EDITORIAL COMMENT

THE NATIONALITY CONVENTION ADOPTED BY THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

Declared Mr. Hughes, in the course of a presidential address on the development of international law delivered before the American Society of International Law on April 23, 1925: "One thing stands out clearly—that we should have a friendly hospitality for every suggestion intended to be helpful." Such an intention must be imputed to Messrs. Rundstein, Schücking, and de Magalhaes, the experts who have submitted the fruits of their careful labors, embracing a preliminary draft of a convention on nationality, to the Committee of Experts of the League of Nations for the Progressive Codification of International Law, and which have, during the present year, been submitted to the Council and Members of the League and to other governments including that of the United States.[1] The Committee of Experts, through its distinguished chairman, Dr. Hammarskjöld, has sought the replies of interested governments. A concrete proposal is thus submitted for discussion by those most deeply interested in the problem.

The authors of the convention would doubtless be the last to claim the achievement of a great work. Their modesty, their conservatism, their full appreciation of national prejudices, their zeal to point out what they believe to offer feasible bases of general agreement, and their obvious desire to promote international justice, must inspire respect in every quarter. They have sought to find a safe path through a field of sloughs and pitfalls. Their distinctive service consists in arousing governments to consider what can be or ought to be the solution of common difficulties. Congratulations are, therefore, due them, despite the issue to be taken with some of their conclusions, for their labor is bearing the best fruit of scientific endeavor.

It may not be deemed unreasonable to examine the convention as a proposal addressed to the United States, and to consider the several provisions in the light of American theories and commitments and constitutional pronouncements.

The one overshadowing problem with respect to nationality which today vexes and baffles governments such as our own arises from the fact that in a variety of situations more than one state regards as its own national the same

[1] "The report comprises a statement presented by M. Rundstein and approved by M. de Magalhaes (including a preliminary draft of a convention), a supplementary note by M. Rundstein, observations by M. Schücking and a reply by M. Rundstein, and, finally, the text of the preliminary draft of a convention as amended by M. Rundstein in consequence of the discussions which took place in the Committee of Experts." All printed in Special Supplement to this JOURNAL for July, 1926, pp. 21–61.

individual at the same time. This dual claim finds its origin in conflicting assertions as to nationality by right of birth, one state relying upon the fact of birth within its territory under the *jus soli*, and another relying upon the fact of the father's nationality, invoking the *jus sanguinis*. What prolongs and aggravates the controversy is the reluctance of some states to heed the fact that when a child has attained his majority the opposing claims are not of equal merit, or to accept the principle that the superior of these should thereafter be recognized as the basis of a single, unopposed nationality. The controversy is also accentuated by the unwillingness of certain states to acknowledge that it lies within the power of the adult national, even though permanently residing abroad, to divest himself of the nationality of his sovereign without its consent and simultaneously to assume the single nationality of another state in which he resides. Thus, in practice, it is the tenacity with which states seek to retain the connection of nationality as between themselves and adult persons in the face of superior equities in favor of opposing states, which is accountable for the existing confusion. By reason of the lack of any general endeavor to agree to terminate claims which, however sound in origin, have become inequitable when applied to the individual who has attained his majority, controversies continue to fester and justice remains perverted. Yet upon such an endeavor would seem to depend the solution of the problem.[2]

Other devices offer less hope of practical achievement. It is not to be anticipated, for example, that states will generally agree, at least in the near future, to limit the basis of claims by right of birth, as by abandoning reliance upon either the *jus sanguinis* or the *jus soli*, and to confine such claims to those founded upon one theory rather than the other. Both the habits of states reflected in constitutional and legislative pronouncements, and the absence of numerous and serious difficulties in the handling of actual cases, justify the opinion that the attempt to restrict states in claiming persons as their nationals by right of birth, at least during the period of minority, is neither wise nor feasible.[3]

[2] "For the present, it is believed that the most feasible measure will be the adoption of a multilateral convention providing for the termination of the status of dual nationality at the time when the persons concerned attain the age of majority, or, perhaps, one year thereafter." R. W. Flournoy, Jr., Proceedings, American Society of International Law, Nineteenth Annual Meeting, 1925, p. 77.

[3] In view of the provisions of the Fourteenth Amendment to the Constitution of the United States that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and in view also of the assertions made by the Act of Congress of February 2, 1855, with respect to children born outside of the United States whose fathers were at the time of their birth citizens thereof, our own country is hardly in a position to impute arbitrariness to states which invoke either or both theories, or to advocate the adoption of a plan which deprives a state of the right to do so.

Diplomatic controversies arising from conflicting claims respecting the nationality of a child during his minority are relatively infrequent. In such cases the United States respects

When a child attains its majority, the claims with respect to his nationality asserted by opposing states can rarely, in American opinion, possess equal merit. It is highly desirable that thereafter he be deemed to possess a single nationality, entitled to general respect, and that it be acknowledged that the doctrine of dual nationality has ceased to be applicable to him. A common sense of that desirability is bound ultimately to influence the trend of the development of the law. States may even find it possible to register their appreciation of it through appropriate agreements. If, however, they are unable at the moment to find an acceptable formula, it is unlikely that they will proceed in the opposite direction and give general approval to the theory that the doctrine of dual nationality is fairly applicable to adult persons. It is highly improbable that the United States would accept any arrangement which purported to do so.

The draft convention from the League Committee of Experts declares in Article I

> The high contracting parties undertake not to afford diplomatic protection to and not to intervene on behalf of their nationals if the latter are simultaneously considered as its nationals from the moment of their birth by the law of the state on which the claim would be made.

No distinction is here made between adult and minor persons who invoke the interposition of their governments. Moreover, the obligation seems to be imposed upon a prospective claimant state to respect, as a deterrent of its own interposition, the assertion by another state that the individual concerned is its national, even though he was born within the territory of the former state and there continued to reside after attaining his majority and up to the very time when he invoked its aid. As it stands, the article gives sinister heed to the doctrine of dual nationality. It opposes a barrier against interposition which leaves no room for the ascertaining and termination of the least equitable of the conflicting claims to the nationality of the individual concerned.

Again, Article V declares that

> A person possessing two nationalities may be regarded as its national by each of the states whose nationality he has. In relation to third states, his nationality is to be determined by the law in force at his place of domicile if he is domiciled in one of his two countries.
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> If he is not domiciled in either of his two countries, his nationality is determined in accordance with the law in force in that one of these two states in which he was last domiciled.

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the equities of the state claiming the child as its own by right of birth under the *jus sanguinis* or the *jus soli* so long as he continues to reside within its territory. Moreover, it is inclined to the opinion that during the period of minority changes of residence or domicile effected by the parents should not serve to deprive the child of the inchoate right to take appropriate steps, upon attaining his majority, to clothe himself with the single nationality of his choice.

In the first paragraph respect is again bred for the continued application of the doctrine of dual nationality to adult persons, and is thus in sharp conflict with the theory which it is believed that the United States and other states should uphold. The second sentence of the same paragraph is designed to cover a situation which is not often productive of diplomatic controversy. It may be doubted whether conventional arrangement to provide for it is necessary or desirable. The second paragraph (as well as the sentence next preceding it) is unfortunate in failing to provide that the domicile in the third state should be that possessed by the individual at the time of his attaining his majority or shortly thereafter.

Article IV of the draft convention declares that

> A child born outside the state of which its parents are nationals has the nationality of the state where it was born if the state of origin does not give the parent's nationality to such child.

This article would serve to deprive a state of the right, under certain conditions, to invoke the *jus soli* as a legitimate basis of a claim to an individual as a national by right of birth. Apart from constitutional difficulties which would preclude a country such as the United States from accepting such an arrangement, the article would not, for reasons given above, seem to embody a proposal calculated to win general approval.[4] The effort is likely to be futile which essays to bind states generally to give up claims to children by right of birth based on either the *jus soli* or the *jus sanguinis*.

The distinguished authors of the convention would not assert that the articles quoted reflect an attempt to go to the root of the difficulties inherent in the main problem noted above, or that they point to a feasible mode of removing them.[5] An expert of the Department of State has, however, sought to do that very thing. His conclusions deserve attention. Mr. Richard W. Flournoy, Jr., proposes that the dual claim to the nationality of an individual be terminated when he becomes an adult, by according him the single nationality of the state within whose territory he is then domiciled.[6] As a rule for inclusion in a model statute or an international convention he suggests the following:

[4] An objection of the same general character, although of a possibly less practical significance, might be raised with respect to Article III, which provides that "A child of parents who are unknown or whose nationality cannot be ascertained acquires the nationality of the state in which it was born or found when it cannot claim another nationality in right of birth, proof of such other nationality being admissible under the law in force at the place where it was found or born." These provisions appear to limit the free application of the *jus soli*.

[5] M. Rundstein's report manifests a frank disclaimer of such a design.

[6] See "Suggestions concerning an International Code on the Law of Nationality," Yale Law Journal, June, 1926, Vol. XXXV, 939; also address by the same writer before the American Society of International Law, April, 1925, Proceedings, Nineteenth Annual Meeting, 69. The writer acknowledges his indebtedness to Mr. Flournoy for numerous valuable suggestions set forth in these papers, of which free use is here made.

> A person who is born a national of one country under *jus soli* and a national of another country under *jus sanguinis*, if he is domiciled in either of the two countries when he reaches the age of 22 years shall thereafter be regarded as having lost the nationality of the other. If, at the time when he reaches the age of 22 years, he is domiciled in a third country, he shall thereafter be regarded as having the nationality of that one of the two countries claiming his nationality in which he was last domiciled.

Here is revealed what is or should be made the decisive factor in establishing the superior equity of a state deriving its rights from the *jus soli* or the *jus sanguinis*, namely the possession and retention by the individual concerned of an actual and permanent residence within its territory when or shortly after he has become an adult. The form of the proposal may be fairly open to discussion or criticism. It is worth considering whether actual and continued residence within the territory of a claimant state is preferable to domicile therein as a test of the equities of such a state.[7] A formula is doubtless to be found which will give adequate expression to the principle which underlies Mr. Flournoy's proposal. That proposal is believed to be so responsive to the common need of states, and so applicable to conditions of daily recurrence, that a government such as our own might well consider the submission of it at the appropriate time as the basis of a counter-proposal to certain of the articles above quoted.

Article VI of the League Convention is as follows:

> Naturalization may not be conferred upon a foreigner without his having shown the will to be naturalized or at least without his being allowed to refuse naturalization.
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> Naturalization acquired without the applicant being released from his allegiance by the state of origin does not give to the state according such naturalization the right to give diplomatic protection to, and to intervene on behalf of, the person naturalized as against the state whose subject he originally was.

It should be noted that the Committee of Experts declares that it does not feel that the question raised in Article VI is among those which can be regarded as at present capable of being treated by way of international regulation, and appears to exclude the article from the convention in which it is embraced. Such exclusion is doubtless wise.

The second paragraph is sharply at variance with principles to which the United States appears to be committed with respect to naturalization and to the propriety of interposition on behalf of naturalized citizens.[8] As is

[7] In Anglo-American jurisprudence that term has reference to a conclusion of law derived from certain factors, of which an important one is the state of mind of the individual concerned. It might well be urged that the fact of actual residence should, regardless of the design of that individual, suffice to produce the termination of an adverse claim.

[8] See Act of July 27, 1868, 15 Stat. 223, as embodied in Rev. Stats. Sections 1999, 2000, 2001. See in this connection, "Naturalization and Loss of Nationality," by Green H.

now well understood, the United States denies the duality of the nationality of the individual who in pursuance of its laws has acquired and retained American citizenship.[9] It is unnecessary to comment on the provisions of Article VII, which concern the legal effect of a "release from allegiance" (permit of expatriation) referred to in Article VI.[10]

Might not, however, renewed consideration and discussion of some aspects of the problem of expatriation and naturalization still be desirable in the course of an effort to produce a fitting convention on nationality? Possibly a fresh statement respecting what the United States is or might be prepared to accept as the limits of the right of expatriation would prove to be a gesture distinctly encouraging to some foreign offices, which may take it for granted that, for example, the United States denies the right of a foreign state to prevent in times of peace the emigration of its own nationals from its own territory, or that it contends that an individual possesses the right to leave the territory of the state of which he is a national against its will, as well as after having left it to divest himself, under certain conditions, of the nationality with which he was clothed.[11] A state possesses the right to restrict the emigration of its own nationals. It is not believed that the United States can well deny the existence of that right, or that it is in fact disposed to do so.[12] It is concerned rather with the legal effect of the conduct of an individual who, after he has entered and continued to reside within American territory, seeks to be clothed with, and is in fact granted, American

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Hackworth, Proceedings, American Society of International Law, Nineteenth Annual Meeting, 1925, p. 59.

[9] "The doctrine embodied in the Act of 1868 is that naturalization invests the individual with a new and single allegiance, and by consequence absolves him from the obligations of the old. The position of governments and of publicists who deny the American contention is that naturalization merely adds a new allegiance to the old, so that the individual becomes subject to a dual allegiance, and may be held to all the obligations of his original citizenship if he returns to his native country. The doctrine of dual allegiance is, in a word, the precise test, the acceptance of which distinguishes those who reject the doctrine of voluntary expatriation from those who support it." (John Bassett Moore, Principles of American Diplomacy, 1918, p. 294.)

[10] The article is as follows: "A release from allegiance (permit of expatriation) shall produce loss of the original nationality only at the moment when naturalization is actually obtained in one of the contracting states. Such release shall become null and void if the naturalization is not actually granted within a period to be determined."

[11] See the views of Attorney General Black, concerning the case of Christian Ernst, 9 Opinions Attys. Gen., 356, Moore, Digest, III, 573.

[12] Declared Secretary Bayard in the course of a communication to Mr. Lothrop, Minister to Russia, Feb. 18, 1887: "The Department is far from questioning the right of His Imperial Majesty to refuse to permit his subjects to emigrate. This is an incident of territorial sovereignty recognized by the law of nations, but can only be exercised within the territory of Russia. . . . His Imperial Majesty may 'prevent' Russians from coming to the United States, but when they have come, and have acquired American citizenship they are entitled to the privileges conferred by the article (10 of the treaty of commerce of Dec. 18, 1832)." (For. Rel. 1887, 948, Moore, Digest, III, 633.)

naturalization. In the judgment of the writer, the United States should no longer deem it desirable to incorporate in treaties of naturalization provisions designed to restrict a contracting state from punishing its nationals for emigrating in disobedience to its commands. After long and harrowing experiences with naturalized American citizens who return to reside within the territories of their respective countries of origin, and after having witnessed the insufficiency of its own legislation relating to the expatriation of them, the United States may be ready to enter into a general arrangement making appropriate provision for the termination of the nationality acquired by the naturalization of persons who resume permanent residence within the territories of states of origin.

With Article VI of the proposed convention excluded from consideration, it is believed that the United States might well consider the wisdom of making known at the appropriate time some constructive proposal which it might deem appropriate for general acceptance.[13]

Certain other articles of the convention deserve attention. Article II provides that

> The children of persons who enjoy diplomatic privileges and immunities, of consuls who are members of the regular consular service, and, in general, of all persons who exercise official duties in relation to a foreign government shall be considered to have been born in the country of which their father is a national. Nevertheless, they shall have the option of claiming the benefit of the law of the country in which they were born, subject to the conditions laid down by the law of the country of origin.

It may be greatly doubted whether the United States would deem it desirable to agree that children born within its territory and within the broad limits established by this article, other than children of diplomatic officers accredited to itself, should not be claimed as its nationals under the *jus soli*. Whether it could constitutionally so agree, and by treaty cause such children born within the continental United States to be deemed not to have been born "within the jurisdiction thereof" within the meaning of the Fourteenth Amendment, when no rule or principle of international law forbade or denied that jurisdiction, raises a question on which no opinion is expressed. Attention is merely called to the problem.[14]

[13] Lack of space forbids the discussion of the form which it is believed such a proposal might well assume. Mr. R. W. Flournoy, Jr., has made interesting suggestions in his paper in the Yale Law Journal for June, 1926, Vol. XXXV, 939, 943-946.

[14] It may be observed in this connection that the withholding by a state of a claim to a child as a national who was born within its territory to a foreign father accredited as a diplomatic officer to itself does not necessarily involve recourse to a fiction such as one to the effect that the child is to be deemed to have been born in the territory of the state of which his father is a national. It is believed that the withholding of the claim is to be explained on simpler grounds. It is due to the consensus of opinion that the diplomatic character of the father cuts off the right of the state within whose territory the birth occurred to invoke the

Articles VIII, IX, and X of the League Convention pertain to marriage or the dissolution thereof when a woman marries a foreigner. Article VIII declares that

> A woman who has married a foreigner and who recovers her nationality of origin after the dissolution of her marriage loses through such recovery of the original nationality the nationality which she acquired by marriage.

Such a provision is reasonable, even though it does not purport to indicate what circumstances subsequent to the dissolution of the marriage shall serve to produce a recovery of the nationality of origin.

Article IX declares that

> A married woman loses her original nationality in virtue of marriage only if at the moment of marriage she is regarded by the law of the state to which her husband belongs as having acquired the latter's nationality.
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> Where a change in the husband's nationality occurs during the marriage the wife loses her husband's nationality only if the law of the state whose subject her husband has become regards her as having acquired the latter's nationality.

It is believed that the first paragraph if generally accepted might serve a useful purpose. It is apparently not designed to indicate generally what should be the effect of marriage upon the nationality of the wife. It merely specifies a condition (and a reasonable one) under which the fact of marriage shall not serve to divest her of her nationality of origin. Nor does the second paragraph of the article appear objectionable. Acceptance of the article would not seemingly interfere with, or preclude the submission of constructive proposals covering the broad and difficult problem as to the effect of marriage upon the nationality of the woman.

Article X provides that

> A woman who does not acquire through marriage the nationality of her husband and who, at the same time, is regarded by the law of her country of origin as having lost her nationality through marriage, shall nevertheless be entitled to a passport from the state of which her husband is a national on the same footing as her husband.

If states were to agree to the first paragraph of Article IX and harmonized their domestic laws therewith, it is not apparent how, as among the contracting parties, the situation would arise where a woman would be deemed by her state of origin to have lost her nationality of origin through marriage in case she did not acquire through marriage her husband's nationality. Standing by itself, however, Article X is believed to embody a sensible pro-

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jus soli. The law of nations denies to that state that privilege by depriving it of jurisdiction for purposes of nationality over one who was in fact born within and remains within its territory.

posal the feasibility of which would depend upon its acceptance by a large number of states.[15]

Article XI declares that

> An illegitimate child does not lose its nationality of origin in consequence of the change in its civil status (legitimation, recognition) unless at that moment it is considered by the law of the state to which the father or the mother, as the case may be, belongs as having acquired the nationality of the parent in question.

No objections to this article are apparent. The wisdom of incorporating it in a general convention would, however, seem to depend upon the importance to be attached to the provisions contained therein. Like comment might be made with respect to Article XII which provides that "An adopted child who does not by the fact of adoption acquire the nationality of the person adopting it, retains its original nationality."

Article XIII declares that

> As between the contracting parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the central authority of the state. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The contracting parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality.

Whether it is feasible for states to agree to making proof of nationality by the processes contemplated in Article XIII is a matter of policy rather than of law, and one on which opinions may well differ. It is believed, however, that the United States should endeavor to determine whether the advantages accruing to it from such an arrangement would equalize or outweigh the burdens involved in submitting the requisite certificates.

If the United States is not inclined to accept the proposed convention as it stands, its reluctance may be due to a belief that the plan offers no feasible solution of the larger problems of nationality, that it encourages the application of the doctrine of dual nationality to adult persons, that it curtails the right to invoke the *jus soli* by provisions which could not be accepted without rewriting the Fourteenth Amendment to the Constitution, and that the unobjectionable articles relate to matters of relatively minor importance respecting which general agreement is not indispensable. Nevertheless, the convention and the data accompanying it, especially by reason of the spirit in which they are proffered, challenge both American and foreign legal advisers to produce something better. Those familiar with the problems of foreign offices respecting nationality are aware of the imperative need of general agreement where none exists today. The preparation of the

[15] *Cf.* Instruction to American Diplomatic and Consular Officers, of April 12, 1924, concerning the "Mention of Alien Wives in Husbands' American Passports."

proposed convention and the submission of it to interested governments will not have been in vain if they are moved thereby to declare at the appropriate time how far they are willing to go and what they are prepared to offer for what they conceive to be the requirements of international justice, and in particular, for the sake of gaining recognition of the singleness of nationality of the adult person whom more than one state claimed as a national at the time of his birth.

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DIPLOMATIC PRIVILEGES AND IMMUNITIES

In the whole range of the international rules of conduct governing the relations of states, there is probably no matter more ripe for codification than the privileges and immunities of diplomats. If we could go back beyond the dawn of history, the inviolability of envoys would no doubt be found generally to have been respected, for among the surviving savage tribes of the uttermost and most widely separated regions of the earth the sanctity of envoys seems to be well recognized. Evidently a rule so generally observed and so potent to restrain rival populaces from doing harm to one another's representatives must be consonant with practical needs.

Unless envoys were free to enter into discussions for the prevention or termination of hostilities, agreements to those ends could not be reached, and wars of utter extermination or enslavement would be the only alternative. International agreements, the fruit of diplomatic negotiations, are then a means to conserve human energy, to help to secure and preserve the peace, which means in the end to help to develop a greater measure of the coöperation essential to the progress of each state. It is evident then that those states or political communities that respected envoys and facilitated the discharge of their mutually helpful mission would, in the struggle for national survival, have a distinct advantage over the communities that did not accord to envoys adequate protection and immunity in order to enable them to fulfil their important functions.

When the institution of chivalry prevailed throughout Europe, the rights of envoys were watched over by the Colleges of Heralds. The universal character of chivalry gave to their rules a superior status such as is held today by what we now call the rules of international law relative to diplomatic privileges and immunities. The rules of heraldry tried by actual practice, and the accumulation of precedents derived from the experience of so many states down through the centuries, have supplied us with a somewhat disjointed set of rules, but these rules may well be coördinated and formulated in the articles of a code. Already this has been attempted with more or less success, notably by the Institute of International Law at the session held in Cambridge, England, in 1895, and more recently by the American Institute of International Law through its committee of jurists meeting in Havana in