

Nationality of Formosans

1. (a) In the Potsdam Declaration it States

"The terms of the Cairo Declaration shall be carried out and Japan sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine, and the territories outside those mentioned above which had hitherto belonged to Japan is stipulated as being separated from Japanese sovereignty. With the above alone it is not clear precisely what territories depart from Japanese sovereignty and to what country they shall belong or what their future status will be.

The Japanese Government is constrained to understand that the terms of the Potsdam Declaration promise the transfer which will occur over a part of Japanese territory and that until the sovereignty over territories is finally settled and made valid by the Peace treaty in any transfer of territories a claim may be considered to have arisen but not a real right.

(b) The U. S. interpretation considers the occupation of Japan as a military occupation and the various measures taken in Japan are considered as military operations of the Allied Occupation Forces. In other words it holds the view that until the conclusion of the Peace Treaty, the Allied Nations and Japan are technically to be in a relation with each other where the state of belligerency cannot be considered to have been terminated.

In war, international customary law however forbids the division of territories or any such permanent alteration by one belligerent nation of another and in this sense we are forced to conclude that at least until the conclusion of the peace treaty that the territories of Korea, Formosa etc. still belong in a legal sense to Japan.

(c) In January of this year Secretary of State Byrnes stated that the status of southern half of Saghalien and Kuriles decided at the Yalta Conference will receive final legal validity after the peace treaty.

(d) In Europe at the present time the alteration of territories agreed upon the Truce Agreement by such countries as Finland, Rumania, Hungary has been stipulated again in the draft provisions of the Peace Treaty.

Does this not support the stand taken by the Japanese Government also. If in the case of Formosa alone, the United States having recognized that it shall belong to China, that a real right exists the stand such as that taken by Mr. Byrnes could not be maintained against the U.S.S.R.

(e) The alteration of nationality of the inhabitants of those territories which will depart from Japanese sovereignty should await the alteration in the final legal status of such territories and generally in order to change the nationality of the inhabitants before a final territorial alteration, a special understanding between the nations concerned stipulating this fact is required.

2. To determine the nationalities of a nation is an exclusive and internal affair and although it seems that a view that China is not bound in any way in deciding the nationality of Chinese nationals is taken, it may be said that if China took this stand within her own territories it would certainly not be a matter for us to intervene but to maintain outside her own territory that the inhabitants therein are its own nationals and that the determination of nationalities is an internal affair and that the other country must recognize such a decision as a matter of course is a clearly erroneous interpretation of International Law.

On this point reference may be made to the opinion expressed by the Permanent International Court of Justice on the Question of Nationality Decrees of Tunis and Morocco in February 1923. The above may be considered a most authoritative refutation of the erroneous interpretation mentioned previously (See Annex 2)

ANNEX II

NATIONALITY DECREES IN TUNIS AND MOROCCO

On November 8th, 1921, a Decree was promulgated by the Bey of Tunis, the first article of which enacts as follows:

"With the exception of citizens, subjects or nationals of the Protecting Power (other than our own subjects), every person born in the territory of our Kingdom of parents one of whom was also born there, is a Tunisian, subject to the provisions of conventions or treaties binding the Tunisian Government."

On the same date, the President of the French Republic issued a Decree of which the first article was as follows:

"Every person born in the Regency of Tunis of parents of whom one, justiciable as a foreigner in the French Courts of the Protectorate, was also born there, is French."

Similar legislation was introduced at the same time in Morocco (French Zone).

The British Ambassador in Paris protested to the French Government against the application to British subjects of the decrees promulgated in Tunis, and also stated that his Government was unable to recognize that the decrees put into force in the French Zone of Morocco were applicable to persons entitled to British nationality. As it was not found possible to adjust the divergence of views, the British Government proposed to the French that the matter should be referred to the Court, invoking amongst other things, the Franco-British Arbitration Convention of October 14th, 1903. The French Government refused to submit the matter

to

to arbitral or judicial settlement, whereupon the British Government stated, on July 14th, 1922, that it had no alternative but to submit the dispute to the Council of the League of Nations, relying on Articles 13 and 15 of the Covenant[#]. The Quasi d'Orsay replied that the question was not one for consideration by the Council of the League of Nations, having regard to the reservation made in paragraph 8 of Article 15 of the Covenant concerning questions which by international law are solely within the domestic jurisdiction of one Party.

The Governments concerned then came to an agreement, under the auspices of the Council, to the effect that the latter should request the Court to give an advisory opinion on this question of jurisdiction, viz. whether the dispute is or is not, by international law, solely a matter of domestic jurisdiction.

On October 4th, 1922, the Council passed a resolution to this effect. The Request was communicated by the Registrar of the Court to the Members of the League of Nations (through the Secretary-General of the League), and to the States mentioned in the Annex to the Covenant.

An extraordinary session of the Court (Second Session) was held, from January 8th to February 7th, 1923, to deal with the question. The following judges attended:

(Omitted)

The Governments concerned had each filed a Case in November, 1922, and a Counter-Case in December of that year. The Court also heard oral statements by both Parties.

[#] Which concern disputes likely to lead to a rupture.

On February 7th, 1923, the Court delivered its Opinion. At the outset, the Court states that the question before it is whether the dispute relates to a matter which, by international law, is solely within the domestic jurisdiction of France, and goes on to observe that as it has to give an opinion upon the nature of the dispute and not upon the merits, nothing in the opinion can be interpreted as indicating a view as regards the merits of the dispute between the Parties.

The Court next observes that, according to the terms of the Request itself, the question must be read in the light of paragraph B of Article 15 of the Covenant; and to this end it proceeds to define the meaning of the expression "solely within the domestic jurisdiction" therein contained.

In the view of the Court, the exclusive jurisdiction of States embraces matters which are not in principle regulated by international law. The extent of this jurisdiction, which, in the opinion of the Court, includes, in principle, questions of nationality, varies with the development of international relations; it is therefore a purely relative question. Moreover, even as regards matters falling within this domain, the right of a State to use its discretion may be restricted by the effect of international obligations. Nevertheless, a dispute, which, in principle, falls within the domestic jurisdiction of a State, is not removed from that domain simply because international engagements are invoked. These engagements must be of a nature to justify the provisional conclusion that they are of juridical importance for the purposes of the dispute. Nor does the mere fact that one of the Parties brings a dispute before the League

of Nations suffice to remove it from this exclusive domain.

The Court then proceeds to apply this doctrine to the question before it. For this purpose, it takes the legal grounds and arguments advanced by the Parties one by one; nevertheless, the purpose of this examination is only to enable the Court to form an opinion as to the nature of the dispute, and not as to its merits. For to give an opinion on the merits of the case, in order to reply to a question regarding exclusive jurisdiction, would hardly be in conformity with the system established by the Covenant. From this point of view, the Court considers the contention that France enjoys in Tunis and Morocco the same exclusive right to legislate on questions of nationality as in France itself, and that the local sovereignty of the protected State in conjunction with the public powers exercised by the protecting State may be equivalent to full sovereignty. Similarly, the Court alludes to the question whether the Capitulatory rights of Great Britain in Tunis and Morocco still exist, or whether they have lapsed. It also considers the argument put forward by Great Britain based on the most favoured nation clause, and the French contention that Great Britain had formally recognized France's right to legislate as to the nationality of persons in Tunis under the same conditions as in France itself.

The Court, without going into the merits of the dispute and confining itself to consideration of the facts above referred to, arrives at the conclusion that the dispute in question does not relate to a matter which, by international law, is solely within the domestic jurisdiction of France; the Council therefore is

competent

competent to deal with the dispute laid before it by Great Britain regarding the nationality decrees in Tunis and Morocco.

(From Annual Report of the Permanent Court of International Justice
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