Comments of the Government of Iraq

Stressing on the importance of the subject the Iraqi Special Committee which studied the Report of the Secretariat and the Draft Convention presented by the U.A.R. Delegation on Dual Nationality have indicated their preference to resort to bilateral agreements rather than multilateral conventions in solving the matters concerning this vital question.

THE COMMITTEE MADE THE FOLLOWING OBSERVATIONS ON THE DRAFT AGREEMENT* PRESENTED BY THE U.A.R. DELEGATION:—

Article 1:

(i) To delete Clause (a) as the title is un-necessarily stated in the text of the Agreement.

(ii) Age of majority in Iraq is 18 years according to the prevailing laws, therefore the provisions of Clause (b) could not be accepted. It is suggested that the majority age may be left to be determined in accordance with the laws prevailing in the contracting countries.

(iii) Clause (c) may be changed to read as:

(c) Marriage is the true marriage in accordance with the matrimonial laws where the marriage has been concluded (*lex loci celebrationis*).

Article 2:

May be phrased to read as:

"If a woman who is a national of one of the contracting parties married a national of another countracting party, this marriage shall have no effect on the nationality of the either of the two.

Nevertheless, the wife may opt for the nationality of her husband.

If she acquired such nationality she loses her original nationality on the date of acquiring the new nationality. The application for the new nationality should be filed with the competent authorities in the country concerned."

*The Draft Agreement presented at the Second Session of the Committee.

Article 3:

Pronouns referring to the husband to be omitted from the first two sentences. Last sentence to be replaced by the following:

"In case of recovering her nationality before marriage she loses her nationality acquired after marriage."

Article 4:

To be deleted.

Article 5:

To remain as it is.

Article 6:

To delete part of the first sentence concerning the approval of the government of the person who opt for the nationality which reads as:

"on condition that the two countries should agree to this option."

Article 7:

The Iraqi Delegation reserves the right to Article 7 as its application is not in conformance with the Iraqi Laws.

Article 8:

The following paragraph may be added:

"If his mother's nationality is unknown or if his mother had died before taking the option, or his mother is unknown, he should be considered as having the nationality of his birth."

Article 9:

To remain as it is.

Article 10:

To be amended on the basis that it represents bilateral agreements and reads as follows:

"This Agreement shall be ratified as soon as possible by the contracting parties in accordance with their constitutional systems. The instruments of ratification shall be exchanged and this Agreement shall come into force from the date of exchange of the instruments of ratification."

Article 11:

To be deleted.

Article 12:

To be amended on the basis that it represents bilateral agreements and reads as follows:

"The Agreement shall remain in force until one of the contracting parties gives the other one year notice of its intention to suspend its operation."

Article 13:

To remain as it is.

Comments of the Government of Japan

A. General Comments

The Japanese Government understands that this Agreement* is intended to prevent the occurrence of, or to reduce the cases of, multiple nationality in future. If this is the aim of the present Agreement, it is advisable to re-arrange the structure of this Draft with this aim in mind.

B. Comments on Individual Articles

Article 1:

Paragraph (d) should be deleted since the term is not used in any other provision in the present Agreement.

Article 2:

The option for a nationality provided for in the second sentence of this Article ought to be made subject to the nationality law of the country of which nationality has been opted for.

Article 3:

The recovery of the nationality ought to be subject to the nationality law of the country concerned.

Article 4:

The approval of the government of the country to which he belongs should not be made a condition for the acceptance of an application for naturalisation by another country.

Article 5:

There is a need for some provision as to a minor whose father is unknown or stateless. In such cases a minor should follow his mother's nationality.

Also, even when a minor's father (or mother) acquires another nationality after his birth, the application should be made by the minor (directly or through his legal representative) for the nationality of his father (or mother), instead of the nationality automatically given to the minor.

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* The Draft Agreement on Dual or Multiple Nationality presented by the Delegation of the United Arab Republic at the Second Session of the Committee.

Article 6:

In acquiring the nationality of the country of birth, the approval of the country to which the person formerly belongs should not be made a condition.

Article 7:

The phrase "in accordance with the two laws of the adopting and adopted persons" may well be deleted.

Also, instead of automatically following the nationality of the persons who adopted him, a minor should apply, directly or through his legal representative, for the new nationality of the persons who adopted him.

Article 8:

First paragraph

It is preferable not to limit the period for making the option.

Third paragraph

It is desirable to redraft the second and third sentences so that it may be clearly understood that a father (or mother) may opt for a nationality on behalf of his (or her) son and that the father (or mother) does so as the minor's legal representative.

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*Memorandum of the Government of the United Arab Republic**

The U.A.R. Delegation had presented to the Committee during its Second Session held at Cairo, a Memorandum on Multiple Nationality and a Draft Agreement on the subject.

The Delegation explained, in that Memorandum, the disadvantages of multiple nationality and the impossibility of its elimination owing to the social, economic and political contradictions in the interests of the different States, and the differences in the principles of conflict of laws and public policy.

The Draft Agreement attached to the above-mentioned Memorandum included some rules aiming to eliminate multiple nationality and its complications.

The Delegation, considering the different points of view expressed at the Committee's Third Session held at Colombo as well as the Comments expressed by the Iraqi Government on the said Draft, submits for consideration another Draft. The Delegation is of the opinion that the conclusion of bilateral or multilateral agreements or treaties should be left to the discretion of each of the member States, and the complications which may arise regarding the treatment of persons holding more than one nationality, the determination of their rights and obligtions towards each of the States whose nationality they hold, as the right to diplomatic protection and the military service obligations and so forth, should be settled through diplomatic channels or by special agreements.

Finally, the Delegation wishes to point out that the complications arising from multiple nationality are rare and scarcely exist in the United Arab Republic.

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* Presented by the Delegation of the United Arab Republic at the Fourth Session of the Committee.

OTHER DECISIONS OF THE COMMITTEE

LEGALITY OF NUCLEAR TESTS

At its Third Session held in Colombo in January, 1960 the Committee decided to take up for consideration the question of Legality of Nuclear Tests, a subject which had been suggested by the Government of India under Article 3(c) of the Statutes of the Committee as being a matter of common concern to all the participating countries in the Committee. The Committee decided to take up this subject especially in view of the fact that this matter had not been considered by any other body from the legal point of view nor had it been adequately dealt with by any of the authorities on international law. The Committee also took note of the fact that nuclear tests had been carried out in various parts of the Asian-African continents or in areas adjacent thereto, and as such the problem was of great concern to the Asian-African countries. The Committee directed its Secretariat to collect background material and information on the subject including scientific data as may be available and to place the same before the Committee at its Fourth Session.

At the Fourth Session held in Tokyo in February, 1961 the Committee considered the subject on the basis of a report prepared by the Secretariat. The Delegates of the United Arab Republic, India, Ceylon, Indonesia, Iraq, Japan, Burma and Pakistan stated their points of view on the question of legality of nuclear tests, indicating at the same time the scope of the subject and the basic principles on which further material had to be collected. The Committee also heard statements from the Observer for Ghana and Mr. F. V. Garcia Amador, Member of the International Law Commission, in his personal capacity as a recognised expert. Indicating the scope of the subject which the Committee had to consider, the Member for India pointed out that the Committee was not concerned with the controversial and debatable question of the legality of the use of nuclear weapons in time of war, but was concerned with the question of legality of nuclear tests in time of peace. The question for consideration in his view was: Are nuclear tests conducted by a country within its territory or elsewhere, which are likely to cause harm to inhabitants of other countries, permissible according to international law? The Committee, in his view, was concerned with considering whether

any known or accepted principles of international law could be applied to the situation arising out of these tests. If the existing principles were inapplicable or inadequate, the Committee would have to consider whether international law, which had in the past met new situations by evolving new principles, could not in the present case similarly attempt to counter the grave threat to which States were exposed by these tests by formulating a suitable doctrine with new principles to meet the new situation. The representatives of other participating countries concurred in this approach to the problem and the Committee decided that it would confine itself to an examination of the problem of legality of nuclear tests in time of peace. The Committee further decided that the Secretariat of the Committee should continue its study of this subject and prepare a report for the consideration of the Committee at its Fifth Session.

At the Fifth Session held in Rangoon in January, 1962 the subject was fully discussed by the Committee on the basis of the materials on the scientific and legal aspects of nuclear tests collected by the Secretariat of the Committee. The Governments of Japan and the United Arab Republic submitted written Memoranda on the subject. The Committee heard the view point and expressions of opinion on the various topics on this subject from the Delegations of Burma, Ceylon, India, Indonesia, Japan, Pakistan, Thailand and the United Arab Repubic. The Committee also heard statements from the Observers for Ghana, Laos and the Philippines, and the representative of the League of Arab States. Dr. Radhabinod Pal, President of the International Law Commission, in his personal capacity as an expert and Dr. Oscar Schachter in his personal capacity also made a few remarks.

The Committee considered the question on the basis of the scientific information on the effects of such tests contained in the Reports of the United Nations Scientific Committee on the "Effects of Atomic Radiation", the Reports of the British Medical Research Council on the "Hazards to Man of Nuclear and Allied Radiations" and the Reports of Japanese Scientists on the "Effects and Influences of Nuclear Bomb Test Explosions." Indicating the scope of the discussion, the President of the Committee, Mr. M. C. Setalvad, again pointed out that the Committee was

not concerned with the question of the use of nuclear weapons in time of war, but only with the question of the legality of nuclear tests in time of peace. The President drew the attention of the Committee to the topics for discussion prepared by the Secretariat and the Committee discussed the subject on the basis of the following questions:—

I. (a) Is a State responsible or ought to be so for direct damages caused to the inhabitants of the area where the tests are carried out due to deaths of human beings and destruction of their property resulting from explosions of atomic devices under the law of tort or principles analogous thereto?

(b) If such damage is caused to a foreign national resident or sojourning in its territory or to one who may be accidentally passing through the danger area, would the State which is carrying out the tests be liable to pay reparation to the injured alien's home State under the principles of State Responsibility in international Law?

(c) If such damage is caused to a foreign national whilst resident or sojourning in a neighbouring State, would the State carrying out the test be held liable to pay reparation to the injured person's home State under principles analogous to that of State Responsibility in international law?

II. (a) Can it be said that a State which carries out atomic tests in its own territory is endangering the safety and well-being of its neighbouring States and their inhabitants due to possibilities of radioactive fall-out; and if so, whether the use by a State of its own territory for such purposes is not contrary to the principles of international law?

(b) Can it be said that the use by a State of its own territory for the purpose of carrying out nuclear tests by explosion of atomic devices amounts to an abuse of its rights in respect of use of its State territory?

III. (a) If it is established that explosion of nuclear devices results in pollution of the air with radioactive substance and that such contaminated air is injurious to the health of the peoples of the world, would the State carrying out the tests be said to be

responsible for an international tort in accordance with the principles laid down in the *Trail Smelter Arbitration case* ?

(b) In an action based on commission of an international tort, would it be necessary for the claimant State to prove actual damage, or is the general scientific and medical evidence on the effects of nuclear explosions sufficient to maintain the action?

(c) Even if the harmful effect resulting from contamination of the air can be confined within the territories of the particular State, can it be said that the State has violated the human rights of the citizens and aliens living in its territory, and if so, whether the State is responsible for the harm caused to the aliens under the principles of international law relating to State Responsibility?

IV. Is the use of atomic weapons in a war illegal, and if so, can the tests carried out for the purpose of manufacture and perfection of such weapons be said to be illegal by itself without proof of any damage? Can the question of stoppage of such tests be said to be a matter of international concern?

V. Would the payment of damages by a State for injuries suffered due to nuclear tests be regarded as sufficient or should an injunction for stoppage of such tests be necessary?

VI. Does the interference with the freedom of the air or the sea navigation resulting from declaration of danger zones over the areas where the tests may be carried out amount to violation of the principles of international law?

VII. Is the destruction of living resources of the sea which result from nuclear tests on islands or areas of the high seas to be regarded as violative of the principles of international law?

VIII. Is it lawful for an administering authority to use territories, which it holds on trust from the United Nations, for purposes of holding nuclear tests?

The Delegates expressed their views on the above questions and on the basis of these discussions, the Secretary of the Committee prepared and presented a Draft Report on the subject for the consideration of the Committee. After a general discussion, the Committee decided that the Secretariat should submit the Draft

Report on Legality of Nuclear Tests to the Governments of the participating countries for their comments and that the subject should be placed before the next session of the Committee as a priority item on the agenda.

ARBITRAL PROCEDURE

At its Second Session held in Cairo in October, 1958 the Committee decided to take up for consideration the subject of Arbitral Procedure as a matter arising out of the work done by the International Law Commission. The International Law Commission at its Tenth Session had finalised its recommendations on the subject and had drawn up Model Rules on Arbitral Procedure. The Committee directed its Secretariat to prepare a questionnaire on the subject to serve as a basis for discussion at the next session of the Committee.

At the Third Session held in Colombo in January 1960, the Committee generally discussed the subject on the basis of the questionnaire prepared by the Secretariat. The Delegates of India and Indonesia expressed the view that the Model Rules prepared by the International Law Commission went far beyond the established concepts of arbitration and approached that of a process of Court. The Delegates of Burma, Iraq and Pakistan reserved their position on this subject. The Delegates of Ceylon, India, Indonesia and the United Arab Republic were of the opinion that the consent of the parties underlies the formation of an arbitral agreement as also its enforcement and were generally opposed to the acceptance of the concept of judicial arbitration as formulated by the International Law Commission. If there was any disagreement, for instance, regarding the existence of a dispute or its arbitrability, these Delegates took the view that such a dispute should be settled by the consent of parties and not by empowering any tribunal like the International Court of Justice or the Permanent Court of Arbitration to decide the question. The Delegate of Japan, however, took a different view. He was in favour of the omission only of the Permanent Court of Arbitration from the tribunals before which the question of arbitrability could be taken up. The Delegates of India and Ceylon were of the view that such a dispute should not be referred to the arbitral tribunal even if it had already been constituted, but the Delegates of Japan and the United Arab Republic were of the view that it should be referred to the arbitral tribunal if it had already been constituted. With regard to the constitution of the arbitral tribunal, the Delegates of Ceylon and the United Arab Republic were of the

opinion that an arbitral tribunal could be constituted not merely at the request of one of the parties but after the parties agreed that an arbitrable dispute had arisen. The Delegates of Ceylon, India, Indonesia and the United Arab Republic appeared to be of the view that in the absence of agreement, the International Court of Justice should not be brought in to make appointments of arbitrators. The Delegate of Japan saw no objection to the appointment of an arbitrator by the President of the International Court of Justice in the absence of agreement between the parties. With regard to the question of the immutability of the tribunal, the Delegates of the United Arab Republic and Japan were of the opinion that a party may replace an arbitrator appointed by it until the tribunal has begun its proceedings, but the arbitrator should not be replaced during the proceedings before the tribunal except by mutual agreement. The Delegate of Ceylon, however, put forward the view that either party to an agreement should have the right to change the arbitrator appointed by it at any stage of the proceedings. The Delegates of India and the United Arab Republic were of the opinion that arbitrators may be changed on account of a disqualification at the instance of any party at any stage of the proceedings, but not by any decision of the International Court of Justice. With regard to the *compromis*, the Delegates of Ceylon, India and the United Arab Republic were agreed that the parties having recourse to arbitration should conclude a *compromis* which would include such provisions as are deemed desirable by the parties. The Delegate of the United Arab Republic was further of the view that if the parties failed to reach agreement on the contents of the *compromis* or failed to conclude a *compromis*, the arbitral tribunal should draw up the *compromis* after it was constituted. The Delegates of Ceylon and India, however, adhered to their earlier view that if the parties failed to agree, such a dispute should not be referred for decision even to the arbitral tribunal. All the three Delegates were of the view that such a dispute should not be referred to the International Court of Justice. With regard to the powers of the tribunal, the Delegate of the United Arab Republic was of the opinion that the arbitral tribunal was the judge of its own competence and possessed the widest powers to interpret the *compromis*. The views of the Delegate of Ceylon were similar with the exception that he was of the view that the arbitral

tribunal was not free to decide on counter-claims or additional or incidental claims arising out of the subject-matter. The Delegate of India answered these questions in the negative and was opposed to the arbitral tribunal deciding a case *ex parte*. With regard to the award, the Delegate of the United Arab Republic was of the view that the time to give the award could be extended not only by the agreement of the parties, but also by the court when it deemed such extension necessary to reach a just decision. The Delegates of Ceylon and India thought that the time could not be extended except by agreement of the parties. On the question of the interpretation of the award, the Delegates of Ceylon, India and the United Arab Republic were agreed that a dispute should not be referred to the International Court of Justice without the agreement of the parties. On the question of the annulment of the award by the International Court of Justice, the Delegate of the United Arab Republic was prepared to recognise the legal right of the parties to ask for such annulment on important grounds, but the Delegates of Ceylon and India were averse to referring such a matter to the International Court of Justice. All the three Delegates were agreed that such a dispute should not be referred to the International Court of Justice except by consent of the parties. With regard to the revision of the award, the Delegate of the United Arab Republic thought that the parties should have the right to ask for the revision of the award in the case of discovery of new material facts, while the Delegates of Ceylon and India thought that this could be done only with the agreement of the parties. All the three Delegates were agreed that an application, if it could be made, for such a revision should be made to the arbitral tribunal, but not to the International Court of Justice except by consent of the parties. The Delegates of Burma, Iraq, Japan and Pakistan reserved their position on these matters. A Preliminary Report on the subject was drawn up by a Sub-Committee, but as all the Delegates had not as yet expressed their views, the Committee decided that the subject should be taken up for further consideration at its next session.

The Committee generally discussed the subject at its Fourth Session held in Tokyo in February 1961. Since all the Delegations had not as yet furnished their answers to the questionnaire prepared by the Secretariat, the Committee postponed consideration

of the subject until its Fifth Session and directed the Secretariat to prepare a general report on the subject summarising the views of the Delegations expressed at the Colombo Session or communicated later in their answers to the questionnaire.

At the Fifth Session held in Rangoon in January, 1962 the subject was fully considered by the Committee on the basis of a report prepared by the Secretariat. The Delegate of Pakistan made a general statement on the subject and gave the answers to the questionnaire prepared by the Secretariat. The Delegate of Pakistan was of the opinion that the Model Rules on Arbitral Procedure, prepared by the International Law Commission, constituted a remarkable technical work of drafting and were an important contribution to the cause of peaceful settlement of international disputes. In his opinion, the Model Rules would be of great value to governments in the drafting of arbitral agreements. He stated that he did not agree with the objections which had been raised against the Model Rules on the ground that they did not respect the sovereignty of States. The rules were intended to be binding on the States which had agreed to submit a dispute to arbitration and, in his view, the sovereignty of States may have to be limited to the extent of the new development of procedures for the binding settlement of international disputes. He emphasised the importance of peaceful settlement of international disputes through the machinery of the International Court of Justice and through the measures of international arbitration, and stated that his Government supported the Commission's Draft and hoped that States might find it possible to use the Model Rules as a guide. In his opinion, the concept of voluntary arbitration had not led to very useful results nor had it solved the vital conflicts that break the relationship between nations. He thought, therefore, that in the interests of international understanding and peace, some sort of procedure should be devised to avoid the possibility of frustration of arbitral agreements. In his view, the principle of non-frustration, as formulated by the Commission, had great merits. He stated that his Government were in favour of considering the recommendations of International Law Commission as a useful guide and said that, broadly speaking, his Delegation was generally in support of the Model Rules on Arbitral Procedure as recommended by the International Law Commission. After

a general discussion on the subject, it was found that there was divergence of views among the Delegations of the participating countries, some accepting the principle of judicial arbitration as recommended by the International Law Commission, whilst others were in favour of the traditional procedure of arbitration and were of the view that the Draft Code prepared by the Commission went far beyond the scope of arbitral procedure and contained substantive provisions contrary to the notion of arbitration as conceived in existing international law. In view of this position, it was felt that no useful purpose would be served by the Committee attempting to draw up some model rules of its own on this subject and there was general agreement with the suggestion of the Delegation of Japan that the subject might be removed from the agenda of future sessions. The Committee finally decided that a report should be drawn up incorporating the views expressed by the various Delegations and that the matter should be removed from the agenda of the future sessions of the Committee.

REPORT OF THE INTERNATIONAL LAW COMMISSION

THIRTEENTH SESSION

During its Thirteenth Session, held in Geneva from 1st May to 7th July 1961, the International Law Commission had considered the subject of Consular Intercourse and Immunities and had adopted Draft Articles on this subject. A report on the work done by the International Law Commission, prepared by the Secretariat of the Committee, was placed before the Committee at its Rangoon Session in accordance with Article 3(a) of its Statutes. The Committee was represented at the Thirteenth Session of the Commission by an Observer, H. E. Mr. Hafez Sabek, Member for the United Arab Republic. H.E. Mr. Hafez Sabek's Report on the work done by the Commission at this Session was placed before the Committee and the Delegates expressed their appreciation of the very valuable services rendered by the distinguished Member for the U.A.R. in representing this Committee at the Thirteenth Session of the Commission. After a general discussion on the subject of Consular Intercourse and Immunities, the Committee decided to request the Governments of the participating countries to transmit their comments on the Draft Articles, prepared by the Commission, to the Secretariat of the Committee as soon as possible. It was further decided that the Secretariat should prepare a report on the basis of these comments which should be considered as a priority item at the next session of the Committee. The Committee took note of the decision of the United Nations to convene a conference of Plenipotentiaries on this subject and decided to be represented at this conference by an Observer.
