OFFICIAL DOCUMENTS

CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW
The Hague, March 13, 1930

FIRST REPORT SUBMITTED TO THE COUNCIL BY THE PREPARATORY COMMITTEE FOR THE CODIFICATION CONFERENCE *

The Preparatory Committee for the Codification Conference[1] met at Geneva from January 28th to February 17th, 1929. It examined the replies made by the Governments to the request which had been addressed to them for information upon the three questions on the programme of the proposed Conference, namely: nationality, territorial waters and the responsibility of States for damage caused on their territory to the person or property of foreigners. Replies have been received from twenty-nine Governments. Some of them, however, do not deal with all the above-mentioned questions.

As a result of this examination, the Committee, in fulfilment of its terms of reference, has drawn up bases of discussion for the use of the proposed Conference. These bases form a statement of the provisions upon which agreement appears to exist, or which do not give rise to divergencies of view so serious as to make it impossible to anticipate that an agreement may be reached after consideration, and if necessary, modification and amendment, of the bases by the Conference. Certain suggestions upon which agreement appears more difficult or on which there has not been an adequate expression of the opinion of the various Governments, could not be adopted as bases

* League of Nations Document C. 73. M. 38. 1929. V.

[1] The Committee consists of Professor BASDEVANT (France), Chairman, M. Carlos CASTRO-RUIZ (Chile), M. FRANÇOIS (Netherlands), Sir Cecil HURST (Great Britain), and M. Massimo PILOTTI (Italy).

The Committee was appointed under the Council's resolution of September 28th, 1927, with the terms of reference contained in the Assembly's resolution of September 27th, 1927, worded as follows:

> "The Assembly,
> " . . . .
>
> "Decides:
> " . . . .
>
> "(5) To entrust the Council with the task of appointing, at the earliest possible date, a Preparatory Committee, composed of five persons possessing a wide knowledge of international practice, legal precedents, and scientific data relating to the questions coming within the scope of the first Codification Conference, this Committee being instructed to prepare a report comprising sufficiently detailed bases of discussion on each question, in accordance with the indications contained in the report of the First Committee;
> " . . . . "

[The complete text of this resolution is printed in Special Supplement to this JOURNAL, Vol. 22 (1929) pp. 231-232.]

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of discussion. It remains open to each Government to take up any particular suggestion and make it the subject of a proposal which the Conference will discuss.

The bases of discussion are in no way proposals made by the Committee: they are the result of the Committee's study of the Government replies and of its endeavor to harmonize the views therein expressed.

The Committee felt that it ought to offer certain explanations with regard to the bases of discussion. These appear in the observations which accompany the bases.

The Committee does not consider that it has finished its work. It therefore proposes to meet again in the month of May.

As some of the replies which have been under consideration only reached the Secretary-General of the League of Nations during the course of its session, the Committee continues to hope that still further replies may be received before the month of May. At the new session which it intends to hold in that month, it will consider any replies which are thus brought before it and will revise the conclusions which it has so far reached, so far as such revision seems necessary.

The Committee will then be in a position to give final form to a document which is still only provisional, and which will constitute the essential result of its activity. This document will contain in regard to each of the three subjects on the programme of the proposed Conference, and to every point mentioned in the request for information, a reproduction of the Government replies, the observations suggested to the Committee by the examination and comparison of those replies, and finally the corresponding base of discussion. It will follow the order adopted in the request for information addressed to the Governments. As this order involves repetition and may not prove to be that most convenient for the discussions at the Conference, a section setting out the bases of discussion in a systematic order will also be included.

Further, the Committee proposes at its May session to draw up a more complete report in which it will indicate in greater detail the progress made in the preparatory work for the Codification Conference. In this report it will, in particular, indicate in regard to each subject before the Conference the principal points with which the discussion at the Conference might deal.

In the course of its work, the Committee has been led to consider the question of the date at which the first Codification Conference should meet. The earliest date which can be contemplated is October 1929. In October, however, the Institute of International Law will meet at New York, and it is to be expected that several of its members will be delegates at the Conference. The members of the Institute are expected to return to Europe about November 5th. Those of them who will be delegates at the Conference must be allowed first to get into touch with their Governments. Further-

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more, it is impossible without risk of disorganization to hold the Conference concurrently with the December session of the Council of the League of Nations. It seems, therefore, that it is impossible to convene the Conference in 1929.

On the other hand, it must be observed that a certain period of time is necessary to enable Governments and learned bodies to examine the replies of each Government, the Committee's observations and the bases of discussion drawn up by it. Such a study, if sufficient time is allowed for it, will make it possible for existing differences of opinion to be attenuated. From this point of view, a delay of a few months will not be time lost.

The Committee would accordingly suggest that the meeting of the Conference should be fixed for the spring of 1930.

SECOND REPORT SUBMITTED TO THE COUNCIL BY THE PREPARATORY COMMITTEE FOR THE CODIFICATION CONFERENCE *

The Preparatory Committee for the Codification Conference met again at Geneva from May 6th to 11th, 1929.

At a former session held from January 28th to February 17th, 1929, this Committee had examined the replies to the request addressed to Governments for information on the three questions included in the agenda of the future Conference: nationality, territorial waters and responsibility of States for damage caused in their territory to the person or property of foreigners. In the light of these replies, it prepared certain bases of discussion for the use of the forthcoming Conference. In its first report to the Council, dated February 18th, 1929, it gave an account of this stage of its work.

At the present session, it first considered the replies which have been received in the meantime from the United States of America, Australia and Belgium. With these replies, thirty Governments have now, in whole or in part, complied with the request for information.

The new replies have made it possible for the Committee to review its bases of discussion, together with the explanatory notes which accompanied them, and to draft them in final form.

These bases of discussion are not in any way proposals put forward by the Committee. They are the result of the Committee's examination of the Government replies and a classification of the views expressed therein. In most cases, these bases of discussion take the form of provisions concerning which all, or at any rate most, of the Governments are agreed, or provisions regarding which the difference of opinion is not so great as to preclude agreement after further consideration and, if necessary, emendation by the Conference. Some of these bases—though very few—have been proposed

* League of Nations Document C. 73. M. 38. 1929. V.

as an opening for discussion, in the hope that such discussion may lead to agreement.

In some cases, in drawing up these bases of discussion, the suggestions put forward by a Government have not been incorporated, either because their realization seemed difficult or because the opinion of the various Governments was not stated in sufficient detail. Every Government will naturally be free to offer its suggestion once more in the form of a proposal to be laid before the Conference. The Committee, however, considers that such proposals should only be put forward if there seems to be some reasonable hope of their adoption.

In the first part of the report submitted by the Committee, the bases of discussion, with the explanatory observations, are set out in the same order as the points in the request for information and the replies supplied by the Governments. The Committee has now thought it desirable to group these bases in a more systematic manner, by which grouping the Conference may be guided when proceeding to their examination.

Although these bases are the result of a comparison of the various Governments' views, they are merely a stage in the procedure and not an end in themselves. It should also be remembered that all Governments have not sent their replies. Moreover, the bases do not represent in every respect the expression of existing unanimity.

According to circumstances also, these bases have been arrived at on different lines. Sometimes they represent what Governments or certain Governments hold to be the existing law; sometimes they express what the Governments or certain Governments are disposed to accept as a new provision of conventional law; in some cases, again, the same provision is regarded by some Governments as coming within the former category and by others as coming within the latter. Certain bases of discussion have been put forward—for instance, as regards the extent of territorial waters—in the hope that a compromise may be reached as between conflicting concepts. Occasionally, particularly in the case of nationality, the bases of discussion contemplate certain provisions to which the various States would agree to make their law conform. In this connection, it will be necessary to decide whether the undertaking shall have full and immediate effect or shall only apply to future legislation, leaving existing laws intact.

It is essential for the success of the Conference that these bases of discussion should be studied with great care by the Governments before they give their instructions to their delegations.

Even now, apart from the results which may be expected from the Conference itself, the Committee observes that the replies of certain Governments are such—owing to the details they contain—as to define the present state of international law with greater clearness than heretofore. Moreover, the proposal for a Conference on the Codification of International Law has led to much important work of a doctrinal order. The Committee has

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borne constantly in mind the resolutions adopted in the past few years by the Institute of International Law and the International Law Association on the subjects coming within the scope of the first Conference. It has also greatly benefited by the research work specially conducted, in view of the Conference, at Harvard, under the direction of Mr. Manley O. Hudson with the able assistance of Mr. Richard W. Flournoy, Mr. Edwin M. Borchard and Mr. George Grafton Wilson. In these documents the Conference will find very valuable information regarding the state of positive law and the practical difficulties which have arisen between States in connection with nationality, territorial waters and responsibility for damage suffered by foreigners.

At its May 1929 session, the Committee also had occasion to consider a letter from the Chairman of the Advisory and Technical Committee for Communications and Transit, dated March 26th, 1929, and containing certain desiderata in respect of territorial waters. The Committee suggests that the Council should communicate a copy of this letter to the various Governments, which would thus be able to take it into account in so far as they deem this necessary when issuing instructions to their delegates to the Conference.*

At this same session, the Committee has had to fulfil a new duty entrusted to it by the Council in its resolution of March 7th, 1929, instructing the Committee to consider the action which the Council might take in execution of paragraph 6 of the Assembly's resolution of September 27th, 1927.

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* LETTER FROM THE PRESIDENT OF THE ADVISORY AND TECHNICAL COMMITTEE FOR COMMUNICATIONS AND TRANSIT

[Document C. 218 (1) M. 96. 1929. V.]

Geneva, March 26th, 1929.

[*Translation.*]

I have the honor to bring to your attention the following resolution which was adopted by the Advisory and Technical Committee for Communications and Transit in the course of its thirteenth session, held at Geneva from March 15th to 23rd, 1929:

"The Advisory and Technical Committee for Communications and Transit,

"Having taken note of the inclusion of the question of territorial waters in the draft agenda of the First Conference for the Progressive Codification of International Law, and having regard solely to the interests of communications and transit:

"Draws the Conference's attention to the following points to which it thinks consideration should be given in the codification of international law:

"(*a*) In exercising its sovereignty, the State must respect the limitations imposed by international law;

"(*b*) The ship merely passing through territorial waters should have the fullest possible freedom;

"(*c*) Territorial waters should be kept within as narrow limits as possible;

"(*d*) A State, even within territorial waters, should not interfere with the rights, duties and obligations of those on board a foreign ship, as established under the laws of the flag of that ship;

"(*e*) The State should be responsible for the infringement of the rights of a foreign ship under international law."

(*Signed*) SEELIGER,
President of the Advisory and Technical Committee for Communications and Transit.

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This resolution recommends that the Council, in issuing the invitations to the Conference, "should indicate a number of general rules which should govern the Conference, more particularly as regards:

"(*a*) The possibility, if occasion should arise, of the States represented at the Conference adopting, amongst themselves, rules accepted by a majority vote;

"(*b*) The possibility of drawing up, in respect of such subjects as may lend themselves thereto, a comprehensive convention and, within the framework of that convention, other more restricted conventions;

"(*c*) The organization of a system for the subsequent revision of the agreements entered into; and

"(*d*) The spirit of the codification, which should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life."

The Committee, therefore, has framed draft Rules for the first Conference.[1]

Naturally, these Rules must be regarded merely as proposals. It will be for the Conference itself to adopt or to reject them, or to make any modifications, additions or extensions it may consider desirable.

In framing these Rules, the Committee drew upon the regulations adopted by a number of recent conferences, and upon the Rules of the Assembly. As regards certain details, it has expressly referred to the latter.

The composition of the Conference, which is indicated at the beginning of these draft Rules, is in conformity with the decision adopted by the Assembly. No reference has been made to the desirability of including women on the delegations in view of the discussion which will take place on the subject of nationality. The reason for this is that the composition of delegations is a matter for the individual Governments, and the latter will adopt on this question the decisions which they consider desirable.

The draft Rules have been framed with the object of enabling the Conference to work rapidly and of ensuring that each delegation shall have adequate influence on the joint work and be free to submit proposals. It has accordingly been suggested that questions should be discussed fully in three Committees, and that the latter should perform their work simultaneously. In order to allow of this being done, delegations must be appropriately constituted by Governments. Each delegation might, perhaps, consist of an adequate number of technical delegates in addition to a plenipotentiary delegate. Though this point may be brought to the notice of Governments, it was not, however, a matter which could be dealt with in the Rules.

The suggestion that the Conference should deliberate on the bases of discussion prepared by the Preparatory Committee was also prompted by a desire to facilitate the work of the Conference. In point of fact, these bases of discussion were furnished by the Governments themselves, which

[1] Submitted to the Council in Document C. 190. 1929. V. [Printed herein, *infra*, p. 74.]

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replied to the requests submitted to them for information. The Committee merely collated their replies and brought out the points in which they are in agreement. The individual delegations will, moreover, have the fullest liberty to submit amendments. The reason why proposals which do not come within the scope of the bases of discussion can only be dealt with if this is allowed by a previous decision is to obviate the necessity for the Conference to handle questions on which, as a result of the work of the Committee of Experts and the replies received from Governments, agreement would appear to be very unlikely. Moreover, the Conference will have the fullest possible powers to allow any question to be considered.

The draft Rules lay down the internal organization of the Conference and its method of working. They contain no provision regarding the appointment of the President and of the Secretary-General, the reason being that the Committee did not think it was competent to make any suggestions on this point.

The Committee also considered the question of the publicity of the Conference's work. In view of the disadvantages attending both public and private sittings, the Committee thought it desirable, in principle, that the plenary meetings should be public, but not the meetings of the Committees; it hopes that its proposals on this point will help to diminish initial divergencies and will facilitate unanimous agreement.

The Committee examined the four points to which the Assembly resolution of September 27th, 1927, specially drew the Council's attention. It considered that all these points were not equally suitable for inclusion in the Rules.

As regards the use to be made of the majority rule, the draft is based on the idea that this rule should merely be adopted for the successive votes which may have to be taken when the various parts of a draft proposal are being framed in a Committee. The matter is more delicate when the question of the final adoption of a draft is involved. The Preparatory Committee is of opinion that the Conference should do everything in its power to secure unanimous agreement, and that, where agreement is reached, it should be definitely placed on record. Moreover, in conformity with the Assembly resolution, the draft Rules recognize as being an act of the Conference any convention concluded by a majority of the States represented. Finally, it provides for a declaration, also representing the views of the majority and indicating what the States which subscribe to it regard as constituting existing international law.

At this point the Preparatory Committee was confronted with the problem of the place which should be given in the work of codification to the conclusion of conventions conferring on the rules which they lay down the character of conventional law, and to the signature of declarations designed to recognize existing law. This problem is one of the special aspects of the problem of "the spirit of codification," and is an exceedingly

delicate matter. A particular Government which is prepared to sign some provision or other as a conventional rule might possibly refuse to recognize it as being the expression of existing law, whereas another Government which recognizes this provision as existing law may not desire to see it included in a convention, being apprehensive that the authority of the provision will be weakened thereby. It did not appear to be possible to give a decision on this matter in the draft Rules. That is a problem which the Conference will be better able to settle when it has definite stipulations before it. The attention of Governments should be drawn to the importance of this point.

The solution which will be found for this problem involves certain consequences relating to the term of validity of the provisions adopted and the right to denounce them. While such a right is very natural in the case of a convention, it is much less so in the case of a declaration laying down the content of ordinary international law. These also are points for which it is not easy to give solutions in advance in the Rules. The Conference will, however, require to examine them carefully in connection with the individual acts which it has to frame, and must find suitable solutions in accordance with the contents of each instrument.

The Conference will also have to decide whether a procedure should be laid down for revision, and how and to what extent the new instrument will, in the case of revision, replace the old instrument. That, again, would not appear to be a point which could be dealt with in the Rules for the Conference.

The spirit of the codification, moreover, cannot be dealt with in the Rules. It was not possible to indicate whether only existing law should be registered, or whether the aim should be to adapt existing law to contemporary conditions of international life. The Conference will have to settle this question when the individual points are taken up. The Preparatory Committee would desire merely to state here that the work of codification involves the risk of a setback in international law if the content of the codification instrument is less advanced than the actually existing law. This is a matter which the Conference must always bear in mind.

Finally, the Conference will have to decide carefully, in regard to each of the instruments which it adopts, the procedure of ratification and accession, and to determine to what extent reservations will be allowed. Only a few particulars could be indicated on this matter in the draft Rules.

With the revision it has carried out and with the framing of draft Rules for the Conference, the Preparatory Committee has completed its work, and it submits the documents it has prepared to the Council of the League. It would suggest that they should be transmitted to Governments before being communicated to the Conference.

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BASES OF DISCUSSION DRAWN UP FOR THE CONFERENCE BY THE PREPARATORY COMMITTEE

I. NATIONALITY *

[General observations were submitted by the Governments of Australia, Austria, France, Great Britain, Irish Free State, Netherlands, Poland, Czechoslovakia.] †

Point I

Right of each State to regulate the Acquisition and Loss of its Nationality

In the request for information addressed to the Governments, this point is stated as follows:

> "It appears necessary to take as the point of departure the proposition that questions of nationality are in principle matters within the sovereign authority of each State and that in principle a State must recognize the right of every other State to enact such legislation as the latter considers proper with regard to the acquisition and loss of its nationality. The consequence should be that any question as to the acquisition or loss of a particular nationality by any person is to be decided by application of the law of the State of which the person is claimed to possess, or not to possess, the nationality.
>
> "Are there, however, limits to the application of these two principles? Is there no limit to the right of the State to legislate in this matter? Is a State bound in every case to recognize the effects of the law of the other State?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Chile, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

It appears to be recognized in all the replies: (1) that, in principle, nationality questions are within the sovereign authority of each State; (2) that any question as to the acquisition or loss by a person of the nationality of a particular State should be decided in accordance with the law of the State whose nationality is claimed or disputed.

Some Governments consider that international law to-day imposes certain limitations upon the exercise of its rights in this matter by the particular State; others confine themselves to stating that such limitations are desirable; others, again, say nothing on the point. It does not seem possible at present to formulate limitations fully and precisely; one might; it seems, agree upon a general formula accompanied by various examples which would not constitute an exhaustive enumeration.

* League of Nations Document C. 73. M. 38. 1929. V. Reply from the Government of Canada received after publication of this document. See Document C. 73 (a). M. 38 (a). 1929. V.

† General observations, and views of the Governments on each point, omitted from this SUPPLEMENT on account of their length.

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Basis of Discussion No. 1

Questions as to its nationality are within the sovereign authority of each State. Any question as to the acquisition or loss by an individual of a particular nationality is to be decided in accordance with the law of the State whose nationality is claimed or disputed. 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 on application by or on behalf of the person concerned, transfer of territory;

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.

OBSERVATIONS

Various Governments have called attention to the desirability of prescribing the obligation incumbent upon a State to admit to its territory a former national who, after entering a foreign country, has lost his nationality without acquiring another. This point does not fall directly within the scope of a codification of the rules governing nationality, but relates rather to the consequences of the deprivation of nationality which has befallen the particular person. It might be examined on the following basis:

Basis of Discussion No. 2

If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose national he was remains bound to admit him to its territory at the request of the State where he is residing.

Point II

Case of a Person possessing Two Nationalities

The request for information addressed to the Governments distinguishes three cases.

Point II, No. 1

"The question may arise before the authorities and courts of a State which attributes its nationality to the person concerned. The first sentence of Article 5 of the preliminary draft drawn up in 1926 in the course of the discussions of the Committee of Experts for the Codification of International Law recognizes the right of each State to apply exclusively its own law."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, United States of America, Finland,

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France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies set out above recognize in general the right of each State to apply its own law to the exclusion of any other. The question of diplomatic protection will be examined below.

Basis of Discussion No. 3

A person having two nationalities may be considered as its national by each of the two States whose nationality he possesses.

Point II, No. 2

A second case is formulated in the request for information addressed to the Governments as follows:

> "The question may arise directly between two States each of which considers the person to be its national. The point to be determined is whether either of these States is entitled to exercise the right of diplomatic protection on behalf of the person as against the other State (see Articles 1, 5 and 6 of the Preliminary Draft of the Committee of Experts). If no answer covering all cases can be given, certain subsidiary questions should be considered. Can such diplomatic protection be exercised as against a State of which the person concerned has been a national since his birth, or as against a State of which he is a national through naturalization, or in which he is domiciled or on behalf of which he is or has been charged with political functions? Or, finally, is the admissibility or inadmissibility of the exercise of diplomatic protection as between the two States governed by other considerations capable of being formulated?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies set out above are not in absolute agreement with one another. While some replies claim to exclude any exercise of diplomatic protection in the case in question, others would do so only where such protection would be exercised against the State in which the person concerned is habitually resident; other replies, on the contrary, admit the right of protection. Accordingly, it has seemed desirable to formulate on this point a basis of discussion accompanied by an alternative.

Basis of Discussion No. 4

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

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Alternative; Add to the above text the words:

"If he is habitually resident in the latter State."

POINT II, No. 3

A third case is formulated in the request for information addressed to the Governments as follows:

> "The question may present itself to a third State. What principle decides which nationality is to prevail over the other? Should preference be given to the nationality which corresponds to the domicile of the person concerned (the criterion adopted in the Preliminary Draft of the Committee of Experts and by the International Committee of Jurists which met at Rio de Janeiro in 1927), or to the nationality which corresponds to the person's habitual residence (the criterion adopted by the Conference on Private International Law at The Hague in 1928), or to the nationality last acquired; or should account be taken of the person's own choice; or should preference be given as between the conflicting laws to the one most closely resembling the law of the third State itself; or should some other element of the case determine which nationality is to prevail?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies on this point are somewhat divergent. The divergences which they show are, however, capable of reconciliation if it is agreed that there would be advantages in possessing on the point in question a fixed rule which would henceforth be generally accepted.

On the other hand, the question does not arise in exactly the same form where the case is one of applying the law of the person's nationality to determine his personal status and where it is a question of one of the other consequences of nationality. In the former case, it is necessary to have an objective criterion independent of arbitrary choice: the criterion of habitual residence is that adopted in the matter by the Conference of Private International Law at The Hague in 1928, in preference to the criterion of domicile, which involves a legal conception which is differently understood in different countries; failing habitual residence in one of the two States which consider the person as their national, it would be necessary to determine which State was, according to the circumstances of the case, the one with which the person was in fact the more intimately connected. For purposes other than personal status (application of a treaty, police regulations regarding foreigners, etc.), it seems possible to make the person's own choice the determining factor.

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Basis of Discussion No. 5

Within a third State: (*a*) as regards the application of a person's national law to determine questions of his personal status, preference is to be given to the nationality of the State in which the person concerned is habitually resident or, in the absence of such habitual residence, to the nationality which appears from the circumstances of the case to be the person's effective nationality: (*b*) for all other purposes, the person concerned is entitled to choose which nationality is to prevail; such choice, once made, is final.

Point III

Loss of Nationality by Naturalization Abroad and the Expatriation Permit

In the request for information addressed to the Governments, this point is stated as follows:

> "Does the loss of nationality result directly from the naturalization in the foreign country? Or, on the contrary, is it the authorization to renounce the former nationality which causes that nationality to be lost, and, if so, how and at what date? Is there an exact correspondence between the loss of the former nationality and the acquisition of the new nationality by naturalization, especially as regards date? If such correspondence does not exist, is it desirable to establish it by an international convention?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Chile, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

A great diversity exists on this point between the various legal systems. Some contain the rule that the nationality of the State is lost by acquisition of a foreign nationality; others make this consequence conditional upon the fulfilment of certain requirements prescribed by law; and, finally, others make the loss of nationality dependent on the grant by the competent authority of a release from allegiance or an expatriation permit.

An important advance would be made if States agreed to recognize that, in principle, the voluntary acquisition of a foreign nationality should involve the loss of the former nationality. At the same time, an understanding might be reached as to restricting the list of the legal requirements on which a State would continue free to make the loss of its nationality conditional.

The system of an expatriation permit would continue to be useful in the case of persons not satisfying the requirements prescribed by law for loss of the State's nationality as the result of acquiring a foreign nationality; the permit would then not be sufficient in itself to produce loss of nationality but would allow this consequence to arise from the acquisition of a new nationality.

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Basis of Discussion No. 6

In principle, a person who on his own application acquires a foreign nationality thereby loses his former nationality. The legislation of a State may nevertheless make such loss of its nationality conditional upon the fulfilment of particular legal requirements regarding the legal capacity of the person naturalized, his place of residence, or his obligations of service towards the State; in the case of persons not satisfying these requirements, the State's legislation may make the loss of its nationality conditional upon the grant of an authorization.

OBSERVATIONS

If the above basis of discussion is not adopted, it would seem at least possible to reach a more limited agreement in the sense of making the loss of nationality resulting from release from allegiance (an expatriation permit) conditional upon the acquisition of a foreign nationality; this would ensure a concordance between the two processes which States applying the system of release from allegiance declare in general to be desirable. With this purpose, the following basis of discussion has been drawn up; it has a subsidiary character and will only require to be considered if the preceding basis is rejected.

Basis of Discussion No. 6 *bis.*

A release from allegiance (expatriation permit) does not entail loss of nationality until a foreign nationality is acquired.

Point IV

Effect of Naturalization of Parents upon the Nationality of Minors

In the request for information addressed to the Governments, this point is stated as follows:

"Effect of naturalization of parents upon the nationality of minors."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

It is fairly generally recognized to-day that naturalization of the parents involves that of children who are minors and not married—at least, if they live with their parents. This legal situation might be stabilized. As regards the exceptions to this principle in some legal systems, a rule might be adopted permitting each State to maintain such exceptions as are embodied at the present moment in its own law.

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Basis of Discussion No. 7

Naturalization of parents involves that of their children who are minors and not married but this shall not affect any exceptions to this rule at present contained in the law of each State.

OBSERVATIONS

The replies do not all consider the question whether naturalization of the parents causes children who are minors to lose their former nationality. Doubts may arise in this connection from the fact that sometimes acquisition of a new nationality only involves loss of the former nationality if the acquisition was voluntary. The question deserves to be considered and discussed.

In this connection, it seems that the loss of nationality by the children should only occur if it also occurs for the parents themselves.

Basis of Discussion No. 8

Naturalization of the parents causes children who are minors and not married to lose their former nationality if the children thereby acquire their parents' new nationality and the parents themselves lose their former nationality in consequence of the naturalization.

A State may exclude the application of the preceding provision in the case of children of its nationals who become naturalized abroad if such children continue to reside in the State.

OBSERVATIONS

It is not sufficient in this matter to prevent the children from having two nationalities; it is desirable also to prevent divergences between legal systems resulting in the children being left without nationality as a consequence of the naturalization of the parents. For this purpose, it is desirable to provide that the children shall keep their former nationality when their parents' new nationality does not extend to them.

Basis of Discussion No. 9

When naturalization of the parents does not extend to children who are minors, the latter retain their former nationality.

Point V

Application of the jus soli *to the Children of Various Foreign Officials*

In the request for information addressed to the Governments, this point is stated as follows:

> "Application of laws conferring the nationality of the State on persons born within its territory to the case of children of persons enjoying diplomatic privileges, and, in general, of persons exercising official functions

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on behalf of a foreign Government, such as consuls, financial agents, members of a military or commercial mission, etc.

"If these laws are applicable to such children, should the cases of double nationality which result be treated in accordance with the rules ordinarily applicable or in accordance with different rules?

"If these laws do not automatically apply to such children, are they given the opportunity of claiming the benefit of them?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Chile, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

This question arises only under legal systems admitting the *jus soli.* There would seem to be no objection of principle to the view that the *jus soli* does not apply compulsorily to children born to persons enjoying diplomatic immunities.

It will be for the Conference to consider whether this solution of the problem should be extended to the children of consuls by profession (consuls *de carrière*) and, in general, to the children of persons of foreign nationality exercising official functions in the name of a foreign Government or, whether it is necessary to make special provision for the possibility of repudiating nationality acquired *jure soli;* the Government replies show hesitation on this point.

BASIS OF DISCUSSION No. 10

Rules of law which make nationality depend upon the place of birth do not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs. The child will, however, be entitled to claim to come within the provisions of the law of the country to the extent and under the conditions prescribed by that law.

The same principle shall apply: (1) to the children of consuls by profession; (2) to the children of other persons of foreign nationality exercising official functions in the name of a foreign Government.

POINT VI

Birth on the Territory of a State while the Parents were merely passing through the Territory

In the request for information addressed to the Governments, this point is stated as follows:

"Application of laws conferring the nationality of the State on persons born in its territory to the case of a child born in the territory while the parents were merely passing through."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Chile, Denmark, Egypt, Estonia, United States of America, Finland,

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France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

On this point, the replies indicate the divergences which exist between the various legal systems. Some regard the question as not arising, since they maintain the rule of *jus sanguinis*. Others grant nationality *jure soli* only if other factors accompany birth on the territory. Others attach this consequence to mere birth on the territory, but at the same time avoid the disadvantages of the rule by granting a possibility of option. In these circumstances, it does not seem possible to retain the present point for discussion.

POINT VII

Children born of Parents who are Unknown or have no Nationality or are of Unknown Nationality

In the request for information addressed to the Governments, this point is stated as follows:

> "Nationality of a child of unknown parents, of parents having no nationality, or of parents of unknown nationality."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

In the case of a foundling or of a child whose parents are juridically not known, the attribution to the child of the nationality of the country of birth is generally admitted.

BASIS OF DISCUSSION No. 11

A child whose parents are unknown has the nationality of the country of birth.

A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

OBSERVATIONS

The case of the child of parents of unknown nationality or having no nationality raises greater difficulties. Some legal systems give it the nationality of the country of birth; others refuse this nationality in order to avoid conferring the country's nationality on too large a number of children of persons without nationality; others, finally, adopt an intermediate solution by making the attribution of the country's nationality conditional upon prolonged residence in the country. This intermediate system would seem

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to furnish a basis for regulating the matter in a convention in a way which would prevent certain cases of absence of nationality. The acquisition of the nationality might be made conditional on the child's remaining in the territory of the State up to a fixed age. It would, moreover, be desirable in this connection not to interfere with legal systems which are more generous in conferring the nationality of the country on persons who would otherwise be without nationality.

Basis of Discussion No. 12

Except where the nationality of the State is acquired directly by birth on its territory, a child of parents having no nationality, or whose nationality is unknown, has the nationality of the State of birth if it lives there up to an age to be determined by the State. The age thus to be determined shall not exceed eighteen years.

Point VIII

Children of Parents whose Nationality is not transmitted to them by Operation of Law

In the request for information addressed to the Governments, this point is stated as follows:

> "The Committee has in mind the case of a child born abroad the law of whose parents makes transmission of their nationality conditional upon their birth on the national territory, or, again, the case of an illegitimate child whose parents are of different nationalities and who, under the national law of the father, should possess the mother's nationality, and, under the national law of the mother, should possess the father's nationality.
>
> "In cases of this nature, should the child be considered to possess the nationality of the parents, or one of them, or the nationality of the State of birth?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Chile, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The case in which the nationality of the parents is not transmitted to the child by operation of law presents analogies to the case in which the parents are of unknown nationality or without nationality. It seems that the solution could be sought in the same direction. Certain replies suggest removing the limitations which particular legal systems sometimes place on the transmission to children of their parents' nationality; this idea, however, ignores the fact that those obstacles have in general the beneficial effect of preventing numerous cases of double nationality.

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BASIS OF DISCUSSION No. 13

Except where the nationality of the State is acquired directly by birth on its territory, a child of parents whose nationality is not transmitted to it by operation of law has the nationality of the State of birth if it lives there up to an age to be determined by the State. The age thus to be determined shall not exceed eighteen years.

POINT IX

Birth on Board a Merchant Ship

In the request for information addressed to the Governments, this point is stated as follows:

> "Is birth on board a merchant ship to be assimilated, as regards acquisition of nationality in virtue of birth, to birth on the territory of the State whose flag the ship flies:
>
> "(*a*) When the birth occurs while the ship is on the high sea?
> "(*b*) When it occurs while the ship is in the territorial waters of a foreign State?
> "(*c*) When it occurs while the ship is in a foreign port?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

This point arises only in connection with the determination of nationality *jure soli*. The replies submitted show that, while the assimilation in question is in some cases admitted by most of the Governments (a merchant ship on the high seas), it causes more doubt in other cases. Accordingly, it has appeared desirable to formulate on this point a basis of discussion contemplating assimilation to birth on the territory in very broad terms; this will render it possible, after discussion, either to affirm the basis or to restrict it to the extent considered appropriate.

BASIS OF DISCUSSION No. 14

For the purposes of acquisition of nationality by birth, birth on board a merchant ship is assimilated to birth on the territory of the State whose flag the ship flies, whether the ship be in the waters or ports of such State or on the high seas or in foreign territorial waters or in a foreign port.

OBSERVATIONS

Some replies say that birth in a port constitutes birth on the territory of the State to which the port belongs, even if it occurs on board a foreign merchant ship. If the child is at the same time considered to have been born on the territory of the State whose flag the ship flies, the result may be to

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give it two nationalities *jure soli.* The attention of Governments is called to this point. With a view to its examination, it is dealt with in the following provision, which should be considered at the same time as the preceding basis of discussion:

BASIS OF DISCUSSION No. 14 *bis*

Birth in a port on board a merchant ship constitutes birth on this territory of the State to which the port belongs, even if the ship is a foreign ship.

POINT X

Right of Option in case of Double Nationality

In the request for information addressed to the Governments, this point is stated as follows:

> "Option by a person entitled to double nationality. Conditions governing such option. Is there an option between the two nationalities or a power to renounce one of them and, if so, which? Can the system of option be made general or be extended and, if so, to what extent?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Chile, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

As is explained in the request for information, what is to be dealt with under this point is less an option than a renunciation by the person concerned of one of two nationalities attributed to him.

The views of the Governments on the point are very divergent. While some think that the solution of the problem of double nationality can be found in giving the person concerned wide possibilities of renouncing one nationality, others merely contemplated a power to reject the nationality which has been acquired *jure soli,* and others, again, refer to the danger which free choice by the person may involve. Doubts are raised as to the possibility of settling this question by a general provision. On the other hand, the suggestion is made that the question should not be left to be decided by the person concerned, but that a solution should be imposed upon him if he does not make his choice at the proper time; it does not seem likely that in present circumstances this last suggestion would meet with general acceptance.

It appears that an intermediate solution might be sought which would give the person concerned the power to renounce one of his two nationalities, subject, however, to the authorization of the Government and with the formulation of certain restrictions on the Government's right to refuse the authorization. The liberty would require to be reserved to each State to establish wider rights to renounce its nationality.

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Basis of Discussion No. 15

Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person of double nationality may, with the authorization of the Government concerned, renounce one of his two nationalities. The authorization may not be refused if the person has his habitual residence abroad and satisfies the conditions necessary to cause loss of his former nationality to result from his being naturalized abroad.

OBSERVATIONS

Mention should be made of the fact that some replies have referred to the inconveniences which arise from enforcing military service obligations upon persons of double nationality before they have reached the age at which they have an option between their two nationalities.

Point XI

Effect of Marriage upon the Nationality of the Wife

In the request for information addressed to the Governments, this point is stated as follows:

> "Loss of nationality by a woman as the result of marriage with a foreigner.
>
> "Assuming such loss of nationality to be the rule of the woman's national law, is it conditional on the national law of the husband conferring his nationality on the woman?
>
> "In like manner, if during the period of married life a change occurs in the nationality of the husband, is loss of nationality by the woman, assuming it to be the rule of her national law, conditional upon the new national law of the husband giving her the husband's new nationality?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies submitted do not make it possible at present to hope for a general agreement establishing either the rule that marriage does not affect the wife's nationality or the rule that the wife takes by marriage the nationality of her husband.

It appears at least possible, and it is desirable, to prevent the operation of conflicting legal rules from causing a woman to lose her nationality, as the result of marriage, without acquiring another. It would be sufficient for this purpose to agree that the loss of the one nationality shall be conditional on the acquisition of the other. The two contrasting legal systems remain unaffected, but the woman will be prevented from becoming stateless.

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Basis of Discussion No. 16

If the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the nationality of the husband.

OBSERVATIONS

An analogous provision seems possible in regard to the effect upon the nationality of the wife which some legal systems attach to a change in the husband's nationality during marriage.

Basis of Discussion No. 17

If the national law of the wife causes her to lose her nationality upon a change in the nationality of her husband occurring during marriage, this consequence shall be conditional on her acquiring her husband's new nationality.

OBSERVATIONS

It seems, moreover, that, in the case of naturalization of the husband during marriage, it is possible to go further than merely to provide for concordance between the acquisition of the one nationality and the loss of the other which may result therefrom for the wife. Without purporting to determine completely whether such change of the husband's nationality involves a corresponding change for the wife, it might be agreed that the change in the wife's nationality shall be conditional on her consent.

Basis of Discussion No. 18

Naturalization of the husband during marriage does not involve a change of nationality for the wife except with her consent.

Point XII

Effect of Dissolution of a Marriage upon the Nationality of the Wife

In the request for information addressed to the Governments, this point is stated as follows:

> "Status of a woman who, after acquiring the nationality of her husband in consequence of or during her marriage, recovers her original nationality after dissolution of the marriage.
>
> "Does the woman in such a case lose the nationality which she acquired in consequence of or during the marriage? It seems necessary to consider separately: (*a*) the case where the recovery of the original nationality occurs automatically by operation of law; (*b*) the case where the recovery results from the decision of a public authority; and (*c*) the case where the recovery results from a declaration of intention by the woman herself."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland,

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France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

Here the divergences between different legal systems may involve the wife either in loss of all nationality or in double nationality. It is desirable to establish a concordance between her recovery of her former nationality and her loss of the nationality acquired by her marriage, making such loss dependent on the recovery of the former nationality. On the other hand, instead of contemplating a recovery of the former nationality operating automatically and in every case, it appears proper to allow it only on application by the woman herself; it is to be presumed that she will take account of the interests of her children.

Basis of Discussion No. 19

After dissolution of a marriage, the wife recovers her former nationality only on her own application and in accordance with the law of her former country. If she does so, she loses the nationality which she acquired by her marriage.

Point XIII

Other Effects of Marriage upon Nationality

In the request for information addressed to the Governments, this point is stated as follows:

"Other effects of marriage upon nationality."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland.]

OBSERVATIONS

It does not seem possible to extract from the replies any point on which a further basis of discussion is needed.

Point XIV

Effect of Legitimation upon Nationality

In the request for information addressed to the Governments, this point is stated as follows:

"Effect of a change in the status of an illegitimate child (recognition, legitimation) upon the child's nationality.

"In what cases and to what extent is there such an effect? More particularly, if the illegitimate child loses the former nationality, is such loss conditional upon acquisition of another nationality (that of the father or of the mother, as the case may be)?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland,

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France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

It does not seem possible to anticipate an agreement determining the consequences of the recognition of an illegitimate child upon the child's nationality.

The divergences between the various rules appear, however, to be less serious as regards the effect of legitimation upon nationality. An attempt might be made to unify the law on this point by agreeing that legitimation shall cause the child which is legitimized to take the father's nationality and to make it lose the nationality previously acquired by descent. Some States do not to-day accept this solution, but they will perhaps be willing to adopt it in order to arrive at a simple and uniform solution of the problem.

BASIS OF DISCUSSION No. 20

Legitimation by the father of an illegitimate child who is a minor and does not already possess the father's nationality gives the child the father's nationality and causes it to lose a nationality which it would previously have acquired by descent from its mother.

OBSERVATIONS

If the above basis of discussion is not adopted, it seems that agreement could easily be secured to make the loss of the illegitimate child's former nationality conditional upon acquisition of a new nationality as the result of the change in the child's civil status. With this object, the following is submitted as a subsidiary basis of discussion.

BASIS OF DISCUSSION No. 20 *bis*

The original nationality of an illegitimate child is not lost by change in its civil status (legitimation, recognition) unless the law governing the effects thereof in regard to nationality invests it with another nationality.

POINT XV

Effect of Adoption upon Nationality

In the request for information addressed to the Governments, this point is stated as follows:

> "In what cases and to what extent is there such an effect? More particularly, if the adopted child loses the former nationality, is such loss conditional upon acquisition of the nationality of the adoptive parent?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, Hungary, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

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OBSERVATIONS

Governments would hesitate to bind themselves as regards the acquisition of nationality by adoption. It seems, however, easy to agree that a State which admits loss of nationality as the result of adoption must make such loss conditional upon acquisition by the person adopted of the nationality of the adoptive parent.

BASIS OF DISCUSSION No. 21

In countries of which the legal system admits loss of nationality as the result of adoption, this result shall be conditional upon the adopted child acquiring the nationality of the adoptive parent.

FINAL OBSERVATION

In so far as the provisions decided upon by the Conference involve modifications in the internal law of various countries in regard to the acquisition or loss of nationality, it must be made clear that such provisions do not affect the position established on individual cases before the entry into force of such provisions.

II. TERRITORIAL WATERS*

[General observations were submitted by the Governments of Austria, France, Hungary, Irish Free State, Netherlands, Portugal.]

POINT I

Nature and Content of the Rights possessed by a State over its Territorial Waters

In the request for information addressed to the Governments, this point is stated as follows:

"It would seem possible to take as the point of departure the proposition that the State possesses sovereignty over a belt of sea around its coasts. This involves possession by the State in the belt of the totality of those rights which constitute sovereignty, so that it is not necessary to specify that, for example, it has legislative authority over all persons, power to make and apply regulations, judicial authority, power to grant concessions and so forth. It is obvious that in exercising its sovereignty the State must respect the limitations imposed by international law. It has therefore to be determined what those limitations are (see points IX, X, XII, XIII).

"The breadth of the belt will be considered under Point III.

"The question arises whether it is possible for special rights belonging to another State to restrict or exclude the rights of the coastal State in

* League of Nations Document C. 74. M. 39. 1929. V. Replies from the Government of Canada and of the Union of Soviet Socialist Republics received after publication of this document. See Documents C. 74 (a). M. 39 (a). 1929. V. and C. 74 (b). M. 39 (b). 1929. V.

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the belt. Are such special rights claimed by any State? If so, what is the extent and ground of the claim? Is the claim admitted by other States?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden.]

OBSERVATIONS

The replies show that the Governments agree in considering that a State has sovereignty over a belt of sea round its coast. The only reservations expressed appear to be due to the desire not to pronounce upon the theoretical aspect of a question of terminology, or to anxiety not to leave out of account the fact that, in exercising such sovereignty, the coastal State must respect the restrictions which result from international law.

Attention is called to the special position of a protecting State or a mandatory Power in regard to the territorial waters surrounding the territory under its protection or mandate; it has not seemed necessary to mention this question expressly in the text prepared by the Committee.

Basis of Discussion No. 1

A State possesses sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters.

OBSERVATIONS

These replies contain few references to special rights claimed by one State over the territorial waters of another other than rights founded on treaty and to which reference is made by some Governments. More often they indicate either that such claims are neither made nor admitted, or else that the question is rather one of the delimitation between the territorial waters of two States. In these circumstances, this question does not, it seems, require to be made the subject of a basis of discussion.

Point II

Application of the Rights of the Coastal State to the Air above and the Sea Bottom and Subsoil covered by its Territorial Waters

In the request for information addressed to the Governments, this point is stated as follows:

"Application of the rights of the coastal State to the air above and the sea bottom and subsoil covered by its territorial waters."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

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OBSERVATIONS

Unanimity exists on this point.

BASIS OF DISCUSSION NO. 2

The sovereignty of the coastal State extends to the air above its territorial waters, to the bed of the sea covered by those waters and to the subsoil.

POINT III

Breadth of the Territorial Waters

In the request for information addressed to the Governments, this point is stated as follows:

> "(*a*) Breadth of the territorial waters subject to the sovereignty of the State (three miles, six miles, range of cannon, etc.).
>
> "(*b*) Does the State admit any claim by any foreign State to exercise sovereignty, in virtue of usage, special geographical configuration, or any other ground, over a greater breadth of territorial waters than that over which the former State itself exercises sovereignty along its own coasts?
>
> "(*c*) Does the State claim to exercise rights outside the territorial waters subject to its sovereignty? If so, what precisely are those rights? On what are they founded? Are they claimed within a belt of fixed breadth or within an indeterminate area of the waters adjacent to the coast but outside the territorial waters?
>
> "(*d*) Does the State admit any claim by any foreign State to exercise such rights outside the territorial waters subject to the sovereignty of the latter State?
>
> "(*e*) Whatever be the existing law, is it considered possible and desirable to embody in a convention an agreement upon one of the following alternatives:
>
> "(1) A uniform breadth for territorial waters would be fixed for all States and for all purposes;
>
> "(2) A uniform breadth for territorial waters would be fixed for all purposes but the breadth might be different for different States on the ground of special circumstances;
>
> "(3) The territorial waters in which the State exercises sovereignty would be delimited, but beyond such limits, within an area to be determined, the State would be entitled to exercise such special rights as might be specified?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Portugal, Roumania, Sweden.]

OBSERVATIONS

The first question to be settled is the breadth of the territorial waters under the sovereignty of the State.

On this point, the replies are not unanimous. According to the majority, the breadth is three nautical miles. No reply disputes that territorial

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waters include such a three-mile belt, but there are several which contemplate a greater breadth. Some present the claim of individual States to a greater breadth of territorial waters as one established in international law, a contention which is expressly rejected by other replies; others mention such a greater breadth without stating whether they regard it as already recognized by international law; others recommend an extension of territorial waters as a matter to be agreed to but involving an innovation. The breadth proposed in some replies is four miles, in others six or eighteen. The idea is also found that, subject to certain reservations, a State would be entitled to fix for itself the breadth of its territorial waters. In these circumstances, a basis of discussion is put forward resting on the majority opinion, *i.e.*, the three-mile limit; in no case, if considered as a minimum, is this contested in any reply.

Basis of Discussion No. 3

The breadth of the territorial waters under the sovereignty of the coastal State is three nautical miles.

OBSERVATIONS

Some States regard the above formula as an accurate and sufficient statement of existing international law. Others, however, appear to hold strongly to the claim of sovereign rights over more than three miles of territorial waters, particularly on the ground of historic rights or geographical or economic necessity; this claim is admitted by some and categorically disputed by other States. The question is not solely one of law: it is necessary to consider whether, whatever the existing law may be, it would not be desirable to insert in the Convention to be concluded a provision recognizing particular named States to possess more extensive territorial waters. Despite the small number of the replies which favor this idea, it has been felt well to formulate it as a basis of discussion, since it may furnish a means of reaching agreement.

If the idea is adopted, it will be necessary to state clearly which States will enjoy the privilege in question and what will be the resulting breadth of their territorial waters. These questions can only be decided by the Conference itself.

Basis of Discussion No. 4

Nevertheless, the breadth of the territorial waters under the sovereignty of the coastal State shall, in the case of the States enumerated below, be fixed as follows: . . .

OBSERVATIONS

In another respect the basis of Discussion No. 3 seems to some States to be an accurate and sufficient statement of international law. They consider that, while the coastal State exercises sovereignty up to the three-mile limit,

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outside the three miles is the high sea on which no State has any special rights. Other States, on the contrary, assert that they exercise certain rights beyond the three miles, more particularly in regard to the enforcement of Customs, sanitary and military regulations, and that they do not consider themselves to act contrary to international law by so doing.

Examination of the replies shows it to be unnecessary to settle the questions of international law which may arise in this connection. Most States agree, to a greater or lesser extent, that exercise of particular specified rights by the coastal State outside its territorial waters, *i.e.*, on the high seas, can be accepted as legitimate—at any rate, as a compromise and as the result of a convention on the subject. It seems possible to reach agreement on the matter in respect of Customs and sanitary police measures and protection of the territory against dangers which may threaten it from the presence of particular ships. The rights in question do not exclude the exercise by other Powers of their rights on the high seas. On the other hand, the Government replies do not make it possible to expect that agreement could be secured for an extension beyond the limits of territorial waters of exclusive rights of the coastal State in regard to fisheries.

Taking as a basis the precedents furnished by various treaties, the exercise of the special rights in question might be restricted to twelve miles measured from the coast.

Basis of Discussion No. 5

On the high seas adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its Customs or sanitary regulations or interference with its security by foreign ships.

Such control may not be exercised more than twelve miles from the coast.

Point IV

Determination of the Base Line for Measurement of the Breadth of Territorial Waters

Point IV (*a*)

In the request for information addressed to the Governments, this point is stated as follows:

> "Along the coasts. Is the line that of low tide following the sinuosities of the coast; or a line drawn between the outermost points of the coast, islands, islets or rocks; or some other line? Is the distance between islands and the coast to be taken into account in this connection?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

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OBSERVATIONS

Various replies call attention to the different meanings which can be given to the expression "low water." This is a question of a technical character which must be brought to the notice of the Governments, in order that they may submit it for examination by their experts so as to enable the latter to agree at the Conference upon the best expression to employ. Subject to the more accurate formulation which may thus be secured it is possible for the moment to maintain the traditional expression "low-water mark."

Much more difficult is the question whether the breadth of territorial waters is to be measured from low-water mark following all the sinuosities of the coast, or whether an imaginary line connecting particular salient points of the coast is to be taken as the base line. In examining this point: (1) bays, and (2) islands in proximity to the coast are left out of account. These problems will be considered subsequently, and the solutions adopted will be combined with that taken for the question examined here.

To take as the base line the line of low-water mark following all the sinuosities of the coast is equivalent to saying that any point in the sea situated not more than three miles from a point on the line of low-water mark is included in the territorial waters. According to the other conception, the boundary of the territorial waters is a line parallel to an imaginary line connecting certain salient points of the coast.

The majority of the States which have supplied information pronounce for the first formula, which has already been adopted in various international conventions. The second formula would necessitate detailed information as regards the choice of the salient points and the distance determining the base line between these points. The replies received do not furnish such details. In these circumstances, the first formula is the only one which can be adopted.

BASIS OF DISCUSSION No. 6

Subject to the provisions regarding bays and islands, the breadth of territorial waters is measured from the line of low-water mark along the entire coast.

POINT IV (*b*)

In the request for information, the question how the breadth of territorial waters in front of bays is measured, was brought to the attention of the Governments as follows:

> "In front of bays. Breadth of the bay to be taken into account. Historic bays. Bays whose coasts belong to two or more States."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Portugal, Roumania, Sweden.]

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OBSERVATIONS

It is agreed that the base line constituted by the sinuosities of the coast should not be maintained for every bay. The suggested exception, however, contemplates, not a mere curvature of the shore line, but an indentation presenting the characteristic features of a bay, showing in particular a well-marked entrance and a certain proportion (which it will be for the Conference to fix) between the breadth of such entrance and the depth of the indentation. Furthermore, it is necessary that the bay should not be too wide at its entrance. Divergent views exist as to the maximum size of the entrance. It seems, nevertheless, from examination of the replies, that agreement could be reached in regard to bays of which the entrance is not more than ten miles wide. An imaginary line would be drawn across the bay and would serve as the basis for measurement of the breadth of the territorial waters. If the opening of the bay is wider than ten miles, the line must be drawn at the nearest point to the entrance at which the breadth of the bay does not exceed ten miles. This is the system adopted in the Convention of May 6th, 1882, on the North Sea fisheries, on which the formula proposed as the basis of discussion is founded.

The provisions with regard to islands set out below have the consequence that, where islands belonging to the coastal State lie at the entrance of a bay, the breadth of the opening of the bay is to be measured from the coast to the island or from one island to another.

BASIS OF DISCUSSION NO. 7

In the case of bays the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles.

OBSERVATIONS

The Government replies appear to indicate that agreement can easily be reached to extend the same method of calculation to bays of a greater breadth than ten miles where the coastal State is in a position to prove the existence of a usage to that effect (historic bays).

BASIS OF DISCUSSION NO. 8

The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State: the onus of proving such usage is upon the coastal State.

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OBSERVATIONS

The provisions above contemplated for bays relate to bays the coast of which belongs to a single State. Where two or more States touch the coast of a bay, the Government replies are again in favor of the method of measuring the breadth of territorial waters from the line of low-water mark along the coast. The Netherlands Government, however, without disputing this view, has pointed out that the rule might produce difficulties, particularly where the result would be to leave a small area of high sea completely enclosed. This particular case requires to be brought to the notice of the Governments; it can be considered at the same time as the basis of discussion.

BASIS OF DISCUSSION NO. 9

If two or more States touch the coast of a bay or estuary of which the opening does not exceed ten miles, the territorial waters of each coastal State are measured from the line of low-water mark along the coast.

POINT IV (c)

The request for information addressed to the Governments raises, in the third place, the question how the base line for measuring the breadth of territorial waters is to be fixed in front of ports.

[Replies were made by the following Governments; South Africa, Germany, Australia, Belgium, Denmark, Egypt, United States of America, Finland, France, Great Britain, India, Italy, Japan, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

It has been pointed out that what is meant by a port in the present connection is a port properly so called, serving for loading and unloading ships, without reference to the more extended use of the term which may be found in the Customs legislation of particular countries.

Agreement exists in favor of measuring the breadth of the territorial waters from a line drawn between the outermost permanent harbor works.

BASIS OF DISCUSSION NO. 10

In front of ports, territorial waters are measured from a line drawn between the outermost permanent harbor works.

OBSERVATIONS

It has been proposed to assimilate to ports roadsteads serving for the loading and unloading of ships. Such roadsteads would constitute the starting-point of a belt of territorial waters measured from the exterior boundary of the roadstead as fixed by the coastal State. The Governments have not had the opportunity of pronouncing on this question, which would

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require to be submitted to their experts. The following basis of discussion is formulated for the purpose of securing such consideration.

BASIS OF DISCUSSION NO. 11

In front of roadsteads which serve for the loading and unloading of ships and of which the limits have been fixed for this purpose, territorial waters are measured from the exterior boundary of the roadstead. It rests with the coastal State to indicate what roadsteads are in fact so employed and what are the boundaries of such roadsteads from which the territorial waters are measured.

POINT V

Territorial Waters around Islands

In the request for information addressed to the Governments, this point is stated as follows:

> "An island near the mainland. An island at a distance from the mainland. A group of islands; how near must islands be to one another to cause the whole group to possess a single belt of territorial waters?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Roumania, Sweden.]

OBSERVATIONS

In the case of an island at a sufficient distance from the mainland and from other islands, it is evident that the island will possess territorial waters measured in accordance with the principles already stated.

BASIS OF DISCUSSION NO. 12

Each island has its own territorial waters.

OBSERVATIONS

On the other hand, the replies show great diversity of view as regards islands in proximity to one another or to the mainland.

According to some Governments, each island has its own territorial waters and their breadth is in all cases measured in the ordinary way; if the islands are separated by less than twice the breadth of the territorial waters, the overlapping of their territorial waters is a simple fact without further consequences. This is a very simple conception embodying the idea that any point in the sea less than three miles distant from the land is within territorial waters. This conception renders it unnecessary to make any special mention of groups of islands or archipelagos.

According to other Governments, wherever two or more islands are sufficiently near to one another or to the mainland, the islands or the islands and the mainland form a unit, and territorial waters must be determined by

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reference to the unit and not separately for each island; there will thus be a single belt of territorial waters. This conception claims to be based on geographical facts. On the other hand, it raises more complicated questions than the other view. In the first place, it makes it necessary to determine how near the islands must be to one another or to the mainland. Some Governments are in favor of twice the breadth of the territorial waters; others do not advocate any particular distance but desire to take account of geographical facts, which would make it possible to consider as a whole portions of land at a much greater distance from one another, particularly in the neighborhood of the mainland. This view, moreover, makes it possible to consider as a single whole, possessing its own belt of territorial waters, a group of islands which are sufficiently near one another at the circumference of the group, although within the group the necessary proximity may not exist.

To treat a group of islands or an island and the mainland as a single whole possessing its own belt of territorial waters raises a new question. What is to be the status of the waters separating either the mainland from the islands or the islands from one another? According to one opinion, such waters are inland waters and the ordinary belt of territorial waters surrounds the group at its circumference. Another opinion, which appears to be that of the majority of Governments, considers all the waters in question to be territorial waters and to be subject accordingly to the rules governing territorial waters. The first opinion is based on the interests of the coastal State; the second is more favorable to freedom of navigation. In face of these divergences of view, an attempt has been made to discover a possible basis of discussion which would be a compromise: it consists in treating as a unit a group of islands which are sufficiently near to one another at the circumference of the group while giving to the waters included within the group the character of territorial waters.

Basis of Discussion No. 13

In the case of a group of islands which belong to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters.

The same rule shall apply as regards islands which lie at a distance from the mainland not greater than twice the breadth of territorial waters.

Point VI

Definition of an Island

In the request for information addressed to the Governments, this point is stated as follows:

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"For the purposes of Points IV and V, what is meant by an island?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Denmark, Egypt, Estonia, United States of America, Finland, Great Britain, India, Japan, Norway, New Zealand, Netherlands, Roumania, Sweden.]

OBSERVATIONS

Two main conceptions appear in the above replies. According to one, an island must be above water at high tide. According to the other, it is sufficient for it to be above water at low tide.

A compromise may be contemplated. It will consist in allowing an island (*i.e.*, an isolated island) to have its own territorial waters only if it is above water at high tide, but in taking islands which are above low-water mark into account when determining the base line for the territorial waters of another island or the mainland, if such islands be within those waters.

BASIS OF DISCUSSION No. 14

In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide.

In order that an island lying within the territorial waters of another island or of the mainland may be taken into account in determining the belt of such territorial waters, it is sufficient for the island to be above water at low tide.

POINT VII

Straits

In the request for information addressed to the Governments, this point is stated as follows:

> "Conditions determining what are territorial waters within a strait connecting two areas of open sea or the open sea and an inland sea: (*a*) when the coasts belong to a single State; (*b*) when they belong to two or more States."

[Replies were made by the following Governments: South Africa, Germany, Australia, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Roumania, Sweden.]

OBSERVATIONS

When the coasts of a strait belong to a single State and the strait is not wider than twice the breadth of territorial waters, agreement is easily reached for the view that all the waters of the strait are territorial waters of the coastal State. It is reasonable to adopt the same solution when the entrances of the strait are not wider than twice the breadth of territorial waters, even though some parts of the strait may be broader. There would be no advantage in attributing the character of high sea to areas of sea situated within the strait.

It is evident, and it is unnecessary to state, that if islands belonging to the

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coastal State lie at the entrance of a strait, the distance of twice the breadth of territorial waters applies to the individual straits which lie between each island and the coast or another island. It is equally unnecessary to state that, if the entrance to the strait is wider than twice the breadth of territorial waters, the limit of the territorial waters is to be drawn in the same manner as along any other coast.

Basis of Discussion No. 15

When the coasts of a strait belong to a single State and the entrances of the strait are not wider than twice the breadth of territorial waters, all the waters of the strait are territorial waters of the coastal State.

OBSERVATIONS

In straits the coasts of which belong to two States, the breadth of the territorial waters is measured in the ordinary manner. In narrow straits, the dividing line between the territorial waters is admitted to run down the centre of the strait. These rules do not affect different arrangements established by treaty or arbitral award so far as concerns States bound by those arrangements.

Basis of Discussion No. 16

When two States border on a strait which is not wider than twice the breadth of territorial waters, the territorial waters of each State extend in principle up to a line running down the centre of the strait; if the strait is wider, the breadth of the territorial waters of each State is measured in accordance with the ordinary rule.

OBSERVATIONS

It seems that the above provisions should easily be accepted for straits connecting two areas of the high seas. Where, however, the strait is a channel of communication between an inland sea and the high seas, the rules relating to bays should seemingly apply; it will then be necessary to take into consideration whether there is only one or several coastal States as well as the breadth of the strait and the existence of any usage varying the ordinary rule.

Basis of Discussion No. 17

Where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait and sea.

Point VIII

Line of Demarcation between Inland Waters and Territorial Waters

In the request for information addressed to the Governments, this point is stated as follows:

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"Line of demarcation between inland waters and territorial waters. A port. A bay. The mouth of a river."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, United States of America, Finland, France, Great Britain, India, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

The replies indicate a desire to settle this question in conformity with the solution which is given to the question how to measure the breadth of territorial waters in front of ports and bays; roadsteads will also have to be taken into account if they are taken into account in measuring the breadth of territorial waters. Several replies mention the case of rivers which flow directly into the sea without any estuary; in this case, all the waters of the river are inland waters, whatever its breadth may be.

Basis of Discussion No. 18

The base line from which the belt of territorial waters is measured in front of bays, ports and roadsteads forms the line of demarcation between inland and territorial waters.

The waters of a river are inland waters down to the point at which it flows directly into the sea, whatever be its breadth at that point. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

OBSERVATIONS

Bases of discussion Nos. 6 to 18 deal with the question how the territorial-waters belt is to be measured in the various cases discussed. Even, however, if precise rules are adopted, their application in practice may still give rise to difficulties.

In this connection, the German Government, in its reply under Point No. 4, suggests that the coastal State might be left entirely free to make minor adjustments of the line at the coast in the interests of clearness and of meeting practical necessities. It does not consider such adjustments are likely to cause difficulties, if they are clearly indicated on the marine charts. The German Government further thinks it desirable that the convention should lay down rules for uniform measurement of the breadth of bays.

The Netherlands Government for its part, in the introduction to its reply, observes that it considers it very important not to be content with merely drawing up theoretical rules, but to obtain a complete and precise view of what are the waters which, on the basis of the rules, each State considers to be its territorial waters. The Government expresses itself on this matter as follows:

"1. Although the laws of war are provisionally excluded from codification, it should nevertheless be laid down that the delimitation of

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State territory along coasts, in front of bays, etc., as it will be fixed by the proposed collective convention, will also apply in time of war. Indeed, it is mainly (though not exclusively) in time of war that the precise delimitation of maritime zones subject to State sovereignty is of outstanding importance from the practical point of view.

"2. Even if rules governing the breadth of territorial waters were actually introduced in an international convention, it would be extremely important to draw up, apart from such theoretical rules, a complete and precise record of what the various States regard as their territorial waters on the basis of the rules in question. For that purpose, the Governments should agree to produce one or more charts specifically indicating what they regard as the limits of the territorial sea throughout their territories; in this way there would also be revealed the bases—more especially in the case of roadsteads and groups of islands—which they adopt for the purpose as regards river-mouths, bays, islands, groups of islands, etc., and also the common frontier between adjacent territorial seas. This would be the only way to obtain exact information on which to base practical solutions.

"3. It would be very desirable to include in the proposed convention clauses establishing a judicial or arbitral court to settle international disputes regarding territorial waters.

"4. It would be expedient to adopt a uniform terminology to define territorial waters. In this connection, it should be noted that Article 2 of the Preliminary Draft attached to M. Schücking's report refers to the 'coastal sea,' while elsewhere the term 'territorial sea' is used, and the questionnaire is entitled 'territorial waters.'"

The above are technical points to which the attention of the Governments requires to be drawn in order that the Conference may be provided with all the relevant information and be put in a position to go into details to the extent which it finds desirable.

It would likewise be convenient that at the Conference the Governments should state what are the bays which they claim to be historic bays and what are the roadsteads for which they claim to have the territorial-waters belt measured from the exterior boundary of the roadstead.

Point IX

Innocent Passage of Foreign Ships through Territorial Waters

In the request for information addressed to the Governments, this point is stated as follows:

"Rights of passage: (*a*) of merchant ships; (*b*) of warships; (*c*) of submarines.

"Anchoring in territorial waters while exercising the right of passage.

"Anchoring in case of distress.

"Rights of passage of persons and goods."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

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OBSERVATIONS

The replies of the Governments which have been quoted above envisage not only the principle of the right of passage of foreign merchant ships but also the rules governing the exercise of this right. They suggest this same principle for warships, but the explanations regarding the rules consequent thereon require to be completed by those mentioned in Point X. For this reason, only the passage of merchant ships is considered here.

The principle that merchant ships have a right of innocent passage is not contested. There is also agreement that there are complementary rules applying the principle to persons and goods and permitting the ship to anchor within territorial waters where this is necessary for purposes of navigation.

Basis of Discussion No. 19

A coastal State is bound to allow foreign merchant ships a right of innocent passage through its territorial waters; any police or navigation regulations with which such ships may be required to comply must be applied in such a manner as to respect the right of passage and without discrimination.

The right of innocent passage covers persons and goods.

The right of passage comprises the right of anchoring so far as is necessary for purposes of navigation.

OBSERVATIONS

Some Government replies regard waters lying between islands and the coast as inland, not territorial, waters where the islands and the coast belong to the same State: the right of innocent passage could then not be claimed. According to other Governments, such waters are territorial waters. The bases of discussion set out above follow the latter opinion, with the result that the right of innocent passage can be claimed in such waters.

It would seem possible to find a compromise between the two views which would consist in maintaining the character of such waters as territorial waters while excluding the right of innocent passage where they are not ordinarily utilized for commercial navigation between countries other than the coastal State. It does not seem necessary to embody this compromise in a basis of discussion; it can without difficulty be put forward at the Conference.

Point X

Passage and Anchoring of Foreign Warships in Territorial Waters

The question of innocent passage of foreign warships through territorial waters has already been raised in Point IX and the Governments have furnished information on this point. Here, in addition, this question has given rise to a further request for information, stated as follows:

> "Regulation of the passage and the anchoring in territorial waters of foreign warships.

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"Penalties for non-observance of the local laws and regulations. Right to require the ship to depart."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

In the replies given to Point IX as well as to Point X, the right of innocent passage for warships and the right of the coastal State to regulate the conditions of such passage and the conditions in which they may anchor in its territorial waters are accepted without difficulty. The divergences of view on points of detail are of little importance.

BASIS OF DISCUSSION No. 20

A coastal State should recognize the right of innocent passage through its territorial waters of foreign warships, including submarines navigating on the surface.

A coastal State is entitled to make rules regulating the conditions of such passage without, however, having the right to require a previous authorization.

A coastal State is entitled to make rules governing the anchoring of foreign warships in its territorial waters, but it may not forbid anchoring in case of damage to the ship or of distress.

OBSERVATIONS

There is general agreement in the views expressed by the Governments as to the duty of a foreign warship to respect local laws and regulations and as to the consequences following upon any infraction thereof which it may commit.

BASIS OF DISCUSSION No. 21

In foreign territorial waters, warships must respect the local laws and regulations. Any case of infringement will be brought to the attention of the captain: if he fails to comply with the notice so given, the ship may be required to depart.

POINT XI

The Law of War and Neutrality to be excluded from Consideration

In the request for information addressed to the Governments, this point is stated as follows:

"It is to be remembered in connection with Points IX and X that the Committee of Experts for the Progressive Codification of International

> Law did not include in the scope of its work questions relating to war and neutrality."

[Replies were made by the following Governments: South Africa, Germany, Australia, Denmark, Egypt, Estonia, United States of America, Finland, Great Britain, India, Japan, Norway, New Zealand, Netherlands, Sweden.]

OBSERVATIONS

The special rules applicable to territorial waters in time of war do not fall within the programme of the Conference: the principles governing this matter were laid down in the Hague Convention No. XIII, 1907. Accordingly, this is not the place to provide for a rule as to the passage of belligerent warships through the territorial waters of a neutral State or the prohibition of such passage by such State; this question is reserved.

POINT XII

Limitations upon the Criminal and Civil Jurisdiction of the Coastal State

In the request for information addressed to the Governments, this point is stated as follows:

> "Is the coastal State precluded from exercising jurisdiction: (*a*) in civil cases; (*b*) in criminal cases?
>
> "Is jurisdiction only exercisable in respect of occurrences happening during the passage?
>
> "Are there distinctions to be made according to whether the ship is passing through the territorial waters on its way to or from a port of the coastal State or is merely passing through such waters?
>
> "Are there distinctions to be made according to whether the effect of the occurrences does or does not extend beyond the ship itself or the persons on board or according to other criteria?
>
> "Arrest of a person on a ship passing through territorial waters."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

In order to safeguard the innocent passage of merchant ships through territorial waters, it seems desirable to establish some limitations upon the exercise of criminal jurisdiction by the coastal State. States in practice spontaneously impose such a restriction upon themselves.

BASIS OF DISCUSSION NO. 22

The criminal jurisdiction of the coastal State may not be exercised in regard to crimes or offences committed on a foreign merchant ship passing through territorial waters except: (1) where the consequences of the crime or offence extend beyond the ship; or (2) where the crime or offence is of a nature to disturb the peace of the country or the maintenance of order in

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the territorial waters; or (3) where the assistance of the local authorities has been requested by the captain of the ship or the consul of the State whose flag it flies.

OBSERVATIONS

On the other hand, it is desirable to maintain intact, and to assert expressly, the coastal State's right of arresting on board a foreign merchant ship in its territorial waters any person whose arrest is sought by the judicial authorities of the country in order that he may be prosecuted or extradited or made to serve a sentence.

BASIS OF DISCUSSION NO. 23

A person whose arrest is sought by the judicial authorities of the coastal State may be arrested on board a foreign merchant ship within the territorial waters of the State.

OBSERVATIONS

It is less easy to find any advantage in restricting the exercise by the coastal State of the powers which it possesses in virtue of its sovereignty when the case is one of civil jurisdiction. In the first place, exercise of the jurisdiction does not seem seriously to threaten the innocent passage of the ship. Secondly, jurisdiction of courts in civil cases depends upon principles the application of which is but little affected by the place in which the ship may be.

A fear has been expressed that the arrest within territorial waters of foreign ships by the judicial authorities at the request of private persons might interfere with the exercise of the right of innocent passage; but to this it is objected that in practice these difficulties scarcely ever happen. If, however, the Conference should think it desirable to restrict the possibility of such arrest, the following suggestion might be examined.

BASIS OF DISCUSSION NO. 24

When a foreign merchant ship is passing through territorial waters but is neither coming from nor bound for a port of the coastal State, the authorities of that State may not, in the exercise of the civil jurisdiction of the State, divert the ship from its course for the purpose of levying an execution or taking measures to preserve the rights of parties to any legal proceedings, except where such action is taken in consequence of events occurring in the waters of the State the effects of which extend beyond the ship itself.

POINT XIII

Limitations upon the Exercise of the Sovereignty of the Coastal State in Fiscal Matters

In the request for information addressed to the Governments, this point is stated as follows:

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> "May dues be levied upon foreign ships passing through territorial waters? If so, is their collection subject to conditions: dues collected to cover expenses incurred in the interests of navigation, equality of treatment, exemption for ships forced to take refuge in the territorial waters, etc.?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

Almost all the replies state that the mere passage of foreign merchant ships through territorial waters either should not or does not involve payment of any charges. On the other hand, they admit charges in return for services rendered, but on this point there is some uncertainty: some replies appear to admit charges corresponding to services of a general character rendered to navigation (lighting and buoyage dues), while others contemplate only remuneration for a specific service rendered to the particular ship (pilotage dues). The first class of charges might easily give rise to abuses, and at the same time such charges are difficult to collect. An agreement to allow only the second class of charges may be contemplated.

Basis of Discussion No. 25

No charge may be levied upon foreign ships by reason of their passing through territorial waters.

Charges may be levied upon a foreign ship passing through territorial waters only as payment for specific services rendered to the ship itself. Such charges must be levied without discrimination.

Point XIV

Continuation on the High Seas of a Pursuit begun within Territorial Waters

In the request for information addressed to the Governments, this point was stated as follows:

> "Is such pursuit permitted? If so, to what conditions or restrictions is it subject (zone contiguous to the territorial waters, entry into the territorial waters of another State, etc.)?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

With one exception, all the replies on this point recognize that a State is entitled to continue on the high seas a pursuit begun within its territorial waters. The only differences of opinion are as to whether the entry of the

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ship pursued into the territorial waters of another country merely suspends the pursuit or puts an end to it.

BASIS OF DISCUSSION No. 26

A pursuit of a foreign ship lawfully begun by the coastal State within its territorial waters on the ground of infringement of its laws or regulations may be continued on the high seas and the coastal State may arrest and take proceedings against the ship so pursued, provided that the pursuit has not been interrupted. The right of pursuit ceases so soon as the ship enters the territorial waters of its own country or of a third Power.

Any such capture of a ship on the high seas shall be notified without delay to the State whose flag it flies.

OBSERVATIONS

Basis of Discussion No. 26 deals with a pursuit which was begun within territorial waters. It has been suggested that the same rule should be adopted for a pursuit begun in a part of the high seas in which the coastal State is entitled to exercise special powers over foreign ships; such a right of pursuit is recognized in the Convention of Helsingfors of August 19th, 1925, for the Repression of the Contraband Trade in Alcohol. This extension of the principle not having been contemplated in most of the replies, it seems enough to refer to it without embodying it in a basis of discussion, each State remaining free to take the matter up at the Conference if it so desires.

POINT XV

Jurisdiction over Foreign Ships in Ports

In the request for information addressed to the Governments, this point is stated as follows:

> "Should this point form the object of a provision of the Convention on Territorial Waters?
>
> "To meet the eventuality of the above question being answered affirmatively, to what extent may the coastal State exercise: (*a*) civil jurisdiction, (*b*) criminal jurisdiction, over such ships and the persons on board? Measures of execution involved in the civil jurisdiction (arrest). Right of the authorities of the coastal State to make an arrest upon a foreign ship."

[Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Roumania, Sweden.]

OBSERVATIONS

Opinion is divided as to the desirability of dealing with this question in the contemplated Convention on Territorial Waters. It has, therefore, been felt that attention might be called to the subject by embodying it in a

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Basis of Discussion, each State being free to put forward its objections to inserting a provision on this subject in the Convention. The decision rests with the Conference.

If the question is taken up, the replies as a whole appear to indicate that, on the basis of actual practice, an agreement could be reached imposing certain restrictions on the exercise by a State of criminal jurisdiction over foreign merchant ships within its ports. Exercise of such jurisdiction would remain possible in particular specified cases, particularly in the case where, in the opinion of the authorities of the coastal State, the crime or offence committed on board the ship was of a nature to disturb the peace of the port.

Basis of Discussion No. 27

The criminal jurisdiction of the State to which the port belongs may not be exercised in regard to crimes or offences committed on board a foreign merchant ship lying in a port except: (1) where the crime or offence was committed by or against persons not forming part of the crew; or (2) where, in the opinion of the competent local authority, it was of a nature to disturb the peace of the port; or (3) where the assistance of the local authorities was requested by the captain of the ship, the consul of the country whose flag the ship flies, or a person directly affected.

OBSERVATIONS

It may furthermore appear convenient to assert expressly the right of the local authorities to arrest an accused person who is on board a foreign merchant ship.

Basis of Discussion No. 28

The local authorities are entitled to arrest an accused person on board a foreign merchant ship lying in a port, even though the arrest is occasioned by an offence committed outside the ship.

OBSERVATIONS

Certain restrictions upon the action of the local judicial authorities in matters of civil jurisdiction might also be contemplated. Provision could be made for guarantees against arrest of the ship and for enabling the ship to secure release on furnishing bail. It has, however, been felt that provisions of this kind, being, as they are, closely connected with the institutions and the civil procedure of private law, fall within the province of the International Maritime Committee rather than that of the proposed Conference.

Settlements of Disputes

Attention has been called to the desirability of rendering obligatory recourse to some arbitral or judicial procedure to settle disputes on points of

fact in connection with the application of the rules governing territorial waters: for example, the master of a fishing vessel claims to have been on the high seas at the moment at which he is charged with having fished in territorial waters. This class of question was not dealt with in the request for information sent to the Governments. Its importance cannot, however, be disputed, and it is accordingly brought to the notice of the Governments.

Breadth of Territorial Waters for Purposes of Applying the Laws of War and Neutrality

At Point XI, it has been noted that the special rules applicable to territorial waters in time of war do not fall within the programme of the Conference. Such an exclusion from the Conference's programme is natural as regards the rules applicable in war-time, but cannot be maintained as regards determination of the breadth of territorial waters and of the special rights exercisable by the coastal State outside its territorial waters for the protection of certain of its interests. Several replies show the Governments to be anxious to bear in mind the case of war and of neutrality. The information on the subject given in the replies is nevertheless not complete. It will be desirable that the instructions given to the delegations should be such as to enable the Conference to fix precisely what is the extent of territorial waters for war-time as well as for peace-time, and what is the distance within which the coastal State may exercise special rights outside its territorial waters.

III. RESPONSIBILITY OF STATES FOR DAMAGE CAUSED IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS *

[General observations were submitted by the following Governments: Germany, Austria, Chile, Denmark, Irish Free State, Japan, Netherlands, Roumania, Czechoslovakia.]

Point I

Distinction between the Responsibility of the State under Municipal Law and Its Responsibility under International Law

In the request for information addressed to the Governments, this point is stated as follows:

> "The responsibility of a State in international law for damage caused in its territory to the person or property of foreigners must be distinguished from the responsibility which under its laws or constitution such State may have towards its nationals or the inhabitants of its territory. In particular, a State cannot escape its responsibility under international

* League of Nations Document C. 75. M. 69. 1929. V. Replies from the Governments of Canada and the United States of America received after the publication of this document.

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law, if such responsibility exists, by appealing to the provisions of its municipal law."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The Government replies show unanimous acceptance of the idea that the responsibility of a State under international law for damage caused on its territory to the person or the property of foreigners is distinct from its responsibility under its own laws. There seems to be no need to express this idea in the proposed Convention.

On the other hand, it is admitted that international responsibility is governed by international law and consequently the State cannot escape responsibility by invoking its municipal law. A basis of discussion embodying this view is submitted; it may, however, eventually be placed after the statement of the rules determining the extent of the responsibility.

BASIS OF DISCUSSION NO. 1

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.

POINT II

The Juridical Basis of International Responsibility

In the request for information addressed to the Governments, this point is stated as follows:

"It seems possible to take as the point of departure the proposition that recognition of a political unit as a member of the community governed by international law indicates that the States by which it is recognized assume that such unit will conform to certain standards of organization and behavior and will obey the standards and rules which in general govern the conduct of States. The community thus established between all such States implies for each of them the obligation to conform to such standards and rules in their relations with one another. It will follow that: (*a*) a political unit which declines to admit the obligation to conform to these standards and to obey these rules cannot claim to be considered as a member of the community governed by international law; (*b*) that a State which fails to comply therewith, as regards the person or the property of foreigners on its territory, incurs responsibility and must make reparation in such form as may be appropriate.

"It would be desirable to know whether the principle above stated is regarded as correct, and, if not, on what principle the international responsibility of the State is based."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

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OBSERVATIONS

The object with which the above point was put forward was to give an opportunity of indicating the general trend of opinion on the problem of how international responsibility for damage suffered by foreigners is to be visualized rather than to arrive at a precise provision on the subject in the proposed instrument. Some replies have in fact pointed out that the questions raised are theoretical.

Various views on the theoretical aspect of the problem are put forward in the replies. At the least, however, it may be said that these replies in general accept the idea that the State's duty to obey certain rules of conduct towards other States arises from the fact that it is a member of the international community, and that this community is governed by rules of law: the responsibility resulting from failure to obey these rules is a consequence of this duty.

The reflections on this point which are to be found in the replies are of a nature to guide the Conference in the accomplishment of its task. It will rest with the Conference to consider to what extent any part of them should appear in the preamble of the instrument which it is to draw up.

Point III

OBSERVATIONS

The first case to be considered is that in which damage is done to a foreigner by an act of the State itself. The State will only incur responsibility if the act not merely causes damage to a foreigner but is also at the same time marked by an element of wrongfulness, of which the clearest example is disregard of the provisions of a treaty. The problem is therefore to determine: (1) which are the bodies and persons whose acts are to be regarded as acts for which the State is directly responsible; (2) what elements of wrongfulness must attach to the acts of such bodies or persons in order to render the State responsible. In order to allow the various possible cases to be examined individually, the request for information addressed to the Governments dealt separately with acts of the legislature, those connected with the administration of justice and those of the executive. The same method will be followed here. It has the disadvantage of involving a certain amount of repetition, but eventually it will be easy to remedy this by such simplification and regrouping as may be found convenient.

Acts of the Legislative Organ

OBSERVATIONS

The legislature, whatever its composition and (in the case of countries whose law recognizes this distinction) irrespective of whether it be the ordinary legislative organ or the organ competent to legislate in regard to the constitution, is certainly able to involve the State in responsibility by its own measures or by reason of the application which is necessarily given to such

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measures by the other authorities of the State. The sole question arising here is as to what elements of wrongfulness must attach to the legislative act in order to render the State responsible.

The request for information addressed to the Governments contained four main questions on this point.

POINT III, No. 1

"Does the State become responsible in the following circumstances:
"Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

There is no doubt that a State is responsible for damage suffered by a foreigner as the result of legislation incompatible with its international obligations or of the absence of legislative provisions necessary to carry out those obligations.

BASIS OF DISCUSSION No. 2

A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations.

POINT III, No. 2

The second question raised in the request for information addressed to the Governments was the following:

"Does the State become responsible in the following circumstances:
"Enactment of legislation incompatible with the terms of concessions or contracts granted to or concluded with foreigners or of a nature to obstruct their execution?"

[The replies made by the Governments were as follows: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The prevalent opinion is that a State renders itself internationally responsible if it enacts legislation incompatible with a concession which it has granted to or a contract which it has made with a foreigner. Some hesitation is, however, apparent. Certain replies consider that a concession or

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contract, as also the violation of a concession or contract, sets up relations which are merely matters of municipal law; others feel that distinctions must be made; while others, on the contrary, deprecate entering too much into detail.

This hesitation may, it would seem, be diminished by observing that to hold a State to be responsible internationally does not affect the validity under municipal law of the action which it has taken. There is no question of discussing the reasons which it may have for putting an end to a concession or to the performance of a contract; it is merely a question of obliging it to make good the damage which it causes by so doing, in violation, *ex hypothesi*, of the terms of the concession or contract.

It seems, on the other hand, that certain difficulties will be met if a distinction is made between legislation which directly infringes rights conferred by the State upon a foreigner in a concession or a contract and legislation of a general character which is incompatible with such concession or contract; as regards the latter, the responsibility of the State would seem to depend to some extent on the circumstances of the case.

Basis of Discussion No. 3

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

Point III, No. 3

The third question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances:
> "Enactment of legislation infringing vested rights of foreigners?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies on this question reveal fairly substantial differences of opinion. Doubts are felt as to what precisely is to be understood by vested rights. Some replies admit that the State is responsible. Others say that the rights in question, having been acquired under the law of the State, are liable to be terminated by that law. Some consider a general answer impossible.

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In these circumstances, it has not been felt desirable to make the question the subject of a separate basis of discussion. Moreover, if the infringement of vested rights involves a breach of international law, the State will incur responsibility by virtue of the principle laid down in Basis of Discussion No. 2.

POINT III, No. 4

The fourth question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances:
> "Repudiation of debts?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies in general admit that a State incurs responsibility by repudiating its debts, whether they arise from public loans, from ordinary contracts, or from some other cause. Some make a reservation for the case of distress. Examination of the replies suggests that a distinction ought to be drawn between repudiation pure and simple and legislation suspending or modifying the service of a debt; as regards the first, a reservation for the case of distress appears superfluous, since that ground could not justify final repudiation of the debt. It is, of course, always assumed that the debts in question are debts for which the State is properly liable and that no arrangement has been come to with the creditors.

One reply points out that the principle of international responsibility could only be admitted in the cases of debts contracted towards foreigners as such, *e.g.*, by the floating of a loan in a foreign market. This is a point for consideration by the Conference.

BASIS OF DISCUSSION No. 4

A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

POINT IV

Acts relating to the Operation of the Tribunals

OBSERVATIONS

It is not disputed that the courts are able to involve the State in responsibility, but the judicial decision with which it is confronted must be final and

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without appeal. The only question arising here is as to what elements of wrongfulness must attach to acts concerned with the operation of the courts in order to render the State responsible. The provisions set out below are to be regarded as covering judicial bodies of every kind.

Point IV, Nos. 1 to 4

The request for information addressed to the Governments put the following questions on this point:

> "Does the State become responsible in the following circumstances:
>
> "1. Refusal to allow foreigners access to the tribunals to defend their rights?
>
> "2. Decisions of the tribunals irreconcilable with the treaty obligations or the international duties of the State?
>
> "3. Unconscionable delay on the part of the tribunals?
>
> "4. Decisions of the tribunals which are prompted by ill-will against foreigners as such or as subjects of a particular State?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Chile, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

Observations

The above replies make it possible to expect that on these four points agreement can fairly easily be secured on the lines indicated below.

Basis of Discussion No. 5

A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights.
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State.
3. There has been unconscionable delay on the part of the courts.
4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

Point IV, No. 5

The request for information addressed to the Governments further put the following question:

> "In what other circumstances may a State incur responsibility on account of an unjust decision given by its tribunals?"

[Replies were received from the following Governments: South Africa, Australia, Belgium, Denmark, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland.]

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OBSERVATIONS

Some replies consider that the four cases set out above are the only ones in which a State can incur responsibility by reason of defective functioning of its courts. These replies are prompted by a recognition of the safeguard ordinarily furnished by the organization and procedure of courts of law, and by the feeling that the binding force of a final judicial decision ought not lightly to be brought into question nor an appeal therefrom be deliberately created for foreigners. In general, the replies suggest that the State's responsibility ought not to be restricted to the four cases, but there are great divergences of opinion as to what other cases should be provided for. Various formulas are contemplated. Thus it is proposed to declare the State responsible in the case of a judgment so erroneous that no properly constituted court could honestly have arrived at such a decision, or in that of an erroneous judgment given by judges who have been bribed or subjected to pressure by their Government. Reference is also made to gross defects in the procedure or to features in the organization of the courts rendering them unworthy of a civilized State.

It will rest with the Conference to decide upon a formula. The following basis of discussion is intended to furnish the occasion for the necessary examination.

BASIS OF DISCUSSION No. 6

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

POINT V

Acts of the Executive Organ

[The German and French Governments have submitted general observations on this point.]

OBSERVATIONS

The executive power (the Government, the higher State authorities), however organized, is undoubtedly able by its acts to involve the State in responsibility. The only question arising here is as to what elements of wrongfulness must attach to an act of the executive power in order to render the State responsible.

In this connection, it is first of all desirable to provide for a rule analogous to that inserted in Basis of Discussion No. 2 for legislative acts.

BASIS OF DISCUSSION No. 7

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State.

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POINT V, No. 1 (*a*)

The first question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "1. Acts of the executive Government (higher authorities of the State):
> "(*a*) Acts incompatible with the terms of concessions or contracts granted to or concluded with foreigners or of a nature to obstruct their execution?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies warrant the view that the same solution may be contemplated as for the case of legislative acts infringing rights conferred on foreigners by a State concession or contract.

BASIS OF DISCUSSION No. 8

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

POINT V, No. 1 (*b*)

The second question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Repudiation of debts?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies received warrant the view that a solution may be contemplated analogous to that proposed for the case of legislative acts repudiating a State debt.

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Basis of Discussion No. 9

A State incurs responsibility if the executive power repudiates or purports to cancel debts for which the State is liable.

A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity.

OBSERVATIONS

Bases of Discussion Nos. 3 and 8 and Bases Nos. 4 and 9 have been kept distinct in order to facilitate consideration.

Point V, No. 1 (*c*)

The third question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
>
> "Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognized—for example: persons invested with a public character recognized by the State?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies show that a State incurs responsibility if the Government fails to exercise due diligence in protecting the foreigners. The following points emerge in the replies: the degree of diligence to be attained is such as may be expected from a civilized State; the diligence required varies with the circumstances; the standard cannot be the same in a territory which has barely been settled and in the home country; the standard varies according to the persons concerned in this sense that the State has a special duty of vigilance and has therefore a greater responsibility in respect of persons invested with a recognized public status. The protection which is due is mainly protection against crime.

Basis of Discussion No. 10

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.

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POINT V, No. 1 (*d*)

The fourth question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Unwarrantable deprivation of a foreigner of his liberty?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

It appears from the replies that agreement can easily be secured for a rule that a State incurs responsibility where the executive power unwarrantably deprives a foreigner of his liberty. It is evident that not every interference with liberty is unwarrantable. The idea may be rendered clearer by an example: thus, for instance, maintenance of an arrest which is illegal under the law of the State in which it occurs will be regarded as unwarrantable under international law.

BASIS OF DISCUSSION No. 11

A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty. The following acts in particular are to be considered unwarrantable: maintenance of an illegal arrest; preventive detention, if it is manifestly unnecessary or unduly prolonged; imprisonment without adequate reason or in conditions causing unnecessary suffering.

POINT V

2. Acts or Omissions of Officials

OBSERVATIONS

The request for information addressed to the Governments proceeds next to consider the acts or omissions of officials. Two questions arise, namely: (1) Are such acts or omissions to be considered to be acts of the State? (2) If so, what element of wrongfulness must attach to them in order to render the State responsible?

POINT V, No. 2 (*a*)

The request for information first considers acts or omissions of an official acting within the scope of his authority; it does so in the following terms:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Acts or omissions of officials when acting within the limits of their authority? If such acts or omissions are contrary to the international obligations of the State or tainted with illegality under the municipal

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law or marked by culpable negligence, how far is this fact to be taken into account? Are there other factors which must be taken into account in order to establish responsibility on the part of the State? Do the same rules apply to damage caused on the sea—for example: by a collision with a warship?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Bulgaria, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

It is agreed that an act or omission of an official acting within the scope of his authority entails responsibility for the State if such act or omission contravenes the international obligations of the State. The reservations which are occasionally made relate to the question whether the judicial remedies provided by the municipal law must first be exhausted; this question will be examined later.

Basis of Discussion No. 12

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

Point V, No. 2 (*b*)

A second question raised in the request for information addressed to the Governments was the following:

"Does the State become responsible in the following circumstances and, if so, on what grounds does liability rest:

"Acts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Bulgaria, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

Here the case is that of an act which the official was not authorized to perform but in performing which he purported to act within the scope of his authority—an official act, not one performed in a private capacity by a person who happened to be an official.

The replies reveal differences of opinion. The prevailing view seems, however, to be that the act is to be regarded as the act of the State and is therefore of a nature to render the State internationally responsible. This view rests on the consideration that, since acts causing damage are frequently such as their authors were not authorized to perform, a rule restricting responsibility to the acts of officials acting within the scope of their authority would be inadequate.

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Basis of Discussion No. 13

A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State.

Point V, No. 2 (*c*)

A third question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Acts of officials in a foreign country, such as diplomatic agents or consuls acting within the apparent scope of, but in fact exceeding, their authority?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

In the case of an act performed by an official of a State in a foreign country (a diplomatic agent, a consul), the persons who may be affected have no means of knowing whether the act is within the scope of the official's authority. It seems, therefore, that it should be sufficient in this case for the act to be within the apparent scope of the official's authority.

Basis of Discussion No. 14

Acts performed in a foreign country by officials of a State (such as diplomatic agents or consuls) acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.

Point V, No. 2 (*d*)

A fourth question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Acts or omissions of officials unconnected with their official duties?"

[Replies were made by the following Governments: South Africa, Australia, Belgium, Bulgaria, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

Here the act is the act of a private person, not of an official. It cannot therefore entail any direct responsibility for the State. Responsibility can only arise as the result of such an act in the same measure as it would arise in

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connection with the acts of private persons, a point which will be examined later. It is therefore not necessary to submit a basis of discussion relating to this case.

POINT V, No. 2 (*e*)

A fifth question raised in the request for information addressed to the Governments was the following:

> "Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:
> "Where a right of recourse against the official in question is excluded: (i) by some act on the part of the State, *e.g.*, an amnesty or act of indemnity; or (ii) by some rule of law, such as immunity from the jurisdiction of the courts?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

This case has not been considered by all the Governments nor has it in every case been looked at from the same standpoint. It would seem necessary to take account both of the case where the State puts an end to the right to reparation by an "act of indemnity" and of that in which proceedings against officials require authorization from the Government and such authorization is not granted. It seems right to regard the State as becoming responsible for the damage to the extent to which the official whom it relieves from responsibility was himself liable.

BASIS OF DISCUSSION No. 15

If by a special legislative or administrative measure a State puts an end to the right to reparation enjoyed by a foreigner against one of its officials who has caused damage to the foreigner, or if it does not permit the right to be enforced, the State thereby renders itself responsible for the damage to the extent to which the official was responsible.

OBSERVATIONS

It is evident that, where responsibility attaches to the State under international law, it cannot be abrogated or attenuated as the result of internal measures such as an act of indemnity or amnesty; this conclusion, moreover, follows from what is said in Basis of Discussion No. 1.

POINT VI

Acts or Omissions of Bodies exercising Public Functions of a Legislative or Administrative Character (Communes, Provinces, etc.)

In the request for information addressed to the Governments, this point is stated as follows:

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"Acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

There is almost complete agreement that the acts of such bodies are to be deemed acts of the State. It seems desirable to take account, not merely of such corporate entities as a commune or province, but also of autonomous institutions which exercise public functions of a legislative or administrative character.

Basis of Discussion No. 16

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.

Point VII

Acts of Private Persons

In the request for information, the Governments were asked to consider this case from several points of view. The first point mentioned was the following:

Point VII (*a*)

"Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:

"Failure on the part of the State authorities to do what is in their power to preserve order and prevent crime, or to confer reasonable protection on the person or property of a foreigner."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The ground on which a State may be responsible for damage caused by a private person to a foreigner is not to be found in the act itself but in the conduct of the State, *i.e.*, in its failure to discharge its duty to maintain order. The principle that such a responsibility exists has already been stated in Basis of Discussion No. 10.

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Basis of Discussion No. 17

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or propërty such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.

Point VII (*b*)

A second question raised in the request for information addressed to the Governments was the following:

> "Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:
>
> "Failure to exercise reasonable diligence in punishing persons committing offences against the person or property of a foreigner."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The case here considered is that in which negligence can be imputed to the State in the performance of its duty of punishing offences which have been committed against foreigners. It is generally admitted that such negligence renders the State responsible.

Basis of Discussion No. 18

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.

Point VII (*c*) and (*d*)

The request for information addressed to the Governments next raises the following questions:

> "Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:
>
> "If the acts were directed against a foreigner as such, should this fact be taken into account?
>
> "If the foreigner who has suffered damage had adopted a provocative attitude against the persons who inflicted it, should this fact be taken into account?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

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OBSERVATIONS

The replies here are somewhat divergent. Doubts are expressed as to the possibility of stating precise rules for the cases considered. Some think it necessary to take account of the fact that, whereas the hostility felt for a particular group of persons may sometimes outrun the anticipations of the public authority, whose responsibility may thus be attenuated or eliminated, the case will be quite different if the feeling of hostility was so widespread among a considerable part of the population that it could not have escaped the notice of the public authority, which, accordingly, ought to have taken precautions. The following basis of discussion has been drawn up to enable the problem to be examined, if this is thought desirable.

BASIS OF DISCUSSION No. 19

The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.

OBSERVATIONS

Examination of the Government replies has led the Committee to think that, in the case of damage caused by a private person, as in the case of damage caused by an official, it is necessary to consider as regards the State's responsibility the consequences which may follow from a decision putting an end to the injured foreigner's right to obtain reparation from the author of the damage.

BASIS OF DISCUSSION No. 20

If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the extent to which the author of the damage was responsible.

POINT VIII

Damage caused in suppressing Disturbances

In the request for information addressed to the Governments, this point is stated as follows:

> "Responsibility of the State in the case of damage done to the person or property of a foreigner when the forces or officials of the State were engaged in suppressing insurrections, riots or mob violence; property destroyed during the struggle; closing of a port to commerce; requisitions, etc."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India,

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Italy, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies in general say that a State is not responsible for all the damage which its agents cause in suppressing an insurrection, riot or other disturbance. Some replies even point out that the State performs a duty in suppressing disturbances. Nevertheless, there are several replies which consider the State responsible in certain cases—in particular, if its agents cause unnecessary damage or where the State appropriates a foreigner's property. The following basis of discussion has been founded on these latter replies and on international jurisprudence.

Basis of Discussion No. 21

A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

The State must, however:

(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;

(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;

(3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States;

(4) Accord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance the same indemnities as it accords to its own nationals in similar circumstances.

Point IX

Damage caused by Insurgents, Rioters or Mob Violence

The first question asked of the Governments in the request for information was the following:

> "Damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence. Is, in general, the State liable, or not liable, in such cases?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Roumania, Siam, Sweden, Switzerland, Czechoslovakia.]

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OBSERVATIONS

In principle, the replies do not admit that a State is responsible for damage caused to foreigners by insurgents, rioters or mob violence.

BASIS OF DISCUSSION NO. 22

A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

POINT IX (*a*)

The request for information addressed to the Governments then raises the following question:

> "What is the position:
> "(*a*) Where negligence on the part of the Government or its officials can be established, or where connivance on the part of the latter can be shown?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Belgium, Denmark, Egypt, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

In this case, the State's responsibility is a consequence of the principle already stated in Basis of Discussion No. 10, according to which a State is responsible for damage to foreigners resulting from failure on its part to use due diligence for their protection. The lack of diligence which renders the State responsible covers the case in which its officials show connivance with the insurgents.

BASIS OF DISCUSSION NO. 22 (*a*)

Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

POINT IX (*b*)

A second question raised in the request for information addressed to the Governments was the following:

> "What is the position:
> "(*b*) Where the Government pays compensation for damage done in such cases to its own nationals or to other foreigners?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Denmark, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

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OBSERVATIONS

The reply to this question is the same as is given in Basis of Discussion No. 21 (4). The two provisions might be combined in a single text.

BASIS OF DISCUSSION No. 22 (*b*)

A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

POINT IX (*c*)

A third question raised in the request for information addressed to the Governments was the following:

> "What is the position:
> "(*c*) Where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government?"

[Replies were made by the following Governments: South Africa, Australia, Austria, Denmark, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

On this point the replies of the Governments display some hesitation. The opinion which seems to prevail, and which is supported by international jurisprudence, is that, when the insurrection is successful, the State is responsible for the acts of the insurrectionist party to at least the extent to which it is responsible for the acts of the legal Government and its agents. The question is raised whether one should not go further and consider the State responsible for all the acts of the insurgents.

BASIS OF DISCUSSION No. 22 (*c*)

A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government de jure or its officials or troops.

POINT IX (*d*)

A fourth question raised in the request for information addressed to the Governments was the following:

> "What is the position:
> "(*d*) Where the movement is directed against foreigners as such or against persons of a particular nationality?"

[Replies were made by the following Governments: South Africa, Denmark, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland.]

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OBSERVATIONS

In this case, the Government has a special duty of diligence, the consequence of which will be that, in order to escape responsibility, it must prove that no negligence can be imputed to it.

BASIS OF DISCUSSION No. 22 (*d*)

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials.

POINT X

Responsibility of the State in the Case of a Subordinate or a Protected State, a Federal State or other Unions of States

In the request for information addressed to the Governments, this point is stated as follows:

> "Responsibility of the State in the case of a subordinate or a protected State, a federal State and other unions of States."

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies show agreement on the principle. There is merely some difficulty in finding—as should be done in codification—a formula sufficiently wide to apply to the various situations which actually exist and to those which may arise in the future; such a formula must not enumerate a series of cases.

BASIS OF DISCUSSION No. 23

Where a State is entrusted with the conduct of the foreign relations of another political unit, the responsibility for damage suffered by foreigners on the territory of the latter belongs to such State.

Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility for damage suffered by foreigners on the territories of such States belongs to such common or central Government.

POINT XI

Circumstances in which a State is entitled to disclaim Responsibility

[On this point, the Egyptian Government makes a general observation.]

POINT XI (*a*)

The request for information addressed to the Governments deals first with the following case:

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"Circumstances in which a State is entitled to disclaim responsibility. What are the conditions which must be fulfilled: 'When the State claims to have acted in self-defence'?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies do not all treat of the same case. Some refer to acts occurring within the national territory. Here a provision exonerating the State from international responsibility for damage caused in self-defence may be thought superfluous. The principle according to which the State's international responsibility arises from a breach of international law, and the solution contemplated for the case of damage caused by agents of the State in repressing an insurrection (Basis of Discussion No. 21), would normally imply exoneration from responsibility. Other replies appear to have in mind self-defence against acts occurring outside the national territory but capable of compromising its security (seizure of the *Caroline* in 1837). Strictly speaking, this case does not fall within the scope of the draft which the Committee is preparing, since it implies damage suffered outside the territory of the State whose responsibility is in question. To meet the eventuality of its being desired to settle the point, a basis of discussion has been drafted. It has been drawn up in terms sufficiently wide to apply also to the first case.

Some replies have called attention to the desirability of fixing the limits of what is to be regarded as self-defence.

The question of legitimate defence against an aggressor State and its consequences from the point of view of responsibility for damage caused to foreigners in the exercise of such defence has been raised; it does not seem that this question would fall within the scope of the proposed Conference which is not called upon to deal with the laws of war.

Consideration might be given to the case where, in the exercise of legitimate defence against an individual, damage has been caused to a third party: the replies have thrown no light on this point.

BASIS OF DISCUSSION No. 24

A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.

Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined.

POINT XI (*b*)

A second question raised in the request for information addressed to the Governments was the following:

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"What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Denmark, Finland, Great Britain, Hungary, India, Italy, Japan, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

To decide whether reprisals can to-day be justified, and between what States and in what circumstances they can be justified, would here be out of place. Attention must be called to the subject in order to enable the Conference to consider what inferences might be drawn in other fields from the solutions which it adopts on this point as regards international responsibility.

BASIS OF DISCUSSION NO. 25

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.

POINT XI (*c*)

A third question raised in the request for information addressed to the Governments was the following:

"What are the conditions which must be fulfilled, when the State claims that circumstances justify the unilateral abrogation of its contractual engagements?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Denmark, Finland, Great Britain, Hungary, India, Japan, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

Under this head, some replies discuss unilateral abrogation of treaties between States. The question raised related only to contractual engagements concluded between the State and a foreigner. On this point, the solutions contemplated in Bases of Discussion Nos. 3 and 8 appear sufficient without the addition of any further provision.

POINT XI (*d*)

A fourth question raised in the request for information addressed to the Governments was the following:

"What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Finland, Great Britain, Hungary, India, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

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OBSERVATIONS

The replies in general state that a contractual undertaking by a private person not to have recourse to the diplomatic remedy does not bind the State of which he is a national and that, accordingly, the international responsibility of the other State persists. One may, however, contemplate a mitigation of the strictness of this rule borrowed from international jurisprudence.

BASIS OF DISCUSSION NO. 26

An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in Bases of Discussion Nos. 5 and 6.

POINT XII

Exhaustion of the Remedies afforded by the Municipal Law

In the request for information addressed to the Governments, this point is stated as follows:

> "Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

The answer given to this question is affirmative and the same affirmative solution has been adopted in recent treaties for compulsory arbitration. The following basis of discussion has been suggested by the terms of those treaties. Some Governments, however, have called attention to the difficulties which the generally accepted rule may produce in certain cases.

BASIS OF DISCUSSION NO. 27

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 6.

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Point XIII

National Character of the Claim

In the request for information addressed to the Governments, this point is stated as follows:

> "It is recognized that the international responsibility of a State can only be enforced by the State of which the individual who has suffered the damage is a national or which affords him diplomatic protection. Some details might be established as regards the application of this rule.
>
> "Is it necessary that the person interested in the claim should have retained the nationality of the State making the claim until the moment at which the claim is presented through the diplomatic channel, or must he retain it throughout the whole of the diplomatic procedure, or until the claim is brought before the arbitral tribunal or until judgment is given by the tribunal? Should a change occur in the nationality of the person making the claim are there distinctions to be made according to whether his new nationality is that of the State against which the claim is made or that of a third State, or according to whether his new nationality was acquired by a voluntary act on his part or by mere operation of law?
>
> "Are the answers given to the preceding questions still to hold good where the injured person dies leaving heirs of a different nationality?
>
> "If in the answers given to the preceding questions it is considered that a claim cannot be upheld except for the benefit of a national of the State making the claim, what will be the position if some only of the individuals concerned are nationals of that State?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Switzerland, Czechoslovakia.]

OBSERVATIONS

The replies are not unanimous as to the moment at which a claim must possess a national character in order that it may be supported by the State. Some take the moment at which the damage was caused, others that at which the claim is presented. According to the opinion of the majority, and to international jurisprudence, the claim requires to have the national character at the moment when the damage was suffered, and to retain that character down to the moment at which it is decided; the basis of discussion which is submitted is founded on this view.

It is, however, evident that, if the injury is continuing (maintenance of an unwarrantable imprisonment) and if the injured person changes his nationality while it still persists, the State whose national he has become may make a claim.

Assuming adoption of the principle stated above, the secondary rules which follow therefrom do not seem to be open to question.

The provisions to which one is thus led relate only to claims for pecuniary indemnities. One can imagine the case of the murder, in circumstances en-

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tailing responsibility for the State to which he was accredited, of a diplomatic agent who leaves an heir of a different nationality. The State which the agent represented will not be able to take up the question of international responsibility for the benefit of the heir, but it will be entitled to do so in respect of the wrong done to its representative abroad and the failure to afford him protection.

Basis of Discussion No. 28

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.

Point XIV

Reparation for the Damage caused

In the request for information addressed to the Governments, this point is stated as follows:

> "Should this point form the object of a provision of the agreement to be reached?
>
> "To meet the eventuality of the above question being answered affirmatively, what answers should be given on the following points:
>
> "(*a*) Performance of the obligation?
>
> "(*b*) Pecuniary reparation? What factors are to be taken into account in calculating the indemnity? Actual proved losses? Loss of profits? Indirect damage: if this is not admissible, how is it to be distinguished from direct damage? Moral damage? May an indemnity be claimed by way of a mere penalty for the wrong done? From what date may interest be granted? Is account to be taken of expenses incurred for the purpose of obtaining reparation from the State responsible for the damage in question?
>
> "(*c*) Reparation other than pecuniary? Apologies? Punishment of the guilty individuals?
>
> "(*d*) When the responsibility of the State arises only from a failure to take proper measures after the act causing damage had been committed (for example: failure to prosecute the guilty individual), is any pecuniary reparation due from it to be limited to making good the loss occasioned by such omission?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

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OBSERVATIONS

The replies on this point are very divergent. Some express a desire that the matter should be the subject of definite rules and they occasionally enter into minute details. Others feel that it would be preferable not to have rules on this question; they can point to the example furnished by the legal systems of some countries and to the fact that the absence of any rule has so far not caused inconvenience in international practice. An intermediate view is in favor of simply stating certain principles, without entering into details which might hamper the judge more than they assisted him. This furnishes a method reconciling the various opinions which may be successful. The basis of discussion is borrowed, with slight modifications, from the draft of the Institute of International Law referred to in some replies.

BASIS OF DISCUSSION NO. 29

Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

Reparation may, if there is occasion, include an indemnity to the injured persons in respect to moral suffering caused to them.

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

A State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails, so far as it rests with them to do so; if it is unable to do so, it is bound to furnish an equivalent compensation.

In principle, any indemnity to be accorded is to be put at the disposal of the injured State.

POINT XV

Conciliation, Arbitration, Judicial Settlement

In the request for information addressed to the Governments, this point is stated as follows:

> "Enquiry, conciliation, arbitration, judicial settlement.
> "Should this point form the object of a provision of the agreement to be reached?
> "To meet the eventuality of the above question being answered affirmatively, what answers should be given on the following points:

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"(*a*) To what extent have: (*i*) an international enquiry, (*ii*) conciliation, (*iii*) arbitration been employed to settle disputes between States as to responsibility for damage caused to foreigners in their territories?

"(*b*) How far is recourse to such methods of procedure obligatory under general or special treaties?

"(*c*) Is it desirable that recourse to such methods of procedure, or certain of them, should be made obligatory?

"(*d*) Should jurisdiction be given to the Permanent Court of International Justice in preference to any other jurisdiction?"

[Replies were made by the following Governments: South Africa, Germany, Australia, Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, Great Britain, Hungary, India, Italy, Japan, Norway, New Zealand, Netherlands, Poland, Siam, Sweden, Switzerland, Czechoslovakia.]

OBSERVATIONS

Here the essential question is whether a provision for compulsory arbitration or judicial settlement should be introduced into the proposed arrangement. The majority of the replies are in favor of this course, but there is a substantial minority which considers such a provision undesirable. The view taken by this minority is based on the particularly strong argument that, in the matter of international responsibility, codification should aim at stating the already established principles of international law and that a provision for compulsory jurisdiction would in this matter constitute new law, at least for a fairly large number of States.

Two replies suggest intermediate solutions. One would consist in inserting in the proposed arrangement a provision for compulsory jurisdiction limited to the interpretation of the arrangement. It may be anticipated that many States will regard that as insufficient.

The other intermediate solution[1] would consist in placing the provision for compulsory jurisdiction in a special protocol separate from the main instrument. A basis of discussion embodying this suggestion is submitted; the provisions contained in it have been reduced to the minimum.

Basis of Discussion No. 30

Special Protocol

A claim made by a State in respect of damage suffered by one of its nationals and based on the provisions of the convention to which the present protocol is attached shall, failing amicable settlement and without prejudice to any other method of settlement in force between the States concerned, be submitted for decision to the Permanent Court of International Justice.

[1] Austrian reply.

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Concluding Observations

A

If the replies of the Governments to the request for information addressed to them are examined as a whole, it will be found that to a large extent they have endeavored to set out what they consider to be the present state of the law.

The subject is pre-eminently one in regard to which the Conference will have to consider whether it should draw up an instrument which is in character strictly an international convention, the provisions of which operate only as between the States which sign or accede to it, or an instrument of which the purpose would be to set out what, in the view of the States subscribing thereto, is the law at present in force. A basis of discussion is proposed to meet the eventuality of the Conference deciding in favor of the latter course: the corresponding provision would, of course, be inserted at the beginning of the statement of rules.

Basis of Discussion No. 31

The high contracting parties recognize that the provisions set out below are in accordance with the principles of international law as at present in force; they acknowledge their obligatory character and declare their intention to comply therewith.

B

As regards the form to be given to the results of its work, the Conference will have to examine whether the provisions which it adopts should take the form of articles of a convention or that of a separate body of rules to which the convention would refer. In the latter case, the convention would confine itself to a provision referring to the body of rules and importing their acceptance. An example of the second method was furnished as regards transit by the Conference of Barcelona. The decision on this point rests with the Conference.

DRAFT RULES OF PROCEDURE FOR THE FIRST CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW:*

I

The First Conference for the Codification of International Law shall comprise the plenipotentiaries and technical delegates of Members of the League of Nations and of the non-Member States which have been invited by the Council of the League of Nations to send representatives.

There shall be a President and a Secretary-General of the Conference.

* Drawn up by the Preparatory Committee in execution of the Council's resolution of March 7, 1929. (League of Nations Document C. 190 (1). M. 93. 1929. V.)

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II

On the opening of the Conference, the credentials of the plenipotentiaries shall be presented to the Secretariat, together with a list of the technical delegates.

III

A committee of five members, appointed by the Conference on the proposal of the President, shall be entrusted with the duty of examining credentials, and shall report immediately to the Conference. Any plenipotentiary to whose admission objection has been made shall sit provisionally with the same rights as other plenipotentiaries, unless the Conference decides otherwise.

IV

Priority as between delegations shall be determined according to the French alphabetical order.

V

The Bureau of the Conference shall consist of the President, three Vice-Presidents elected by the Conference, the Chairman elected by the three Committees mentioned in Article VI, the Secretary-General of the Conference and a Deputy-Secretary-General, who will be elected by the Conference.

VI

Three Committees shall be set up, namely: (1) Committee on Nationality; (2) Committee on Territorial Waters; (3) Committee on the Responsibility of States for Damage suffered by Foreigners.

As soon as possible after the opening of the Conference, the head of each delegation shall designate for each Committee the member of his delegation empowered to represent the latter thereon. This member may be replaced by another member of the delegation. Except in such a case, members of the Conference present at meetings of Committees of which they are not members may not take part in the proceedings save by authorization of the Chairman of the Committee. Nevertheless, the head of each delegation may, should he think fit, take part in the proceedings of any Committee.

As a general rule, the three Committees will work simultaneously.

VII

Each Committee shall appoint its Chairman and one Vice-Chairman; it shall also appoint, at such time as it thinks fit, a rapporteur or rapporteurs.

VIII

Each Committee shall have the power to form sub-committees and to constitute from among the members of the delegations special committees for the examination of particular questions. The sub-committee or the special

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committee shall appoint its chairman and, if necessary, a rapporteur, and shall report to the full Committee.

IX

A Drafting Committee, composed of five members, shall be entrusted with the co-ordination of the acts adopted by the Conference. It shall be appointed by the Conference on the proposal of the Bureau; its members shall be selected from among the plenipotentiaries or technical delegates. A delegate of each Committee shall be attached to the Drafting Committee for the examination of the acts prepared by the said Committee.

On the report of the Drafting Committee, the acts of the Conference shall be adopted by the latter in their final form.

It shall be left to each Committee to determine whether it is necessary for it to set up a special drafting committee.

X

The public shall be admitted to the plenary meetings of the Conference; the Secretary-General shall be responsible for the issue of tickets for this purpose, in conformity with the President's instructions.

The Bureau may, however, decide that particular meetings shall be private.

Meetings of the Committees shall be private.

In the case of meetings not open to the public, the publicity of the work of the Conference and its Committees shall be ensured by means of official *communiqués* prepared by the Secretary-General and signed by the President of the Conference or the Chairman of the Committee, as the case may be.

XI

The Secretary-General shall be responsible for the French and English texts of the Minutes of the Conference. For meetings of the Committees, only summary reports shall be drawn up. In the case of the sub-committees and special committees of examination, a record shall be kept only of the conclusions reached by them.

The Minutes shall be distributed in provisional form to the delegations with the least possible delay. If no corrections are asked for within forty-eight hours, the text shall be regarded as approved and shall be deposited in the archives. If corrections are asked for, the Secretary-General shall be responsible for purely formal changes; for others, he shall refer to the President, who shall, if necessary, lay the matter before the Conference or the Committee concerned.

The Minutes of meetings of Committees shall not be published until after the close of the Conference; the latter may, as an exceptional measure and more particularly when the proceedings in regard to certain questions have not resulted in an agreement, decide to defer the publication of those Minutes.

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XII

The Secretary-General shall be responsible for the translation into French or English of opinions expressed and of documents, proposals and reports submitted in either of those languages. Any delegate employing another language must himself be responsible for a translation in French or English.

XIII

The Bureau shall consider the order of the work of the Conference and shall submit to the latter proposals on the subject. It shall be responsible for co-ordinating the work of the different Committees.

XIV

The President of the Conference and, in the case of each Committee, the Chairman of that Committee, shall direct the proceedings in accordance with the provisions laid down in the Rules of Procedure of the Assembly of the League of Nations, unless otherwise provided in the present Rules.

XV

Any act intended to form part of the work of the Conference shall first be prepared and voted upon by the Competent Committee, and shall then, after adoption by the latter, be submitted to the Conference for approval.

XVI

In each Committee, the debate shall be opened on the text of the Bases of Discussion prepared by the Preparatory Committee for the Codification Conference.

Any member of the Committee may present amendments and proposals coming within the scope of the Bases of Discussion and of the Observations submitted to the Committee. Proposals outside this scope shall only be discussed if the Committee so decides.

XVII

All amendments and proposals must be submitted in writing to the President, who shall cause them to be circulated.

As a general rule, no draft shall be discussed unless it has been circulated to delegations on the day preceding the meeting. The President, however, may permit immediate discussion.

XVIII

Within the Committees, each provision shall be voted upon separately. The vote shall only be valid if the proposal is supported by a majority of the delegations present at the meeting.

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If, however, a majority of the delegations represented on the Committee was not present when the vote was taken, a new vote shall be taken should this be asked for by ten delegations.

XIX

If the Chairman of a Committee considers that modifications of certain provisions adopted by that Committee are likely to facilitate a unanimous agreement, he may request the Committee to discuss such modifications.

XX

If the Committee cannot reach unanimous agreement on all points, it shall incorporate the provisions upon which it has unanimously agreed in a special instrument.

The Committee shall also formulate the provisions which have obtained the assent of the majority of the delegations.

It may also establish the terms of a Declaration setting forth the principles regarded at least by a majority of the delegations represented on the Committee as the expression of existing international law.

XXI

Each Committee shall forward to the Conference the results of its work, backed by a report. In particular, it shall state whether it regards certain drafts as final or whether it recommends that certain questions or drafts should be submitted for fresh examination by Governments.

XXII

The Conference shall pronounce upon proposals submitted to it by the Committees.

XXIII

In so far as the Conference arrives at a unanimous agreement, the act embodying such agreement shall be signed by all the delegations subject to ratification; it shall be open for the accession of any State.

Reservations to the unanimous act may be made by individual signatories. Such reservations may either imply the exclusion of a particular article or may consist of a declaration that the provisions of the act are insufficient, but they may not relate to any other point, for example, the interpretation of the act. The said act shall indicate the extent to which reservations may accompany accession. It shall also specify the period of its validity and, if necessary, the method of revision.

XXIV

In the absence of or in addition to a unanimous agreement, conventions may be signed, as acts of the Conference, provided that the object of the

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convention comes within the competence of the Conference and provided they are finally adopted by a vote of the majority of the Members of the League of Nations and non-member States represented on the Committee in which the draft was prepared. Each of these conventions shall be open to accession by any State; the period of validity and, if necessary, the method of revision shall be specified in the convention.

XXV

Declarations by which the signatory Governments will recognize certain principles as being sanctioned by existing international law may also be signed as acts of the Conference, provided the said Declarations have been finally adopted by a vote of a majority of the Members of the League of Nations and non-member States represented on the Committee in which the draft was prepared. These Declarations, which shall be subject to ratification, shall be open for accession; they shall not specify any period of validity or contain any denunciation clause, and they shall lapse if the rules which they enunciate cease to form part of international law.

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