

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1952

Volume II

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

UNITED NATIONS



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NOTE TO THE READER

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ARBITRAL PROCEDURE

DOCUMENT A/CN.4/57

Note complémentaire du deuxième rapport par Georges Scelle, rapporteur spécial

[Texte original en français]
[6 juin 1952]

1. En résumé, les propositions du rapporteur tendent à modifier la procédure traditionnelle du « compromis » général portant sur l'ensemble des stipulations sur lesquelles les parties devaient se mettre d'accord pour que le litige qui les divise fût définitivement réglé — par l'adoption de trois stades successifs dans la procédure arbitrale — en cas de désaccord entre les parties.

2. Le premier stade comporterait une décision sur l'existence de l'engagement arbitral des parties et le caractère d'arbitrabilité du différend. Cette décision serait prise par la plus haute autorité juridictionnelle, la Cour internationale de Justice (CIJ), qui aurait compétence pour prescrire les mesures conservatoires nécessaires.

3. Le deuxième stade comporterait la constitution d'un Tribunal arbitral, soit de l'accord des parties, soit, à défaut, conformément à l'article 28 de l'Acte général d'arbitrage. Le caractère d'immutabilité de ce tribunal arbitral doit être soustrait à la mauvaise volonté éventuelle de l'une quelconque des parties et notamment à la révocation ou aux efforts des arbitres dits nationaux.

4. Le troisième stade consisterait dans les débats et la sentence du Tribunal.

* * *

5. Le rapporteur s'excuse d'avoir négligé de présenter à la Commission, dans ses précédents rapports, un argument d'analogie qui lui paraît avoir une grande valeur. C'est que, les mêmes difficultés s'étant présentées en matière d'arbitrage privé devant la Chambre de commerce internationale, des solutions identiques à celles qu'il propose ont été données par le « Règlement de conciliation et d'arbitrage » de ladite Chambre de commerce internationale (CCI), règlement actuellement en vigueur depuis le 1^{er} juillet 1947.

6. La CCI distingue aussi les trois phases ci-dessus décrites. Dans une première phase, une « Cour d'arbitrage » préconstituée, saisie par le demandeur, examine le point de savoir si l'engagement originaire de recourir à l'arbitrage existe juridiquement et, en ce cas, notifie au défendeur qu'il est tenu d'y satisfaire; dans une seconde phase, le Tribunal est constitué en dépit, si nécessaire, de l'obstruction du défendeur; dans une troisième, le jugement arbitral intervient, au besoin par défaut.

(On voudra bien consulter, en annexe, les articles 5, 6, 7, 9, 10, XI, 12, 15 et 16 du règlement ci-dessus cité.)

7. Cet argument d'analogie n'empêche pas le rapporteur de comprendre qu'il peut y avoir une différence de traitement entre des particuliers et des gouvernements; aussi ses propositions sont-elles moins sévères que les dispositions adoptées par la CCI. Mais il estime qu'une *obligation juridique* a la même force entre gouvernements qu'entre particuliers.

8. Les propositions du rapporteur sont basées, en outre, d'abord sur cette constatation juridique que l'arbitrage est un acte de juridiction proprement dit; en second lieu que l'obligation de se soumettre à l'arbitrage est une obligation juridique qui naît de la clause compromissoire originaire, c'est-à-dire de l'engagement réciproque des deux parties de s'y soumettre, et non pas du « compromis » classique de la procédure arbitrale; en troisième lieu du fait que la jurisprudence arbitrale constituant une des sources les plus importantes du droit international doit être sauvegardée contre la mauvaise foi éventuelle d'un plaideur et contre le discrédit que le refus, trop fréquent, de faire honneur à ses engagements par un gouvernement récalcitrant peut entraîner dans l'opinion publique et même dans celle des juristes en ce qui concerne l'utilité de l'arbitrage.

9. Le rapporteur ajoute que les modifications procédurales proposées ne portent aucune atteinte à la liberté d'action des gouvernements intéressés puisque, lorsqu'ils sont de bonne foi, il leur est toujours loisible d'éviter les interventions proposées et que, d'autre part, ces interventions ne résulteront éventuellement que d'un engagement conventionnel analogue à la clause optionnelle prévue à l'Article 36, paragraphe 2, du Statut de la CIJ.

10. Enfin, le rapporteur estime que le rôle de la Commission consiste non pas seulement à enregistrer des pratiques qui, dans bien des cas, se sont révélées insuffisantes et vicieuses, sous prétexte qu'elle est un organisme de codification, mais aussi et surtout — et toujours — de promouvoir le progrès nécessaire des relations internationales en proposant aux gouvernements, qui restent maîtres de leurs décisions, ce qu'elle considère comme nécessaire à ce progrès du droit. En un mot, la Commission a le choix entre la consécration implicite d'une inflation redoutable des clauses compromissoires et l'avenir d'une institution juridictionnelle réellement effective.

ANNEXE A LA NOTE COMPLÉMENTAIRE

Règlement de conciliation et d'arbitrage
de la Chambre de commerce internationale
(1^{er} juillet 1947)

ARBITRAGE

Article 5

Il existe auprès de la Chambre de commerce internationale un Organisme international d'arbitrage dont les membres sont nommés par le Conseil de la Chambre de commerce internationale et qui, sous le nom de *Cour d'arbitrage*, a pour mission de procurer de la façon indiquée ci-après la solution arbitrale des différends d'ordre commercial ayant un caractère international.

Article 6

Toute Partie désirant avoir recours à l'arbitrage de la CCI adresse sa demande à celle-ci par l'entremise de son Comité national...

La demande contient notamment les mentions suivantes : ...

b) Exposé des prétentions du demandeur.

c) Conventions intervenues, correspondance échangée entre les Parties... et tous autres documents ou renseignements de nature à établir clairement les circonstances de l'affaire.

Article 7

1^o Si la Cour d'arbitrage estime que le cas peut être soumis à l'arbitrage, conformément au présent règlement, elle notifie sans délai les éléments essentiels de la demande à la Partie défenderesse et prie celle-ci de vouloir bien lui fournir, dès que possible, l'exposé de ses prétentions, ainsi que toutes pièces et renseignements..., etc.

2^o Un délai d'un mois, à dater de cette notification, lui est imparti pour fournir ces divers documents...

...

Article 9

(Cas où l'arbitrage ne peut avoir lieu)

Lorsqu'il n'existe entre les Parties aucune clause d'arbitrage, ou lorsqu'il existe une clause ne visant pas la CCI..., la Partie demanderesse est informée que cet arbitrage ne peut avoir lieu.

Article 10

(Cas où l'arbitrage a lieu malgré le refus d'une Partie)

1^o Lorsque les Parties étaient convenues d'avoir recours à un arbitrage rendu conformément au présent règlement, la Partie défenderesse est tenue de s'y soumettre.

2^o Si elle refuse ou s'abstient de s'y soumettre, la Cour d'arbitrage ordonne que l'arbitrage aura lieu nonobstant ce refus ou cette abstention.

3^o Dans le cas où les Parties sont en désaccord sur la question de savoir si elles sont liées par une clause d'arbitrage, c'est la Cour d'arbitrage qui décide...

Article 11

Lorsque les Parties sont liées par la clause d'arbitrage... en cas d'urgence, à la demande des Parties ou de l'une d'elles, le Président de la Cour pourra, à tout moment, avant l'entrée en fonction de l'arbitre, et ce dernier pourra, après son entrée en fonction, désigner un expert et au besoin plusieurs experts pour faire toutes constatations, prendre toutes mesures provisoires ou conservatoires..., etc.

Article 12

(Choix des arbitres)

1^o Les Parties peuvent convenir que le différend sera tranché par un arbitre unique ou éventuellement par trois arbitres. Si trois arbitres ont été prévus, chacune des Parties, sauf stipulation contraire, désigne un arbitre et la Cour d'arbitrage choisit le troisième arbitre... Si l'une des Parties s'abstient de désigner son arbitre, dans le délai qui lui est imparti par la Cour, la Cour le désigne d'office...

3^o En cas de récusation d'un arbitre par une Partie, la Cour statue sans recours, les motifs étant laissés à sa seule appréciation.

...

Article 15

(Compromis)

En temps opportun, la Cour d'arbitrage rédige le texte d'un *compromis*, convention qui contient les mentions suivantes :

...

c) Exposé sommaire des prétentions des Parties.

d) Objet de l'arbitrage... Détermination des points litigieux...

g) Détermination des pouvoirs des arbitres (notamment s'ils auront les pouvoirs d'amiables compositeurs ou s'ils seront tenus de suivre les règles du droit).

h) Engagement par les Parties de tenir la sentence à intervenir pour définitive, de renoncer à toutes les voies de recours... à son encontre et de l'exécuter.

...

Article 16

1^o Le texte du compromis est envoyé aux Parties pour signature.

2^o Lorsque les Parties étaient convenues de soumettre leurs différends à l'arbitrage de la Chambre de commerce internationale, et que l'une d'elles refuse ou s'abstient de signer le compromis, la Cour d'arbitrage ordonne que la sentence sera rendue nonobstant.

* * *

(Les articles 17 et suivants ont trait à la procédure devant les arbitres.)

NATIONALITY, INCLUDING STATELESSNESS

DOCUMENT A/CN.4/50

Report by Manley O. Hudson, Special Rapporteur

[Original text : English]
[21 February 1952]

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REPORT TO THE INTERNATIONAL LAW COMMISSION

1. In 1949, the International Law Commission placed on the list of subjects tentatively selected for codification "nationality, including statelessness".

2. In 1950, the Secretary-General of the United Nations communicated to the International Law Commission resolution 304 D (XI) adopted on 17 July 1950 by the Economic and Social Council, in pursuance of a report by the Commission on the Status of Women at its fourth session.¹ The Council proposed to the International Law Commission that

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

and requested the International Law Commission to

"determine at its present session whether it deems it appropriate to proceed with this proposal".

The International Law Commission adopted a resolution declaring it

"appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'Nationality, including statelessness'".²

¹ See *Yearbook of the International Law Commission, 1950*, vol. II, p. 363.

² *Ibid.*, Report of the International Law Commission, para. 20.

3. In 1951, the International Law Commission was apprised of resolution 319 B III (XI) adopted by the Economic and Social Council on 11 August 1950, requesting that the Commission

"prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness".³

This matter was deemed by the Commission to lie within the framework of the topic "Nationality, including statelessness".

4. In 1951, the International Law Commission decided to initiate work on "Nationality, including statelessness", and appointed one of its members, Manley O. Hudson, special rapporteur on this subject.

5. The special rapporteur promptly placed himself in contact with the United Nations High Commissioner for Refugees, to avail himself of the High Commissioner's generous offer of assistance to the Commission. The High Commissioner was good enough to request Dr. Paul Weis to render assistance to the special rapporteur. Dr. Weis arrived in Cambridge, Massachusetts, on 6 October 1951, and devoted seven weeks to working with the special rapporteur.

³ See *Yearbook of the International Law Commission, 1951*, vol. II, p. 121.

6. The special rapporteur also requested the assistance of the Legal Department of the Secretariat of the United Nations. The Legal Department decided to undertake the preparation of a collection of the nationality laws of all countries.⁴ It has also rendered assistance in the preparation of the papers accompanying this report.

7. The special rapporteur has taken account of the urgency with which the Economic and Social Council has viewed the two requests which were communicated to the International Law Commission. It has seemed to him, therefore, that a special effort should be made to embody in this report concrete materials which would enable the Commission to consider at its session in 1952 the two subjects suggested by the Economic and Social

⁴ See *Laws Concerning Nationality*, United Nations publication, Sales No. 1954.V.I.

Council, in the hope that the Commission might promptly frame some definite proposals with reference to these subjects.

8. This anticipation has dominated the preparation of the materials which the special rapporteur now submits to the Commission. These materials consist of:

Annex I. An introductory statement, partly historical and partly analytical, on the subject of "Nationality in General";

Annex II. A working paper on the "Nationality of Married Persons"; and

Annex III. A working paper on "Statelessness".

Annex I is intended to serve only as a presentation of the background of the subject, with which the Commission may wish to deal in the future. The two working papers are placed before the Commission for its consideration of them at its fourth session in 1952.

Annex I

NATIONALITY IN GENERAL

SECTION I. PAST ACTION FOR THE CODIFICATION OF INTERNATIONAL LAW IN THE FIELD OF NATIONALITY

1. *The Hague Conference for the Codification of International Law*

In 1924, the Council of the League of Nations appointed a Committee of Experts on the Progressive Codification of International Law, in order

"to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment".

The Committee decided to include in its list the following subjects:

(1) "Whether there are problems arising out of the conflict of laws regarding nationality the solution of which by way of conventions could be envisaged without encountering political obstacles";

(2) "If so, what these problems are and what solution should be given to them."

The report on this subject, prepared by a Sub-Committee consisting of M. Rundstein as rapporteur, M. Schücking and M. de Magalhaes, included a Preliminary Draft of a Convention for the Settlement of Certain Conflicts of Laws regarding Nationality.⁵

The Committee circulated to Governments questionnaires on the subjects considered sufficiently ripe for regulation, and some thirty Governments sent replies.

The Assembly of the League of Nations decided to submit the following questions for examination to a first Codification Conference:

(a) Nationality

(b) Territorial waters, and

(c) Responsibility of States for damage done in their territory to the person or property of foreigners.

⁵ League of Nations publication, *V. Legal*, 1927.V.I (document C.196.M.70.1927.V).

It entrusted the Council of the League with the task of appointing a Preparatory Committee composed of five jurists. [Resolution adopted on 27 September 1927.]⁶

The Preparatory Committee, consisting of Professor Basdevant, Counselor Carlos Castro Ruiz, Professor François, Sir Cecil Hurst and M. Massimo Pilotti, circulated to Governments a list of points on which they were invited to state their views, both as to existing international law and practice and as to any modification therein which might be desirable; on the basis of the replies received from Governments, "Bases for discussion" were drawn up for the Conference by the Committee.⁷

The careful preparatory work provides a wealth of information on the legal position as regards the subjects concerned, particularly as to State practice. Despite this fact, the results of the Conference, which was held at The Hague from 13 March to 12 April 1930, were relatively modest.

The Conference adopted and opened for signature in the field of nationality the following instruments under the date of 12 April 1930:

(a) *A Convention on Certain Questions relating to the Conflict of Nationality Laws*⁸

This deals, in Chapter I, with general principles (Articles 1, 2), in particular principles relating to cases of double nationality (Articles 3-6); in Chapter II with expatriation permits; in Chapter III with the nationality of married women; in Chapter IV with the nationality of children; and in Chapter V with adoption.

The Convention first entered into force on 1 July 1937; it was ratified or acceded to before the end of 1939 by twelve States: Belgium (with reservations), Brazil (with reservations), Great Britain and Northern Ireland, Canada, Australia, India, China (with reservations), Monaco, the Netherlands (with reservations), Norway, Poland, Sweden

⁶ *Ibid.* (document C.L.36, 1928.V. Annex).

⁷ *Ibid.*, *V. Legal*, 1929.V.I (document C.73.M.38.1929.V).

⁸ *Ibid.*, *Treaty Series*, vol. CLXXIX, p. 89. Also in *Laws Concerning Nationality*, *op. cit.*, pp. 567-572.

(with reservations).⁹ No ratifications or accessions were deposited after 1939. The signatures of twenty-seven States were not followed by ratification.

(b) *A Protocol relating to Military Obligations in Certain Cases of Double Nationality*¹⁰

This Protocol first entered into force on 25 May 1937. It was ratified or acceded to by twelve States before the end of 1939: United States, Belgium, Brazil, Great Britain and Northern Ireland, Australia, Union of South Africa (with reservations), India, Colombia, Cuba (with a reservation), the Netherlands, El Salvador, Sweden. No ratifications were deposited after 1939.

(c) *A Protocol relating to a Certain Case of Statelessness*¹¹

This Protocol first entered into force on 1 July 1937. It was ratified before the end of 1939 by ten States: Brazil, Great Britain and Northern Ireland, Australia, Union of South Africa, India, Chile, China, the Netherlands, Poland, El Salvador.

(d) *A Special Protocol concerning Statelessness*¹²

This Protocol did not enter into force though it was ratified by eight States, as the required number of ten ratifications or accessions had not been reached.

The Hague Conference adopted also, in its Final Act, a number of recommendations relating to nationality.¹³

2. Inter-American conventions

(a) At Rio de Janeiro on 13 August 1906, the Second International Conference of American States adopted a convention concerning the resumption of their former nationality by naturalized persons. The Convention is now in force between ten States: Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Nicaragua, Panama and the United States.¹⁴

(b) The Code of Private International Law, known as the *Bustamante Code*, annexed to the Convention signed at the sixth International Conference of American States at Havana on 20 February 1928, deals in Book I, Title I, Chapter I, with conflicts of laws relating to nationality and naturalization. The Convention has been ratified by fifteen States, with reservations in some cases: Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.¹⁵

(c) At the Seventh International Conference of American States held in Montevideo in 1933, two conventions on nationality were adopted:

(i) A Convention of 26 December 1933, on the Nationality of Women. This Convention is in force between ten

States: Brazil, Chile, Colombia, Cuba, Ecuador, Guatemala, Honduras, Mexico, Panama, United States; but Honduras, Mexico and the United States have made reservations.¹⁶

(ii) A Convention of 26 December 1933, on Nationality. This Convention deals with naturalization and the effects of transfer of territory and of marriage on nationality. It is in force between five States: Chile, Ecuador, Honduras (accession with reservations), Mexico (with reservations), and Panama (accession with reservations).¹⁷

3. Other international agreements relating to nationality

There exist, in addition, a great number of bilateral treaties which deal either exclusively or partially with nationality as well as multilateral treaties dealing partially with nationality such as the Peace Treaties concluded after the First World War and the Peace Treaty with Italy of 1947. They will be referred to in the text whenever necessary.

SECTION II. ANALYTICAL SURVEY OF INTERNATIONAL LAW ON NATIONALITY

1. Concept of nationality in international law

For the purpose of this survey, the term "nationality" is used in regard to physical persons only. The national character of business associations, of ships, and of aircraft, does not come within the scope of this paper.

The terms "nationality" and "national" have to be distinguished from similar, but not necessarily synonymous terms such as "citizenship" and "citizen", "subject", "ressortissant", etc.

A person may be a national of a State without having its citizenship.¹⁸

The term "subject" is usually employed in States with a monarchical head where it denotes "national". The recently enacted nationality legislation in some parts of the British Commonwealth declares the expressions "British subject" and "Commonwealth citizen" to be synonymous. It has created a distinction between "Commonwealth citizenship" and the citizenship of particular members of the Commonwealth, the latter being determined by the law of the member. The title "British subject" is a common denomination of the citizens of the members of the Commonwealth.

The French term "ressortissant" may be used with a wider meaning than the term "national". The fact that it has been used as an equivalent to "national" in the French text of treaties which were published in several languages has led to difficulties of interpretation.

Nationality is usually defined in terms of municipal law. The following definition is more general: "Nationality is the status of a natural person who is attached to a State by the tie of allegiance" (Draft Convention of the Harvard Research in International Law, Article 1).¹⁹

Distinctions made by municipal law between various classes of nationals are, as a rule, immaterial from the

⁹ League of Nations, *Official Journal*, Special Supplement No. 193, p. 63.

¹⁰ *Ibid.*, *Treaty Series*, vol. CLXXVIII, p. 227. Also in *Laws Concerning Nationality*, *op. cit.*, pp. 572-575.

¹¹ *Ibid.*, vol. CLXXIX, p. 115. Also in *Laws Concerning Nationality*, *op. cit.*, pp. 575-577.

¹² League of Nations, *V. Legal*, 1930.V.6 (document C.227.M.114.1930.V). Also in *Laws Concerning Nationality*, *op. cit.*, pp. 577-580.

¹³ *Ibid.*, *V. Legal*, 1930.V.7 (document C.228.M.115.1930.V). Also in *Laws Concerning Nationality*, *op. cit.*, pp. 580-582.

¹⁴ See text in J. B. Scott, *International Conferences of American States* (New York, Oxford University Press, 1931, p. 131). Also in *Laws Concerning Nationality*, *op. cit.*, pp. 582-583.

¹⁵ See text in League of Nations, *Treaty Series*, vol. LXXXVI, p. 111. Also in *Laws Concerning Nationality*, *op. cit.*, pp. 583-584.

¹⁶ See text in M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment, 1937), vol. 6, p. 589. Also in *Laws Concerning Nationality*, *op. cit.*, p. 584.

¹⁷ *Ibid.*, p. 593. *Ibid.*, p. 585.

¹⁸ See U.S. Nationality Act, 1940 in 8 U.S.C., sec. 101(6).

¹⁹ Harvard Law School, *Research in International Law*, Supplement to *American Journal of International Law*, vol. 23 (1929).

point of view of international law.²⁰ They become, however, relevant if a State creates a class of nationals in regard to whom it does not assume the rights and obligations inherent in the above-mentioned concept of nationality for the purpose of international law.

The treatment of German Jews by Nazi Germany is a case in point. The Reich Citizenship Law of 15 September 1935 provided that Jews, though German subjects or nationals (*Staatsangehörige*) could not be Reich citizens (*Reichsbürger*). Jews had no political rights. In the course of its policy of persecution Jews were, by legislative and administrative measures, gradually deprived of all rights usually attributed to nationals under municipal law, and of the protection by the law. Their status was inferior to that of aliens. By the 11th Ordinance under the Reich Citizenship Law of 25 November 1941, German Jews who had their ordinary residence abroad were deprived of German nationality.

German Jews were forced to emigrate from Germany; later, the Government resorted to mass deportation, and, ultimately, to the extermination of the Jews. German Jews abroad were not given diplomatic protection; thus, a usual consequence of nationality was denied them.

2. General remarks regarding the relationship between municipal law and international law in the field of nationality

In principle, questions of nationality fall within the domestic jurisdiction of each State.

This rule has been codified in The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws in the following manner:

"Article 1. It is for each State to determine who are its nationals...."

"Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

Article 1 contains, however, in the second sentence, the following important qualification:

"This law shall be recognized by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality."

This question gave rise to considerable discussion in the preparatory stages of The Hague Codification Conference and in the First Committee of the Conference itself.

In the Committee of Experts for the progressive codification of international law, M. Rundstein, rapporteur of the sub-committee on nationality, took the view that the jurisdiction of States in the field of nationality was unlimited.²¹

The Preparatory Committee for the Conference, after stating the principle that questions of nationality are within the sovereign authority of each State, defined the limitations imposed on this sovereign right by international law in the following terms:

"The legislation of each State must nevertheless take account of the principles generally recognized by States. These principles are, more particularly:

"As regards acquisition of nationality:

"Bestowal of nationality by reason of the parents' nationality or of birth on the national territory, marriage with a national, naturalization by or on behalf of the person concerned, transfer of territory.

²⁰ See L. Oppenheim, *International Law: A Treatise*, 7th ed. (London, Longmans, Green and Co., 1948), vol. I, p. 587.

²¹ League of Nations, *V. Legal*, 1926.V.1 (document C.43.M.18.1926.V), p. 2.

"As regards loss of nationality:

"Voluntary acquisition of a foreign nationality, marriage with a foreigner, *de facto* attachment to another country accompanied by failure to comply with provisions governing the retention of the nationality, transfer of territory".²²

The representatives of Governments in the First Committee of The Hague Conference of 1930 could not agree on the principles set out in the basis of discussion and the rule was subsequently adopted in the form contained in Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws.

The matter has been stated succinctly by the Permanent Court of International Justice in 1923 in its Advisory Opinion on the Tunis and Morocco Nationality Decrees:

"The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."²³

It has, therefore, to be examined whether there exist any rules of international law which limit the sovereign jurisdiction of a State to confer, withhold or cancel its nationality — apart from treaty obligations; such rules may either impose on States a duty to act in a certain manner or may restrict its freedom of action.

3. Power of a State to confer its nationality and duty of a State to confer its nationality

(a) As regards conferment of nationality at birth

The links of attribution of nationality at birth are, according to municipal law, either descent (*jus sanguinis*) or birth on the territory (*jus soli*) or a combination of these links. The law of the Vatican City State under which nationality is not acquired at birth but by the exercise of an office or the authorization to reside in the territory only forms an exception which finds its explanation in the specific nature of that State.

This uniformity of nationality laws seems to indicate a consensus of opinion of States that conferment of nationality at birth has to be based on either, on *jus soli* or on *jus sanguinis*, or on a combination of these principles. It may be a moot question whether this rule merely constitutes usage or whether it imposes a duty on States under customary international law.

As regards *jus soli*, it seems an accepted rule that nationality shall not be conferred by reason of birth on the territory on children of an alien who enjoys diplomatic immunity in the country concerned or who is otherwise exempt from its jurisdiction. (*Cf.* Convention on Certain Questions relating to the Conflict of Nationality Laws, Article 12, and Harvard Research Draft, Article 5).

The question arises whether for the purpose of the application of *jus soli*, birth on a merchant vessel flying the flag of the State concerned should be assimilated to birth in the territory when the birth occurs (a) while the ship is on the high sea, (b) while the ship is in foreign territorial waters, (c) while the ship is in a foreign port.

The replies given by Governments on this question to the questionnaire prepared by the Preparatory Commission

²² *Ibid.*, *V. Legal*, 1929.V.1 (document C.73.M.38.1929.V), p. 20. Basis of discussion No. 1.

²³ Publications of the Permanent Court of International Justice, *Advisory Opinions*, Series B, No. 4, p. 24.

for The Hague Codification Conference showed great divergencies of views and of practice. The Conference did not succeed in incorporating a rule on this question in the Convention and it cannot be maintained that a rule of international law exists on it.

(b) *As regards conferment of nationality subsequent to birth (naturalization)*

Naturalization in the wider sense means every conferment of nationality upon an individual subsequent to birth. In the narrower sense it means grant of nationality to an individual on his application or on the application of a person acting on his behalf (father on behalf of minor children, husband on behalf of the wife; as to the latter, see, however, Annex II).

It cannot be said that rules of international law can be deduced from the practice of States as to the conditions on which such conferment of nationality can be considered as consistent with international law; in order to justify it, a personal or territorial link between the conferring State and the individual must exist. As to the nature of this link, the various modes of acquisition of nationality must be distinguished.

Nationality laws differ as to whether conferment (or, for that matter, withdrawal or cancellation) of nationality on the husband or father involves *ipso facto* conferment (withdrawal or cancellation) of nationality on the wife or minor children. The effect varies, moreover, according to the reason for the conferment (withdrawal, cancellation) of nationality. (On the effect of marriage on nationality, see Annex II.)

(aa) *Naturalization in the narrower sense. Option*

Naturalization must be based on an explicit voluntary act of the individual or of a person acting on his behalf. Habitual residence in the territory of the naturalizing State is usually a requirement (cf. Harvard Research Draft, Article 14), but there are exceptions to this rule (e.g., in the case of the naturalization of the wife and minor children; under English law (British Nationality Act, 1948, 11 & 12 Geo. 6, ch. 56, second schedule, para. 1) and the law of the United States (54 Stat. 1149, 8 U.S.C. 724, sec. 324 (a)). State Service abroad is deemed equivalent to residence).

(bb) *Conferment of nationality by operation of law*

Under the law of some States nationality is conferred automatically by operation of law, as the effect of certain changes in civil status: adoption, legitimation, recognition by affiliation, marriage (as to marriage see, however, Annex II).

Appointment as teacher at a university also involves conferment of nationality under some national laws.

While these reasons for the conferment of nationality have been recognized by the consistent practice of States and may, therefore, be considered as consistent with international law, others have not been so recognized.

Thus, certain modes of conferment of nationality practised by certain Latin-American States in the last century such as the imposition of nationality on aliens ("collective naturalization") who had acquired real property in the country (Peru, Mexico) or who were residing in the country on a certain date (Brazil) were considered by other States as inadmissible and were held to be inconsistent with international law by international tribunals (cf. the decision of the U.S. Mexican Claims Commission in *re Fayette Anderson and William Thompson v. Mexico*).²⁴

The mass imposition of German nationality on nationals of territories occupied by Germany in the last war during *occupatio bellica* were obviously inconsistent with international law.

A recent example of automatic conferment of nationality is furnished by the legislation of the Argentine. Article 31 of the Constitution of the Argentine Republic provides:

"Foreigners who enter the country without violating the laws shall enjoy the civil rights of Argentines, as well as political rights, five years after having obtained Argentinian nationality. Upon their petition, they may be naturalized if they have resided two consecutive years in the territory of the Nation, and they shall acquire Argentinian nationality automatically at the end of five years of continuous residence in the absence of express declaration to the contrary....".²⁵

(It will be noted that naturalization does not immediately confer political rights; two classes of nationals, such enjoying political rights and such who do not, are hereby created).

A bill which would have conferred Argentinian nationality automatically on aliens after two years' residence led to protests by other States.

It is difficult to draw the line between modes of automatic conferment of nationality which are or are not considered as consistent with international law.

Probably, the modes mentioned above which are recognized by State practice can, to a certain degree, be assimilated to voluntary naturalization: though not based on application, they result from a voluntary act of the individual or of the person acting on his behalf.

(c) *As regards conferment of nationality in consequence of territorial changes*

In cases of territorial changes the question of nationality becomes *ipso facto* a matter of international concern, as it is from the outset the concern at least of two States, the acquiring State and the State whose territory is acquired.

A distinction has to be made between original modes of acquisition: total annexation or incorporation; partial annexation and secession; and the derivative method of cession where the title to the territory is derived from the title of the predecessor State.

In the case of cession, the territorial transfer is usually based on treaty, and the agreement made between the ceding and cessionary State will, as a rule, include provisions concerning the nationality of the inhabitants of the ceded territory. It follows that, in distinction to other modes of acquisition, the ceding State is under an obligation to recognize the rules established by the cessionary State as regards the nationality of the inhabitants in accordance with the treaty of cession. This applies generally to all States parties to a multilateral treaty containing provisions for territorial changes, such as the Treaties of Peace concluded after the First World War. Of the Treaties of Peace concluded after the Second World War, only the Treaty with Italy contains provisions dealing with the nationality of inhabitants of the territories ceded by Italy and the nationality of the inhabitants of the Free Territory of Trieste.

In the absence of treaty provisions on nationality in case of cession and in case of original modes of acquisition the question arises what rules of customary international law and general principles of law, if any, exist which bind the acquiring State as regards the regulation of the nationality of the inhabitants of the territory concerned, by its muni-

²⁴ Moore, *International Arbitrations* (Washington, Government Printing Office, 1898), vol. 3, pp. 2479-2481, No. 3331.

²⁵ A. J. Peaslee, *Constitutions of Nations*, 2nd ed. (Martinus Nijhoff, 1956), vol. 1, p. 51.

cipal law which is the sole determining factor, in particular whether there is a duty to confer its nationality on such persons.

It is sometimes asserted that international law imposes a duty on the successor State to confer its nationality on the inhabitants of the territory acquired. (Such a rule based on habitual residence as the connecting link has been suggested by the Harvard Research Draft, Article 18.) In practice, States have, however, not necessarily conferred their nationality on all the inhabitants. The alleged rule cannot, therefore, be maintained, but it can be stated that under international law the successor State is under an obligation to make provision for the regulation of the nationality of the inhabitants of the acquired territory.

The acquiring State may not confer its nationality on aliens, *i.e.*, persons resident on the territory, who are not nationals of the predecessor State or stateless, since such action would infringe on the right of protection of the State of nationality. (*Cf., i.e., Masson v. Mexico.*)²⁶ In practice, States have rarely made use of their right to confer their nationality on stateless persons although this might be desirable in the interest of the elimination of statelessness (see Annex III).

The view has been taken by writers that the acquiring State has no power to confer its nationality on persons outside its territorial jurisdiction. Such persons who were nationals of the predecessor State will, according to this view, acquire the nationality of the successor State only if they submit voluntarily to its jurisdiction, either by a voluntary declaration to this effect (option) or by voluntary return to their territory of origin. This view is supported by decisions of municipal courts (*cf., e.g., U.S. ex rel Paul Schwarzkopf v. Uhl*, District Director of Immigration,²⁷ where it was held that an Austrian national who had been resident in the United States at the time when Austria was incorporated into Germany had not acquired German nationality).

The question arises: what is the criterion on which the acquisition of the nationality of the successor State is to be based? In case of cession this question is usually regulated by treaty. According to the Treaty of Versailles of 1919, habitual residence on the ceded territory on a certain date was stipulated as the criterion from which acquisition of the nationality of the cessionary State was to follow. In the Treaty with Italy of 1947, the principle of domicile (in the sense of habitual residence) in the territories ceded by Italy has been used (Article 19). The same applies as regards acquisition of the nationality of the Free Territory of Trieste (Annex IV, Article 6, to the Treaty).

The Treaties of St. Germain with Austria (1919), of Trianon with Hungary (1919), and the Minorities Treaties of 1919 with Czechoslovakia and Yugoslavia established the possession of *Heimatrecht* (*indigénat*, *Pertinenza*) in a community within the territory of the State concerned as the principal link for the acquisition of the nationality; this criterion, the right of citizenship in a particular community, constituted a condition for the possession of nationality of the Austro-Hungary monarchy peculiar to the law of that State.

The complicated nature of these links resulted in the creation of a great number of stateless persons. Moreover, in so far as these provisions were to affect the nationality of persons who were resident in the territories of States which were not parties to the treaties at the crucial time, they were probably *ultra vires*.

In the absence of treaty provisions, physical presence on the territory which is subject to the change of sovereignty must be considered as the determining criterion.

Where, as in the case of total annexation or incorporation, the predecessor State is extinguished, nationals of that State who fail to acquire the nationality of the successor State become stateless.

Thus, when the Baltic States of Latvia, Lithuania and Estonia were incorporated into the U.S.S.R. in 1940, the latter enacted legislation providing for the conferment of Soviet nationality on nationals of these States. (Edict of the Presidium of the U.S.S.R. of 7 September 1940.)²⁸ Nationals who resided abroad at the date of incorporation were required to register with the diplomatic or consular representatives of the U.S.S.R., failing which they might obtain Soviet nationality by naturalization only. Those who did not acquire Soviet nationality became stateless.

A last problem connected with territorial change is whether there is an obligation under international law to grant persons (to the inhabitants of the transferred territory) a right of option to retain their original nationality or to leave the transferred territory. Most of the treaties of cession and multilateral treaties dealing with cession of territories (Peace Treaties) or questions arising from such cession contain provisions for the exercise of this right; it has, however, in some instances been limited to specific groups (national or religious minorities). Persons exercising the right to opt for their former nationality were, as a rule, compelled to leave the transferred territory.

The Inter-American Convention on Nationality signed at Montevideo on 26 December 1933 provides that:

"In case of the transfer of a portion of the territory on the part of one of the States signatory hereof to another of such States, the inhabitants of such transferred territory must not consider themselves as nationals of the State to which they are transferred, unless they expressly opt to change their original nationality." (Article 4)

The Harvard Research Draft provides for a right of the inhabitants to decline the new nationality (Article 18).

As regards recent cases of cession, the treaty concluded between Poland and the U.S.S.R. on 16 August 1945 on the Soviet-Polish state frontier, by which parts of Eastern Poland were ceded to the Soviet Union, contains no provisions relating to the nationality of the inhabitants. An agreement was, however, concluded previously, on 6 July 1945, between Poland and the U.S.S.R. according to which persons of Polish and Jewish race, who had Polish nationality until 17 September 1939, and were residing on Soviet territory, and members of their families, were authorized to renounce Soviet nationality and to move to Poland. Persons of Russian, Ukrainian, Byelorussian, Ruthenian and Lithuanian race, residing in Poland, and members of their families, were authorized to renounce Polish nationality and move to Soviet territory. Acquisition of the nationality of the State to which the persons moved was subject to approval of the competent authorities.²⁹

A protocol accompanying the treaty between Czechoslovakia and the U.S.S.R. of 29 June 1945, by which the Transcarpathian Ukraine was ceded to the U.S.S.R., provides that persons of Ukrainian and Russian race residing in Czechoslovakia may, until 1 January 1946, opt for Soviet nationality. Persons of Czech and Slovak race residing in

²⁶ Moore, *op. cit.*, vol. 3, pp. 2542-2543.

²⁷ U.S. Circuit Court of Appeals, 137 F. 2d., p. 898.

²⁸ *Vedomosti*, 1940, No. 31.

²⁹ U.S. Department of State, *Bulletin*, Vol. XV, No. 374.

the Transcarpathian Ukrain may opt for Czechoslovak nationality until 1 January 1946 (Article II of the Protocol). The option referred to in this treaty does not constitute option in the usual sense, as it required the consent of the authorities of the State in whose favour it was exercised in order to become effective.

The Peace Treaty with Italy provides for a mutual right of option on the basis of linguistic affinity (Article 18, para. 2, Article 20, para. 1). A right of option for re-acquisition of Italian nationality is also provided for persons acquiring the nationality of the Free Territory of Trieste whose customary language is Italian (Annex VI, Article 6, para. 2).

It seems doubtful whether this consistent, but not entirely uniform treaty practice can be considered as a common consent of States for a rule of international law establishing such a right of option. In view of the tendency for the increasing integration of the individual in international law, this may be argued.

4. *Power of a State to withhold or cancel its nationality and duty of a State to withhold or cancel its nationality*

(a) *In general*

Nationality may be lost by unilateral act of the State or of the national. It may further be lost automatically, by operation of law, upon conferment of nationality by another State (see below).

Loss of nationality by unilateral act of the State may be caused by prolonged residence of the national abroad (expiration) or because of some action or conduct of the national (deprivation of nationality or denationalization). Denationalization has often the character of a penal sanction (because of criminal or political offences, misconduct, disloyalty). Loss of nationality may also take place on application by the national (release).

Loss of nationality by unilateral act of the national is effected by renunciation of nationality or declaration of alienage.

Under the laws of some States, the authorities have wider powers to deprive nationals who have acquired the nationality concerned by naturalization, of their nationality (denaturalization) than in the case of born nationals. Denaturalization may either consist in cancellation of nationality because it is found that the necessary requirements for the naturalization did not exist, whether such error was caused by fraud or misrepresentation by the applicant or not, or in revocation of nationality because of acts or conduct of the naturalized person subsequent to naturalization.

In principle, the power of States to cancel or withdraw nationality is, in the absence of treaty obligations, not limited by international law (as to duty to cancel or withdraw, see below).

When, however, certain States resorted to mass denationalization for political reasons, this was alleged to be inconsistent with international law. It has been said that such action by States was an abuse of rights as it was an attempt by the State of nationality to evade the duty of receiving back their nationals and would thus cast a burden on other States, or that it was irreconcilable with the notion of the individual as a person before the law.

The question arose on the issue of the recognition of the mass denationalization of nationals by a law of the Russian S.F.S.R. of 15 December 1921, and of the U.S.S.R. of 13 November 1925. The prevailing view was that the withdrawal of nationality had to be recognized (the decision

of the Swiss Federal Court in *Lempert v. Bonfol*, may be regarded as a leading case on this question).³⁰

The question was raised again in connexion with the withdrawal of German nationality from German Jews having their ordinary residence abroad, by the 11th Ordinance under the Reich Citizenship Law of 25 November 1941. As this Ordinance was issued during the war, the issue was somewhat blurred by the fact that the question of recognition raised in Allied countries the issue of the recognition of acts taken by an enemy power in time of war. Recognition was refused by an English Court in *The King v. The Home Secretary, ex parte L.* and another (1945), 1 K.B. 7, in line with decisions made during the First World War (*Liebmann's Case* (1916)). K.B. 268; 1 A.C. 421 (House of Lords). The withdrawal was recognized by United States courts (*cf.* the above cited case, *U.S. ex rel Schwartzkopf v. Uhl*, followed in later decisions).

After the Second World War nationality was withdrawn *en masse* from persons of German and Hungarian races by Czechoslovakia and from persons of German race by Poland. Persons of German race were expelled to Germany under the Potsdam Agreement.

The extent to which mass denationalization is prohibited by international law is not clear. A distinction has to be drawn between the power of States to withdraw nationality and the effect of withdrawal on the duty of a State to grant its nationals a right of residence and to receive them back in its territory. It has been contended that this duty persists after the withdrawal of nationality.

The Preparatory Committee for the Codification of International Law proposed, in its Basis of Discussion No. 2³¹ the stipulation of this duty as a relative duty only, existing between the State of former nationality and the State of residence provided the withdrawal of nationality took place after the individual's entry into a foreign country and he had not acquired another nationality (see also Harvard Research Draft, Article 20).

The Conference adopted on this question the Special Protocol concerning Statelessness which provides for a duty of readmission of former nationals under certain conditions only; this Protocol is not in force. The Conference adopted in its Final Act a recommendation to States to examine the desirability of readmitting former nationals who had not acquired another nationality under conditions different from those set out in the Protocol.

(b) *Withdrawal of nationality upon conferment of another nationality (substitution of nationality)*

Under the law of many States the nationality of their nationals is withdrawn *ipso facto* by their naturalization (in the wider sense of the term) by another State. But this practice is not uniform. There is, in fact, a sharp cleavage in the attitude of States to this problem. The United States legislation is a typical example for the law of those States which provide for automatic loss of nationality by foreign naturalization (Nationality Act of 1940, 54 Stat. 1169, sec. 401, a national of the United States "shall lose his nationality by... (a) obtaining naturalization in a foreign State..."). The right of expatriation has, by an Act of Congress of the United States (15 *Statutes at Large* 223), been declared "a natural and inherent right of all people".

In other States nationality may be withdrawn on foreign naturalization; the withdrawal is, however, not automatic but requires a renunciation of nationality (declaration of alienage).

³⁰ Tribunal fédéral, *Recueil officiel*, vol. 60, t. I, p. 67.

³¹ League of Nations, *V. Legal*, 1929.V.I (document C.73.M.38.1929.V, p. 21).

The law of England as regards this question has undergone certain changes. The common law doctrine of perpetual allegiance was abandoned in 1870. The British Nationality and Status of Aliens Act, 1914, contained the principle of automatic withdrawal (Article 18). Since the coming into force of the British Nationality Act, 1948, however, foreign naturalization is no longer a cause for the withdrawal of British nationality, but a citizen of the United Kingdom and Colonies who is also a national of another country may make a declaration of renunciation of citizenship (Article 19). (See also the Swiss law as regards nationals residing abroad.)

The law of France provides in principle for automatic withdrawal by voluntary acquisition of a foreign nationality, but in certain cases (liability for military service) withdrawal of nationality is subject to authorization by the government (*Code de la nationalité*, Ordinance No. 45-2441 of 15 October 1945, Article 88).

It would seem that the number of States which make authorization a condition for the release from their nationality upon foreign naturalization is on the increase. A number of recent nationality laws contain this condition (e.g., Bulgaria, Decree of 3 June 1948, Article 6; Egypt, Law No. 160 of 28 September 1940, Article 11; Hungary, Law LX of 24 December 1948, Article 14, under which renunciation of nationality requires acceptance; Romania, Law No. 125 of 6 July 1948, Article 2; Yugoslavia, Law No. 370 of 1 July 1946, Article 19).

The refusal of States to release nationals from their nationality and the obligations resulting from nationality, particularly from the obligation to perform military service, has led to friction between States, particularly between countries of emigration and countries of immigration. In order to overcome these difficulties a considerable number of bilateral agreements for the mutual recognition of naturalization have been concluded. The so-called Bancroft treaties concluded in the 1870s between the United States and European States are typical for this kind of treaties. Automatic withdrawal of the nationality of origin by foreign naturalization is also provided for in the Inter-American Convention on Nationality signed at Montevideo on 26 December 1933 (Article 1).

It is proclaimed in Article 15 of the Universal Declaration of Human Rights that:

"(1) Everyone has the right to a nationality.

"(2) No one shall be arbitrarily deprived of his nationality nor denied the *right to change his nationality*". (Rapporteur's italics).

In the present stage of development of international law it cannot, in view of the divergencies of State practice, be said that there is, under international law, a duty of States to withdraw their nationality upon foreign naturalization.

(c) *Withdrawal of nationality in consequence of territorial changes*

The acquisition of the nationality of the successor State does not terminate *ipso jure* the nationality of the predecessor State. Withdrawal of its nationality depends on its municipal law. The question arises, however, whether, under international law apart from treaty, the predecessor State is bound to withdraw its nationality from those of its nationals on whom the nationality of the successor State is conferred by the latter.

This depends on the question whether the change of sovereignty and the conferment of nationality have been effected in accordance with international law.

Where the transfer of territory is based on cession the predecessor State recognizes its legality. If the effects of the cession on the nationality of the inhabitants of the ceded territory are regulated by treaty, such treaties usually provide that the nationality of the predecessor State is lost by the conferment of nationality by the successor State.

Where the transfer of territory and the conferment of nationality is in accordance with international law, the predecessor State is obliged to recognize it. Its sovereignty has been replaced by that of the successor State, and the predecessor State is, therefore, under an obligation of international law to withdraw its nationality from the inhabitants of the transferred territory upon whom the nationality of the successor State has been conferred.

Where the transfer or the conferment of nationality is not consistent with international law, no such duty rests on the predecessor State under international law.

5. *Multiple nationality*

Conflicts of nationality laws may result in a person having no nationality (statelessness, see Annex III) or more than one nationality (double or multiple nationality).

Multiple nationality may occur at birth or subsequent to birth. The most frequent case of double nationality at birth is caused by the application of *jus soli* and *jus sanguinis* to the same individual: a person born in a country which has the *jus soli*, of parents who have the nationality of a country which employs *jus sanguinis*, becomes a double national or *sujet mixte*.

Double nationality arises subsequent to birth if a new nationality is conferred on a person by naturalization or in consequence of transfer of territory without his losing his original nationality. Since, according to the law of many States, the former nationality is not automatically withdrawn by voluntary naturalization in another country, this is probably the most frequent cause of double nationality.

Double or multiple nationality may create difficulties both for States and for the persons concerned, because of the conflicts of allegiance which result from it. A person possessing more than one nationality may be considered liable for military service by any of the States whose nationality he possesses; he may be recalled by the State of his former nationality in time of war, although he has severed all links with that country, etc.

A number of bilateral treaties have been concluded in order to avoid double nationality or to define the duties of the individuals in relation to each of the States whose nationality he possesses.

The Inter-American Convention signed at Rio de Janeiro on 18 August 1906, has laid down rules for the avoidance of double nationality of naturalized persons who return to the country of their original nationality. Persons shall be considered as having resumed their original nationality and as having renounced the nationality acquired by naturalization if they have taken up residence in their native country without the intention of returning to the country in which they were naturalized; the intention not to return shall be presumed after two years' residence in the native country.

The Peace Treaties concluded after the First World War contain provisions to the effect that the defeated States undertook to recognize any acquisition of a new nationality under the laws of the Allied and Associated Powers by their nationals and

"to regard such persons as having in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin".

(*Cf.*, e.g., Article 278 of the Treaty of Versailles.)

The Hague Codification Conference found itself unable to eliminate multiple nationality; it tried, however, to reduce the cases of multiple nationality and to mitigate some of its adverse consequences. In its Final Act the Conference appealed to States to reduce, as far as possible, cases of dual nationality, and to the League of Nations to consider steps for the settlement of conflicts which arise from double or multiple nationality.³³

The 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws contains provisions designed to avoid double nationality in certain special cases (Article 6, 12). It further contains certain general principles applicable in cases of multiple nationality:

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

³³ League of Nations, *V. Legal*, V.7 (document C.228.M.115.1930.V).

This rule is a consequence of the recognized sovereign right of States to regulate nationality.

(2) "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." (Article 4)

This rule was applied in the Canevaro Case between Italy and Peru,³⁴ decided by a tribunal of the Permanent Court of Arbitration on 5 March 1912.

(3) "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any convention in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected." (Article 5)

This has been called the principle of *active* or *effective* nationality. *Cf.* Article 3, par. 2, of the Statute of the International Court of Justice; Article 2 (3) of the Statute of the International Law Commission.

³⁴ See *American Journal of International Law*, Vol. 6 (1912), p. 746.

Annex II

NATIONALITY OF MARRIED PERSONS

(A working paper)

1. The subject of the nationality of married women has been studied by the Commission on the Status of Women since 1948. (See the Secretariat's report on "Nationality of Married Women", E/CN.6/126/Rev.1 and E/CN.6/129/Rev.1.) At its second session in January 1948, that Commission:

"Noting the many and varied discriminations against women that result from conflicts in national law relating to nationality..., and

"Noting The Hague Convention on the Conflict of Nationality Laws (1930), the Montevideo Convention on the Nationality of Women (1933), and the studies in that field undertaken by the League of Nations." ³⁴ recommended to the Economic and Social Council that it instruct the Secretary-General

"To forward to Member Governments the request that married women should have the same rights as regards nationality as are enjoyed by men and single women."

The Economic and Social Council did not act on this recommendation in 1948.

2. At its third session in March-April 1949, the Commission on the Status of Women noted the right, with respect to nationality, contained in article 15 of the Universal Declaration of Human Rights, and considered:

"that a convention on the nationality of married women, which would assure women equality with men in the exercise of this right and especially prevent a woman from becoming stateless or otherwise suffering hardship arising out of these conflicts in law, should be prepared as promptly as possible." ³⁵

³⁴ Doc. E/615.

³⁵ Doc. E/1816.

On 1 August 1949, the Economic and Social Council adopted a resolution 242 C (IX), which read as follows:

"Noting that article 15 of the Universal Declaration of Human Rights states that:

"1. 'Everyone has the right to a nationality';

"2. 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality',

"Considering that a convention on the nationality of married women, which would assure women equality with men in the exercise of these rights and especially prevent a woman from becoming stateless or otherwise suffering hardships arising out of these conflicts in law, should be prepared as promptly as possible",

and invited Member States to reply to certain supplementary questions.

3. At its fourth session in May 1950, the Commission on the Status of Women requested the Economic and Social Council:

"(a) To take appropriate measures, as soon as possible, to ensure the drafting of a convention on nationality of married women, embodying the following principles:

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

"(ii) Neither marriage nor its dissolution shall affect the nationality of either spouse. Nothing in such a convention shall preclude the parties to it from making provision for the voluntary naturalization of aliens married to their nationals"; ³⁶

At this session, also, the Commission decided not to recommend that the draft convention include a provision con-

³⁶ Doc. E/1712.

cerning distinction as between the father and the mother in the transmission of the nationality *jure sanguinis*.

In part D of its resolution 804 (XI) of 17 July 1950, the Economic and Social Council noted the above recommendation of the Commission on the Status of Women, and proposed

"to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women."

4. In July 1950, the International Law Commission decided to deal with the matter in connexion with its consideration of the topic "Nationality, including statelessness", previously listed as a topic for codification.³⁷

5. At its fifth session in May 1951, the Commission on the Status of Women recommended that the Economic and Social Council propose that the International Law Commission undertake to complete a draft convention on the nationality of married women in 1952. At its thirteenth session in August 1951, the Economic and Social Council adopted a resolution 885 F (XIII) expressing the hope:

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

6. Under these circumstances, it is proposed that the International Law Commission undertake to comply with the request made by the Economic and Social Council in 1950, by drafting a convention embodying the principles formulated by the Commission on the Status of Women. It would seem to be unnecessary for the International Law Commission to express any views concerning those principles, or to analyse the consequences of their application, e.g., on the transmission of nationality *jure sanguinis* to children.

7. The Commission may wish to note that the first of the principles which it is asked to embody in a draft convention — no distinction based on sex either in legislation or practice — would seem to call for a broadening of the subject-matter to be covered. Instead of drafting a convention on the nationality of married women, the International Law Commission may wish to draft a convention on the nationality of married persons, men as well as women. The following draft, envisaging a convention on the nationality of married persons, is submitted for the appreciation of the Commission.

³⁷ See Report of the International Law Commission concerning its first session, para. 15, in *Yearbook of the International Law Commission*, 1949.

DRAFT CONVENTION ON NATIONALITY OF MARRIED PERSONS

Noting that conflicts in law and in practice with reference to nationality have arisen as a result of distinctions based on sex,

Noting that in Article 15 of the Universal Declaration of Human Rights the General Assembly has proclaimed that "everyone has the right to a nationality", and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality",

Desiring to co-operate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex.

The High Contracting States agree upon the following provisions:

Article 1. Each of the Contracting States agrees that it will make no distinction based on sex either in its legislation or in its practice in regard to nationality.

[This follows quite closely Article 1 of the Montevideo Convention on Nationality of Women, of 26 December 1933.]

Article 2. Each of the Contracting States agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien shall affect the nationality of the spouse who is its national.

Article 3. (1) Each of the Contracting States may make special provisions for the voluntary acquisition of its nationality by aliens who are the spouses of its nationals.

(2) Each of the Contracting States agrees that its nationals who voluntarily acquire the nationality of their alien spouses shall thereupon cease to be its nationals.

Article 4. Each of the Contracting States agrees that its naturalization of an alien will not affect the nationality of the spouse of the alien.

Article 5. Each of the Contracting States agrees that the voluntary acquisition of the nationality of another State by one of its nationals will not affect the retention of its nationality by the spouse of such national.

Article 6. Each of the Contracting States agrees that the renunciation of its nationality by one of its nationals will not affect the retention of its nationality by the spouse of such national.

Article 7. No reservation may be made either at the time of signature or ratification of, or at the time of accession to, this convention.

[Final clauses to be added.]

Annex III STATELESSNESS (A working paper)

A survey of municipal law relating to the subject has been made by the Secretariat of the United Nations in 1949 in a report on "Elimination of Statelessness" prepared by the Department of Social Affairs. This report, together with a report on "Improvement of the Status of Stateless Persons", has been published in print under the title "A Study of Statelessness".³⁸ Quotations of national laws have, therefore, as far as possible been avoided in the present paper, but some references relating, in particular, to

recent laws not yet considered in the report of the Secretariat, have been made.

SECTION I. PAST INTERNATIONAL ACTION FOR THE REDUCTION OF STATELESSNESS

1. *The Hague Conference for the Codification of International Law*

The Hague Conference in 1930¹ constitutes the only effort to eliminate statelessness by multilateral agreements.

³⁸ United Nations publication, Sales No. 1949.XIV.2.

The results fell far short of the aim of eliminating statelessness though they have to be assessed not only by the agreements reached but also by the influence they exercised on the legislation of States as well as on their practice. Provisions designed to reduce statelessness may be found in the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws, and in the Special Protocol relating to a Certain Case of Statelessness.

The relevant provisions of the Convention are of a two-fold nature : provisions purporting to prevent loss of nationality without acquisition of another nationality (Article 7 relating to expatriation permits, Articles 8 and 9 relating to the effect of marital status in nationality, Article 13 relating to the effect of naturalization of the parents on the nationality of minor children, and Articles 16 and 17 relating to the effect of legitimation, recognition and adoption on nationality) and provisions purporting to reduce statelessness occurring at birth (Articles 14, 15).

The 1930 Protocol contains only one substantial provision (Article 1), according to which a child born in a State which does not apply *jus soli* of a mother who is a national of that State and of a stateless father or of a father of unknown nationality shall have the nationality of that State.

The number of ratifications of these instruments has not been considerable and they include few countries whose law is based on *jus sanguinis*.

The 1930 Special Protocol concerning Statelessness (which has not come into force) deals with the question of readmission of former nationals.

It was stated in the Final Act of the Conference that

"the Conference is unanimously of the opinion that it is very desirable that States should, in the exercise of their power of regulating questions of nationality, make every effort to reduce as far as possible cases of statelessness, and that the League of Nations should continue the work which it has already undertaken for the purpose of arriving at an international settlement of this matter."³⁹

It is probably true to say that this recommendation has influenced States to amend their legislation (as is stated in "A Study of Statelessness", p. 148), but this influence seems to have decreased in the course of time.

2. Action by the United Nations

The Commission on Human Rights adopted at its second session in 1947 a resolution on statelessness which reads :

"The Commission on Human Rights

"I. Expresses the wish :

"(a) that the United Nations make recommendations to Member States with a view to concluding conventions on nationality;

"(b) that early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality as regards their legal and social protection and their documentation.

"II. Recommends that such work be undertaken in consultation with those specialized agencies at present assuming the protection of some categories of persons not enjoying the protection of any government and that due regard be paid to relevant international agreements and conventions."⁴⁰

³⁹ League of Nations, *V. Legal*, 1930.V.7 (document C.228.M.115.1930.V), p. 14.

⁴⁰ Doc. E/600, para. 46.

The Universal Declaration of Human Rights, which was adopted by the Commission at its third session in 1948 and subsequently proclaimed by the General Assembly, contains the following article on nationality :

"Article 15 (1) Everyone has the right to a nationality.

"(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

On the basis of the resolution of the Commission on Human Rights the Economic and Social Council adopted at its sixth session in 1948 the following resolution 116 D (VI) :

"The Economic and Social Council,

"Taking note of the resolution of the Commission on Human Rights adopted at its second session regarding stateless persons,

"Recognizing that this problem demands in the first instance the adoption of interim measures to afford protection to stateless persons, and secondly the taking of joint and separate action by Member Nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality,

"Requests the Secretary-General, in consultation with interested commissions and specialized agencies :

"(a) To undertake a study of the existing situation in regard to the protection of stateless persons by the issuance of necessary documents and other measures, and to make recommendations to an early session of the Council on the interim measures which might be taken by the United Nations to further this object;

"(b) To undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject."

In pursuance of this resolution, the Department of Social Affairs of the United Nations Secretariat prepared, in consultation with the International Refugee Organization, the above-mentioned study, which is divided into two parts : "Improvement of the Status of Stateless Persons" and "The Elimination of Statelessness".

By resolution 248 B (IX) of 8 August 1949, the Economic and Social Council decided

"to appoint an *ad hoc* Committee consisting of representatives of thirteen governments who shall possess special competence in this field, and who, taking into account comments during the discussions on the subject at the ninth session of the Council, 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 status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention :

"(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 suggestions they deem suitable for the solution of these problems, taking into consideration the recommendations of the Secretary-General referred to above;..."

The *ad hoc* Committee held two sessions, in January/February and in August 1950. At its first session it discussed the problem of the elimination of statelessness.

A memorandum on elimination of statelessness had been prepared by the Secretariat for the Committee.⁴¹ A proposal for a basis of discussion for a draft convention for the elimination of statelessness was submitted by the representative of Denmark; the Committee took no action on this proposal. The part of the Committee's report which deals with the question of elimination of statelessness reads:

"22. In dealing with the question of elimination of statelessness, the Committee discussed the responsibilities of various organs of the United Nations in regard to this problem, including the International Law Commission and the Commission on the Status of Women, having in mind the desirability of avoiding overlapping of activities in the same field.

"23. It reviewed the basic causes of statelessness, including

- (a) Failure to acquire nationality at birth;
- (b) Loss of nationality through marriage and dissolution of marriage;
- (c) Voluntary renunciation of nationality; and
- (d) Deprivation of nationality.

"24. Discussions in the Committee developed two main points of view: (a) that of the majority, that the Committee could not at this stage proceed to the drafting of a convention on the subject of the elimination of statelessness; and (b) the view of the minority, that a draft convention could and should be formulated by the Committee as a basis of discussion for some other organ which would be called upon to deal more definitively with the matter. A proposal submitted by the representative of Denmark as a basis for drafting will be found in Annex V.

"25. The conclusions of the majority were based principally upon the following considerations:

"(a) The Committee had, by the time it reached this item on the agenda, already completed a draft convention relating to the status of refugees, and a protocol relating to the status of stateless persons. These labours had largely exhausted the time at the disposal of the Committee.

"(b) The Committee felt, moreover, that it was at this stage difficult, if not impossible, to approach in the necessary detail a matter of such complexity.

"26. As a result of its deliberations, the Committee decided to recommend to the Economic and Social Council the following draft resolution:

"The Economic and Social Council

"A. 1. Invites Member States to re-examine their nationality laws with a view to reducing so far as possible cases of statelessness which arise from the operation of such laws; and

"2. Recommends to Member States involved in changes of territorial sovereignty that they include in the arrangements for such changes the necessary provisions for the avoidance of statelessness; and

"3. Invites Member States to contribute to the reduction of the number of stateless persons by extending to persons in their territory the opportunity to be naturalized; and

"4. Requests the Secretary-General to seek information from Member States with regard to the carrying out of this resolution and to report thereon to the Council; and

"B. 1. Considering that progress in the elimination of statelessness requires joint international action; and

"2. Considering that the conclusion of an agreement or of agreements for this purpose is necessary;

"3. Requests the International Law Commission to prepare the necessary draft documents at the earliest possible date.'

"27. The Committee did not include in the above draft resolution a specific reference to the statelessness of women resulting from marriage or dissolution of marriage since the question of the nationality of married women is at present being considered on a broader basis by the Commission on the Status of Women."⁴²

The proposal of the representative of Denmark referred to in paragraph 24 reads:

"Article 1. In so far as the law of a State provides that the legitimate child of a father, possessing the nationality of that State, acquires by birth the nationality of the father, regardless of where the child was born, the illegitimate child of a mother possessing the nationality of that State shall acquire by birth the nationality of the mother.

"Article 2. (i) Where the nationality of a State is not acquired automatically by reason of birth in its territory, a child born in the territory of that State of a mother possessing the nationality of that State and of a father without nationality, shall acquire the nationality of that State by birth.

"(ii) The provision of paragraph (i) of this article shall also apply in cases where the father is in possession of a nationality which his children born abroad do not acquire by birth.

"Article 3. (i) Where the nationality of a State is not acquired automatically by reason of birth in its territory, a child born in the territory of that State of parents having no nationality shall acquire the nationality of that State either by birth or at least after -- years of residence in that State.

"(ii) The provisions of paragraph (i) of this article shall also apply in cases where the parents are in possession of a nationality which, however, their children born abroad do not acquire by birth.

"Article 4. A wife shall not lose her nationality on marriage with a foreigner unless by such marriage she acquires a new nationality.

"Article 5. A wife shall not lose her nationality upon a change in the nationality of her husband occurring during marriage unless she herself, by such change, acquires a new nationality.

"Article 6. A wife shall not lose her nationality acquired on or during marriage by the mere fact of dissolution of her marriage.

"Article 7. A child born out of wedlock shall not lose its nationality on legitimation or recognition unless by such legitimation or recognition, it acquires a new nationality.

"Article 8. A child shall not lose its nationality as a result of adoption unless, by such adoption, it acquires a new nationality.

"Article 9. A person who wishes to be released from his present nationality in order to acquire another nationality shall be released only on the condition that he acquires such nationality.

⁴¹ Doc. E/AC.32/4.

⁴² Doc. E/1618, chap. IV, paras. 22-27.

"Article 10. No person shall lose his nationality as a result of territorial settlements unless he acquires another nationality."

At its eleventh session in 1950, the Economic and Social Council adopted a resolution 319 B III (XI) of 11 August 1950 on Provisions relating to the Problem of Statelessness, which reads:

"The Economic and Social Council,

"Recalling its concern with the problem of statelessness as expressed in its resolution 248 B (IX) of 8 August 1949, in which it established an *ad hoc* committee to study this problem,

"Having considered the report of the *ad hoc* Committee and its recommendations concerning the elimination of statelessness [E/1618],

"Taking note of Article 15 of the Universal Declaration of Human Rights concerning the right of every individual to a nationality,

"Considering that statelessness entails serious problems both for individuals and for States, and that it is necessary both to reduce the number of stateless persons and to eliminate the clauses of statelessness,

"Considering that these different aims cannot be achieved except through the co-operation of each State and by the adoption of international conventions,

"Recommends to States involved in changes of territorial sovereignty that they include in the arrangements for such changes provisions, if necessary, for the avoidance of statelessness;

"Invites States to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory and, if necessary, to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws;

"Requests the Secretary-General to seek information from States with regard to the above-mentioned matters and to report thereon to the Council;

"Notes with satisfaction that the International Law Commission intends to initiate as soon as possible work on the subject of nationality, including statelessness, and urges that the International Law Commission prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness;

"Invites the Secretary-General to transmit this resolution to the International Law Commission."

Based on the report of the Secretary-General on the replies so far received from governments, the Economic and Social Council adopted at its twelfth session on 13 March 1951, another resolution on the subject, resolution 352 (XII) which reads:

"The Economic and Social Council,

"Referring to its resolution 319 B (XI), sec. III, and

"Noting that only a limited number of governments have replied to the Secretary-General's inquiry of September 27, 1950,

"1. Requests the Secretary-General to address another communication to governments inviting them to submit their observations at latest by 1 November 1951, and to include in their replies not only an analysis of legal and administrative texts and regulations but of the practical application of those laws and regulations;

"2. Asks the Secretary-General to transmit a consolidated report on the basis of these replies to the Council and to the International Law Commission; and

"3. Decides to defer further discussion of this subject to its fourteenth session."

At the time this report was prepared, the rapporteur had received from the Secretariat the texts of the observations of twenty-one governments. The Commission will, when it considers this report, undoubtedly have the benefit of the consolidated report of the Secretary-General based on all the replies received from governments.

Most of the time of the first session of the *ad hoc* Committee on Refugees and Stateless Persons was devoted to the preparation of a draft Convention relating to the Status of Refugees and a draft Protocol relating to the Status of Stateless Persons. According to the Protocol, certain provisions of the draft Convention were to be made applicable to stateless persons not covered by the Convention.

The Economic and Social Council revised at its eleventh session the Preamble and Article 1 of the draft Convention [Resolution 319 B II (XI)]; it decided to reconvene the *ad hoc* Committee in order to revise the draft agreements, and to submit the drafts, as revised, to the General Assembly [Resolution 319 B I (XI)].

The General Assembly decided at its fifth session by Resolution 429 (V) of December 14, 1950, to convene a Conference of Plenipotentiaries in Geneva in order to examine and adopt these draft instruments.

The Conference of Plenipotentiaries which was held at Geneva in July 1951 adopted a Convention relating to the Status of Refugees, but took no action on the draft Protocol relating to the Status of Stateless Persons which was referred to the appropriate organs of the United Nations for further study [cf. document A/Conf.2/108].

3. Proposals for the reduction of statelessness made by non-governmental organizations

The problem of statelessness has frequently occupied learned societies. Among the proceedings of these societies, the following should be particularly mentioned:

The resolution on Nationality and Naturalization adopted at the 33rd Session of the International Law Association at Stockholm in 1929;⁴³

The resolution on Nationality adopted at the 35th Session of the Institute of International Law at Stockholm in 1928;⁴⁴

The resolution on the status of refugees and stateless persons adopted at the 40th Session of the Institute at Brussels in 1936;⁴⁵

The report of a Committee appointed by the Executive Committee of the Grotius Society for the Status of Stateless Persons⁴⁶ and

The report of a Committee of the International Law Association on Nationality and Statelessness, and a Report of the American Branch of the Association on this subject, which were both submitted to the 44th Conference of the Association held at Copenhagen in 1950.⁴⁷

⁴³ International Law Association, *Report of the Thirty-third Conference*, pp. 22-53.

⁴⁴ Institut de droit international, *Annuaire*, 1928, p. 760.

⁴⁵ *Ibid.*, 1936, vol. II, pp. 292-299.

⁴⁶ *Transactions of the Grotius Society*, vol. 28 (1942), pp. 151-168.

⁴⁷ International Law Association, *Report of the Forty-fourth Conference*, pp. 35-62.

SECTION II. STATELESSNESS "DE FACTO" AND "DE JURE".

In a "Study of Statelessness" prepared by the Secretariat a distinction is made between stateless persons *de jure* and stateless persons *de facto* (pp. 8, 9). The former are described as "persons who are not nationals of any State"; the latter as

"persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals".

Such a distinction may have been useful for the purpose for which the study was made; it has, however, no place in the present paper. *Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law.* The so-called stateless persons are *de facto* nationals of a State who are outside of its territory and devoid of its protection; they are, therefore, not stateless: it might be better to speak of "*unprotected persons*" and to call this group "*de facto unprotected persons*", in distinction to "*de jure unprotected persons*", i.e., stateless persons. Refugees may be stateless or not; in the first case they are *de jure* unprotected persons; in the latter, *de facto* unprotected. The present paper deals exclusively with statelessness in the strict, legal sense of the term.

SECTION III. NUMBER OF STATELESS PERSONS

The Secretariat has, in its study, given some figures of stateless persons (*Ibid.*, pp. 7, 8), but they refer to stateless persons in the sense in which the term is used in the study; i.e., including *de facto* unprotected persons. The figures given refer, in fact, to refugees. No statistics or estimates of the number of stateless persons appear to be available.⁴⁸ It is, however, possible to indicate certain groups which, in whole or in part, consist of stateless persons.

The territorial changes resulting from the First World War, particularly the dissolution of the Austro-Hungarian Monarchy, created a great number of stateless persons, probably several hundred thousands. (D. A. Macartney, in his book *National States and National Minorities*, p. 509, mentions the figure of 80,000 for Czechoslovakia alone.) It cannot be said how many stateless persons of this group there are today; their number has decreased through death and naturalization, though in many cases the children of such persons are stateless.

Most of the Russian refugees who left Russia in consequence of the Soviet revolution became stateless as they were denationalized by the U.S.S.R. Their number was given as 355,000 in 1936, but for the same reason as in the case of the stateless persons from the territories of the Austro-Hungarian Monarchy an estimate of their present number is difficult, but it is probably considerably less than in 1936.

The sum total of refugees from Nazi Germany and Austria was estimated at approximately 400,000-450,000,

most of whom were Jewish and as such denationalized by Nazi Germany. Their present number is unknown, but here, too, the number seems to have greatly decreased by repatriation, naturalization and death.

The German expellees and refugees in Germany who number approximately 8,000,000 are in a special position; many were denationalized by the countries from which they were expelled or which they left. Article 116 of the Constitution of the Federal Republic of Germany provides that

"Unless otherwise regulated by law, a German within the meaning of this Basic Law is a person who possesses German nationality or who has been accepted in the territory of the German Reich as of December 1, 1937, as a refugee or expellee of German stock or as the spouse or descendant of such person."⁴⁹

In the absence of a nationality law they do not possess German nationality, but they possess the same rights, including political rights, as German nationals.

Among other refugee groups such as the non-German refugees who left eastern Europe after the Second World War, some are stateless while others have retained their nationality. (Yugoslav nationality, e.g., was, by a law of 23 October 1946, withdrawn from officers and non-commissioned officers of the former Yugoslav Army who fell into the hands of the enemy, and who refused to return to Yugoslavia, and from certain other groups. As a rule, withdrawal of nationality from refugees does not take effect by operation of law but is permissive for the authorities.)

Out of the large number of Arab refugees from Palestine, some have been naturalized (particularly those in Jordan), but the majority must be considered as stateless.

There is probably a number of stateless persons in the Far East owing to the political changes which have taken place there, but their condition and numbers are unknown.

Apart from these large groups of stateless persons there is, of course, a great number of individual cases. They are either persons born stateless, or persons who became stateless as a result of conflicts of nationality laws or by individual denationalization or denaturalization.

It is, therefore, impossible to make an estimate of the total number of stateless persons, but these indications might serve as an illustration of the magnitude of the problem.

SECTION IV. CAUSES OF STATELESSNESS

1. *Statelessness at birth (original or absolute statelessness)*

Both the application of the *jus soli* and the *jus sanguinis* may lead to statelessness, though *jus sanguinis* is the more serious case as it tends to make statelessness hereditary. As a general rule, the law of countries of emigration is based on *jus sanguinis*, while the law of countries of immigration and the law of common law countries which derives from the feudal conception of attachment to the soil is based on *jus soli*. In fact, the nationality laws of most countries are based on a combination of *jus soli* with *jus sanguinis* or of *jus sanguinis* with *jus soli*, though the nationality laws of a few countries such as Finland and Switzerland are still based exclusively on *jus sanguinis*. There are few if any countries whose law is based solely on *jus soli*.

The subsidiary application of *jus soli* in *jus sanguinis* countries, which may be partly due to the influence of

⁴⁸ An investigation made by the Council of Europe referred only to stateless refugees. According to figures received by the Committee of Ministers of the Council from the Governments of Belgium, France, Greece, Ireland, Italy, Luxembourg, Netherlands, the Federal Republic of Germany, United Kingdom, Saar, Sweden and Turkey, there are approximately 190,000 stateless refugees in the territories of these States [document CM (51) 17].

⁴⁹ Peaslee, *op. cit.*, vol. 8, p. 58.

The Hague Codification Conference, and the subsidiary application of *jus sanguinis* in *jus soli* countries, have contributed to the reduction of statelessness. Under the laws of most countries the application of the secondary principle is, however, subject to conditions, and it still leads to statelessness in those cases where the conditions are not fulfilled. Thus, e.g., United States nationality is conferred, by descent, if both parents are citizens and if one has resided in the United States prior to the birth of the child; if only one parent is a citizen, if he has resided in United States territory for ten years, five years of these after the age of sixteen, prior to the birth of the child, the other being an alien [Nationality Act of 1940 (8 U.S.C. § 601)]. The rule of English common law that nationality by descent is not transmitted beyond the second generation born abroad has been abolished by the Nationality Acts enacted in the British Commonwealth.

Foundlings may be stateless when the place of birth is unknown. A considerable number of States confer, however, their nationality on a child found in their territory on the basis of a presumption that the child was born there, in accordance with the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (Article 14).

Birth aboard merchant vessels may lead to statelessness in *jus soli* countries which do not assimilate birth aboard a merchant ship (outside their territorial waters) flying their own flag to birth in the territory (United States) or which do not assimilate birth aboard a foreign ship in their territorial waters to birth in the territory (Great Britain).

2. Statelessness subsequent to birth (subsequent or relative statelessness)

A person becomes stateless subsequent to birth if his nationality is withdrawn or cancelled without another nationality being conferred on him.

(a) As a result of conflicts of nationality laws

Under the laws of some countries change of personal status may lead to a withdrawal of nationality: marriage to an alien, legitimation, adoption, recognition of affiliation by an alien, dissolution of marriage in case of a person on whom nationality has been conferred by marriage. Where, under the law of the other countries, these changes in personal status are not recognized as modes of conferment of nationality, this leads to statelessness. (If the principle of sex equality were adopted, marriage and dissolution of marriage would cease to be causes of statelessness (see Annex II); it would, on the other hand, lead to perpetuation of statelessness in cases where the spouse was stateless prior to marriage.) The Hague Conference established rules for the elimination of statelessness in such cases (Convention on Certain Questions relating to the Conflict of Nationality Laws, Articles 8, 9, 16, 17)).

According to the principle of the unity of the family the nationality of the wife follows that of the husband, the nationality of minor children that of the father in the case of legitimate children, that of the mother in the case of illegitimate children. Divergencies of national laws as regards the application of this principle may lead to statelessness if the nationality of the wife or of minor children is lost in consequence of loss of nationality by the husband or parent, without the acquisition of another nationality (as to the wife, see Annex II). The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws contains rules designed to avoid statelessness in these cases (Articles 9, 13).

(b) Statelessness resulting from voluntary action of the national

Under the law of a few States nationals may renounce their nationality regardless of the fact whether another nationality is conferred on them (e.g., in the United States, Nationality Act, 1940 (8 U.S.C. § 801)); this may result in statelessness. According to the laws of other States, they may be released from nationality on application, by the granting of an expatriation permit. Article 7 of the Convention on Certain Questions relating to the Conflict of Nationality Laws is designed to reduce statelessness as a consequence of the granting of expatriation permits.

Under the law of some States nationality is withdrawn by operation of law if a national has continuously resided abroad over a certain period. (In Denmark, Norway, Sweden in the case of nationals born abroad; in the United States in the case of naturalized persons (Nationality Act, 1940 (8 U.S.C. § 804)).

Failure to comply with certain conditions or formalities prescribed by law for the conferment or retention of nationality (e.g., registration with a consular authority, assumption of residence in the country) may also be considered as coming within this category since it may be regarded as implying voluntary expatriation; frequently, however, omission of formalities is accidental rather than deliberate. It leads, however, to statelessness.

(c) Statelessness resulting from unilateral action of the State. Denationalization. Denaturalization

Under the laws of other countries nationality may be withdrawn on prolonged absence abroad or, in the case of naturalized persons, prolonged residence in the country of former nationality, by decision of the competent authority; in these cases denationalization may be regarded as giving effect to the national's desire for expatriation. This may be distinguished from those cases where denationalization is imposed as a penalty.

Denationalization may take effect by operation of law (collective denationalization) or by decision of the competent authority in the individual case based on enabling laws (individual denationalization). Denationalization may, or may not, affect automatically the wife and/or minor children.

The grounds on which denationalization is imposed are numerous: entry into foreign military or civil service; acceptance of honours and titles without authorization; conviction for criminal offences; and disloyalty. These are to be found in the laws of many countries. It is noteworthy that the tendency to provide for denationalization on the ground of disloyalty is increasing; a number of recently enacted nationality laws provide for this possibility. Disloyalty is considered to consist in evasion of military service, illegal emigration, refusal to return on request of the authorities, hostile association, desertion from the armed forces, committing of treason or of other activities prejudicial to the interests of the State.

Apart from denationalization on the ground of disloyalty, which is usually permissive and imposed by individual decision, some States have enacted special legislation providing for collective denationalization on political, racial or religious grounds.

Denaturalization may result in statelessness; such denaturalization may either consist in cancellation of the naturalization because of absence of material conditions for naturalization or in subsequent withdrawal of naturalization on the ground of disloyalty or disaffection, hostile association, bad conduct, criminal conviction, prolonged absence or return of the naturalized person to the country of his

former nationality with the intention to remain there. Denaturalization on racial grounds was effected by Germany under the law concerning the Cancellation of Naturalization and the Deprivation of German Nationality of 14 July 1933, as interpreted by the First Executive Order of 26 July 1933.

(d) *Statelessness as a result of territorial changes*

In case of annexation (incorporation) of the whole of the territory of a State, its nationality ceases to exist by the extinction of the State. Unless the nationality of the annexing State is conferred upon the former nationals of the annexed State, they become stateless.

In the absence of treaty regulations relating to the nationality of the inhabitants, their nationality is regulated by the laws of the acquiring State and the State whose territory is acquired. "Negative conflicts" of these laws may lead to statelessness; i.e., in those cases where the nationality of the predecessor State is withdrawn under its law but the nationality of the successor State is not conferred on the person. This is particularly likely to happen in the case of persons who were outside the territory of the acquiring State at the time of the transfer of the territory since its territorial jurisdiction does not extend to them while the predecessor State may withdraw its nationality from those persons (over whom it has personal jurisdiction). The problem is aggravated in those cases of change of sovereignty where the predecessor State has ceased to exist as in the case of the dissolution of the Austro-Hungarian Monarchy.

Where the nationality of the inhabitants is regulated by treaty, it may lead to statelessness:

(i) Because the treaties contain "lacunae" as to the conferment of nationality on the inhabitants, e.g., by the establishment of links of attribution which are inadequate or difficult to prove such as *Heimatrecht* in the Peace Treaties of St. Germain and Trianon,

(ii) Because the treaty provisions are not fully implemented by the municipal law of States parties to the treaty.

(iii) Because the treaties and implementing laws are interpreted or applied in a manner which creates statelessness.

The Peace Treaties of St. Germain and Trianon, the Minorities Treaties and the practice of the successor States of the Austro-Hungarian Monarchy provide ample examples of how statelessness was created by the treaties or the, often deliberately, defective application of treaties and national laws.

The exercise of a right of option granted to all inhabitants of a transferred territory or to special groups may also result in statelessness. (Such option may either be positive option, i.e., the right to declare in favor of retaining the nationality of the predecessor State or of acquiring the nationality of the successor State, or negative option, i.e., the right to repudiate the new nationality or to emigrate.) Option is a unilateral act which does not require acceptance, and positive option should, as such, not lead to statelessness. It has, in practice, led to statelessness; options were held to be invalid by the State in whose favour they were exercised on the ground of expiration of time limits or non-compliance with formalities prescribed for the exercise of the right of option or when the right was granted to particular groups only (racial, linguistic or religious minorities) because the optant was held not to belong to the eligible group while the original nationality of the optant was withdrawn from him by the mere fact that he availed himself of the right of option.

In order to overcome conflicts of nationality laws in the case of transfers of territory, arbitration tribunals were

sometimes established by treaty, which were authorized to settle conflicts. This was the case in the Convention between Germany and Poland relating to Upper Silesia concluded at Geneva on 15 May 1922.⁵⁰ A Conciliation Commission established at the Arbitral Tribunal created by the Convention had power to settle conflicts in questions of nationality arising from the interpretation or application of the relevant provisions of the Convention, on application by the interested individual (Articles 55, 56). If the Commission could not settle the difficulties or on request of the Agent of one of the Contracting States, the matter was to be submitted to the Arbitral Tribunal (Article 58).

Another instance is the Commission established by the Convention between Austria, Czechoslovakia, Hungary, Italy, Poland, Rumania and the Serb-Croat-Slovene State signed at Rome on 6 April 1922, which was authorized to settle disputes as regards nationality between the Parties to the Convention (Article 4);⁵¹ the Convention was ratified by Austria, Italy and Poland only. The Treaty between Czechoslovakia and Austria concerning nationality and the protection of minorities, signed at Brno on 7 June 1920, provided also for the establishment of a Mixed Commission and of an Arbitral Tribunal for the settlement of disputes concerning nationality and the protection of minorities between the parties (Article 21).⁵²

SECTION V. ANALYSIS OF THE PROBLEM AND THE POSSIBILITIES OF ITS SOLUTION

While all the causes mentioned in the preceding chapter may result in statelessness, they are not all of equal importance.

Failure to acquire a nationality at birth is an important cause; laws based exclusively on *jus sanguinis* and those establishing *jus soli* as a subsidiary link of attribution of nationality in special, limited cases only, are particularly apt to lead to statelessness.

Loss of nationality in consequence of territorial changes has created a great number of cases of statelessness, particularly after the First World War.

Denationalization is an important cause, particularly denationalization on the ground of disloyalty or disaffection. The number of cases of statelessness resulting from denationalization on these grounds is, however, limited under those laws which require for the denationalization or denaturalization of a national a decision of the competent authority in each individual case. Probably the greatest number of cases of statelessness has been created by collective denationalization on political, racial or religious grounds.

Statelessness is considered as undesirable, both from the aspect of the interests of States and from the aspect of the interests of the individual. From the point of view of States it is desirable in the interest of orderly international relations that every individual should be attributed to some State which, as a result, has certain rights and obligations as regards this individual under international law, in its relations to other States. As has been pointed out in Annex I, the right is that of diplomatic protection, the duty that to permit the national to reside in the territory of the State and to readmit him to that territory.

From the point of view of the individual, statelessness is undesirable as the status of stateless persons is, as a rule, precarious. The deficiencies of that status have been de-

⁵⁰ League of Nations, 122 (document 396.M.248).

⁵¹ Hudson, *op. cit.*, vol. 2, p. 866.

⁵² League of Nations, *Treaty Series*, vol. III, p. 190.

scribed in section I of Part I of the "Study of Statelessness" prepared by the United Nations Secretariat (pp. 17-33).

Any attempt to eliminate statelessness can only be considered as fruitful if it results not only in the attribution of a nationality to individuals, but also in an improvement of their status. As a rule, such an improvement will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his "effective nationality", if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law. Purely formal solutions which do not take account of this desideratum might reduce the number of stateless persons but not the number of unprotected persons. They might lead to a shifting from statelessness *de jure* to statelessness *de facto* which, in the view of the Rapporteur, would not be desirable. (Cf. the proceedings of the International Law Association at its 39th Conference in Paris in 1936, where it was suggested that neither *jus soli* nor *jus sanguinis* should be decisive but the *jus connectionis* or right of attachment, i.e., a person should have the nationality of the State to which he has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances).⁵²

From the purely technical and legal aspect, statelessness could be eliminated by the adoption of two rules:

(a) If no other nationality is acquired at birth, the individual should acquire the nationality of the State in whose territory he is born;

(b) Loss of nationality subsequent to birth shall be conditional on the acquisition of another nationality.

Yet an analysis of the preparatory work for The Hague Codification Conference, of the proceedings of the Conference itself, of the discussions which took place in various organs of the United Nations on the subject, particularly in the *ad hoc* Committee on refugees and stateless persons, and of the observations made by governments in response to the request made by the Secretary-General of the United Nations in pursuance of the resolutions of the Economic and Social Council of 11 August 1950, and 13 March 1951, would seem to indicate that governments are not prepared to accept these principles in their entirety.

Moreover, such a purely technical solution would be open to objection from the point of view of the individual. In any attempt at a solution the *functions* of nationality have to be borne in mind. Conferment of nationality can only be considered as fruitful if it confers the functions which are inherent in its concept.

It is doubtful, therefore, whether *elimination* of statelessness by international agreement is possible in the present stage of development of international law and international relations. In the absence of a complete solution, possibilities for the *reduction* rather than for the *elimination* of statelessness will have to be examined.

If it is true that statelessness cannot be eliminated at present, the efforts for the improvement of the status of stateless persons which are at present under consideration in other organs of the United Nations acquire added weight and importance.

In examining the possibilities of reducing statelessness, the various causes of statelessness have to be distinguished.

1. Reduction of statelessness at birth

As the unqualified acceptance of *jus soli* as a subsidiary principle of acquisition of nationality in countries whose law is based on *jus sanguinis* does not appear feasible owing to the traditional aversion of *jus sanguinis* countries against the adoption of *jus soli*, the following possibilities would seem to recommend themselves:

(a) Extension of the conferment of nationality *jure sanguinis* by *jus soli* countries. (There are few, if any, countries whose law is based exclusively on *jus soli*.)

(b) Extension of the conferment of nationality *jure sanguinis* by *jus sanguinis* countries whose law contains *lacunae* which lead to statelessness.

(c) Conferment of nationality in *jus sanguinis* countries by the application of *jus soli* in certain cases or by a combination of *jus sanguinis* and *jus soli* in cases where *jus sanguinis* alone does not confer nationality.

The following rules, which are not mutually exclusive, but which could be adopted alternatively, would give effect to these principles:

(a) A child born abroad shall acquire the nationality of the State of which one of the parents is a national, provided that it does not acquire at birth another nationality.

(b) A child born in the territory of a State whose nationality is not conferred by the mere fact of birth in its territory shall acquire the nationality of that State if one of the parents is a national, provided that it does not acquire at birth another nationality. (This broad rule would be supplementary to the normal rules of conferment of nationality *jure sanguinis* according to which a legitimate child acquires the nationality of the father; an illegitimate child that of the mother.)

(c) A child born of unknown parents, or of stateless parents, or of parents whose nationality is undetermined, and a child who for any other reason does not acquire the nationality of its parents, shall acquire at birth the nationality of the State in whose territory it is born. (Cf. Articles 14, 15 of The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.)

(A rule combining *jus sanguinis* with *jus soli* may be found in Article 1 of The Hague Protocol relating to a Certain Case of Statelessness:

"In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State."

This rule has been implemented by municipal legislation, lately by the nationality laws recently enacted in Scandinavian countries although they have not acceded to the Protocol.)

Two additional rules appear desirable in order to fill certain loopholes in municipal law which may result in statelessness at birth;

(a) A foundling shall be presumed to have been born in the territory of the State in which it was found until the contrary is proved. (Cf. Article 14 of The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.)

(b) Birth aboard national merchant vessels shall be deemed to constitute birth in the national territory.

The International Union for Child Welfare has, in a booklet on "Stateless Children" suggested a number of alternative model provisions founded on *jus sanguinis* or

⁵² International Law Association, *Report of the Thirty-ninth Conference*, pp. 13-51.

jus soli.⁵⁴ Eight groups of countries whose nationality laws have common features are distinguished, and it is suggested that statelessness could be reduced if the various groups of countries adopted those model provisions which correspond most closely to the system on which their nationality laws are based.

2. *Reduction of subsequent statelessness by the elimination of causes of loss of nationality*

(a) *As a result of conflicts of nationality laws*

The rules contained in Articles 16 and 17 of the Convention on Certain Questions relating to the Conflict of Nationality Laws are adequate. The rule contained in Article 18 of the Convention could be generalized as follows :

“ A minor child shall not lose its nationality in consequence of the loss of nationality by either of its parents unless it acquires another nationality.”

(b) *As a result of voluntary action by the national*

Statelessness rarely results from renunciation of nationality. No special rule seems indicated, nor would it be desirable to tie the individual irrevocably to a State from which he has severed his connexion. (The rule on expatriation permits contained in Article 7 of The Hague Convention on Certain Questions relating to the Conflict of Nationality Laws contributes, however, to the reduction of statelessness in case of release from nationality.)

(c) *As a result of unilateral action by the State.*
Denationalization. Denaturalization.

The Universal Declaration of Human Rights proclaims in Article 15 “ No one shall be arbitrarily deprived of his nationality. . . .”

The reasons for which denationalization or denaturalization may take place are, as a rule, established by law, and may rarely be regarded as arbitrary.

A rule that “ nobody shall be deprived of his nationality by a unilateral act of the State unless and until he acquires another nationality ” has frequently been advocated, e.g., by the International Law Association at its session in Stockholm in 1924 and by the Institute of International Law at its session in Stockholm in 1928. Governments were, however, not ready to accept such a rule. Moreover, the objections against such a rule from the aspect of the individual would appear to be particularly strong. Even if, by international agreement, States could be obliged to refrain from denationalization, they could not be obliged to grant to the individuals concerned those rights which are usually implied in nationality. By denationalization, the individual loses the rights resulting from nationality, but he may also be relieved from his duties towards the State of nationality. By the abolition of denationalization, the individual would not be relieved from these duties while his rights could not be guaranteed in the absence of an International Bill of Rights. It appears, therefore, that the abolition of unilateral deprivation of nationality should be linked up with an international guarantee of human rights.

Nor does it seem likely that a proposal for the abolition of denationalization as a penalty would be accepted favorably by governments.

A more hopeful course would seem to consist in efforts to restrict the grounds on which denationalization may be imposed. Some of these grounds — such as acceptance of foreign honours or commission of common crimes — would seem to be based on a confusion of citizenship rights and

nationality status. While there may be ground in such cases to withdraw certain rights of citizenship (e.g., political rights), there seems hardly to be any reason for the withdrawal of nationality in such cases which ultimately may cast a burden on other States. Agreement on internationally recognized grounds for denationalization and a stricter definition of such vague grounds as “ disloyalty ” or “ disaffection ” would be desirable.

Denaturalization on the ground that naturalization was obtained illegally is certainly justifiable. There seems, however, little justification for the practice of admitting denaturalization on wider grounds than denationalization, except in cases where the naturalized person returns to his native country with the intention to remain there or where he voluntarily re-acquires his former nationality when it will, however, not result in statelessness. Naturalization usually takes place after thorough screening of the applicant only, while acquisition of nationality by birth may be purely accidental and does not provide any greater guarantee of loyalty.

Except in the above-stated cases denaturalization should, therefore, be admissible only on the same grounds as denationalization.

It has already been stated that collective denationalization is a far more serious cause of statelessness than individual denationalization. It has, in the past, often been resorted to for reasons of a discriminatory nature. Such discriminatory action seems to many persons to be inconsistent with the Purposes and Principles of the Charter of the United Nations. It has been argued that the Charter of the United Nations imposes a duty on Member States to refrain from discrimination on the ground of race, sex, language or religion. If, however, an International Bill of Human Rights prohibiting discrimination should be adopted, discriminatory denationalization by States parties to the Bill would become illegal.

In order to reduce statelessness, collective denationalization should be prohibited. For this purpose the following rule may be suggested :

“ No person shall be deprived of his nationality except in pursuance of a decision reached by the competent authority in each individual case in accordance with due process of law (unless the deprivation of nationality results from the acquisition of another nationality).”
(d) *As a result of territorial changes*

Statelessness has resulted in consequence of changes of sovereignty over territories for a variety of reasons. Statelessness is frequently created in consequence of territorial changes by the fact that the nationality of the predecessor State is withdrawn from the inhabitants of the territory which is subject to the change of territory, by operation of law, e.g., if they exercise a right of option for another nationality, regardless of whether they acquire another nationality.

Statelessness would be avoided in these cases if loss of nationality as a result of transfer of territory would be made conditional on the acquisition of another nationality. Any acquiring State could, moreover, be bound by an international convention to confer its nationality on the inhabitants of the transferred territory subject to a right of option to retain the nationality of the predecessor State.

It is, however, doubtful whether States would be prepared to undertake in an international convention general obligations for future cases of transfer of territory, but this objection seems to be less strong as regards the first principle suggested.

⁵⁴ International Union for Child Welfare, *Stateless Children*, Geneva, 1947.

3. Reduction of statelessness by the conferment of nationality after birth

(a) By operation of law.

According to the laws of some States children acquire their nationality subsequent to birth by operation of law or on option; e.g., under the law of the United States;

(1) A child born outside the United States one of whose parents is an alien and the other a citizen of the United States if the alien parent is naturalized while the child is under the age of eighteen years and it resides in the United States at the time of naturalization (Nationality Act, 1940 (8 U.S.C. §713));

(2) A child born outside the United States of alien parents if both parents are naturalized and on certain other conditions, provided the child resides in the United States (Nationality Act, 1940 (8 U.S.C. §714));

(3) A child born outside the United States one of whose parents is a citizen of the United States may be naturalized on petition of the citizen parent if it is under eighteen years of age and residing permanently in the United States with the citizen parent (Nationality Act, 1940 (8 U.S.C. §715)). Under the law of the United Kingdom :

(1) A child born abroad of a father who is a citizen by descent shall be a citizen if the birth is registered at a United Kingdom consulate within one year of the occurrence or, with the permission of the Secretary of State, later (British Nationality Act, 1948, Article 5);

(2) A minor child of a citizen may be registered as a citizen upon application by a parent or guardian; in special circumstances, any minor may be so registered (British Nationality Act, 1948, Article 7).

Under the law of France :

A child born in France of alien parents acquires French nationality when it reaches full age provided it resides in France and had its habitual residence in French territory since the age of sixteen (*Code de la nationalité*, 1945, Article 44).

Under the recently enacted nationality laws of the Scandinavian countries, a stateless person born in the country and having been in continuous residence there, acquires the nationality concerned when he, between his eighteenth and his twenty-third year of age, declares his intention of becoming a national (*Cf.*, for example, Norwegian Nationality Act, 1950, sec. 8). Such provisions tend to reduce statelessness. If, however, the rules mentioned above were adopted, such persons would become nationals at birth.

(b) By naturalization

Statelessness is reduced by the naturalization of stateless persons in their country of residence. In order to become naturalized, a stateless person has to comply with the general requirements for naturalization prescribed by the municipal law of the country concerned.

It has been suggested that the naturalization of stateless persons should be facilitated. (Resolution 319 B III (XI) of the Economic and Social Council; *cf.*, also, Article 34 of the Convention relating to the Status of Refugees, 1951).

The laws as well as the practice of States as regards naturalization differ greatly. Naturalization is, in some States, made difficult by certain conditions required by law or, more frequently, by administrative regulations or practice, which either affect aliens in general or, in particular, stateless persons. Requirements which render naturalization of aliens in general difficult are :

(1) Prolonged residence requirements (in Belgium, ten years' habitual residence for "ordinary naturalization",

fifteen years, for full naturalization; in Luxembourg, fifteen years residence).

(2) Complicated and costly procedure, which sometimes delays naturalization far beyond the minimum period of residence required by law.

(3) High fees.

(4) Stringent requirements as to the possession of property.

Requirements which create particular difficulties in the naturalization of stateless persons are.

(1) Proof of statelessness (Ecuador) or proof that the applicant has not availed himself of the opportunity of retaining his former nationality and that he loses it or has lost it (Luxembourg law of 9 March 1940, Article 7) or proof that the applicant will not retain his former nationality (Belgian law of 14 December 1932, Article 14).

Statelessness, as a negative fact, is difficult to prove. Stateless persons are often unable to obtain documentary evidence of loss of nationality from the authorities of the country of their former nationality.

(2) Production of documents from the country of former nationality or habitual residence.

It has also been suggested to grant priority in naturalization to certain categories of stateless persons who may be considered to be especially attached to the country of their residence. (*Cf. A Study of Statelessness, op. cit.*, p. 168.)

Naturalization is, however, in all countries a question which is decided on grounds of national, demographic policy and where the interest of the State is the overriding consideration (see Belgian observations in pursuance of the Economic and Social Council's resolution 319 B III (XI), document E/1869, Add.7). It seems unlikely that Governments would be prepared to undertake obligations by international agreement regarding naturalization, nor is it probable that they would be ready to grant privileges to applicants on the ground of their statelessness as each case is considered on its merits, from the aspect of national interests (see observations of the United Kingdom, document E/1869, Add.14).

International action in this matter would, therefore, seem to be limited to recommendations.

(c) By reinstatement into former nationality

The number of cases of relative statelessness can be reduced by reinstatement into the nationality which the stateless person has lost.

Thus, the legislation providing for discriminatory denaturalization and denaturalization which was enacted by Nazi Germany and her satellites was repealed after the war by the Allied occupation authorities or the legitimate governments of the countries concerned. In Germany, reinstatement takes place on individual request.

In the U.S.S.R. several decrees were promulgated under which former nationals of the Russian Empire or former Soviet nationals who resided in certain areas were enabled to acquire or re-acquire Soviet nationality by option. A similar Amnesty Law has recently been enacted in Hungary. (For further examples, see *A Study of Statelessness, op. cit.*, pp. 164-165.)

Such reinstatement is obviously a question of national policy and cannot be regulated by international conventions, but it could be recommended as a means of reducing statelessness.

4. Reduction of statelessness by international arbitration

The activities of the Mixed Commission and the Arbitral Tribunal established by the Geneva Convention concerning

Upper Silesia of 1922 have proved the usefulness of international arbitration for the settlement of disputes in questions of nationality, particularly in case of territorial changes. The special features of this procedure were :

- (1) It could be instituted by the interested individual;
- (2) Individuals had direct access to the international tribunal;
- (3) The decision of the tribunal on nationality had binding effect *erga omnes* within the territories of the Contracting States.

The establishment of international arbitration for the settlement of disputes on nationality could do much to reduce statelessness. The question whether a person possesses the nationality of *another* State is frequently prejudicial for the determination of the nationality of a person by the authorities of the State whose nationality is in issue. In order to decide on the preliminary question they have to resort to the law of the foreign State, but this preliminary decision may be at variance with the determination of nationality by the authorities of the other State. If, in the determination of the authorities of the first State, the person is a national of the other State, but if in the determination of the second State's own authorities he is not such a national, a negative conflict on nationality arises which results in statelessness.

Statelessness would be avoided if recourse could be taken to an international tribunal which could determine the nationality of the person with binding effect on the authorities of both States.

SECTION VI. POINTS FOR DISCUSSION

The Rapporteur hopes that the foregoing exposition and analysis of the problem and of possibilities for its solution will furnish a sound basis for the deliberations and decisions of the Commission. In view of the fact that any solution of the problem of statelessness involves considerations of a political nature, the Rapporteur does not wish to make concrete proposals to the Commission. The following points are submitted for discussion :

A. Elimination of statelessness

1. It is difficult to envisage any measures which would wholly eliminate the statelessness of presently stateless persons. (Measures for reducing the number of such persons are suggested later.)

2. The general adoption of the following rules would preclude future additions to the number of stateless persons.

(i) If no other nationality is acquired at birth, every person shall acquire at birth the nationality of the State in whose territory he is born. This would extend *pro tanto* the application of the *jus soli* rule in many countries.

(ii) No person shall lose his nationality unless such person acquires another nationality.

3. The universal or general adoption of the rules stated in paragraph 2 seems to be improbable, even if the rules were thought to be desirable.

B. Reduction of presently existing statelessness

4. In lieu of an attempt to eliminate statelessness, efforts may be concentrated on the reduction of statelessness.

5. The number of persons who are presently stateless could be reduced by their naturalization in the countries in which they are habitually resident.

6. In cases in which presently stateless persons have previously possessed a nationality, the number of presently

stateless persons could be reduced by their reinstatement into a nationality previously possessed.

7. It seems improbable that many States would be willing to assume an obligation to naturalize (paragraph 5) or to reinstate (paragraph 6) presently stateless persons. Any measures to be adopted on these lines may therefore be limited to recommendations, as in resolution 319 B III (XI) of the Economic and Social Council of 11 August 1950, and in Article 34 of the 1951 Convention on Status of Refugees.

8. Can any useful system of arbitration be devised, on analogy to the precedent established in Upper Silesia, for resolving conflicts between national laws which have resulted in statelessness? (*Cf. Transactions of the Grotius Society, op. cit.*, vol. 28 (1942), pp. 151 ff.)

C. Reduction of statelessness arising in the future

9. Measures for the reduction of statelessness arising in the future require international legislation. The 1930 Hague Convention and the Special Protocol relating to a Certain Case of Statelessness are not sufficient for this purpose, and it seems better to draw up new international instruments. The Hague Convention does not deal exclusively with statelessness, and the provisions relating to this problem have done little to reduce statelessness; moreover, chapter III relating to the nationality of married women would be superseded by the adoption of a Convention on the Nationality of Married Persons as contained in Annex II.

10. It seems possible, therefore, that a new convention or conventions should be drawn up. The Commission will have to decide whether

(i) It considers the subject sufficiently ripe for international legislation and wishes, therefore, to proceed immediately to the drafting of one or several conventions; or

(ii) Whether it is necessary to ascertain the views of governments on the various possibilities regarding the substance of such an international instrument or instruments.

In the latter case, the Commission might wish to set out the various possibilities in the form of a questionnaire addressed to governments and may proceed to the drafting of texts only after the replies have been received and examined.

11. In doing so, the Commission may

(i) Draw up a single convention containing uniform provisions which would have to be accepted by all Contracting States;

(ii) The Commission may find that the problem is not amenable to a uniform solution because the principles of *jus soli* and *jus sanguinis* are too deeply rooted in the legal tradition and policy of States and may, therefore, decide to draw up several conventions. In view of the fact that various combinations of the two principles exist in municipal laws on nationality it might, in this case, be desirable to draw up more than two conventions whose provisions would be adjusted to the main systems of nationality laws. (*Cf. the above-mentioned suggestions of the International Union for Child Welfare.*)

As regards the substantial provisions of such a convention, the following points should be considered :

12. Supplementing existing law in *jus soli* countries, a child born abroad shall acquire the nationality of the State if one of the parents has such nationality, provided that it does not acquire at birth the nationality of another State. This may have to be qualified by some additional identification of the parent with the State.

13. Supplementing existing law in *jus sanguinis* countries, a child, wherever born, of a national shall acquire the nationality of the State, provided that it does not acquire at birth the nationality of another State. This may have to be qualified by some additional identification of the parent with the State.

14. A child born of unknown parents, of stateless parents, or of parents whose nationality is undetermined, shall acquire the nationality of the State in whose territory it is born. (Cf. Articles 14 (1) and 15 of The Hague Convention).

A foundling shall be presumed to have been born in the territory of the State in which it was found, until the contrary is proved; and birth on a national vessel shall be deemed to constitute birth in the national territory.

15. If a child acquires no nationality at birth, it may subsequently acquire the nationality of the State to which it is specifically identified by criteria to be defined in an international convention; e.g., continuous residence within the territory of the State for a prescribed period, perhaps followed by a declaration to be made by the child at a certain age.

16. If the law of the State whose nationality is possessed by a person recognizes that such nationality may be lost as a consequence of a change in the person's personal status (legitimation, recognition, adoption), such loss shall be conditioned upon the acquisition of the nationality of another State in consequence of the change of personal status.

17. A minor child shall not lose a State's nationality as a consequence of the loss of that nationality by either of

its parents unless it acquires the nationality of another State.

18. No person shall be deprived of the nationality of a State, when such person does not acquire the nationality of another State, (a) except on decision in each case by a competent authority acting in accordance with due process of law; or alternatively (b) except on the following grounds:

(i) Cancellation of naturalization on ground of non-compliance with governing law;

(ii) Continuous residence of naturalized person abroad (or in the country of his origin);

(iii) Evasion of military service.

19. If neither (a) nor (b) of paragraph 18 is acceptable, the following rules shall be applicable with reference to territory over which the sovereignty is transferred:

(i) If the transferring State continues to exist, no person inhabiting the transferred territory shall lose his nationality as a consequence of the transfer, unless he acquires the nationality of another State;

(ii) The State to which the territory is transferred shall confer its nationality on the persons inhabiting the territory, subject to their option to retain the nationality of the transferring State if the latter continues to exist;

(iii) The State to which the territory is transferred may not impose its nationality against their will on persons who have previously inhabited the transferred territory but have established their habitual residence elsewhere.

[Alternative — leave this whole matter to be dealt with by treaty.]

RÉGIME OF THE TERRITORIAL SEA

DOCUMENT A/CN.4/53

Rapport par J. P. A. François, rapporteur spécial

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Introduction

1. Afin de faciliter la discussion, le rapporteur spécial se permet de présenter son rapport sous forme d'une série d'articles, suivis de commentaires. Le but de ce rapport est principalement de déblayer le terrain très vaste qui devra être examiné.

2. En rédigeant ce rapport, le rapporteur spécial s'est inspiré dans une large mesure du rapport qu'il avait eu l'honneur de soumettre, en sa qualité de rapporteur de la Deuxième Commission à la Conférence pour la codification du droit international de 1980, sur la mer territoriale : ce rapport¹, adopté par la Conférence plénière, était accompagné de deux appendices. Le premier était intitulé « Régime juridique de la mer territoriale » et contenait un avant-projet de treize articles, traitant du régime général et du droit de passage. L'autre appendice, intitulé « Rapport de la Sous-Commission II », contenait des dispositions sur la ligne de base, les baies, les ports, les rades, les îles, les groupes d'îles, les détroits, le passage de navires de guerre dans les détroits et la délimitation de la mer territoriale à l'embouchure d'un fleuve. Le passage suivant du rapport explique la portée de ces appendices :

« La première Sous-Commission avait élaboré et adopté treize articles relatifs aux sujets qu'elle avait à étudier. La Commission était appelée à décider quel serait le sort qu'on devait réserver à ce travail. Quelques délégations étaient d'avis que, nonobstant l'impossibilité de parvenir à un accord concernant l'étendue de la mer territoriale, la conclusion d'une convention sur le régime juridique de cette mer était possible et désirable; pour cette raison, elles proposèrent d'incorporer ces articles dans une convention à adopter par la Conférence. La plupart des délégations n'ont pu se rallier à ce point de vue. Les articles en question étaient conçus comme partie éventuelle d'une convention qui établirait la largeur de la mer territoriale. L'acceptation de ces articles avait, dans plusieurs cas, un caractère transactionnel et avait été subordonnée à la condition expresse ou tacite qu'un accord concernant la largeur de la zone serait atteint. A défaut de cet accord, il ne pouvait être question de la conclusion d'une convention dans laquelle ces seuls articles seraient incorporés. Une troisième opinion de caractère transactionnel, fondée sur un précédent récent, s'est fait jour : on consignerait les articles dans une convention qui pourrait être signée et ratifiée, mais dont l'entrée en vigueur serait subordonnée à celle d'un accord ultérieur concernant l'étendue de la zone. Finalement, on s'est rallié à l'idée de ne pas procéder à la conclusion immédiate d'une convention, et on a décidé d'annexer au rapport de la Commission (appendice I, p. 126), les articles proposés par la première Sous-Commission et approuvés à titre provisoire par la Commission.

¹ Publication de la Société des Nations, Annexe 10 aux Actes de la Conférence pour la codification du droit international, vol. I, séances plénières, V. *Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), pp. 123 et suiv. Publié séparément dans V. *Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V).

« Le manque d'un accord concernant l'étendue de la mer territoriale a eu encore plus d'influence sur la suite à donner au Rapport de la deuxième Sous-Commission. La relation entre les questions que cette Sous-Commission avait à examiner et l'étendue de la mer territoriale est si étroite que l'absence de règles relatives à la largeur de la zone a empêché la Commission de se prononcer, même à titre provisoire, sur les articles élaborés par cette Sous-Commission. Ces articles, qui constituent quand même un matériel précieux pour la continuation des études en cette matière, ont été également annexés au présent rapport (appendice II, p. 181)². »

3. Le rapporteur spécial propose de proclamer dans le chapitre premier, intitulé « Dispositions générales », le principe de la souveraineté de l'Etat riverain sur la mer territoriale. Dans le même chapitre la question du sol recouvert par cette mer, ainsi que celle du sous-sol, a été réglée. Etant entendu que la Commission ne désire pas s'occuper en ce moment du régime aérien, toute référence au régime de l'espace atmosphérique au-dessus de la mer territoriale a été omise. Dans le chapitre II, intitulé « Etendue de la mer territoriale », on traite de la largeur de la mer territoriale et de différentes questions qui s'y rattachent. Si la Commission accepte le principe de la souveraineté, il ne sera pas nécessaire de régler les droits de l'Etat riverain en ce qui concerne la pêche et le cabotage, ainsi que d'autres droits qui découlent *ipso jure* de la notion de la souveraineté. Par contre, il faudra traiter explicitement certains points sur lesquels la souveraineté de l'Etat riverain est limitée; il s'agit notamment du droit de passage inoffensif dans la mer territoriale pour différentes catégories de navires étrangers, et de certaines limitations dans la juridiction que l'Etat riverain peut exercer sur les navires pendant le passage. Cette matière est traitée dans le chapitre III, intitulé « Le droit de passage ».

4. Le rapporteur spécial ne voulant pas dépasser les limites de son mandat, ne s'est occupé que du régime de la mer territoriale en temps de paix. Suivant l'exemple donné par la Conférence de la codification de 1980, le rapport ne traite pas des droits des belligérants et des neutres en temps de guerre; aussi le rapporteur a-t-il laissé de côté la Déclaration de Panama de 1989, envisageant l'exercice par les Etats neutres de droits spéciaux dans certaines parties de la mer en temps de guerre. Cela n'implique toutefois nullement que, lors de la fixation de la largeur de la mer territoriale, il ne faudra pas se rendre compte des répercussions que la décision à prendre exercera sur les droits des belligérants et des neutres en temps de guerre, vu que la délimitation, telle qu'elle sera fixée, s'appliquera également en temps de guerre. En effet, il ne serait pas opportun de fixer l'étendue de la mer territoriale différemment pour le temps de paix d'une part, et pour les situations de guerre et, le cas échéant, de neutralité d'autre part.

² *Ibid.*, pp. 124-125 et p. 4, respectivement.

PROJET DE RÈGLEMENT

Chapitre premier

DISPOSITIONS GÉNÉRALES

Article premier. — Dénomination de la mer territoriale

Le territoire de l'Etat comprend une zone de mer désignée sous le nom de mer territoriale.

Commentaire

1. Le texte proposé est, sauf une modification de forme, identique au paragraphe premier de l'article premier du Règlement de 1930. Le rapporteur voudrait recommander l'expression « mer territoriale », parce que cette expression indique clairement que les eaux intérieures ne sont pas comprises. Le rapport de 1930 s'est exprimé comme suit :

« On a hésité entre le choix des expressions eaux territoriales et mer territoriale. En faveur du premier terme, qui était employé par le Comité préparatoire, militent l'usage plus général et l'emploi dans plusieurs conventions internationales. Toutefois, on ne saurait contester que ce terme est de nature à prêter — et prêle en effet — à des confusions du fait qu'on s'en sert aussi pour indiquer les eaux intérieures, ou bien l'ensemble des eaux intérieures et des eaux territoriales, dans le sens restreint du mot. Pour ces raisons, on a donné la préférence à l'expression mer territoriale³. »

2. Tout en reconnaissant qu'il n'existe pas encore à ce sujet une unité absolue, on peut constater que depuis 1930 l'expression mer territoriale a déjà gagné du terrain. En ce qui concerne la dénomination en anglais, le rapporteur, bien que se rendant compte qu'on préfère parfois l'expression *territorial waters*, *marginal sea* ou *maritime belt* et que l'expression *territorial sea* n'y a pas encore le même droit de cité que parmi les auteurs de langue française l'expression « mer territoriale », voudrait proposer tout de même la dénomination *territorial sea*.

3. Pour indiquer l'Etat qui exerce la souveraineté sur la mer territoriale, on se sert également de différentes expressions; le rapporteur préfère celle d'« Etat riverain » à « Etat côtier ».

Article 2. — Caractère juridique de la mer territoriale

La souveraineté sur cette zone s'exerce dans des conditions fixées par le droit international.

Commentaire

1. Le paragraphe 2 de l'article premier du Règlement approuvé par la deuxième commission de la Conférence de codification de 1930 était libellé comme suit :

« La souveraineté sur cette zone s'exerce dans les conditions fixées par la présente Convention et par

les autres règles du droit international ». Le rapport contenait à ce sujet les observations suivantes :

» En stipulant que la zone de mer territoriale forme une partie du territoire de l'Etat, on a voulu exprimer que le pouvoir exercé par l'Etat sur cette zone ne diffère point, de par sa nature, du pouvoir que l'Etat exerce sur le domaine terrestre. C'est également pour cette raison qu'on a retenu le terme « souveraineté », qui caractérise mieux que tout autre la nature juridique de ce pouvoir. Il est évident que la souveraineté sur la mer territoriale, comme d'ailleurs celle sur le domaine terrestre, ne saurait s'exercer que conformément aux règles fixées par le droit international. Vu que les limitations que le droit international impose au pouvoir étatique quant à la souveraineté sur la mer territoriale sont plus grandes que celles relatives au domaine terrestre, on n'a pas cru superflu de faire expressément mention de ces limitations dans le texte même de l'article. Les limitations préconisées devront être cherchées en premier lieu dans la présente Convention; étant donné cependant que cette Convention ne pourrait tendre à épuiser la matière, il s'imposait de se référer également aux autres règles du droit international⁴. »

2. Le rapporteur spécial n'hésite pas à caractériser la nature juridique du pouvoir exercé par l'Etat riverain sur la bande de mer en question comme « souveraineté ». Depuis la Conférence de codification cette conception a été presque généralement adoptée; il n'y a que très peu de voix qui, notamment en France, s'inspirant des idées énoncées par M. de la Pradelle déjà en 1898, continuent à nier la souveraineté de l'Etat riverain et à ne lui attribuer que certains droits de police ou de conservation. Il s'agit notamment de MM. Le Fur⁵, Aman⁶ et Sibert⁷. Le Conseil d'Etat s'est prononcé dans le même sens dans une décision en date du 24 mai 1935 :

« La mer territoriale est la portion de mer sur laquelle s'exercent les pouvoirs de police de l'Etat; elle ne fait pas partie du domaine public de l'Etat riverain⁸. »

3. La presque totalité des auteurs contemporains reconnaît toutefois la souveraineté de l'Etat riverain, tout en se servant quelquefois de termes différents comme : *impérium*, *dominium*, juridiction et même propriété. Le rapporteur voudrait citer en exemple : Gidel⁹, Lauterpacht¹⁰, Starke¹¹, Kelsen¹², Verdross¹³,

⁴ *Ibid.*

⁵ *Précis de droit international public* (Paris, Dalloz, 1939), p. 425.

⁶ *Le statut de la mer territoriale* (Paris, Pedone, 1938), pp. 31 et 307.

⁷ *Traité de droit international public* (Paris, Dalloz, 1951), p. 721.

⁸ *Revue de droit international*, vol. XVII (1936), p. 303.

⁹ La mer territoriale et la zone contiguë, *Recueil des cours de l'Académie de droit international*, 1934, II, p. 139.

¹⁰ Sovereignty over Submarine Areas, *British Year Book of International Law*, 1950, p. 387.

¹¹ *An introduction to International Law* (Londres, Butterworth & Co., 1950), pp. 145 et 147.

¹² *General Theory of Law and State*, 1946, p. 211.

¹³ *Völkerrecht* (Vienne, Springer Verlag, 1950), p. 173.

³ *Ibid.*, p. 126 et p. 6, respectivement.

Sauer¹⁴, Guggenheim¹⁵, Quadri¹⁶, Florio¹⁷, Balladore Pallieri¹⁸, Accioly¹⁹, Mateesco²⁰, etc.

4. Parmi les traités récents dans lesquels la notion de la souveraineté a été adoptée, il faut relever le Traité de paix avec le Japon en date du 8 septembre 1951, dont l'article premier sous *b* est libellé comme suit :

« Les Puissances alliées reconnaissent la pleine souveraineté du peuple japonais sur le Japon et ses eaux territoriales²¹. »

5. On pourrait emprunter un même argument à la Convention relative à l'aviation civile internationale, adoptée à Chicago le 7 décembre 1944, dont l'article 2 dit :

« Aux fins de la présente Convention, il faut entendre par territoire d'un Etat les régions terrestres et les eaux territoriales y adjacentes placées sous la souveraineté, la suzeraineté, la protection ou le mandat dudit Etat²². »

6. L'acceptation de la notion de souveraineté n'exclut point que l'exercice de cette souveraineté est limité par le droit international :

« En fait, toute la partie du droit international qui traite du territoire de l'Etat et de la souveraineté territoriale est constamment traversée par le thème de la limitation de la souveraineté en divers domaines et dans différentes directions²³. »

Cette idée a été exprimée dans le texte de l'article.

7. Il s'ensuit de ce qui précède qu'on pourrait se rallier au texte tel qu'il a été adopté par la Deuxième Commission de 1980, sauf certaines modifications de rédaction, résultant du fait que, pour le moment, il ne s'agit pas d'incorporer les dispositions dans une convention.

Article 3. — Caractère juridique du sol et du sous-sol

1. Le territoire de l'Etat riverain comprend aussi le sol recouvert par la mer territoriale, ainsi que le sous-sol.

2. Les dispositions du présent Règlement ne portent pas atteinte aux conventions et aux autres règles du droit international relatives à l'exercice de la souveraineté dans ces domaines.

¹⁴ *Grundlehre des Völkerrechts*, 3^e éd., p. 84. (Cologne, Carl Heymanns Verlag, 1955).

¹⁵ *Lehrbuch des Völkerrechts* (Bâle, Verlag für Recht und Gesellschaft, 1948), vol. I, p. 350.

¹⁶ *Diritto internazionale pubblico* (Palerme, Priulla, 1949), p. 423.

¹⁷ *Il mare territoriale e la sua delimitazione* (Milan, A. Giuffrè, 1947), p. 27.

¹⁸ *Diritto internazionale pubblico* (Milan, A. Giuffrè, 1948), p. 301.

¹⁹ *Traité de droit international public*, 1941, II, p. 97.

²⁰ *Vers un nouveau droit international de la mer* (Paris, Pedone, 1950), p. 45.

²¹ United Nations, *Treaty Series*, vol. 136, p. 49.

²² Hudson, *International Legislation* (New-York, Carnegie Endowment, 1950), vol. IX, p. 169.

²³ Lauterpacht, *op. cit.*, *British Year Book of International Law*, 1950, p. 391.

Commentaire

1. L'article 2 adopté en 1980 était conçu comme suit :

« Le territoire de l'Etat riverain comprend aussi l'espace atmosphérique au-dessus de la mer territoriale, ainsi que le sol recouvert par cette mer et le sous-sol.

» Les dispositions de la présente Convention ne portent pas atteinte aux conventions et aux autres règles du droit international relatives à l'exercice de la souveraineté dans ces domaines²⁴. »

2. Sauf une légère modification de rédaction et sauf l'omission de l'espace atmosphérique (voir p. 26 ci-dessus), les deux paragraphes de l'article proposé sont identiques à ceux de l'article 2 du Règlement de 1980.

3. Il s'ensuit de la souveraineté sur la mer territoriale, proclamée à l'article 2, que le territoire de l'Etat riverain comprend, à défaut de limitations expressément stipulées, le sol recouvert par la mer territoriale, ainsi que le sous-sol. Bien qu'il existe parmi les auteurs quelques opinions dissidentes²⁵, la pratique d'un certain nombre d'Etats accepte cette souveraineté. D'ailleurs la Commission du droit international dans les projets d'articles sur le plateau continental adoptés en 1951 (art. 1^{er}, sous 9) s'est déjà prononcée dans ce sens²⁶.

4. A toutes fins utiles le rapporteur se permet de rappeler que la Commission du droit international a décidé de séparer nettement le droit qui incombe aux Etats en ce qui concerne le plateau continental, d'une part, et les pouvoirs que les Etats peuvent exercer à l'égard du sol et du sous-sol de la mer territoriale, d'autre part.

Chapitre II

ETENDUE DE LA MER TERRITORIALE

Article 4. — Largeur

La largeur de la zone de mer désignée dans l'article premier sera fixée par l'Etat riverain, mais elle ne saurait dépasser six milles marins.

Commentaire

1. La Conférence de 1980 n'est pas parvenue à un accord qui fixerait pour l'avenir l'étendue de la mer territoriale. Elle s'est abstenue de se prononcer sur la question de savoir si le droit international en vigueur

²⁴ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 126; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V), p. 6.

²⁵ Fauchille, *Traité de droit international public* (Paris, Rousseau et C^{ie}, 1925), vol. I : 2, p. 204.

²⁶ Rapport de la Commission du droit international sur les travaux de sa troisième session, *Documents officiels de l'Assemblée générale, sixième session, Supplément n° 9* (A/1858), p. 23.

reconnait ou non l'existence d'une largeur déterminée de cette zone ²⁷.

2. L'examen de la législation actuellement en vigueur, telle qu'elle a été recueillie notamment par le Secrétariat, donne les résultats suivants ²⁸.

ALLEMAGNE (RÉPUBLIQUE FÉDÉRALE D')	3 milles
ARABIE SAOUDITE *	6 milles
Sécurité	12 milles
Douane	12 milles
ARGENTINE *	1 lieue
Sécurité	4 lieues
Douane	4 lieues
Pêche	12 milles
AUSTRALIE	3 milles
BELGIQUE	3 milles
Douane	10 kilomètres
BRÉSIL *	3 milles
Pêche	12 milles
BULGARIE	12 milles
CANADA	3 milles
Douane	3 lieues
Pêche	12 milles
CEYLAN	3 milles
Douane	2 lieues
CHILI *	50 kilomètres (1948)
Sécurité	100 kilomètres
Douane	100 kilomètres
CHINE	3 milles
Douane	12 milles
COLOMBIE	6 milles (1980)
Pêche	12 milles
Pollution de la mer	12 milles
Douane	20 kilomètres
CORÉE (RÉPUBLIQUE DE) *	
Pêche	50 à 60 milles
COSTA-RICA *	
Pêche	12 milles
Pollution de la mer	3 milles
CUBA	6 milles
Douane	12 milles
Pêche	3 milles
Pollution de la mer	5 milles
Défense sociale	8 milles
Sécurité (frontière maritime)	8 milles
DANEMARK	1 lieue ordinaire
Douane	1 mille marin (4 kwartmil)
Pêche	3 milles
Groenland	3 milles

EGYPTE	6 milles
Sécurité	12 milles
Navigation	12 milles
Mesures sanitaires	12 milles
Douane	12 milles
Pêche	3 milles
EQUATEUR	12 milles
Sécurité	4 lieues
Douane	4 lieues
Neutralité	4 lieues
Pêche	12 milles
ESPAGNE	6 milles
Douane	6 milles
Neutralité	3 milles
Pêche	6 milles
Maroc espagnol	
Neutralité	3 milles
ETATS-UNIS D'AMÉRIQUE *	3 milles
Douane	4 lieues
Californie	3 milles
Floride	3 lieues
Louisiane	27 milles
Oregon	1 lieue
Washington	1 lieue
FINLANDE	4 milles
Douane	6 milles
FRANCE	
Pêche	3 milles
Neutralité	6 milles
Douane	20 kilomètres
Sécurité	8 à 6 milles
Algérie	
Pêche	3 milles
Indochine	
Pêche	2 myriamètres
Maroc	
Pêche	6 milles
Tunisie	
Douane	2 myriamètres
GRÈCE	6 milles
Neutralité	6 milles
Sécurité	10 milles
GUATEMALA *	12 milles
Douane	2 lieues
HONDURAS *	12 kilomètres
INDE	1 lieue
INDONÉSIE	3 milles
IRAN *	6 milles
Douane	12 milles
Sécurité	12 milles
IRLANDE	d'après le droit international
ISLANDE	4 milles
ISRAËL	3 milles

²⁷ Pour un exposé des différents points de vue, voir le rapport de la Deuxième Commission; publications de la Société des Nations, *V. Questions juridiques, 1930.V.14* (document C.851.M.145.1980.V), pp. 128-124; *V. Questions juridiques, 1930.V.9* (document C.230.M.117.1930.V), p. 8.

²⁸ Les Etats qui réclament des droits sur un « plateau continental » sont indiqués par un astérisque.

ITALIE	6 milles
Douane	12 milles
Sécurité navires de commerce ..	10 milles (en temps de paix)
Sécurité navires de guerre ...	6 milles (en temps de paix)
Sécurité navires de guerre et de commerce	12 milles (en temps de guerre)
Neutralité	6 milles
JAPON	3 milles
Neutralité	3 ri
LIBAN	
Pêche	6 milles
Douane	20 kilomètres
Loi pénale	20 kilomètres
LIBÉRIA	1 lieue
MEXIQUE *	9 milles (1945)
Pêche	20 kilomètres
Douane	20 kilomètres
NICARAGUA *	
NORVÈGE	1 lieue marine ordinaire
Pêche	1 lieue marine ordinaire (7.529 m)
Neutralité	3 milles
Douane	10 milles
PAKISTAN *	
PANAMA *	
PAYS-BAS	3 milles
PÉROU	3 milles
POLOGNE	
En 1932	3 milles
Défense	6 milles
Douane	6 milles
PORTUGAL	6 milles
Douane	6 milles
Pêche (1917)	réciprocité
Neutralité	6 milles
RÉPUBLIQUE DOMINICAINE	3 lieues
ROUMANIE	12 milles
ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD	3 milles
SALVADOR *	200 milles
Sécurité	4 lieues
Douane	4 lieues
SUÈDE	4 milles
Neutralité	3 milles
Douane	4 milles
Pêche (dans les eaux limitrophes du Danemark et de la Suède)	3 minutes-latitude
SYRIE	
Pêche	6 milles
Douane	20 kilomètres
TURQUIE	6 milles
Douane	4 milles

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES	12 milles
UNION SUD-AFRICAINE	8 milles
URUGUAY	5 milles
Pêche	3 kilomètres
VENEZUELA	3 milles
Sécurité	12 milles
Douane	12 milles
Protection des intérêts (1944) ..	12 milles
Neutralité	3 milles
Mesures sanitaires	12 milles
YOUgoslavie	6 milles
Douane	6 milles
Pêche	10 milles

3. Il résulte en outre de la documentation soumise par le Secrétariat qu'on a aussi déterminé, dans certains traités, la largeur de la mer territoriale. Dans la Convention pour régler la police de la pêche dans la mer du Nord, conclue le 6 mai 1882 entre l'Allemagne, la Belgique, le Danemark, la France, le Royaume-Uni et les Pays-Bas, on a adopté la règle des 3 milles²⁹. La Convention concernant le canal de Suez (29 octobre 1888), ne parlant expressément de « mer territoriale », contient néanmoins la stipulation suivante :

« ... les Hautes Parties contractantes conviennent qu'aucun droit de guerre, aucun acte d'hostilité ou aucun acte ayant pour but d'entraver la libre navigation du canal ne pourra être exercé dans le canal et ses ports d'accès, ainsi que dans un rayon de trois milles marins de ces ports, ... »³⁰

4. Une catégorie spéciale concerne les traités conclus dans le dessein de combattre la contrebande de boissons alcooliques. Certains de ces traités, notamment ceux entre les Etats-Unis et, respectivement, l'Allemagne, le Royaume-Uni et les Pays-Bas, contiennent la stipulation suivante :

« Les Hautes Parties contractantes déclarent que c'est leur ferme intention de maintenir le principe que la réelle limite des eaux territoriales est constituée par trois milles marins en partant de la côte vers la haute mer et mesurés à partir de la ligne de retrait des eaux³¹. »

5. Dans les traités des Etats-Unis avec d'autres pays (France, Italie, pays scandinaves, Belgique, Espagne, entre autres) la stipulation est remplacée par la suivante :

« Les Hautes Parties contractantes réservent respectivement leurs droits et revendications quant à l'étendue de leur juridiction territoriale, sans que l'arrangement actuel y porte préjudice³². »

6. Le rapporteur spécial se permet encore d'appeler l'attention sur un accord, conclu le 22 mai 1980 entre

²⁹ De Martens, *Nouveau Recueil général de traités*, 2^e série, vol. IX, p. 557.

³⁰ *Ibid.*, 2^e série, vol. XV, p. 560.

³¹ Société des Nations, *Recueil des traités*, vol. 27, p. 183; vol. 33, p. 440; vol. 41, p. 277.

³² *Ibid.*, vol. 26, p. 50; vol. 27, p. 368; vol. 29, p. 427; vol. 61, p. 416; vol. 67, p. 187; vol. 72, p. 172. De Martens, *op. cit.*, 3^e série, vol. XVII, p. 532.

l'Union des Républiques socialistes soviétiques et le Royaume-Uni, dans lequel il a été stipulé :

« Le Gouvernement de l'Union des Républiques socialistes soviétiques convient que les bateaux de pêche, immatriculés dans les ports du Royaume-Uni, sont autorisés à pêcher à une distance de trois à douze milles géographiques à partir de la laisse de basse mer le long du littoral nord de l'Union des Républiques socialistes soviétiques et des îles qui en dépendent. »

7. On y a ajouté :

« Aucune disposition du présent accord temporaire ne sera considérée comme préjugant les vues de l'une ou de l'autre partie contractante quant aux limites des eaux territoriales, au point de vue du droit international ³³. »

8. Les données qui précèdent démontrent clairement que l'unanimité en ce qui concerne l'étendue de la mer territoriale fait défaut. Tous les auteurs le constatent. Gidel s'exprime ainsi :

« Il n'existe pas d'autre règle de droit international concernant l'étendue de l'exercice des droits de l'Etat riverain sur ses eaux adjacentes que la règle minimum en vertu de laquelle tout Etat riverain possède sur les eaux adjacentes à son territoire jusqu'à une distance de trois milles le faisceau des droits inhérents à la souveraineté et au delà, pour certains intérêts déterminés, certaines compétences fragmentaires ³⁴. »

9. Scelle fait observer :

« En réalité il n'existe aucune règle coutumièrement établie, mais seulement les règles fixées par les Etats, soit de façon unilatérale, soit plus rarement de façon conventionnelle, et dont ils imposent le respect dans la limite où ils en ont le pouvoir... En somme, c'est l'anarchie ³⁵. »

10. Signalons toutefois que les Etats qui, lors de la Conférence de 1930, proclamaient la règle des 3 milles représentaient 80 pour 100 du tonnage mondial. Aussi Pearce Higgins et Colombos estiment-ils pouvoir affirmer :

« La limite des trois milles est la vraie limite des eaux territoriales ³⁶. »

11. Actuellement ce sont les Etats suivants qui adoptent la règle des 3 milles, ou bien pure et simple, ou bien en la combinant seulement avec une zone contiguë pour les droits douaniers, fiscaux et sanitaires (la seule zone contiguë que la Commission du droit international s'est déclarée prête à accepter) : Allemagne, Australie, Belgique, Chine, Danemark, Etats-Unis d'Amérique, Indonésie, Israël, Italie, Japon, Pays-Bas, Royaume-Uni et Union Sud-Africaine.

12. Même dans certains pays qui ont adopté l'étendue de 3 milles, on exprime toutefois des doutes sur la possibilité de maintenir ce point de vue.

« La marée irrésistible des intérêts économiques, politiques et sociaux — c'est ainsi que s'exprime Joseph Walter Bingham ³⁷ — se heurte à la doctrine anglo-américaine des trois milles. Cette doctrine est condamnée. »

13. De l'avis d'Edwin Borchard :

« Logiquement, il n'y a pas de raison apparente pour que les Etats-Unis d'Amérique demeurent indéfiniment fidèles à la règle des trois milles. Il semble qu'elle gêne les Etats-Unis plus qu'elle ne les avantage ³⁸. »

14. Hyde fait observer :

« La communauté internationale se trouve ainsi dans une situation particulière du fait que l'application d'une règle depuis longtemps consacrée par son droit des gens ³⁹ mécontente un grand nombre de ses membres. »

15. Westlake avait déjà en 1910 appelé la règle « tout à fait désuète et inappropriée ».

16. Dans ces conditions, le rapporteur spécial croit devoir constater qu'une proposition visant à fixer la largeur à 3 milles n'aura aucune chance d'aboutir; l'accord sur cette distance, soit *de lege lata*, soit *de lege ferenda*, lui semble exclu. Le problème exige néanmoins une solution, car, en laissant à chaque Etat la liberté absolue de fixer lui-même l'étendue de sa mer territoriale, on affecterait, d'une manière inadmissible, le principe de la liberté de la mer.

17. Alvarez, dans son opinion dissidente jointe à l'arrêt de la Cour internationale de Justice dans l'affaire de pêcheries (18 décembre 1951) ⁴⁰, a affirmé :

« Chaque Etat peut fixer l'étendue de sa mer territoriale et la manière de la compter, à condition de le faire d'une manière raisonnable, de pouvoir surveiller ladite zone, d'y remplir les obligations que le droit international lui impose, de ne pas violer les droits acquis des autres Etats, de ne pas nuire à l'intérêt général et de ne pas commettre d'abus du droit. »

18. Il est évident que ces critères n'offrent pas la précision juridique nécessaire à une codification des règles de droit.

19. Sibert ⁴¹ défend la thèse qu'il n'existe qu'une série de zones variables d'après la nature de la protection qui s'y rattache et, en outre, variant très souvent de pays à pays. C'est surtout en France et en Italie que cette théorie trouve des partisans. Florio ⁴², reprenant une thèse déjà défendue par l'Italien Sarpi en

³³ Société des Nations, *Recueil des Traités*, vol. 102, p. 105.

³⁴ *Le droit international public de la mer*, 1934, vol. III, p. 135.

³⁵ *Droit international public* (Paris, Domat-Montchrestien, 1948), p. 425.

³⁶ *The International Law of the Sea*, 2^e éd. (Londres, Longmans, Green and Co., 1959), p. 76. Voir aussi Fenwick, *International Law* (New-York, Appleton-Century-Croft, Inc., 1948), p. 376.

³⁷ *Proceedings of the American Society of International Law*, 1930, p. 62.

³⁸ *American Journal of International Law*, vol. 40 (1946), p. 61.

³⁹ *International Law*, vol. I, 1945, p. 455.

⁴⁰ *C.I.J.*, *Recueil 1951*, p. 150.

⁴¹ *Op. cit.*, 1951, p. 731.

⁴² *Op. cit.*, 1947, p. 103.

1686 et par l'Argentin Storni en 1922⁴³, est d'avis qu'il ne serait pas nécessaire d'exiger l'uniformité en cette matière et que l'on pourrait adopter un système par lequel des étendues différentes seraient fixées pour les différentes parties de la côte d'un pays et pour différentes parties du monde. Le rapporteur ne saurait accepter ces suggestions; il partage l'opinion de Gidel :

« Quant à définir ces exigences locales, c'est ce qui est assurément fort malaisé et laissera toujours la porte ouverte aux discussions⁴⁴. »

20. Azcarraga⁴⁵ préconise l'idée de fixer l'étendue de la mer en relation avec certains facteurs, comme la superficie du territoire et le nombre de la population du pays. Le rapporteur croit que cette proposition ne présente aucune possibilité de réalisation pratique.

21. Se rendant compte du fait qu'il existe un très fort courant d'opinions d'après lequel, eu égard au développement de la technique et notamment à la vitesse augmentée des navires, une étendue de 3 milles ne serait plus satisfaisante, le rapporteur se permet de suggérer que la Commission examine la possibilité de fixer la limite de la mer territoriale à 6 milles au maximum. Le rapporteur ne se dissimule pas que cette proposition se heurtera d'une part à l'opposition des Etats qui sont partisans de la règle des 3 milles, soit parce qu'ils s'intéressent tout particulièrement au principe de la liberté de la mer, soit parce qu'ils craignent une aggravation de leurs responsabilités dans ces parages, notamment au cas de neutralité en temps de guerre; d'autre part, la règle des 6 milles sera réfutée par ceux qui réclament une étendue dépassant les 6 milles. En effet, il semble très douteux qu'un compromis sur la distance de 6 milles soit facilement obtenu. Il est toutefois évident, eu égard à toutes les divergences de vues qui se sont manifestées en cette matière, qu'il sera impossible d'arriver à un accord si, de part et d'autre, l'on n'est pas prêt à faire des concessions. Les protagonistes de la liberté de la mer devront se rendre compte que l'acceptation générale ou quasi générale de l'étendue des 6 milles — étendue déjà adoptée par un certain nombre d'Etats — couperait court à toute tendance d'adopter unilatéralement une largeur encore plus grande. (Il faut se rendre compte que les Etats qui fixeront la largeur de la mer territoriale à 6 milles auront toujours la faculté de conclure entre eux des accords par lesquels ils se reconnaîtront le droit d'exercer la pêche, à titre de réciprocité, dans les parties de la mer territoriales au-delà de la limite des 3 milles. Il est bien entendu qu'on laisse aux Etats la faculté de fixer la largeur de la mer territoriale à une distance de moins de 6 milles.) Les partisans d'une plus grande étendue devront réaliser que l'adoption du système de la protection des richesses de la mer, préconisé par la Commission du droit international dans son rapport élaboré lors de sa troisième session, serait de nature à aplanir certaines difficultés qu'ils redoutent de la réduction de cette zone; en outre, l'adoption de la

règle de 6 milles n'exclurait pas la création de zones contiguës prévue par le rapport de la Commission du droit international, pour la protection des intérêts douaniers, fiscaux et sanitaires.

22. La question a été soulevée si, au cas où la mer est perpétuellement gelée, la souveraineté de l'Etat riverain s'étend jusqu'aux limites de la glace, constituant une masse contiguë devant la côte. La Russie a, en 1911, formulé la doctrine que la mer territoriale serait mesurée à partir de la limite des glaces perpétuelles devant la côte. Cette conception n'a pas été adoptée. Le traité du 9 février 1920, relatif au Spitzberg⁴⁶, a soumis la mer territoriale à un régime uniforme, qu'elle soit gelée ou non. Le même point de vue a été adopté par la Convention concernant les îles d'Aaland du 20 octobre 1921⁴⁷, et par le Traité de paix entre la Russie et la Finlande du 14 octobre 1920⁴⁸.

23. De nouvelles prétentions de ce genre ont été soulevées récemment en application du soi-disant principe des secteurs. L'Union soviétique réclama en 1926 toute la partie de l'Arctique au nord du territoire soviétique, jusqu'au pôle Nord. Le Gouvernement des Etats-Unis a rejeté cette prétention comme « une tentative pour créer artificiellement une mer fermée en violation du droit de toutes les nations au libre usage de la haute mer »⁴⁹. Plusieurs pays toutefois réclament, à l'heure actuelle, la souveraineté sur certains secteurs des régimes polaires. Le rapporteur spécial se borne à signaler ce point à la Commission, sans proposer l'insertion d'une disposition spéciale à cet effet.

24. Le rapporteur spécial soumet à la Commission la question de savoir si la détermination de la largeur de la mer territoriale présente, pour la codification du régime juridique de la mer territoriale, un intérêt tellement essentiel que, dans le cas où les efforts d'aboutir à un accord sur la largeur seraient voués à l'échec, il faudrait abandonner l'idée de codifier le régime juridique de la mer territoriale.

25. La Conférence de 1930 a été de cet avis. Le rapporteur spécial ne croit pas que la Commission devra suivre la Conférence dans cette voie. Même si l'uniformité de la largeur de la mer territoriale ne pouvait être atteinte dès maintenant, il y aurait intérêt à poursuivre les efforts tendant à un accord sur les autres points controversés.

Article 5. — Ligne de base

1. Comme règle générale et sous réserve des dispositions concernant les baies et les îles, l'étendue de la mer territoriale se compte à partir de la ligne de basse mer, le long de toutes les côtes

2. Toutefois, s'il s'agit d'une côte profondément découpée d'indentations ou d'échancrures, ou bordée par un archipel, la ligne de base se détache de la ligne de basse mer, et la méthode des lignes de base reliant des points appropriés de la côte doit être admise.

⁴³ Gidel, *op. cit.*, vol. III, p. 130.

⁴⁴ *Ibid.*, p. 132.

⁴⁵ Los derechos sobre la plataforma submarina, *Revista Española de Derecho Internacional*, 1940, t. II, p. 47.

⁴⁶ Société des Nations, *Recueil des Traités*, vol. 2, p. 7.

⁴⁷ *Ibid.*, vol. 9, p. 211.

⁴⁸ *Ibid.*, vol. 3, p. 5.

⁴⁹ Pearce Higgins et Colombos, *op. cit.*, p. 84.

Le tracé des lignes de base ne peut s'écarter de façon appréciable de la direction générale de la côte, et les étendues de mer situées en deçà de cette ligne doivent être suffisamment liées aux domaines terrestres pour être soumises au régime des eaux intérieures.

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

4. Les élévations du sol situées dans la mer territoriale, bien qu'elles n'émergent qu'à marée basse, sont prises en considération pour le tracé de cette mer.

Commentaire

1. La Sous-Commission II de la Conférence de 1980 avait fait accompagner son article sur la ligne de base des observations suivantes :

« Pour calculer l'étendue de la mer territoriale, on prendra pour base la laisse de basse mer en suivant toutes les sinuosités de la côte. Il est fait abstraction : 1) du cas où l'on serait en présence d'une baie; 2) de celui où existeraient des îles à proximité de la côte; 3) du cas d'un groupe d'îles; ces trois cas seront traités ultérieurement. Il ne s'agit, dans cet article, que du principe général.

» L'expression traditionnelle, « laisse de basse mer », peut revêtir des sens divers et elle a besoin de précision. Il existe un certain nombre de critères qui, dans la pratique des divers Etats, servent à déterminer la ligne en question. On a pris en considération notamment les deux critères suivants : d'une part, la ligne de basse mer indiquée sur la carte officielle de l'Etat côtier, d'autre part, la laisse moyenne des plus basses mers bimensuelles et normales. On a choisi le premier critère qui, du point de vue pratique, a semblé préférable. Il est vrai que tous les Etats ne possèdent pas des cartes officielles publiées par leurs propres services hydrographiques; on a été d'avis, cependant, qu'il existe, dans chaque Etat riverain, une carte adoptée en tant que carte officielle par les services de l'Etat, et on a choisi une expression qui comprend également ces cartes.

» Les divergences résultant de l'adoption de critères différents dans les diverses cartes, sont très peu importantes et pourraient être négligées. Toutefois, pour éviter des abus, on a ajouté que la ligne indiquée par la carte ne devrait pas s'écarter sensiblement du critère qu'on a considéré comme étant le plus exact : la laisse moyenne des plus basses mers bimensuelles et normales. Il faut reconnaître que le terme « sensiblement » est assez vague; vu, cependant, que d'une part l'application de la stipulation n'est prévue que pour les cas où le manque de bonne foi serait évident, et que, d'autre part, une précision serait extrêmement difficile, on a cru pouvoir accepter cette expression.

» Si une élévation du sol, qui émerge seulement à marée basse, se trouve dans la mer territoriale d'un continent ou d'une île, elle a, conformément

au principe adopté dans la Convention concernant les pêcheries dans la mer du Nord, de 1882, sa propre mer territoriale.

» Il est bien entendu que les dispositions de la présente Convention ne sont pas en général applicables aux côtes ordinairement ou constamment prises dans les glaces⁵⁰.

2. La Cour internationale de Justice, dans son arrêt du 18 décembre 1951, concernant l'affaire des pêcheries, a reconnu que, pour mesurer la largeur de la mer territoriale, « c'est la laisse de basse mer et non celle de haute mer ou une moyenne entre ces deux laisses qui a été généralement adoptée par la pratique des Etats⁵¹. » Ce critère est, d'après la Cour, le plus favorable à l'Etat côtier et met en évidence le caractère de la mer territoriale comme accessoire du territoire terrestre.

3. En ce qui concerne la question de savoir si une sèche, pour être prise en considération, doit être située à moins de 4 milles (largeur de la mer territoriale en question) d'une terre émergeant en permanence, la Cour fait observer ce qui suit :

« Les Parties sont également d'accord pour reconnaître qu'en cas d'une élévation qui ne découvre qu'à marée basse (d'une sèche), la limite extérieure à marée basse de cette élévation peut être prise en considération comme point de base pour le calcul de la largeur de la mer territoriale. Les conclusions du Gouvernement du Royaume-Uni ajoutent une condition qui n'est pas admise par la Norvège, à savoir qu'une sèche, pour être prise ainsi en considération, doit être située à moins de quatre milles d'une terre émergeant en permanence. La Cour ne croit pas devoir examiner cette question, la Norvège ayant approuvé, à la suite d'un examen contradictoire des cartes, qu'en fait aucune sèche utilisée par elle comme point de base n'est distante de plus de quatre milles d'une terre qui émerge en permanence⁵². »

4. La Cour a constaté que trois méthodes ont été envisagées pour assurer l'application de la règle de la laisse de basse mer. La méthode du tracé parallèle, qui paraît la plus simple, consiste à tracer la limite extérieure de la ceinture de la mer territoriale en suivant la côte dans tous ses mouvements. D'après la Cour, cette méthode peut être appliquée sans difficultés à une côte simple, n'offrant pas trop d'accidents. Dans le cas d'une côte profondément découpée d'indentations ou d'échancrures ou bordée par un archipel tel que le *skjaergaard* en Norvège, la ligne de base se détache de la laisse de basse mer et ne peut être obtenue que par quelque construction géométrique. La Cour s'exprime à ce sujet comme suit :

« On ne peut dès lors persister à présenter la ligne de la laisse de basse mer comme une règle qui oblige à suivre la côte dans toutes ses inflexions. On ne peut

⁵⁰ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 181; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V), p. 11.

⁵¹ *C.I.J.*, *Recueil* 1951, p. 128.

⁵² *Ibid.*

pas non plus présenter comme des exceptions à la règle les si nombreuses dérogations qu'appelleraient les accidents d'une côte aussi tourmentée : la règle disparaîtrait devant les exceptions. C'est tout l'ensemble d'une telle côte qui appelle l'application d'une méthode différente : celle de lignes de base se détachant dans une mesure raisonnable de la ligne physique de la côte.

» Il est vrai que les experts de la Sous-Commission II de la Deuxième Commission de la Conférence de 1930 pour la codification du droit international ont formulé la règle de la laisse de basse mer d'une façon assez rigoureuse (« en suivant toutes les sinuosités de la côte »). Mais ils ont été obligés d'admettre en même temps de nombreuses exceptions relatives aux baies, îles à proximité de la côte, groupes d'îles. Dans la présente affaire, cette méthode du tracé parallèle, opposée à la Norvège dans le mémoire, a été abandonnée dans la réplique écrite puis dans la plaidoirie de l'agent du Gouvernement du Royaume-Uni. Par conséquent, elle n'a plus aucun intérêt pour la présente instance. « Au contraire, dit la réplique, la méthode de la courbe tangente ou, en anglais, *envelopes of arcs of circles*, est celle que le Royaume-Uni considère comme correcte. »

» La méthode des arcs de cercle, d'un usage constant pour fixer la position d'un point ou d'un objet en mer, est un procédé technique nouveau en tant que méthode de délimitation de la mer territoriale. Ce procédé a été proposé par la délégation des Etats-Unis à la Conférence de 1930 pour la codification du droit international. Son but est d'assurer l'application du principe que la ceinture des eaux territoriales doit suivre la ligne de la côte. Il n'a rien de juridiquement obligatoire, ainsi que le conseil du Gouvernement du Royaume-Uni l'a reconnu dans sa réplique orale. Dans ces conditions, et bien que certaines conclusions du Royaume-Uni se fondent sur l'application de la méthode des arcs de cercle, la Cour estime qu'il n'y a pas lieu de s'attacher à l'examen de ces conclusions en tant que basées sur cette méthode.

» Le principe selon lequel la ceinture des eaux territoriales doit suivre la direction générale de la côte permet de fixer certains critères valables pour toute délimitation de la mer territoriale et qui seront dégagés plus loin. La Cour se borne ici à constater que, pour appliquer ce principe, plusieurs Etats ont jugé nécessaire de suivre la méthode des lignes de base droites et qu'ils ne se sont pas heurtés à des objections de principe de la part des autres Etats. Cette méthode consiste à choisir sur la ligne de la laisse de basse mer des points appropriés et à les réunir par des lignes droites. Il en est ainsi, non seulement dans les cas de baies bien caractérisées, mais aussi dans des cas de courbes mineures de la côte, où il ne s'agit que de donner à la ceinture des eaux territoriales une forme plus simple⁵³.

5. Le rapporteur croit devoir interpréter l'arrêt de la Cour, rendu en ce qui concerne le point en question

avec une majorité de 10 voix contre 2, comme l'expression du droit en vigueur; par conséquent, il s'en est inspiré lors de la rédaction de l'article. Le second alinéa de l'article reflète le point de vue de la Cour, exprimé dans l'arrêt, concernant une côte présentant de profondes échancrures. Le rapporteur a cru devoir maintenir, dans le premier alinéa, comme règle générale le principe posé par la deuxième Sous-Commission dans le premier alinéa de son article. La condition que la laisse de basse mer indiquée sur la carte officielle employée par l'Etat riverain ne s'écarte pas sensiblement de la laisse moyenne des plus basses mers bimensuelles et normales a aussi été maintenue. Quoique la Cour ne se soit pas prononcée à cet égard, le rapporteur croit pouvoir conserver également le troisième alinéa de l'article de la Sous-Commission qui paraît maintenant comme le quatrième alinéa de l'article 5.

Article 6. — Baies

Pour les baies dont un seul Etat est riverain, l'étendue de la mer territoriale sera mesurée à partir d'une ligne droite tirée en travers de l'ouverture de la baie; si l'ouverture de la baie excède dix milles, cette ligne sera tirée en travers de la baie dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excèdera pas dix milles.

Commentaire

1. La Sous-Commission II de la Conférence de 1930 avait fait à ce sujet les observations suivantes :

« Il est admis que la ligne de base fournie par les sinuosités de la côte ne doit pas être maintenue indistinctement. Quand il s'agit d'une échancrure qui n'a pas une très grande largeur à son entrée, il y a lieu de considérer cette baie comme faisant partie des eaux intérieures. Les opinions étaient partagées quant à la largeur à laquelle il fallait s'arrêter. Plusieurs délégations ont exprimé l'avis que le caractère d'eaux intérieures devait être attribué aux baies dont l'ouverture n'excède pas dix milles; une ligne fictive serait tracée en travers de la baie, entre les deux points les plus avancés, et cette ligne servirait de base pour la détermination de l'étendue des eaux territoriales. Si l'ouverture de la baie excède dix milles, il y aura lieu de tirer cette ligne fictive au premier point, à partir de l'entrée, où la largeur de la baie n'excèdera pas dix milles. C'est le système qui a été adopté entre autres dans la Convention du 6 mai 1882 sur la pêche dans la mer du Nord. D'autres délégations ne voulaient considérer les eaux d'une baie comme eaux intérieures que si les deux zones de mer territoriale se rencontraient à l'ouverture de la baie, en d'autres termes, si l'ouverture n'excédait pas le double de l'étendue de la mer territoriale. Pour les Etats qui étaient en faveur d'une étendue de mer territoriale de trois milles, l'ouverture ne devrait donc pas excéder six milles. Les partisans de cette dernière opinion craignaient notamment que l'adoption d'une plus grande largeur des lignes fictives tracées en travers des baies ne fût de nature à compromettre le principe énoncé à l'article précédent

⁵³ C.I.J., *Recueil* 1951, pp. 129-130.

tant qu'on n'aurait pas fixé les conditions qu'une échancrure doit remplir pour présenter le caractère essentiel d'une baie. La majorité des délégations a pu tomber d'accord sur une largeur de dix milles pouvu qu'on adoptât en même temps un système permettant de dénier le caractère de baie aux échancrures de peu de profondeur.

» Toutefois, ces systèmes ne seront susceptibles d'une application pratique que si les Etats riverains mettent les marins à même de savoir comment ils doivent considérer les différentes échancrures de la côte.

» Deux systèmes ont été proposés; on les trouvera annexés aux observations à cet article. La Sous-Commission ne s'est pas prononcée sur ces systèmes, elle a voulu réserver la possibilité d'envisager, soit d'autres systèmes, soit la modification de l'un ou l'autre des systèmes présentés⁵⁴.

2. La Cour internationale de Justice, dans son arrêt du 18 décembre 1951 concernant l'affaire des pêcheries, a fait observer que si la règle des 10 milles en ce qui concerne les baies a été adoptée par certains Etats, aussi bien dans leurs lois nationales que dans leurs traités et conventions, et si quelques décisions arbitrales en ont fait application entre ces Etats, d'autres Etats, en revanche, ont adopté une limite différente. La Cour est d'avis qu'en conséquence la règle des 10 milles n'a pas acquis l'autorité d'une règle générale de droit international⁵⁵.

3. Le rapporteur a tout de même inséré l'article de la Sous-Commission dans l'article 6, puisque la tâche de la Commission ne se borne pas à codifier le droit existant, mais comprend également la préparation du développement progressif du droit. Il ne s'ensuit point que la règle des 10 milles s'appliquerait à un Etat comme la Norvège, qui s'est toujours élevée contre toute tentative de l'application de cette règle à sa côte pour des raisons dues à la formation géographique de celle-ci. Etant donné que le tracé de la ligne de base dans les baies constitue un problème très compliqué — Gidel y voue dans son livre pas moins de 77 pages — il est impossible au rapporteur de développer les différents points de vue dans le cadre de ce rapport. La question pourrait être réservée à une étude ultérieure, avec l'aide d'experts en cette matière.

4. La Sous-Commission de 1980 s'est placée au point de vue qu'il fallait adopter en même temps un système permettant de dénier le caractère de baies aux échancrures de peu de profondeur. Deux systèmes avaient été proposés⁵⁶, mais la Sous-Commission ne s'est pas prononcée sur ces systèmes et elle a voulu réserver la possibilité d'envisager soit d'autres systèmes, soit

les modifications de l'un ou l'autre des systèmes préconisés.

5. Le rapporteur est d'avis qu'il s'agit ici d'une question technique bien compliquée, qui sort du cadre juridique tracé aux travaux de la Commission du droit international. Le rapporteur propose donc que, dans cette première phase de ses travaux, la Commission s'abstienne de se prononcer à ce sujet. Elle pourrait reprendre ce point avec l'assistance d'experts dans une phase plus avancée de ses travaux.

Article 7. — Ports

Devant les ports, les installations permanentes qui s'avancent le plus vers le large sont considérées comme faisant partie de la côte, aux fins de la délimitation de l'étendue de la mer territoriale.

Commentaire

Cet article est identique à celui du règlement de 1980⁵⁷. Le rapport s'est borné à faire observer que les eaux du port, jusqu'à une ligne tracée entre les deux ouvrages fixes les plus avancés, constituent des eaux intérieures de l'Etat riverain.

Article 8. — Rades

Les rades qui servent au chargement, au déchargement et au mouillage des navires et qui, à cet effet, ont fait l'objet d'une délimitation de la part de l'Etat riverain, sont comprises dans la mer territoriale de cet Etat, bien qu'elles puissent en partie être situées en dehors du tracé général de la mer territoriale. L'Etat riverain doit indiquer quelles rades sont effectivement employées à cet usage et quelles en sont les limites.

Commentaire

Le rapport de 1980 s'est exprimé comme suit :

« Il avait été proposé d'assimiler aux ports les rades qui servent au chargement et au déchargement des navires. Ces rades auraient alors été considérées comme des eaux intérieures, et la mer territoriale aurait été mesurée à partir de la limite extérieure de la rade. On n'a pas cru devoir se rallier à cette proposition. Tout en reconnaissant que l'Etat riverain doit pouvoir exercer sur la rade des droits de contrôle et de police spéciaux, on a jugé excessif de considérer les eaux en question comme eaux intérieures, ce qui pourrait avoir comme conséquence que le passage inoffensif des navires de commerce y soit interdit. On a suggéré, pour satisfaire à ces objections, de reconnaître expressément le droit de passage dans ces eaux. Du point de vue pratique, les différences principales entre « ces eaux intérieures » et la mer territoriale auraient consisté en ce que les rades auraient eu une zone de mer territoriale qui leur aurait été propre. Mais, puisqu'on n'a pas jugé nécessaire d'accorder une pareille zone, on est tombé

⁵⁴ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), pp. 181-182; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V), pp. 11-12.

⁵⁵ *C.I.J., Recueil* 1951, p. 181.

⁵⁶ Voir les appendices A et B du rapport de la Sous-Commission; publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 182; *V. Questions juridiques*, 1930.V.9 (document C. 230.M.117.1930.V), p. 12.

⁵⁷ *Ibid.*, p. 133 et p. 12, respectivement.

d'accord sur une solution suivant laquelle les eaux de la rade sont comprises dans la mer territoriale de l'Etat, même si elles s'étendent en dehors du tracé général de cette mer⁵⁸.)

Article 9. — Iles

Chaque île comporte une mer territoriale qui lui est propre. Une île est une étendue de terre, entourée d'eau, qui se trouve d'une manière permanente au-dessus de la marée haute.

Commentaire

1. Le texte de cet article a été emprunté au rapport de 1930; il était accompagné des observations suivantes :

« La définition du terme île n'exclut pas les îles artificielles, pourvu qu'il s'agisse de véritables fractions de territoire, et non pas de travaux d'art flottants, de balises ancrées, etc. Le cas d'une île artificielle érigée près de la délimitation entre les zones territoriales de deux pays est réservé.

» Une élévation du sol, qui émerge seulement à marée basse, n'est pas considérée, aux fins de cette Convention, comme une île. (Voir toutefois la disposition ci-dessus concernant la ligne de base⁵⁹.) »

2. En ce qui concerne les phares, érigés en haute mer, le rapporteur voudrait se référer aux observations suivantes de Pearce Higgins et Colombos⁶⁰ :

« L'absence de toute mention de « rochers » dans la Convention de 1882 pour régler la police de la pêche dans la mer du Nord a fait naître quelques doutes en ce qui concerne les phares érigés sur les rochers Eddystone, le Bell Rock et les Seven Stones Rocks, au large des îles Scilly. Pour ce qui est des Eddystone, le Gouvernement britannique s'est abstenu de vouloir étendre sur eux sa juridiction territoriale probablement parce que ces rochers ne sont pas constamment émergés à marée haute. Sir Charles Russell, dans les arguments qu'il a présentés au cours de l'arbitrage relatif à l'affaire de la mer de Behring, a soutenu qu'un phare construit sur un rocher ou sur des piliers enfoncés dans le lit de la mer « devient, pour autant qu'il s'agit du phare lui-même, partie intégrante du territoire de l'Etat qui l'a édifié et bénéficie de tous les droits attachés à la protection du territoire ». Westlake ne voudrait voir dans cette thèse qu'une affirmation du droit à l'immunité contre toute intrusion et toute dégradation ainsi que de l'autorité et de la juridiction exclusives de l'Etat territorial. Il serait difficile d'admettre qu'un simple rocher surmonté d'un édifice, qui ne saurait être armé de manière à pouvoir contrôler effectivement les eaux contiguës, puisse être la source d'un prétendu droit d'occupation s'exerçant sur elles, qui transformerait une vaste étendue de mer en eaux territoriales⁶¹. » Le récif rocheux sur lequel est érigé le phare d'Eddy-

stone est immergé à marée haute, mais il émerge sur une superficie de 500 yards carrés à la marée basse des mortes-eaux⁶².

» En ce qui concerne le rocher de Bell Rock, qui se trouve à environ dix milles à l'est-sud-est d'Abroath et qui est surmonté d'un phare, l'exploitation des pêcheries avoisinantes par des pêcheurs étrangers a donné lieu à des réclamations. Ce rocher est, lui aussi, entièrement immergé à marée haute; aux marées basses du printemps, il émerge de quatre pieds et le sommet du rocher est à peine visible à marée basse des mortes-eaux⁶³. On ignore si le Gouvernement britannique a soutenu que les eaux contiguës à ce récif soient des eaux territoriales, mais il est probable que les considérations qui s'appliquent aux rochers Eddystone sont également valables à l'égard de Bell Rock.

» Les Seven Stones Rocks, auxquels est amarré un bateau-phare, constituent un récif s'étendant sur une longueur d'environ un mille au large des îles Scilly, à une distance approximative de sept milles de Land's End. Aucune partie des rochers n'émerge à la marée basse des mortes-eaux. Il n'est pas soutenu que ces rochers soient situés dans les eaux territoriales britanniques⁶⁴. Ce refus d'affirmer sa juridiction sur eux est cité par Westlake⁶⁵ comme un exemple d'attitude « plus modérée » que celle qui fut adoptée par l'Espagne au début du XIX^e siècle, lorsqu'elle a revendiqué les îles Falkland en alléguant qu'elles dépendaient du continent. »

3. Le rapporteur rappelle que dans le projet d'articles relatifs au plateau continental adopté par la Commission du droit international en 1951, la Commission était d'avis que les installations érigées pour l'exploration du plateau continental et l'exploitation de ses sources naturelles n'auraient pas le statut d'îles pour ce qui est de la délimitation de la mer territoriale, mais que des zones de sécurité, dans lesquelles peuvent être prises les mesures nécessaires à la protection de ces installations, pourraient être établies autour de celles-ci jusqu'à une distance raisonnable⁶⁶. On pourrait adopter le même point de vue vis-à-vis des phares érigés sur des rochers, au cas où ces derniers émergent seulement à marée basse.

Article 10. — Groupes d'îles

En ce qui concerne un groupe d'îles (archipel) et les îles situées le long de la côte, la ligne des dix milles est adoptée comme ligne de base pour la mesure de la mer territoriale vers la haute mer. Les eaux comprises dans le groupe auront le caractère d'eaux intérieures.

Commentaire

1. Tout en formulant une observation dans le sens de la première phrase de l'article proposé, la Sous-Com-

⁵⁸ *Ibid.*, p. 133 et p. 13, respectivement.

⁵⁹ *Ibid.*

⁶⁰ Pearce Higgins et Colombos, *op. cit.*, pp. 81-82. (*Traduction du Secrétariat.*)

⁶¹ Westlake, *International Law*, vol. I (Cambridge University Press, 1910), p. 190.

⁶² Fulton, *The Sovereignty of the Sea*, 1911, p. 642.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, pp. 642-643.

⁶⁵ *Op. cit.*, p. 119.

⁶⁶ Voir *Documents officiels de l'Assemblée générale, sixième session, Supplément n° 9 (A/1858)*, annexe, 1^{re} partie, art. 6.

mission II de la Conférence de 1980 a été d'avis qu'à défaut de précisions techniques on devrait abandonner l'idée de formuler un texte à ce sujet ⁶⁷.

2. La Cour, dans son arrêt du 18 décembre 1951 concernant l'affaire des pêcheries, a fait à cet égard les observations suivantes :

« La Cour aborde maintenant le problème de la longueur des lignes de base tirées à travers les eaux situées entre les diverses formations du *skjaergaard*. Ici, le Gouvernement du Royaume-Uni, s'appuyant sur l'analogie avec la prétendue règle générale des dix milles relative aux baies, soutient encore que la longueur des lignes droites ne peut excéder dix milles.

» A cet égard, la pratique des Etats ne permet de formuler aucune règle générale de droit. Les tentatives qui ont été faites pour soumettre les groupes d'îles ou les archipels côtiers à des conditions analogues aux limitations concernant les baies (distance des îles ne dépassant pas la double mesure des eaux territoriales ou dix ou douze milles marins) ne sont pas sorties du stade des propositions ⁶⁸. »

3. Le rapporteur a inséré l'article 10 non pas comme expression du droit en vigueur, mais comme base de discussion dans le cas où la Commission voudrait étudier un texte envisageant le développement progressif du droit international à ce sujet.

Article 11. — Détroits

1. Dans les détroits qui servent de passage entre deux parties de la haute mer, la mer territoriale sera délimitée de la même manière que devant les autres parties de la côte, même quand un seul Etat est riverain.

2. Lorsque la largeur dépasse l'étendue des deux zones de mer territoriale, les eaux comprises entre ces deux zones forment des parties de la haute mer. Au cas où cette délimitation aurait pour résultat de laisser une zone de mer, dont la largeur ne dépasse pas deux milles, enclavée dans la mer territoriale, cette zone pourra être assimilée à la mer territoriale.

Commentaire

Le texte est identique à celui proposé en 1980. Ce texte était accompagné des observations suivantes :

« A l'intérieur des détroits auxquels se réfère cet article, les zones de mer baignant les côtes constituent des eaux territoriales, de même que devant toute autre partie de la côte. La zone de mer entre les deux rives ne pourra être considérée comme faisant partie des eaux intérieures, même si les deux bandes de mer territoriale se touchent et si les deux rives appartiennent au même Etat. Les règles concernant l'adoption de la ligne de démarcation entre les eaux intérieures et les eaux territoriales sont les mêmes que devant les autres parties de la côte.

⁶⁷ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1980.V), p. 133; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1980.V), p. 13.

⁶⁸ C.J.I., *Recueil* 1951, p. 131.

» Lorsque la largeur dépasse, dans tout le détroit, la somme des largeurs des deux bandes de mer territoriale, il existe dans tout le détroit un chenal de haute mer. Si, au contraire, la largeur dans tout le détroit est inférieure à l'étendue des deux zones de mer territoriale, les eaux du détroit seront des eaux territoriales. D'autres cas peuvent se présenter et se présentent en effet : la largeur du détroit est, à certains endroits, supérieure, à d'autres endroits, égale ou inférieure à l'étendue totale des deux bandes de mer territoriale. Dans ces cas, des portions de haute mer pourront se trouver enclavées dans les eaux territoriales. On a été d'avis qu'il n'y avait pas de motifs valables pour dénier à ces portions de mer enclavées — et qui peuvent avoir une assez grande superficie — le caractère de haute mer. Néanmoins, s'il ne s'agit que de portions d'une importance minime, on peut, pour des raisons pratiques, les assimiler aux eaux territoriales. Toutefois, ces exceptions seront limitées à celles de ces « enclaves » maritimes dont la largeur ne dépasse pas deux milles marins.

» De même que dans les cas des baies dont plusieurs Etats sont riverains, on s'est abstenu de donner des règles concernant le tracé de la ligne de démarcation entre les eaux territoriales dans les détroits où il y a deux ou plusieurs Etats riverains, et où la largeur est inférieure à l'étendue des zones de mer territoriale.

» L'article se borne à donner des règles pour les détroits qui servent de passage entre deux parties de la haute mer. On a laissé de côté le régime des détroits qui ne donnent accès qu'à des eaux intérieures. Pour ces détroits, les règles concernant les baies et le cas échéant les îles restent applicables ⁶⁹. »

(Pour le droit de passage des navires de guerre dans les détroits, voir l'article 22.)

Article 12. — Délimitation de la mer territoriale à l'embouchure d'un fleuve

1. Si un fleuve se jette dans la mer sans estuaire, les eaux du fleuve constituent des eaux intérieures jusqu'à une ligne tirée à travers l'embouchure suivant la direction générale de la côte, quelle que soit la largeur.

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

Commentaire

Cet article a été présenté par la Sous-Commission II de la Conférence de 1980 sans commentaire ⁷⁰. C'est, en effet, ce critère qui est le plus généralement adopté. Il présente toutefois la difficulté que l'estuaire n'est pas susceptible d'une définition générale, suffisamment ferme; pour établir si l'on se trouve en présence d'un

⁶⁹ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1980.V), pp. 133-134; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1980.V), pp. 13-14.

⁷⁰ *Ibid.*, p. 134 et p. 14, respectivement.

estuaire, il faut prendre en considération, notamment, l'écartement et la nature des côtes, la nature des atterrissements, les courants, etc.⁷¹.

Article 13. — Délimitation de la mer territoriale de deux Etats adjacents

La délimitation de la mer territoriale de deux Etats adjacents est généralement constituée par une ligne, dont à chaque point les distances jusqu'au point le plus proche des côtes des deux Etats sont égales.

Commentaire

1. La Conférence de codification de 1930 ne s'est pas occupée de cette question. Plusieurs solutions peuvent être envisagées. Comme solution de principe on pourrait envisager celle du prolongement vers le large, jusqu'à l'extrême étendue de leurs territoires maritimes, de la frontière de terre suivant sa direction générale. Une autre solution comporte la ligne médiane, c'est-à-dire le tracé d'une ligne « dont tous les points sont équidistants des points les plus rapprochés situés sur les lignes côtières des deux Etats »⁷².

2. Dans la sentence de la Cour permanente d'arbitrage du 23 octobre 1909 sur les frontières maritimes entre la Norvège et la Suède⁷³, on a adopté comme telle la ligne perpendiculaire à la côte à l'endroit où la frontière entre les deux territoires atteint la mer.

3. Dans le décret du Gouvernement bulgare, en date du 10 octobre 1951, relatif aux eaux territoriales et intérieures de la République populaire de Bulgarie, on rencontre la stipulation suivante : « Le parallèle géographique du point où la frontière terrestre touche la côte délimite les eaux territoriales bulgares et celles des Etats voisins. » Cette règle ne saurait toutefois être considérée que comme une solution pour un cas spécial.

4. La Commission du droit international pourrait adopter en principe la ligne médiane qui a reçu un certain nombre d'applications positives⁷⁴. Mais cette solution ne saurait être retenue au cas où la configuration spéciale exigerait des modifications. Un tel cas se présente notamment quand la limite passe par un fleuve ou une baie dont les eaux ne sont pas également navigables au voisinage de la ligne médiane. Alors la notion déterminante pourrait être celle du talweg. Si, par exemple, une rivière après avoir quitté le territoire d'un Etat se dirige vers la haute mer en parcourant la mer territoriale d'un autre Etat, en d'autres termes, si le chenal navigable de cette rivière à partir de son embouchure se trouve totalement ou partiellement dans la mer territoriale d'un autre Etat, la ligne médiane n'offre plus une solution satisfaisante. Ce cas se présente

entre autres à l'embouchure de l'Escaut, dans le Wielingen. Peut-être la Commission voudra-t-elle se prononcer en faveur de la solution générale qui — abstraction faite d'arguments historiques pouvant être concluants dans chaque cas spécial — devrait être donnée à ce problème.

Chapitre III

DROIT DE PASSAGE

Article 14. — Signification du droit de passage

1. Le « passage » est le fait de naviguer dans la mer territoriale, soit pour la traverser, sans entrer dans les eaux intérieures, soit pour se rendre dans les eaux intérieures, soit pour prendre le large en venant des eaux intérieures.

2. Un passage n'est pas inoffensif lorsque le navire utilise la mer territoriale d'un Etat riverain aux fins d'accomplir un acte portant atteinte à la sécurité, à l'ordre public ou aux intérêts fiscaux de cet Etat.

3. Le passage comprend éventuellement le droit de stoppage et le mouillage, mais seulement dans la mesure où l'arrêt et le mouillage constituent des incidents ordinaires de navigation ou s'imposent au navire en état de relâche forcée ou de détresse.

Commentaire

1. Comme le dit Oppenheim⁷⁵, c'est la conviction commune que chaque Etat, en vertu du droit international coutumier, a le droit d'exiger qu'en temps de paix il sera permis à ses navires, autres que les navires de guerre, de passer d'une manière inoffensive par la mer territoriale d'un autre Etat. Un tel droit est la conséquence de la liberté de la haute mer. Le droit de passage inoffensif paraît être reconnu par la plupart des auteurs⁷⁶.

2. L'article est adapté à celui qui figurait dans le rapport de la deuxième commission de 1930. Il était accompagné des observations suivantes :

« Pour qu'il puisse être question d'un passage qui n'est pas inoffensif, il faut qu'il s'agisse d'une utilisation de la mer territoriale aux fins d'accomplir un acte portant atteinte à la sécurité, à l'ordre public, ou aux intérêts fiscaux de l'Etat. Il importe peu que l'intention d'accomplir cet acte ait déjà existé ou non au moment où le navire est entré dans la mer territoriale. Le passage cesse d'être inoffensif s'il est fait abus du droit accordé par le droit international et défini dans le présent article; en pareil cas, l'Etat riverain reprend sa liberté d'action. L'expression intérêts fiscaux doit être interprétée dans un sens large comprenant tous les intérêts douaniers. Les interdictions d'importation, d'exportation et de transit, même quand elles n'ont pas été édictées à des fins fiscales, mais par exemple à des fins sanitaires, sont couvertes par les termes employés au second alinéa.

⁷¹ Gidel, *op. cit.*, vol. III, p. 613.

⁷² Whittemore Boggs, « Delimitation of Seaward Areas under National Jurisdiction », *American Journal of International Law*, vol. 45 (1951), p. 259. Voir également, du même auteur : « National Claims in Adjacent Seas », *Geographical Review* (New-York, The American Geographical Society, 1951), pp. 185 et suiv.

⁷³ Bruns, *Fonctions Juris Gentium*, sér. A, sect. 1, *Tomus 2* : Répertoire des décisions de la Cour permanente d'arbitrage (Berlin, Carl Heymanns Verlag, 1931), p. 50.

⁷⁴ Gidel, *op. cit.*, vol. III, p. 769.

⁷⁵ *International Law*, 7^e éd. (Londres, Longmans, Green and Co., 1948), vol. I, par. 188.

⁷⁶ Voir, pour une argumentation contraire : Quadri, *Le navi private nel diritto internazionale* (Milan, Giuffrè, 1939), p. 53.

» D'autre part, il faut relever que, dans le cas où un Etat aurait contracté des obligations internationales comportant la liberté du transit sur son territoire, soit d'une manière générale, soit au bénéfice de certains Etats, les obligations qu'il aurait ainsi assumées s'appliquent également à la traversée de la mer territoriale. De même, en ce qui concerne l'accès aux ports ou aux voies navigables, les facilités que l'Etat aurait accordées en vertu d'obligations internationales concernant le libre accès aux ports, ou la navigation sur ces voies d'eau, ne sauraient être mises en échec par des mesures prises dans les parties de la mer territoriale qui constituent raisonnablement des voies d'accès auxdits ports ou aux voies navigables ⁷⁷. »

SECTION A. — NAVIRES AUTRES QUE LES
NAVIRES DE GUERRE.

**Article 15. — Droit de passage inoffensif
dans la mer territoriale**

1. L'Etat riverain ne peut entraver le passage inoffensif des navires étrangers dans la mer territoriale.

2. Il est tenu d'user des moyens dont il dispose pour sauvegarder dans la mer territoriale le principe de la liberté des communications et de ne pas laisser utiliser ces eaux aux fins d'actes contraires aux droits d'autres Etats.

Commentaire

1. Le premier alinéa de l'article a été emprunté à celui de l'article 4 du rapport de 1930. Les observations étaient libellées comme suit :

« L'expression « navires autres que les bâtiments des marines de guerre » comprend, non seulement les navires de commerce, mais encore les bâtiments tels que les yachts, les poseurs de câble, etc., qui ne sont pas des bâtiments appartenant aux forces navales d'un Etat au moment du passage ⁷⁸. »

2. L'article 4 de 1930 contenait un deuxième alinéa conçu dans les termes suivants : « Les navires sous-marins ont l'obligation de passer en surface » ⁷⁹. Puisque, contrairement à ce qu'on prévoyait en 1930, les navires sous-marins commerciaux n'ont pas obtenu d'importance pratique, il semble superflu d'insérer une stipulation en cette matière.

3. Le droit de passage inoffensif, reconnu aux navires étrangers, entraîne pour l'Etat riverain le devoir de ne pas permettre l'usage de ces eaux de manière à nuire aux intérêts des autres Etats. C'est ce qu'a déclaré la Cour internationale de Justice, le 9 avril 1949, dans l'affaire du détroit de Corfou : « Les obligations qui incombaient aux autorités albanaises consistaient à faire connaître, dans l'intérêt de la navigation en général, l'existence d'un champ de mines dans les eaux territoriales ... Ces obligations sont fondées ... sur certains

principes généraux et bien reconnus tels que des considérations élémentaires d'humanité, ... le principe de la liberté des communications maritimes et l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats ⁸⁰. »

4. Le rapporteur est d'avis que cette idée pourrait être exprimée dans le texte de l'article. A cette fin il a proposé d'ajouter le second alinéa.

**Article 16. — Mesures à prendre
par l'Etat riverain**

Le droit de passage ne fait pas obstacle à ce que l'Etat riverain prenne toutes les mesures nécessaires pour prévenir, dans la mer territoriale, toute atteinte à sa sécurité, à son ordre public et à ses intérêts fiscaux, et, en ce qui concerne les navires se rendant dans les eaux intérieures, toute violation des conditions auxquelles l'admission de ces navires est subordonnée.

Commentaire

Le même article a déjà paru comme article 5 dans le rapport de 1930. Les observations étaient libellées comme suit :

« L'article attribue à l'Etat riverain le droit de vérifier, le cas échéant, le caractère inoffensif du passage et de prendre les mesures nécessaires pour prévenir toute atteinte à sa sécurité, son ordre public, ou ses intérêts fiscaux. Toutefois, afin de ne pas entraver inutilement la navigation, l'Etat riverain sera tenu de faire usage de ce droit avec beaucoup de circonspection. Quant aux navires dont l'intention de toucher un port a été constatée, la compétence de l'Etat est plus grande et comporte notamment le droit de vérification des conditions d'admission ⁸¹. »

**Article 17. — Devoirs des navires étrangers
dans le passage**

1. Les navires étrangers qui usent du droit de passage devront se conformer aux lois et règlements édictés, en conformité avec la coutume internationale, par l'Etat riverain, notamment en ce qui concerne :

a) La sécurité du trafic et la conservation des passes et du balisage;

b) La protection des eaux de l'Etat riverain contre les diverses pollutions auxquelles elles peuvent être exposées du fait des navires;

c) La conservation des richesses de la mer territoriale;

d) Les droits de pêche, de chasse, et droits analogues appartenant à l'Etat riverain.

2. L'Etat riverain ne peut, toutefois, établir une discrimination entre les navires étrangers de nationalités diverses, ni, sauf en ce qui concerne la pêche et la chasse, entre les navires nationaux et les navires étrangers.

⁷⁷ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 127; *V. Questions juridiques*, 1930.V.9 (document C.230. M.117.1930.V), p. 7.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ C.J.I., *Recueil* 1949, p. 22.

⁸¹ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 127; *V. Questions juridiques*, 1930.V.9 (document C.230. M.117.1930.V), p. 7.

Commentaire

L'article est identique à l'article 6 de 1930. Il était accompagné des observations suivantes :

« Le droit international a, depuis longtemps, reconnu à l'Etat riverain le droit d'édicter, dans l'intérêt général de la navigation, les règlements spéciaux qui s'appliqueront aux navires exerçant le droit de passage dans la mer territoriale. Les principaux pouvoirs que le droit international a jusqu'à présent reconnu appartenir à cet effet à l'Etat riverain sont définis dans l'article.

» On n'a pas jugé opportun d'insérer une stipulation d'après laquelle le droit de passage inoffensif s'étend aux personnes et aux marchandises se trouvant à bord. Il va de soi qu'on n'a point eu l'intention de limiter le droit de passage aux seuls navires, et qu'on a voulu comprendre aussi les personnes et les biens qui se trouvent à bord. Une pareille stipulation cependant, aurait été, d'une part, incomplète, parce qu'elle ne fait pas mention, par exemple, de la correspondance postale et des bagages des voyageurs; elle va, d'autre part, trop loin, parce qu'elle semble exclure tout droit de l'Etat riverain de procéder à l'arrestation d'une personne ou à la saisie de marchandises se trouvant à bord.

» L'expression « édictés » doit être comprise dans le sens que les lois et règlements devront être dûment publiés. Il va de soi que les navires qui enfreignent les lois ou règlements régulièrement édictés sont justiciables de la juridiction de l'Etat riverain.

» Le dernier alinéa a une portée plus générale; il ne se réfère pas seulement aux lois et règlements qui pourraient être édictés, mais à toutes mesures prises par l'Etat riverain aux fins de cet article.⁸²»

**Article 18. — Taxes à percevoir
sur les navires étrangers**

1. Il ne peut être perçu de taxes sur les navires étrangers en raison de leur simple passage dans la mer territoriale.

2. Des taxes ne peuvent être perçues sur un navire étranger passant dans la mer territoriale qu'en rémunération de services particuliers rendus à ce navire. Ces taxes seront perçues sans discrimination.

Commentaire

L'article reproduit l'article 7 de 1930; ledit article était accompagné des observations suivantes :

« Le but de cet article est d'exclure des taxes qui correspondent à des services généraux rendus à la navigation (droit de phare, de balisage, etc.), et de n'admettre que la rémunération d'un service spécialement rendu au navire (taxe de pilotage, de remorquage, etc.). Ces taxes devront être appliquées dans des conditions d'égalité.

» La stipulation du premier alinéa comprendra le cas de séjour forcé dans la mer territoriale, dans les conditions prévues à l'article 3, dernier alinéa⁸³»

**Article 19. — Arrestation à bord
d'un navire étranger**

1. L'Etat riverain ne peut procéder, à bord d'un navire étranger passant dans la mer territoriale, à l'arrestation d'une personne ou à des actes d'instruction à raison d'une infraction pénale commise à bord de ce navire lors dudit passage, que dans l'un ou l'autre des cas ci-après :

a) Si les conséquences de l'infraction s'étendent hors du navire;

b) Si l'infraction est de nature à troubler la paix publique du pays, ou le bon ordre dans la mer territoriale;

c) Si l'assistance des autorités locales a été demandée par le capitaine du navire, ou le consul de l'Etat dont le navire bat pavillon.

2. Les dispositions ci-dessus ne portent pas atteinte au droit de l'Etat riverain de procéder à des arrestations, ou à des actes d'instruction prévus dans sa législation, à bord d'un navire étranger qui stationne dans la mer territoriale, ou bien qui passe dans la mer territoriale en provenance des eaux intérieures.

3. Toutefois, l'autorité locale doit tenir compte des intérêts de la navigation à l'occasion d'une arrestation à bord du navire.

Commentaire

1. L'article a déjà paru dans le rapport de 1930 (art. 8). Le rapport contenait à ce sujet les observations suivantes :

« Dans le cas d'un délit commis à bord d'un navire étranger dans la mer territoriale, il peut surgir un conflit de compétence entre l'Etat riverain et l'Etat du pavillon. Si l'Etat riverain veut procéder à l'arrêt du navire en vue de déférer le coupable à ses tribunaux, un autre conflit d'intérêts peut surgir : d'une part, l'intérêt de la navigation, qui doit être entravé le moins possible; d'autre part, celui de l'Etat riverain, qui veut appliquer sa loi pénale sur toute l'étendue de son territoire. L'article proposé n'envisage pas de donner une solution pour le premier de ces conflits; il ne s'occupe que du dernier. La question de la compétence judiciaire de chacun des deux Etats reste donc entière; seulement la faculté de l'Etat riverain de procéder à l'arrestation de personnes ou à des actes d'instruction (par exemple une perquisition) pendant le passage sera limitée aux cas énumérés dans l'article. Cela n'empêche pas qu'aussi pour des cas non prévus dans l'article une poursuite judiciaire puisse être instituée par l'Etat riverain contre l'inculpé, si plus tard celui-ci met pied à terre. On a pris en considération d'insérer, sous *b*, après le mot « infraction » les termes « de l'avis de

⁸² *Ibid.*, pp. 127-128 et pp. 7-8, respectivement.

⁸³ *Ibid.*, p. 128 et p. 8, respectivement. L'article 3 mentionné dans le passage cité correspond à l'article 14 de notre texte.

l'autorité locale compétente ». Toutefois, on a cru ne pas devoir adopter cette proposition. En effet, l'usage de cette expression donnerait à l'autorité locale une compétence exclusive qui ne lui revient pas. Dans un conflit éventuel entre l'Etat côtier et l'Etat du pavillon, il devrait y avoir un critère objectif.

» L'Etat riverain ne pourrait arrêter un navire étranger, passant à travers la mer territoriale sans toucher les eaux intérieures, du seul fait qu'il se trouve à bord une personne recherchée par la justice de l'Etat riverain à cause d'un fait punissable, commis hors du navire. A plus forte raison une demande d'extradition, adressée à l'Etat riverain, à cause d'un délit commis à l'étranger, ne peut être considérée comme un motif valable pour interrompre le cours du navire.

» S'il s'agit d'un navire qui stationne dans la mer territoriale, il incombe à la législation de l'Etat riverain de régler sa compétence en cette matière. Cette compétence est plus étendue qu'à l'égard des navires qui ne font que traverser la mer territoriale le long des côtes. Cela s'applique également en ce qui concerne les navires qui ont touché un port, ou qui ont quitté une voie navigable; le fait qu'un navire a mouillé dans un port et qu'il a eu des rapports avec le territoire, a pris des passagers, etc., augmente les pouvoirs de l'Etat en cette matière. L'Etat riverain devra cependant toujours s'efforcer d'entraver la navigation le moins possible. Les inconvénients causés à la navigation par l'interruption du voyage d'un grand paquebot prenant le large à cause de l'arrestation d'une personne qui aurait commis à terre une infraction de peu d'importance ne sauraient être considérés comme d'une importance moindre que l'intérêt de l'Etat de s'emparer du coupable. De même, la justice de l'Etat riverain devrait dans la mesure du possible s'abstenir de procéder à des arrestations de personnes appartenant à l'état-major ou à l'équipage, dont l'absence rendrait impossible la continuation du voyage⁸⁴.

2. Ces observations font ressortir que l'article proposé n'envisage pas de donner une solution pour les conflits de compétence entre l'Etat riverain et l'Etat du pavillon en matière de droit pénal. Le rapporteur est d'avis que, dans le stade actuel des travaux de la Commission du droit international, cette question devra être réservée.

3. D'après Gidel⁸⁵, le navire étranger, en simple passage latéral dans la mer territoriale, qui aurait à bord un individu inculpé d'un acte délictueux tombant sous la compétence des juridictions de l'Etat riverain, doit pouvoir être l'objet de mesures tendant à son arrestation. Comme atténuation à cette solution rigoureuse, qui serait de nature à augmenter considérablement le nombre des cas où un navire est arrêté, il faudrait, selon Gidel, ajouter que l'Etat riverain qui exercerait mal à propos ou abusivement ce droit, engagerait sa responsabilité dans les termes du droit commun. De l'avis du rapporteur, il serait préférable de restreindre

les cas d'arrestation à ceux prévus par l'article dans le texte proposé. A juste titre le texte n'admet pas non plus l'arrêt du navire afin de s'emparer d'une personne se trouvant à son bord et dont l'extradition a été demandée à l'Etat riverain.

Article 20. — Arrêt du navire pour l'exercice de la juridiction civile

1. L'Etat riverain ne peut pas arrêter ni dérouter un navire étranger passant dans la mer territoriale, pour l'exercice de la juridiction civile à l'égard d'une personne se trouvant à bord. Il ne peut pratiquer, à l'égard de ce navire, de mesures d'exécution ou de mesures conservatoires en matière civile, que si ces mesures sont prises en raison d'obligations assumées ou de responsabilités encourues par ledit navire, en vue de la navigation lors de ce passage dans les eaux de l'Etat riverain.

2. La disposition ci-dessus ne porte pas atteinte au droit de l'Etat riverain de prendre des mesures d'exécution ou des mesures conservatoires en matière civile, que peut autoriser sa législation, à l'égard d'un navire étranger qui se trouve dans ses eaux intérieures, ou qui stationne dans la mer territoriale, ou bien qui passe dans la mer territoriale, en provenance des eaux intérieures.

Commentaire

1. Le texte de l'article est le même que celui de l'article 9 de 1980. Les observations jointes à cet article étaient libellées comme suit :

« On a suivi une règle analogue à celle qui est adoptée en ce qui concerne l'exercice de la juridiction pénale. Si le navire ne fait que traverser la mer territoriale sans toucher les eaux intérieures, on ne peut aucunement l'arrêter aux fins d'exercer la juridiction civile contre une personne qui se trouve à bord, et le navire lui-même ne peut être arrêté ou saisi qu'à la suite de circonstances qui se sont produites dans les eaux de l'Etat riverain pendant le voyage en cours, par exemple un abordage, un sauvetage, etc., ou en raison d'obligations assumées en vue de la navigation⁸⁶. »

2. Le rapporteur fait observer que cet article n'envisage pas de donner une solution générale pour les conflits de compétence entre l'Etat riverain et l'Etat de pavillon en ce qui concerne le droit privé. Les questions de cet ordre devront être résolues à l'aide des principes généraux du droit international privé et ne sauraient être traitées par la Commission dans la phase actuelle des travaux. Aussi les questions de compétence en ce qui concerne la responsabilité civile à cause d'abordages dans la mer territoriale ne sont-elles pas traitées par cet article. L'article a seulement pour but de prohiber, sauf dans certains cas bien déterminés, l'arrêt d'un navire étranger lors du passage dans la mer territoriale pour l'exercice de la juridiction civile.

⁸⁴ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.851.M.145.1930.V), p. 129; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V), p. 9.

⁸⁵ *Ibid.*, pp. 128-129 et pp. 8-9, respectivement.

⁸⁶ *Op. cit.*, vol. III, p. 261.

8. La Commission des réclamations instituée entre les Etats-Unis et le Panama, composée du baron van Heeckeren, président, d'Elihu Root et d'Horacio Alfaro, a rendu, le 29 juin 1933, une décision⁸⁷ suivant laquelle — contrairement à la règle proposée dans le texte — un navire pourrait être arrêté à cause d'un abordage ayant eu lieu lors d'un voyage antérieur. La législation britannique admet également une pareille arrestation; un *act* de 1854 est libellé comme suit :

« Lorsqu'un dommage aura, en un point quelconque du monde, été causé à un bien appartenant à S.M. ou à un sujet de S.M. par un navire étranger, et si ce navire vient par la suite à être trouvé dans un port ou rade du Royaume-Uni ou dans les trois milles de ses côtes, le juge britannique compétent peut faire arrêter ce navire⁸⁸. »

4. La décision de la Commission des réclamations (donnée avec la voix dissidente de M. Alfaro) a été combattue notamment par M. Borchard⁸⁹.

Le rapporteur, se ralliant à l'opinion de M. Alfaro, de M. Borchard et de M. Gidel⁹⁰, voudrait maintenir le texte de l'article tel qu'il a été adopté en 1930.

Article 21. — Navires affectés à un service gouvernemental et non commercial

Les règles prévues par les articles 19 et 20 réservent la question du traitement des navires exclusivement affectés à un service gouvernemental et non commercial, ainsi que des personnes se trouvant à bord de ces navires.

Commentaire

L'article est identique à celui inséré dans le rapport de 1930 sous le n° 10. Les observations jointes à cet article étaient libellées comme suit :

« La question s'est posée de savoir si, à l'égard des navires appartenant à un Etat et exploités par lui à des fins commerciales, on pourrait se prévaloir de certains privilèges et immunités en ce qui concerne l'application des articles 8 et 9. La Convention de Bruxelles sur les immunités des navires d'Etat s'occupe de l'immunité au sujet de la juridiction civile. En s'inspirant des principes et des définitions adoptés dans cette convention (voir notamment l'article 3), on a stipulé que les règles ci-dessus énoncées réservent la question du traitement des navires ainsi que des personnes exclusivement affectés à un service gouvernemental et non commercial. Les navires d'Etat exploités à des fins commerciales tomberont donc sous le coup des articles 8 et 9⁹¹. »

⁸⁷ Texte dans *American Journal of International Law*, vol. 28 (1934), p. 596.

⁸⁸ Gidel, *op. cit.*, vol. III, p. 267.

⁸⁹ *American Journal of International Law*, vol. 29 (1935), p. 103.

⁹⁰ *Op. cit.*, vol. III, p. 269.

⁹¹ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 129; *V. Questions juridiques*, 1930.V.9 (document C.230.M.117.1930.V), p. 9. Les articles 8 et 9 mentionnés dans le passage cité correspondent aux articles 19 et 20 de notre texte.

SECTION B. — NAVIRES DE GUERRE

Article 22. — Passage

1. En règle générale, l'Etat riverain n'empêchera pas le passage des navires de guerre étrangers dans sa mer territoriale et n'exigera pas une autorisation ou notification préalables.

2. L'Etat riverain a le droit de régler les conditions de ce passage.

3. Les navires de guerre sous-marins ont l'obligation de passer en surface.

4. Le passage ne peut être entravé sous aucun prétexte, en ce qui concerne les navires de guerre, dans les détroits qui servent, aux fins de la navigation internationale, à mettre en communication deux parties de haute mer.

Commentaire

1. L'article 12 du rapport de 1930 contenait seulement les trois premiers alinéas de l'article proposé. Les observations se référant à ces trois alinéas étaient conçues comme suit :

« En statuant que l'Etat riverain n'empêchera pas le passage inoffensif des bâtiments de guerre étrangers dans sa mer territoriale on ne fait que consacrer la pratique existante. Il est également en conformité avec cette pratique qu'on n'établisse pas une règle stricte et absolue, mais qu'on laisse à l'Etat la faculté d'interdire, dans des cas exceptionnels, le passage des navires de guerre étrangers.

» L'Etat riverain peut réglementer les conditions du passage, notamment en ce qui concerne le nombre des unités étrangères passant simultanément dans sa mer territoriale, considérée soit dans son ensemble, soit par secteur, sans toutefois, en règle générale, pouvoir exiger pour ce passage une autorisation ou même une notification préalables⁹². »

2. La disposition qui figure maintenant comme le quatrième alinéa de l'article, constituait le troisième alinéa des observations jointes à l'article de la Commission de 1930. Toutefois, le texte était légèrement différent, à savoir :

« Le passage ne peut être entravé sous aucun prétexte en ce qui concerne les navires de guerre dans les détroits entre deux parties de la haute mer, servant à la navigation internationale. »

3. Le rapporteur a modifié la rédaction de cette stipulation en tenant compte de l'arrêt de la Cour internationale de justice, rendu dans l'affaire du détroit de Corfou, le 9 avril 1949. La Cour s'est exprimée à ce sujet comme suit :

« De l'avis de la Cour, il est généralement admis et conforme à la coutume internationale que les Etats, en temps de paix, possèdent le droit de faire passer leurs navires de guerre par des détroits qui servent, aux fins de la navigation internationale, à mettre en communication deux parties de haute mer, sans obtenir au préalable l'autorisation de l'Etat rive-

⁹² *Ibid.*, p. 180 et p. 10, respectivement.

rain, pourvu que le passage soit innocent. A moins qu'une convention internationale n'en dispose autrement, un Etat riverain ne possède pas le droit d'interdire un tel passage par les détroits en temps de paix ⁹³»

4. L'arrêt de la Cour contient aussi le passage suivant:

« On ne saurait non plus tenir pour décisive la considération selon laquelle ce détroit n'est pas une route à emprunter nécessairement entre deux parties de haute mer, mais seulement un itinéraire facultatif pour la navigation entre la mer Egée et l'Adriatique. Le détroit nord de Corfou n'en a pas moins été une route utile au trafic international ⁹⁴»

Article 23. — Inobservation des règles

En cas d'inobservation des règles de l'Etat riverain par le navire de guerre de passage dans la mer territo-

riale, et faute par ce navire de tenir compte de l'invitation qui lui serait adressée de s'y conformer, la sortie du navire hors de la mer territoriale peut être exigée par l'Etat riverain.

Commentaire

L'article est identique à l'article 18 de 1930. Il était accompagné des observations suivantes :

« On a jugé superflu d'insérer une stipulation indiquant que les bâtiments de guerre doivent dans la mer territoriale, respecter les lois et règlements locaux. Toutefois, on a jugé utile de faire ressortir que, par l'inobservation de ces règlements, le droit de libre passage prend fin et que, conséquemment, la sortie du navire hors de la mer territoriale peut être exigée ⁹⁵»

⁹³ *C.I.J.*, *Recueil* 1949, p. 28.

⁹⁴ *Ibid.*, pp. 28-29.

⁹⁵ Publications de la Société des Nations, *V. Questions juridiques*, 1930.V.14 (document C.351.M.145.1930.V), p. 181; *V. Questions juridiques*, 1930.V.9 (document C.280.M.117.1930.V), p. 10.

RÉGIME OF THE HIGH SEAS

DOCUMENT A/CN.4/51

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

[Texte original en français]
[28 février 1952]

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Les questions suivantes, considérées par la Commission du droit international au cours de sa troisième session, furent renvoyées au rapporteur spécial pour étude complémentaire et présentation d'un rapport.

1. — NATIONALITÉ DU NAVIRE (par. 79)¹

Lors de sa troisième session la Commission a adopté, avec une seule voix dissidente, le principe que l'octroi de la nationalité au navire est limité par les principes de droit international².

Dans cet ordre d'idées la Commission a adopté provisoirement le texte suivant :

« En général, un Etat peut fixer les conditions auxquelles il autorise un navire à se faire immatriculer sur son territoire et à battre son pavillon ; pourtant, la pratique générale des Etats a établi des conditions minimums qui doivent être réunies pour que le caractère national du navire soit reconnu par les autres Etats. Ces conditions minimums sont :

» Le navire doit être dans la proportion de 50 pour 100 la propriété :

a) De nationaux ou de personnes domiciliées sur le territoire de l'Etat ;

b) D'une société en nom collectif ou en commandite simple, dont plus de la moitié des membres personnelle-

ment responsables sont des nationaux ou des personnes domiciliées sur le territoire de l'Etat ;

c) D'une société par actions constituée conformément à la législation de l'Etat et ayant son siège sur le territoire de cet Etat³. »

Il semble que la rédaction de cet article puisse être légèrement améliorée. Au lieu de parler des personnes « domiciliées » sur le territoire de l'Etat on pourrait exiger que les personnes fussent *établies* sur le territoire de l'Etat. Il serait préférable d'envisager l'établissement de fait sur le territoire, et de ne pas se contenter d'un domicile légal.

En outre, on pourrait supprimer dans l'alinéa *b* les mots « plus de », étant donné que dans le premier membre de phrase du paragraphe on n'exige pas que le pourcentage de 50 pour 100 soit dépassé. Dans ce paragraphe également on pourrait remplacer le mot « domiciliées » par *établies*.

Le rapporteur spécial avait proposé d'exiger comme l'une des conditions requises pour l'acquisition du pavillon que le capitaine eût la nationalité de l'Etat du pavillon. Le rapporteur spécial avait démontré qu'il s'agissait ici d'une pratique très répandue, notamment si l'on tenait compte du tonnage de la marine marchande des pays qui prescrivent cette condition en comparaison avec le total mondial⁴. Il avait fait valoir que la nationalité du capitaine était de la plus grande importance pour revêtir le navire du caractère national, et qu'elle pouvait offrir de meilleures garanties pour

¹ Les chiffres indiqués à la suite des titres des différentes parties du présent rapport renvoient aux paragraphes du rapport de la Commission du droit international sur les travaux de sa troisième session du 16 mai au 27 juillet 1951, *Documents officiels de l'Assemblée générale, sixième session, Supplément n° 9* (A/1858).

² Voir compte rendu de la 121^e séance, par. 56.

³ *Ibid.*, par. 59-102.

⁴ Document A/CN.4/42; *Yearbook of the International Law Commission, 1951*, vol. II, p. 77.

l'application à bord de la législation du pays du pavillon. La majorité de la Commission a toutefois jugé que la règle était trop rigoureuse; tout en admettant qu'il y ait intérêt à ce que le capitaine possède la nationalité du pays du pavillon, on fut d'avis qu'il fallait tenir compte du fait que certains pays, à l'heure actuelle, ne disposent pas d'un personnel suffisant pour remplir cette condition⁵.

Si la Commission maintient son opinion à cet égard, il faudra donc omettre ce critère pour l'attribution de la nationalité du navire. Evidemment, il serait possible de prévoir une telle stipulation, tout en faisant une exception pour les cas extraordinaires où le nombre de capitaines de la nationalité de l'Etat du pavillon s'avérerait insuffisant. Cette exception enlèverait toutefois à la disposition toute sa valeur pratique.

2. — COMPÉTENCE PÉNALE EN MATIÈRE D'ABORDAGE (par. 80)

Lors de la troisième session, le rapporteur spécial avait proposé l'adoption d'un article libellé comme suit :

« Au cas d'abordage ou de tout autre accident de navigation en haute mer, le capitaine, ainsi que toute autre personne au service du navire qui est entièrement ou partiellement responsable, ne pourra être poursuivi, à titre pénal ou disciplinaire, que devant les tribunaux de l'Etat dont le navire portait le pavillon au moment de l'abordage ou autre accident de navigation. Aucune saisie ou retenue du navire ne pourra être ordonnée à titre pénal par les autorités d'un autre Etat que celui dont le navire portait le pavillon⁶. »

Dans son rapport, le rapporteur spécial avait exposé les arguments qui, à son avis, militent en faveur d'une pareille disposition⁷.

La proposition a fait l'objet d'une assez longue discussion au sein de la Commission⁸. Certains membres l'ont chaleureusement appuyée, d'autres membres, étant d'avis que les critiques qui s'étaient fait entendre contre l'arrêt de la Cour permanente de Justice internationale dans l'affaire du *Lotus* n'étaient pas fondées, ont formulé des objections.

La Commission n'a pu arriver à une conclusion nette à ce sujet et elle a décidé d'ajourner la question jusqu'à la quatrième session. Elle a fait ressortir dans son rapport « qu'il convient de poser une règle en la matière, car la nécessité s'en est fait sentir »⁹.

Après un examen minutieux des arguments pour et contre développés par les membres de la Commission, le rapporteur spécial ne peut que maintenir sa proposition de l'année passée. A son avis, on ne saurait réfuter la règle proposée, pour le seul motif qu'elle ne serait pas conforme aux principes généraux qui régissent en droit international la compétence des Etats dans les affaires pénales.

Tout en laissant de côté la question de savoir s'il s'agissait en effet d'une discordance portant sur des principes généraux, le rapporteur estime qu'il ne faut pas perdre de vue que la navigation maritime présente un intérêt international de tout premier ordre, et peut se prévaloir d'un long passé ainsi que d'un développement qui lui est propre. On ne saurait s'étonner que se soit développé à l'égard de cette navigation un droit coutumier déviant sur certains points des principes régissant les autres activités du genre humain. Dans la pratique on s'est laissé guider par l'intérêt primordial pour la navigation maritime de pouvoir accomplir sa tâche sans être entravée par des persécutions judiciaires non justifiées et vexatoires, et par la nécessité de confier la juridiction pénale, dans les affaires d'abordage en haute mer, à des tribunaux qui, dans cette matière très compliquée, pourraient juger en toute connaissance de cause et avec toute l'expérience que le caractère spécial de ces incidents requiert. Aussi s'est constituée la pratique de ne pas poursuivre le capitaine ainsi que toute autre personne au service du navire — à titre pénal ou disciplinaire à raison d'abordage en haute mer. Le rapporteur partage l'opinion de Fischer Williams¹⁰, d'après lequel la (très faible) majorité de la Cour dans l'affaire du *Lotus* n'a pas suffisamment fait allusion aux considérations pratiques qui sont à la base de ces prétentions et qui sont loin de n'être que des arguments *ab inconvenienti*. « Le point de vue de l'individu — et ainsi s'exprime Fischer Williams — semble lui avoir échappé. Dans le raisonnement de la majorité de la Cour, tout est rigide et déductif. »

C'est pour ces raisons que le rapporteur spécial voudrait insister auprès des membres de la Commission afin qu'ils ne considèrent pas cette affaire exclusivement du point de vue de la théorie abstraite. « La jurisprudence de la Cour — dit Charles de Visscher en traitant de l'affaire du *Lotus* — aboutit à des conséquences qui dénotent la faiblesse de son système et qui entraînent, sur le terrain pratique, des résultats regrettables¹¹. »

Lors des discussions de l'année passée, on a posé la question de savoir si l'aviation — qui paraît être à ce sujet dans une situation quelque peu analogue à la navigation maritime — a éprouvé les mêmes difficultés. L'examen auquel le rapporteur a procédé, à ce sujet, semble démontrer qu'à l'égard des pilotes d'avions on n'a jamais procédé à des poursuites judiciaires pour cause de collisions dans l'espace aérien libre, de sorte que le besoin de protection ne s'est pas encore fait sentir.

On a demandé également si l'on ne pouvait pas laisser cette matière aux soins du Comité maritime international qui actuellement l'a inscrite à l'ordre du jour de la prochaine Conférence de droit maritime, à Bruxelles. Le rapporteur spécial, tout en formulant les vœux les plus sincères pour la réussite des travaux de la Conférence, se permet de faire observer que l'entrée

⁵ Voir compte rendu de la 121^e séance, par. 103-127.

⁶ A/CN.4/42; *Yearbook of the International Law Commission*, 1951, vol. II, p. 80.

⁷ *Ibid.*, pp. 77-80.

⁸ Voir compte rendu de la 121^e séance, par. 128-151; 122^e séance, par. 1-106.

⁹ A/1858, *op. cit.*, par. 80.

¹⁰ *Revue générale de droit international public*, 1928, p. 369.

¹¹ *Revue de droit international et de législation comparée*, 1928, p. 81.

en vigueur d'une convention en cette matière, conclue entre les Etats maritimes qui ont l'habitude de participer à ces conférences de droit maritime, ne suffira point à protéger les marins contre les dangers de poursuites pénales dont ils peuvent faire l'objet de la part des Etats se tenant à l'écart de pareilles conventions, ainsi qu'il appert des travaux préparatoires de la Conférence. Le Comité maritime international, il est vrai, envisage de consacrer une pratique internationale par un texte formel et non pas de créer un droit nouveau et purement conventionnel. Cependant, il est à redouter que l'élaboration d'une convention à ce sujet ne soit considérée par ceux qui ne veulent pas se conformer à cette pratique comme un argument en faveur de leur thèse, selon lequel il s'agirait ici d'obligations internationales valant seulement pour ceux qui sont parties à la Convention.

Le rapporteur spécial reconnaît pleinement que sa proposition n'offre point une solution idéale. Celle-ci ne pourrait être obtenue que par l'institution, en matière d'abordage, d'une juridiction internationale connaissant des conflits internationaux qui résultent des collisions en haute mer. Mais, aussi longtemps que celle-ci ne paraît pas encore réalisable, il faut se contenter de la solution *next best*.

C'est pour ces raisons que le rapporteur spécial voudrait suggérer que la Commission insère dans le Règlement sur le régime de la haute mer la règle qu'il s'est permis de formuler.

3. — SAUVEGARDE DE LA VIE HUMAINE EN MER (par. 81)

Lors de sa deuxième session, la Commission a déclaré attacher une grande importance aux règles internationales destinées à prévenir les abordages en mer, et prévues à l'annexe B de l'Acte final de la Conférence de Londres de 1948¹². La Commission a prié le rapporteur spécial d'étudier la question afin de déduire de ces règles quelques principes que la Commission pourrait examiner¹³. Répondant à cette invitation, le rapporteur spécial a énoncé, dans le rapport qu'il a présenté à la Commission lors de la troisième session, certains principes qui, à son avis, pourraient être dégagés des règles internationales destinées à prévenir les abordages en mer¹⁴.

Pendant sa troisième session, la Commission a examiné ces principes¹⁵. De plusieurs côtés, on a exprimé la crainte que la Commission ne dépassât les limites de sa compétence en abordant l'examen des questions d'ordre technique dans cette matière. Tout en admettant qu'il est désirable d'unifier la réglementation, par les lois nationales, de la sauvegarde de la vie humaine en mer, la Commission du droit international

a estimé qu'il ne lui appartenait pas de s'occuper de la question. A cet égard, il faudrait s'attacher spécialement aux travaux des organismes compétents qui existent ou qui sont sur le point d'être créés.

Certains membres ont été d'avis que ce serait faire œuvre de codification que de prescrire aux Etats de s'abstenir d'édicter des règles qui soient en contradiction avec celles qui ont été établies de concert par les autres Etats maritimes. Une telle obligation aurait une réelle utilité. Cela ne veut pas dire que les principales puissances maritimes pourraient s'ériger en régulatrices de la police de la navigation et que les autres Etats seraient obligés d'adopter les règles ainsi établies. Cependant, il faudrait éviter que des Etats, en édictant des règles en contradiction avec celles établies par la plupart des autres Etats maritimes, ne mettent en péril la sauvegarde de la vie humaine en mer. Dans cet ordre d'idées, le rapporteur spécial se permet de soumettre à la Commission un projet d'article libellé comme suit :

« Les Etats sont tenus de s'abstenir d'édicter des règles en contradiction avec celles qui ont été établies de concert par la plupart des autres Etats maritimes, dans la mesure où une telle contradiction pourrait compromettre la sauvegarde de la vie humaine en mer. »

La Commission a été d'accord pour estimer qu'il était possible de déduire de l'article 11 de la Convention de Bruxelles du 23 septembre 1910 pour l'unification de certaines règles en matière d'assistance et de sauvetage maritime¹⁶, ainsi que de l'article 8 de la Convention du même jour pour l'unification de certaines règles en matière d'abordage¹⁷, un principe général en ce qui concerne la sauvegarde de la vie humaine¹⁸. On pourrait, à côté d'une obligation, imposée aux capitaines de navires, établir le devoir des Etats de promulguer une législation destinée à assurer l'application du principe énoncé. Ces principes pourraient être formulés comme suit :

« Le capitaine d'un navire est tenu, autant qu'il peut le faire sans danger sérieux pour son navire, son équipage et ses passagers, de prêter assistance à toute personne trouvée en mer en danger de se perdre. Après un abordage, le capitaine de chacun des navires entrés en collision est tenu, autant qu'il peut le faire sans danger sérieux pour son navire, son équipage et ses passagers, de prêter assistance à l'autre bâtiment, à son équipage et à ses passagers. Les Etats sont tenus de prévoir dans leurs législations nationales des dispositions de nature à garantir l'application de ces principes par les capitaines des navires sous leur pavillon. »

4. — DROIT D'APPROCHE ET TRAITE DES ESCLAVES (par. 82)

Dans le rapport qu'il avait soumis à la Commission lors de sa troisième session, le rapporteur spécial traitait la question du droit d'approche et celle de la traite des esclaves dans des chapitres différents. En ce

¹² Great Britain, *Cmd.* 7492.

¹³ Rapport de la Commission du droit international sur les travaux de sa deuxième session du 5 juin au 29 juillet 1950, *Documents officiels de l'Assemblée générale, cinquième session, Supplément n° 12* (A/1316), par. 188.

¹⁴ A/CN.4/42; *Yearbook of the International Law Commission, 1951*, vol. II, p. 81.

¹⁵ 122^e séance, par. 107-117; 123^e séance, par. 7-80.

¹⁶ De Martens, *Nouveau Recueil général de traités*, 3^e série, vol. VII, p. 739.

¹⁷ *Ibid.*, p. 721.

¹⁸ A/1316, *op. cit.*, par. 189.

qui concerne le droit d'approche, il proposait le texte suivant :

« *Sauf les cas où les actes d'ingérence se fondent sur des pouvoirs accordés par traité, un bâtiment de guerre, qui rencontre à la mer un navire de commerce étranger, n'a pas le droit de l'arraisonner ni de prendre aucune autre mesure à son égard, à moins qu'il n'y ait un motif sérieux de penser que ledit navire se livre à la piraterie. Dans le cas où les soupçons ne se trouveraient pas fondés et où le navire arrêté n'aurait donné de sa part aucun motif à soupçons par des actes non justifiés, le navire doit être indemnisé du dommage subi par l'arrêt*¹⁹. »

En ce qui concerne la traite des esclaves, le rapporteur spécial était d'avis que le droit d'approche ne pourrait être exercé dans toute l'étendue de la haute mer, mais seulement dans une zone spéciale où, dans les circonstances actuelles, la traite existe encore²⁰.

La Commission a toutefois adopté un autre point de vue; elle a, par sept voix contre quatre, adopté une proposition tendant à ne pas faire de distinction en ce qui concerne le droit d'approche, selon qu'il s'agit d'un navire soupçonné de piraterie ou d'un navire suspect de se livrer à la traite des esclaves²¹. Le rapporteur spécial soumet donc à la Commission la proposition suivante :

« *Sauf les cas où les actes d'ingérence se fondent sur des pouvoirs accordés par traité, un bâtiment de guerre, qui rencontre à la mer un navire de commerce étranger, n'a pas le droit de l'arraisonner ni de prendre aucune autre mesure à son égard, à moins qu'il n'y ait un motif sérieux de penser que ledit navire se livre à la piraterie ou à la traite des esclaves. Dans le cas où les soupçons ne se trouveraient pas fondés et où le navire arrêté n'aurait donné de sa part aucun motif à des soupçons par des actes non justifiés, le navire doit être indemnisé du dommage subi par l'arrêt.* »

La Commission a prié le rapporteur d'examiner, sans toutefois entrer dans les détails, si, du moment que la piraterie est mentionnée dans le texte, il est nécessaire de définir cette conception²². Le rapporteur spécial est d'avis qu'il n'est pas possible de définir la piraterie sans entrer dans les détails. Or, la Commission n'a pas l'intention d'entreprendre, dès à présent, l'étude de cette matière assez compliquée. A juste titre, on a rappelé que les travaux du Harvard Research on International Law ont montré combien il était difficile de donner une définition applicable à tous les cas de piraterie imaginables. Dans ces conditions, le rapporteur propose que la Commission s'abstienne pour le moment de toute définition en ce qui concerne la conception de la piraterie.

La Commission a pensé qu'elle ne devait pas se contenter, en ce qui concerne la traite des esclaves, de reconnaître un droit d'approche, mais qu'en outre elle devait insérer certaines dispositions qui obligeraient les

Etats à coopérer dans la mesure du possible à la suppression de la traite. Le rapporteur spécial avait proposé à cet effet certaines dispositions²³ qui, cependant, selon la Commission, étaient trop détaillées. M. Yepes a proposé le texte suivant :

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

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

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

» Tout esclave qui se serait réfugié sur un navire de guerre ou un navire marchand sera *ipso facto* affranchi²⁴. »

Ce texte envisageait de combiner dans un seul article le droit d'approche et les devoirs des Etats en ce qui concerne la répression de la traite.

Le rapporteur spécial est d'avis qu'il serait préférable de faire une distinction nette entre les deux matières : d'une part le droit d'approche, d'autre part les obligations des Etats en matière de répression de la traite. Dans le premier cas, il s'agit de sauvegarder la liberté de la navigation et d'interdire tout droit de visiter et d'examiner des navires en haute mer, sauf dans les cas nettement indiqués. Dans l'autre cas, il s'agit de tout autre chose, à savoir d'obliger les Etats à collaborer aux mesures visant la suppression de la traite. Le rapporteur spécial propose donc de traiter de la dernière obligation dans un article spécial qui pourrait être libellé comme suit :

« 1. *Tous les Etats sont obligés de coopérer afin d'assurer le plus efficacement possible la répression de la traite des esclaves en haute mer. Ils sont tenus de prendre des mesures efficaces pour empêcher le transport des esclaves sur les navires autorisés à arborer leur pavillon et pour prévenir l'usurpation de leur pavillon à cette fin.*

» 2. *Tout esclave qui se réfugie sur un navire de guerre ou un navire marchand sera ipso facto affranchi.* »

5. — CÂBLES SOUS-MARINS (par. 83)

A sa deuxième session la Commission avait retenu le principe selon lequel tous les Etats ont le droit de poser des câbles sous-marins en haute mer. Dans son rapport sur les travaux de sa deuxième session la Commission avait prié le rapporteur d'étendre la règle aux pipe-lines ainsi que d'examiner la question des mesures

¹⁹ A/CN.4/42; *Yearbook of the International Law Commission*, 1951, vol. II, p. 83.

²⁰ *Ibid.*, p. 84.

²¹ Compte rendu de la 123^e séance, par. 132.

²² Compte rendu de la 124^e séance, par. 89-94.

²³ A/CN.4/42; *Yearbook of the International Law Commission*, 1951, vol. II, p. 85.

²⁴ Compte rendu de la 124^e séance, par. 74.

de protection²⁵. Dans son deuxième rapport, le rapporteur avait fait observer que la Convention du 14 mars 1884 relative aux câbles sous-marins ne donne plus pleinement satisfaction et que l'évolution technique rend nécessaire des stipulations plus complètes²⁶. En 1927, l'Institut de droit international avait adopté certains vœux destinés à compléter la Convention. Le rapporteur s'est demandé dans son rapport si cette matière ne relevait pas plutôt d'une convention résultant d'une conférence générale que des travaux de la Commission. Il s'est borné à emprunter à la Convention de 1884 et aux résolutions de l'Institut de droit international quelques dispositions d'ordre général qui lui avaient paru propres à être insérées dans la réglementation dont la Commission envisage l'adoption²⁷.

Lors de sa troisième session, la Commission a examiné les propositions du rapporteur et certains membres ont exprimé l'avis que la réglementation était encore trop détaillée²⁸. Aussi le rapporteur a-t-il réexaminé son projet. Il soumet maintenant à l'examen de la Commission un nouveau projet abrégé qui contient seulement les principes les plus importants qui régissent cette matière, à savoir :

Article premier

Tout Etat peut immerger sur le lit de la haute mer des câbles télégraphiques ainsi que des pipe-lines.

Article 2

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

(Voir l'article II de la Convention de 1884.)

Article 3

Le propriétaire d'un câble ou d'un pipe-line, en dehors de la mer territoriale, qui, par la pose ou la réparation de ce câble ou de ce pipe-line, cause la rupture ou la détérioration d'un autre câble ou d'un autre pipe-line, doit supporter les frais de réparation que cette rupture ou cette détérioration aura rendu nécessaires.

(Voir l'article IV de la Convention de 1884.)

²⁵ Documents officiels de l'Assemblée générale, cinquième session, Supplément n° 12, (A/1316), par. 192.

²⁶ De Martens, *Nouveau Recueil général de traités*, 2^e série, vol. XI, pp. 281-286.

²⁷ A/CN.4/42; *Yearbook of the International Law Commission*, 1951, vol. II, pp. 85-88.

²⁸ Compte rendu de la 124^e séance, par. 95-105; compte rendu de la 125^e séance, par. 7-36.

Article 4

Tous les engins de pêche dont on se sert en chalutant doivent être construits de telle façon, et maintenus dans de telles conditions, que tout danger d'accrocher les câbles ou pipe-lines sous-marins au fond de la mer soit réduit au minimum.

(Voir résolution I de la Conférence de Londres de 1913²⁹.)

6. — DROIT DE POURSUITE (par. 84)

La réglementation que la Conférence de codification de 1930 a élaborée en ce qui concerne le droit de poursuite reproduit d'une façon générale des principes qui ne se trouvent pas contestés en droit international³⁰, mais elle contient certains points controversés et ce sont notamment ces points-là que la Commission du droit international a examinés pendant sa troisième session³¹. Il s'agit des points suivants :

i) A quel moment peut-on dire que la poursuite a commencé? Il appert des observations consignées dans le rapport de la Deuxième Commission de la Conférence de La Haye que celle-ci a adopté le point de vue suivant : si un navire d'inspection reçoit un message radiotélégraphique lui annonçant une infraction commise et s'il se met en route sans encore voir le navire en question, on ne saurait considérer la poursuite comme commencée. La poursuite ne peut être considérée comme commencée qu'au moment où le navire poursuivant s'est convaincu lui-même de la présence du navire dans la mer territoriale et qu'il lui a donné l'ordre de stopper en hissant le signal prescrit. Afin d'éviter des abus, on n'a pas voulu se contenter de l'ordre au moyen de la T.S.F., qui pourrait être donné à une distance illimitée. De certains côtés, on a émis l'opinion que cette stipulation rend trop difficile la tâche du navire et qu'elle ne saurait être considérée comme reproduisant le droit en vigueur. La Commission, toutefois, a été d'avis que la compétence très large réclamée par certains auteurs à ce sujet ne saurait être considérée comme généralement admise; la Commission s'est donc ralliée au principe adopté en 1930.

ii) Est-ce que le navire de police donnant l'ordre doit se trouver également dans la mer territoriale?

Il résulte des observations jointes à l'article adopté par la Conférence de La Haye que celle-ci a voulu répondre négativement à cette question. On n'a pas jugé nécessaire qu'au moment où le navire étranger, se trouvant dans la mer territoriale, reçoit l'ordre de stopper, le navire qui donne l'ordre s'y trouve également. Il suffit qu'au moment où commence la poursuite le navire qui commet l'infraction se trouve dans la mer territoriale. La Commission s'est ralliée à ce point de vue.

iii) La poursuite peut-elle commencer tandis que le navire se trouve dans la zone contiguë?

²⁹ Grande-Bretagne, *Parliamentary Papers* (1913), Cmd. 7079.

³⁰ Publications de la Société des Nations, V. *Questions juridiques*, 1930, V.7. Conférence pour la codification du droit international. Acte final. Document C.228.M.115. 1930.V, p. 17.

³¹ Compte rendu de la 125^e séance, par. 37-76.

A la Conférence de La Haye, on n'a pu arriver à un accord sur ce point. La Commission fut d'avis que, du point de vue logique, la poursuite ne saurait commencer dans une zone contiguë si cette zone a été établie à des fins différentes de celles qui sont à la base de l'arrêt du navire. Si, par exemple, un navire a pêché illégalement dans la mer territoriale, la poursuite ne saurait être commencée si le navire, ayant déjà quitté ses eaux, se trouve dans une zone contiguë, instituée à des fins douanières ou fiscales. Certains membres de la Commission, tout en reconnaissant la logique de ce point de vue, ont exprimé des doutes à l'égard de la possibilité pratique de maintenir cette distinction. Le rapporteur a, tout de même, inséré cette distinction dans le nouveau projet.

iv) La poursuite peut-elle être commencée en cas de *constructive presence* d'un navire dans les eaux territoriales?

On envisage ici le cas où le navire lui-même se trouve en dehors des eaux territoriales, mais y fait effectuer par des embarcations des opérations délictueuses. La règle élaborée par la Conférence de La Haye dispose que la poursuite ne peut être considérée comme commencée que si le navire poursuivant s'est assuré, par des relèvements, des mesures d'angle ou d'une autre façon, que le navire poursuivi ou l'une de ses embarcations se trouve dans les limites de la mer territoriale. Le cas du navire, stationnant en dehors de la mer territoriale, qui se sert, pour faire accomplir dans ces eaux des actes délictueux, non plus de ses propres canots mais d'autres embarcations, n'a pas trouvé à la Conférence de La Haye une réponse nette. L'opinion a été émise que le bâtiment n'est pas moins coupable s'il se sert, pour faire accomplir dans les eaux étrangères des actes délictueux, non pas de ses propres canots mais d'autres embarcations³². La Commission était cependant d'avis que cette opinion n'était pas suffisamment fondée.

³² Voir Pearce Higgins et Colombos, *The International Law of the Sea*, 2^e éd. (Londres, Longmans, Green and Co., 1951), p. 112.

v) La Commission s'est également prononcée sur une variante du droit de poursuite qui s'est présentée dans la pratique. Il s'agissait de savoir si un navire, arrêté dans les eaux territoriales et conduit à un port pour y être examiné, peut réclamer sa mise en liberté, si la route vers le port mène à travers la haute mer. La Commission a répondu à cette question par la négative.

Se basant sur les décisions de la Commission, le rapporteur soumet le texte suivant à l'approbation de la Commission :

1. La poursuite d'un navire étranger pour infractions aux lois et règlements de l'Etat riverain, commencée alors que le navire étranger se trouve dans les eaux intérieures ou dans la mer territoriale, peut être continuée hors de la mer territoriale, à condition que la poursuite n'ait pas été interrompue. Il n'est pas nécessaire qu'au moment où le navire étranger se trouvant dans la mer territoriale reçoit l'ordre de stopper, le navire qui donne l'ordre s'y trouve également.

2. Dans le cas où le navire étranger se trouve dans une zone contiguë, la poursuite peut seulement être commencée si elle a lieu à cause d'une lésion d'intérêts que l'on a voulu protéger par l'institution de la zone.

3. Le droit de poursuite cesse dès que le navire poursuivi entre dans la mer territoriale de son pays ou d'une tierce puissance.

4. La poursuite ne peut être considérée comme commencée que si le navire poursuivant s'est assuré, par des relèvements, des mesures d'angle ou d'une autre façon, que le navire poursuivi ou l'une de ses embarcations se trouve dans les limites de la mer territoriale, et que l'on a commencé la poursuite en donnant le signal de stopper. L'ordre de stopper doit être donné à une distance telle qu'il puisse être vu ou entendu du navire.

5. Un navire arrêté dans la juridiction de l'Etat et escorté vers un port de cet Etat afin d'être traduit devant les autorités compétentes ne peut réclamer sa mise en liberté du seul fait qu'au cours de ce voyage une partie de la haute mer a été traversée.

LAW OF TREATIES

DOCUMENT A/CN.4/54 *

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ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS THIRD SES- SION WITH COMMENTARY THEREON

CAPACITY TO MAKE TREATIES

Article 1

Capacity to enter into treaties is possessed by all States but the capacity of a State to enter into certain treaties may be limited.

Comment

1. In general "the right of entering international engagements is an attribute of State sovereignty", as was declared by the Permanent Court of International Justice in the *Wimbledon* case (1923).¹ However, the capacity of a particular State to enter into any category, or all categories, of treaties, may be limited by reason of its qualified status. Thus, protected States have usually (subject to anything laid down in the treaty between the protecting and the protected State) no treaty-making capacity of their own, treaties being concluded on their behalf by the protecting State.

* Incorporating document A/CN.4/54/Corr.1.

¹ See Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 1, p. 21.

Members of confederations and federal unions may or may not possess treaty-making capacity according to the circumstances, *e.g.*, member states of the Federal State of Germany as it existed before the First World War retained their competence to conclude international treaties between themselves without the consent of the Federal State, and could also conclude international treaties with foreign States as regards matters of minor interest. Even under the Weimar Constitution of 1919, Bavaria retained her right to maintain diplomatic relations with the Holy See. Under the Federal Constitution of the Swiss Confederation (1848 as revised up to date) it is provided (Article 9): "exceptionally the cantons retain the right to conclude treaties with foreign States in respect of matters of public economy, relations with neighbouring cantons, and police relations; nevertheless such treaties shall not contain anything incompatible with the Confederation or with the rights of other cantons". Under the Bonn Constitution of 1949 the German *Laender* forming part of the Federal Republic possess certain limited treaty-making capacity.

2. Apart from the above cases which are instances of the qualified status of a State (a kind of *capitis diminutio*) there are also examples of States whose capacity to make treaties is restricted in point of subject-matter by international agreement, *e.g.*, in 1982 the Permanent

Court of International Justice held that although the Free City of Danzig was a State, it was subjected to certain limitations affecting both the manner and the extent of its treaty-making capacity.

3. By Article 88 of the Treaty of St. Germain, 1919, Austria's independence was declared to be inalienable and she undertook to abstain from any act which might directly or indirectly compromise her independence, in particular, by participating in the affairs of another State. A further, and somewhat wider, undertaking by Austria was recorded in the Geneva Protocol of 4 October 1922.² These provisions were held, by the Permanent Court of International Justice in 1931, to prohibit a proposed customs union between Germany and Austria.³

COMPETENCE OF HEAD OF STATE

Article 2

In the absence of provisions in its constitutional law and practice to the contrary, the Head of the State is competent to exercise the State's capacity to enter into treaties.

Comment

4. The relevance of the constitutional laws of States to the exercise on their behalf of the treaty-making power is discussed fully in the Comment on Article 4 of this Draft. Generally, it will be seen from what is said there that the traditional rule set forth in the above Article has sustained many inroads upon its former vigor. In practice today most constitutions do limit in some form or other the competence of the Head of State in this matter. However, constitutions change and it is necessary to lay down a rule — the traditional rule of international law — to cover the situation where the constitution is not specific on this point.

ESTABLISHMENT OF THE TEXT OF TREATIES

Article 3

The establishment of the text of a treaty may be effected by :

(a) **The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of that treaty by their duly authorized representatives; or**

(b) **Incorporation in the Final Act of the conference at which the treaty was negotiated; or**

(c) **Incorporation in a resolution of an organ of an international organization in accordance with the constitutional practice of that organization; or**

(d) **Other formal means prescribed by the negotiating States.**

Comment

5. The object of negotiations or discussions for a treaty is the establishment of a text in writing. This

may be done by any of the methods described in Article 1. Examples of these methods are as follows : As regards Article 3(a), The Hague Conventions of 1899 and 1907 were signed on behalf of States which decided to sign. Initialling *ne varietur* is not very common in practice; but examples do exist, e.g., the Final Act of the Locarno Conference. Examples of Article 3(b) are : The Final Acts of The Hague Codification Conference of 1930, the Civil Aviation Conference of 1944 and the United Nations Conference on the Declaration of Deaths of Missing Persons, 1950. Examples of Article 3(c) are conventions adopted by resolutions of such bodies as the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational and Scientific Organization, or by the United Nations itself, as, for example, the Convention on Privileges and Immunities of the United Nations, 1946.⁴ A case in which "other formal means" contemplated by Article 3(d) were adopted is that of the General Act for the Pacific Settlement of International Disputes (1928).⁵ This was not signed by delegates nor does it fall under any of the sub-paragraphs (a), (b) or (c) of Article 3. It was signed by the President of the Assembly of the League of Nations and by the Secretary-General.

ASSUMPTION OF TREATY OBLIGATIONS

Article 4

A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose.

Comment

6. This Article enumerates the methods traditionally employed whereby a State becomes bound by a treaty. In addition, in order to embrace the practice which has sometimes been used of recent years, and which is known as "acceptance", the Article specifies "other means of expressing the will of the State". Further, it specifies that the relevant "means" shall be expressed (a) through an organ competent for that purpose, and (b) in accordance with the constitutional law and practice of the State.

7. As regards this latter point there have been two schools of thought in international law. The adoption of the views put forward by either school raises difficult practical problems. On the one hand, some writers have argued that the conditions of the validity of treaties are determined by international law, and not by the national law of the parties concluding them. According to this view, a treaty which has been ratified and promulgated by the Head of State, to whom (it is said) international law attributes the right to speak in its international relations, must be regarded as a valid and binding treaty, notwithstanding the fact that it may not have been concluded in compliance with the provisions of the Constitution. On the other hand,

² League of Nations, *Treaty Series*, vol. XII, p. 387.

³ Customs Régime between Germany and Austria. Advisory Opinion of 5 September 1931. Publications of the P.C.I.J., Series A/B, No. 41, p. 37.

⁴ United Nations, *Treaty Series*, vol. I, p. 15.

⁵ League of Nations, *Treaty Series*, vol. XCIII, p. 345.

according to the majority of writers, the international validity of treaties is determined, at least in point of form, by the constitutional law of the States which conclude them. It is argued by this school of thought that a treaty concluded in violation of the constitutional provisions of a State is not binding on that State, and that it is both the right and the duty, of a State, when negotiating with another State, to verify the facts relative to the treaty-making power of the organs of the other State.

8. A measure of support was given to the former view by the judgment of the Permanent Court of International Justice, in 1933, in the dispute between Norway and Denmark concerning the sovereignty over Eastern Greenland.⁶ In 1919 the Danish Minister at Christiania (now Oslo) requested a statement as to the Norwegian attitude to the question of Denmark's claim over Eastern Greenland. He expressed the hope that Norway would raise no difficulty. Eight days later Mr. Ihlen, the Norwegian Minister for Foreign Affairs, gave an oral reply, of which he recorded a minute. It was to the effect that he had told the Danish Minister that "the Norwegian Government would not make any difficulties in the settlement of this question". The Court held that this statement, in spite of the Norwegian argument that its Foreign Minister had exceeded his constitutional powers, was binding on Norway.

9. Although this judgment of the Court would appear to support the opinion that constitutional requirements are irrelevant in determining the validity of treaties it will be observed, on closer examination, that what was involved was (a) not a treaty strictly so called, but a unilateral statement, and (b) a declaration of policy rather than a legal engagement. However, this may be, the exact interpretation to be given to the judgment is not free from doubt.

10. The majority of the Commission decided, after careful consideration, that without prejudice to the strictly legal and difficult issues involved, the view of the majority of writers was to be preferred, as more in accordance with the facts of international life, and decided also that this applied, not only to the traditional procedure of signature and ratification, but, in addition, to any novel methods of concluding treaties which may arise in the future, such as, for example, acceptance. Such novel methods are legitimate, and in accordance with international law, to the extent that, and in so far as, they conform with constitutional requirements. Consequently when, for example, a treaty dispenses with ratification expressly (as some do) the efficacy of such a provision depends upon whether it is in accordance with constitutional requirements.

11. A collection has recently been prepared by the Secretariat of the United Nations of national laws and practices regarding the negotiation and conclusion of treaties and other international agreements.⁷ Much

information was supplied by Governments by way of commentary on the constitutional texts regulating this matter. From this study the following facts emerge:

(1) As a general rule the power to ratify treaties is formally vested in the Head of State; but the overwhelming majority of constitutions qualify this rule by specifying that such ratifications shall not be given (or, if given, shall not be binding) unless the prior approval of the legislature (or of a section of it, as in the case of the United States Senate) has been obtained. In most countries this applies to all treaties, with minor exceptions. In some countries it only applies to particular classes of treaties.

(2) In very few countries does the rule still prevail that the Head of State has an unfettered power to ratify treaties. As a matter of pure form this is still legally the position in the countries of the British Commonwealth of Nations, but, in practice, it has become not unusual to seek prior Parliamentary approval before treaties are ratified, at any rate if they are of an important political nature, or impose financial burdens on the State. In any case, the Cabinet System ensures harmony of policy between executive and legislature.

Out of 86 countries, only an insignificant minority state the rule, in an unqualified form, that the Head of State ratifies treaties. Apart from one or two cases, where the actual legal situation is not quite clear, the following countries fall into this class: Ethiopia, Jordan, Monaco, Saudi Arabia, Vatican City.

(3) Occasionally the constitution, or constitutional practice, empowers State authorities other than the Head of State to make, and ratify, international agreements, e.g., in the name of the Government or of a Government department. Thus postal conventions and agreements are concluded on behalf of the United States by the Postmaster-General by and with the advice and consent of the President. Similarly, Article 66 (2) of the Austrian Federal Constitution Act, 1920 provides that the Federal President may authorize the Federal Government or the competent members thereof to conclude certain categories of international treaties for which his ratification is not required.

(4) Some constitutions stipulate that treaties shall be ratified even if there is no provision in the treaty to that effect.

"Other means of expressing the will of the State"

12. This wording is intended to take account of the practice of inserting into international treaties a provision enabling States to "accept" the treaty. This practice is of recent origin,⁸ and was adopted owing to the desire of some States to avoid the usual reference in treaties to "ratification", and so render unnecessary the precise observance of the constitutional procedure appropriate for ratification. Thus, there has appeared, in connexion with multipartite treaties drafted under

⁶ *The Eastern Greenland Case*, Publications of the P.C.I.J., Series A/B, No. 53.

⁷ *Laws and Practices concerning the Conclusion of Treaties*, United Nations publication, Sales No. 1952.V.4.

⁸ It may be noted, however, that the United States used this procedure as long ago as 1884 when joining the International Labour Organisation.

the auspices of the United Nations, a clause which, subject to minor variations, enables an intending party to become bound by either:

- (a) Signature without reservation as to acceptance; or
- (b) Signature with reservation as to acceptance followed by acceptance; or
- (c) Acceptance.

13. The purpose of this practice was to offer Governments greater freedom in regard to the methods used to become parties to treaties. This was particularly so in the case of the United States, under whose political system it is desirable sometimes to give the House of Representatives (instead of the Senate alone, as in the normal ratification procedure) an opportunity to consider the treaty.

14. An article is included below which deals specifically with the procedure of acceptance (Article 10).

RATIFICATION OF TREATIES

Article 5

Ratification is an act by which a State, in a written instrument, confirms a treaty as binding on that State.

Comment

15. As a general rule, ratification applies to treaties which have been signed, and, historically, ratification meant that the act of a diplomatic agent in signing a treaty was confirmed and approved. In modern times, however, ratification is considered to apply not so much to the signature as to the treaty itself. Nor is it necessary that a treaty be signed at all. For example, the Conventions of the International Labour Organisation are not signed, but are simply authenticated by the signature of the President of the Conference and of the Director. Also, many Conventions are simply "adopted" and submitted for acceptance by the appropriate constitutional procedure, which may include ratification. (See Article IV of the Constitution of the Food and Agriculture Organization.)

16. In practice, ratification is a formal act executed in writing. It is theoretically possible to have an oral ratification or a tacit ratification, but the writers⁹ who refer to such a possibility are unable to point convincingly to examples which have arisen in practice. It is correct, therefore, to represent existing law as requiring that ratification should take the form of a written instrument.

WHEN RATIFICATION IS NECESSARY

Article 6

A State is deemed to have undertaken a final obligation by its signature of the treaty:

- (a) If the treaty so provides; or

⁹ L. Oppenheim, *International Law: A Treatise*, 4th ed. (London, Longmans, Green and Co., 1928), vol. I, p. 723, remarked that there might be an oral ratification, but added that he was "not aware of any case where ratification was given orally". These comments do not appear in later editions of his work.

- (b) If the treaty provides that it shall be ratified but that it shall come into force before ratification; or

- (c) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification.

Except in these cases a State is not deemed to have undertaken a final obligation until it has ratified that treaty.

Comment

17. Here the general rule is laid down that, in the absence of special stipulation, ratification of a treaty is necessary. In its judgment, in 1929, in the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder*, the Permanent Court of International Justice said that, unless there was in the treaty an express provision to the contrary, the contracting parties must have intended to abide "by the ordinary rules of international law, amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification".¹⁰ The contrary view has been advocated, namely that treaties do not require ratification unless the text, or the circumstances, point clearly in that direction. The rule stated in Article 4 of this draft is believed, however, to conform more closely to the practice of States, most of whose constitutions specify that treaties shall be ratified according to a particular constitutional procedure. It must also be remembered that the constitutions of some countries provide that treaties shall be ratified, even if there is no provision in the treaty to that effect (See Comment on Article 4). Further, it can hardly be denied that, according to the established custom of centuries, treaties have normally been ratified, and that it is only in exceptional cases, and generally as a development of modern times, that the cases specified under (a), (b) and (c) have arisen.

Examples:

(a) Anglo-Japanese Alliances of 1902, 1905 and 1911;¹¹ Treaty of Lausanne (1912) between Italy and Turkey;¹² Agreement of 14 June 1929 concerning a transit card for emigrants;¹³ Anglo-Polish Treaty of Alliance (1939); Four-Power Agreement of 1944 concerning the punishment of war criminals; Interim Arrangements for the United Nations, signed at San Francisco (26 June 1945);¹⁴ Agreement between United States and Burma concerning the use of certain funds (1947).¹⁵

(b) Some treaties provide for ratification, but specify that they shall come into force from the date of signature. The Treaty of Madrid (1880), which was subject to ratification, and concerned the protection of the nationals of the High Contracting Parties in Morocco, provided that, by exceptional agreement of the parties, the provisions of the treaty should enter into force as from the date of signature. The Balkan Pact of Non-

¹⁰ Publications of the P.C.I.J., Series A, No. 23, pp. 17-21.

¹¹ *British and Foreign State Papers*, vol. 95, p. 88; vol. 98, p. 136; vol. 104, p. 173.

¹² *Ibid.*, vol. 106, p. 1100.

¹³ M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment), vol. IV, p. 2848.

¹⁴ *Ibid.*, vol. IX, p. 366.

¹⁵ United Nations, *Treaty Series*, vol. 25, p. 28.

Agression (1934), although subject to ratification, took effect from the date of signature, as did the Soviet-Czech-Slovak Treaty of Friendship and Mutual Assistance (1943). Instances of particular clauses of a treaty coming into force from the date of signature are as follows :

Treaty of Peace, Amity, Commerce and Navigation (1893) between Japan and Peru (1893); Treaty of Rapallo between Germany and Russia (1922); Agreement between the Union of South Africa and Portugal (1928).

(c) A case where the form of the treaty indicates an intention to dispense with ratification is a treaty providing for conclusion by "acceptance". (See Article 10.) Other examples are often furnished by protocols, by declarations, and by agreements, concluded by subordinate officials, such as military officers or postal officials.

18. Ratification must be in accordance with the constitutional laws of the State. (See Article 4.)

NO OBLIGATION TO RATIFY

Article 7

If a treaty is subject to ratification, signature by a State does not create for that State any obligation to ratify the treaty.

Comment

19. Originally, it was the rule of customary international law that, where a treaty provided ratification, it was normally obligatory to ratify it; and a refusal to ratify a signed treaty, except for good cause, was a serious breach of faith. As a result, however, of the French and American Revolutions of the eighteenth century, it became the practice to insert a clause in Full Powers expressly *reserving* the right to ratify, instead of the traditional *promise* to ratify, which reflected the time-honored rule. In the course of the nineteenth century, as more and more countries adopted the constitutional practice that the legislature should be consulted in the matter of ratification of treaties, the conception that ratification was discretionary became established. Various theories have been advanced in modern times with a view to preventing the abuse of this discretion, and of imposing restrictions on the right to refuse ratification. None of these theories, however, have succeeded in obtaining general acceptance in the practice of States, which, it is believed, is accurately reflected in the rule stated in text. Attempts were made, during the period of the League of Nations, to lay down principles which would at least obviate undue delay on the part of the States in taking a decision whether to ratify or not, but the report produced by the committee appointed on the subject by the League of Nations Assembly failed to influence practice.¹⁶

20. There is an important conventional exception to the rule that ratification may be refused. This is created by Article 19 of the Constitution of the Inter-

national Labour Organisation. This provides that, when the consent of the competent authority has been obtained, a member of the Organisation is bound to communicate its ratification of the Convention for which consent has been given. Such instruments of ratification, however, take, in practice, a somewhat different form from the usual type of instrument of ratification employed in connexion with treaties generally.

21. A certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless.¹⁷ This material is, however, of too fragmentary and inconclusive a nature to form the basis of codification. The same applies to the conception that, where one party has partially executed a treaty, which the other party has signed but not ratified, there arises a kind of estoppel against the non-ratifying party. See Harvard Draft Convention on Treaties.¹⁸

ENTRY INTO FORCE OF TREATIES

Article 8

Unless otherwise provided in the treaty itself,

(a) A treaty not subject to ratification enters into force on signature of all States which have participated in the negotiations;

(b) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories;

(c) A treaty subject to ratification but containing no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories.

Comment

22. Except for a slight verbal alteration (the expression "enters into force" rather than "come into force") the above Article follows the wording of Article 10 of the Harvard Draft Convention.

23. Article 8(b) states what is generally accepted, and appears to require no illustration. However, treaties which provide for ratification and deposit or exchange of ratifications, but which contain no provision as to the date when they should come into force, have not been uncommon. Among them may be mentioned the treaty of defensive alliance between Albania and Italy (1927), and between the Chinese Republic and the Persian Empire of 1 June 1920. The rule stated in

¹⁷ Publications of the P.C.I.J., Series C, No. 17, II, p. 279; Series A, No. 23, pp. 20-21; Series A, No. 5, p. 39; Series C, No. 11, II, pp. 631-632; Series A, No. 7, pp. 39-40. *American and British Claims Arbitration*, Report of Fred K. Nielsen, (Washington, Government Printing Office, 1926), p. 382.

¹⁸ Harvard Law School, *Research in International Law*, "Draft Convention on the Law of Treaties" in *American Journal of International Law*, vol. 29 (1935), Supplement, pp. 778-787.

¹⁶ League of Nations, *Official Journal* (1930), Annex 1207, p. 598.

paragraph (b), as will be seen, requires the exchange of, or deposit of, the instruments of ratification of *all* the signatories to bring a treaty into force, unless, of course, the treaty otherwise provides.

24. The situation dealt with in paragraph (c) is unusual, but examples have occurred in practice of treaties which have provided that they should be subject to ratification, but have nevertheless contained no provision for exchange or deposit of ratifications; *e.g.*, Convention on the Establishment of Common Rules of Private International Law (1921),¹⁹ and the Money Order Convention of the Pan-American Postal Union (1921).²⁰

ACCESSION TO TREATIES

Article 9

(a) Accession to a treaty is an act by which a State, which has not signed or ratified the treaty, formally declares in a written instrument that the treaty is binding on that State.

(b) A State may accede to a treaty only when that treaty contains provisions allowing it to do so, or with the consent of all the parties to the treaty.

(c) Unless otherwise provided in the treaty, a State may accede to a treaty only after it has entered into force.

Comment

25. Accession originally began as an invitation to particular States to become parties to a treaty who were not signatories to that treaty. Later, towards the end of the nineteenth century, it became customary to insert clauses, in a general form, allowing *any* State to "accede".

26. The principle stated in paragraph (b) would appear to be self-evident, as well as in accordance with practice. A State claiming to accede to a treaty is offering a legal relationship with other States which it is for them to accept or reject.

27. As regards the rule stated in paragraph (c) the entry into force of a treaty is, in most instances, an essential pre-requisite to effective accession to the treaty by non-signatory States, inasmuch as the invitation to, or permission for, such States to accede is usually contained in a clause of the treaty, which like the other clauses thereof, is ineffective until the treaty has entered into force. It was declared, at the Second Hague Conference, to be "evident" that an "adhesion" (equivalent to accession in practice) "may have no effect except, at the earliest, from the time the Convention goes into effect".²¹ The invitations sent out by the United States, in connexion with the Pact of Paris (1928), on the day the treaty was signed, referred to "notice of adherence".²² The text of the treaty provided that the

treaty "shall, when it has come into effect... remain open as long as may be necessary for adherence by all the other Powers of the World" (Article III). Likewise, Article 38 of the International Air Transport Convention of Warsaw (1929) provides: "This Convention shall, after it has come into force, remain open for accession by any State."²³

28. In some cases, to which the rule in paragraph (c) applies, an attempt by a State to accede to a treaty not yet in force has been treated as a notice of intention to accede, if and when the treaty enters into force. In such cases, the instrument of accession can be treated as effective on the date of entry into force of the treaty.

"Unless otherwise provided in the treaty"

29. Some treaties are not signed, but simply made "open" to accession, and their entry into force is made expressly dependent on the deposit of a certain number of instruments of accession. Thus, the General Act for the Pacific Settlement of International Disputes (1928) was not opened to signature and ratification, but was merely "adopted" by the Assembly of the League of Nations, and opened to accession. It was provided that it should enter into force on the ninetieth day following the receipt by the Secretary-General of the League of Nations of the accessions of not less than two Contracting Parties. The United Nations Convention on Privileges and Immunities (1946) adopted by the General Assembly in similar fashion, contains (Article 31) provision for only one method of becoming a party — by accession. Article 32 provides that it shall come into force for each party on the deposit of its instrument of accession. In other instances, treaties, although they are signed, and subject to ratification, provide for accession also; nevertheless, they provide that they shall enter into force on the deposit of a certain number of ratifications *or* accessions, *e.g.*, the International Convention for the Suppression of Counterfeiting Currency (1929); the Convention for the Prevention and Punishment of the Crime of Genocide (1949) is to the same effect.

30. In these cases it is clear that the treaty establishes an exception to the normal rule that accession is only possible when the treaty has entered into force.

31. The above Article is subject to the over-riding principle stated in Article 4 that accession must be in accordance with the constitutional requirements of the State.

ACCEPTANCE

Article 10

Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or all of these procedures, declares itself bound by the treaty.

Comment

32. In the Comment on Article 2 of the Draft an explanation is given of the reference to "other means of expressing the will of the State", including the

¹⁹ See Hudson, *op. cit.*, vol. I, p. 678.

²⁰ *Ibid.*, p. 726.

²¹ J. B. Scott, *The Proceedings of the Hague Peace Conferences*, the Conference of 1907 (New York, University Press), vol. I, p. 211.

²² See Treaty for the Renunciation of War (Washington, U.S. Government Printing Office, 1933).

²³ Hudson, *op. cit.*, vol. V, p. 117.

fairly novel procedure of acceptance; and a brief description of this procedure is given. In Article 10, the Commission has sought to give a general definition of acceptance as it has recently emerged in the practice of States.

33. To some extent it may be said that, in point of effect, acceptance differs very little, if at all, from the standpoint of international law, from the traditional modes — ratification, etc. — by which the State indicates its willingness to be bound.²⁴ It is for this reason that it is comprehended under the expression "other means" in Article 4. Nevertheless, in practice, acceptance does present some points of difference. Thus, under the traditional procedures, it is difficult for a single convention to be simply signed by some States, and ratified by others: a uniformity of procedure is presumed. When a convention provides for ratification, the same procedure must be followed by all; if, however, acceptance is provided for, there is a choice of method for each State. Under acceptance procedure those States whose constitutions do not make ratification subject to parliamentary approval can bind themselves at once; whereas others can bind themselves "subject to acceptance". In short, acceptance does away with certain formalities (e.g., the ceremony of signature), combines various traditional methods, and makes the entry into force a more flexible and speedy process. This is particularly true, and important, in connexion with multilateral conventions.

34. In interpreting this Article, the over-riding principle, adopted by the Commission in Article 4, that constitutional law and practice must be observed, is always to be implied and understood. It is not necessary, in the view of the Commission, to repeat

²⁴ It may also be added as a matter of history that the idea underlying acceptance, as distinct from the actual formula used, is not so novel. Thus, some earlier treaties entered into force in relation to each State, either upon signature or upon signature followed by ratification. In such cases each signatory had the option of saying whether or not his signature was subject to ratification. The intention underlying such a clause was the same as that upon which the practice of acceptance rests, though, as will be seen from the formulation of that practice, the scope of the latter, and the options it provides, are much wider.

that language in Article 8, owing to the generality of the wording of Article 4. Accordingly, although the whole idea of acceptance is to provide an informal alternative to the traditional procedures, nothing excludes the legality of acceptance being indicated in the form of those procedures, if such be the constitutional requirement of any particular State. Thus some countries, whose constitutions have no specific provision or practice for acceptance as such, have become parties to conventions prescribing such procedure by the traditional instrument of ratification. According to information supplied to the Secretariat of the United Nations by the Governments of the countries concerned, this is the position, for example, under the constitutional law and practice of Chile and the Netherlands.

35. The formula adopted in most United Nations Conventions is generally accompanied by the clause: "Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations." Such formal instrument may be an instrument of ratification, accession or a simple declaration of willingness to be bound. Nevertheless, it will be seen, if the rest of the standard clause is examined (See para. 12 of this draft) it also provides for signature with or *without* acceptance. Signature without acceptance is thus not the same thing as acceptance, but is yet another form in which the State can be bound. This illustrates the fact that the international practice in the matter is flexible enough to meet all contingencies.

36. It must be observed that discussion took place in the Sixth Committee of the General Assembly during the first part of its Third Session (1948) with respect to the meaning and implications of "acceptance".²⁵ After a lengthy consideration of the matter, the Sixth Committee resolved that it preferred the procedure of signature followed by ratification rather than the new procedure. However, although this at present reflects the position within the United Nations, the possibility of a revival of the practice, or a reversion to it, is not to be excluded.

²⁵ *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 88th meeting, et seq.*

REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/2163

Report of the International Law Commission covering the work of its fourth session,
4 June-8 August 1952

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Chapter I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its fourth session at Geneva, Switzerland, from 4 June to 8 August 1952. The work of the Commission during this session is related in the present report which, being in the nature of a progress report, is submitted to the General Assembly for its information.

OFFICERS

2. At its meeting on 4 June 1952, the Commission elected, for a term of one year, the following officers :

Chairman : Mr. Ricardo J. Alfaro;

First Vice-Chairman : Mr. J. P. A. François;

Second Vice-Chairman : Mr. Gilberto Amado;

Rapporteur : Mr. Jean Spiropoulos.

FILLING OF CASUAL VACANCIES

3. The Commission took note of the casual vacancies in its membership arising from the resignation of three of its members—Mr. James Leslie Brierly, Mr. Vladimir M. Koretsky and Sir Benegal N. Rau. In pursuance of article 11 of its Statute, the Commission elected, on 5 June 1952, Mr. F. I. Kozhevnikov, a national of the Union of Soviet Socialist Republics and

Mr. H. Lauterpacht, a national of the United Kingdom of Great Britain and Northern Ireland, to fill two of these vacancies.

MEMBERSHIP AND ATTENDANCE

4. Consequent upon the above-mentioned elections, the Commission consisted of the following members :

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khoury	Syria
Mr. F. I. Kozhevnikov	Union of Soviet Socialist Republics
Mr. H. Lauterpacht	United Kingdom of Great Britain and Northern Ireland
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

5. All the foregoing members were present at the fourth session, Messrs. Kozhevnikov, Lauterpacht and Zourek attended meetings of the Commission from

9 June, Mr. Amado from 10 June, Mr. Córdova from 30 June, and Mr. Spiropoulos from 4 July 1952. Mr. Sandström ceased to attend meetings after 20 July, and Mr. Amado after 25 July.

6. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

7. At its meeting on 8 August 1952, the Commission elected Mr. Radhabinod Pal, a national of India, to fill the remaining casual vacancy in its membership.

AGENDA

8. The Commission adopted an agenda for the fourth session consisting of the following items :

- (1) Filling of casual vacancies in the Commission;
- (2) Arbitral procedure;

- (3) Law of treaties;
- (4) Régime of the high seas;
- (5) Régime of territorial waters;
- (6) Nationality including statelessness;
- (7) Date and place of the fifth session;
- (8) Review of the Statute of the Commission;
- (9) Other business.

9. In the course of its fourth session, the Commission held forty-nine meetings. It considered all the items on the foregoing agenda, with the exception of the question of the review of its Statute (item 8). As to that question, the Commission, having regard to General Assembly resolution 600 (VI) adopted on 31 January 1952, deemed it inopportune to proceed with the consideration of it at the present session.

10. The work on the questions dealt with by the Commission is summarized in chapters II to VII of the present report.

Chapter II

ARBITRAL PROCEDURE

11. The International Law Commission, at its first session in 1949, selected arbitral procedure as one of the topics of international law for codification and gave it priority. It elected Mr. Georges Scelle as special rapporteur on the subject. In pursuance of Article 19, paragraph 2, of its Statute, the Commission also requested Governments to furnish it with the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the subject.¹

12. At the second session in 1950, Mr. Scelle, the special rapporteur, submitted to the Commission a "Report on Arbitration Procedure" (A/CN.4/18) in which he proposed a preliminary draft on arbitral procedure. The Commission also received replies from certain Governments to its afore-mentioned request (A/CN.4/19, part I, B). In addition, the Commission had before it a "Bibliography on Arbitral Procedure" (A/CN.4/29) and a "Memorandum on Arbitral Procedure" (A/CN.4/35), both submitted by the Secretariat. The Commission undertook a preliminary consideration of certain parts of the report of the Special Rapporteur and requested him to present a revised draft, taking into account the views expressed in the Commission.²

13. At the third session in 1951, the special rapporteur, Mr. Scelle, presented his "Second Report on Arbitration Procedure" (A/CN.4/46) in which was contained a "Second Preliminary Draft on Arbitration

Procedure". This report was held over for consideration at the fourth session.³

14. In the course of its fourth session in 1952, the Commission, at its 187th to 156th, 178rd to 177th and 179th to 183rd meetings, considered the "Second Preliminary Draft on Arbitration Procedure" presented by Mr. Scelle, who had also submitted a "Supplementary Note to the Second Report on Arbitration Procedure" (A/CN.4/57). It adopted a "Draft on Arbitral Procedure", consisting of thirty-two articles, with comments, which is set out at the end of the present chapter.⁴ In accordance with article 21, paragraph 2, of its Statute, the Commission decided to transmit, through the Secretary-General, this draft to Governments with the request that the latter should submit to it their comments on this document within a reasonable time. The Commission further decided, in pursuance of article 21, paragraph 1, of its Statute, to request the Secretary-General to issue the said draft as a Commission document and to give it all necessary publicity. The Commission will draw up a final draft on arbitral procedure at its next session and will submit it to the General Assembly, in conformity with article 22 of its Statute.

15. It was also decided that the final draft should be accompanied by a detailed commentary, as envisaged in Article 20 of the Statute, giving an account and an

¹ Report of the International Law Commission covering the work of its first session, see A/925, *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (paragraphs 16, 20-22). Also in *Yearbook of the International Law Commission, 1949*, p. 281.

² Report of the International Law Commission covering the work of its second session, see A/1316, *Ibid.*, *Fifth Session, Supplement No. 12* (part VI, chapter II). Also in *Yearbook of the International Law Commission, 1950*, vol. II, pp. 381-383.

³ Report of the International Law Commission covering the work of the third session, see A/1858, *Ibid.*, *Sixth Session, Supplement No. 9* (paragraph 7). Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 124.

⁴ Mr. Hudson declared that he had voted against the adoption of the draft as a whole. Mr. Kozhevnikov stated that he had voted against the draft as a whole and also against the comments. Mr. Zourek stated that he had voted against the draft as a whole and against the comments, for reasons which he had had occasion to explain during the discussions (see, in particular, the summary records of the 140th, 147th, 149th, 151st and 177th meetings).

analysis of the relevant practice, including arbitration treaties and compromissory clauses, arbitral decisions and the literature on the subject. That commentary, to be prepared by the Secretariat under the direction of and in consultation with the Special Rapporteur, should be available to the Commission at the next session.

16. In preparing the "Draft on Arbitral Procedure", the Commission, in conformity with its Statute, had to bear in mind the distinction between the codification of existing practice and the development of international law on the subject. On the other hand, the Commission realized that the draft as a whole could not be based on the exclusive adoption of either method. Accordingly, while with regard to some aspects of arbitral law and procedure the present draft gives expression to what the Commission considers to represent the preponderant practice of governments and arbitral tribunals, with regard to other aspects of the subject the draft has taken into account both the lessons of experience and the requirements of international justice as a basis for provisions which are *de lege ferenda*. The comments which follow the Articles of the draft indicate the character of the solution adopted in each case. However, it is deemed convenient, in these introductory observations, to draw attention to certain general features of the draft.

17. In the first instance, the Commission considered that it was doing no more than codify the existing practice, dating from the end of the eighteenth century, inasmuch as it based the draft on the principle that arbitration is a method of settling disputes between States in accordance with law, as distinguished from the political and diplomatic procedures of mediation and conciliation. That principle has found expression not only in Article 12 of the draft relating to the law to be applied by the arbitral tribunal, but also in other articles.

18. In the light of experience, moreover, the Commission considered it necessary to take certain steps to render the undertaking to arbitrate and the whole procedure as effective as possible. The Commission took into account the fact that the difficulties arising in the selection of arbitrators and the drafting of a *compromis* might deprive the original undertaking to arbitrate of any real force. It therefore thought it necessary to provide for recourse to a court which could give a binding decision on the "arbitrability" of the dispute; to bring about the constitution of the arbitral tribunal, if necessary before the drafting of the *compromis*; and, finally, to empower the arbitral tribunal, once constituted, to draft the *compromis* itself, in case of disagreement between the parties. The purpose of the articles contained in the first two chapters of the draft is to resolve those difficulties.

19. Similarly, having regard both to the legal nature of arbitration and to past experience in the functioning of international tribunals, it has been considered desirable to safeguard the effectiveness of the process of arbitration and the independent standing of arbitral tribunals in their capacity as international organs, by provisions relating to what may be described as the continuity of arbitral tribunals once they have been

constituted. These principles intended to ensure the continued functioning and the independence of the tribunal notwithstanding the attitude of any one of the parties bound by the undertaking to arbitrate, are expressed mainly in the articles of the draft bearing on the replacement and withdrawal of arbitrators.

20. In giving formal expression to the principle that the arbitral tribunal has the legal power to determine its jurisdiction in conformity with the instrument creating the obligation to arbitrate and that the tribunal decides on the procedure before it and the manner and weight of the evidence submitted to it, the Commission has, in its opinion, followed the preponderant existing practice and the generally recognized principles of law on the subject. However, it has been considered that the effectiveness of the process of arbitration requires some more detailed elaboration, as done in chapter IV of the draft, of the law on this subject.

21. For the same reason, while adopting the principle that arbitral awards are final and without appeal, the Commission has deemed it essential to include, in the draft, articles concerning revision and annulment of the award. The Commission hopes, in particular, that the adoption by governments of the legal procedures prescribed in the draft as regards action *ultra vires* will remedy what in the past has frequently been a considerable defect in arbitral procedure which may be highly prejudicial both to the authority of arbitration and to international law in general. It is only by this means that a solution can be found for the otherwise insoluble conflicts between the principle that the instrument establishing the tribunal is the source of its competence and the no less important principle that any dispute on the extent of that competence should be settled, in the first instance, by the tribunal itself.

22. With regard to the machinery for solving conflicts of this nature, as well as in some other matters, the present draft is based on the view that, in the absence of other machinery agreed upon by the parties, the International Court of Justice is the most suitable agency for safeguarding the effectiveness of the undertaking to arbitrate and the independence and the authority of arbitral procedure in general.

23. The Commission considers that it is in accordance with the nature of arbitral procedure that the parties should be in a position to adapt the details of that procedure to the requirements of any particular dispute. For that reason, many of the provisions of the draft are qualified by the recognition of the admissibility of alternative solutions agreed upon by the parties. On the other hand, it follows from the character of arbitration conceived as a judicial process and distinct from the methods of political adjustment and conciliation that some provisions of the draft, such as those relating to revision and annulment of the award, must be cast in a form which is essentially mandatory. The Commission has endeavoured to strike a balance between these two sets of considerations.

24. Two currents of opinion were represented in the Commission. The first followed the conception of arbitration according to which the agreement of the parties

is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking.

DRAFT ON ARBITRAL PROCEDURE

CHAPTER I

The Undertaking to Arbitrate

Article 1

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future.

2. The undertaking shall result from a written instrument.

3. The undertaking constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results.

Comment

(1) This article, which is based on article 39 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, is not purely declaratory. Its purpose is to affirm the binding force of the undertaking to arbitrate, even when unaccompanied by any provision on procedure. The term *clause compromissoire* (arbitration clause) which is sometimes used in French as equivalent to *engagement arbitral* (undertaking to arbitrate) has not been adopted by the Commission, as it might be confused with the *compromis* referred to in Article 9.

(2) In view of the fundamental importance of the undertaking to arbitrate, paragraph 2 of this article implies that the undertaking may not be based on a mere verbal agreement. The paragraph does not mean, however, that the undertaking to arbitrate requires the conclusion of a convention or intentional treaty in the strict sense of those terms. For instance, it would be sufficient for the parties concerned to accept a resolution of the Security Council recommending them to have recourse to arbitration for the settlement of a specific dispute. In such a case the official records of the United Nations would provide the authentic text of the undertaking.

Article 2

1. If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, the question may, in the absence of agreement between the parties upon another procedure, be brought before the International

Court of Justice on an application by either party. The judgment rendered by the Court shall be final.

2. In its judgment on the question, the Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

Comment

(1) This article constitutes an important innovation. It deals with the "arbitrability" of the dispute and is designed to ensure the effectiveness of the undertaking to arbitrate. It provides, in case of disagreement between the parties as to the existence of a dispute or as to whether a dispute between them is covered by a prior undertaking to arbitrate, for the intervention of an international organ competent to decide the question, whose decision shall be final. In accordance with the traditional nature of arbitration, the parties may themselves agree on the body to be called upon to decide the question of arbitrability. Only if they fail to reach agreement on this point does the International Court of Justice become competent to decide the question of arbitrability.

(2) This provision is not without precedents. The practice of the United States has provided for recourse to the constitution of commissions of inquiry for the same purpose, namely, to ensure the effectiveness of general arbitration treaties, but it has required a quasi-unanimous decision on arbitrability by the commissioners. The provision is calculated to remove the most frequent obstacle to the effectiveness of an original arbitration clause, an obstacle that has, in the past, proved difficult to overcome. In the view of the Commission, unless otherwise agreed by the parties, the International Court of Justice, and not the Chamber of Summary Procedure of that Court, is the suitable organ to decide this important matter.

(3) In paragraph 1 of this article, it is assumed that the dispute on arbitrability has arisen between the parties before they have constituted an arbitral tribunal. Otherwise, it is the tribunal which will be responsible for deciding the question of arbitrability.

(4) Paragraph 2 provides that, in its judgment, the Court may also prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

CHAPTER II

Constitution of the Tribunal

Article 3

1. Within three months from the date of the request made for the submission of a dispute to arbitration, or from the date of the decision of the International Court of Justice in conformity with article 2, paragraph 1, the parties to an undertaking to arbitrate shall constitute an arbitral tribunal by mutual agreement. This may be done either in the *compromis* referred to in article 9, or in a special instrument.

2. If the appointment of the members of the tribunal is not made by the parties within the period of three months as provided in the preceding paragraph, the parties shall request a third State to make the necessary appointments.

3. If the parties are unable to agree on the selection of the third State within three months, each party shall designate a State, and the necessary appointments shall be made by the two States thus designated.

4. If either party fails to designate a State under the preceding paragraph within three months, or if the Governments of the two States designated fail to reach an agreement within three months, the necessary appointments shall be made by the President of the International Court of Justice at the request of either party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

Comment

(1) The first paragraph of Article 3 deals with the second major difficulty that may arise when the undertaking to arbitrate has to be carried out. The choice of arbitrators rests with the parties and this is one of the essential features of arbitration which distinguishes it from proceedings in a court of law; but when it comes to choosing the arbitrators, governments, concerned as they are about the defence of their interests, sometimes hesitate, because they have doubts about the legal views or the personal character of the prospective nominees. Nevertheless, the choice of a single arbitrator or of an arbitral tribunal must be made. It is necessary if the international dispute is to be settled. Following the precedent of Article 28 of the Revised General Act for the Pacific Settlement of International Disputes, the Commission feels that where the choice is made by the parties, the tribunal should be constituted within a very short time, i.e., three months from the date when there is no further doubt as to the arbitrability of the dispute. The constitution of the tribunal may be provided for in a *compromis* or in a special immediate agreement between the parties. In either case it is a judicial body of the international community, constituted by the States parties to the dispute.

(2) The next question which arises is how the tribunal is to be constituted if the parties are unable to reach agreement. This is dealt with in paragraphs 2, 3 and 4. The time limits thus prescribed amount to a total of nine months, not including any period required for the intervention of the President, the Vice-President, or a member of the International Court of Justice.

Article 4

1. The parties having recourse to arbitration may act in whatever manner they deem most appropriate; they may refer the dispute to a tribunal consisting of a sole arbitrator or of two or more arbitrators as they think fit.

2. With due regard to the circumstances of the case, however, the sole arbitrator or the arbitrators should be chosen from among persons of recognized competence in international law.

Comment

(1) This article is generally applicable, whether the undertaking to have recourse to arbitration derives from the *compromis* or is anterior thereto.

(2) Paragraph 1 affirms the freedom of the parties in the composition of an arbitral tribunal. Thus an arbitral tribunal, sometimes referred to in this draft merely as "tribunal", means either a single arbitrator or a body of several arbitrators.

(3) Paragraph 2 stipulates that the arbitrators should be persons of recognized competence in international law. This, however, is not an inflexible rule. The Commission does not wish to exclude cases in which the technical nature of the issues involved might lead the parties to choose arbitrators not exactly fulfilling that requirement. This is the sense of the words "with due regard to the circumstances of the case".

(4) Similarly, the Commission does not wish to preclude the possibility of the appointment, as arbitrators, of heads of State or important political personages, although this practice is sometimes hardly calculated to enhance the judicial nature of arbitration.

(5) The article does not exclude the possibility of the arbitrators or the majority of the arbitrators being nationals of the parties to the dispute. The Commission does not wish to preclude the constitution of a tribunal consisting of two national arbitrators or of two national arbitrators and an umpire.

(6) For the same reason, the Commission does not consider it necessary to follow the precedent of article 22 of the Revised General Act for the Pacific Settlement of International Disputes, which requires the constitution of an arbitral tribunal of five members.

(7) Although precedence is given to the principle of full freedom of the parties in the choice of arbitrators, the Commission does not overlook the importance of emphasizing the judicial character of arbitration. It endeavours to pursue this object in many articles of the draft, such as Articles 5, 7 and 8 on the immutability of the tribunal; Articles 11, 12, 13, 17 and 21 on the powers of the tribunal; and finally in chapters VI and VII on revision and annulment.

Article 5

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator may not be replaced during the proceedings before the tribunal except by agreement between the parties.

Comment

(1) This article is based on the principle of "immutability" of the tribunal once it has been set up; this is a

corollary of the principle of judicial arbitration as distinguished from diplomatic or political arbitration.

(2) The principle laid down in paragraph 1 is, in fact, that once the dispute has been submitted to the tribunal, the composition of the latter should remain unchanged until the award has been rendered, so that the parties cannot, in view of the course taken by the proceedings, influence the final decision by changing the composition of the tribunal. Moreover, this precaution is linked with the concept of the arbitral tribunal as a common organ of the parties, that is, a judicial organ of the international community constituted by them.

(3) Paragraph 2, nevertheless, allows either party freely to replace an arbitrator appointed by it provided that the proceedings before the tribunal have not yet begun. Once the proceedings have begun, replacement of an arbitrator appointed by one party requires the consent of the other. Moreover, it is implicit in the text, although not actually stated, that an arbitrator appointed by an international authority, such as the International Court of Justice or its President, may in no circumstance be replaced either by one of the parties or by agreement between them.

(4) Nevertheless, where a tribunal is set up to settle not one but several disputes, this paragraph will permit adaptation of its composition to suit the technical requirements of each case.

(5) Where there is a single arbitrator, the parties remain free to appoint another up to the time the proceedings have begun, provided that the first arbitrator was appointed by them.

Article 6

Should a vacancy occur for reasons beyond the control of the parties, it shall be filled by the method laid down for the original appointment.

Comment

This article requires no comment.

Article 7

1. Once the proceedings before the tribunal have begun, an arbitrator may not withdraw, or be withdrawn by the government which has appointed him, save in exceptional cases and with the consent of the other members of the tribunal.

2. If, for any reason such as previous participation in the case, a member of the tribunal considers that he cannot take part in the proceedings, or if any doubt arises in this connexion within the tribunal, it may decide, on the unanimous vote of the other members, to request his replacement.

3. Should the withdrawal take place, the remaining members shall have power, upon the request of one of the parties, to continue the proceedings and render the award.

Comment

(1) This article reaffirms and supplements the principle of immutability of the tribunal. Paragraph 1 recalls the rule laid down in Article 5, but permits an exception

to it by stating that in exceptional cases an arbitrator may withdraw or be withdrawn by the government which has appointed him, but that the unanimous consent of the other members of the tribunal is then required.

(2) Among the exceptional cases contemplated, paragraph 2 mentions withdrawal of an arbitrator owing to previous participation in the case. If any doubt arises in this connexion within the tribunal, the latter may decide to request his replacement. It may also decide, upon the request of one of the parties, to continue the proceedings and render the award with a reduced number of members.

Article 8

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal; it may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that it was unaware of the fact or has been a victim of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator, the decision shall rest with the International Court of Justice.

Comment

(1) The composition of the tribunal may also be changed by disqualification of a member on the proposal of one of the parties. This is the object of article 8.

(2) These provisions are logically necessary. The arbitrators are jointly appointed by the two parties as a result of agreement between them. It is the duty of each of the parties to make sure that the conditions of appointment are fulfilled at the time when the tribunal is constituted. Hence, they cannot propose disqualification on account of a fact arising prior to such constitution, except in case of fraud or justifiable ignorance. Here, and in the case of disqualification proposed on account of a fact arising subsequently to the constitution of the tribunal, the decision rests with the other members of the tribunal.

(3) In the case of a single arbitrator, it is again necessary to appeal to a higher judicial body, namely, the International Court of Justice.

CHAPTER III

The Compromis

Article 9

Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, in particular :

- (a) **The subject of the dispute, defined as precisely and as clearly as possible;**
- (b) **The selection of arbitrators, in case the tribunal has not already been constituted;**
- (c) **The appointment of agents and counsel;**

(d) The procedure to be followed, or provisions for the tribunal to establish its own procedure;

(e) Without prejudice to the provisions of article 7, paragraph 3, if the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings;

(f) Without prejudice to the provisions of article 7, paragraph 3, the number of members constituting the majority required for an award of the tribunal;

(g) The law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono*;

(h) The time limit within which the award shall be rendered; the form of the award, any power of the tribunal to make recommendations to the parties; and any special provisions concerning the procedure for revision of the award and other legal remedies;

(i) The place where the tribunal shall meet, and the date of its first meeting;

(j) The languages to be employed in the proceedings before the tribunal;

(k) The manner in which the costs and expenses shall be divided.

Comment

(1) In the arrangement of chapter III, which begins with article 9, this draft is closer to the traditional concept of a code of arbitral procedure than it is in the preceding articles. Article 9 deals with the drafting of the *compromis* needed to give effect to any undertaking to arbitrate. This undertaking may constitute the basis and the main provisions of the *compromis*. It should be pointed out that the reason why this article is not inserted earlier than in chapter III, as at present, is that it is advisable to remove all the preliminary obstacles which might prevent the conclusion of the *compromis*. Its conclusion is now ensured, since if the parties fail to agree on the provisions to be included, the *compromis* may be drawn up by the tribunal itself.

(2) The eleven paragraphs of article 9 list the matters which in principle should be governed by the *compromis*. Obviously the parties are at liberty to introduce any number of others.

(3) Paragraphs (a), (b) and (c) require no explanation.

(4) Paragraph (d) allows the parties to settle the procedure or limit the competence of the tribunal on this point.

(5) Paragraphs (e) and (f) refer to article 7, paragraph 3, concerning the principle of immutability, and give otherwise the parties the right to fix the quorum and majority for decisions to be taken by the tribunal, including the final award.

(6) Paragraph (g) affirms that the parties may specify the rules of law to be applied by the tribunal, or empower it to adjudicate *ex aequo et bono*.

(7) Paragraph (h) gives the parties the power of fixing the time limit within which the award shall be rendered, even if the tribunal does not consider itself fully enlightened within that time.

(8) As regards the power to adjudicate *ex aequo et bono*, the text grants the tribunal this power only if the parties agree, as provided in Article 38 of the Statute of the International Court of Justice. The Commission takes the view that the arbitral tribunal is always entitled to adjudicate on the basis of general principles of law considered to be rules of positive law, but is not entitled to act as *amiable compositeur*, that is, to judge *contra legem*, without the consent of the parties. Strictly speaking, the latter procedure is not so much arbitration as conciliation or mediation, except that the settlement remains obligatory.

(9) As regards the provisions concerning the procedure for revision and annulment, the parties are bound by the general provisions of articles 29 to 32. Their freedom of action, provided for in paragraph (h), refers only to the procedures of revision and annulment.

Article 10

1. If the parties cannot agree on the contents of the *compromis*, they may request the good offices of a third State which shall appoint a person, or a body of persons, to draw up the *compromis*.

2. If the parties are bound by an undertaking to arbitrate, and when the tribunal has been constituted, then, in the event of the failure of the above procedure for drawing up the *compromis*, the tribunal shall draw up the *compromis* within a reasonable time which it shall itself determine.

Comment

This article deals with the case of an obligatory undertaking to arbitrate, when the parties cannot reach agreement on all or part of the contents of the *compromis*. Such a case has traditionally been provided for and been known as the "obligatory *compromis*", from the adoption of the 1907 Hague Convention for the Pacific Settlement of International Disputes (articles 53 and 54) till the time of the Pact of Bogotá of 1948 (article 43). Since, under article 3, the tribunal may be constituted before the *compromis* is drawn up, there is no further obstacle to the application of the article.

CHAPTER IV

Powers of the Tribunal

Article 11

The tribunal, as the judge of its own competence, possesses the widest powers to interpret the *compromis*.

Comment

This article, which lays down a general principle, calls for no comment.

Article 12

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

2. The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*.

Comment

(1) The effect of this article, in so far as it adopts the substance of paragraph 1 of Article 38 of the Statute of the International Court of Justice as the basis of the law to be applied by the arbitral tribunal, is to exclude the possibility of a *non liquet*.

(2) Paragraph 2 contains one of the most important stipulations in the whole draft. It corresponds to the general rule of law recognized in a large number of the juridical systems of the world according to which a judge may not refuse judgment on the ground of the silence or obscurity of the law. The Commission considers that the adoption of this principle would mark a great advance in the development of judicial arbitration.

Article 13

In the absence of any agreement between the parties concerning the procedure of the tribunal, the tribunal shall be competent to formulate its rules of procedure.

Comment

This article is a statement of a general principle, to apply where there is no agreement between the parties as to the procedure to be followed.

Article 14

The parties are equal in any proceedings before the tribunal.

Comment

The rule embodied in this article is deemed to be important enough to be made the subject of a separate article. It is a fundamental rule of procedure, non-observance of which would, under Article 30, paragraph (c), justify an application for the annulment of the award.

Article 15

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.

2. The parties shall co-operate with one another and with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.

4. At the request of the parties, the tribunal may visit the scene with which the case before it is connected.

Comment

(1) Paragraph 1 affirms an incontrovertible principle of customary law.

(2) Paragraph 2 lays down essential powers of the tribunal. A party has no right to refuse to produce evidence in its possession when this is requested by the other party and ordered by the tribunal. The tribunal itself may take any action, with a view to the production of evidence, including steps to determine the meaning and scope of a rule of municipal law.

Article 16

For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute.

Comment

The provision on counter-claims and additional or incidental claims is designed to enable the tribunal to rule on all questions bearing on the subject-matter of the dispute.

Article 17

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to prescribe, if it considers that circumstances so require, any provisional measures to be taken for the protection of the respective interests of the parties.

Comment

The Commission considers that competence to prescribe provisional measures should be accorded not only to the tribunal itself, but, in cases of urgency, to its president subject to confirmation by the tribunal. The word "prescribe" implies an obligation on the parties to take the measures prescribed.

Article 18

When, subject to the control of the tribunal, the agents and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

Comment

This article requires no comment.

Article 19

1. The deliberations of the tribunal, which should be attended by all of its members, shall remain secret.

2. All questions shall be decided by a majority of the tribunal.

Comment

This article requires no comment.

Article 20

1. Whenever one of the parties does not appear before the tribunal, or fails to defend its case, the other party may call upon the tribunal to decide in favour of its claim.

2. In such case, the tribunal may give an award if it is satisfied that it has jurisdiction and that the claim is well founded in fact and in law.

Comment

The power of the tribunal to render an award by default was accepted by the Commission on analogy with Article 58 of the Statute of the International Court of Justice. The purpose of paragraph 2 is to ensure that no decisive importance would be attached by the tribunal to the fact of default and that the award must be based on a full examination of the jurisdiction of the tribunal and of the merits of the case. The adoption of the article would represent a step forward in the law of arbitral procedure.

Article 21

1. Discontinuance of proceedings by the claimant may not be accepted by the tribunal without the respondent's consent.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

Article 22

The tribunal may take note of the conclusion of a settlement reached by the parties. At the request of the parties, it may embody the settlement in an award.

Comment

(1) Articles 21 and 22 are closely connected. Obviously the claimant cannot be allowed to dispose of the case and, by improperly discontinuing the proceedings, prevent its settlement, to the detriment of the respondent's interests. The case may be withdrawn only by agreement between the parties with a view, in particular, to adopting some other method of settlement.

(2) The parties may request the tribunal to record any settlement reached between them, in order to give it the authority of *res judicata*. In French procedure, this is known as a *jugement d'expédient* (settlement out of court). The use of the word "may" in article 22 is important, as it leaves the tribunal free to embody the settlement reached in an award or not. It is, in fact, necessary that the tribunal should be able to verify the legality and effective scope of the settlement. It cannot be compelled, even by an agreement between the parties, to give binding force to an illegal or a purely fictitious settlement.

CHAPTER V

*The Award**Article 23*

1. The award shall be rendered within the period fixed by the *compromis*, unless the parties consent to an extension of that period.

2. In case of disagreement between the parties on such an extension of the period, the tribunal may refrain from rendering an award.

Comment

(1) This article reaffirms the provision of article 9 that the time limit within which the award shall be rendered is fixed by the parties. It may be extended by them alone.

(2) Paragraph 2 provides that if the tribunal does not consider that it can render its award within this time limit, it may refrain from doing so. This second paragraph cannot, of course, be regarded as at variance with article 12, paragraph 2, which prohibits a finding of *non liquet*, since it does not refer to a refusal to render an award on the ground of silence or obscurity of the law.

Article 24

1. The award shall be drawn up in writing, and communicated to the parties. It shall be read in open court, the agents of the parties being present or duly summoned to appear.

2. The award shall include a full statement of reasons.

3. The award shall contain the names of the arbitrators and shall be signed by the president and the registrar or secretary of the tribunal.

Comment

This article is in conformity with traditional practice in the matter and its three paragraphs specify the essential requirements as to the content and form of the award.

Article 25

Subject to any contrary provision in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

Comment

This article is in accord with the traditional practice of the International Court of Justice, but permits the parties nevertheless to adopt the contrary system in the *compromis*.

Article 26

As long as the time limit set in the *compromis* has not expired, the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation in the award.

Comment

This article refers to mere typographical and arithmetical corrections which will not alter the meaning and scope of the award. It will be observed, however, that the Commission has implicitly decided the question whether the powers of the tribunal come to an end when the award is rendered or can be regarded as continuing until the expiry of the time limit for rendering the award set in the *compromis*. It follows, *e contrario*, that when this time limit has expired, such corrections are no longer permitted.

Article 27

The award is binding upon the parties when it is rendered, and it must be carried out in good faith.

Comment

(1) The Commission thought it necessary to specify that the award is binding when it is rendered and to assert that it must be carried out in good faith and forthwith.

(2) The award is binding only upon the parties. The Commission decided not to include in the draft any provisions concerning intervention — such as those in article 84 of the Convention of 1907 for the Pacific Settlement of International Disputes and in Articles 62 and 68 of the Statute of the International Court of Justice — according to which the intervention of a third party may in some cases result in the award becoming binding upon the intervening State.

Article 28

1. Unless the parties agree otherwise, any dispute between the parties as to the meaning and scope of the award may, at the request of either party, be submitted to the tribunal which rendered the award.

2. If, for any reason, it is impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed otherwise, the dispute may be referred to the International Court of Justice at the request of either party.

Comment

(1) This article incidentally raises the question of when the powers of the tribunal finally expire. If an application is made for interpretation, they are automatically prolonged beyond the period fixed for rendering the award. The Commission considers that if the tribunal could not be reconstituted in its original form when an application for interpretation is made, it is necessary to provide for recourse to the International Court of Justice, unless the parties should agree otherwise.

(2) The article provides no time limit for an application for interpretation.

CHAPTER VI

Revision

Article 29

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact.

3. The proceedings for revision shall be opened by a judgment of the tribunal recording the existence of such a new fact and ruling upon the admissibility of the application. The tribunal shall then proceed to revise the award.

4. The application for revision shall be made to the tribunal which rendered the award. If, for any reason, it is not possible to address the application to that tribunal, the application may, unless the parties agree otherwise, be made to the International Court of Justice.

Comment

(1) With regard to the remedies against the award, the Commission is in favour of allowing the award to be revised or an application to be made for its annulment (*cassation*), but rules out appeals on the ground of misapplication of the law. The Commission thus follows the traditional practice that an arbitral award should be final, subject, however, to the possibility of its revision or annulment.

(2) Revision, as laid down in Article 61 of the Statute of the International Court of Justice, is considered essential by the Commission. The sense of the Commission is that, with regard to both the revision and the annulment of the award, the provisions of this draft on the subject are of such importance as to prevent the parties from excluding recourse to these remedies, notwithstanding the discretion which article 9 (*h*) leaves to them in the matter of procedure for revision and annulment.

(3) The definition of “new fact”, which by now has become classic, has been inserted in paragraph 1.

(4) The application for revision must be made to the tribunal which rendered the original award, since revision does not imply any suggestion of wrong judgment. Here again, the Commission feels that if the tribunal could not be reconstituted with its original membership, recourse should be had to the International Court of Justice.

CHAPTER VII

Annulment of the Award

Article 30

The validity of an award may be challenged by either party on one or more of the following grounds :

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure.

Comment

The Commission recognizes only three causes justifying annulment: action *ultra vires*, corruption on the part of an arbitrator, and violation of a fundamental rule of procedure. However, since the draft deals solely with arbitral procedure, the Commission does not attempt to define what these various grounds of annulment might cover. Hence, the International Court of Justice is left with complete latitude in regard to the decision to be taken.

Article 31

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

2. In cases covered by paragraphs (a) and (c) of article 30, the application must be made within sixty days of the rendering of the award.

3. The application shall stay execution unless otherwise decided by the Court.

Article 32

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal to be constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 3.

Comment

(1) The Commission is in favour of making the period of application by either party for annulment of the award a very short one. This very short period should, however, apply only to applications made on grounds stated in paragraphs (a) and (c) of article 30. Consequently, no time limit is prescribed for an application for annulment on the ground of corruption on the part of an arbitrator.

(2) It is the sense of the Commission that the parties would at all times be free, provided they are in agreement, not to proceed with the execution of the award.

Chapter III

NATIONALITY INCLUDING STATELESSNESS

25. The International Law Commission, at its first session in 1949, included "nationality including statelessness" in its list of topics of international law provisionally selected for codification.⁵

26. During its second session in 1950, the Commission was apprised of resolution 804 D (XI) of the Economic and Social Council, adopted on 17 July 1950, in which the Council:

"Noting the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women (document E/1712, paragraph 37)..."

"Proposes to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women..."

The International Law Commission, after considering the above-quoted resolution, adopted a decision declaring that it:

"Deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of nationality including statelessness.

"Proposes to initiate that work as soon as possible."

27. At its third session in 1951, the Commission was notified of another resolution of the Economic and Social Council, resolution 819 B III (XI) of 11 August 1950, in which the Council requested the Commission to:

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

This matter was deemed by the Commission to lie 'within the framework of the topic of 'nationality including statelessness'".⁷

28. At the same session, the Commission decided to initiate work on the topic of nationality including state-

lessness. It appointed one of its members, Mr. Manley O. Hudson, special rapporteur on this subject.⁸

29. The special rapporteur submitted a "Report on Nationality including Statelessness" (A/CN.4/50) to the Commission at its fourth session. Several documents prepared by the Secretariat were also made available to the Commission, including a consolidated report by the Secretary-General entitled "The Problem of Statelessness" (A/CN.4/56), "Nationality of Married Women" (E/CN.6/126/Rev.1 and E/CN.6/129/Rev.1) and "A Study of Statelessness" (E/1112 and Add.1). The Commission considered the topic at its 155th to 168rd, 172nd, 178th, 179th, 181st and 183rd meetings.

30. In his report, the special rapporteur made a survey of the subject of nationality in general (annex I) and presented two working papers for the consideration of the Commission. The first of these (annex II) contained a draft of a convention on nationality of married persons, which followed very closely the terms proposed by the Commission on the Status of Women and approved by the Economic and Social Council. The special rapporteur suggested that the International Law Commission should comply with the request to draft a convention embodying those terms, without expressing its own views. The Commission was of the opinion that the question of nationality of married women could not but be considered in the context, and as an integral part, of the whole subject of nationality including statelessness. Furthermore, it did not see fit to confine itself to the drafting of a text of a convention to embody principles which it had not itself studied and approved.

31. The second working paper (Annex III) dealt with statelessness. It listed nineteen points for discussion, under the rubrics of elimination of statelessness, reduction of presently existing statelessness, and reduction of statelessness arising in the future. The Commission took the view that a draft convention on elimination of statelessness and one or more draft conventions on the reduction of future statelessness should be prepared for consideration at its next session. The Commission also considered various suggestions as to the content of the

⁵ A/925 (paragraph 16).

⁶ A/1316 (paragraphs 19 and 20).

⁷ A/1858 (paragraph 85).

⁸ *Ibid.*

draft convention envisaged, and gave general directions to guide the work of the special rapporteur.⁹

32. The Commission, in accordance with article 16 (*e*) and article 21, paragraph 1, of its Statute, decided, at

⁹ Faris Bey el-Khoury declared that, as indicated in the summary records of the Commission, he was opposed to these general directions.

Mr. Kozhevnikov declared that he had voted against the general directions as an effective basis for the preparation of draft conventions for the elimination of statelessness and the reduction of future statelessness.

Mr. Zourek pointed out that he had voted for the proposal to request the special rapporteur to submit to the Commission at its next session a detailed report on the basis of which a decision could be taken as to the possibility of preparing a draft convention on the elimination or reduction of statelessness. That proposal having been rejected, he had voted against the general directions to the special rapporteur on the subject.

its meeting on 25 July 1952, to invite Dr. Ivan S. Kerno to serve, after his separation from the Secretariat of the United Nations, as an individual expert of the Commission charged with work on the question of elimination or reduction of statelessness, under the general direction of the Chairman of the Commission.

33. On 1 August 1952, the Commission was apprised of the request of Mr. Manley O. Hudson to be relieved of his responsibility as special rapporteur on the topic of nationality including statelessness. The Commission decided, with regret, at a meeting held on 4 August 1952, to accept Mr. Hudson's resignation.

34. On 8 August 1952, the Commission elected Mr. Roberto Córdova special rapporteur on the topic of nationality including statelessness, to succeed Mr. Hudson.

Chapter IV

RÉGIME OF THE TERRITORIAL SEA

35. At its third session in 1951, the International Law Commission decided to initiate work on the topic "régime of territorial waters", which it had previously selected for codification, and to which it had given priority in pursuance of a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1950. Mr. J. P. A. François was appointed special rapporteur on the topic.¹⁰

36. At the fourth session, Mr. François submitted a "Report on the Régime of the Territorial Sea" (A/CN.4/53) which contained a "Draft Regulation" consisting of twenty-three articles, together with comments.

37. Taking this report as a basis of discussion, the Commission considered, at its 164th to 172nd meetings, certain aspects of the régime of the territorial sea. The Commission first of all decided, in accordance with a suggestion of the special rapporteur, to use the term "territorial sea" in lieu of "territorial waters", as the

latter expression had sometimes been taken to include also inland waters.

38. The Commission further considered the questions of the juridical status of the territorial sea, of its bed and subsoil, and of the air space above it; the breadth of the territorial sea; base line; and bays. It expressed some tentative views on some of those questions for the guidance of the special rapporteur.

39. With regard to the question of the delimitation of the territorial sea of two adjacent States, it was decided to request governments to furnish the Commission with information on their practice and to submit any observations they might wish to make in that regard. The Commission further decided that a special rapporteur might make contact with experts in order to seek clarification of certain technical aspects of the problem, and that the Secretary-General should be requested to provide the necessary expenses for any such consultation.

40. The special rapporteur was requested to present to the Commission, at its fifth session, a further report, with a revised draft and commentary, taking into account the views expressed at the fourth session.

¹⁰ A/1858 (paragraph 80).

Chapter V

RÉGIME OF THE HIGH SEAS

41. The régime of the high seas was one of the topics of international law which the International Law Commission, at its first session in 1949, selected for codification and to which the Commission gave priority. Mr. J. P. A. François was elected special rapporteur on the subject.¹¹

42. The subject was considered by the Commission at its second (1950) and third (1951) sessions on the basis, respectively, of the first (A/CN.4/17) and second (A/CN.4/42) reports of the special rapporteur.¹²

¹¹ A/925 (paragraphs 16, 20 and 21).

¹² A/1316 (part VI, chapter III); A/1858 (chapter VII).

43. At the third session, the Commission prepared a set of "Draft Articles on the Continental Shelf and Related Subjects"¹³ and, in accordance with article 16, paragraphs (*g*) and (*h*), of its Statute, decided to give it publicity and to invite governments to submit their comments on the draft articles within a reasonable time. The Commission also considered various other subject matters in the régime of the high seas and gave certain indications for the guidance of the special rapporteur, who was requested to submit a further report to the Commission.

¹³ A/1858 (annex).

44. At its fourth session, the Commission had before it the third report of the special rapporteur (A/CN.4/51). In addition, the Commission received comments on its "Draft Articles on the Continental Shelf and Related Subjects" from a number of governments (A/CN.4/55 and Adds. 1, 2, 3 and 4).

45. The Commission deferred consideration of the afore-mentioned report of the special rapporteur on the régime of the high seas until its fifth session.

46. With regard to the "Draft Articles on the Continental Shelf and Related Subjects", the Commission

decided to invite those governments which had not yet submitted their comments thereon to do so within a reasonable time. The special rapporteur was invited to study all replies from governments as well as comments brought about by the publication of the draft articles, and to submit to the Commission, at its fifth session, a final report on the continental shelf and related subjects, so that the Commission might, after considering and modifying it so far as may be deemed necessary, adopt it with a view to submission to the General Assembly.

Chapter VI

LAW OF TREATIES

47. The law of treaties was one of the topics of international law which the International Law Commission, at its first session in 1949, selected for codification and to which the Commission gave priority. Mr. James L. Brierly was elected special rapporteur on the subject.¹⁴

48. The Commission gave consideration to the topic at its second (1950) and third (1951) sessions, on the basis, respectively, of the first (A/CN.4/23) and second (A/CN.4/43) reports submitted by the special rapporteur. Tentative texts of articles on certain aspects of the law of treaties were provisionally adopted and referred to the special rapporteur, who was requested to present a final draft to the Commission at its fourth session.¹⁵

¹⁴ A/925 (paragraphs 16, 20 and 21).

¹⁵ A/1316 (part VI, chapter I); A/1858 (chapter VI).

49. In the interval between the third and fourth sessions of the Commission, Mr. Brierly resigned from membership in the Commission, an event regretted by all the members.

50. Before his resignation, Mr. Brierly presented to the Commission a "Third Report on the Law of Treaties" (A/CN.4/54), which was laid before the Commission at its fourth session. In the absence of its author, however, the Commission did not deem it expedient to discuss this report.

51. In the course of its fourth session, the Commission, at its meeting on 4 August 1952, elected Mr. H. Lauterpacht, special rapporteur on the law of treaties, to succeed Mr. Brierly. Mr. Lauterpacht was requested to take into account the work that had been done by the Commission, as well as that by Mr. Brierly, on the subject entrusted to him, and to present, in any manner he might deem fit, a report to the Commission at its fifth session.

Chapter VII

OTHER DECISIONS

DEVELOPMENT OF A TWENTY-YEAR PROGRAMME FOR ACHIEVING PEACE THROUGH THE UNITED NATIONS

52. The International Law Commission took note of General Assembly resolution 608 (VI) of 31 January 1952, communicated to it by the Secretary-General under cover of letter dated 19 May 1952 and, in particular, of point 10 of the "Memorandum of points for consideration in the development of a twenty-year programme for achieving peace through the United Nations". The Commission, in compliance with paragraph 2 of the said resolution, decided to inform the General Assembly at its seventh session, through the Secretary-General, that the Commission has been making every effort to expedite its work for the progressive development and codification of international law and, as related in the present report, has made progress since its last report in 1951.

RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY AT ITS SIXTH SESSION

53. In addition to resolution 600 (VI) relating to the review of its Statute referred to in paragraph 9 above, the Commission also took note of several other resolutions adopted by the General Assembly during its sixth session on or in connexion with the reports of the Commission, namely, resolution 596 (VI) on the draft Declaration on Rights and Duties of States, resolution 598 (VI) on reservations to multilateral conventions, resolution 599 (VI) on the question of defining aggression, resolution 601 (VI) on the report of the International Law Commission covering the work of its third session (chapters VI, VII and VIII (and resolution 602 (VI) on ways and means for making the evidence of customary international law more readily available.

REPRESENTATION AT THE GENERAL ASSEMBLY

54. The Commission decided that it should be represented, at the seventh session of the General Assembly, by its Chairman, Mr. Ricardo J. Alfaro, for purposes of consultation.

DATE AND PLACE OF THE FIFTH SESSION
OF THE COMMISSION

55. The Commission considered the question of the date and place of its fifth session (item 7 of the agenda). In view of the fact that this session of the Commission

will be the last during the tenure of office of its present membership, the Commission was anxious that sufficient time should be made available for the session in order that as much as possible of the unfinished work remaining on its agenda might be undertaken. It was accordingly decided that this session should last twelve weeks, to begin on about 1 June 1953, the exact date being left to the discretion of the Chairman of the Commission, in consultation with the Secretary-General. The Commission further decided, after consultation with the Secretary-General in accordance with article 12 of its Statute, to hold the session at Geneva, Switzerland.

LIST OF OTHER DOCUMENTS RELATING TO THE WORK OF THE FOURTH SESSION OF THE COMMISSION NOT REPRODUCED IN THIS VOLUME

<i>Document No.</i>	<i>Title</i>	<i>Observations and references to other sources</i>
A/CN.4/52	Provisional Agenda	Incorporated in footnote 2 to the summary record of the 135th meeting
A/CN.4/55	Régime of the High Seas—Comments by Governments on Draft Articles on the Continental Shelf and Related Subjects	Incorporated in the "Report of the International Law Commission covering the work of its fifth session", <i>Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)</i> , Annex II
A/CN.4/55/Add.1, Add.1/Rev.1 and Add.2-6	Régime of the High Seas—Addendum to Comments by Governments on Draft Articles on the Continental Shelf and Related Subjects	<i>Ibid.</i>
A/CN.4/56	The Problem of Statelessness—Consolidated Report by the Secretary-General	Mimeographed document only
A/CN.4/56/Add.1	The Problem of Statelessness—Addendum to Consolidated Report by the Secretary-General	<i>Ibid.</i>
A/CN.4/58	Report of the International Law Commission Covering the Work of its Fourth Session	Same text as A/2163
A/CN.4/58/Corr.1	Corrigendum to the Report of the International Law Commission Covering the Work of its Fourth Session	Incorporated in A/2163
A/CN.4/59	Draft on Arbitral Procedure Prepared by the International Law Commission at its Fourth Session, 1952	Same text as A/2163, Chapter II
A/CN.4/L.32	Agenda for the one hundred and thirty-fifth meeting	Incorporated in the table of contents of the summary record of the 135th meeting
A/CN.4/L.33	Arbitral Procedure—Articles Tentatively Adopted as of 11 June 1952	Incorporated in the summary records of the 138th-140th meetings
A/CN.4/L.33/Add.1	Arbitral Procedure—Articles Tentatively Adopted as of 13 June 1952	<i>Ibid.</i> , 140th-142nd meetings
A/CN.4/L.33/Add.2	Arbitral Procedure—Articles Tentatively Adopted on 16, 17 and 18 June 1952	<i>Ibid.</i> , 143rd-145th meetings
A/CN.4/L.33/Add.3	Arbitral Procedure—Articles Tentatively Adopted on 19 June 1952	<i>Ibid.</i> , 146th meeting
A/CN.4/L.33/Add.4	Arbitral Procedure—Articles Tentatively Adopted on 20, 23 and 24 June 1952	<i>Ibid.</i> , 147th-149th meetings
A/CN.4/L.33/Add.5	Arbitral Procedure—Articles Tentatively Adopted on 25 June 1952	<i>Ibid.</i> , 150th meeting
A/CN.4/L.33/Add.6	Arbitral Procedure—Articles Tentatively Adopted on 26 June 1952	<i>Ibid.</i> , 151st meeting
A/CN.4/L.33/Add.7	Arbitral Procedure—Articles Tentatively Adopted on 27 June 1952	<i>Ibid.</i> , 152nd meeting
A/CN.4/L.33/Add.8	Arbitral Procedure—Articles Tentatively Adopted on 30 June 1952	<i>Ibid.</i> , 153rd meeting
A/CN.4/L.33/Add.9	Arbitral Procedure—Provisions Tentatively Adopted on 1 July 1952	<i>Ibid.</i> , 154th meeting
A/CN.4/L.34	Arbitral Procedure—Decision Taken by the Commission on 3 July 1952	<i>Ibid.</i> , 156th meeting

<i>Document No.</i>	<i>Title</i>	<i>Observations and references to other sources</i>
A/CN.4/L.35	Arbitral Procedure—Draft Articles Agreed Upon by the Standing Drafting Committee, with Commentaries by Mr. Georges Scelle	Incorporated with drafting changes in A/2163, Chapter II. Drafting changes are indicated in the summary records of the 173rd-177th and 179th-180th meetings
A/CN.4/L.36	Arbitral Procedure—Alternative Text for Paragraphs 5-13 of Document A/CN.4/L.35 Submitted by Mr. H. Lauterpacht	<i>Ibid.</i> 180th-181st meetings
A/CN.4/L.36/ Corr.1	Arbitral Procedure—Alternative Text for Paragraphs 5-13 of Document A/CN.4/L.35 Submitted by Mr. H. Lauterpacht—Corrigendum	<i>Ibid.</i>
A/CN.4/L.37	Arbitral Procedure—Alternative Text for Paragraphs 5-13 of Document A/CN.4/L.35 Submitted by Mr. Georges Scelle	<i>Ibid.</i>
A/CN.4/L.38	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter I	Incorporated with drafting changes in A/2163, Chapter I. Drafting changes are indicated in the summary record of the 181st meeting
A/CN.4/L.38/ Corr.1	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter I—Corrigendum	<i>Ibid.</i>
A/CN.4/L.38/ Add.1	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter IV	<i>Ibid.</i> , Chapter IV
A/CN.4/L.38/ Add.2	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter III	<i>Ibid.</i> , Chapter III
A/CN.4/L.38/ Add.2/Corr.1	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter III—Corrigendum	<i>Ibid.</i>
A/CN.4/L.38/ Add.3	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter VII	<i>Ibid.</i> , Chapter VII
A/CN.4/L.38/ Add.3/Corr.1	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter VII—Corrigendum	<i>Ibid.</i>
A/CN.4/L.38/ Add.4	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter VI	<i>Ibid.</i> , Chapter V
A/CN.4/L.38/ Add.5	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter V	<i>Ibid.</i> , Chapter VI
A/CN.4/L.38/ Add.6	Draft of Report of the International Law Commission Covering the Work of its Fourth Session—Chapter II	<i>Ibid.</i> , Chapter II
A/CN.4/L.39	Arbitral Procedure—Proposal by Mr. Zourek	Incorporated in para. 6 of the summary record of the 181st meeting
A/CN.4/SR.135 through A/CN.4/SR.183	Summary records of the 135th to 183rd meetings	Printed in vol. I of the present publication
A/2248	Report of the International Law Commission on the work of its fourth session : report of the Sixth Committee	<i>Official Records of the General Assembly, Seventh Session, Annexes, agenda item 51</i>

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