum. The rapporteurs are now preparing reports on these three topics, and they are to be considered at the next meeting of the Commission, to be held at Geneva around 1 June 1950.

15. It is to be observed that all the topics considered by the Commission are standard and ancient subjects of international law text-books. Without discounting their importance, they do not include modern topics upon which law is needed. The General Assembly put upon the agenda of the International Law Commission certain topics of recent development, but the Commission itself did not consider such topics as human rights, or a law of aviation, or of health, or of commerce. Another topic which possibly deserves consideration would be, following the Advisory Opinion Concerning Reparation for Injuries Suffered by United Nations Officials, the status in international law of international organizations.

/It may

It may be argued that such subjects are now being studied by other international bodies. Thus, the Commission on Human Rights is developing new law in that field; the ICAO for aviation, the WHO for health, etc. A difficult question is thus raised. Carried to an extreme, this argument would exclude the International Law Commission from the whole field of "development". There may be some danger that important current topics, with respect to which professional legal opinion is needed, may be pre-empted by political bodies. There is little doubt that the greatest need for development of international law lies in such modern fields as these, and it is an important question as to how such subjects are to be handled. It is not sufficient to say that topics such as these are excluded because they are legislative; the International Law Commission is to work upon the development as well as the codification of international law.

16. Under codification, the International Law Commission may select its own topics; under development, study of a topic must be authorized by the General Assembly - which body, if one may judge by the topics already assigned by it to the International Law Commission - is not at all conservative in its approach. Nevertheless, this method is slow, not only as regards the Assembly itself, but because it involves submission of treaties to States for ratification. The process of security adoption of new law by treaty is discouragingly difficult, and one may therefore ask: Can such a subject as aviation be a topic for codification? It may be argued that rules in these fields are not to be found in customary law, but in treaties, none of which is binding upon the whole community of nations. On the other hand, it can be argued that from treaties and practice certain rules of aviation (or other fields) are so well established that they could be codified. The subject of recognition was included in the list of topics accepted by the Commission, though recognition has long been regarded as a political matter. If it is possible to derive rules concerning recognition from practice - though there are no international judicial decisions - it might equally be possible to do so as regards aviation. Indeed, if one recalls the entire lack of agreement on three topics (territorial waters, responsibility of States, nationality) at The Hague Codification Conference in 1930, it is possible that more agreement could be reached nowadays on such a subject as aviation. It might therefore be preferable, where possible, to

/regard

regard a subject as one suitable for codification, rather than delay its consideration by the slower procedure of "development".

17. In any case, it is desirable to pay more attention to current needs than was shown by the International Law Commission; in fact, its discussions reveal no awareness of these pressing modern problems of international law. So far as subject matters are concerned the Commission discussed only what it would have discussed fifty or a hundred years ago. Without discounting the importance of clear statement or restatement of the older law, the International Law Commission must also attempt to meet important current needs.

Adoption of the recommendations of the Commission

18. There remains for consideration the most important and the most difficult question of all. International legislation is the weakest part of the machinery of international government. The theory of consent still prevails, and no State can in theory be bound to a new rule of law except by its own consent expressed in the ratification of a treaty. Assuming that the International Law Commission has agreed upon a statement of the law on a given topic, what is to be done with this statement? Several procedures are possible.

I. The ordinary procedure is for a convention to be drafted, containing the proposed rules of laws, and submitted for ratification by individual States. Since the Codification Conference at The Hague in 1930 there has been little hope that such conventions would be ratified by a sufficient number of States to make it worth while; and today the political situation would seem to make that possibility even smaller. In any case, few legislative treaties have ever been ratified by a sufficient number of States to justify calling them the law of the community of nations.

II. The text submitted by the International Law Commission could be adopted as a resolution or recommendation of the General Assembly. Such resolutions have under the Charter no legally binding effect, but they do have much weight. In this case, it can be expected that political considerations would determine the votes cast. There would doubtless be much controversy and possible detrimental modification of the texts if they were submitted to political debate in the General Assembly.

/III. The text

III. The text might go no further than adoption by the International Law Commission itself. It would then be regarded as a scientific statement by experts which would stand upon its own authority. The International Law Commission would perhaps represent political considerations to a greater degree than was true of the Research in International Law conducted by the Harvard Law School; and this could be considered as desirable. Political factors always affect the making of law and should be taken into consideration; on the other hand, if the method followed is treaty-making or a resolution by the General Assembly, political factors may have too much weight.

19. The third of these proposals was suggested by Sir Cecil Hurst in a paper before the Grotius Society in 1946: "The weight which would attach to any such pronouncement would depend entirely on its scientific merit. It would possess no Governmental authority; it would commend itself to the world at large - as does all scientific work - merely by its own intrinsic value. No finality would attach to it. It would and should be constantly subject to discussion and to revision. Its value to Government would be that of providing a firm foundation for the modification by treaty of any of its provisions which were found to be unjust or to work badly under modern conditions and in consequence to require amendments". This approach was favoured in the Report of the Committee on Development and Formulation of International Law of the International Law Association in 1947. It is recommended that this procedure be followed in so far as the work of codification by the International Law Commission is concerned.

Summary of recommendations

1. That the General Assembly, at the next election of members of the International Law Commission, should select independent experts in preference to persons whose time is limited by their duties as representatives of their governments at the United Nations.

2. That the staff work for the Commission be done in the Division for the Development and Codification of International Law of the Secretariat, for which additional staff should be authorized by the General Assembly.

3. That in the selection of topics to be considered by the International Law Commission, whether as "development" or as "codification", more attention than has been given to it should be paid to new topics concerning which customary law has not yet been adequately developed.

/4. That,

4. That, where possible, topics should be considered by the Commission under the procedure for "codification" rather than under the procedure for "development"; and that texts considered as "codification" should not usually be submitted for adoption by the General Assembly or by States.

5. That the International Law Commission should study the methods by which it could be put into effect that a State would be obligated by a legislative treaty approved and submitted by the General Assembly unless it formally rejected the convention within a stated period of time.

Clyde Eagleton, (Chairman)
James W. Ryan, (Vice-Chairman)
William W. Bishop, Jr.
Joseph P. Chamberlain
Elliot E. Cheatham
Frederic R. Coudert, Sr.
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Judson Falknor
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Arthur K. Kuhn
Arnold J. Lien
Rt. Rev. Mgr. Donald A. MacLean
Charles H. McLaughlin
Orie L. Phillips
Philip W. Thayer
George Grafton Wilson

New York
1 April, 1950
