The Norm of Preventing Statelessness in International Law and Its Influence on Japanese Nationality Law

国際法における無国籍予防規範と日本の国籍法への影響

A Dissertation Presented to
the Graduate School of Arts and Sciences,
International Christian University,
for the Degree of Doctor of Philosophy

国際基督教大学 大学院
アーツ・サイエンス研究科提出博士論文

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LIST OF ABBREVIATIONS

(1) States

DPRK	Democratic People's Republic of Korea
PRC	People's Republic of China
ROC	Republic of China
ROK	Republic of Korea
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
USSR	Union of Soviet Socialist Republics

(2) International Organisations

Ad Hoc Committee	*Ad Hoc* Committee on Statelessness and Related Problems
CHR	Commission on Human Rights
CSW	Commission on the Status of Women
ECOSOC	Economic and Social Council
IDI	*Institut de Droit International*
ILC	International Law Commission
LN	League of Nations
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	Office of the United Nations High Commissioner for Refugees
UNSG	United Nations Secretary-General

(3) Treaties and International Instruments

1930 Convention	Convention on Certain Questions relating to the Conflict of Nationality Laws (Adopted in 1930, entered into force in 1937)
1954 Convention	Convention relating to the Status of Stateless Persons (Adopted in 1954, entered into force in 1960)
1957 Convention	Convention on the Nationality of Married Women (Adopted in 1957, entered into force in 1958)
1961 Convention	Convention on the Reduction of Statelessness (Adopted in 1961, entered into force in 1975)
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works (Adopted in 1886, entered into force in 1887)

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (Adopted in 1979, entered into force in 1981)
CERD	International Convention on the Elimination of All Forms of Racial Discrimination (Adopted in 1966, entered into forced in 1969)
CRC	Convention on the Rights of the Child (Adopted in 1989, entered into force in 1990)
CRPD	Convention on the Rights of Persons with Disabilities (Adopted in 2006, entered into force in 2008)
DEDAW	Declaration on the Elimination of All Forms of Discrimination against Women
Draft Convention on Elimination	Draft Convention on the Elimination of Future Statelessness
Draft Convention on Reduction	Draft Convention on the Reduction of Future Statelessness
ICCPR	International Covenant on Civil and Political Rights (Adopted in 1966, entered into force in 1976)
ICESCR	International Covenant on Economic, Social and Cultural Rights (Adopted in 1966, entered into force in 1976)
Paris Convention	Paris Convention for the Protection of Industrial Property (Adopted in 1883, entered into force in 1884)
Potsdam Declaration	The Proclamation Defining Terms for Japanese Surrender (Issued in 1945)
Protocol on Statelessness	Protocol relating to a Certain Case of Statelessness (Adopted in 1930)
Refugee Convention	Convention relating to the Status of Refugees (Adopted in 1951, entered into force in 1954)
Refugee Protocol	Protocol relating to the Status of Refugees (Adopted in 1967, entered into force in 1967)
Special Protocol on Statelessness	Protocol on Statelessness and Special Protocol concerning Statelessness
Statelessness Conventions	Convention relating to the Status of Stateless Persons and Convention on the Reduction of Statelessness
UDHR	Universal Declaration of Human Rights (Adopted in 1948)
VCLT	Vienna Convention on the Law of Treaties (Adopted in 1969, entered into force in 1980)

(4) Organisations in Japan

GHQ	General Headquarters of the Allied Powers
MOFA	Ministry of Foreign Affairs

MOJ	Ministry of Justice
NDL	National Diet Library
SCAP	Supreme Commander for the Allied Powers

(5) Others

Codification Conference	League of Nations Codification Conference (1930)
CPCC	Preparatory Committee for the Conference for the Codification of International Law
WWI	World War I
WWII	World War II

AUTHOR'S NOTE

This dissertation uses the Hepburn romanisation system when Japanese words are written.

Although the MOJ provides the Japanese Law Translation Database System (http://www.japaneselawtranslation.go.jp), which translates some Japanese laws into English, the database does not include all laws referred to in the dissertation. In addition, it is not an official English translation. This dissertation refers to the database if the database has a translation although the author has modified some expressions where necessary. Where necessary, the author also refers to the *Standard Legal Terms Dictionary* (March 2019 edition), prepared by the Japanese Law Translation Council.

INTRODUCTION

Statement of the Problem and Research Questions

Determination of nationals is regarded as a matter for each state, and this principle is enshrined in international law. In the *Tunis and Morocco Nationality Decree* case of 1923, the PCIJ stated that "in the present [i.e., 1923] state of international law, questions of nationality are, [...] in principle within this [each state's] reserved domain".[1] Article 1 of the 1930 Convention also provided that "[i]t is for *each State* to determine under its own law who are its nationals".[2] Since each state has the primary right to determine who its nationals are, it is inevitable that some people become stateless as a result of the lack of coordination between the nationality laws of states. In fact, it is estimated that there are 10 million stateless persons around the world.[3] Since statelessness is regarded as a problem from both theoretical and practical perspectives,[4] some treaties contain the norm of preventing statelessness. For instance, some articles in the 1930 Convention provide for the prevention of statelessness, and the prevention of statelessness was intended during the drafting process of the ICCPR and CRC, both of which provide for children's right to acquire a nationality.[5]

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[1] Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 PCIJ, File F. c. V. Docket II. 1. 24 (Feb. 7).
[2] Emphasis added.
[3] UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 2 (2017), *at* http://www.unhcr.org/5943e8a34.pdf.
[4] For traditional reasons why statelessness was regarded as an issue, see 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to the International Order".
[5] Note that the 1930 Convention and human rights treaties such as the ICCPR and CRC provide for the prevention of statelessness from different backgrounds. See Chapter One "The Norm of Preventing Statelessness in International Law".

The norm of preventing statelessness in international law offers an interesting insight to analysing the current norms in international society.[6] On the one hand, there is a traditional norm that determination of nationals, i.e., members of the state, is regarded as a matter for each state. On the other hand, some treaties were concluded to prevent statelessness. In other words, each state's right to determine its nationals is limited by international treaties to some extent. Thus, the impact of the norm of preventing statelessness upon state behaviour needs to be examined to understand the extent to which states follow the norm, which has a potential to conflict with the norm that determination of nationals is within a state's domestic jurisdiction.[7]

However, such impact upon Japanese nationality laws has not been examined in any detail. Existing literature covered that the CEDAW resulted in the amendment of the nationality act in 1984,[8] but the impact of other treaties to which Japan is a contracting party,

[6] International society is observable when "a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions". HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 13 (1977). For English School scholars who claims that states compose society, international law is one instrument in international society, so states may find it necessary to follow international law. For the role of international law in international society, see the following. BULL, *supra* note 6, at 122-155.

[7] The "impact" of the norm of preventing statelessness is observable when the norm triggered the amendment of municipal law or discussion to consider the necessity or desirability to prevent statelessness in the government. Regarding the definition of "follow" in this dissertation, see "Scope and Terminology of the Dissertation" in the Introduction.

[8] A woman's equal rights with man with respect to her children's nationality in the CEDAW triggered enactment of the 1984 Nationality Act. SHOICHI KIDANA, *CHIKUJOU CHUUKAI KOKUSEKI HOU* [COMMENTARY ON THE NATIONALITY ACT] 40 (2003). Since it is commonly understood that Japan incorporates international law, treaties that Japan has concluded become a part of the Japanese legal order without specific domestic legislation. YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 29 (1998). Makoto Matsuda, Jitsumu toshiteno Jouyaku Teiketsu Tetsuzuki [*Practice of Concluding Process of Treaties*], 10 HOKKAIDO J. OF NEW GLOBAL L. AND POLICY 301, 311 (2011). OSAMU ARAKAKI, STATELESSNESS CONVENTIONS AND JAPANESE LAWS: CONVERGENCE AND DIVERGENCE (translated by Hajime Akiyama) 28 (2016). However, in Japan, international law is not typically directly applied to cases. The Japanese government legislates "collateral law" that is compatible with the treaties. When there are already relevant municipal laws, such laws are amended, and if not, a new law is legislated. Matsuda, *supra* note 8, at 313. This indicates the significance of municipal law in implementing international law in Japan.

such as the ICCPR and CRC, has not been well examined.[9] In addition, the impact of treaties containing a norm of preventing statelessness, wherein Japan is not a contracting party to, on Japanese laws is not examined in any detail. For the traditional legal scholars, treaties which Japan is not a contracting party to are not necessarily a matter of concern because the treaties do not legally bind the state.[10] However, international law has a feature to be a standard in international society. As a result, there is a possibility for states to follow international law even if the state is not a contracting party to the treaty. This indicates the necessity to examine the role of treaties to which Japan is not a contracting party. For instance, Abe and Arakaki pointed out that Japan participated in the Codification Conference and signed the 1930 Convention, to which Japan is not a contracting party, but they did not examine the compatibility between the 1930 Convention and Japanese laws and the Japanese stance on the 1930 Convention.[11]

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[9] One possible reason is that the norm of preventing statelessness in international law did not trigger an amendment to the nationality laws. For the previous amendments of the nationality act, see the following. KIDANA, *supra* note 8, at 40.

[10] For traditional international legal scholars' division of "law" and "non-law" and emphasis on legally binding law, see the following. ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 24-25 (2016).

[11] KOHKI ABE, OVERVIEW OF STATELESSNESS: INTERNATIONAL AND JAPANESE CONTEXT (2010). ARAKAKI, *supra* note 8, at 17, 28. It must be noted that under Article 18 of the VCLT, states which signed the treaty have the obligation not to defeat the object and purpose of the treaty if the state does not indicate a clear intention not to be a party to the treaty. From this perspective, it can be argued that Japan was legally required to follow the object and purpose of the 1930 Convention after it signed the convention. However, this legal requirement may not be present to Japan regarding the 1930 Convention in the 1930s for the following reasons. First, the VCLT was signed in 1969, and it entered into force in 1980. Therefore, the VCLT cannot be applied to the situation right after the adoption of the 1930 Convention. Second, it is debatable whether Article 18 of the VCLT constituted a customary international law around 1930. On the one hand, the Draft Convention on the Law of Treaties prepared by the Harvard Law School in 1935 included a similar provision with Article 18 of the VCLT. This may imply that the idea similar to Article 18 of the VCLT was shared by international legal scholars, and such idea possibly constituted customary international law. For the provision of the draft, see the following. Anonymous, *Draft Convention on the Law of Treaties* 29, Supplement AJIL 657-665 (1935). On the other hand, James L. Brierly, who contributed to the drafting of the VCLT stated that whether or not such customary law exists is not clear in 1953. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 246 (2009). This indicates that it was not clear whether or not there was customary law that determined a state was expected to follow object and purpose of a treaty which the state signed while it is not a party to the treaty when Japan signed the 1930 Convention.

On the basis of this background, this dissertation asks two research questions. The first research question is: *To what extent has the norm of preventing statelessness in international law influenced Japanese nationality law?* In order to find the implications of the answers to the first research question, the second research question is: *What determined whether the norm of preventing statelessness in international law influenced Japanese nationality law?*

Methodology and Sources

This dissertation adopts the historical method to answer the research questions, [12] which is different from the traditional method in legal studies such as interpretation of treaties and analysis of authoritative texts and case law. Japan began to be a member of international society since the end of the eighteenth century, and international law was important standard for Japan since then. The historical method allows to examine how the Japanese government's stance towards international law, which prevents statelessness, has changed. Since the status of Japan in international society has changed, the Japanese attitude towards the norm of preventing statelessness in international law may have changed during the concerned eras.

This dissertation mainly explores first-hand administrative sources to examine the Japanese government's position on the norm of preventing statelessness.[13] For the most part, laws, minutes of international conferences and Japanese parliament such as the Imperial Diet

[12] For a historical method in legal studies, see the following. Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo & Wibo van Rosseum, *Methodology of Legal Research: Challenges and Opportunities* 13(3) UTRECHT LAW REVIEW 1, 5 (2017). Historical approach to international law has clarified the role of international law to socialise states. For instance, see the following. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2009). Ian Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations*, *in* THE EXPANSION OF INTERNATIONAL SOCIETY 357 (Hedley Bull & Adam Watson eds., 1984). See also 4.2.1., "The Status of Japan in International Society" of this dissertation.
[13] For the reason why this dissertation focuses on the governmental view, see note 34 and accompanying text.

and Diet,[14] and administrative documents from the MOJ and MOFA are analysed to understand the Japanese government's interpretation of international law and its view on the compatibility of international law and Japanese laws.[15]

The Significance and Limits of This Dissertation

There are two categories of significance in this dissertation. The first category, an international one, is composed of the analysis of the role of treaties to which the state is not a contracting party and the historical perspective. The examination of the role of treaties to which the state is not a contracting party is significant to determine the impact of international law on states. A hypothesis is that states follow treaties to which they are not a contracting party if these treaties are regarded as a standard in international society. Traditional international legal scholars have not paid much attention to treaties to which the state is not a contracting party because a state is bound by treaties to which it agrees to be bound.[16] However, in reality, states follow treaties that do not legally bind them if a state perceives such a treaty as a rule or standard in international society which states are required

[14] The Imperial Diet existed from 1889 to 1947, and the Diet existed from 1947 to present.
[15] The minutes and documents relating to the 1961 Convention are available online from the UN website at http://legal.un.org/diplomaticconferences/1959_statelessness/. Other minutes and documents are obtained from the Library of the UN University in Tokyo and the UN Library and Archives in Geneva. The minutes of the Imperial Diet are available online at http://teikokugikai-i.ndl.go.jp. The minutes of the Diet are available online at http://kokkai.ndl.go.jp. The MOJ is the primary ministry dealing with nationality. Article 4 of the Act for Establishment of the MOJ reads, "Ministry of Justice […] is responsible for […] matters concerning nationality […]" (Article 4(xx)). Translated by the author. The MOFA is a relevant ministry when nationality is covered by international law. According to Article 4 of the Act for the Establishment of the MOFA, the MOFA is responsible for "matters concerning the conclusion of treaties and other international agreements" and "matters concerning interpretation and implementation of treaties, other international agreements and established laws of nations" (Articles 4(iv) and (v)). Translated by the author. Administrative documents from these ministries are obtained using the procedure of the request to disclose administrative documents, and historical administrative documents are obtained online or by visiting the archives and library in Japan. Archives and library include the National Archives of Japan, Diplomatic Archives of the MOFA and NDL. Some historical administrative documents are available online from the websites of the National Archives of Japan and the Japan Center for Asian Historical Records at https://www.jacar.go.jp/english/index.html and https://www.digital.archives.go.jp/index_e.html, respectively.
[16] For the concern of traditional legal scholars, see note 10. For the current status of treaties which the state signed, see note 11.

to follow. Thus, this dissertation clarifies the extent of influence of treaties on prevention of statelessness to which the state is not a contracting party.[17]

In order to examine the impact of treaties upon states, this dissertation conducts the historical analysis of a state's reaction to the norm of preventing statelessness in international law, and this is also a part of significance of this dissertation. Based on the understanding that international law becomes a standard in international society, one hypothesis is that the state's attitude towards the norm of preventing statelessness in international law depends on the status of the state in international society. This indicates the necessity of introducing historical perspectives in order to understand the features of the norm of preventing statelessness in international law and examine how the state responds to the norm depending on the era. Although this dissertation examines the Japanese case, this method can be used to analyse other states' reaction to the norm of preventing statelessness in international law.

The second category of significance is relevant to the region which this dissertation focuses on. The selection of the Japanese case study has a significance. There are a few works on statelessness from the legal perspective in Japan. For instance, UNHCR has published several reports on statelessness in Japan. In 2010, Abe grasped the laws related to statelessness and the situation of stateless persons in Japan.[18] In 2014, Arakaki analysed the Japanese law from the perspectives of the 1954 and 1961 Conventions.[19] In 2017, Study Group on Statelessness in Japan categorised cases of stateless persons in Japan and made

[17] It must be noted that there are works to analyse the role of documents which do not legally bind the state according to the traditional understanding of international law. For instance, Brunnée and Toope approached international law not from the legally-binding nature based on the traditional "law" and "non-law" distinction, but from the perspective of the state's perception of the norm. See the following. Jutta Brunnée & Stephen J. Toope, *Interactional International Law: An Introduction*, 3(2) INT'L THEORY 307 (2011). JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010). Note that this dissertation focuses on the role of treaties *on prevention of statelessness* which a state is or is not contracting party, and its purpose is not to theorise the role of treaties which the state is not a contracting party in general.
[18] ABE, *supra* note 11.
[19] ARAKAKI, *supra* note 8.

proposals to improve the situation of stateless persons.[20] However, many works on statelessness from the international and municipal legal perspectives focus on European states, and the number of works on statelessness in Japan is limited compared to that of the European states.[21] For instance, in the website of UNHCR, there are 21 reports and documents related to statelessness in Europe while the number of other regions' reports and documents are limited.[22] In addition, there are many reports on laws on nationality and statelessness in Europe and there exists much information on laws related to statelessness in Europe in the Global Nationality Laws Database while information on laws related to statelessness in non-European states is limited.[23] Given this context, this dissertation analyses the Japanese stance on the norm of preventing statelessness and contributes to global statelessness studies.

It must also be noted that the Japanese case clarifies the role of international law on the prevention of statelessness from the non-Western perspective. Japan has adopted the isolationist policy since the 1630s, meaning that it did not have much official contact with other states.[24] However, it officially opened its doors to other states after the "black ships" of the US arrived in 1853. After that, *oitsuke oikose* (catch up and overtake) became the Japanese slogan with regard to the West. Japan had the chance to learn international law,

[20] STUDY GROUP ON STATELESSNESS IN JAPAN, TYPOLOGY OF STATELESS PERSONS IN JAPAN (2017).
[21] UNHCR reports are not the only works on statelessness in Japan, and there are more books and articles on statelessness written in Japanese from variety of disciplines. For the list of books and articles on statelessness written in Japanese, see the following. Information Centre on Statelessness in Japan, Bunken Jouhou [*Relevant Literature*], *at* https://mukokuseki-centre.jimdo.com/%E6%96%87%E7%8C%AE%E6%83%85%E5%A0%B1-1/ (visited Feb. 25, 2019).
[22] UNHCR runs the "refworld" website, and many documents including report commissioned by UNHCR are made public by this website. There are 11 reports and documents concerning Africa and Asia and four reports and documents concerning Americas and Middle East and North Africa. This number is the analysis of "Country and Region Specific Situations" in the following link. UNHCR, *Statelessness*, *at* https://www.refworld.org/statelessness.html (visited Feb. 4, 2019). Note that there are more books and articles on statelessness from legal perspectives. However, this dissertation refers to the reports and documents in the website of UNHCR to compare work on statelessness by region.
[23] Global Nationality Laws Database is available online at http://globalcit.eu/national-citizenship-laws/. Country reports of Europe and other regions are available online at http://globalcit.eu/country-profiles/.
[24] However, Japan communicated with some states as exceptions. See note 612.

which emerged and developed in Europe,[25] to improve its status in international society. As explained later, the need to prevent statelessness was mainly discussed in Europe, and international law covered prevention of statelessness.[26] The Japanese case study will indicate how non-Western states attempted to become members of international society by following – or not following – the norm of preventing statelessness in international law. There are works which indicate that Japan learnt and followed international law to become a member of international society,[27] and this dissertation examines the relationship between the Japanese status in international society and the Japanese stance on international law related to nationality and statelessness.

In order to explore the Japanese position on the norm of preventing statelessness in international law, this dissertation mainly uses administrative documents,[28] and such an approach constitutes the uniqueness of this dissertation too. Abe and Arakaki referred to the deliberation in the Diet and Memorandum on Questions in the Diet (*Shitsumon Shuisho*) to examine the Japanese stance towards statelessness,[29] but no literature on statelessness in Japan examined administrative documents in detail. It is necessary to do so because Japan takes the parliamentary system, and bills are submitted to the Diet, the legislative organ in Japan, by either the cabinet or members of the Diet.[30] The majority of the bills are submitted

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[25] See the following. Martin Kintzinger, *From the Late Middle Ages to the Peace of Westphalia*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 607 (Bardo Fassbender & Anne Peters eds., 2009). Heinz Duchhardt, *From the Peace of Westphalia to the Congress of Vienna*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 628 (Bardo Fassbender & Anne Peters eds., 2009). Miloš Vec, *From the Congress of Vienna To the Paris Peace Treaties of 1919*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 654 (Bardo Fassbender & Anne Peters eds., 2009).

[26] See 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to International Order" and 4.2.2., "Status of the Norm of Prevention of Statelessness in International Society".

[27] For instance, see the following. Yoshiro Matsui, *Modern Japan, War and International Law*, *in* JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE 7 (Nisuke Ando ed., 2001). Kinji Akashi, *Japan-Europe*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 724 (Bardo Fassbender and Anne Peters eds., 2012).

[28] See also "Methodology and Sources" in the Introduction.

[29] ABE, *supra* note 11. ARAKAKI, *supra* note 8.

[30] MAKOTO NAKAJIMA, *RIPPOU GAKU: JORON, RIPPOU KATEI RON* [LEGISLATIVE STUDIES: INTRODUCTION AND LEGISLATION PROCESS] 30 (3rd ed,. 2014).

by the cabinet, and they are drafted by the ministries of the government,[31] thus, it is significant to analyse the understanding of administration in relation to the necessity of legislation. If the administration recognises the necessity of legislation, it is possible that a ministry proposes a bill which can result in actual legislation in the Diet. As already discussed, international law triggered the amendment of a Japanese nationality act in 1984, and this is widely known as the only occasion that international law influenced on nationality law. However, the MOFA, for instance, might have examined the compatibility between the Japanese laws and the norm of preventing statelessness in international law. In such occasion, the normative influence of the prevention of statelessness in international law on the Japanese law may be observable. Thus, it is necessary to examine the administrative sources.

However, this method is not globally valid. In other words, the role of the administration in the legislation process depends on the state. When the Japanese situation is compared with that of other states, the proportion of the bills submitted by the members of the Diet vis-à-vis all the bills submitted to the Diet including those submitted by the cabinet is small.[32] In some states, the views of the administration may not influence on legislation much. Considering the situation in these states, the method adopted in this dissertation may not have as much validity as intended. This is a limitation of this method to examine the administrative sources.

Scope and Terminology of the Dissertation

In this dissertation, the prevention of statelessness means any measure to prevent statelessness. A stateless person is defined as "a person who is not considered as a national

[31] *Id*, at 30.
[32] Mutsumi Shimizu, Rippou Katei niokeru Kokkai to Seifu no Yakuwari Buntan wo megette: Houan no Hatsuan, Teishutu wo Chuusin toshite [*The Role of the Diet and Government in the Legislation Process: Focusing on Drafting and Submission of Drafts of Laws*], *in* RIPPOU KATEI NO KENKYU: RIPPOU NIOKERU SEIFU NO YAKUWARI [A STUDY OF LEGISLATION PROCESS: THE ROLE OF THE GOVERNMENT IN LEGISLATION] 3, 20 (Mutsuo Nakamura and Hideaki Maeda eds., 1997).

by any State under the operation of its law", pursuant to Article 1 of the 1954 Convention.[33] This definition is a reminder that it is the government's view that determines whether a person is a national of a particular state or not.[34] Thus, this dissertation focuses on the governmental view on nationality and statelessness.

It distinguishes between the concepts of nationality and citizenship, and its scope is limited to nationality.[35] Although some scholars use these terms interchangeably,[36] the backgrounds of these concepts are different. The concept of citizenship originated from the city-state period of Ancient Greece, and the practical necessity of protecting the community was the basis of the concept. Citizens possessed military obligations to protect the community,[37] and in return, they participated in the politics of the city-state.[38] Thus, protection of the community from the external threats and citizens' participation in the community were the principal features of citizenship. On the basis of this historical background, the word "citizenship" sometimes carries the implication of participation in politics.[39] By contrast, "nationality" assumes that members of the "nation" share a certain identity. As this dissertation explains, the concept of nationality emerged after the French

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[33] This definition is regarded as customary international law by the ILC. UN, REPORT OF THE INTERNATIONAL LAW COMMISSION: FIFTY-EIGHTH SESSION (1 MAY-9 JUNE AND 3 JULY-11 AUGUST 2006), A/61/10, 49 (2006). In other words, non-contracting parties to the 1954 Convention, such as Japan, are also bound by this definition.

[34] With regard to the significance of the government's view toward individuals, see the following. UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS: UNDER THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS paras. 23-24 (2014). Hajime Akiyama, Mukokusekisha toha Dareka: Kokusaihou niokeru Mukokusekisha no Teigi to Mitourokusha no Kanrensei kara [*Who is a Stateless Person? Definition of a Stateless Person in International Law and Unregistered Persons*], 22 SOCIAL-HUMAN ENVIRONMENTOLOGY 67, 69 (2016).

[35] The following sentences are reconstructed and modified on the basis of the paper published elsewhere. Hajime Akiyama, *Enforcement of Nationality and Human Insecurity: A Case Study on Securitised Japanese Nationality of Koreans during the Colonial Era*, 7(2) J. OF HUMAN SEC. STUDIES 79, 82-84 (2018).

[36] For instance, see the following. Matthew J. Gibney, *Statelessness and Citizenship in Ethical and Political Perspective*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 44, 44 (Alice Edwards and Laura van Waas eds., 2014).

[37] KEITH FAULKS, CITIZENSHIP 16 (2000).

[38] Engin F. Isin & Bryan S. Turner, *Citizenship Studies: An Introduction*, *in* HANDBOOK OF CITIZENSHIP STUDIES 1, 5 (Engin F. Ishin and Bryan S. Turner eds., 2002).

[39] See the following. Jonathan Lepofsky and James C. Fraser, *Building Community Citizens: Claiming the Right to Place-making in the City*, 40(1) URBAN STUDIES 127, 130 (2003).

Revolution, and the shared identity of individuals who compose a nation has been emphasised.[40] In international law, the definition of stateless persons refers to "nationals", so the concept of nationality should be the basis of analysis of the prevention of statelessness. Thus, this dissertation focuses on nationality.

This dissertation covers the prevention of statelessness by automatic conferral or loss of nationality. Naturalisation, however, is not covered in this dissertation. Statelessness can be reduced by naturalisation as well, but naturalisation is generally regarded as being at the discretion of the state.[41] In other words, the system of naturalisation does not guarantee the prevention of statelessness. Therefore, this dissertation covers the automatic conferral of nationality which guarantees the prevention of statelessness when the criteria in law are met. For instance, its scope includes the prevention of individuals being stateless when they are born in Japan and the prevention of Japanese being made stateless as a result of loss of Japanese nationality. Conferral of nationality in the former case and prevention of loss of nationality in the latter case are necessary measures to prevent statelessness.

The prevention of statelessness that can occur as a result of the application of the concept of the Japanese nation is the main scope of this dissertation. The basis for conferring Japanese nationality has been the Japanese household since the 1899 Nationality Act, the first nationality act in Japan. As a result, a *jus sanguinis* through the paternal line was applied as a method for conferring Japanese nationality by birth in the 1899 Nationality Act. *Jus sanguinis* is a principle by which the parents' nationality is transmitted to the child, but only fathers can transmit the nationality when the *jus sanguinis* through the paternal line is applied. This can be contrasted with the *jus soli* principle, which confers nationality on the basis of the place in which a child is born. Measures to prevent statelessness that may arise as a result

[40] See 1.2., "The Emergence of Nationality and the Nation-State Principle".
[41] For the Japanese case, see the following. KIDANA, *supra* note 8, at 234.

of *jus sanguinis* through the paternal line, derived from a Japanese household, comprise the scope of this dissertation.

In terms of time range, this dissertation covers international law and nationality laws since 1889, when the first Japanese constitution was enacted. In international law, it mainly covers the 1930, 1957, and 1961 Conventions, as well as the ICCPR, CEDAW and CRC.[42] Japan participated in the conferences to adopt the 1930 and 1961 Conventions, so the Japanese positions in these conferences are examined too. This dissertation also concerns the Treaty of San Francisco since it could have covered the nationality of people from the former colonies although it did not do so.

In this dissertation, a norm means a standard of appropriate behaviour for states. This definition is inspired by Finnemore and Sikkink's definition of the same: "a standard of appropriate behaviour for actors with a given identity."[43] It must be noted that the identity as a member of international society, in other words, a state, is a basis for states to comply with international law.[44] A norm emerges in international society when some states regard a certain action as appropriate behaviour as a state. When increasing number of states regard a certain action as appropriate, such norm is strengthened and more states commit to the

[42] Note that Japan is a contracting party to the ICCPR, CEDAW and CRC, but not to the other treaties listed above. This dissertation does not cover the CERD and CRPD even though they concern nationality. Article 5 (c) (iii) of the CERD provides that racial discrimination concerning "[t]he right to nationality" be prohibited. However, the meaning of this article is vague and it does not seem to have had much substantial impact on the prevention of statelessness. In addition, although Article 18 of the CRPD provides for the right of persons with disability to acquire and change nationality and prohibits the deprivation of nationality, prevention of statelessness was not mentioned during the drafting process of the CRPD. For the drafting process of the CRPD, see the following. UN, *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, at https://www.un.org/esa/socdev/enable/rights/adhoccom.htm (visited Jan. 16, 2019). This dissertation does not focus on documents that are regarded as non-legally binding documents such as political ones including the UDHR, since it pays attention to the reaction of states to treaties. However, it must be noted that there is a view that the UDHR is regarded as a customary international law. John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 21 (Bertland G. Ramcharan ed., 1979).

[43] Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52(4) INT'L ORG, 887, 891 (1998).

[44] See 4.2.1., "The Status of Japan in International Society".

norm.[45] In this sense, this dissertation's understanding of a "norm" is different from a "legal norm" in traditional international legal studies which covers customary law and treaties which the state is a contracting party.

The verb "follow" is used when international treaties, including those to which the state is not a contracting party, influence the text or interpretation of municipal law. The scope of "following" is wider than that of "compliance with" international law in the existing literature. "Compliance" is typically used to describe situations in which states act in line with a treaty to which the state is a contracting party.[46] In this dissertation, "following" includes the impact of the provisions of treaties to which Japan is not a contracting party.[47] International treaties' influence is observable if the Japanese government officials refer to international treaties when a new law is legislated or an existing law is amended. The scope of "following" international treaties is not limited to the influence of the text of international treaties. It includes the interpretation of or the drafting process of international law. For instance, if Japan uses an interpretation or drafting process of international law to interpret municipal law, Japan is regarded as "following" international law.[48]

In this dissertation, the term "nationality laws" refers to Japanese laws that cover nationality. The main law to examine is the Japanese nationality act. The first Japanese nationality act was enacted in 1899 and amended in 1916. New nationality acts were enacted in 1950 and 1984. This dissertation also covers the 1889 and 1946 Constitutions since they

[45] For detailed analysis, see 4.2.2., "Status of the Norm of Preventing Statelessness in International Society" and Finnemore & Sikkink, *supra* note 43, at 895.
[46] For instance, Chayes and Chayes argue that "it is not realistic to expect 100 percent compliance from the day a treaty *enters into force*" (emphasis added). Abram Chayes & Antonia Handler Chayes, *Compliance without Enforcement: State Behavior under Regulatory Treaties*, 7(3) NEGOTIATION J. 311, 312 (1991). This implies that legally binding nature based on the action for being a contracting party is assumed in the word of "compliance".
[47] For explanation of the "impact" of the norm of preventing statelessness, see note 7.
[48] This interest in the drafting process is similar to the International Legal Process School. For the International Legal Process School, see ABRAM CHAYES, THOMAS EHRLICH AND ANDREAS LOWENFELD, INTERNATIONAL LEGAL PROCESS (1968).

also concern nationality matters. Laws and circulars on nationality related to the former colonies are also examined.

Structure of the Dissertation

There are four chapters in this dissertation following introduction, as well as a conclusion.

Chapter One reviews the development of the norm of preventing statelessness in international law. It indicates a number of international treaties paid attention to the prevention of statelessness even if their text did not explicitly provide for it.

Chapters Two and Three are the main parts of this dissertation. They examine the extent to which the norm of preventing statelessness in international law has influenced Japanese nationality laws. Chapter Two covers the nationality laws from 1889 to 1945 under the 1889 Constitution, and it argues that the norm of preventing statelessness in international law influenced the first Japanese nationality act, and Japan paid attention to the prevention of statelessness when the 1930 Convention was discussed in the Codification Conference. Chapter Three covers the development of the norm of preventing statelessness under the 1946 Constitution. It argues that the norm of preventing statelessness in international law did not influence Japanese laws except the 1930 Convention, which influenced the interpretation of the clause on nationality in the 1946 Constitution.

Chapter Four analyses the findings of Chapters One to Three, and examines the factors that determined whether the norm of preventing statelessness in international law influenced on Japanese nationality laws. It indicates that international and national factors explain the Japanese stance towards the norm of preventing statelessness in international law. The dissertation concludes with insights for the future.

CHAPTER 1: THE NORM OF PREVENTING STATELESSNESS IN INTERNATIONAL LAW

1.1. Summary of the Chapter

This chapter explores the development of the norm of preventing statelessness in international law. It indicates that the prevention of statelessness was intended by some treaties even if these treaties' text did not explicitly provide for the prevention of statelessness. It also examines why the prevention of statelessness was included in the provision or discussed in the drafting process of each treaty.

Scholars on international law have pointed out that, from the perspective of maintaining the international order, statelessness has been an issue since the end of the nineteenth century. Married women's experience of statelessness was also regarded as a practical problem, and the 1930 Convention provided for the prevention of statelessness among married women and some children, such as foundlings. After the adoption of the UDHR, the 1957 Convention that provides for the prevention of statelessness among married women was adopted on the basis of the concept of human rights. The 1961 Convention, the most holistic convention for preventing statelessness, was drafted in order to find a solution for the issues that refugees and stateless persons faced, and is of a different context for dealing with statelessness from that faced by the 1930 and 1957 Conventions. Children's right to acquire a nationality was included in the ICCPR, and the prevention of statelessness was intended by the provision. The CEDAW covers nationality from the perspective of gender equality and provides for the prevention of statelessness as a result of marriage.

Similar to the ICCPR, states intended to prevent statelessness by the CRC's clause on the children's right to acquire a nationality. Although a measure to implement the prevention of statelessness was not included in the provision, the emphasis on the prevention of statelessness allowed the CRC to mention the "stateless" in Article 7(2). This chapter begins with an analysis of the emergence of nationality, which is a precondition of the occurrence of statelessness.

1.2. The Emergence of Nationality and the Nation-State Principle

The concepts of nationality and statelessness emerged after the introduction of the nation-state principle. The nation-state principle developed after the French Revolution. In the eighteenth century, ideas of the Enlightenment spread throughout France.[49] Around that time, people, the elites in particular, questioned the monarchical system in place at the time.[50] The Universal Declaration of the Rights of the Man and the Citizen in 1789 played an important part in people's questioning of the existing system. This declaration was drafted by liberal revolutionaries and Article 3 of the declaration provided that "sovereignty" essentially resides with the "nation".[51] When the sovereign state system became the norm in the seventeenth century,[52] secular kings and princes were regarded as sovereign.[53] However,

[49] Marisa Linton, *The Intellectual Origins of the French Revolution*, *in* THE ORIGINS OF THE FRENCH REVOLUTION 139, 140 (Peter R. Campbell ed., 2006).
[50] Note that it is said that the Enlightenment is not the only cause of the French Revolution. *Id*, at 141.
[51] The original text of the Universal Declaration of the Rights of the Man and the Citizen can be found from the following. Conseil Constitutionnel, Déclaration des Droits de l'Homme et du Citoyen de 1789 [*The 1789 Universal Declaration of the Rights of the Man and the Citizen*], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html (visited Jan. 16, 2019).
[52] It is said that 1648, when the Thirty Years' War ended, is the beginning of the current sovereign state system. While some secular political units exercised sovereignty even before the end of the Thirty Years' War (Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55(2) INT'L ORG. 251, 251 (2001).), the sovereignty of secular political unit were recognised as a principle in international society as a result of the Peace of Westphalia in 1648. Daud Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, 9 YEARBOOK OF NEW ZEALAND JURISPRUDENCE 62, 66-67 (2006).
[53] See the following. Osiander, *supra* note 52, at 252.

this understanding was challenged by the declaration of 1789. By the "nation", the declaration meant the people,[54] and it shifted the bearer of sovereignty from the king to the people who constituted the state. For the liberal revolutionaries, there were two significant points. First, in order to mobilise the people of France to overthrow the king, the revolutionaries wanted to make them aware that the French people shared a collective identity.[55] Second, in order to strengthen that shared collective identity, the concept of equality was necessary. Article 3 of the declaration was strong enough for the people of France to believe that they shared a collective identity as the French people, and as a result, they sought to liberate themselves from the tyranny of the king.[56] This collective identity can be seen as nationalism, which provides an emotional basis for the concepts of the nation and nationality.

After the revolution, the extent of those considered nationals was "substantiated" by the concept of "nationality".[57] Since the "French people" became the bearer of sovereignty in France, it was necessary to determine who the French people were. In this context, the legal system developed,[58] determining the scope of the French nationals. In the first

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[54] The word "nation" originated in the Latin word *natio*, which meant place of birth or origin. WALTER C. OPELLO, JR. & STEPHEN J. ROSOW, THE NATION-STATE AND GLOBAL ORDER: A HISTORICAL INTRODUCTION TO CONTEMPORARY POLITICS 181 (1999). Anderson defines a nation as "an imagined political community – and imagined as both inherently limited and sovereign". He explains that a nation has the features of being "imagined", "limited", and a "community". First, a nation is imagined because the members of the nation have not met all other members of the nation. Second, it is limited because there are always the *others*, outside of the nation, and there is boundary between *us* and the *others*. Third, it is a community because the sense of the nation allows members to feel comradeship even if there is inequality among members. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6-7 (Rev. ed., 1991).

[55] In order to mobilise people, nationalism was "invented" by state elites. ERNEST GELLNER, NATIONS AND NATIONALISM 65 (1983). Although the concept of "nation" was invented by elites, there must also be a basis upon which the people can accept such a concept. See the following. ANDERSON, *supra* note 54.

[56] OPELLO & ROSOW, *supra* note 54, at 183.

[57] ARAKAKI, *supra* note 8, at 14. Even before then, there was a concept of being French. The Paris Parliament, the court under the monarchy system, decided who the French were. For details, see the following. PATRICK WEIL, HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1980 (translated by Catherine Porter) 1-3 (2008). However, it was after the French Revolution that the concept of nationality developed.

[58] In a nation-state system, the law, the constitutional law in particular, plays a significant role. It is reported that during the era of the Bourbon Dynasty, Louis XIV said "*l'état, c'est moi*" [The State? I am

constitution of France, in 1791, conditions required to be "French citizens" were included.[59] At the time, the word "citizens" (*citoyens* in French) was used,[60] but the background of the revolution indicates that the "citizens" in these constitutions assumed that citizens shared a collective identity. Therefore, the 1791 French Constitution can be seen as the first constitution under the nation-state system. The word "nationality" (*nationalité* in French) began to be used in the beginning of the nineteenth century, and it was used as a synonym for the "quality of being French", which was also used as substitute for "citizens" by many authors from the 1840s.[61] In the legal sphere, the word "nationality" was used in the treaties France concluded with other states during the 1860s.[62] In French law, the word nationality was used for the first time in 1889.[63]

This nation-state system spread across Europe after 1848 as a result of revolutions in many parts of Europe, referred to as the Spring of Nations. Although the revolutions were not necessarily successful in Italy or Germany in 1848, nationalism increased, helping in the

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the state.]. THOMAS CARLYLE, THE FRENCH REVOLUTION: A HISTORY Volume I 8 (1906). This implies that the king was the ruler and sovereign, and written law was not necessarily significant. However, after the bearer of sovereignty became the nationals of the state, laws played an important role since no one individual could make decisions as the only bearer of sovereignty. See the following. Ulrich K. Preuss, *The Political Meaning of Constitutionalism, in* CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 11, 15 (Richard Bellamy ed., 1996).

[59] See Title II, Article 2 of the following. Conseil Constitutionnel, Constitution de 1791 [*The 1791 Constitution*], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1791.5082.html (visited Jan. 16, 2019).

[60] Constitutions in 1793 (Article 4), 1795 (Article 8) and 1799 (Article 2) also used the word "citizens". See the following. Conseil Constitutionnel, Constitution du 24 juin 1793 [*The Constitution of 24 June 1793*], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-24-juin-1793.5084.html (visited Jan. 16, 2019). Conseil Constitutionnel, Constitution du 5 Fructidor An III [*The Constitution of 5 of the Twelfth Month, Year III*], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-5-fructidor-an-iii.5086.html (visited Jan. 16, 2019). Conseil Constitutionnel, Constitution du 22 Frimaire An VIII [*The Constitution of 22 of the Third Month, Year VIII*], *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-22-frimaire-an-viii.5087.html (visited Jan. 16, 2019).

[61] WEIL, *supra* note 57, at 258-259.

[62] The Turin Treaty (24 March 1860) and annexation treaties between France and Monaco (2 February 1861) and between France and Switzerland (8 December 1862) used the word "nationality". *Id*, at 259.

[63] The reason why the word "nationality" appeared in the Constitution around that time is not clear from the available sources. *Id*, at 259.

unification of Italy in 1861[64] and Germany in 1871.[65] Nationalism emerged in other parts of the Habsburg Empire at the time as well.[66] In Italy, the concept of nationality was incorporated into the 1865 Civil Code,[67] and the first German "nationality law" was introduced in 1913.[68]

Nationality was introduced into other regions, such as the Americas and Asia, in the late nineteenth century. New states in these regions learnt the concept of nationality from Europe, and they introduced the system of nationality.[69] For instance, the US and Japan determined their definitions of nationals in their own municipal laws. Section One of the Fourteenth Amendment of the US Constitution in 1868 provided that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside".[70] This Amendment of the constitution determined the scope of nationals of the US holistically for the first time.[71] As this

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[64] GIOVANNA ZINCONE & MARZIA BASILI, COUNTRY REPORT: ITALY, EUDO CITIZENSHIP OBSERVATORY 4 (2013). For the process of Italian unification, see the following. JOHN MERRIMAN, A HISTORY OF MODERN EUROPE: FROM THE RENAISSANCE TO THE PRESENT 754-765 (1996).

[65] For the process of the German unification, see the following. MERRIMAN, *supra* note 64, at 765-778.

[66] *Id*, at 778.

[67] The Civil Code used the word "citizenship" (*cittadinanza*). ZINCONE & BASILI, *supra* note 64, at 5. Italy prepared a law on nationality at an earlier period than did other states.

[68] KAY HAILBRONNER, COUNTRY REPORT: GERMANY, EUDO CITIZENSHIP OBSERVATORY 1 (2012).

[69] In the colonies, nationality was not necessarily introduced. For instance, in the French colonies, French citizenship, which entailed political rights, was introduced, but French nationality, which was composed of political rights and civil status, was not introduced at the end of the nineteenth century. Lorelle D. Semley, *"Evolution Revolution" and the Journey from African Colonial Subject to French Citizen*, 32(2) L. AND HISTORY REV. 267, 276 (2014). Although the difference between French citizenship and French nationality at the time is not clear, this indicates that people in the colonies were regarded as having some kind of tie with France, but they were not necessarily regarded as equal members of France.

[70] For more details on Section One of the Fourteenth Amendment, see the following. Library of Congress, *Fourteenth Amendment and Citizenship*, *at* https://www.loc.gov/law/help/citizenship/fourteenth_amendment_citizenship.php (visited Jan. 16, 2019).

[71] This amendment was triggered by the abolition of slavery after the end of the Civil War. There had previously been a decision that did not recognise the status of black people as citizens of the US, but this decision was overturned by the Fourteenth Amendment. JOHN R. VILE, A COMPANION TO THE UNITED STATES AND ITS AMENDMENTS 185 (4th ed., 2006). As a result, black people born in the US became US nationals. With regard to terminology, it must be pointed out that the term "citizens" is used in the US law. However, this "citizenship" should be interpreted as "nationality" in the international legal sense, so this dissertation uses "nationality" instead. See "Scope and Terminology of the Dissertation" in the Introduction.

dissertation discusses, Japan adopted its first nationality act in 1899.[72] These examples indicate that, in some cases, the concept and practice of nationality spread not because European states imposed such a system but because there were non-European states who introduced a nationality system.[73]

1.3. The Norm of Preventing Statelessness in International Law

1.3.1. Awareness of the Issue of Statelessness as a Challenge to the International Order

Statelessness began to be regarded as an issue by international legal scholars in the late nineteenth century and by states in the 1920s.[74] After that, the prevention of statelessness was provided for in international law. This subsection explores why statelessness came to be regarded as an issue during those periods, and the following subsections examine how and why the prevention of statelessness was intended by international treaties, referring to the drafting process of each treaty.

In the late nineteenth century, states were the main actors in international law, and international legal scholars regarded statelessness as something that should be prevented, mainly from the perspective of the maintenance of international order.[75] At the time, individuals were not regarded as subjects in international law; they were recognised by

[72] See 2.3., "The 1899 Nationality Act".
[73] This point is relevant to the analysis of this dissertation. See 4.2.1., "The Status of Japan in International Society".
[74] Arakaki notes that "nationality and statelessness have the same length of history". ARAKAKI, *supra* note 8, at 14. However, it must be noted that statelessness was not necessarily regarded as an issue when the concept of nationality emerged in the French Revolution. Theoretically, statelessness could have arisen when France introduced the concept of nationality, but at the time, many states had not introduced it. In other words, nationality was not necessarily a significant issue for many states, and as a result, statelessness was not a significant issue either. Thus, it must be emphasised that statelessness was regarded as an issue to be discussed only after a certain number of states had introduced a nationality system.
[75] This can be contrasted with the emphasis on the prevention of statelessness in current international law from the perspective of human rights. See the following. Peter J. Spiro, *A New International Law of Citizenship* 105 AJIL 694, 709 (2011).

international law through their nationality, which bound individuals and states.[76] Stateless persons were regarded as a challenge to the international order because no state was responsible for their actions, including illegal ones.[77] This is one reason why international legal scholars called for the prevention of statelessness. In 1895, at a conference held in Cambridge, the IDI, an organisation composed of experts in international law,[78] adopted a resolution called "Principles relating to conflicts of laws concerning nationality".[79] The first principle was that "No one shall be without nationality".[80] This indicates that international lawyers were beginning to regard statelessness as an issue by the end of the nineteenth century.

Statelessness and nationality matters were discussed in the LN, which was established in 1920. Pursuant to the resolution of the LN Assembly on 22 September 1924, the Committee of Experts for the Progressive Codification of International Law discussed matters necessary for codification,[81] and nationality was included as one of them.[82] The report of the sub-committee on nationality in 1926 mentioned that the "lack of any

[76] By 1928, the role of nationality in individuals' entitlement to receive benefits provided by international law was recognised. Lassa Oppenheim, a well-known international legal scholar, stated that "since they [i.e., stateless persons] do not own a nationality, the link by which they could derive benefits from International Law is missing". L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE VOL. I. PEACE 546 (4th ed., 1928).
[77] Spiro, *supra* note 75, at 709.
[78] The IDI was established in 1873, and its purpose was to "promote the progress of international law". For the statutes of the IDI, see the following. IDI, *Statutes*, *available at* http://www.idi-iil.org/app/uploads/2017/06/Statutes-of-the-Institute-of-International-Law.pdf (visited Jan. 16, 2019).
[79] IDI, Principles relatifs aux conflits de lois en matière de nationalité (naturalisation et expatriation) [*Principles relating to Conflicts of Laws concerning Nationality (Naturalisation and Expatriation)*], *available at* http://www.idi-iil.org/app/uploads/2017/06/1895_camb_02_fr.pdf (visited Jan, 16, 2019).
[80] The second principle was "No one can have two nationalities simultaneously". *Id*. Both principles were translated from French by the author. These principles indicate that both positive and negative conflicts of nationality was regarded as an issue.
[81] The committee was composed of "representatives of the main forms of civilization and the principal legal systems of the world". ILC, *About the Commission*, *at* http://legal.un.org/ilc/league.shtml (visited Aug. 14, 2019). See the following. Manley O. Hudson, *General Introduction*, 23(2) AJIL 1, 1-3 (1929).
[82] Territorial waters, diplomatic privileges and immunities, responsibility of states in respect to injury caused in their territory to persons or property of foreigners, procedure of international conferences and procedure for the conclusion and drafting of treaties, piracy, and exploitation of the products of the sea were also listed as issues to be discussed. UN, *Documents on the Development and Codification of International Law* 41 Supplement AJIL 29, 68-69 (1947).

nationality (*Heimatlosat*) has become very frequent and constitutes a serious problem in international life",[83] and it called for the prevention of statelessness.[84] For instance, many people were denationalised by Russia in 1921, and this resulted in statelessness.[85] In this context, the Committee of Experts for the Progressive Codification of International Law regarded nationality issues needed to be codified by the LN Assembly in 1927,[86] and statelessness was discussed in the Codification Conference held in 1930.

1.3.2. The 1930 Convention: The Emphasis on Married Women and Children

The 1930 Convention was the first convention to provide for the prevention of statelessness among married women and children.[87] In addition to the concern for statelessness from the perspective of maintenance of international order,[88] the hardships that stateless married women faced was another driving force for states to work on the prevention of statelessness among married women. There were cases in which women married to foreign men became stateless. Marriage between non-American women and American men was one example. Some states provided that women lost their nationality when they married

[83] Committee of Experts for the Progressive Codification of International Law, LN, Questionnaire No. 1, adopted by the Committee at its Second Session, held in January 1926: Nationality, LN Doc. C.43.M.18.1926.V [C.P.D.I. 53], 2 (1926). *Heimatlosat* means homelessness in German.
[84] *Id*, at 5.
[85] J. H. W. VERZIJI, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART V NATIONALITY AND OTHER MATTERS RELATING TO INDIVIDUALS 44 (1972).
[86] See the following. Committee of Experts for the Progressive Codification of International Law, LN, *supra* note 83, at 2. Territorial waters and the responsibility of states also remained as issues to be codified. UN, *supra* note 82, at 106.
[87] It must be noted that the 1930 Convention provides for the prevention of statelessness among children only in some cases as will be explained later. The Committee of Experts for the Progressive Codification of International Law, which drafted the 1930 Convention, stated that, as of 1926, there was no customary law providing for the prevention of statelessness. Committee of Experts for the Progressive Codification of International Law, LN, *supra* note 83, at 5. Thus, the prevention of statelessness was covered in international law for the first time in the 1930 Convention. It must also be noted that Article 1 of the 1930 Convention provided that "It is for each State to determine under its own law who are its nationals". Thus, the 1930 Convention assumed that determination of nationals was a matter for each state, and it was on the basis of this understanding that the Convention covered the prevention of statelessness.
[88] See 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to the International Order".

foreigners.[89] In addition, US law did not confer nationality on non-American women who married American men.[90] As a result, some women became stateless when marrying Americans. In order to mitigate the "hardship"[91] and "injustices"[92] married women faced, a method of preventing statelessness among married women was considered. Women's organisations campaigned on this issue in the international arena.[93] The 1930 Convention included articles on the prevention of statelessness in this context. It also provided for the prevention of statelessness among children in some cases, while the reason why this was included in the 1930 Convention is not clear from available sources.[94] Although the hardships that married women faced comprised one trigger for the drafters of the 1930 Convention to include the prevention of statelessness among married women, it must be emphasised that the basic motivation of the 1930 Convention seems to have been maintenance of international order, and the concept of human rights, including women's rights, did not develop in international law until the end of WWII.[95]

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[89] It is said that 24 states determined loss of women's nationality in cases of international marriage. J. W. Garner, *Uniformity of Law in Respect to Nationality*, 19(3) AJIL 547, 548-549 (1925). It was assumed that women acquired the nationality of their husband in cases of international marriage.
[90] *Id*, at 549.
[91] Richard W. Flournoy, Jr., *Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law*, 24(3) AJIL 467, 476 (1930).
[92] Garner, *supra* note 89, at 548.
[93] Flournoy, *supra* note 91, at 476. In 1923, the International Woman Suffrage Alliance adopted a draft convention that prevented "the hardships arising from conflicts of law". *Id*, at 551.
[94] However, one possibility is that the prevention of statelessness among children was regarded as the first step to preventing statelessness that was regarded as necessary from the perspective of maintenance of international order. As will be discussed later, the scope of the prevention of statelessness among children covered in the 1930 Convention was limited to the case of foundlings. It may have been less controversial for states to include this provision than a principle that nationality to be conferred on the basis of either *jus soli* or *jus sanguinis,* such as Articles 1 and 4 of the 1961 Convention. See also 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[95] The preamble of the 1930 Convention states that "it is in *the general interest of the international community* to secure that all its members should recognise that every person should have a nationality and should have one nationality only" (emphasis added). Although it is difficult to interpret what "the general interest of the international community" means, this preamble implies that married women's rights were not considered the most significant motivation for adopting the 1930 Convention. However, it must be pointed out that the "interests of individuals" were also mentioned during the drafting process of the 1930 Convention. See the following. LN, Acts of the Conference for the Codification of International Law Held at The Hague from March 13th to April 12th, 1930: Meetings of the Committees, Vol. II Minutes of the First Committee, Nationality, LN Doc. C.351(a).M.145(a).1930.V, 18 (1930).

Articles 8, 9 and 14 to 16 of the 1930 Convention covered the prevention of statelessness. Articles 8 and 9 concerned married women, and they contributed to preventing married women's loss of nationality. Article 8 established that the nationality of a married woman could be lost only when she acquires the nationality of her husband. Article 9 held that when a husband changed his nationality during marriage, the nationality of the woman to whom he was married could be lost only if she acquired the new nationality of her husband. These articles ensured that married women acquired another nationality when they lost their original nationality. Articles 14 to 16 covered children. Article 14 stated that a child whose both parents were not known, namely, foundlings, acquired the nationality of the state in which the child was born. Article 15 allowed a state to confer a nationality on a child born in the territory of the state whose parents did not have any nationality or whose nationality was unknown.[96] Article 16 provided that when the nationality of a child born out of wedlock was lost as a result of a change in civil status, such as recognition by a parent, the loss had to be conditional on the child's acquisition of another nationality. Although the 1930 Convention was not a comprehensive treaty in preventing statelessness, it determined some measures to prevent statelessness among married women and, in some cases, children.

1.3.3. The 1957 Convention: Married Women's Human Rights

The first universal treaty that covered the prevention of statelessness from a human rights perspective was the 1957 Convention. Both the 1930 and 1957 Conventions concerned the nationality of married women, but they were different because human rights were the driving force of adoption for the latter while the former did not mention human rights. One

[96] It must be emphasised that Article 15 did not place an obligation on states to confer a nationality on the basis of the *jus soli* principle since the provision stated that nationality "may" be conferred. Article 15 reads that "Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, *may* obtain the nationality of the said State" (emphasis added). However, it is notable that the *jus soli* principle was mentioned in cases where both parents' nationalities were not known.

significant development was the adoption of the UDHR. The UDHR, the first international instrument on human rights, covers nationality, and nationality began to be regarded as a human right.[97] The preamble of the 1957 Convention mentioned the UDHR, indicating that human rights were the basis of the 1957 Convention.[98]

The origin of the 1957 Convention dates back to 1949. Referring to the reality that married women tended to face a conflict between nationality laws and Article 15 of the UDHR, the CSW stated that a convention on the nationality of married women should be adopted.[99] The CSW also stated that the convention should "prevent a woman from becoming stateless or otherwise suffering hardships arising out of these conflicts in law".[100] In 1950, it proposed the ILC to draft a convention on married women "as soon as possible",[101] and the ECOSOC was also requested to draft a convention to eliminate statelessness.[102] In a report prepared by the ILC in 1952, a draft convention was attached, but the subject was not married women, as requested by the CSW, but married persons in

[97] Article 15 of the UDHR stated that: "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

[98] A paragraph of the preamble of the 1957 Convention states that (*sic*):

> *Recognizing* that, in article 15 of the Universal Declaration of Human Rights, the General Assembly of the United Nations has proclaimed that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[99] E/RES/242 (IX) C. Report of the Third Session of the Commission on the Status of Women: Resolutions of 1 August 1949. Economic and Social Council Official Records: Fourth Year, Ninth Session, 5 July–15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 39 (1949). The CSW is a commission of the ECOSOC which is mandated to "prepare recommendations and reports to the Economic and Social Council on promoting women's rights." E/RES/11(II). Commission on the Status of Women, 21 June 1946.

[100] E/RES/242 (IX) C. Report of the Third Session of the Commission on the Status of Women: Resolutions of 1 August 1949. Economic and Social Council Official Records: Fourth Year, Ninth Session, 5 July–15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 39 (1949).

[101] E/RES/304 (XI) D. Report of the Commission on the Status of Women (fourth session). Economic and Social Council Official Records: Fifth Year, Eleventh Session, Supplement No. 1 Resolutions E/1849/Corr.1&2, 30-31 (Nov. 29, 1950). The ILC was established by the Resolution 174 of the UNGA in 1947 to promote "the progressive development of international law and its codification." Article 1 of the Statute of the ILC. A/RES/174(II), Nov. 21, 1947.

[102] E/RES/319 (XI) B. Economic and Social Council Official Records: Fifth Year, Eleventh Session, Supplement No. 1 E/1849/Corr. 1&2, 58-59 (Nov. 29, 1950). See 1.3.4., "The 1961 Convention: Link with Refugee Issues".

general.[103] The ILC believed that there must be "no distinction based on sex" in dealing with nationality issues, so married persons rather than married women became the subjects of the draft convention.[104]

The draft convention on the nationality of married persons was negotiated in the CSW in 1953, and some states argued that married women should be the focus of the convention because of the "urgent necessity of action to improve the status of married women in the field of nationality".[105] In response, Cuba proposed a convention on the nationality of married women, and the Cuban draft was discussed in the CSW in 1954.[106] This draft became a basis for the 1957 Convention. This drafting process indicates that mitigation of the plight of married women was the motivation for adopting the 1957 Convention, so human rights were the normative basis of the Convention.

Article 1 provided that marriages to aliens or the dissolution of marriages with aliens did not affect the nationality of the wife. This functioned to prevent women's loss of nationality that might result in statelessness in cases of international marriages or the dissolution of international marriages. Article 2 determined that the husband's acquisition of another nationality or renunciation of his original nationality did not prevent his wife from

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[103] UN, Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur, A/CN.4/50, 13 (Feb. 21, 1952). Although the ILC did not discuss matters relevant to statelessness in 1951, because it discussed other matters, such as reservations to multilateral conventions, definitions of aggression, the law of treaties, and the regime of the high seas, it stated that statelessness would be dealt with in the ILC in the future. UN, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1951 VOLUME II, Report of the International Law Commission to the General Assembly: Report of the International Law Commission Covering the Work of its Third Session, 16 May-27 July 1951, A/CN.4/48 and Corr.1 & 2, 123-144 (1951). In such circumstances, the CSW "*express*[ed] *the hope*" [*sic*] that the ILC would draft a convention on the nationality of married women in 1951. E/RES/385(XIII) F, Report of the Commission on the Status of Women (fifth session) (Aug. 27, 1951).

[104] UN, *supra* note 103 (A/CN.4/50), at 13.

[105] UN, Commission on the Status of Women: Report of the Seventh Session (16 March-3 April 1953) ECOSOC Official Records: Sixteenth Session, Supplement No. 2, E/2401, E/CN.6/227, para. 19 (1953). It must be noted that married women tended to be stateless around that time. See 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children". The CSW argued that the prevention of an automatic loss of nationality upon marriage to an alien husband was the most significant concern for it. UN, Commission on the Status of Women, Report of the Eighth Session, 22 March-9 April 1954, ECOSOC, Official Records: Eighteenth Session, Supplement No. 6, E/CN.6/253, 6 (1954).

[106] UN, *supra* note 105 (E/CN.6/253), at 5-6.

retaining her nationality. This article itself did not provide for the prevention of statelessness, but it prevented married women's loss of nationality in certain cases and therefore effectively helped to prevent statelessness.[107] The prevention of women's loss of nationality in relation to marriage was the central concern for states when the 1957 Convention was drafted.

1.3.4. The 1961 Convention: Link with Refugee Issues

The 1961 Convention was a holistic convention to prevent statelessness. The background of the 1961 Convention was different from that of the 1930 and 1957 Conventions.[108] The 1961 Convention was drafted to react to refugee issues.

When WWII ended, there were many stateless persons in Europe, and this triggered the UN to work on the prevention of statelessness. It was estimated that most of the 400,000 to 450,000 German nationals were denationalised.[109] In 1947, the International Refugee Organization recognised 2.7 million stateless refugees,[110] and solutions for refugees and stateless persons were explored. In this context, in 1948, the ECOSOC requested that the Secretary-General undertakes a study of the existing situation of the protection of stateless persons and municipal and international laws relevant to statelessness.[111] In addition, the Secretary-General was requested to submit recommendations on the desirability of concluding international agreements on statelessness.[112] In response, the Department of

[107] Article 3 provided for married women's privileged naturalisation to the nationality that her husband possessed. Because the focus of this dissertation is not naturalisation, it does not cover this article.
[108] See 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children", and 1.3.3., "The 1957 Convention: Married Women's Human Rights".
[109] The UN report also refers to cases of statelessness in the Austro-Hungarian Monarchy, Russia and Eastern Europe. UN, *supra* note 103 (A/CN.4/50), at 17.
[110] UN, A STUDY OF STATELESSNESS E/1112, E/1112/Add. 1, 7-8 (1949).
[111] E/RES/116 (VI) D. Resolutions adopted by the Economic and Social Council during its Sixth Session 18 (2 February to 11 March 1948).
[112] *Id*, at 18.

Social Affairs of the UN published A STUDY OF STATELESSNESS.[113] In this study, not only stateless persons but also refugees were covered since they were in a similar situation in practice at the time.[114] The study stated that there were no statistics on stateless persons who were not refugees, and continued that "[t]he only thing that can be said is that their number [i.e., the number of stateless persons who are not refugees] is limited".[115] This implies that the phenomena of stateless persons and refugees were closely linked at the time.[116] The study proposed two solutions to the issue of statelessness: "improvement of the status of stateless persons and the elimination of statelessness".[117] In other words, "the elimination of statelessness" was coupled with an improvement in the status of stateless persons in the same context of the "question of displaced persons, refugees and stateless persons".[118] This is a significant finding of this dissertation because it has been commonly understood that the 1930 Convention was a conceptual root of the 1961 Convention, and the historical relationship between the 1961 Convention and an improvement in the status of stateless persons has not been explained before.[119]

After A STUDY OF STATELESSNESS was published, the ECOSOC considered the status of stateless persons and the elimination of statelessness as a response to the issues of stateless persons and refugees. It adopted a resolution on a "Study of Statelessness", and this resolution on the "question of displaced persons, refugees and stateless persons" considered

[113] UN, *supra* note 110.
[114] It must be pointed out that stateless persons and refugees were not separated historically. Osamu Arakaki, Mukokusekisha no Nanminsei: Nyuujiiranndo no Jissen no Kentou wo Chuushin ni [*Stateless Refugees: Practice of New Zealand as a Case Study of Refugee Status Determination*], 31 YEARBOOK OF WORLD L. 65, 68 (2012).
[115] UN, *supra* note 110, at 5.
[116] However, it must be noted that this study introduced both the concepts of stateless persons and refugees. Thus, there seems to have been a conceptual distinction between stateless persons and refugees at the time although the exact difference is not clear from the study.
[117] UN, *supra* note 110, at 12.
[118] E/RES/248 (IX). Economic and Social Council Official Records: Fourth Year, Ninth Session 5 July-15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 60 (1949).
[119] For an example of the typical understanding of the history of the drafting process of the 1961 Convention, see Paul Weis, *The United Nations Convention on the Reduction of Statelessness, 1961*, 11 INT'L & COMPARATIVE L. QUARTERLY 1073, 1073-1078 (1962). ARAKAKI, *supra* note 8, at 23-24.

the following two matters: the status of refugees and stateless persons and the elimination of statelessness.[120] It then decided to appoint an *Ad Hoc* Committee, composed of representatives from thirteen states, to work on preparing a "convention relating to the international status of refugees and stateless persons"[121] and on considering the desirability of requesting that the ILC prepare a study on the elimination of statelessness.[122]

The status of refugees and stateless persons received more attention than the elimination of statelessness, particularly after the discussions in the *Ad Hoc* Committee. The *Ad Hoc* Committee discussed the international status of refugees and stateless persons and means of eliminating statelessness.[123] On the one hand, it prepared a Draft Convention relating to the Status of Refugees and a Protocol relating to the Status of Stateless Persons, which provided a basis for the Refugee Convention and the 1954 Convention in response to the request from the ECOSOC.[124] On the other hand, it did not prepare a convention to eliminate statelessness although it identified four basic causes of statelessness – failure to acquire nationality at birth, loss of nationality through marriage and dissolution of marriage, voluntary renunciation of nationality and deprivation of nationality – and recommended that the ECOSOC request that the ILC prepare a draft convention to eliminate statelessness.[125] It offered two reasons for not preparing a draft convention on the elimination of statelessness.

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[120] E/RES/248 (IX). Economic and Social Council Official Records: Fourth Year, Ninth Session 5 July – 15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 60 (1949).
[121] E/RES/248 (IX) B. Economic and Social Council Official Records: Fourth Year, Ninth Session 5 July – 15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 60 (1949).
[122] E/RES/248 (IX) B. Economic and Social Council Official Records: Fourth Year, Ninth Session 5 July – 15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 60-61(1949).
[123] UN ECOSOC, Report of the *Ad Hoc* Committee on Statelessness and Related Problems: Lake Success, New York 16 January to 16 February 1950. E/1618, E/AC.32/5, para. 13 (Feb. 17, 1950), *available at* http://www.refworld.org/docid/40aa15374.html (viewed Jan. 17, 2019).
[124] *Id*, at 11-63. It must be noted that refugees received more attention than stateless persons at the time. The *Ad Hoc* Committee stated that refugees are "the special concern of the United Nations". *Id*, at 63. As a result, a Draft *Convention* relating to the status of refugees and a Draft *Protocol* relating to the status of stateless persons were drafted. See the following. ARAKAKI, *supra* note 8, at 20. For the relationship between reaction to the refugees and stateless persons, see 4.2.2., "Status of the Norm of Preventing Statelessness in International Society".
[125] UN ECOSOC, *supra* note 123, at paras. 23, 26.

First, it spent so much time on drafting the Draft Convention relating to the Status of Refugees that no time remained for drafting a convention on the elimination of statelessness.[126] Second, it was difficult for the *Ad Hoc* Committee "to approach in the necessary detail a matter of such complexity".[127] It must be emphasised that the ECOSOC did not request that the *Ad Hoc* Committee draft a convention on the elimination of statelessness.[128] As a result, the elimination of statelessness was separated from the protection of the status of refugees and stateless persons. The Refugee Convention was adopted in 1951, and the 1954 Convention was adopted in 1954, while a convention to eliminate statelessness was not adopted at the time.[129]

On the basis of the report submitted by the *Ad Hoc* Committee, the ECOSOC adopted a resolution on refugees and stateless persons in 1950, and it urged the ILC to draft an international convention for the elimination of statelessness.[130] In 1953, two draft conventions, namely, a Draft Convention on Elimination and a Draft Convention on Reduction,[131] were prepared, and they were discussed in the UN Conference on the

[126] *Id*, at para. 25.
[127] *Id*, at para. 25.
[128] E/RES/248 (IX) B. Economic and Social Council Official Records: Fourth Year, Ninth Session 5 July-15 August 1949 Resolutions. Supplement No. 1, E/1553/Corr.1, 60-61(1949). Although the reason why the ECOSOC did not request this is not clear from the available sources, there are three possible reasons. The first possibility is that the status of refugees and stateless persons was regarded as more significant than the elimination of statelessness. The protection of refugees and stateless persons stabilised the status of refugees and stateless persons at the time while the elimination of statelessness was a preventive measure. Thus, in practical terms, the immediate impact for refugees and stateless persons might have been more important than any preventive measure. The second possibility is that the implementation of the elimination of statelessness was too controversial even though states had agreed the need to eliminate statelessness. Since the elimination of statelessness requires a state to confer its nationality, it is directly relevant to membership of the state, which is regarded as the central issue for each state. As a result, states might have been cautious about drafting a convention on the elimination of statelessness. The third possibility is that nationality matters were regarded as too technical, so it was assumed that legal experts, members of the ILC, should draft a convention, not state representatives. This may have been what the *Ad Hoc* Committee meant by "complexity" when it explained why it did not draft a convention on the elimination of statelessness. *Id*, at para. 25.
[129] ARAKAKI, *supra* note 8, at 21. For further analysis, see 4.2.2., "Status of the Norm of Preventing Statelessness in International Society".
[130] E/RES/319 (XI) B. Economic and Social Council Official Records: Fifth Year, Eleventh Session. Supplement No. 1 E/1849/Corr. 1&2, 58-59 (Nov. 29, 1950).
[131] UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness: Text of the Draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future

Elimination or Reduction of Future Statelessness that took place in 1959 and 1961.[132] The drafting process at the conference implies that the states intended to maintain their discretion on nationality matters while they agreed to eliminate or reduce statelessness. The Draft Convention on Elimination was more ambitious than the Draft Convention on Reduction in preventing statelessness.[133] For instance, while the Draft Convention on Elimination applied the *jus soli* principle to all cases where individuals could not acquire other nationalities, the Draft Convention on Reduction limited the cases where the *jus soli* principle was to be applied.[134] Concerning the deprivation of nationality, the Draft Convention on Elimination prohibited any case of deprivation of nationality.[135] By contrast, the Draft Convention on Reduction listed some exceptions to prohibition of deprivation of nationality.[136] At the conference, many representatives supported the Draft Convention on Reduction because it would receive wider support from states, and the Draft Convention on Reduction became

Statelessness prepared by the International Law Commission at its Sixth Session, A/CONF.9/L.1 (March 20, 1959).

[132] They were first prepared by Roberto Córdova, the Special Rapporteur of the ILC, and revised by the ILC in 1953. UN, Nationality, including Statelessness, Report on the Elimination or Reduction of Statelessness, by Mr. Roberto Córdova, Special Rapporteur, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, A/CN.4/64, 187-194 (Mar. 30, 1953). See the following. ARAKAKI, *supra* note 8, at 23. In addition to these drafts, the draft submitted by the Danish delegation was also presented on 24 March 1959, the first day of the conference. The Denmark draft put an emphasis on *jus sanguinis*. UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness, Denmark: Memorandum with Draft Convention on the Reduction of Statelessness, A/CONF.9/4 (Jan. 15, 1959). However, the Danish draft did not receive much support.

[133] ARAKAKI, *supra* note 8, at 23.

[134] Paragraphs 2 and 3 of Article 1 of the Draft Convention on Reduction read as follows:

> 2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen years and on the condition that on attaining that age he does not opt for and acquire another nationality.
> 3. If, in accordance of the operation of paragraph 2, a person on attaining the age of eighteen years would become stateless, he shall acquire the nationality of one of his parents, if such parent has the nationality of one of the Parties. Such Party may make the acquisition of its nationality dependent on the persons having been normally resident in its territory. The nationality of the father shall prevail over that of the mother.

UNGA, *supra* note 131, at 3.

[135] *Id*, at 5.

[136] If a person became a threat to the security of the state of the person's nationality, he or she could be deprived of their nationality. In addition, if a person acquired a nationality via naturalisation, and that person lived in the state of their birth, which was not the state of their nationality, for more than five years, they could be deprived of their nationality. Even in such cases, nationality could not be removed if such deprivation of nationality rendered the person stateless. *Id*, at 5.

the basis of discussions.[137] This drafting process of the 1961 Convention indicates that although states could agree to *reduce* statelessness, their commitment was not strong enough to *eliminate* statelessness completely.

The 1961 Convention provided for the acquisition of nationality by birth and prevention of loss of nationality from the perspective of human rights.[138] Articles 1 to 4 concerned a child's acquisition of nationality. Article 1 established that the nationality of the state of birth is granted to persons "who would otherwise be stateless".[139] Article 2 provided that a foundling found in the territory of a state is considered to have been born in the territory of that state from its parents having that nationality. It did not provide for the conferral of nationality by itself, but it was expected to constitute the basis for conferral of nationality since it made an assumption about the parents and the place of birth.[140] Article 3 provided that persons born on a ship or in an aircraft were considered to be born in the territory of the state of the flag flown by the ship or of the state to which the aircraft was registered. It was

[137] 28 voted for and none against, with five abstentions. Orally, nine states (the UK, China, Yugoslavia, France, Canada, Ceylon, the US, the Netherlands and Sweden) supported the Draft Convention on Reduction. Four states (Belgium, Italy, Brazil, and Turkey) supported the Draft Convention on Elimination. Italy preferred the draft on elimination on the basis that it was better for individuals. UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary Record of the Second Plenary Meeting Held at the Palais des Nations, Geneva, on Wednesday, 25 March 1959, at 10.05 a.m., A/CONF.9/SR.2 (Apr. 24, 1961).

[138] Although the 1961 Convention did not explicitly mention human rights in its preamble, the drafting process and a careful reading of the provisions of the 1961 Convention imply that human rights were the basis of the 1961 Convention. The first reason for claiming this is that human rights were considered during the drafting process of the Convention. The preamble of the Draft Convention on Reduction stated that "the Universal Declaration of Human Rights proclaims that 'everyone has the right to a nationality'". UNGA, *supra* note 131, at 2. However, this was omitted in the final stage of the drafting process of the Convention. Mr. Larsen, the Danish chairman of the conference, stated that the Convention would not guarantee everyone the right to a nationality because statelessness could take place even when the Convention was fully implemented. In other words, he admitted that the Convention was not perfect to ensure the right to a nationality. This indicates that the purpose of the 1961 Convention was to guarantee human rights even though the Convention was not regarded as sufficient to guarantee human rights. The second reason is that a human rights perspective was mentioned in the provisions of the Convention. Although Article 7(1)(a) stated that a renunciation of nationality was prohibited unless the person acquired another nationality, Article 7(1)(b) stated that this principle (i.e. the prohibition of renunciation of nationality) did not apply if it was inconsistent with Articles 13 (freedom of movement) and 14 (right to seek asylum from persecution) of the UDHR. These reasons suggest that human rights were the underlying principle of the 1961 Convention.

[139] Conferral of a nationality can be conditional on application. See Article 1(1)(b) of the 1961 Convention.

[140] ARAKAKI, *supra* note 8, at 70.

introduced to prevent any confusion over the determination of the child's place of birth, which would have been problematic for determining nationality if states adopted the *jus soli* principle. Article 4 provided that the nationality of one of a child's parents would be granted to the child when he or she would otherwise be stateless, even if he or she was not born in the territory of the relevant state.

Articles 5 to 10 covered loss of nationality. Article 5 stated that nationality could not be lost in the case of a change in personal status, such as marriage, termination of marriage, recognition, or adoption unless the person acquired another nationality. Article 6 provided that even if the nationality of a child or of a spouse was lost as a result of a parent's or spouse's loss of nationality, the loss was conditional on the acquisition of another nationality. Article 7 stated that if renunciation of nationality was allowed under municipal law, this needed to be conditional on the acquisition of another nationality. Article 8 prohibited the deprivation of nationality if it led to the person becoming stateless.[141] Article 9 also banned deprivations of nationality based on racial, ethnic, religious or political reasons even if this did not lead to statelessness. Article 10 required states to include provisions on prevention of statelessness when they concluded treaties that provided for the transfer of territory. By these articles, the 1961 Convention prevented statelessness although statelessness could still occur even if the 1961 Convention was implemented.

[141] However, Articles 8(2) and 8(3) listed exceptions for prohibition of deprivation of nationality. For instance, if a nationality was acquired by misrepresentation or fraud, it could be deprived (Article 8(2)). In the 1961 Convention, deprivation is interpreted as withdrawal of a nationality initiated by state authorities not based on the operation of law. UNHCR, Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions") para. 9 (2014), *available at* http://www.refworld.org/docid/533a754b4.html.

1.3.5. ICCPR: Children's Right to Acquire a Nationality

The ICCPR was the first instrument to provide for the acquisition of nationality as a child's right. Article 24(3) of the ICCPR provided that "[e]very child has the right to acquire a nationality".

States primarily intended prevention of statelessness during the drafting process of a child's right to acquire a nationality in the ICCPR. First, Poland proposed the inclusion of the following provision: "The child shall be entitled from his birth to a name and a nationality" when it proposed a clause on protection of children to the ICCPR, and this became a basis of Article 24(3).[142] When Poland proposed a provision on a nationality, "there was agreement that every effort should be made to prevent statelessness among children", and many states supported the inclusion of this provision on nationality.[143] However, there were also objections to the inclusion of such a provision in the ICCPR. Opponents argued that "a State could not undertake an unqualified obligation to accord its nationality to every child born on its territory regardless of circumstances".[144] They pointed out that prevention of statelessness did not seem to receive much support from states, referring to the fact that the 1961 Convention had not received any ratification as of 1963.[145] Although there were such opponents, a provision on nationality remained and was adopted by 51 votes to 4, with 16 abstentions, after the text was changed to "Every child has the right to acquire a nationality."[146]

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[142] UNGA, Draft International Covenants on Human Rights, Report of the Third Committee, A/5365, para. 5 (Dec. 17, 1962).
[143] *Id*, at para. 25.
[144] UNGA, Draft International Covenants on Human Rights, Report of the Third Committee, A/5655, para. 76 (Dec. 10, 1963).
[145] *Id*, at para. 76. See the following. UN Treaty Collection, *Convention on the Reduction of Statelessness*, *at*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en (visited Aug. 30, 2019).
[146] Afghanistan, Brazil, Iran, Nigeria, Panama, Poland, the United Arab Republic, and Yugoslavia proposed this text. UNGA, *supra* note 144, at paras. 61, 84. Although the intention of this modified text is not clear from the available sources, one possibility is that it was intended to clarify the scope of the article since "the right to acquire a nationality" seems more concrete than "[t]he child shall be entitled from his birth to […] a nationality". The relationship between the right to acquire a nationality and

The subject of the article was limited to children, and there was no substantial debate to regard acquisition of a nationality as a human right in general. Some states "regretted the absence from the draft Covenant of an article on the right of everyone to a nationality".[147] However, they did not propose a clause on the acquisition of nationality in terms of human rights in general. Some states were even critical of the inclusion of the right of everyone to a nationality "because of the complexity of the problem".[148] It is not clear exactly what this meant, but opponents implied that the nationality issue was too controversial to regard as a human rights issue since nationality was a matter that each state determined.[149] In this context, it was not realistic for the right to acquire a nationality in the ICCPR to be regarded considered as a human rights in general. As a result, the ICCPR provided for children's right to acquire a nationality.[150]

1.3.6. CEDAW: Women's Right to a Nationality

Article 9 of the CEDAW read as follows:

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prevention of statelessness needs careful consideration. Although prevention of statelessness was mentioned during the drafting process, the provision did not include the words "prevention of statelessness". There are two possible interpretations of this. First, states intended to prevent statelessness by the words "the right to acquire a nationality". This interpretation is justified by the fact that many states agreed to prevent statelessness among children during the drafting process. UNGA, *supra* note 142, at para. 25. The second interpretation is that states were not ambitious enough to include a provision to implement the prevention of statelessness. Even states that supported the prevention of statelessness among children may not have wanted to *place an obligation* on states to prevent statelessness under the ICCPR.

[147] UNGA, *supra* note 144, at para. 76.

[148] *Id*, at para. 76.

[149] It must be noted that opponents stated that the right of everyone to a nationality was included in the UDHR but that it was not in the draft of the ICCPR. UNGA, *supra* note 142, at para. 25. Opponents seemed to mean that states agreed to include the right of everyone to a nationality in the UDHR because the UDHR was not a legally binding treaty. They seem to have hesitated to introduce such provision in the ICCPR because it was too controversial to include in a legally binding treaty.

[150] From the available documents, it is not clear why loss of nationality was not considered during the drafting process. However, it is possible that states assumed that a guarantee of acquisition of nationality was sufficient to prevent statelessness. Another possibility is that states may have believed that they had the discretion to determine individuals' nationality. However, elimination of statelessness was mentioned by some states during the drafting process, and it received a certain level of commitment from states. Thus, it is probable that acquisition of nationality was regarded as a sufficient measure to prevent statelessness among children.

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

This covers nationality in the context of women's rights. Although prevention of statelessness was not the sole purpose of the CEDAW, it was one central feature of the provision. Nationality and prevention of statelessness were included in the draft of the CEDAW from the beginning.[151] Article 5 of the DEDAW, which constitutes the philosophical basis of the CEDAW, provided for the prevention of statelessness among women.[152] Thus, inclusion of nationality and prevention of statelessness in the CEDAW was a natural consequence, given the history of the women's rights in international instruments.

Since married women tended to be stateless, the provision on the prevention of statelessness was included in Article 9(1) of the CEDAW.[153] In addition, Article 9(2)

[151] UN ECOSOC, Consideration of Proposals concerning a New Instrument or Instruments of International Law to Eliminate Discrimination against Women: Report of the Working Group to the Commission on the Status of Women, E/CN.6/574, 10-11 (Jan. 18, 1974). For the history of the drafting process of the CEDAW, see the following. Christine Chinkin & Marsha A. Freeman, *Introduction*, *in* THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 1, 6-7 (Marsha A. Freeman, Christine Chinkin and Beate Rudolf eds., 2012).
[152] Article 5 of the DEDAW read as follows: "Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband". UNGA, Resolution adopted by the General Assembly: 2263 (XXII). Declaration on the Elimination of Discrimination against Women, A/RES/22/2263 (Nov. 7, 1967).
[153] UN ECOSOC, International Instruments and National Standards relating to the Status of Women: Consideration of Proposals concerning a New Instrument or Instruments of International Law to Eliminate Discrimination against Women, Working Paper by the Secretary-General, E/CN.6/573, para. 67 (Nov. 6, 1973). See also 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children", and 1.3.3., "The 1957 Convention: Married Women's Human Rights".

determined that "States Parties shall grant women equal rights with men with respect to the nationality of their children". This paragraph itself provided for neither prevention of statelessness nor acquisition of a nationality. However, it must be emphasised that this paragraph did provide that both father and mother had equal rights to transmit their nationality where the *jus sanguinis* principle was applied, and this contributed to children's acquisition of their mother's nationality.[154] Thus, this paragraph had the potential to prevent statelessness in cases where children do not acquire the nationality of their father and that of the state which they were born. This marked the first time that women had equal rights with men with respect to the nationality of their children, which was included as part of the right to nationality in an international instrument. Such rights were included from the first draft of the CEDAW.[155] During the drafting process, the Philippines' delegate stated that although women's rights on the nationality of their children were mentioned in neither the DEDAW nor the 1961 Convention, it is necessary for such rights to be included in the CEDAW.[156] In particular, the delegate mentioned Article 1(3) of the 1961 Convention, which recognised children's right to acquire their mother's nationality if they would otherwise have been stateless.[157] The delegate then stated that the provision of the 1961 Convention was not sufficient because the scope was limited to legitimate children.[158] This indicated that the Philippines intended the prevention of statelessness among children born out of wedlock by introducing women's rights vis-à-vis the nationality of their children.[159]

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[154] However, note that this did not make any difference regarding states that adopted the *jus soli* principle.
[155] See Article 6 of the "Text of the Draft Convention on the Elimination of Discrimination against Women Proposed by the Philippines". UN ECOSOC, *supra* note 153, at Annex I, 2-3 (Nov. 6, 1973).
[156] *Id*, at para. 67.
[157] *Id*, at para. 67.
[158] *Id*, at para. 67. Article 1(3) of the 1961 Convention provided that "a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless".
[159] It is important to point out that the CEDAW itself did not provide for the independent right of women except in cases of statelessness; rather, it provided for their "*equal* rights with men to acquire, change or retain nationality" (emphasis added; CEDAW, Article 9(1)). In addition, Article 9(2) provided for women's *equal* rights with men to pass their nationality to their children. Thus, the rights

1.3.7. CRC: The Commitment to Preventing Statelessness among Children

Article 7 of the CRC read as follows:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Prevention of statelessness was considered from an early stage of the drafting process of the CRC. When Poland proposed the first draft of the CRC in 1978, the following provision was included: "The child shall be entitled from his birth to a name and a nationality."[160] Later, Poland submitted another draft in 1980, and it added the second paragraph to implement the right to a nationality:[161]

> 1. The child shall have the right from his birth to a name and a nationality.
> 2. The States Parties to the present Convention undertake to introduce into their legislation the principle according to which a child shall acquire the nationality of the state in the territory of which he has been

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of women in the CEDAW were dependent on men. Women's rights on the nationality of their children were not guaranteed if the corresponding rights of men were not also guaranteed.

[160] Article III of draft. CHR, Question of a Convention on the Rights of the Child Poland: Draft Resolution, E/CN.4/L.1366, 3 (Feb. 7, 1978).

[161] Article 2 of the draft. CHR, Question of a Convention on the Rights of the Child: Note Verbale dated 5 October 1979 Addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva, E/CN.4/1349*, 2 (Jan. 17, 1980).

> born if, at the time of the child's birth, the application of the proper national law would not grant him any nationality whatever.

The second paragraph introduced the *jus soli* principle if a child did not acquire any other nationality. Thus, this provision aimed at the prevention of statelessness.

There were states that supported the prevention of statelessness by the CRC and states that opposed it. With regard to paragraph 1, the US proposed the following amendment: "*In accordance with the laws and practices of each Contracting State*, the child shall have the right from his birth to acquire a name and a nationality" (emphasis added).[162] The US stated that this amendment "would avoid any implication that the draft convention would automatically entitle stateless children entering the territory of a State party to the nationality of that State".[163] This statement indicated that the US prioritised a state's right or discretion to confer nationality over the prevention of statelessness. In response, some states opposed this amendment from the perspective of the protection of stateless children.[164] Under these circumstances, the following text was adopted: "The child shall have the right from his birth to a name and to acquire a nationality."[165] "[T]he right […] to […] a nationality" was amended to "the right […] to […] *acquire* a nationality" (emphasis added). Since the phrase "[i]n accordance with the laws and practices of each Contracting State" from the US proposal was not included, it is clear that the text was not substantially modified to meet the request of the US. Although the purpose of this adopted text is not clear, the right to *acquire* a nationality seems to have been more concrete than the right to a nationality, the expression in the former draft. This background indicates that the right to acquire a

[162] CHR, Question of a Convention on the Rights of the Child: Report of the Working Group, E/CN.4/L.1542, para. 37 (March 10, 1980).
[163] *Id*, at para. 37.
[164] *Id*, at para. 39.
[165] *Id*, at para. 38.

nationality in the CRC is intended to ensure the prevention of statelessness among children from the time of their birth.[166] Thus, as intended by the paragraph, the emphasis on the prevention of statelessness prevailed over the US idea to recognise the states' right to determine who qualified as their nationals.

There were diverse positions on paragraph 2, which was intended to implement the prevention of statelessness. One group of states, including Australia, supported the prevention of statelessness. It was not satisfied by the Polish proposal of 1980, which placed an obligation on states *to make an effort* to apply *jus soli*, and it proposed instead to *place an obligation* on contracting states to apply *jus soli*.[167] This Australian proposal followed Article 1 of the 1961 Convention, the application of the *jus soli* principle.[168] It "aimed at providing every child with a nationality so as to prevent cases of statelessness among children".[169] However, this Australian proposal was opposed and criticised by states that did not adopt the *jus soli* principle.[170] Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan, and Tunisia proposed the insertion of the phrase "in accordance with their laws" ahead of the introduction of the *jus soli* principle.[171] It was argued that many states did not prioritise *jus soli* over *jus sanguinis*, and these states' proposal wanted to allow states to choose either *jus sanguinis* or *jus soli*.[172] Given these

[166] Note that for children soon after the birth, acquisition of a nationality ensures the prevention of statelessness while the prevention of a loss of nationality is also necessary to prevent statelessness among children and adults who have already acquired a nationality.
[167] CHR, *supra* note 162, at paras. 40-41.
[168] Australia acceded to the 1961 Convention in 1970, before this phase of the drafting process of the CRC took place in 1980.
[169] CHR, Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/L.1575, para. 14 (February 17, 1981).
[170] CHR, *supra* note 162, at para. 42. UN ECOSOC, "Commission on Human Rights, Forty-second Session, Agenda Item 13: Question of a Convention on the Rights of the Child, Report of the Working Group on a Draft Convention on the Rights of the Child," E/CN.4/1986/39, Annex IV, 2 (March 13, 1986).
[171] CHR, Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1989/48, para. 93 (March 2, 1989).
[172] *Id*, at paras. 94-95. Some other states also made other proposals. For instance, the Federal Republic of Germany proposed to include a clause that a nationality to be acquired after application if the child would otherwise be stateless. This proposal is similar to Article 1(1)(b) of the 1961 Convention. See

circumstances, a drafting group for a paragraph on nationality was established, and the following provision was proposed:[173]

> States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

This provision received states' support,[174] and it was adopted without substantial amendment. Although the reason for this proposal was not clear, its background suggests that the drafters were trying to make the draft acceptable to states that did not adopt the *jus soli* principle. However, it is interesting to note that the emphasis on stateless children persisted in the finalised text. Although the *jus soli* principle was not provided for in paragraph 2 of the article on nationality in the CRC, and the CRC failed to specify which state's nationality needed to be conferred on a child, an emphasis on the prevention of statelessness is observable in the drafting process of the CRC.

1.4. Conclusion on the Norm of Preventing Statelessness in International Law

This chapter explored the development of the prevention of statelessness in international law. It covered not only treaties that provided for the prevention of statelessness by the text of provision, such as the 1961 Convention, but also treaties that did not provide for prevention of statelessness explicitly by the text, such as the ICCPR. An analysis of the drafting process of treaties whose text do not explicitly cover the prevention of statelessness

note 139. The Netherlands proposed the insertion of a certain period of habitual residence in the conditions for the application of the *jus soli* principle. *Id*, paras. 98-101.

[173] *Id*, at para. 104. This seems to have been based on the draft proposed by the USSR. The USSR proposal read as follows: "The States Parties shall ensure the realization of this right in accordance with their national legislation and their international legal obligations in this field." *Id*, at para. 102.

[174] *Id*, at para. 106.

reveal that the prevention of statelessness was discussed when these treaties were drafted. Since states were involved in the drafting process, it is possible that the drafting process became a source of development of the norm of preventing statelessness even if that principle or norm was not explicitly provided for in the treaty. This chapter serves as a standard by means of which to analyse the Japanese position on the prevention of statelessness in international law.

CHAPTER 2: INTERNATIONAL LAW AND THE PREVENTION OF STATELESSNESS IN JAPAN UNDER THE 1889 CONSTITUTION

2.1. Summary of the Chapter

The following two chapters examine the influence of the norm of preventing statelessness in international law on Japanese laws. This chapter deals with how the norm of preventing statelessness in international law influenced Japanese laws under the 1889 Constitution, the first Japanese constitution. The main findings of this chapter are as follows. First, the drafters of the 1889 Constitution learnt that nationality could be covered by international law, and they decided to legislate a specific law on nationality, which is separate from the constitution. Second, the norm of preventing statelessness in international law influenced the 1899 Nationality Act, the first nationality act in Japan. The drafters of the Act referred to a resolution from the IDI, an organisation composed of experts in international law, and learnt the necessity to prevent statelessness. Although the 1899 Nationality Act adopted a *jus sanguinis* through the paternal line, it also possessed some provisions to prevent statelessness. Third, because Japanese laws were already in line with provisions on the prevention of statelessness from the 1930 Convention, the Convention did not trigger the amendment of the 1899 Nationality Act. Preparations for the Codification Conference that adopted the 1930 Convention and the Japanese position during the drafting process of the Convention indicated the Japanese commitment to preventing statelessness and to international law.

2.2. Nationality in the 1889 Constitution

Article 18 of the 1889 Constitution provided that "[t]he conditions necessary for being a Japanese subject shall be determined by law",[175] and the constitution was the first positive law that covered nationality in Japan.[176] However, it did not specify who the Japanese were, and it required a specific law to determine who qualified as Japanese nationals. Since it was assumed that international law could influence nationality matters, amendment of any law that determined who qualified as a Japanese national might well have been necessary. In this context, the constitution required a specific law to determine qualification as a Japanese national from the perspective of the stability of the constitution. This section begins with the analysis of background of the 1889 Constitution.

After the US black ships arrived in Japan in 1853, Japan was forced to conclude unequal treaties with the West, and Japanese status was inferior to Western status in international society.[177] In order to amend unequal treaties, the West asked Japan to develop the kind of modern legal system that was common in "civilised nations",[178] so Japan

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[175] This translation derives from an English translation of the commentary on the 1889 Constitution written by Hirobumi Ito, who contributed to the drafting of the 1889 Constitution. HIROBUMI ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (translated by Miyoji Ito) 37 (1889).
[176] While "Provisions Permitting Marriage with an Alien" (Proclamation No. 103 of the Great Council of State) in 1873 already concerned a nationality issue, it merely covered the nationality of people who were married to foreigners. In other words, it was not a general provision on the acquisition and loss of Japanese nationality. Thus, the 1889 Constitution was the first positive law that determined the general method of acquiring and losing Japanese nationality. Note that Tashiro argues that there used to be an "assumed nationality law" even before the drafting of the 1889 Constitution and 1899 Nationality Act. ARITSUGU TASHIRO, *KOKUSEKI HOU CHIKUJOU KAISETSU* [A COMMENTARY ON NATIONALITY LAW] 58 (1974). For details of the "assumed nationality law", see note 202. This dissertation uses "subjects" and "nationals" synonymously because both concepts entail a sense of a shared collective identity. The difference between these concepts is that the term "subjects" emphasises a vertical relationship between the Emperor and Japanese nationals while the term "nationals" emphasises a horizontal relationship among Japanese nationals. For the shared collective identity of the Japanese, see 4.3.2., "Japanese National Identity". For the historical relationship between a shared collective identity and nationality, see 1.2., "The Emergence of Nationality and the Nation-State Principle".
[177] For historical background, see 4.2.1., "The Status of Japan in International Society".
[178] YOSHIHIKO KAWAGUCHI, *NIHON KINDAI HOUSEI SHI* [HISTORY OF MODERN JAPANESE LAW] 3 (2nd ed., 2014).

attempted to develop municipal laws by hiring foreign advisers and by sending missions to the West. For instance, Hermann Roesler, a foreign adviser, played a significant role during the drafting process of the 1889 Constitution.[179] With regard to Japanese missions sent to the West, the Iwakura Mission led by Tomomi Iwakura, an Ambassador Extraordinary and Plenipontentiary, visited the West from 1871 to 1873 to learn about the systems and culture of "the developed states".[180] From 1882 to 1883, Hirobumi Ito visited Germany and met legal scholars, such as Rudolf von Gneist, Lorenz von Stein, and Albert Mosse, to learn about the Constitutions of Europe.[181] As a result of the research, Japan developed municipal laws, including the 1889 Constitution.

The Roesler Draft prepared in April 1887 became the basis of Article 18 of the 1889 Constitution, and the role of international law in nationality matters was recognised during the drafting process.[182] Article 50 of the Roesler Draft stated that "The principles concerning

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[179] JOHANNES SIEMES, *NIHON KOKKA NO KINDAIKA TO ROESUERAA* [MODERNISATION OF THE JAPANESE STATE AND ROESLER] (translated by Nagayo Homma) 139-180 (1970). As another example, Gustave Boissonade, another foreign adviser, was commissioned to draft the Civil Code in 1879 (MASAO IKEDA, *BOWASONAADO TO SONO MIMPOU* [BOISSONADE AND THE CIVIL CODE OF JAPAN] 80 (2011).) This Boissonade's draft constituted the basis of the first draft of the Civil Code of Japan, although the draft was amended to a great extent before the Civil Code was enforced.

[180] It visited the US, UK, France, Belgium, Netherlands, Germany, Russia, Denmark, Sweden, Italy, Austria and Switzerland. AKIRA TANAKA, *IWAKURA SHISETSUDAN NO REKISHITEKI KENKYUU* [HISTORICAL STUDIES OF THE IWAKURA MISSION] 3 (2002).

[181] SHIN SHIMIZU, *DOKUOUNI OKERU ITOU HIROBUMI NO KEMPOU TORISHIRABE TO NIHON KEMPOU* [HIROBUMI ITO'S RESEARCH ON CONSTITUTION IN GERMANY AND AUSTRIA AND JAPANESE CONSTITUTION] 3-4 (1939).

[182] ANNA NAKAMURA, *KOKUMIN GAINEN NO KEISEI TO HENYOU: KEMPOU TO KOKUSEKIHOU NO KANTEN KARA, NIHON TO DOITSU NO HIKAKUWO TOOSHITE* [THE BUILDING AND CHANGE OF THE CONCEPT OF "NATIONALITY" IN CONSTITUTIONAL LAW AND NATIONALITY-LAW, COMPARING JAPAN WITH GERMANY], Dissertation (Meiji University) 54 (2013). A provision on nationality in the Roesler Draft was the basis of the Natsushima Draft, which was the final draft of the 1889 Constitution. For details of the drafting process after the Roesler Draft, see the following. NAKAMURA, *supra* note 182, at 53-54. It must be noted that earlier drafts prepared by the Japanese government already included a clause on nationality although these drafts were abandoned because they were regarded as being overly influenced by the West. Hirobumi Ito criticised these drafts because the drafters had "imitate[d] constitutions of the West" and "ignore[d] Japan's uniqueness" (translated by the author). MASATSUGU INADA, *MEIJI KEMPOU SEIRITSU SHI JOUKAN* [DRAFTING PROCESS OF THE MEIJI CONSTITUTION I] 335-337 (1960). The early drafts of the constitution, in 1876 and 1878, provided that the acquisition and loss of Japanese nationality would be determined by a separate law from the constitution. Article 1 of Book III of the First Draft in 1876 and the Second Draft in 1878 stated that "all people of the Empire of Japan shall possess the rights of Japanese nationals" and "the means of acquiring and losing the [r]ights of being Japanese shall be determined by law". Article 1 of Book III of the Third Draft, in 1880, stated that "Japanese nationals acquire rights" and "when they acquire and lose such rights shall be determined by

acquisition and loss of status of being a national shall be determined by law."[183] It is not clear why Roesler entrusted a specific law to determining qualification for nationality, but communication between Roesler, Mosse and Kowashi Inoue, who played a significant role in drafting the 1889 Constitution, [184] indicates that foreign advisers believed that international law could determine such qualification, so methods of acquisition and loss of nationality needed to be covered by a separate law from the constitution. Inoue learnt that one group of states had constitutions that determined the methods of acquisition and loss of nationality, while another group had constitutions that mentioned nationality but whose methods of acquiring and losing nationality were determined by a separate law.[185] In 1886, he asked Roesler and Mosse whether the Japanese Constitution should include the determination of qualification for nationality.[186] Mosse responded that nationality should be determined by a law, not the constitution.[187] He explained that nationality is an international matter and so is established by international treaties.[188] Thus, amendments to the regulation of nationality may be necessary.[189] Since it is easier to amend a law than the constitution, Mosse argued, qualification for nationality should be covered by a law separate from the constitution.[190] Roesler took the same stance.[191] This indicates that Roesler was aware of the

law" (both translated by the author). Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (3) [*History of the Japanese Nationality Act 3*], 456 KOSEKI 1, 2 (1982). The drafters stated that they had referred to the constitutions of Prussia, Austria, Belgium, Germany and Switzerland. For more detail, see the following. Tanaka, *supra* note 182, at 3. This indicates that early drafts of the constitution already included nationality and that the details of the acquisition and loss of nationality would be determined in a separate law.

[183] NAKAMURA, *supra* note 182, at 86. Translated by the author.

[184] Nakamura evaluates Inoue as "the father of the 1889 Constitution" (translated by the author). *Id*, at 52.

[185] *Id*, at 52.

[186] HIROBUMI ITO (ed.), *HISHO RUISAN HOUSEI KANKEI SHIRYOU JOU* [HISHO RUISAN LEGISLATION DOCUMENT COLLECTION, VOL. I] 435 (1969).

[187] *Id*, at 434.

[188] *Id*, at 434-436.

[189] *Id*, at 434-436.

[190] Mosse stated that the constitution should not be amended frequently because the constitution reflects the principles of the state. *Id*, at 434-436.

[191] *Id*, at 483.

role of international law in the determination of nationals and of the need to define qualification for nationality in a law. This is the background to the clause on nationality in the 1889 Constitution.

Available sources do not indicate why Mosse and Roesler believed that international law might affect matters of nationality. However, international treaties had begun to influence such matters before 1886, when Mosse and Roesler explained the influence of international law on nationality in Japan. On 22 February 1868, the "Convention between the United States of America and the King of Prussia, relative to Naturalization" was concluded.[192] This was concluded to solve issues concerning military service by dual nationals,[193] and the US concluded this kind of convention with several European states in 1868.[194] These conventions seem to have been the first conventions to cover nationality, and Prussia, the homeland of Mosse and Roesler, had concluded this treaty with the US nearly 20 years before Mosse and Roesler commented on the relationship between international law and nationality in Japan. Although it is not clear whether Mosse and Roesler were aware of this treaty, the treaty indicates that nationality was already a matter for discussion in international law at the end of 1860s. On the basis of Roesler Draft, the 1889 Constitution itself did not determine who Japanese nationals were, and a separate law on nationality was entrusted to determining who qualified as nationals.

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[192] VERZIJI, *supra* note 85, at 80.

[193] Article 1 of the treaty stated that "Citizens of the North German Confederation who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years shall be held by the North German Confederation to be American citizens and shall be treated as such." Article 2 contained a reciprocal provision. *Id*, at 80. Note that the King of Prussia represented the North German Union at the time. GOVERNMENT OF THE US, DEPARTMENT OF STATE, TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE UNITED STATES OF AMERICAN AND OTHER POWERS, SINCE JULY 4, 1776 638 (Revised ed., 1873).

[194] For instance, the US concluded treaties with Bavaria (part of the current Germany, 20 May), Mexico (10 July), Württemberg (part of the current Germany, 17 July), Baden (part of the current Germany, 19 July), Hasse (part of the current Germany, 1 August) and Belgium (6 November). GOVERNMENT OF THE US, DEPARTMENT OF STATE, *supra* note 193, at 5-8. These treaties are called the Bancroft Treaties. Roberto Córdova, *Nationality, including Statelessness: Third Report on the Elimination or Reduction of Statelessness by Roberto Cordova, Special Rapporteur*, *in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1954, VOLUME II, A/CN.4/81, 44 (1954).

2.3. The 1899 Nationality Act

The first law that substantially determined the scope of Japanese nationals was the 1899 Nationality Act.[195] During the drafting process, an IDI resolution was mentioned, and the Japanese government recognised the necessity of preventing statelessness. The 1899 Nationality Act prepared some provisions to prevent statelessness that might arise as a result of the application of *jus sanguinis* through the paternal line, the basic principle of the 1899 Nationality Act. This section begins with an analysis of *jus sanguinis* through the paternal line of the Act.

The 1899 Nationality Act adopted *jus sanguinis* through the paternal line, and Article 1 of the Act presented this principle. The first principle of the 1889 Nationality Act was to follow the Japanese household system. It was assumed that the Emperor was the great head of a collection of households,[196] and that each household in Japan was headed by a father or husband.[197] A Statement of Reasons of the Nationality Bill submitted to the Imperial Diet

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[195] It must be noted that the Japanese government recognised the need to enact the 1899 Nationality Act in relation to international law. On 23 February 1899, Nobushige Hozumi, a government delegate, stated that "the day of enforcement of a new treaty is approaching", and that a nationality act should be approved before the enforcement of the treaty in the Imperial Diet (translated by the author). It is not clear what "a new treaty" meant, but the 1894 Treaty of Commerce and Navigation between the US and Japan entered into force on 17 July 1899. Hozumi explained that a new nationality act was necessary in order to regulate the nationality of woman who married foreigners and that of foreigners who might be adopted. Since the Treaty of Commerce and Navigation between the US and Japan was expected to facilitate exchanges and movement between Japan and the US, legislation on nationality was required. See MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (14) [*Proceedings of the Nationality Act 14*], 296 KOSEKI 19, 22-23 (1971). Haruna Asonuma, Nichiei, Nichibei Tsuushou Koukai Jouyaku (1894 Nen) "Bunmei Koku" heno Nakama Iri [*Anglo-Japanese and the US-Japanese Treaties of Commerce and Navigation (1894): Japan Became a Member of "Civilised Nations"*], *in HANDOBUKKU KINDAI NIHON GAIKOUSHI: KUROFUNE RAIKOUKARA SENRYOUKI MADE* [HANDBOOK OF MODERN JAPANESE DIPLOMATIC HISTORY: FROM THE ARRIVAL OF THE BLACK SHIPS TO THE OCCUPIED ERA] 34, 34-35 (Toshihiro Minohara and Souchi Naraoka eds., 2016).

[196] MIKIHARU ITO, *KAZOKU KOKKA KAN NO JINRUI GAKU* [AN ANTHROPOLOGY OF THE FAMILY STATE IDEOLOGY] 2 (1982).

[197] NORIYO HAYAKAWA, *KINDAI TENNOU SEI TO KOKUMIN KOKKA: RYOUSEI KANKEI WO JIKU TOSHITE* [THE MODERN EMPEROR SYSTEM AND THE NATION-STATE: FOCUSING ON THE RELATIONSHIP BETWEEN MALES AND FEMALES] 26 (2005). However, a woman could be the head of the household in cases of *nyufu*. See Article 5 of the 1899 Nationality Act. Although blood and *jus sanguinis* were dominant principles in the Japanese household, they were not the only features of the Japanese household. For

noted that the first principle of the draft was to be compatible with the "unique family system of our country",[198] and this principle is included in the first draft of the 1899 Nationality Act submitted to the Investigation Committee of Codes before the deliberations in the Imperial Diet.[199]

Jus sanguinis through the paternal line was regarded as representative of the Japanese household system. The Statement of Reasons submitted to the Imperial Diet explained that loyal nationals intended for themselves and their *descendants* to contribute to "the state of the Emperor", and this was one reason why the *jus sanguinis* was adopted.[200] This explanation indicates that the Emperor system and *jus sanguinis* were connected in the 1899 Nationality Act. In addition, the Statement of Reasons wrote that *jus sanguinis* through the paternal line "follows […] our customs since the ancient times".[201] Tashiro refers to the literature in the early eighteenth century that states that the blood of the father matters in determining Japanese status.[202]

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instance, children who were adopted by a Japanese father acquired Japanese nationality even if they did not share the blood of the father.

[198] MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (1) [*Proceedings of the Nationality Act 1*], 276 KOSEKI 28, 31 (1969).

[199] MOJ, Department of Judicial System Investigation (supervised), Houten Chousa Kai: Kokuseki Hou Narabi Meiji 6 Nen Dai 103 Gou Fukoku Kaisei An Giji Sokkiroku [*Investigation Committee of Codes: Proceedings of the Nationality Act and Revision of Proclamation No. 103, 1873*], *in NIHON KINDAI RIPPOU SHIRYOU SOUSHO* 26 [MONOGRAPH ON MODERN JAPANESE LEGISLATION DOCUMENTS 26] 1, 1 (1986). This dissertation examines the negotiations at the Investigation Committee of Codes in 1898 and the Imperial Diet in 1898 and 1899. There must have been a drafting process before the negotiations in the Investigation Committee of Codes, but documents on the drafting process are not available, according to Tanaka, who dealt with nationality matters as an official of the MOJ. Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (7) [*History of the Japanese Nationality Act 7*], 467 KOSEKI 1, 1 (1983).

[200] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 31. The basis of this argument seems to be that one needs to be a national of the state to contribute to the state.

[201] Translated by the author. *Id*, at 32. This idea of the family system is the basis of some articles of the 1899 Nationality Act, such as Articles 5(ii), 5(iii), 5(iv), 13 and 18. It must be emphasised that an international perspective was also taken into account in defining *jus sanguinis* through the paternal line. The Statement of Reasons noted that *jus sanguinis* through the paternal line was in line with the "general rules of laws of other states", as well as the Japanese tradition. *Id*, at 32.

[202] He stated that the blood of the mother did not matter in determining Japanese status, indicating that the blood of the paternal line was prioritised over that of the maternal line in Japan. TASHIRO, *supra* note 176, at 44-45. In order to define Japanese nationality on the basis of the *jus sanguinis* principle, there must be original Japanese people. It is said that the original Japanese were determined on the basis of an "assumed nationality law". TASHIRO, *supra* note 176, at 55. Tashiro argues that residents when the isolation policy was lifted in the middle of the nineteenth century in Japan were assumed to be

The 1899 Nationality Act paid particular attention to preventing statelessness that could arise as a result of the application of *jus sanguinis* through the paternal line. The Statement of Reasons recognised the principle that both positive and negative conflicts of nationality should be avoided.[203] It stated that both positive and negative conflicts of nationality, which resulted in multiple nationalities and statelessness, were "harmful for a state".[204] This understanding was based on the principle that each individual should have a single nationality, which was the mainstream idea in international society at the time.[205]

The Japanese government referred to the international legal perspective to indicate that a conflict of nationality, such as multiple nationality and statelessness, was an issue. Hozumi, a government delegate, stated that "nationality matters [were] a part of international law",[206] and that the Nationality Bill attempted to avoid conflict with the principles of other states.[207] He explained that the "resolution of the International Law Association also stated that avoidance of conflict of nationality should be the primary concern", and this resolution was "highly influential".[208]

Japanese. TASHIRO, *supra* note 176, at 55-58. There is also an argument that those persons listed in the *jinshin* household registration in 1871 should be considered the original Japanese. NAKAMURA, *supra* note 182, at 64-65. These views conflict where unregistered people are concerned. Tashiro's argument is valid if people who were not registered in the *jinshin* household registration were regarded as Japanese while Nakamura's argument is valid if people who were not registered in the *jinshin* household registration were not regarded as Japanese. However, there is no reliable evidence to prove which argument is the valid one.

[203] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 31.

[204] Translated by the author. *Id*, at 31. Toru Terao, a government delegate, mentioned the same principle in the House of Peers, a house in the Imperial Diet. MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (3) [*Proceedings of the Nationality Act 3*], 280 KOSEKI 27, 30 (1970).

[205] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 31. See also 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to the International Order".

[206] Translated by the author. MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (12) [*Proceedings of the Nationality Act 12*], 292 KOSEKI 33, 37 (1971). Hozumi also introduced the principle that a husband and wife should have the same nationality, referring to practice of other states and a resolution of "the Universal Association of International Law". Translated by the author. MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (13) [*Proceedings of the Nationality Act 13*], 293 KOSEKI 29, 33 (1971).

[207] MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (11) [*Proceedings of the Nationality Act 11*], 290 KOSEKI 14, 19 (1970).

[208] Translated by the author. *Id*, at 19. He said that "resolution of the International Law Association *also* stated that avoidance of conflict of nationality should be the primary concern" (emphasis added), so he might not regard the international principle as the sole reason to prevent conflict of nationality.

What Hozumi was referring to as a resolution of the "International Law Association" and a "Universal Association of International Law" on another occasion[209] seems to have been that made by the IDI, an organisation composed of experts in international law, in 1895. The first principle of the resolution was that "No one shall be without nationality."[210] The Japanese government learnt a principle of prevention of statelessness in international law from the IDI resolution.[211]

There are some articles that prevented statelessness in the 1899 Nationality Act. Articles 3 and 4 concerned the prevention of statelessness by acquisition of nationality by birth. Article 3 provided for the application of *jus sanguinis* through the maternal line in cases where the father was not known, the nationality of the father was not known, or the father was stateless. Under *jus sanguinis* through the paternal line in the 1899 Nationality Act, a child born in Japan could be stateless when his or her father could not transmit their nationality.[212] In order to prevent statelessness in such circumstances, Article 3 was introduced.[213] Article 4 provided that "If both parents of a child who is born in Japan are not known or do not possess any nationality, the child shall be Japanese."[214] The Statement of Reasons noted that Article 4 adopted the *jus soli* principle as an exception since it was "desir[able]" to prevent the occurrence of stateless persons.[215]

However, this deliberation indicates that the drafters of the 1899 Nationality Act perceived the norm of preventing conflict of nationality including prevention of statelessness as a part of international law.

[209] See note 206.

[210] Translated from French by the author. IDI, *supra* note 79. See 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to the International Order".

[211] Although it is unclear how the Japanese government was aware of the resolution of the IDI, Kentaro Kaneko, a Japanese legal scholar, had been a member of the IDI since 1891 (MOFA, *Bankoku Kokusai Hou Gakkai* [Institut de Droit International], *at* http://www.mofa.go.jp/mofaj/files/000013567.pdf (viewed Jan. 17, 2019).), so Japan might have paid particular attention to the activities of the IDI.

[212] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 32.

[213] Although stateless persons are commonly called *mukokuseki sha* today, they were called *mukokuseki jin* in the Statement of Reasons to introduce Article 3. *Id*, at 32.

[214] Translated by the author.

[215] Translated by the author. The term *mukokuseki jin* was used to introduce Article 4, too. MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 32.

Articles 19, 20, 21 and 23 provided for limitations on the loss of nationality. Article 19 stated that individuals who acquired Japanese nationality by marriage or adoption would lose their Japanese nationality in cases of dissolution of marriage or adoption *only when* they acquired another nationality. Article 5 of the 1889 Nationality Act determined that foreigners would acquire Japanese nationality when, in the case of women, they became the wife of a Japanese man, or when they were adopted by a Japanese national.[216] Article 19 is related to persons who acquired Japanese nationality pursuant to Article 5. In principle, there was no need for a person who had acquired Japanese nationality by marriage or adoption to remain Japanese when he or she "left the Japanese family" by dissolving his or her marriage or by adoption.[217] However, since the occurrence of "persons without any status", which seems to have meant stateless persons,[218] was to be avoided, a person who acquired Japanese nationality by marriage or adoption did not lose their Japanese nationality if they did not

[216] Pursuant to Article 5 of the 1899 Nationality Act, a foreign man acquired Japanese nationality when he married a Japanese woman who had become the head of the family as an exception. For more details on this *nyufu* system, which allows a woman to be the head of the family, see the following. Reiko Shiraishi, Mimpou Hensan Katei niokeru Onna Koshu no Chii to Nyufu Konin: "Ie" no Zaisan wo megutte [*Status of a Woman Head of the Family and* Nyufu *Marriage in the Drafting Process of the Civil Code: Property of the "Family"*], 32 LEGAL HISTORY REV. 141, 141-142 (1982).

[217] Translated by the author. MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (2) [*Proceedings of the Nationality Act 2*], 277 KOSEKI 18, 19 (1970). It was also said that if a person who acquired Japanese nationality by marriage or adoption continued to be Japanese even after the dissolution of their marriage or adoption, such a person continued to be Japanese even if he or she did not qualify under the criteria of naturalisation, and this was an issue. MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 19. This argument implied that when persons who acquired Japanese nationality dissolved their marriage or adoption, they were regarded as foreigners, and their continued possession of their nationality could be regarded as similar to naturalisation. In order to become naturalised as Japanese, the person had to have an address in Japan for more than five years, be an adult, be well behaved, have the ability to make a living, and discard any other nationalities he or she possessed. It must also be noted that naturalisation was at the discretion of the Interior Minister under the 1899 Nationality Act. See Article 7 of the 1899 Nationality Act.

[218] Translated by the author. The phrase *museki jin* was used in Japanese. In today's context, a person without status (*museki sha*) means a Japanese national who is not registered in the household registration. MOJ, Civil Affairs Bureau, Director of the Civil Affairs First Division, Koseki ni Kisai ganaimono nikansuru Jouhou no Haaku oyobi Shien nitsuite (Irai) [*A Request: Identification and Support of the Persons Who Are Not Listed in the Household Registration*] (*Houmushou Min Ichi Dai 817 Gou*) (31 July 2014). Requested in Disclosure of Administrative Documents in one of the Tokyo Metropolitan Special Wards. Hajime Akiyama, *Household Registration and Suffrage in Post World War II Japan: The Case of the Unregistered (*Mukosekisha*)* 16(15(4)) THE ASIA-PACIFIC J.: JAPAN FOCUS 1, 2 (2018).

acquire another nationality in the case of dissolution of marriage or adoption.[219] Thus, Article 19 prioritised prevention of statelessness over the Japanese household, which was the main principle in the 1899 Nationality Act.

Article 20 stated that if a Japanese national acquired another nationality "at his or her choice", he or she would lose Japanese nationality.[220] The Statement of Reasons noted that persons who left Japan to become nationals of other states should not remain Japanese for the following reasons. First, it was not beneficial for Japan to retain Japanese nationality of those who had acquired another nationality.[221] Second, a conflict of nationality took place if Japanese who had acquired another nationality did not lose their Japanese nationality.[222] Although issues of statelessness were not discussed in the Statement of Reasons, since the acquisition of another nationality was a condition for losing Japanese nationality in Article 20, this article functioned to prevent statelessness.

It must be emphasised that Article 20 determined that the acquisition of another nationality "at his or her choice" was a condition of losing Japanese nationality. In other words, nationality could not be lost without the individual's consent to acquire another nationality.[223] The reason why "at his or her choice" was included was discussed neither in the Statement of Reasons nor during the deliberations in the Imperial Diet, but this article prevented the loss of Japanese nationality in cases where Japanese nationals acquired another nationality without intending to do so.[224]

Article 20 was also interpreted as prohibiting deprivation of nationality without a person's intention. Tatsukichi Minobe, a constitutional scholar, stated that "Although a

[219] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 20.
[220] Translated by the author.
[221] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 20.
[222] *Id*, at 20.
[223] As an exception, Japanese nationality could be lost when Japanese women were married to a foreigner pursuant to Article 18 of the 1899 Nationality Act.
[224] For instance, the acquisition of another nationality by birth or change of civil status can be regarded as the acquisition of another nationality without intention.

nationality remains the status of a person and is not itself a right, possession of a nationality is the right of nationals. Thus, a state [i.e., the Japanese government] cannot deprive [Japanese] nationals of their nationality against the will of those nationals."[225] This implies that depriving someone of their nationality against their will had not been permissible under Japanese law in the 1899 Nationality Act, and this understanding is shared by the subsequent nationality acts including the current 1984 Nationality Act.[226]

Where the principle of the household system was emphasised, wives and children were expected to follow the nationality of the husband or father.[227] In other words, when a man lost his Japanese nationality, his wife and children would also lose their Japanese nationality in principle. However, Article 21 provided that the wife and children of a man who lost his Japanese nationality would lose their Japanese nationality *only if* they acquired the nationality of the man. In other words, if a wife and children did not acquire a new nationality from the man, they remained Japanese. Thus, this article prevented statelessness among wives and children whose husbands or fathers acquired another nationality by naturalisation. The Statement of Reasons indicated that the occurrence of stateless persons should be avoided, so Article 21 was introduced.[228]

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[225] Translated by the author. TATSUKICHI MINOBE, *KEMPOU SATSUYOU* [SUMMARY OF THE CONSTITUTION] 148 (Reprint, 1924).

[226] See Article 8 of the 1950 Nationality Act and Article 11 of the 1984 Nationality Act. TASHIRO, *supra* note 176, at 529-530. KIDANA, *supra* note 8, at 342-343. Regarding the 1950 Nationality Act, Tashiro stated that it was "cruel" to force Japanese nationals to lose their Japanese nationality if they did not intentionally acquire another nationality. Translated by the author. TASHIRO, *supra* note 176, at 513. It is interesting to compare the Japanese law and the some states' current practice of deprivation of nationality. See 4.3.2., "Japanese National Identity".

[227] See also note 202.

[228] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 20. *Mukokuseki jin* was used to refer to stateless persons. It must be noted that the use of terminology for stateless persons was not unified in the Statement of Reasons of the draft of the nationality act. For instance, *mukokuseki jin* (stateless persons) was used for Articles 3, 4, and 21 while *museki jin* (person without any status) was used for Article 19. See notes 213, 215 and 218. This indicates that although statelessness was regarded as a problem by the Japanese government at the time, there was not a fixed terminology within the Japanese government for stateless persons.

Article 23 stated that when a Japanese national was recognised by a foreigner and acquired a new nationality, he or she would lose Japanese nationality. In other words, if a Japanese person who was recognised by a foreigner did not acquire a new nationality, he or she did not lose Japanese nationality. The Statement of Reasons noted that Japanese nationality was lost as a result of acquisition of a new nationality after recognition by a foreigner because otherwise a "positive conflict of nationality" would occur.[229] This implies the assumption that Japanese nationality should not be lost unless the Japanese person acquired another nationality. From the perspective of the household principle, it was possible for Japanese nationality to be lost when a Japanese person was recognised by a foreigner because it could be argued that the person had left the Japanese household. However, such an argument was not made by the government, and recognition by a foreigner did not automatically force a Japanese person to lose their nationality if he or she did not acquire another nationality. As a result, statelessness was effectively prevented.

Among articles to prevent statelessness in the 1899 Nationality Act, there were some that were not normatively influenced by the norm of preventing statelessness in international law. On the one hand, the influence of international law can be seen in Articles 3 (*jus sanguinis* through the maternal line), 4 (*jus soli*), 19 (dissolution of marriage or adoption) and 21 (wife and children of men who lost their Japanese nationality). The Statement of Reasons of these articles mentioned the need to prevent statelessness. Since the need to prevent statelessness was mentioned in reference to international law in the Imperial Diet,[230] the influence of the norm of preventing statelessness in international law on these articles is observed. On the other hand, the desirability of preventing statelessness in international law does not seem to have influenced Articles 20 and 23 because the norm of preventing

[229] Translated by the author. *Id*, at 21.
[230] See notes 206 and 208 and accompanying text.

statelessness was not mentioned in the drafting process of these articles.[231] Rather, different principles affected these articles. With regard to Article 20, the prohibition on the deprivation of a nationality seems to have been the main driving force for the article's inclusion. Japanese scholars had stated that deprivation of nationality was not acceptable.[232] Prevention of a positive conflict of nationalities could be a principle at work in Article 23 although this is not clear from the available sources. This suggests that although there seems to have been little or no impact of the norm of preventing statelessness in international law on Articles 20 and 23, statelessness could be prevented as a result of other principles.

A resolution of the IDI influenced the norm of preventing statelessness in the 1899 Nationality Act, but it did not present specific measures to prevent statelessness.[233] The Japanese government learnt from other states and coined some articles of its own to prevent statelessness. Japan seems to have learnt Article 4 (*jus soli*) from other states,[234] and Yasuhisa Tanaka, who used to deal with nationality matters as an official of the MOJ, has indicated the possibility that Japan learnt *jus sanguinis* through the maternal line, the basis of Article 3, from a nationality law of the Netherlands at the time.[235] However, the provisions of Articles 19, 20, 21, and 23 seem to have been coined in Japan. Tanaka states that the Japanese government coined Articles 19 and 21 to prevent statelessness deriving from the

[231] It must be noted that the desirability of preventing a positive conflict of nationality was mentioned during the drafting process of Articles 20 and 23. MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 20-21. Since the Statement of Reasons regarded both positive and negative conflict of nationality to be a problem in reference to international law (MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 198, at 31.), it can be argued that international law was the basis for the concern about a positive conflict of nationality.

[232] For the possible role of Japanese national identity in prohibiting deprivation of nationality, see 4.3.2., "Japanese National Identity".

[233] The resolution of the IDI proposed some articles regarding nationality, but it did not propose particular measures to prevent statelessness. See the following. IDI, *supra* note 79.

[234] The nationality laws of France, the Netherlands, and Greece have similar provisions. Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (8) [*History of the Japanese Nationality Act 8*], 468 KOSEKI 1, 3 (1983).

[235] However, Tanaka states that there is no available evidence to confirm the relationship between the 1899 Nationality Act and the Dutch law. *Id*, at 3.

household system, and Article 23 also considered the household system.[236] Although the reasons and background are not clear, Article 20, the loss of Japanese nationality being conditional on the intentional acquisition of another nationality, is unique to the 1899 Nationality Act, being absent from the legislation of other states at the time.[237] This indicates that Japan was aware of the need to prevent statelessness from an international legal perspective, and it also coined its own methods of preventing statelessness in relation to the Japanese household system.

Although Japan adopted some measures to prevent statelessness, it was still possible for statelessness to occur in Japan. There were three categories of possible statelessness. First, if a child was born to parents of other nationalities in Japan, he or she could not acquire Japanese nationality. If he or she could not acquire the nationality of the parents either, he or she became stateless.[238] Second, if a child was born in Japan to a Japanese mother and a father with another nationality, he or she could be stateless if the father could not transmit his nationality to the child.[239] Third, a Japanese woman who married a foreign man could be stateless.[240] Article 18 of the 1899 Nationality Act provided that Japanese women lost their Japanese nationality when they married foreign men. There was no article in the 1899 Nationality Act that could prevent statelessness in such cases. Thus, when a Japanese woman married a foreigner but did not acquire his nationality, she could be stateless. This issue was discussed at the Investigation Committee of Codes in 1898. Kenjiro Ume, one of the drafters

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[236] Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (10) [*History of the Japanese Nationality Act 10*], 470 KOSEKI 1, 7-8 (1983). Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (11) [*History of the Japanese Nationality Act 11*], 471 KOSEKI 20, 20-22 (1983).
[237] Tanaka, *supra* note 236 (Nihon Kokuseki Hou Enkaku Shi (10)), at 9.
[238] For instance, if the nationalities of the parents were conferred on the basis of the *jus soli* principle, the child became stateless. If the nationality of the mother was conferred on the basis of *jus sanguinis* through the paternal line and the nationality of the father was conferred on the basis of the *jus soli* principle, the child also became stateless.
[239] When the nationality of the father was conferred on the basis of the *jus soli* principle, the child became stateless.
[240] Such cases were discussed in the Imperial Diet in 1916. See 2.4., "The 1916 Amendment of the 1899 Nationality Act".

of the Nationality Bill,[241] stated that cases of marriage with foreign men were different from cases of dissolution of marriage or the naturalisation of a woman's husband.[242] Dissolution of marriage and the naturalisation of a woman's husband were unpredictable, whereas a woman would be aware of the nationality of her prospective husband.[243] In other words, a woman would be able to foresee that she would lose her nationality when she married a foreign man. Ume argued that if a woman did not want to acquire the nationality of her husband and lose Japanese nationality, she should avoid marrying a foreign man.[244] Thus, Japanese women who were married to foreigners lost their Japanese nationality. If such women were unable to acquire the nationality of their husband, they could become stateless. Although the 1899 Nationality Act prevented statelessness in some cases, the possibility of statelessness in Japan thus remained.

2.4. The 1916 Amendment of the 1899 Nationality Act

The 1899 Nationality Act was amended in 1916. Although the main purpose of the amendment was to allow Japanese nationals born in the US to renounce their Japanese nationality in order to protect them in the US,[245] the amendment also prevented statelessness

[241] NAKAMURA, *supra* note 182, at 55.
[242] Articles 19 and 21 prevented statelessness in cases of the dissolution of marriage or naturalisation of a woman's husband. MOJ, Department of Judicial System Investigation (supervised), *supra* note 199, at 22.
[243] *Id*, at 22.
[244] *Id*, at 22. See also the following. Tanaka, *supra* note 236 (Nihon Kokuseki Hou Enkaku Shi (10)), at 7.
[245] See the following. National Archives of Japan, Kokuseki Hou Chuu wo Kaisei su [*Nationality Act to Be Amended*], in *KOUBUN RUISHUU DAI 40 HEN TAISHOU 5 NEN DAI 19 KAN* [COLLECTIONS OF OFFICIAL DOCUMENTS, PART 40 BOOK 2 (1916)] (National Archives of Japan Digital Archive). Ref. Rui-01242100 (1916). There were children who were born to Japanese fathers or Japanese unmarried mothers in the US, and they acquired both Japanese and US nationalities. However, an anti-Japan movement began in the US around 1916, and the Japanese government became concerned about the situation of Japanese-Americans. Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (12) [*History of the Japanese Nationality Act 12*], 472 KOSEKI 13, 14 (1983). In particular, the Japanese government was afraid of future legislation in the US that would deny the US nationality of Japanese-American people. One idea was to allow the renunciation of Japanese nationality so that Japanese-Americans would not have to face discrimination based on the fact of multiple nationality. In this context, Article 20-2 was proposed, according to which it was possible for Japanese nationals to withdraw from

among formerly Japanese women who were married to foreign men. It must be noted that the fact that statelessness took place in Japan, not the norm of preventing statelessness, was a driving force behind the Japanese government's inclusion of the prevention of statelessness in the 1916 Amendment.

Article 18 of the 1899 Nationality Act provided that Japanese nationality would be lost if a Japanese woman married a foreign man. Thus, if a woman did not acquire the nationality of her husband, she could become stateless. In order to prevent this happening, Article 18 was amended so that a woman who married a foreign man lost her Japanese nationality *only when* she acquired her husband's nationality.[246] In 1914, some Japanese women were married to Canadian men and became stateless.[247] The Japanese government had stated that Canadian nationality was not conferred on women who were married to Canadian men if the women were not admitted to Canada.[248] Thus, formerly Japanese women who were married to Canadian men and living in Japan became stateless because they lost their Japanese nationality and did not acquire Canadian nationality.[249] Statelessness among formerly Japanese women who were married to Canadian men was described as "a real problem" although the reason why statelessness among women was regarded as an issue is not clear from the discussion in the Imperial Diet.[250]

The 1916 Amendment regarding the issue of statelessness among formerly Japanese women married to foreign men is interesting to compare with the 1899 Nationality Act. As has already been discussed, during the drafting process of the 1899 Nationality Act, it was

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Japanese nationality if they had acquired another nationality on the basis that they were born in the other state and had an address there. MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (15) [*Proceedings of the Nationality Act 15*], 298 KOSEKI 11, 11, 13 (1971).

[246] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 245, at 11.

[247] During the deliberation in the Imperial Diet, the term "stateless persons" was not used, but "persons who do not belong to any nationality" was (translated by the author). MOJ, Civil Affairs Bureau, The Fifth Division, Kokuseki Hou Shingi Roku (17) [*Proceedings of the Nationality Act 17*], 300 KOSEKI 37, 38 (1971).

[248] *Id*, at 38.

[249] This case was observed in Shiga Prefecture. *Id*, at 38.

[250] Translated by the author. *Id*, at 38.

argued that statelessness derived from marriage to foreign men did not have to be prevented because women could avoid marrying foreign men if they did not want to lose their Japanese nationality.[251] However, in 1916, statelessness among formerly Japanese women derived from marriage to Canadian men was regarded as a problem, and the need to prevent statelessness was discussed. Thus, the 1916 Amendment covered a wider scope of preventing statelessness than did the 1899 Nationality Act. There were three kinds of statelessness that could arise in Japan under the 1899 Nationality Act: children born to parents of other nationalities in Japan, children born to a Japanese mother and a father with another nationality in Japan, and Japanese women who were married to foreign men.[252] As a result of the 1916 Amendment, the problem caused by the third potential cause of statelessness was solved, but the first two remained after the 1916 Amendment.

It must be noted that international law and principles did not play a key role in preventing statelessness in the 1916 Amendment. International law was not mentioned when the amendment was discussed. The driving force of the amendment was not international law, but "a real problem" of statelessness.[253] Statelessness was regarded not as a mere theoretical issue, but as a real issue, and the Japanese government found it necessary to prevent statelessness. This was different from the drafting process of the 1899 Nationality Act, which referred to the norm of preventing statelessness in international law.[254]

[251] See 2.3., "The 1899 Nationality Act".
[252] See 2.3., "The 1899 Nationality Act".
[253] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 247, at 38.
[254] See 2.3., "The 1899 Nationality Act". With regard to the relationship between the impact of statelessness and the Japanese government's reaction to statelessness, see 4.3.1., "The Impact of Stateless Persons in Japan". The 1899 Nationality Act was also amended in 1924, but the amendment did not affect the prevention of statelessness under nationality act (Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (14) [*History of the Japanese Nationality Act 14*], 477 KOSEKI 1, 10-12 (1983).), so this dissertation does not cover it.

2.5. The 1930 Convention

2.5.1. Japanese Reply to the Schedule of Points (1928)

The 1930 Convention covered the prevention of statelessness.[255] Japanese law was in line with the articles on the prevention of statelessness in the 1930 Convention, so the Convention did not become a trigger for the amendment of the 1899 Nationality Act. However, it must be noted that the Japanese stance towards the convention and the Codification Conference that adopted the convention indicates that Japan was committed to preventing statelessness. This section separates the Japanese reaction to the Codification Conference and 1930 Convention into three parts: the Japanese reply to the schedule of points in 1928, the drafting of Japanese directives in 1929 and 1930, and the Japanese position in the Codification Conference in 1930.

The first phase began when Japan received the schedule of points submitted by the CPCC in May 1928, and it finished when Japan replied to the schedule in November 1928. Analysis of this phase indicates that Japan was committed to the prevention of statelessness but did not intend to amend Japanese law to ensure the prevention of statelessness. In 1927, the LN discussed the issues that required codification, and pointed out that nationality, territorial waters and state responsibility should be discussed for codification.[256] In 1928, the CPCC was formed to prepare for the Codification Conference, and it submitted its schedule of points to member states of the LN to ask for their views on the codification for these three matters.[257] After Japan received the schedule of points, scholars and officials from the MOFA met on 25 May 1928 and decided that the draft of the reply to the schedule would be

[255] For the 1930 Convention, see 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children".
[256] UN, *supra* note 82, at 106.
[257] Rikiya Takahashi, Kokusai Renmei ni okeru Kokusai Houten Hensan Jigyou to Nihon Kokusai Hou Gakkai: Kokusai Hou no Ukete kara Tsukurite he [*Codification in the League of Nations and the Japanese Society of International Law: The Dawn of Japanese International Law*], 30 J. OF THE GRADUATE SCHOOL OF ASIA-PACIFIC STUDIES 1, 4 (2015).

drafted by Dr. Saburo Yamada, a scholar on private international law.[258] Consultation on the Yamada's draft took place in the Inter-Ministerial Council, and the Japanese reply was finalised.

The first item that the CPCC asked to examine was "[t]he general principle that the acquisition and loss of its nationality are matters which, by international law, fall solely within the domestic jurisdiction of each State".[259] The CPCC also asked whether there were limitations that states faced in legislating on nationality matters in their relationship with other states.[260] Yamada wrote that although each state had freedom to determine who would acquire and lose its nationality, there had to be limitations to this freedom in order to "prevent positive and negative conflicts of nationality".[261] The preparatory document produced by Yamada stated that conflicts of nationality should be avoided because such conflicts became an obstacle to the "promotion of international cooperation".[262] At the Inter-Ministerial Council, there was no objection to Yamada's draft.[263] Japan responded that while the

[258] MOFA, Kokusai Houten Hensan Chousa Jumbi Iinkai Dai 1 Kai Kaigi [*Preparatory Committee on Investigation of Codification: The First Meeting*] *in KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAI 1 KAN 2-1* [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 1. 2-1] (B-9-2-0-2_001) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014070600 (1928).
[259] LN, First Codification Conference: Schedules of Points Drawn Up by the Preparatory Committee for Submission to the Governments, C.44.M.21.1928.V, 1 (1928).
[260] *Id*, at 1.
[261] Translated by the author. MOFA, Kokuseki Mondai ni Kansuru Kaitou An [*Draft of Reply concerning Nationality Matters*] *in KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAI 11 KAN BUNKATSU 1* [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 11 PART 1] (B-9-2-0-2_014) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014077700 (1928).
[262] Translated by the author. MOFA, Kokuseki Mondai ni Kansuru Kaitou An Jumbi Shorui [*Document to Prepare a Draft of Reply concerning Nationality Matters*] *in KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAI 1 KAN 2-1 SANKOU BUNKATSU 1* [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 1. 2-1, REFERENCE PART 1] (B-9-2-0-2_001) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014070600. (1928).
[263] MOFA, Kokusai Houten Hensan Mondai Kakushou Kyougikai Dai 3 Kai Kaigou [*Inter-Ministerial Council for Codification: The Third Meeting*] *in KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAI 1 KAN 2-1 SANKOU BUNKATSU 1* [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 1. 2-1, REFERENCE PART 1] (B-9-2-0-2_001) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014070600 (1928).

acquisition and loss of nationality were matters for each state, "[t]he possible conflict of nationalities that may in consequence occur [could] be avoided only by international agreement".[264] This indicates that the Japanese government believed that it was desirable to prevent conflicts over nationality, including statelessness, and that international agreements should cover nationality matters when there was a conflict over nationality.

The second item relevant to this dissertation was the nationality of persons born in the territory of a state to parents who were merely passing through the territory.[265] Yamada wrote that the *jus soli* principle should not be applied to children whose parents were passing through by accident because it did not follow the "spirit of the *jus soli* principle".[266] From the available sources, it is not clear what the "spirit of the *jus soli* principle" meant here, but Yamada seems to have meant that the *jus soli* principle was based on the assumption that the child remained in the territory, and this assumption did not work in cases where the parents were merely passing through the territory. There was no objection in the Inter-Ministerial Council to this Yamada's view,[267] and Japan stated that although it was common for states that adopted the *jus soli* principle not to consider the length of stay in their territory as an issue, these states should not apply the *jus soli* principle to children born to parents who were merely passing through their territory.[268] The Japanese government did not mention the Japanese law in this context, and it merely made a general statement.[269]

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[264] MOFA, *NIHON GAIKOU BUNSHO SHOUWA KI I DAI 2 BU DAI 2 KAN* [DOCUMENTS ON JAPANESE FOREIGN POLICY, SHOWA ERA, SERIES I (1927-1931), PART 2, VOLUME II] 586 (1992).
[265] LN, *supra* note 259, at 2.
[266] Translated by the author. MOFA, *supra* note 262.
[267] MOFA, Kokusai Houten Hensan Mondai Kakushou Kyougikai Dai 4 Kai Kaigou [*Inter-Ministerial Council for Codification: The Fourth Meeting*] *in KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAI 1 KAN 2-1 SANKOU BUNKATSU 1* [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 1. 2-1, REFERENCE PART 1] (B-9-2-0-2_001) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014070600 (1928).
[268] MOFA, *supra* note 264, at 588.
[269] It is possible that Japan was not in favour of the other states' application of the *jus soli* principle to children born to parents who were merely passing through a territory in order to prevent multiple nationalities. Japan applied *jus sanguinis* through the paternal line at the time, so other states' application of the *jus soli* principle to children born to parents who were merely passing through the

Third, the CPCC asked about the "[n]ationality of child of unknown parents, of having no nationality, or of parents of unknown nationality".[270] Yamada stated that the *jus soli* principle should be adopted "to prevent the occurrence of stateless persons".[271] Without any objection to this position in the Inter-Ministerial Council,[272] Japan responded that even states that adopt the *jus sanguinis* principle should adopt the *jus soli* principle in cases of foundlings and children born to parents without a nationality or whose nationality was not known.[273] It also introduced Article 4 of the 1899 Nationality Act, which adopted the *jus soli* principle.[274] This indicates that the Japanese government was committed to preventing statelessness, as can be seen from the drafting process of the 1899 Nationality Act.

Fourth, the nationality of women who were married to foreign men was discussed.[275] Yamada mentioned Article 18 of the 1899 Nationality Act, and explained that women's loss of Japanese nationality was conditional on their acquisition of their husband's nationality.[276] Thus, the Japanese government stated that "a negative conflict of nationality" was prevented by Japanese law.[277] The Inter-Ministerial Council did not object to this,[278] and the Japanese reply to the CPCC referred to Article 18 of the 1899 Nationality Act.[279] However, in contrast to cases where the nationality of persons born in the territory of a state to parents who were

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territory could have increased the number of persons with multiple nationalities. Note that the *jus soli* principle was applied in Japan if a child's parents were not known or if they did not have any nationality pursuant to Article 4 of the 1899 Nationality Act. See 2.3., "The 1899 Nationality Act".

[270] LN, *supra* note 259, at 2.

[271] MOFA, *supra* note 261. Yamada used the term *mukokuseki sha* for "stateless persons", which is a common phrase for stateless persons today. Compare this with the usage of words during the drafting process of the 1899 Constitution. See 2.3., "The 1899 Nationality Act".

[272] MOFA, *supra* note 267.

[273] MOFA, *supra* note 264, at 589.

[274] *Id*, at 589.

[275] LN, *supra* note 259, at 3.

[276] MOFA, *supra* note 261. Note that Article 18 of the 1899 Nationality Act had been amended in 1916, and that Japanese women who were married to foreign men no longer lost their Japanese nationality unless they had acquired the nationality of their husband. See 2.4., "The 1916 Amendment of the 1899 Nationality Act".

[277] Translated by the author. *Id*.

[278] MOFA, *supra* note 267.

[279] MOFA, *supra* note 264, at 591.

merely passing through it, the Japanese government did not express its stance on the nationality of women who were married to foreign men in general. It merely explained the Japanese law.

Fifth, the CPCC asked about the nationality of an illegitimate child when his or her civil status changed.[280] In particular, it asked whether the loss of nationality as a result of the change in civil status was conditional on the acquisition of another nationality.[281] This question is related to statelessness because the loss of a former nationality being conditional on the acquisition of a new one functioned to prevent statelessness. Yamada stated that illegitimate children who had been legitimated by Japanese nationals acquired Japanese nationality.[282] The Inter-Ministerial Council did not object to Yamada's statement.[283] Yamada's draft did not seem to answer the question of the CPCC properly because it merely discussed the case of foreigner children who are adopted by Japanese while the CPCC seems to have asked about the case of Japanese children who are adopted by foreigners. The reply to the CPCC modified Yamada's draft to make sure that the reply answers the CPCC's inquiry accurately, and it stated that "if a child who is Japanese acquires foreign nationality in virtue of recognition, [he or she] loses [his or her] Japanese nationality" with reference to Article 23 of the 1899 Nationality Act.[284] The reply indicated that Japanese nationality was not lost if a child who was recognised by a foreign father did not acquire a new nationality. In other words, Japan was prepared to prevent statelessness among Japanese children whose civil status changed as a result of, for example, recognition by foreigners.

Although Yamada recognised the need to prevent statelessness, it must be noted that the Inter-Ministerial Council stated that the treaty to be adopted should "merely obligate

[280] LN, *supra* note 259, at 3.
[281] *Id*, at 3.
[282] MOFA, *supra* note 261.
[283] MOFA, *supra* note 267.
[284] MOFA, *supra* note 264, at 593.

states to *legislate*".[285] Although the meaning of this phrase is not clear, the Inter-Ministerial Council did not want a new treaty to create the need to implement or amend municipal laws.[286] This implies that ministries desired to make the new treaty compatible with the Japanese laws of the time, and did not want to amend the Japanese laws.[287]

2.5.2. The Drafting of the Japanese Directives (1929-1930)

The second phase involved a drafting of directives within the Japanese government in 1929 and 1930, after Japan had received the bases of the discussion prepared by the CPCC. The Japanese stance during the drafting process of the directives indicates that it was in line with the norm of preventing statelessness in the CPCC's bases of the discussion. In addition, it was more committed to the regulation of nationality matters in international law than in the previous phase because a phrase stating that the new treaty should not obligate Japan to amend its municipal law, included during the discussion at the Inter-Ministerial Council in the previous phase, was included neither in the draft of the directive nor in the directive.

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[285] Translated by the author and emphasis added. MOFA, *supra* note 267.
[286] *Id*.
[287] It must be noted that the Japanese government's stance seems to have been different from that of Yamada, who hoped to "contribute to the codification", though this was not directly relevant to the prevention of statelessness. In his draft reply, Yamada added section XVI, while the CPCC's schedule of points contained only 15 sections. The sixteenth section was entitled "The principle to solve issues of conflict of nationality", and Yamada wanted to include this in the reply to the CPCC. It stated that if children acquired the nationality of their parents and place of birth, and they lived in the state of their birth, their nationality by place of birth should be recognised by every state. It continued that if they lived in the state of their parents' nationality or third states, they could choose the nationality of their parents if they wished. Yamada was concerned that there was a conflict of nationality between *jus sanguinis* and *jus soli*, and thus he made this proposal. MOFA, *supra* note 261. The point is that the 1899 Nationality Act did not have such a provision. In other words, this proposal could have led to the amendment of Japanese laws. In the Inter-Ministerial Council, the MOJ did not support this proposal because it was not compatible with the 1899 Japanese Act. Rikiya Takahashi, 1930 Nen Hagu Kokusai Houten Hensan Kaigi niokeru "Tsumano Kokuseki" Mondaito Nihon: "Kokusaihouno Shimpo" to "Teikokuno Rieki" [*Nationality of Married Women in the Hague Codification Conference and Japan: Development of International Law and National Interest*], 188 INT'L RELATIONS 15, 23 (2017). Although Yamada emphasised the importance of "contributing to the codification", this proposal was not included in the Japanese government's reply to the CPCC. This indicates the Inter-Ministerial Council's hesitancy to amend Japanese laws and Yamada's passion to solve issues of conflict of nationality by international law.

After the CPCC examined replies from states, it prepared the "bases of discussion", which served as the draft of the 1930 Convention for discussion at the Codification Conference on the basis of the agreement included in the replies of the states to the schedule of points.[288] The Japanese government examined the bases of discussion and prepared directives for its delegate to attend the conference. The bases of discussion number 1, 11, 12, 16, 17 and 20 *bis* were relevant to the prevention of statelessness. The issue of the nationality of children born in the territory of a state to parents who were merely passing through the territory, included in the schedule of points, was excluded from the bases of discussion since the CPCC found that there was no agreement among states on this issue.[289]

Basis of discussion number 1 had three paragraphs, and the first paragraph noted that acquisition and loss of nationality was determined by "the law of the State whose nationality is claimed or disputed".[290] The second and third paragraphs listed methods of acquisition and loss of nationality.[291] The draft of directives of the Japanese government stated that there was no problem in following the first paragraph but that the second and third paragraphs should be amended because they were "inappropriate as provisions".[292] In addition, the draft stated that the delegate should attempt to propose a provision on non-discrimination based

[288] For the bases of discussion, see the following. LN, Conference for the Codification of International Law, Bases of Discussion: Drawn up for the Conference by the Preparatory Committee, Volume I. Nationality, C.73.M.38.1929.V (1929).
[289] *Id*, at 61.
[290] *Id*, at 20.
[291] The second paragraph of basis of discussion number 1 stated that acquisition of nationality includes "bestowal of nationality by reason of the parents' nationality or of birth on the national territory, marriage with a national, naturalisation on application by or on behalf of the person concerned, transfer of territory". With regard to 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" were listed as examples in the third paragraph. LN, *supra* note 288, at 20.
[292] Translated by the author. From the available resources, it is not clear why the list was "inappropriate". MOFA, Kokusai Houten Hensan Kaigi Kokuseki Mondai Kunrei An [*International Codification Conference: A Draft of Directives on Nationality Issues*], *in* KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN HENSAN KAIGI IKKEN DAI 3 (B) KAN 2 IPPAN JUMBI, DAI 1 KAI KAIGI BUNKATSU 1 [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 3(B) 2. GENERAL PREPARATION, THE FIRST MEETING PART 1] (B-9-2-0-2_004) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014072700 (1930).

on race, nationality, and religion.[293] This was proposed because of "the unique status of" Japan.[294] This reflected Japanese policy of the time, which paid particular attention to the prohibition of racial discrimination in the LN.[295] The draft was transmitted to the Japanese delegate in the LN.[296] However, Harukazu Nagaoka, a Japanese delegate to the Codification Conference and then-ambassador to Germany, claimed that Japan should not propose a clause on the prohibition of racial discrimination to the MOFA in Tokyo because there was little chance that issues of racial discrimination would be included in the treaty.[297] He pointed out that Japan would be in a difficult position to negotiate on nationality matters if it proposed to include a provision on racial discrimination.[298] After Nagaoka's comment, the Japanese government decided to omit the proposal of a clause on the prohibition of racial discrimination from the directives.[299]

Basis of discussion number 11 concerned children whose parents were not known. It stated that "[a] child whose parents are unknown has the nationality of the country of birth", and it continued that a foundling was assumed "to have been born on the territory of the State in which it was found".[300] The draft of the directives stated that since this basis shared the principle of the 1899 Nationality Act, there was no problem in following it,[301] and this stance remained the same in the directives.[302]

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[293] *Id*.
[294] Translated by the author. *Id*.
[295] The Japanese emphasis on the principle of prohibition of racial discrimination can be seen from the drafting process of the LN Covenant although this was opposed by other states, such as the US and Australia, and it was not included in the LN Covenant. See the following. NAOKO SHIMAZU, JAPAN, RACE AND EQUALITY: THE RACIAL EQUALITY PROPOSAL OF 1919 13-37, 89-163 (1998).
[296] MOFA, *supra* note 264, at 617-618.
[297] *Id*, at 628.
[298] *Id*, at 628.
[299] The directives also stated that the Japanese government possessed the freedom to determine issues of nationality of Koreans, given the unique circumstances of Korea. *Id*, at 630. For the Japanese stance on the nationality of Koreans, see 2.6.2., "Korea".
[300] LN, *supra* note 288, at 67.
[301] MOFA, *supra* note 292.
[302] MOFA, *supra* note 264, at 619.

Basis of discussion number 12 covered the nationality of children whose parents did not have any nationality. This was originally classified under the same category as basis of discussion number 11. However, the reply from governments to the schedule of points indicated that states' stance on children who were born to stateless parents varied, while there was general conformity among states' views in the case of foundlings.[303] Thus, basis of discussion number 12 was separated from basis of discussion 11. It stated that the nationality of the state of birth was to be conferred on children whose parents did not have any nationality or whose parents' nationalities were not known if the person lived in the state up to an age determined by that state, not exceeding eighteen years.[304] The residential requirement rendered number 12 different from number 11 because the latter conferred nationality of the state of birth without a residential requirement. The draft of the directives stated that it would be appropriate to handle children of stateless persons and those whose nationality was not known in the same way as foundlings, as the 1899 Nationality Act did.[305] Since this basis of discussion did not conflict with the nationality act, the Japanese government stated that there was no reason to oppose this basis of discussion.[306] This stance remained the same in the directives.[307] The 1899 Nationality Act conferred Japanese nationality on children whose parents were stateless.[308] Thus, length of stay in the territory was not considered in the 1899 Nationality Act. In this sense, the Japanese stance and the 1899 Nationality Act were more open to conferring nationality on children whose parents did not have any nationality than this basis of discussion was.

Bases of discussion numbers 16 and 17 concerned women who were married to foreign men. The sixteenth basis of discussion noted that women would not lose their

[303] LN, *supra* note 288, at 67.
[304] *Id*, at 67.
[305] MOFA, *supra* note 292.
[306] *Id*.
[307] MOFA, *supra* note 264, at 619.
[308] Article 4 of the 1899 Nationality Act. See 2.3., "The 1899 Nationality Act".

nationality when they married foreign men unless they acquired their husband's nationality.[309] Basis of discussion number 17 stated that women did not lose their nationality when their husband changed his nationality during marriage unless the women acquired their husband's new nationality.[310] Although the CPCC acknowledged that it was difficult to decide on a rule for married women's nationality, it recognised that these provisions would prevent statelessness among women.[311] The Japanese draft of the directives stated that there was no problem following these bases since they were compatible with the Japanese stance, which was expressed in the reply to the schedule of points,[312] and this stance did not change in the directives.[313]

Basis of discussion number 20 *bis* stated that a child did not lose his or her original nationality in cases of change in civil status unless he or she acquired another nationality.[314] The draft of directives stated that there was no problem in supporting this basis,[315] and this stance was maintained in the directives.[316]

There is a notable difference between the discussions at the Inter-Ministerial Council of 1928, when the reply to the schedule of points was drafted, and the Japanese directives in 1930. The Inter-Ministerial Council decided to include in the directives a phrase that a new treaty should not obligate Japan to amend its municipal laws.[317] However, such a provision was included neither in the draft of the directive nor the directive itself.[318] Although it is not clear why this proposal was omitted due to the lack of sources, this indicates that Japan did

[309] LN, *supra* note 288, at 95.
[310] *Id*, at 95.
[311] *Id*, at 94.
[312] MOFA, *supra* note 292. See 2.5.1., "Japanese Reply to the Schedule of Points (1928)".
[313] MOFA, *supra* note 264, at 621.
[314] LN, *supra* note 288, at 112.
[315] MOFA, *supra* note 292.
[316] MOFA, *supra* note 264, at 621.
[317] See 2.5.1., "Japanese Reply to the Schedule of Points (1928)".
[318] MOFA, *supra* note 292. MOFA, *supra* note 264, at 621.

not strongly oppose a treaty that could have required amendment of the 1899 Nationality Act in its official stance before participating in the Codification Conference.[319]

2.5.3. The Japanese Position in the Codification Conference (1930)

The third phase was a discussion at the meeting of the Codification Conference held at The Hague in 1930. In the discussion of the Codification Conference, Japan expressed its view that the conflict in the laws on nationality needed to be eliminated by international law. This indicates that the Japanese commitment to preventing statelessness remained at the Codification Conference. Since the 1899 Nationality Act was compatible with the provisions on the prevention of statelessness in the 1930 Convention, the Japanese government did not find the need for amending the nationality act since it already considered to ratify the 1930 Convention. The Japanese commitment to preventing statelessness is also observable from the fact that Japan was in favour of a separate Protocol on Statelessness that was newly introduced at the Codification Conference.

Discussions were based on the "bases of discussion", which had already been circulated to states, and bases of discussion numbers 1, 11, 12, 16, 17 and 20 *bis* were relevant to the prevention of statelessness. When basis of discussion number 1 (each state's competence to determine who its nationals are) was discussed, Nagaoka, a Japanese delegate, had the floor as the first speaker, and he stated that although each state had the freedom to decide on methods of acquisition and loss of nationality, such freedom had "reasonable limits, in order to eliminate as far as possible cases of statelessness and double

[319] Note that the Japanese delegate stated that Japan was willing to amend any nationality law if it conflicted with any new treaty in the Codification Conference. See 2.5.3., "The Japanese Position in the Codification Conference (1930)". It was also said that Japan had prepared an amendment to the nationality act although the act was not amended in reality. See note 332.

nationality". [320] He noted that the Japanese legislation paid attention to preventing statelessness in order "to [avoid] the disadvantages of statelessness".[321] He added:[322]

> If, in this Conference, the various States of the world find that they can, by agreement, eliminate the conflict of laws on this subject, I beg to state here and now that my Government will be prepared to introduce into its nationality law such changes as may be deemed necessary.

This shows the Japanese delegate's commitment to preventing statelessness and multiple nationalities. The Japanese directives stated that the delegate was not against the bases of discussion even though there was a basis that did not seem to be compatible with the 1899 Nationality Act.[323] The first paragraph of basis of discussion 1 became the basis of Article 1 of the 1930 Convention. [324] It must be noted that Japan paid substantial attention to preventing any negative and positive conflicts of nationality, including statelessness, when the 1930 Convention was negotiated.

With regard to the bases of discussion relevant to the prevention of statelessness, Japan did not make many substantial comments during the discussions. There was no

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[320] LN, *supra* note 95, at 19.
[321] *Id*, at 19.
[322] *Id*, at 19.
[323] For instance, the directives noted that the delegate did not need to oppose basis of discussion number 18, which determined that "[n]aturalisation of the husband during the marriage does not involve a change of nationality for the wife except with her consent" (LN, *supra* note 288, at 95), while the 1899 Nationality Act did not take the willingness of women into account. MOFA, *supra* note 264, at 621. Note that although some ministries requested that the treaty be made compatible with the 1899 Nationality Act, this principle was not included in the directives. See 2.5.2., "The Drafting of the Japanese Directives (1929-1930)".
[324] Japan and the US proposed to omit the second and third paragraphs of basis of discussion number 1, which listed examples of "acquisition of nationality" and "loss of nationality". Although Japan did not explain why it sought to omit these, the US offered two reasons. First, it was not clear whether the contents listed in these paragraphs were exhaustive or merely examples of "acquisition" and "loss" of nationality. Second, the meaning of the contents listed in these paragraphs, such as "voluntary acquisition of a foreign nationality", were not necessarily clear. Paragraphs 2 and 3 were then omitted by 18 votes to 17. LN, *supra* note 95, at 28, 33.

discussion about basis of discussion number 11 (application of *jus soli* in the case of foundlings) at the conference, and substantial parts of the basis of discussion remained the same as in Article 14 of the 1930 Convention.[325] Basis of discussion number 12 was modified by the Drafting Committee, which was established during the conference, and a new basis of discussion stated that children whose parents did not have any nationality "may" acquire the nationality of their state of birth, which did not create any substantial legal obligation on states.[326] Although states had different views about the nationality of children whose parents did not have any nationality, this amendment allowed states to agree on a provision,[327] and the basis of discussion number 12 became the basis of Article 15 of the 1930 Convention. There was not much discussion of bases of discussion numbers 16 and 17, and the text of these bases of discussion remained the same in Articles 8 and 9 of the 1930 Convention. Japan did not comment on these articles.[328]

With regard to basis of discussion number 20 *bis* (retention of the original nationality in cases of a change in civil status unless the child acquires another nationality), Japan stated that "the Japanese delegation is able to accept Basis No. 20 *bis* without any amendment".[329] However, it did not comment further, and basis of discussion number 20 *bis* became the basis of Article 16.[330] The prevention of statelessness was included in Articles 8, 9, 14, 15 and 16 of the 1930 Convention.

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[325] The Drafting Committee was appointed, and it redrafted the basis of discussion. It added that when parentage was established, the child's nationality was determined by the established parentage. *Id*, at 164.
[326] *Id*, at 164.
[327] See the following. *Id*, at 165.
[328] Although it is not clear from the available sources why Japan did not comment on these bases of discussion, one possible reason is that Japan was in favour of these bases of discussion, and there was no need to make comments on them because other states were also supporting these articles. Note that the Japanese government recognised that there was no problem in following bases of discussion numbers 16 and 17 in the directives. See 2.5.2., "The Drafting of the Japanese Directives (1929-1930)".
[329] LN, *supra* note 95, at 175.
[330] It must be noted that bases of discussion numbers 20 and 20 *bis* had an effect on preventing both positive and negative conflicts of nationality, but basis of discussion number 20, which provided for prevention of possession of multiple nationalities, was not included in the 1930 Convention. Basis of discussion number 20 stated that when illegitimate children acquired the nationality of their father as a

At the end of the Codification Conference, Japan signed the 1930 Convention on 12 April 1930.[331] However, it did not ratify the 1930 Convention, so the 1930 Convention did not legally bind Japan.[332]

In addition to the 1930 Convention, the conference adopted several protocols: the Protocol relating to Military Obligations in Certain Cases of Double Nationality, the Protocol on Statelessness and the Special Protocol on Statelessness. Of these, the Protocol on Statelessness is relevant to the prevention of statelessness.[333] One idea of the Protocol on Statelessness was derived from the amendment proposed by Poland.[334] The Protocol provided for the application of *jus sanguinis* through the maternal line in cases where the *jus soli* principle was not adopted and the father of the child did not have any nationality or

result of legitimation, they lost the nationality of their mother that they had previously acquired. LN, *supra* note 288, at 111. However, some states disagreed with this, and basis of discussion number 20 was omitted. See the following. *Id*, at 175. It is interesting to note that states could not agree on preventing multiple nationalities among children whose civil status changed while they could agree on the prevention of statelessness among children whose civil status changed.

[331] HIDEBUMI EGAWA, RYOICHI YAMADA & YOSHIRO HAYATA, *KOKUSEKI HOU* [NATIONALITY ACT] 43 (3rd ed., 1997).

[332] Japan reserved Articles 4, 10 and 13 when it signed the 1930 Convention. Ratification was not even discussed in the Imperial Diet. The reason why Japan did not ratify the 1930 Convention is not clear, but Tanaka, a former official of the MOJ who dealt with nationality matters, guesses that a change in the political situation soon after 1930 may have prevented ratification of the 1930 Convention from being discussed in the Imperial Diet. Yasuhisa Tanaka, Nihon Kokuseki Hou Enkaku Shi (Kan) [*History of the Japanese Nationality Act Final*], 478 KOSEKI 1, 2 (1984). The Mukden Incident took place in 1931, and Japan began to leave the international arena after that. This background may have influenced non-ratification of the 1930 Convention. However, it must be noted that the Home Ministry prepared an amendment to the Nationality Act in order to make the Nationality Act compatible with the provisions for multiple nationalities in the 1930 Convention. For instance, a new provision for Article 20-4 was proposed. Article 6 of the 1930 Convention provided that people who possessed multiple nationalities involuntarily could renounce their nationality upon the authorisation of the state of their nationality. After the 1916 amendment, Article 20-2 of the 1899 Nationality Act permitted the renunciation of nationality by persons with multiple nationalities. However, this article was applied only to persons who were born in states that adopted *jus soli*, and this limitation conflicted with the 1930 Convention. Thus, the proposed Article 20-4 lifted the condition of *jus soli*. By the introduction of Article 20-4, any Japanese individuals with other nationalities could apply for renunciation of their Japanese nationality. Tanaka, *supra* note 332, at 5. This implies that the 1930 Convention could influence the Japanese Nationality Act.

[333] The Special Protocol on Statelessness concerns which state is bound to admit a stateless person (Article 1), so this is not directly relevant to the *prevention* of statelessness. The Protocol on Statelessness entered into force on 1 July 1937. EGAWA, YAMADA & HAYATA, *supra* note 331, at 43.

[334] LN, *supra* note 95, at 201.

where his nationality was unknown.[335] At an earlier stage, the "Convention Annexed to the Convention relating to Conflict of Nationality Laws" was proposed, containing three articles.[336] The Polish delegation proposed to separate the articles in the proposed annex convention into three protocols.[337] The Japanese delegate supported the Polish idea and stated that it could sign only Article 3 of the annex convention, which became a provision of the Protocol.[338] The annex convention was separated into three protocols without any objection.[339]

A brief discussion during the drafting process of the Protocol on Statelessness indicated states' strong commitment to preventing statelessness. The draft stated that a child "shall have" a nationality of his or her mother if the *jus soli* principle is not adopted and the father of the child is stateless or the father's nationality is not known.[340] Belgium proposed to replace "shall have" with "shall be allowed to have" or "may have".[341] The purpose of this Belgian proposal was to allow children to have the option of possessing the nationality of his or her mother.[342] However, this Belgian proposal was rejected.[343] This indicates that states preferred the prevention of statelessness over acknowledging children's right to choose their nationality. After that, this article was adopted.[344] Japan voted in favour of this provision.[345]

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[335] It stated that "In a State whose nationality is not conferred by the mere fact of birth in its territory, a child born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality the said State". *Id*, at 300.
[336] *Id*, at 300.
[337] *Id*, at 242.
[338] However, Nagaoka, a Japanese representative, did not comment on why he supported only Article 3. *Id*, at 242.
[339] *Id*, at 242.
[340] *Id*, at 248.
[341] *Id*, at 248.
[342] *Id*, at 248. This proposal is interesting because it allowed the child to choose either to possess his or her mother's nationality or to be stateless, even though statelessness was regarded as an issue at the time.
[343] *Id*, at 249.
[344] This was adopted by 26 votes to two. *Id*, at 249.
[345] *Id*, at 249.

From the available sources, there was no communication between Tokyo and the Japanese delegation regarding the Protocol on Statelessness.[346] Since this provision was in line with Article 3 of the 1899 Nationality Act,[347] Japan seemed to support this provision. Japan signed the Protocol,[348] but it did not become a contracting party to the Protocol.[349]

With regard to the relationship between the 1899 Nationality Act and 1930 Convention, Japan already complied with the norm of preventing statelessness in the 1930 Convention, so the 1899 Nationality Act was not amended to comply with the 1930 Convention.[350]

2.6. Colonies of Japan

2.6.1. Taiwan

The above-mentioned history covers mainland Japan. However, the story was different in the colonies that Japan possessed after 1895 because the legal status of the colonies was different from that of the mainland.[351] The norm of preventing statelessness in international law did not seem to be considered in the colonies. This section concerns the prevention of statelessness in the colonies of Japan, such as Taiwan, Korea and the South Pacific Mandate.[352] It begins with an analysis of Taiwan. Some indigenous people in Taiwan were not regarded as Japanese, and this resulted in their statelessness.

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[346] See the following. MOFA, *supra* note 264, at 583-645.
[347] Article 3 of the 1899 Nationality Act proided for the adoption of *jus sanguinis* through the maternal line if the father was not known or if he did not have a nationality.
[348] EGAWA, YAMADA & HAYATA, *supra* note 331, at 43.
[349] Although the reason is not apparent, it could be similar to that for the lack of ratification of the 1930 Convention. See note 332.
[350] Note that with regard to multiple nationalities, there was a need to amend the 1899 Nationality Act to make it compatible with the 1930 Convention. See note 332.
[351] Colonies were called *gaichi* (outland), and the mainland was called *naichi* (inland) during the colonial era.
[352] While the mandate was different from the colonies because the concept of sovereignty over the mandate was vague, this dissertation covers nationality in the South Pacific Mandate. There were several possible bearers of sovereignty over the South Pacific Mandate, such as the LN, the collective nations of the inhabitants, the five winners of WWI, the former coloniser (Germany) or the Mandatory. RYOICHI TAOKA, *ININ TOUCHI NO HONSHITSU* [A NATURE OF MANDATE] 119-256 (1941). However, the

Taiwan was ceded by China in 1895, pursuant to Article 2(b) of the Treaty of Shimonoseki. Regarding nationality, Article 5 of the treaty provided that:[353]

> The inhabitants of the territories ceded to Japan who wish to take up their residence outside the ceded districts shall be at liberty to sell their real property and retire. For this purpose, a period of two years from the date of the exchange of ratifications of the present Act shall be granted. At the expiration of that period, those of the inhabitants who shall not have left such territories shall, at the option of Japan, be deemed to be Japanese subjects.

There were two interpretations of this article, and each of them made different arguments about when Taiwanese people lost their Chinese nationality and acquired Japanese nationality.[354] However, neither of them concerned statelessness because they assumed that when Chinese nationality was lost, the Taiwanese people acquired Japanese nationality.

Taiwanese people had acquired Japanese nationality by 1897 at the latest. The "Procedure to Deal with the Status of Taiwanese Residents", which was approved by the cabinet and promulgated by the Governor-General of Taiwan, regarded people who had an address in Taiwan or the Penghu Islands before 8 May 1895 to be residents of Taiwan, and

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South Pacific Islands had come under the administration of Japan since 1922, pursuant to the Treaty of Versailles, and there was no other possible state able to confer nationality. In other words, if Japanese nationality was not conferred, inhabitants in the South Pacific Mandate would be stateless. Thus, this issue of the South Pacific Mandate is within the scope of this dissertation.

[353] The English translation of the Treaty of Shimonoseki is available from the following. Taiwan Documents Project, *Treaty of Shimonoseki*, *available at* http://www.taiwanbasic.com/treaties/Shimonoseki.htm (viewed Jan. 17, 2019).

[354] On the one hand, there was the argument that the Japanese government assumed that Taiwanese people remained nationals of the Qing Dynasty of China until the Japanese government came to regard them as Japanese, after 1897, two years after the date of the exchange of ratifications of the Treaty. On the other hand, there was the view that Taiwanese people became Japanese in 1895, and people who left Taiwan recovered the nationality of the Qing Dynasty. EGAWA, YAMADA & HAYATA, *supra* note 331, at 194.

those who remained in Taiwan until 8 May 1897 were regarded as "subjects" of Japan.[355] When the 1899 Nationality Act was promulgated on 18 March 1899, it was not automatically effective in Taiwan because the legal system in the colonies was separate from that on the mainland.[356] However, the 1899 Nationality Act was enforced in Taiwan on 20 June 1899, pursuant to an imperial ordinance.[357]

Since the 1899 Nationality Act was enforced in Taiwan too, in principle, statelessness was prevented in Taiwan as it was in mainland Japan. However, there were some unique reasons why statelessness could arise in Taiwan. First, there was the possibility that some residents of Taiwan were not regarded as Japanese nationals. Article 2 of the "Procedure to Deal with the Status of Taiwanese Residents" of 1897 stated that residents of Taiwan might not be regarded as Japanese nationals if the Governor-General of Taiwan rejected such consideration.[358] This clause was introduced because the Japanese government was trying to avoid conferring Japanese nationality on people who would be "obviously harmful" for Japan.[359] In other words, the Governor-General of Taiwan had the discretion to reject Japanese nationality for Taiwanese people in 1897. If some Taiwanese people were not regarded as Japanese nationals, and the Qing Dynasty did not regard them as its nationals, then those people could be stateless although no available sources indicate that there were such people, except indigenous people as explained below.

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[355] Translated by the author. Articles 1 and 2 of the Procedure to Deal with the Status of Taiwanese Residents. MASATAKA ENDO, *KINDAI NIHON NO SHOKUMINCHI TOUCHI NIOKERU KOKUSEKI TO KOSEKI: MANSHU, CHOSEN, TAIWAN* [NATIONALITY AND KOSEKI IN THE COLONIAL GOVERNANCE IN MODERN JAPAN: MANCHURIA, KOREA AND TAIWAN] 76 (2010). For the conceptual relationship between "subjects" and "nationals", see note 176.
[356] NAKAMURA, *supra* note 182, at 70.
[357] Masataka Endo, Taiwan Sekiminwo meguru Nihon Seifuno Kokuseki Seisakuno Shuttatsu: Nijuu Kokuseki Mondaito Sinkoku Kokusekihou heno Taiouwo Chuushinn toshite [*Beginning of Nationality Policy of the Japanese Government on Taiwanese People: Dual Nationality Issues and Nationality Law of the Qing Dynasty*], 376 THE WASEDA J. OF POLITICAL SCI. AND ECON. 51, 53 (2009).
[358] ENDO, *supra* note 355, at 76.
[359] Translated by the author. *Id*, at 76-77.

Second, the Japanese government interpreted the 1899 Nationality Act as not applying to some indigenous people in Taiwan because they were not included as "inhabitants" of Taiwan in the Treaty of Shimonoseki.[360] The Qing Dynasty classified indigenous people into two categories. The first group of indigenous people were called "mature indigenous people", and they were regarded as subjects of the Qing Dynasty.[361] Thus, "mature indigenous people" were regarded as "residents" of Taiwan under Article 5 of the Treaty of Shimonoseki, and they were came to be considered nationals of Japan.[362] The second group of indigenous people were called "immature indigenous people".[363] "Immature indigenous people" were regarded as "barbarous people" and abandoned by the Qing Dynasty.[364] The Qing Dynasty regarded them as "beasts" since they were "in the habit of beheading".[365] As a result, "immature indigenous people" were not regarded as "residents" under Article 5 of the Treaty of Shimonoseki, and they did not acquire Japanese nationality.[366] In other words, they seem to have been stateless.[367] However, there was the possibility that "immature indigenous people" could become "mature indigenous people" if "they [were] civilised and obedient to laws".[368] It must be noted that "immature indigenous people" were regarded as beasts at the time, and their nationality does not seem to have been regarded as an issue.[369] However, this case should be regarded as an issue of statelessness in

[360] Translated by the author. *Id*, at 79.
[361] Translated by the author. Katsuji Yasui, Seibanjin no Kokuhoujou no Chii nitsuite [*The Legal Status of Indigenous People in Taiwan*], 7(1) TAIWAN KANSHUU KIJI 1, 9 (1907).
[362] Translated by the author. *Id*, at 14.
[363] Translated by the author. *Id*, at 9.
[364] Translated by the author. *Id*, at 9.
[365] Translated by the author. *Id*, at 18.
[366] *Id*, at 16.
[367] There were some groups of indigenous people who were classified under this category, such as the Atayal, Tsou, Paiwan, Puyuma, and Amis. *Id*, at 4.
[368] Translated by the author. *Id*, at 16. This reminds the author that the importance of civility for Japan in being regarded as a member of international society. See 4.2.1., "The Status of Japan in International Society".
[369] Since the 1899 Nationality Act had been enforced in Taiwan, the children of "immature indigenous people" who would have been stateless could have acquired Japanese nationality pursuant to Article 4 of the 1899 Nationality Act in theory, but there are no reports of such cases. See 2.3., "The 1899 Nationality Act". The main reason seems to have been that "immature indigenous people" were not

today's context. This is a case where the norm of preventing statelessness did not work in Taiwan.

2.6.2. Korea

In Korea, children born there to unknown parents or stateless parents could be stateless. In 1910, Japan annexed Korea pursuant to the Japan-Korea Annexation Treaty, and Korea became a colony of Japan. Article 6 of the treaty stated that "the Government of Japan […] undertake[s] to afford full protection for the persons and property of Koreans obeying the laws there in force to promote the welfare of all such Koreans", but the treaty did not discuss the general method of acquisition or loss of nationality. However, it was *assumed* that Korean residents acquired Japanese nationality automatically because Korea was annexed peacefully.[370]

Although the 1899 Nationality Act was not enforced in Korea, "a custom and nature" compatible with the 1899 Nationality Act were *assumed* to be applied in Korea,[371] and in fact, the MOFA regarded Korean people as possessing Japanese nationality.[372] It is said that the nationality act was not enforced in order to prevent Korean people's naturalisation in other states that would have resulted in the loss of Japanese nationality pursuant to Article 20 of the 1899 Nationality Act.[373] The MOFA regarded this prevention of renunciation of

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regarded as *human* which the law is applied to since they were regarded as "beasts". Note that when a child was born in Taiwan, the child was regarded as having been born in "Japan". See also note 377.

[370] It was argued that in cases of peaceful annexation, the nationality of the annexing state was conferred on nationals of the annexed state. EGAWA, YAMADA & HAYATA, *supra* note 331, at 201.

[371] Translated by the author. TOSHIYOSHI MIYAZAWA, *KEMPO RYAKUSETSU* [SUMMARY OF THE CONSTITUTION] 46 (1942).

[372] MOFA, TREATIES BUREAU, LEGAL DIVISION, *NIHON TOUCHI JIDAI NO CHOUSEN ("GAICHI HOUSEI SHI" DAI 4 BU NO 2)* [KOREA UNDER THE JAPANESE RULE: "LEGAL SYSTEM OF THE OUTLAND" VOLUME IV-II] 145-146 (1971).

[373] Article 20 of the 1899 Nationality Act provided for the renunciation of Japanese nationality when Japanese nationals acquired another nationality. Thus, if the 1899 Nationality Act was enforced in Korea, Korean people could have renounced their Japanese nationality. The Japanese government wanted to prevent Koreans from renouncing their Japanese nationality for security reasons, regarding it as easier to control Korean people if renunciation was prevented. See the following. MOFA, Kokusai Houten Hensan Kaigi: Chouseijin no Kokuseki Sousitsu nitsuite [*Codification Conference: Concerning*

Koreans' Japanese nationality as an issue from an international legal perspective.[374] However, the MOFA's concern was not strong enough for the government to enforce the 1899 Nationality Act in Korea. Although prevention of renunciation of Japanese nationality was not a problem from the perspective of prevention of statelessness because enforcement of Japanese nationality resulted in the prevention of statelessness, it must be noted that the MOFA's recognition of a problem of enforcement of nationality did not encourage the Japanese government to enforce the 1899 Nationality Act. This case indicates that there were obstacles for the Japanese government in following international laws and norms in a colonial setting.[375]

There were some possible issues of statelessness in Korea as well. In addition to the possibilities of statelessness on the mainland, it was possible that Japanese nationality might not be conferred on people who were born in Korea to unknown parents or stateless parents. There was a view that the "Japan" referred to in Article 4 of the 1899 Nationality Act (*jus soli*) meant the mainland, Taiwan and Sakhalin,[376] so Korea was excluded.[377] This view was justified by the fact that the nationality act was not enforced in Korea.[378] On the basis of this understanding, a child born to unknown parents or parents without a nationality in Korea

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Koreans' Loss of Nationality] *in* KOKUSAI RENMEI KANKEI KOKUSAI HOUTEN KAIGI IKKEN DAISAN (B) KAN [LEAGUE OF NATIONS CODIFICATION CONFERENCE VOL. 3(B)] (B-9-2-0-2_004) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan). Japan Center for Asian Historical Records, National Archives of Japan. Ref. B04014072900 (1930). *Id*, at 145-146. Akiyama, *supra* note 35, at 86-88. Endo, *supra* note 357, at 57.

[374] The MOFA stated that the 1899 Nationality Act should be enforced in Korea. MOFA, *supra* note 373.

[375] See the following. Akiyama, *supra* note 35, at 89-90.

[376] MIYAZAWA, *supra* note 371, at 46.

[377] There is also the view that Korea was included in "Japan" when applying Article 4 of the 1899 Nationality Act. This view claims that "Japan" referred to mainland, Korea, Taiwan, Sakhalin, the South Pacific Mandate, Japanese territorial waters, Japanese warships, and Japanese merchant ships on the High Seas. Masao Sanekata, Kokuseki Hou [*Nationality Act*], *in* KOKUSAI HOU III [INTERNATIONAL LAW III] 1, 13 (Izutaro Suehiro ed., 1938). This view is supported by the fact that Korean territory was a part of Japan. If the Japanese government followed this understanding, Japanese nationality would be conferred on children born in Korea to unknown parents and stateless parents. In contrast with Korea, both interpretations regarded Taiwan as part of Japan, so Article 4 could be applied to children born in Taiwan to prevent statelessness although there is no evidence of this occurring.

[378] Toshiyoshi Miyazawa, Kokuseki Hou Zatsudai [*Miscellaneous Problems of the Nationality Act*], 57(5) J. OF THE JURISPRUDENCE ASS'N 847, 852 (1939).

could have been stateless. Although the practice at the time is not known,[379] it is fair to say that there was a risk that children born in Korea to unknown parents or stateless parents could become stateless.

2.6.3. South Pacific Mandate

The status of inhabitants of the South Pacific Mandate was unstable, and they were not regarded as Japanese nationals, though the Japanese government exercised its diplomatic protection. In 1914, Japan occupied the South Pacific Islands, a colony of Germany at the time, and ruled the South Pacific Islands.[380] After WWI, the Pacific Islands came under the administration of Japan and became "integral parts" of Japan.[381] The South Pacific Islands became a C mandate of the LN, which was "close […] to colonial rule" by Japan.[382]

Inhabitants in the South Pacific Mandate were not Japanese nationals but the Japanese government could exercise diplomatic protection over the people in the South Pacific Mandate. Neither the 1889 Constitution nor the 1899 Nationality Act was effective in the South Pacific Mandate. As in the case of other colonies, the laws on the mainland became effective in the South Pacific Mandate when a special law was enacted,[383] but there was no such legislation to make the 1889 Constitution and 1899 Nationality Act effective in the South Pacific Mandate.[384] In an annual report on the mandate that was submitted to the

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[379] Miyazawa, a constitutional scholar, believes that in practice, Korea appears to have been excluded from "Japan". *Id*, at 861.
[380] HARUO TOMATSU, *NIPPON TEIKOKU TO ININ TOUCHI: NANYOU GUNTOU WO MEGURU KOKUSAI SEIJI 1914-1947* [THE JAPANESE EMPIRE AND MANDATE: INTERNATIONAL POLITICS CONCERNING SOUTH PACIFIC ISLANDS FROM 1914 TO 1947] 54 (2011).
[381] Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS L. 47, 73 (2005).
[382] The South Pacific Islands were regarded as being "remote […] from the centres of civilization", so they were classified as a C mandate. *Id*, at 73. For details of the Mandate system, see the following. *Id*, at 72-73.
[383] MOFA (ed.), *GAICHI HOUSEI SHI DAI 10 KAN: ININ TOUCHIRYOU NANYOU GUNTOU ZENPEN* [LAWS OF THE OUTLAND VOL. X: SOUTH PACIFIC MANDATE I] 58 (1990).
[384] It was also assumed that the order issued by the government was regarded as the law in the South Pacific Mandate. *Id*, at 58-59.

Council of the LN in 1933, the Japanese government stated that the people in the South Pacific Mandate were considered "[i]nhabitants of the islands", and as different from "Japanese subjects".[385] As a result, they could not be Japanese subjects or nationals unless they were naturalised as Japanese or acquired Japanese nationality by marriage.[386] This indicates that people in the South Pacific Mandate did not possess Japanese nationality. However, in the scholarly literature, Miyazawa, a well-known constitutional scholar, stated that people in the South Pacific Mandate were not necessarily stateless from an international point of view, and that they had a status equivalent to Japanese nationals.[387]

This vague status of the people of the South Pacific Mandate seems to have been justified by the principle developed by the LN at the time. A resolution of the Council of the LN in 1923 stated that indigenous people in the C mandate could be naturalised by the Mandatory,[388] but they did not automatically acquire the nationality of the Mandatory.[389] However, pursuant to Article 127 of the Treaty of Versailles, the Mandatory had a right to diplomatic protection over the people of the mandate.[390] Therefore, Japan had the right of diplomatic protection over the people in the South Pacific Mandate, but they were not regarded as Japanese nationals, unlike those in Taiwan and Korea. Thus, it is difficult to judge whether or not the people in the South Pacific Mandate were stateless. However, it must be noted that the Japanese stance on the people of the South Pacific Mandate was in line with the principle developed by the LN at the time.

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[385] *Id*, at 59.
[386] In fact, it was reported that three inhabitants of the islands acquired Japanese nationality as a result of marriage with Japanese men. *Id*, at 59.
[387] MIYAZAWA, *supra* note 371, at 47.
[388] The Mandatory of the South Pacific Mandate was Japan.
[389] MOFA (ed.), *supra* note 383, at 59.
[390] *Id*, at 59.

2.7. Conclusion on the Prevention of Statelessness under the 1889 Constitution

This chapter examined the prevention of statelessness in Japanese laws from 1889 to 1945, and it indicated that Japan was committed to the norm of preventing statelessness in international law. There are two notable findings. First, Japan referred to a resolution of the IDI, which Japan regarded as a 'highly influential' document in international law,[391] around the time of the enactment of the 1899 Nationality Act. This implies that Japan believed that states needed to follow "international law" even though the resolution of the IDI was not a legally binding document. Second, Japan was passionate about promoting the principle of prevention of conflict of nationality, including statelessness, at the Codification Conference.

In addition, there is one interesting observation concerning the colonies. The prevention of statelessness was considered when the 1899 Nationality Act, which was effective on the mainland, was discussed, but it was not discussed in relation to the colonies. There are two factors for this. The first factor is that the Japanese government did not allow the norm of preventing statelessness in international law to intervene in the governance of its colonies even though the principle was recognised on the mainland. For instance, the nationality policy of Korea was regarded as an issue referring to international law, but it did not change because security issues were also considered.[392] The second factor is that the international principle acknowledged the different treatment of mainland and colony, as can be seen in the case of the South Pacific Mandate in particular. A combination of these elements seems to have assisted the limited commitment to the prevention of statelessness in the colonies.

[391] Translated by the author. MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 207, at 19.
[392] See 2.6.2., "Korea".

CHAPTER 3: INTERNATIONAL LAW AND THE PREVENTION OF STATELESSNESS IN JAPAN UNDER THE 1946 CONSTITUTION

3.1. Summary of the Chapter

The norm of preventing statelessness in international law played a role in the interpretation of the freedom to renounce one's nationality under the 1946 Constitution. Japanese government officials argued that the constitution did not allow Japanese nationals to renounce their nationality if this resulted in statelessness, referring to the preamble of the 1930 Convention. However, the norm of preventing statelessness in other treaties had no influence on Japanese nationality law. For instance, Japan participated in the UN Conference on the Elimination or Reduction of Future Statelessness, which adopted the 1961 Convention, but this did not trigger an amendment to Japanese nationality law. Furthermore, the provisions on children's right to acquire a nationality in the ICCPR and CRC did not trigger the argument within government that Japan needed to prevent statelessness by conferring Japanese nationality on children because these articles were not interpreted as placing an obligation on Japan to do so. While the 1984 Nationality Act had the effect of preventing statelessness among the children of Japanese women because it adopted *jus sanguinis* through both paternal and maternal lines, the norm of preventing statelessness in the CEDAW had no influence on the 1984 Nationality Act.

3.2. The 1946 Constitution

3.2.1. Article 10: General Provision of Nationality

3.2.1.1. The Constitutional Problems Investigation Committee's Draft: Persistent Clause on Nationality based on the 1889 Constitution

In 1946, a new constitution was promulgated, coming into effect in 1947. Article 10 of the 1946 Constitution stated that "The conditions necessary for being a Japanese national shall be determined by law", and Article 22(2) stated that individuals' "[f]reedom […] to renounce their nationality shall be inviolate".[393] Neither international law nor the norm of preventing statelessness was recognised as having a role to play when Article 10 was included in the 1946 Constitution. However, with regard to Article 22(2), the Japanese government recognised the role of international law in renunciation of nationality. The norm of preventing statelessness in the 1930 Convention influenced the interpretation of Article 22(2) after the 1946 Constitution was enacted. This section begins with an analysis of Article 10. It separates the drafting process of Article 10 into three parts: a draft prepared by the Japanese government, a draft prepared by the GHQ, and the Japanese reaction to the draft prepared by the GHQ.

The first draft of the 1946 Constitution was drafted by the Constitutional Problems Investigation Committee of the Japanese government, and there is no evidence of the influence of international law in it. After Japan lost WWII in 1945,[394] there was a need to legislate for a new Japanese constitution. In October 1945, Douglas MacArthur, the SCAP, informed Prime Minister Shidehara of Japan that a new constitution needed to include liberal

[393] Although the Japanese Law Translation Database uses the word "divest" instead of "renounce", this dissertation uses "renounce" because it seems to be a better term for the original Japanese term, *ridatsu*.
[394] The Potsdam Declaration, which Japan accepted on 14 August, stated that the Japanese territory would be occupied by the Allied Powers until militarism in Japan was destroyed. The text of the Potsdam Declaration is available from the following. NDL, *Potsdam Declaration*, *available at* http://www.ndl.go.jp/constitution/e/etc/c06.html (viewed Jan. 17, 2019). Japanese nationals were informed of Japan's acceptance of the Potsdam Declaration on 15 August. On 2 September, Japan signed the Japanese Instrument of Surrender, and Japan legally accepted the Potsdam Declaration.

ideas, in contrast to the 1889 Constitution which determined that the Emperor was sovereign.[395] In response, the Constitutional Problems Investigation Committee, chaired by Joji Matsumoto, the minister dealing with legislation of a new constitution, was established to prepare a draft amendment to the 1889 Constitution.[396]

The draft prepared by the Constitutional Problems Investigation Committee included a clause on nationality. In the first investigation meeting, on 30 October 1945, the committee discussed which provisions in the 1889 Constitution needed to be amended. With regard to Article 18 of the 1889 Constitution, which covered nationality, the committee decided that it was necessary to "study legislative examples [on nationality] very well".[397] From the available documents, it is not clear what the outcome of the study of legislative examples was,[398] but it was decided in the ninth investigation committee, on 5 January 1946, that Article 18 should remain in the draft of the constitution.[399] The draft prepared by the investigation committee amended parts of the 1889 Constitution, but it did not find it necessary to amend Article 18.[400] Since the available documents do not show any further discussion about the clause on nationality, it is not clear whether international law and the prevention of statelessness were discussed during the drafting process of the investigation committee's draft.

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[395] NOBUYOSHI ASHIBE (supplemented by Kazuyuki Takahashi), *KEMPOU* [CONSTITUTIONAL LAW] 23 (6th ed., 2015).
[396] *Id*, at 24.
[397] Translated by the author. NDL, Kempou Mondai Chousa Iinkai Gijiroku [*Minutes of the Constitutional Problems Investigation Committee*], Miyazawa Collection, Rikkyo University (1945--1946), *available at* http://www.ndl.go.jp/constitution/shiryo/02/002_24a/002_24atx.html.
[398] However, it is possible that legislative examples from other states were not researched well because Matsumoto, the chair of the committee, stated in the Privy Council, an advisory council to the Emperor, on 8 May 1946 that he did not know about other states' legislation. NDL, Suumitsuin Iinkai Kiroku [*Record of the Privy Council Committee*], Toshio Irie Document, No. 31 (1946), *available at* http://www.ndl.go.jp/constitution/shiryo/04/111_1/111_1tx.html. For the role of the Privy Council, see note 413.
[399] NDL, *supra* note 397.
[400] See the following. NDL, Kempou Kaisei Youkou [*Summary of the Amendment of the Constitution*], Tatsuo Sato Document, No. 18 (1946), *Kempou Mondai Chousa Iinkai Kou An Otsu An* [Drafts of the Constitutional Problems Investigation Committee], *available at* http://www.ndl.go.jp/constitution/shiryo/02/067a/067atx.html.

3.2.1.2. The GHQ Draft and 2 March Draft: The Disappeared Clause on Nationality

The clause on nationality disappeared after the GHQ Draft was introduced, and when the Japanese government considered the GHQ Draft, it justified the omission of the clause from the draft by referring to the impact of international law on nationality matters. However, since this governmental position was not raised when the clause on nationality was reintroduced at a later stage by the Imperial Diet, the role of international law in nationality matters seems to have been mentioned merely to defend the GHQ Draft.[401]

The draft prepared by the investigation committee was criticised by the GHQ, which found the draft to be "extremely conservative",[402] so the GHQ decided to prepare a draft of the constitution of its own on 4 February 1946.[403] The Government Section of the GHQ, which was in charge of matters related to the constitution, established many thematic committees, and each committee was mandated to draft a chapter of the constitution. The Civil Rights Committee could have covered nationality matters, but it did not include them in its draft.[404] It prepared its draft of the constitution by referring to the constitutions of other states. An interview conducted by Ross Driver, an assistant of Dale M. Hellegers, a scholar on the history of the Japanese constitution, indicates that members of the Civil Rights

[401] Note that there is no available source showing directly that defense of the GHQ Draft was the reason why international law was mentioned. However, it should also be noted that the Japanese government decided that the GHQ Draft should be the basis for the new constitution. NDL, 3-15 GHQ Souan 1946 Nen 2 Gatsu 13 Nichi [3-15 GHQ Draft, 13 February 1946], *at* http://www.ndl.go.jp/constitution/shiryo/03/076shoshi.html (viewed Jan. 17, 2019).
[402] The draft was not officially shared with the GHQ, but was leaked by a newspaper, *Mainichi Shimbun*. Although it is not clear why the GHQ found the draft to be "extremely conservative", the GHQ noted that the Emperor remained sovereign in the draft, and this may be one reason. 2 February 1946 – Memorandum for the Supreme Commander from Gen. Courtney Whitney, Chief, Government Section. *Rowell Papers*. *in* DALE M. HELLEGERS PAPERS BOX 7 (1946). Holding of the Harry S. Truman Presidential Library.
[403] Summary Report on Meeting of the Government Section, 4 February 1946. *in* DALE M. HELLEGERS PAPERS BOX 7 (1946). Holding of the Harry S. Truman Presidential Library.
[404] NDL, *Constitution of Japan*, Alfred Hussey Papers; Constitution File No. 1, Doc. No. 12, *available at* http://www.ndl.go.jp/constitution/e/shiryo/03/076a_e/076a_etx.html.

Committee had not read the draft prepared by the Japanese investigation committee.[405] Thus, members of the Civil Rights Committee were not aware of a clause on nationality based on Article 18 of the 1889 Constitution, which the investigation committee developed in the investigation committee's draft. Since the constitutions of other states did not encourage the members of the Civil Rights Committee to include a nationality clause, such a clause was not included in the GHQ Draft. In addition, none of the available sources indicate that the committee referred to international law. Thus, there is no evidence that international law played a role in the omission of the nationality clause.

The Japanese government received the GHQ Draft on 13 February 1946, and it prepared the "2 March Draft" on the basis of the GHQ Draft, with some modifications.[406] A clause on nationality was reintroduced by the Japanese government at this stage. The earlier drafts of the 2 March Draft, prepared on 28 February and 1 March, included a text similar to that of Article 18 of the 1889 Constitution.[407] However, this article is nowhere to be seen in the 2 March Draft, which was submitted to the GHQ on 4 March,[408] or in later drafts, such as the "5 March Draft" or the "Draft Amendment of the Constitution".[409] While it is not clear

[405] Harry Emerson Wildes 23 April 1972. *in* DALE M. HELLEGERS PAPERS BOX 7 (1972) 16. Holding of the Harry S. Truman Presidential Library.
[406] NDL, *Part 3 Formulation of the GHQ Draft and Response of the Japanese Government*, *available at* http://www.ndl.go.jp/constitution/e/outline/03outline.html (viewed Jan. 17, 2019).
[407] For the first and second drafts of the 2 March Draft, see the following. NDL, Shokou [*The First Draft*], Holding of the National Archives of Japan, 5 (Feb. 28, 1946), *available at* http://www.ndl.go.jp/constitution/shiryo/03/086/086_001l.html (viewed Jan. 17, 2019). NDL, Dai Ni Kou [*The Second Draft*], Holding of the National Archives of Japan, 5 (March 1, 1946), *available at* http://www.ndl.go.jp/constitution/shiryo/03/087/087_001r.html (viewed Jan. 17, 2019). For the background to the 2 March Draft, see the following. NDL, *3-20 Drafting the Constitution of Japan (March 2 Draft) and Its Submission to GHQ*, *available at* http://www.ndl.go.jp/constitution/e/shiryo/03/086shoshi.html (viewed Jan. 17, 2019). "The conditions necessary for being a Japanese subject" in the 1889 Constitution was changed to "The conditions necessary for being a national (Japanese national)" in the first draft, and "The conditions necessary for being a Japanese national" in the second draft. Translated by the author.
[408] For the 2 March Draft, see the following. NDL, Nihon Koku Kempou [*Constitution of Japan*], Toshio Irie Document, No. 15, *Sangatsu Muika Happyou Kempou Kaisei Souan Youkou* [Outline of the Draft Amendment of the Constitution Announced in 6 March], *available at* http://www.ndl.go.jp/constitution/shiryo/03/088/088tx.html (viewed Jan. 17, 2019).
[409] The Japanese government and GHQ negotiated the 2 March Draft, the 5 March Draft and Draft Amendment of the Constitution. For the "5 March Draft", see the following link. NDL, Nihon Koku Kempou [*Constitution of Japan*], Tatsuo Sato Document, No. 41 (March 5, 1946), *available at*

why the article was not included in the 2 March Draft, the second draft of the 2 March Draft crossed out Article 10 on nationality, and the word "unnecessary" is written in pencil just above the article.[410]

After the Draft Amendment of the Constitution was finalised on 17 April 1947, the draft was discussed in the Privy Council and Imperial Diet.[411] In the deliberation, it became clear on many occasions that the Japanese government believed that a new constitution did not need to include nationality matters since both municipal law and unwritten principles and treaties already defined who were regarded as nationals. The first source for this is the deliberation in the Privy Council in April and May 1946. Raizaburo Hayashi, a member of the council, stated that the determination of Japanese nationality clarified the holders of rights and duties under the Japanese constitution, and since this was a legal matter, nationality should be covered by the constitution.[412] In response, the government representatives stated that Japanese nationality was not solely determined by the nationality act.[413] They explained, for instance, that since the original Japanese were considered automatically as Japanese nationals,[414] the criteria for their inclusion could not be written into the constitution.[415] They added that naturalisation was covered by treaties, and that the "general principle" was applied in the case of the annexation of Korea.[416] This indicates that

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http://www.ndl.go.jp/constitution/shiryo/03/091/091tx.html. For the Draft Amendment of the Constitution, see the following link. NDL, Nihon Koku Kempou [*Constitution of Japan*], Tatsuo Sato Document, No. 74 (Apr. 17, 1946), *available at* http://www.ndl.go.jp/constitution/shiryo/03/109/109tx.html.

[410] Translated by the author. NDL, *supra* note 408.

[411] The Privy Council "deliberate[d] upon important matters of State when they have been consulted by the Emperor" (Article 56 of the 1889 Constitution). This translation derives from the following. ITO, *supra* note 175, at 97.

[412] NDL, *supra* note 398.

[413] *Id*.

[414] Statement of Tatsuo Sato, the Deputy Director-General of the Legislation Bureau at the time. *Id*.

[415] *Id*.

[416] *Id*. The meaning of "general principle" is not clear, but this seems to mean an unwritten principle in nationality matters. Note that the nationality matters of Koreans were not determined by either municipal or international law, but by customs. See 2.6.2., "Korea".

municipal law was not regarded as the sole source for determining the scope of nationality; customs, treaties and general principles of law were also regarded as sources.[417]

Second, the Enlarged Version of the Anticipated Questions and Answers for the Imperial Diet, prepared by the Legislative Bureau in June 1946, stated that the determination of nationality was not determined by law, but by customs and treaties, and the nationality act under the 1889 Constitution did not cover all matters related to nationality.[418] It added that it was also possible that treaties determined who nationals were.[419] Since a municipal law did not monopolise determination of nationals, it was "impossible and inappropriate" to cover nationality in the constitution.[420]

Third, during the discussion of the draft of the constitution in the Imperial Diet in June and July 1946, Tokujiro Kanamori, the minister in charge of the constitution and the successor to Matsumoto, argued that nationality was determined not only by law, but also

[417] A similar explanation is observable in the following. TATSUO SATO (supplemented by Isao Sato), *NIHON KOKU KEMPOU SEIRITSU SHI* [THE HISTORY OF THE JAPANESE CONSTITUTION] VOL. III 396 (1994). *Id*. Since "unnecessary" was written in the 2 March Draft, it is fair to conclude that nationality was not included in the Draft Amendment of the Constitution because a clause on nationality was not regarded as necessary. However, it must be noted that there was another explanation for the exclusion of nationality matters. Minister Joji Matsumoto, the former chair of the Constitutional Problems Investigation Committee, stated that the clause on nationality was excluded because the earlier drafts with a clause on nationality prepared by the Japanese government were rejected by the GHQ on 8 May 1946. He claimed that it was difficult for him to negotiate on the inclusion of nationality matters with the GHQ. *Id*. This explanation reminds the author that the GHQ played a dominant role in the drafting process of the new constitution.

[418] SATO, *supra* note 417, at 470. NDL, Kempou Kaisei Souan ni kansuru Soutei Mondou (Dai 1 Shuu – Dai 7 Shuu, Zouho Dai 1 Shuu – Dai 5 Shuu) [*Expected Questions and Answers on the Draft Amendment of the Constitution (The First to Seventh Collection and Added First to Fifth Collection)*], Tastuo Sato Document, No. 77-79 (1946), *available at* http://www.ndl.go.jp/constitution/shiryo/04/118/118_001l.html.

[419] SATO, *supra* note 417, at 470.

[420] Translated by the author. *Id*, at 470.

by customs, treaties and principles in international law.[421] Thus, he noted, the constitution did not have to cover nationality matters.[422]

The absence of a clause on nationality in the Draft Amendment of the Constitution was justified by the role of sources other than municipal law, such as customs and international law, in many occasions. However, interestingly, this argument to justify the absence of a clause on nationality is not in evidence at the later stage, after a clause on nationality had been inserted by the Imperial Diet.[423] This implies the possibility that international law was mentioned to defend the GHQ Draft, but the role of international law in nationality matters was not necessarily regarded as a significant one. Note that the

[421] *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 3, Committee on Amendment of the Imperial Constitution, the House of Peers, 2 July 1946) p. 29. On another occasion, Kanamori said the treaties and international law determined the scope of Japanese nationality. *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 8, Committee on Amendment of the Imperial Constitution, the House of Peers, 8 July 1946) p. 128.

[422] *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 3, Committee on Amendment of the Imperial Constitution, the House of Peers, 2 July 1946) p. 29. There were other explanations in the Imperial Diet as well. One explanation was that the nationality act, not the constitution, determined who nationals were. Kanamori said that although determining the conditions for being Japanese was a significant matter, nationality matters could not be fully covered by the constitution, and needed to be covered by a specific law, not by a constitution. *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 5, Plenary Session, the House of Peers, 25 June 1946) p. 76. Another explanation is that it was obvious that nationality was determined by laws. Kanamori expressed his view that the 1889 Constitution covered nationality in order to clarify that nationality should be determined by laws, not by orders. He believed that if there was no article similar to Article 18 of the 1889 Constitution ("The conditions necessary for being a Japanese subject shall be determined by law"), it could be taken to mean that orders, which are issued by administrative organs, determined who Japanese nationals were. However, determination of Japanese nationals was a significant matter, so Kanamori assumed that it should be the law, not orders, that determined who Japanese nationals were. For him, Article 18 of the 1889 Constitution played a role in clarifying that the scope of Japanese nationality should be determined by law. By contrast, he argued that matters related to individuals needed to be determined by law, as can be observed by the framework of the new constitution. He added that since it was clear that the conditions for being Japanese had to be determined by law, it was not necessary to include a provision on nationality in the constitution. *DAI 90 KAI TEIKOKU GIKAI SHUUGIIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF REPRESENTATIVES, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 3, Committee on Amendment of the Imperial Constitution, the House of Representatives, 2 July 1946) p. 29. *DAI 90 KAI TEIKOKU GIKAI SHUUGIINN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF REPRESENTATIVES, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 8, Committee on Amendment of the Imperial Constitution, the House of Representatives, 8 July 1946) p. 128.

[423] See 3.2.1.3., "Drafting Process in the Imperial Diet: Reintroduced Clause on Nationality".

prevention of statelessness was not discussed in this phase of the drafting process of the constitution.

3.2.1.3. Drafting Process in the Imperial Diet: Reintroduced Clause on Nationality

At the final stage of the drafting process in the Imperial Diet, a clause on nationality was inserted into the draft of the constitution, even though neither international law nor prevention of statelessness was discussed. Political parties in the Imperial Diet made comments on the draft proposed by the government at the Sub-Committee on Amendment of the Imperial Constitution, and some parties proposed the inclusion of a clause on nationality at the beginning of the chapter on the rights and duties of nationals.[424] A provision on nationality was inserted into the draft in the House of Representatives.[425] When the draft was discussed in the House of Peers later, a member of the House of Peers asked why a nationality clause was included in the draft while it had not been included in the first drafts.[426] Minister Kanamori replied that although the Japanese government did not think this clause was necessary, members of the House of Representatives requested its inclusion.[427] He continued that since the constitution should be drafted by the "will of the people" and the government had no objection to including it, the clause on nationality was

[424] Although the Japanese Law Translation Database uses "Rights and Duties of the People", the Japanese draft uses the word "national". Thus, this dissertation uses "national (*kokumin*)". For instance, the Liberal Party, *Jiyu To*, proposed the inclusion of a provision that "The conditions necessary for being a Japanese national shall be determined by law." The Cooperative Democratic Party, *Kyodo Minshu To*, made the same proposal. The Japan Progress Party, *Nihon Shimpo To*, proposed the inclusion of the phrase "The conditions necessary for being a Japanese national needs to be determined by law." All proposals from parties were translated by the author. House of Representatives, *DAI 90 KAI TEIKOKU GIKAI SHUUGIIN TEIKOKU KEMPOU KAISEIAN IIN SHOU IINKAI SOKKIROKU "FUROKU"* [APPENDIX, RECORD OF THE SUB-COMMITTEE ON AMENDMENT OF THE IMPERIAL CONSTITUTION, THE HOUSE OF REPRESENTATIVES, THE 90TH SESSION OF THE IMPERIAL DIET] (1995) 9, 11, 21.
[425] *Id*.
[426] *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 13, Special Committee on Amendment of the Imperial Constitution, the House of Peers, 14 September 1946) p. 11.
[427] *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 13, Special Committee on Amendment of the Imperial Constitution, the House of Peers, 14 September 1946) p. 12.

included.[428] After that, Article 10 of the 1946 Constitution was finalised.[429] After a clause on nationality was included, the role of international law was not discussed, whereas it was mentioned when the GHQ Draft was discussed.[430] Since the Japanese government did not oppose the inclusion of a clause on nationality referring to international law, it seems to have referred to international law in order to defend the GHQ Draft, which did not possess a clause on nationality at the earlier stage. Based on the foregoing, the clause on nationality was included in the 1946 Constitution. During the discussion in the Imperial Diet, the prevention of statelessness was not mentioned.

3.2.2. Article 22(2): Freedom to Renounce a Nationality

One significant difference between the 1889 and 1946 Constitutions relevant to nationality is an article on the freedom to renounce one's nationality. Article 22(2) of the 1946 Constitution provides that people's "[f]reedom […] to renounce their nationality shall be inviolate".[431] Since renunciation of nationality can result in statelessness, this article can produce statelessness. Although available sources do not indicate that international law was referred to when this article was drafted, the norm of preventing statelessness influenced the interpretation of this article by the Japanese government.

The basis of the article on the freedom to renounce one's nationality is found in the drafts that were prepared by the GHQ, but there is no evidence to indicate the influence of international law. The freedom to renounce one's nationality was introduced in the context of freedom to emigrate. In the first stage, the Civil Rights Committee of the Government

[428] Translated by the author. *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 13, Special Committee on Amendment of the Imperial Constitution, the House of Peers, 14 September 1946) p. 12. For details of the drafting process of the clause on nationality in the 1946 Constitution, see the following. NAKAMURA, *supra* note 182, at 95-102.
[429] NAKAMURA, *supra* note 182, at 102.
[430] See 3.2.1.2., "The GHQ Draft and 2 March Draft: The Disappeared Clause on Nationality".
[431] For this translation, see note 393.

Section of the GHQ introduced the basis of Article 22(2) as follows: "All persons shall be free to emigrate if they so desire and if the laws of the country of their choice permit their entrance and residence; but no Japanese citizen can be banished from Japanese territory."[432] It must be noted that nationality was not mentioned at the time. The draft with this provision was discussed with the Steering Committee of the GHQ, and the committee added "Emigrants shall be permitted to change their nationality."[433] At this stage, freedom to emigrate was translated into the freedom to change one's nationality, and the freedom to change one's nationality was expected to secure freedom of movement.[434] However, from the available documents, the reason why nationality was mentioned to secure freedom of movement is not clear.[435] Paragraph 2 of Article XXI of the GHQ Draft stated that "All persons shall be free to emigrate and to change their nationality."[436] After that, the Japanese government considered the GHQ Draft, and "freedom to change nationality" was changed to "freedom to renounce nationality" although the reason why this was changed is not clear.[437]

Before the enactment of the 1946 Constitution, the norm of preventing statelessness was not explicitly considered in relation to the freedom to renounce nationality. In the Privy

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[432] First Draft of the Committee on Civil Rights. *Hussey Papers, 24-G. in* DALE M. HELLEGERS PAPERS BOX 8. Holding of the Harry S. Truman Presidential Library.
[433] First Draft of the Committee on Civil Rights, as amended by the Steering Committee on 8 February 1946 *in* DALE M. HELLEGERS PAPERS BOX 8. Holding of the Harry S. Truman Presidential Library.
[434] The preceding paragraph to that on the right to change one's nationality provided that *"Freedom of movement* and choice of domicile are guaranteed to every person […]" (Emphasis added). First Draft of the Committee on Civil Rights, as amended by the Steering Committee on 8 February 1946 *in* DALE M. HELLEGERS PAPERS BOX 8. Holding of the Harry S. Truman Presidential Library.
[435] Charles L. Kades, Milo E. Rowell and Ruth Ellerman, members of the Steering Committee, did not talk about nationality in an interview that Dale Hellegers conducted. Charles L. Kades *in* DALE M. HELLEGERS PAPERS BOX 3. Holding of the Harry S. Truman Presidential Library. Milo E. Rowell Interview 5/4/72 & 5/5/72 *in* DALE M. HELLEGERS PAPERS BOX 5. Holding of the Harry S. Truman Presidential Library. Ruth Ellerman Hussey 3-29-72 *in* DALE M. HELLEGERS PAPERS BOX 2. Holding of the Harry S. Truman Presidential Library.
[436] NDL, *supra* note 404.
[437] Freedom to renounce nationality had been included since the first draft prepared by the Japanese government in response to the GHQ Draft. NDL, *supra* note 409 (Shokou), 10. NDL, *supra* note 409 (Dai Ni Kou), 16. NDL, *supra* note 408.

Council, which was convened after the announcement of the Draft Amendment of the Constitution, Toshio Irie, the Director-General of the Legislation Bureau at the time, stated that an article on freedom to renounce nationality could allow renunciation of Japanese nationality by Japanese living in Japan.[438] Irie's statement indicates that the Japanese government had not considered the prevention of statelessness because statelessness could occur when Japanese people living in Japan renounced their nationality.[439] After the discussion in the Privy Council, the Legislative Bureau, administered by the Prime Minister, prepared a commentary on the Draft Amendment of the Constitution before the draft was submitted to the Imperial Diet. The commentary did not mention the prevention of statelessness.[440] There was no debate on the relationship between an article on renunciation of nationality and the norm of preventing statelessness in the Imperial Diet.[441] This indicates that the article was not particularly intended as a measure to prevent statelessness when it

[438] This communication took place on 6 May 1946. NDL, *supra* note 398.
[439] Irie's statement is in response to a question from a committee member of the Privy Council. The committee member asked whether Article 20 of the Draft Amendment of the Constitution on the freedom to renounce nationality allowed the renunciation of Japanese nationality by Japanese people living in Japan. The intention of the question was not all that clear, but since he was asking about Japanese people living in Japan, he seems to have been asking whether Japanese people without any other nationality could renounce their Japanese nationality.
[440] NDL, 4-4. "Kempou Kaisei Souan ni kansuru Soutei Mondou, Dou Chikujou Setsumei" 1946 Nen 4 Gatsu – 6 Gatsu [*4-4. "Expected Questions and Answers and Commentary on the Draft Amendment of the Constitution" April-June 1946*], *at* http://www.ndl.go.jp/constitution/shiryo/04/118shoshi.html (viewed Jan. 17, 2019).
[441] However, it must be noted that public welfare was regarded as a matter that could limit the freedom to renounce one's nationality. Minister Tokujiro Kanamori stated that the constitution would ensure that the freedom to renounce one's nationality was inviolate, but if public welfare required it, such a freedom would be limited. *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 26, Plenary Session, the House of Peers, 30 August 1946) p. 315. *DAI 90 KAI TEIKOKU GIKAI KIZOKUIN GIJI SOKKIROKU* [MINUTES OF THE HOUSE OF PEERS, THE 90TH SESSION OF THE IMPERIAL DIET] (No. 15, Special Committee on Amendment of the Imperial Constitution, the House of Peers, 17 September 1946) p. 28. If statelessness was regarded as an issue in light of public welfare, the article could be interpreted as prohibiting the renunciation of nationality in cases where such a renunciation caused statelessness. However, there is no source indicating that statelessness was regarded as an issue from the perspective of public welfare. Note that in the current context, Yasuhiro Okudaira, a constitutional scholar, states that "allowing [statelessness] […] costs much, and it causes trouble for the whole society" (translated by the author). YASUHIRO OKUDAIRA, *KEMPOU III: KEMPOUGA HOSHOUSURU KENRI* [CONSTITUTION III: THE RIGHTS GUARANTEED BY THE CONSTITUTION] 219 (1993).

was drafted. If Japanese people without any other nationality could renounce their nationality, they could become stateless.

It must be noted that the role of international law was mentioned in the context of the freedom to renounce one's nationality. A commentary prepared by the Legislation Bureau stated that the relationship between immigration/migration and the renunciation/acquisition of nationality was determined by "common international treaties" and nationality acts, and an article on the freedom to emigrate and renounce one's nationality in the constitution provided the fundamental principles on this matter.[442] It added that detailed rules on this matter would be determined by international treaties and a nationality act.[443] However, the norm of preventing statelessness was not mentioned in this context. Thus, when the 1946 Constitution was enacted, the norm of preventing statelessness in international law did not affect the freedom to renounce a nationality in the constitution.

However, the norm of preventing statelessness did affect the interpretation of Article 22(2) of the 1946 Constitution with regard to the freedom to renounce one's nationality in 1950. When a draft of the 1950 Nationality Act was discussed in the Diet, the relationship between the freedom to renounce nationality and the possibility of statelessness was discussed. Tomokazu Murakami, a government representative, stated that Article 22(2) covered the principle of non-enforcement of nationality, and this principle was applied to those who had another nationality.[444] Japanese nationals who did not have any other nationality could not renounce their Japanese nationality because they would become

[442] Translated by the author. The original Japanese of "common international treaties" is *kokusai jouyaku kyoutsu ho*. NDL, *supra* note 418.
[443] *Id*. Note that the international law's role in nationality matters in general was mentioned during the drafting process of the 1946 Constitution by the Japanese government. See 3.2.1.2., "The GHQ Draft and 2 March Draft: The Disappeared Clause on Nationality".
[444] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 8.

stateless persons.[445] He added that the prevention of statelessness was "a common ideal of nationality legislation for each state", as can be seen in the preamble of the 1930 Convention.[446] Thus, although the freedom to renounce one's nationality was enshrined in the 1946 Constitution, the government's interpretation prevented statelessness after 1950 because the prevention of statelessness was regarded as a principle in the nationality legislation.[447] In other words, while Japan was not a contracting party to the 1930 Convention, and the convention did not legally bind Japan, Murakami referred to the preamble of the 1930 Convention, which stated that the prevention of statelessness was an ideal for international society.[448] This indicates that the principles in the 1930 Convention, including that of prevention of statelessness, were considered when interpreting the 1946 Constitution.[449] In this context, Murakami stated that it was possible for Japan to be a contracting party to the 1930 Convention.[450]

It must be noted that academics also argued that statelessness should be prevented. Kenta Hiraga, a government official of the Legal Office,[451] argued that a provision on the freedom to renounce nationality in the 1946 Constitution implied in principle the freedom to change nationality.[452] Thus, the freedom to renounce nationality historically meant that individuals could renounce their nationality in order to acquire another nationality.[453] Hiraga

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[445] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 8.
[446] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 20, 5 April 1950) p. 3.
[447] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 8.
[448] He stated that the prevention of multiple nationalities was also provided for in the 1930 Convention. *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 8.
[449] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 30, 24 April 1950) p. 1.
[450] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 30, 24 April 1950) p. 1.
[451] The Legal Office was a predecessor of the MOJ, in existence from 1949 to 1952.
[452] KENTA HIRAGA, *KOKUSEKI HOU GE* [NATIONALITY ACT II] 409-410 (1951).
[453] *Id*, at 409-410.

also argued that statelessness was beneficial neither for an individual nor for states.[454] Therefore, he argued, the acquisition or possession of another nationality was conditional on the renunciation of one's former nationality pursuant to Article 22(2) of the 1946 Constitution.[455] This position on the necessity of preventing statelessness was shared by constitutional scholars such as Toshiyoshi Miyazawa and Tatsukichi Minobe.[456] In this context, in referring to the 1930 Convention, the government interpreted statelessness as something that should be prevented.

The GHQ's involvement in the drafting process of the 1946 Constitution indicates the unique status of Japan in international law soon after the end of WWII. In modern states, their constitutions provide for the fundamental principles of the state,[457] and this influences matters of nationality. Although Article 10 on nationality did not provide for a substantial determination of who qualified as Japanese, Article 22(2) provided for the freedom to renounce one's nationality, and the GHQ proposed the inclusion of a similar provision to Article 22(2), with the text amended. This influence of the GHQ is notable from the perspective of international law. Determination of nationals was regarded as a matter for each state.[458] While the 1946 Constitution was discussed and adopted by the Japanese Imperial Diet, the GHQ significantly influenced the drafting process of the 1946 Constitution. It can be argued that the GHQ also partly determined the nationality policy after WWII, while the main methods of acquisition and loss of Japanese nationality were

[454] *Id*, at 409-410.
[455] *Id*, at 409-410.
[456] Soon after the 1946 Constitution entered into force, Miyazawa stated that Japanese nationals had the freedom to renounce their Japanese nationality if they acquired another nationality. TOSHIYOSHI MIYAZAWA, *KEMPOU TAII* [OUTLINE OF CONSTITUTION] 105, 107 (1949). Minobe stated that Japanese nationals were not allowed to be persons without status (*museki jin*) as a result of renouncing their nationality. TATSUKICHI MINOBE, *NIHON KOKU KEMPOU GENRON* [PRINCIPLES OF THE JAPANESE CONSTITUTION] 198-199 (1948). Interestingly, Miyazawa and Minobe recognised the need to prevent statelessness even before the Japanese government had signalled the need to prevent statelessness as a result of the renunciation of nationality.
[457] ASHIBE, *supra* note 395, at 6.
[458] See "Introduction".

determined by the Japanese government, particularly when the 1950 Nationality Act was drafted.

3.3. The 1950 Nationality Act

Although some articles in the 1950 Nationality Act covered the prevention of statelessness, the norm of preventing statelessness in international law did not affect the 1950 Nationality Act. International law was not mentioned during the drafting process of the 1950 Nationality Act, except in relation to cases of people from the former colonies.

Since some provisions of the 1899 Nationality Act were not compatible with the 1946 Constitution, the 1950 Nationality Act was enacted to make a nationality act that was compatible with the constitution. Although it is often said that Article 10 of the 1946 Constitution triggered the enactment of the 1950 Nationality Act,[459] this does not seem to be accurate. The administrative document prepared by the Legal Office at the time stated that the 1899 Nationality Act should be amended because some of its provisions were incompatible with the 1946 Constitution, but Article 10 of the 1946 Constitution was not mentioned.[460] Thus, it should be said that it was not an article on nationality in the constitution, but rather provisions in the 1946 Constitution that might have conflicted with the 1899 Nationality Act that triggered the amendment to the nationality act. For instance, the household system, which was one principle of the 1899 Nationality Act,[461] was banned in the 1946 Constitution.[462] Thus, the provisions of the nationality act relevant to the

[459] KIDANA, *supra* note 8, at 37.
[460] National Archives of Japan, SHOUWA 25 NEN KOKUSEKI NI KANSURU HOUREI NO KISOUBUN SHORUI [*PREPARATORY DOCUMENTS ON LAWS ON NATIONALITY IN 1950*], National Archives of Japan. Ref. Hei 23 Houmu 00078100 (1950).
[461] See 2.3., "The 1899 Nationality Act".
[462] Article 13 of the 1946 Constitution provided that "All nationals shall be respected as individuals", and Article 14 stated that "All nationals are equal under the law." The Japanese Law Translation Database uses the word "people", not "nationals", in English, but the Japanese version of the constitution uses the word "nationals", so this dissertation uses "nationals (*kokumin*)".

household system were amended in 1950.[463] This section begins with an exploration of the principle in the 1950 Nationality Act in order to understand the scope of the prevention of statelessness in the Act.

A basic principle in drafting the 1950 Nationality Act was that only articles that conflicted with the 1946 Constitution should be amended.[464] First, it must be noted that *jus sanguinis* through the paternal line in the 1899 Nationality Act remained as the main method of conferring nationality in the 1950 Nationality Act. If *jus sanguinis* through the paternal line was retained, children born to a Japanese mother and foreign father in Japan could be stateless if the father was unable to transmit his nationality to the child, so *jus sanguinis* through the paternal line could cause a problem from the perspective of preventing statelessness.[465] However, statelessness was not mentioned during the drafting process of the 1950 Nationality Act. The government justified *jus sanguinis* through the paternal line

[463] Even before 1950, there was an attempt to amend the 1899 Nationality Act after the enactment of the 1946 Constitution, but this attempt failed because the relationship between the amendment of the Nationality Act and a peace treaty was taken into consideration. The Interior Ministry prepared a draft to amend the 1899 Nationality Act, stating in 1947 that an amendment was necessary for gender equality and the promotion of the rights and freedoms of Japanese nationals provided for in the 1946 Constitution. National Archives of Japan, *Kokuseki Hou oyobi "Gaikokujin wo Youshi mataha Nyuufuto Nasuno Houritsu" no Ichibu wo Kaisei suru Houritsuan nitsuite* [Draft to Amend a Part of the Nationality Act and "Act to Adopt Aliens"] (National Archives of Japan Digital Archive). Ref. San 03121100 (1947). However, this draft was not passed to the Diet in 1947. Kenta Hiraga, an officer of the Legal Office who dealt with nationality at the time, has stated that this was because it was assumed that the 1899 Nationality Act would be amended after the conclusion of the peace treaty, which could have had an influence on nationality matters, and the peace treaty was under negotiation at the time. Kenta Hiraga, Shin Kokuseki Hou no Kaisetsu [*Commentary on a New Nationality Act*], 22(7) HOURITSU JIHO 25, 25 (1950). He added that since the 1899 Nationality Act employed "a new way of thinking", such as the prevention of positive and negative conflicts of nationality, there was no urgent necessity to amend the nationality act. Yoshito Aoki, Kenta Hiraga, Hideo Ii, Kijuro Omata, Minoru Yokoyama, Yashuhisa Tanaka, Masaharu Miura, Hiroko Shimano & Shozo Sawada, "Zadankai" Genkou Koseki Hou no ayumi: Dai 1 Kai [*Round-table Talk: Current Household Registration Act I*], 457 KOSEKI 29, 38 (1982). However, since it took time to conclude the peace treaty, it was necessary to amend the nationality act from the perspective of the consistency of the legal order, and the 1950 Nationality Act was enacted before the conclusion of the peace treaty in 1951. KENTA HIRAGA, *KOKUSEKI HOU JOU* [NATIONALITY ACT I] 140 (1950). It is interesting to note that Hiraga, who worked on the amendment of the nationality act, mentioned the prevention of positive and negative conflicts of the nationality laws.

[464] *DAI 7 KAI KOKKAI SHUUGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF REPRESENTATIVES, THE 7TH SESSION OF THE DIET] (No. 20, 5 April 1950) p. 1. HIRAGA, *supra* note 463, at 140.

[465] See also 2.3., "The 1899 Nationality Act".

for several reasons. First, it prevented a positive conflict of nationality. Tomokazu Murakami, a representative of the government, stated that majority of states that adopted *jus sanguinis* did so through the paternal line, and only few states adopted it through both the paternal and maternal lines.[466] In such circumstances, he added, adoption of *jus sanguinis* through both paternal and maternal lines could increase the number of persons with multiple nationalities.[467] In order to prevent persons from having multiple nationalities, he concluded, a new nationality act would also have to adopt *jus sanguinis* through the paternal line.[468] Note that the reason why multiple nationalities was regarded as an issue was not explained when the 1950 Nationality Act was discussed.[469] Second, *jus sanguinis* through the paternal line was not regarded as problematic from the perspective of the equality of men and women, which was provided for in the 1946 Constitution. Murakami stated that since the adoption of *jus sanguinis* through the paternal line did not constitute discrimination against women, it was not against the principle of the "fundamental equality" of men and women guaranteed in the 1946 Constitution.[470] Hiraga, an official from the Legal Office, also stated that *jus sanguinis* through the paternal line was not problematic from the perspective of equality of men and women because it did not discriminate in "the legal status" of the father and the

[466] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 6.
[467] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 6. If the state of which the mother is a national adopts *jus sanguinis* through both the paternal and maternal lines and the state of which the father is a national adopts *jus sanguinis* through the paternal line or through both the paternal and maternal lines, the children would acquire the nationalities of both the father and the mother.
[468] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 6.
[469] When the 1899 Nationality Act was adopted, the Japanese government mentioned the need to prevent conflicts of nationality, including multiple nationalities, by referring to the resolution of the IDI. See 2.3., "The 1899 Nationality Act".
[470] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 6. See note 462 for the provisions on equality in the 1946 Constitution.

mother.[471] Thus, *jus sanguinis* through the paternal line was not regarded as problematic. Neither the norm of preventing statelessness nor international law was explicitly mentioned during the discussion on *jus sanguinis* through the paternal line.

The 1950 Nationality Act was different from the 1899 Nationality Act in two respects,[472] both of which are relevant to the prevention of statelessness, whereas international law was not relevant to the amendment. First, renunciation of nationality was made easier in order to make the nationality act compatible with Article 22(2) of the 1946 Constitution.[473] Article 20-2 of the 1899 Nationality Act provided that the Interior Minister could approve the loss of Japanese nationality of Japanese individuals who were born abroad and acquired another nationality. It was at the Interior Minister's discretion to allow the loss of Japanese nationality. However, Article 9 of the 1950 Nationality Act determined that Japanese individuals who were born abroad and acquired another nationality would "retroactively" lose their Japanese nationality unless they indicated an intention to retain their Japanese nationality. Thus, loss of nationality was not at the discretion of the Interior Minister any longer but an automatic function of the 1950 Nationality Act. It is important to emphasise that only those Japanese individuals who possessed another nationality could lose their Japanese nationality as a result of this article.[474] Since Japanese people without another nationality were not allowed to renounce their nationality, statelessness was prevented.[475]

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[471] Translated by the author. HIRAGA, *supra* note 452, at 213-214. It is interesting to compare this understanding with the understanding of international law, which regarded nationality as a matter of human rights.

[472] For the provisions of the 1950 Nationality Act, see the following. KIDANA, *supra* note 8, at 487-501.

[473] *DAI 7 KAI KOKKAI SHUUGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF REPRESENTATIVES, THE 7TH SESSION OF THE DIET] (No. 19, 4 April 1950) pp. 9-10.

[474] However, this article can be regarded as a problem because Japanese individuals who did not indicate their willingness to retain their nationality if they were born abroad and acquired another nationality lost their Japanese nationality. In other words, it was possible for the children of Japanese men under the 1950 Nationality Act born abroad to lose their Japanese nationality without anyone realising that they had done so.

[475] Note that the need to prevent statelessness was mentioned when interpretation of Article 22(2) of the 1946 Constitution was considered during discussions on the 1950 Nationality Act that referred to the 1930 Convention. See 3.2.2., "Article 22(2): Freedom to Renounce a Nationality".

Second, Article 5 of the 1899 Nationality Act, which determined that foreigners would acquire Japanese nationality when they became the wife of a Japanese man or through adoption by Japanese, was eliminated because it followed the household system[476] and conflicted with the gender equality and individual dignity of the 1946 Constitution.[477] As a result, the nationality of wives and children was not dependent on the nationality of their Japanese husband or father except in cases where the child acquired nationality by birth under the 1950 Nationality Act. Articles 18, 19 and 21 of the 1899 Nationality Act were eliminated in the 1950 Nationality Act because they were not necessary to prevent statelessness since nationality was no longer conferred on the basis of the household system. Except for the provisions that related to the above-mentioned matters, the 1950 Nationality Act basically followed the 1899 Nationality Act.[478]

The provisions in the 1899 Nationality Act to prevent statelessness were retained in the 1950 Nationality Act except for articles relating to the household system. Articles 3 (application of *jus sanguinis* through the maternal line) and 4 (*jus soli*) in the 1899 Nationality Act became Articles 2(iii) and 2(iv) of the 1950 Nationality Act without substantial changes. Article 20 (loss of nationality upon acquisition of another nationality by choice) of the 1899 Nationality Act became Article 8 of the 1950 Nationality Act. Articles 18, 19 and 21 of the 1899 Nationality Act were omitted because they related to the household system.[479] Since Article 5 of the 1899 Nationality Act, which conferred nationality on the

[476] For the household system, see 2.3., "The 1899 Nationality Act".
[477] *DAI 7 KAI KOKKAI SHUUGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF REPRESENTATIVES, THE 7TH SESSION OF THE DIET] (No. 19, 4 April 1950) p. 10.
[478] Clauses on the rights of naturalised persons and the acquisition of Japanese nationality by children born to Japanese abroad were also amended. HIRAGA, *supra* note 463, at 143-145. Hiraga, *supra* note 463, at 25.
[479] Article 18 had stated that a Japanese woman would lose her nationality when she married a foreign man and did not acquire his nationality. This was amended in 1916 to prevent statelessness. See 2.4., "The 1916 Amendment of the 1899 Nationality Act". Article 19 provided that individuals who acquired Japanese nationality by marriage or adoption would lose their Japanese nationality in cases of dissolution of marriage or adoption *only when* they acquired another nationality. Article 21 stated that

basis of the household principle, was eliminated, Articles 18, 19 and 21 were not necessary to prevent statelessness. As a result, the scope of the prevention of statelessness in the 1899 Nationality Act was retained in the 1950 Nationality Act.

There were possibilities that statelessness could occur under the 1950 Nationality Act as under the 1899 Nationality Act.[480] First, children born in Japan to parents of another nationality could be stateless. Second, children born in Japan to a Japanese mother and foreign father could be stateless if the father could not transmit his nationality to the child. However, no available sources indicate that there was any discussion to deal with statelessness during the drafting process of the 1950 Nationality Act.[481]

The status of people from the former colonies was briefly discussed in the Diet, and the role of international law was recognised but the need to prevent statelessness was not discussed. Article 8 of the Potsdam Declaration, which Japan accepted at the end of WWII, stated that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands", and Japanese sovereignty over its colonies ceased at that time. Thus, the status of those in the former colonies became a topic of discussion. Murakami, a representative of the government, stated that the nationality of Koreans and Taiwanese would be determined by the peace treaty, but they were assumed to possess Japanese nationality until then.[482] However, he stated that Koreans and Taiwanese should be treated as foreigners in light of the Potsdam Declaration because they were regarded as

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the wife and children of a man who lost his Japanese nationality would lose their Japanese nationality if they acquired his new nationality.

[480] There were three forms that statelessness could take place under the 1899 Nationality Act, but one possibility was eliminated in 1916 as a result of amendment. See 2.4., "The 1916 Amendment of the 1899 Nationality Act".

[481] The second possibility of statelessness was discussed from the perspective of the equality of men and women. See the argument on *jus sanguinis* through the paternal line when the 1950 Nationality Act was discussed in this section.

[482] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 7.

foreigners in the Ordinance on Alien Registration enforced in 1947.[483] Thus, their status was complicated because they were regarded as foreigners in the Ordinance on Alien Registration while they possessed Japanese nationality from the perspective of the nationality act.[484] It must be noted that people from the former colonies were regarded as foreigners in certain respects, but statelessness was not mentioned during the drafting process of the 1950 Nationality Act.[485] In principle, the nationality of people from the former colonies was assumed to be covered by the peace treaty.

3.4. The 1951 Treaty of San Francisco and 1952 Circular of the MOJ

3.4.1. The 1951 Treaty of San Francisco

The Japanese government believed that statelessness would not arise as a result of the 1951 Treaty of San Francisco and 1952 Circular of the MOJ, and the norm of preventing statelessness did not play a significant role in either. In the Treaty of San Francisco, the issue of nationality was not covered at all, whereas Japan immediately recognised the role of international law in nationality matters when the Japanese government considered its stance towards the treaty to be concluded. The Treaty of San Francisco, which was signed on 8 September 1951 and entered into force on 28 April 1952, officially ended the rule of the GHQ over Japan. Article 2(a) of the treaty provided that "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet", and Article 2(b) stated that "Japan renounces all right, title and claim to Formosa and the Pescadores".[486] However, the treaty did not include

[483] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 7.
[484] *DAI 7 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 7TH SESSION OF THE DIET] (No. 27, 19 April 1950) p. 7.
[485] See 3.4.2., "The 1952 Circular of the MOJ".
[486] In a middle of WWII, the South Pacific Mandate was occupied by the US, and it became a trust territory of the US after the end of WWII. With regard to the nationality of the inhabitants of the South Pacific Mandate, see note 499.

clauses on the nationality of the Korean and Taiwanese peoples. During the drafting process of the Treaty of San Francisco, nationality was not discussed since the Allied Powers believed that such matters should be solved by the Japanese, Koreans and Taiwanese peoples.[487] Therefore, the Allied Powers did not connect Articles 2(a) and 2(b) of the Treaty of San Francisco with matters of nationality.[488] In other words, neither the norm of preventing statelessness nor international law was considered by the Allied Powers.[489]

When Japan prepared for negotiations for a peace treaty with the Allied Powers, it referred to international law and found it necessary to prevent statelessness because it believed that the Allied Powers would ask the Japanese government to recognise the right of Korean and Taiwanese people to choose their nationality although this stance changed later. Before discussions with the Allied Powers, Japan prepared its stance towards the peace treaty.[490] In 1946, the Legal Affairs Bureau of the MOFA listed some issues that Japan needed to consider, and these included the prevention of multiple nationalities but not the prevention of statelessness.[491] It then considered the peace treaties of the Sino-Japanese and Russo-Japanese Wars and the Treaty of Versailles, a peace treaty made after WWI, to examine examples of nationality matters after wars; it determined that in those treaties,

[487] This understanding is stated by Yasuaki Onuma, an international legal scholar, and this argument is based on his interview with officials who were drafting the treaty. Yasuaki Onuma, Zainichi Chousen Jin no Houteki Chii nikansuru Ichi Kousatsu (4) [*Legal Status of Koreans in Japan: With Special Reference to Nationality (4)*], 97(2) J. OF THE JURISPRUDENCE ASS'N, THE UNIV. OF TOKYO 192, 253 (1980).
[488] However, the Japanese government referred to these articles to deny the Japanese nationality of Koreans and Taiwanese at a later stage. *Id*, at 253.
[489] However, it must be noted that the preamble to the Treaty of San Francisco states that "Japan for its part declares its intention […] to strive to realize the objectives of the Universal Declaration of Human Rights." The expression "objectives of the Universal Declaration of Human Rights" is vague and difficult to implement, but it must be noted that Article 15 of the UHDR states that "Everyone has the right to a nationality."
[490] Japan discussed the peace treaty with the Allied Powers after 1947. MOFA, Nihon Gaikou Bunsho San Furashisuko Heiwa Jouyaku Jumbi Taisaku [*Preparation of the Treaty of San Francisco; Documents on Japanese Foreign Policy*], *available at* http://www.mofa.go.jp/mofaj/annai/honsho/shiryo/bunsho/h17.html (viewed Jan. 17, 2019).
[491] MOFA, *NIHON GAIKOU BUNSHO SANFURANSHISUKO HEIWA JOUYAKU JUNBI TAISAKU* [DOCUMENTS ON JAPANESE FOREIGN POLICY, TREATY OF PEACE WITH JAPAN, PREPARATORY WORK] 52-53 (2006).

people acquired their nationality on the basis of residence.[492] Therefore, people living in Korea were assumed to acquire Korean nationality, and people living in Taiwan were regarded as acquiring Chinese nationality. The Japanese government regarded the principle based on residence as a general principle of international law.[493] In the case of Korea, the Legal Affairs Bureau proposed that, in principle, Japanese subjects, both mainland Japanese and Koreans, residing in a Korean territory should acquire Korean nationality and lose their Japanese nationality.[494] In addition, two types of right to choose a nationality were proposed. First, mainland Japanese above the age of eighteen and residing in a Korean territory had the right to choose Japanese nationality within two years of the peace treaty entering into force.[495] Second, Koreans above the age of eighteen and residing in Japan had the right to choose Japanese nationality.[496] In the case of Taiwan, it was planned that Japanese nationals residing in Taiwan would be able to acquire Chinese nationality since Taiwan had been returned to China. As in the Korean case, it was proposed that mainland Japanese above the age of eighteen and residing in Taiwan would have the right to choose their nationality while Taiwanese above the age of eighteen residing in Japan would also be able to choose.[497] These ideas were based on the Treaty of Versailles.[498] Although the norm of preventing statelessness was not mentioned, recognition of the right to choose one's nationality had the

[492] *Id*, at 53.
[493] The Legal Affairs Bureau had prepared a document titled "Nationality Issues in the Peace Treaty" on 13 December 1946 (translated by the author). It stated that under the general principles in international law, residents in the territories that ceased to be Japanese would lose their Japanese nationality and acquire a new nationality based on residence. Kunihiko Matsumoto, Zainichi Chousen Jin no Nihon Kokuseki Hakudatsu: Nihon Seifu niyoru Heiwa Jouyaku Taisaku Kenkyuu no Kentou [*The Deprivation of Japanese Nationality from Koreans in Japan: A Study of the Counterplan for the 'Peace Treaty with Japan' by the Japanese Government*], 52(4) THE J. OF L. AND POLITICAL SCI. (HOGAKU) 111, 129 (1988).
[494] MOFA, *supra* note 491, at 53-54.
[495] *Id*, at 54.
[496] *Id*, at 54.
[497] *Id*, at 55.
[498] *Id*, at 55.

effect of preventing statelessness since choice of nationality meant that Japanese, Korean or Chinese nationality had to be chosen.[499]

There are some implications from this analysis. First, the Japanese government referred to international law to consider the nationalities of those in former colonies. At the time, international law was referred to in order to anticipate the possible position of the Allied Powers so that the Japanese government could consider its stance towards the peace treaty.[500] Second, although the norm of preventing statelessness was not explicitly mentioned, statelessness could be avoided because the right of Korean and Taiwanese people to choose their nationality was assumed. The right of Koreans and Taiwanese to choose their nationality assumed that Koreans would choose either Korean or Japanese, and that Taiwanese people would choose either Chinese or Japanese; thus, the Japanese government assumed that statelessness could not take place.

However, this stance changed, and the Japanese government ceased to recognise the right of Koreans and Taiwanese people to choose their nationality when it learnt that the Allied Powers did not intend to include nationality matters in the peace treaty.[501] This shift of stance can be seen after 1950. "An Outline of an Expected Peace Treaty with Japan", prepared by the MOFA in September 1950, stated that Korean people would recover their Korean nationality as a result of Korean independence, referring to the case of Alsace-Larraine after WWII, and this principle was also applied to Taiwanese people.[502] Although

[499] The Legal Affairs Bureau mentioned the South Pacific Mandate, and it proposed that inhabitants of the South Pacific Mandate should lose their Japanese nationality. It added that inhabitants of the South Pacific Mandate would have the right to be protected by the government that possessed the mandate over the territory. This provision was proposed by reference to Article 127 of the Treaty of Versailles. *Id*, at 57. However, the South Pacific Mandate became a trust territory of the US after the end of WWII, so Japanese policy did not affect the South Pacific Mandate.
[500] *Id*, at 52.
[501] Onuma, *supra* note 487, at 255. Matsumoto also seems to follow this interpretation. Matsumoto, *supra* note 493, at 138.
[502] Translated by the author. Matsumoto, *supra* note 493, at 138. There are several versions of the Outline, but the version from September 1950 is the last one, according to Matsumoto. Matsumoto, *supra* note 493, at 134.

the right to choose Japanese nationality was not explicitly denied, the Outline does not seem to have recognised the right to choose nationality because the provisions on Alsace-Lorraine in the Treaty of Versailles did not recognise the right to choose nationality.[503] After preparation of the Outline, Japan adopted this stance.[504] This change of stance seems to have taken place because the GHQ did not ask Japan to include the right to choose nationality in the peace treaty. Japan seems to have wanted to have discretion over the nationality of Koreans, as noted by Yasuaki Onuma, a scholar on international law who researched the history of Koreans' Japanese nationality after the end of WWII.[505] As a result, the right of Koreans and Taiwanese people to choose Japanese nationality was not recognised, and Koreans had to be naturalised as Japanese if they wanted to be Japanese. Since naturalisation was regarded as being at the discretion of each state, this process allowed the Japanese government to select who would be naturalised as Japanese.[506] In this context, the 1951 Treaty of San Francisco was signed, and nationality was not covered by the treaty.

3.4.2. The 1952 Circular of the MOJ

Since the nationality of people from the former colonies was not covered by the 1951 Treaty of San Francisco, the 1952 Circular of the MOJ covered it. The Japanese stance on the nationality of people from the former colonies did not change from the last stage of the drafting process of the Treaty of San Francisco. The norm of preventing statelessness did not affect the 1952 Circular, but the Japanese government believed that the circular would not create statelessness. The Treaty of Versailles was referred to when the Treaty of San Francisco was being considered, and this can be recognised as constituting the impact of

[503] *Id*, at 138.
[504] For detail, see the following. *Id*, at 139-144.
[505] Onuma, *supra* note 487, at 257.
[506] Prime Minister Shigeru Yoshida stated that there are both "good and bad" Koreans, and this indicates the perception that Japan needed to select Koreans who would be Japanese (translated by the author). See the following. Matsumoto, *supra* note 493, at 142-144.

international law on the 1952 Circular although there is no evidence of the direct impact of the Treaty of Versailles.[507]

As a result of the discussion with the ROK and ROC governments, the Japanese government determined that Koreans and Taiwanese people were either Korean or Chinese nationals after the end of WWII. After the 1951 Treaty of San Francisco was signed, the Japanese government discussed the issue of nationality with the ROK representatives.[508] The ROK stated that Koreans' Japanese nationality was nullified when Japan accepted the Potsdam Declaration, and that Koreans acquired Korean nationality on 15 August 1948, when the ROK was established.[509] The Japanese government shared this view.[510] The Chinese government, the ROC at the time, enforced a law to recover the Chinese nationality of Taiwanese people on 25 October 1945.[511] Thus, it was generally assumed that Taiwanese people recovered their Chinese nationality.[512] As a result, Japan regarded Koreans and Taiwanese as having acquired or recovered their Korean and Chinese nationalities after the end of WWII. In other words, for governments of Japan, ROK and ROC, statelessness was not an issue.

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[507] See 3.4.1. "The 1951 Treaty of San Francisco".
[508] The meeting took place soon after the Treaty of San Francisco was signed. Yuuichi Tobita, San Furanshisuko Heiwa Jouyaku to Zainichi Chousenjin [*The Peace Treaty and Korean Residents in Japan*], 6 *ZAINICHI CHOUSENJIN SHI KENKYUU* [HISTORY OF KOREAN RESIDENTS IN JAPAN] 1, 4 (1980).
[509] *Id*, at 5.
[510] *Id*, at 4-5. Since the government of the ROK treated the household registration, or *koseki,* which Japan had introduced into Korea during the colonial era, as a standard for defining Korean nationals, those who were listed in the Korean household registration lost their Japanese nationality and acquired Korean nationality. See the following. GyongSu Mun, "Zainichi", "Kokumin" no Hazama wo Ikite [*The "Zainichi" Korean Minority in Japan, Living between Two Nations*], 20(3) RITSUMEIKAN STUDIES IN LANGUAGE AND CULTURE 145, 147 (2009).
[511] The law was enforced in 22 June 1951. HIROSHI TANAKA, *AJIA JIN TONO DEAI: KOKUSAI KOURYUU TOHA NANIKA* [ENCOUNTER WITH ASIANS: WHAT IS INTERNATIONAL COMMUNICATION?] 203-204 (1976).
[512] HIDEBUMI EGAWA & RYOICHI YAMADA, *KOKUSEKI HOU* [NATIONALITY ACT] 118 (1973). However, it must be pointed out that Taiwanese people could refuse to recover their Chinese nationality by application to the consul. *Id*, at 203-204. It must be also noted that the definition of "Taiwanese" people by the Chinese government was not clear. If they were people who were listed in the Taiwan household registration that Japan had introduced during the colonial era, Taiwanese people who had lost their Japanese nationality acquired Chinese nationality. However, if "Taiwanese" people were determined independently of the Taiwanese household registration, there could have been be stateless persons who possessed neither Japanese nor Chinese nationalities.

On the basis of this background, the MOJ issued a circular on Korean and Taiwanese nationality on 19 April 1952, nine days before the Treaty of San Francisco entered into force. The circular stated that "Korea and Taiwan will be separated from the territory of Japan after the treaty enters into force. As a result, Korean and Taiwanese people, including those living in mainland, will lose Japanese nationality."[513] The household registration, or *koseki*, which functioned to register Japanese nationals and was introduced during the colonial period, played an important role in distinguishing mainland Japanese and people from the former colonies, such as Koreans and Taiwanese. A separate household registration from the mainland one was prepared in Korea and Taiwan. In the circular, Korean and Taiwanese people referred to those registered in the household registrations of Korea and Taiwan.[514] Thus, people listed in the Korean and Taiwanese household registrations lost their Japanese nationality. Since this dissertation focuses on the views of governments,[515] it does not discuss the situation of those who lost Japanese nationality in detail, but merely notes that some scholars claimed that people from the former colonies were in a similar situation to statelessness.[516]

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[513] Translated by the author. For the text of the circular, see the following. Yong-hwan Chong, Shokuminchi no Dokuritsu to Jinken: Zainichi Chousenjin no "Kokuseki Sentaku Ken" wo megutte [*Colonial Independence and Human Rights: Focusing on the Rights of Nationality Choice for Koreans in Japan*], 36 PRIME: INT'L PEACE RESEARCH INST. MEIJI GAKUIN UNIV. 49, 49 (2013).

[514] No. 1(2) of the 1952 Circular of the MOJ. It must be noted that the ethnic origins of individuals did not necessarily determine their nationality under the 1952 Circular. For instance, if a woman who was listed in the Korean household registration was married to a man who was listed in the mainland household registration, the woman was listed in the mainland household registration and *vice versa*. This principle derived from the concept of the household, which assumed that a family was composed of one household and headed normally by a father or husband. Koreans and Taiwanese people who were married to or adopted by mainland Japanese did not lose their Japanese nationality because they were registered in the mainland household registration. On the other hand, mainland Japanese who were married to or adopted by Korean or Taiwanese people lost their Japanese nationality because they were registered in the Korean or Taiwanese household registration. See No. 1(3) of the 1952 Circular of the MOJ.

[515] See "Scope and Terminology of this Dissertation" in the "Introduction".

[516] See the following. Yasuaki Onuma, Zainichi Chousen Jin no Houteki Chii nikansuru Ichi Kousatsu (1) [*Legal Status of Koreans in Japan: With Special Reference to Nationality (1)*], 96(3) J. OF THE JURISPRUDENCE ASS'N, THE UNIV. OF TOKYO 266, 274 (1980). For the issue of the status of people from the former colonies, see 4.3.1., "The Impact of Stateless Persons in Japan".

Although the detail of the background to the 1952 Circular is not known, the background of the Treaty of San Francisco indicates that the Treaty of Versailles was the basis of the Japanese government's decision on the loss of Japanese nationality of people from the former colonies. Although the norm of preventing statelessness does not seem to have been considered, the circular functioned to prevent statelessness, at least in theory, by confirming that Korean and Taiwanese people possessed Korean and Taiwanese nationalities, respectively.

3.5. The 1957 Convention

Japan neither signed nor acceded to the 1957 Convention, and the Convention did not influence Japanese nationality law.[517] However, it is worth noting that the 1950 Nationality Act was in line with the norm of preventing statelessness in the 1957 Convention. The 1957 Convention was sometimes discussed in the Diet around the time that Japan was considering accession to the CEDAW but was not discussed before then.[518] In the late 1970s, the Japanese government indicated its willingness to be a contracting party to the 1957 Convention, but it hesitated to accede to the 1957 Convention in 1985. In 1979, around the time that the CEDAW was adopted, a member of the Diet asked about the Japanese attitude to human rights treaties. Harunori Kaya, the Director-General of the United Nations Bureau of the MOFA at the time, mentioned the 1957 Convention, and stated that Japan could

[517] For the 1957 Convention, see 1.3.3., "The 1957 Convention: Married Women's Human Rights".
[518] From the available sources, it is fair to say that Japan considered neither signing nor ratifying the 1957 Convention until the late 1970s. The MOFA stated that Japan was not really relevant to issues of stateless persons in 1957. MOFA, (Gidai Gojuuyon) Mukokusekisha no Jokyo to Genshou ni kansuru Jouyaku An [*(Agenda 54) Draft Conventions on the Elimination and Reduction of Stateless Persons*], *in Kokusai Rengou Soukai Kankei Ikken Dai Juuikkai Soukai Kankei Dai Ikkan* [The 11th Session of the General Assembly of the United Nations]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. B'-2-1-0-1-11 (1957). This may be why Japan considered neither signing nor ratifying the 1957 Convention. No documents on the 1957 Convention were retrieved from the request for disclosure of administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] Jouhou Koukai Dai 01496 Gou. *Heisei 28 Nen 8 Gatsu 15 Nichi* (15 August 2016).

consider the possibility of acceding to the 1957 Convention.[519] However, this stance changed in 1985, when Japan became a contracting party to the CEDAW. A new Director-General of the United Nations Bureau, Chusei Yamada, stated that Japan would not accede to the 1957 Convention because the Convention was problematic.[520] He explained that the 1957 Convention prioritised the naturalisation of women over that of men, and this was problematic, whereas the CEDAW provided for gender equality.[521] Article 3 of the 1957 Convention allowed for married women's naturalisation in the nationality of their husbands, whereas married men's naturalisation in the nationality of their wives was not included.[522] Yamada seems to be referring to this article, which conflicts with gender equality. Japan regarded the 1957 Convention as incompatible with the CEDAW, which Japan considered acceding to at the time, so Japan has neither signed nor acceded to the 1957 Convention thus far.

However, Japan was in line with the norm of preventing statelessness in the 1957 Convention. The 1957 Convention provided that marriages to aliens or the dissolution of marriages to aliens did not affect the nationality of a wife (Article 1) and a husband's acquisition of another nationality or renunciation of his original nationality did not prevent

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[519] *DAI 87 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 87TH SESSION OF THE DIET] (No. 8, 27 April 1979) p. 26. *DAI 87 KAI KOKKAI SANGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF COUNCILLORS, THE 87TH SESSION OF THE DIET] (No. 13, 28 May 1979) p. 14.

[520] *DAI 102 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 102ND SESSION OF THE DIET] (No. 15, 24 May 1985) p. 3. *DAI 102 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 102ND SESSION OF THE DIET] (No. 18, 4 June 1985) p. 3. *DAI 102 KAI KOKKAI SANGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF COUNCILLORS, THE 102ND SESSION OF THE DIET] (No. 17, 18 June 1985) pp. 27-28.

[521] *DAI 102 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 102ND SESSION OF THE DIET] (No. 15, 24 May 1985) p. 3.

[522] Article 3 of the 1957 Convention reads as follows: "Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures."

his wife's retention of her nationality (Article 2). In the 1950 Nationality Act, there were neither provisions requiring women to lose their nationality in cases of marriage or dissolution of marriage, nor in cases of a change in her husband's nationality. Interestingly, even the 1899 Nationality Act and the 1916 Amendment were already in line with the norm of preventing statelessness in the 1957 Convention. Article 18 of the 1899 Nationality Act provided for the loss of women's nationality in cases of marriage, but as a result of the 1916 Amendment, a woman's nationality was not lost unless she acquired her husband's nationality. Article 21 of the 1899 Nationality Act provided that a woman would lose her Japanese nationality only when her husband acquired a new nationality and she also acquired that nationality.[523] These articles were problematic from the perspective of women's equal status with men but they both prevented statelessness. This relationship between the 1957 Convention and the Japanese nationality law indicates that Japan was in line with the norm of preventing statelessness in the 1957 Convention.[524]

3.6. The 1961 Convention

Although the Japanese government indicated its commitment to preventing statelessness, it did not amend the 1950 Nationality Act to bring it in line with the 1961 Convention; rather, it attempted to bring the 1961 Convention in line with the 1950 Nationality Act during the drafting process of the 1961 Convention.[525] Japan was involved in the drafting process of the 1961 Convention and participated in the UN Conference on the Elimination or Reduction of Future Statelessness, which was held in 1959 and 1961, but it neither signed nor acceded to the Convention.

[523] See 2.3., "The 1899 Nationality Act" and 2.4., "The 1916 Amendment of the 1899 Nationality Act".
[524] Note tht Articles 18 and 21 of the 1899 Nationality Act were omitted in the 1950 Nationality Act since the provisions based on the household system were amended. See 3.3., "The 1950 Nationality Act".
[525] See also 1.3.4., "The 1961 Convention: Link with Refugee Issues".

Before the conference, the UNSG requested that member states comment on two draft Conventions: the Draft Conventions on Elimination and Reduction.[526] The Japanese comments submitted to the UNSG indicate that Japan preferred the Draft Convention on Elimination, which was more ambitious in preventing statelessness than was the Draft Convention on Reduction. They stated that it was necessary to eliminate or reduce statelessness by international law.[527] First, the Japanese comment explained the 1950 Nationality Act. It stated that although the principle of the nationality act was *jus sanguinis*, *jus soli* was also applied to some extent.[528] It continued that no person could be deprived of his or her Japanese nationality.[529] It compared the Draft Conventions on Elimination and Reduction and stated that most of the provisions of both drafts were already complied with in Japanese law.[530] Since both drafts seemed to prioritise the *jus soli* principle, and *jus sanguinis* was regarded as an exception, Japan hoped that the draft would be based on *jus sanguinis*.[531] However, Japan recognised that it should not be the case that each state adhered to its own principle.[532] After that, it regarded the Draft Convention on Elimination as more acceptable because it did not "contain provisions regarding the system of conditional acquisition of nationality".[533] This indicates that Japan believed that no condition should be required for individuals to acquire a nationality according to its official statement.

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[526] UN, United Nations Conference on the Elimination or Reduction of Future Statelessness*in* SO 261/411 (1) PART A INTERNATIONAL CONFERENCE OF PLENIPOTENTIARIES TO CONCLUDE A CONVENTION ON THE REDUCTION OR ELIMINATION OF FUTURE STATELESSNESS - REPRESENTATION AND PARTICIPATION - GOVERNMENTS, 1956.01-1958.12 (FILE). Holding of the UN Library and Archives in Geneva. SO 261/411(1) Govts (Aug. 11, 1958). For these two draft conventions, see 1.3.4. "The 1961 Convention: Link with Refugee Issues".
[527] Permanent Mission of Japan to the UN, New York, Comments of the Japanese Government on the revised draft Conventions on the Elimination or Reduction of Future Statelessness (SC/59/75) *in* SO 261/9 (4) CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS, 1956.11-1959.3 (FILE). Holding of the UN Library and Archives in Geneva (Mar. 18, 1959).
[528] *Id*.
[529] *Id*.
[530] *Id*.
[531] *Id*.
[532] *Id*.
[533] *Id*.

The document submitted to the UNSG went on to comment on some draft provisions, and it desired to make the Convention compatible with the 1950 Nationality Act. With regard to Article 1, which applied the *jus soli* principle in cases where a child acquired no other nationality, Japan preferred the Draft Convention on Elimination.[534] Article 1 of the Draft Convention on Elimination was composed of only one paragraph which provided that the *jus soli* principle be applied in cases where the child acquired no other nationality, but the Draft Convention on Reduction included some paragraphs that allowed states to add conditions in terms of the parents' residence in the territory.[535] However, Japan expressed the hope that "an amendment will be made limiting the application of the Article to persons whose parents are both not known or are stateless".[536] This indicates that Japan desired to make the 1961 Convention compatible with Article 2(iv) of the 1950 Nationality Act, which provided for the application of the *jus soli* principle in cases where a child's parents were not known or were stateless. It is interesting to note that Japan preferred the Draft Convention on Elimination over the Draft Convention on Reduction. Since Japan hoped to make conditions to the application of the *jus soli* principle, it could have preferred the Draft Convention on Reduction and proposed a condition on parents. However, it preferred the Draft Convention on Elimination and proposed a condition on parents instead.

Article 4 of the Draft Conventions on Elimination and Reduction provided for the application of the *jus sanguinis* principle in cases where other nationalities were not conferred on a child.[537] The article of the Draft Convention on Reduction set normal residence in the territory of the parents' nationality as a condition, while this condition was not set in the Draft Convention on Elimination.[538] With regard to Article 4, Japan again

[534] *Id*.
[535] See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[536] Permanent Mission of Japan to the UN, New York, *supra* note 527.
[537] The article in both drafts also states that "The nationality of the father shall prevail over that of the mother." This part of the article seems to prevent multiple nationality. UNGA, *supra* note 131, at 3-4.
[538] *Id*, at 3-4.

preferred the Draft Convention on Elimination.[539] This provision of the Draft Convention on Elimination seems to be compatible with Article 2(i) of the 1950 Nationality Act, which adopted *jus sanguinis* through the paternal line without applying the condition of residence.[540] Japan also preferred Articles 5 to 9 of the Draft Convention on Elimination, which did not conflict with the 1950 Nationality Act.[541] This indicates the Japanese stance to make the new Convention on statelessness compatible with the 1950 Nationality Act. However, it must be emphasised that Japan preferred the Draft Convention on Elimination, which placed harsher obligations on states.[542]

Although the Japanese stance was not strongly stated in the UN Conference on the Elimination or Reduction of Future Statelessness in 1959 and 1961, Japan desired to make the new Convention compatible with the existing Japanese laws recognising the significance of preventing statelessness. Although Japan did not express its view verbally in the conference, there are some resources which indicate the Japanese stance to make any new treaty compatible with the 1950 Nationality Act.[543] At the conference, Japan commented on

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[539] The Japanese government declared it desirable that "this Article be amended to make it applicable irrespective of the place of birth". Permanent Mission of Japan to the UN, New York, *supra* note 527. Although the Draft Convention on Elimination did not include a condition on the place of birth, this Japanese statement indicates the Japanese commitment to *jus sanguinis*.

[540] Note that *jus sanguinis* through the maternal line was adopted in the 1950 Nationality Act in cases where a father was not known or was stateless. Article 2(iii) of the 1950 Nationality Act.

[541] Permanent Mission of Japan to the UN, New York, *supra* note 527.

[542] It is possible that Japan had a strong commitment to the norm of preventing statelessness. Since the commitment to preventing statelessness in the Draft Convention on Elimination was stronger than that in the Draft Convention on Reduction, Japan might have supported the Draft Convention on Elimination. However, it must be noted that Japan opposed the establishment of a tribunal regarding this convention. Article 11 of both drafts proposed the establishment of a tribunal to interpret and apply the Convention on statelessness. UNGA, *supra* note 131, at 6. Japan stated that the dispute relevant to this Convention would be between a state and an agency working for the individual. It continued that such issues "should be settled as domestic matters by the Governments concerned […]". Consequently, Japan said, "such disputes should not be settled by an international tribunal empowered to give decisions which will be legally binding upon the parties; they may well be settled by an international investigation or mediation committee empowered to give recommendations to the parties". Permanent Mission of Japan to the UN, New York, *supra* note 527. From this stance, it can be said that Japan was not eager to solve issues of statelessness by legally binding interpretations of the court.

[543] Japan expressed its view on a limited number of occasions in verbal communications and votes taken by roll-call. Usually, the voting attitude of each state is not available in the summary records. However, when any state requests votes to be taken by roll-call, each state's attitude is observable in the summary records.

Article 1 of the Convention. After the Draft Convention on Reduction became the basis of the Convention,[544] Japan stated that although Japanese nationality was conferred on the basis of the *jus sanguinis* principle, it could be conferred by the *jus soli* principle as well.[545] It then supported paragraph 1 of Article 1, which provided that the *jus soli* principle applied in cases where a child acquired no other nationality, but suggested the deletion of paragraphs 2 and 3, which limited the cases where the *jus soli* principle was to be applied.[546] However, since there was a serious disagreement between states about the position of paragraphs 2 and 3, new drafts were introduced, and Article 1 became a compromised provision. When the current paragraph 1 of Article 1 was adopted, Japan abstained because "its expression differed in some respects from existing Japanese law", although Japan "was not opposed to the substance".[547] Although Japan did not explain how paragraph 1 of Article 1 was different from Japanese law, this explanation indicates that Japan was trying to make the new Convention compatible with the existing Japanese laws.[548]

Except for this occasion, Japan did not actively participate in any discussion in the conference. However, the Japanese voting stance is observable from available sources, and this analysis indicates that Japan desired to make clauses on the deprivation of nationality compatible with the 1950 Nationality Act. When Japan submitted its comments on the two Draft Conventions to the UNSG before the conference, Japan preferred to have a provision included in the Draft Convention on Elimination prohibiting the deprivation of nationality if

[544] UNGA, *supra* note 137, at 10. See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[545] UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary Record of the Fourth Plenary Meeting Held at the Palais des Nations, Geneva, on Thursday, 26 March 1959, at 10.05 a.m., A/CONF.9/SR.4, 6 (Apr. 24, 1961).
[546] *Id*, at 6. For the provisions in these paragraphs, see note 134.
[547] UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary Record of the Eighth Plenary Meeting Held at the Palais des Nations, Geneva, on Thursday, 15 April 1959, at 10.50 a.m., A/CONF.9/SR.8, 5 (Apr. 24, 1961).
[548] Paragraph 1 of Article 1 provides that the *jus soli* principle be adopted if a child acquires no other nationality. The 1950 Nationality Act did not contain such a provision, so this seems to have been regarded as the difference between this paragraph and the 1950 Nationality Act.

it caused statelessness.[549] Since the Draft Convention on Reduction allowed for the deprivation of nationality in some cases,[550] the Japanese stance can be interpreted as preferring an unconditional prohibition on the deprivation of nationality.

However, the Japanese stance at a later stage does not indicate the same enthusiasm regarding the unconditional prohibition on the deprivation of nationality. After the Draft Convention on Reduction was adopted as the basis of the Convention in the conference, a draft on the current Article 8, on deprivation of nationality, was modified, and a new draft proposed by the Federal Republic of Germany allowed states the right to deprive a person of their nationality *if the state declared the right to do so at the time of signature, ratification or accession*.[551] Since states had more discretion in depriving someone of their nationality in the original Article 8 of the Draft Convention on Reduction, the proposal of the Federal Republic of Germany to limit the discretion of the states in depriving nationality was deemed a significant proposal. However, Japan opposed this proposal.[552] Since Japan did not explain why it opposed this proposal, the reason remains unclear. However, the previous Japanese position implies that Japan opposed to allowing deprivation of nationality because Japanese law did not allow any form of deprivation of nationality. Subsequently, Japan stated that "there [was] no ground for deprivation of nationality which the Government of Japan, for its part, deems it essential to retain".[553]

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[549] It also introduced a clause on a prohibition on deprivation of nationality in the 1950 Nationality Act. Permanent Mission of Japan to the UN, New York, *supra* note 527.
[550] When nationals served for a foreign country, deprivation of nationality was allowed. UNGA, *supra* note 131, at 5.
[551] See the following. UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness: Text of Article 8 Adopted by the Committee of the Whole and Revised by the Drafting Committee, A/CONF.9/L.40/Add.3 (Apr. 14, 1959). For the original Article 8, see the following. UNGA, *supra* note 131, at 5.
[552] UNGA, United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary Record of the Thirteenth Plenary Meeting Held at the Palais des Nations, Geneva, on Thursday, 17 April 1959, at 3.10 p.m., A/CONF.9/SR.13, 5-6 (Apr. 24, 1961).
[553] Permanent Mission of Japan to the UN, New York, SC/61/196 *in* SO 261/413 Part A Question of Reconvening the International Conference of Plenipotentiaries to Conclude a Convention on the Reduction or Elimination of Future Statelessness, 1961.03-1961.07 (File). Holding of the UN Library and Archives in Geneva (June 22, 1961). In order to examine the Japanese position at the UN

This indicates that Japan did not actively support unconditional allowance of the deprivation of nationality while this was in line with the Japanese law. At the end of the conference, Japan did not sign the 1961 Convention,[554] and it has not acceded to the Convention to date.[555]

After the 1961 Convention was signed, the Convention was discussed in the Diet several times.[556] Although the Japanese government recognised the gap between the 1961 Convention and the 1950 and 1984 Nationality Acts,[557] it did not find it necessity to make the nationality acts compatible with the 1961 Convention. When the government was asked in 1981 why Japan was not a party to the 1961 Convention, Shoichi Kuriyama, an Assistant Vice-Minister for Foreign Affairs, replied that Japan had adopted *jus sanguinis* through the paternal line, and this principle was not in line with the *jus soli* principle of the 1961 Convention.[558] In 1984, Taisuke Biwata, the Director-General of the Civil Affairs Bureau of the MOJ, stated that Japan had a difficulty meeting Article 1 of the 1961 Convention, which

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Conference on the Elimination or Reduction of Future Statelessness, administrative documents of the MOFA need to be explored. However, the author did not find any documents indicating the Japanese position at the conference in the Diplomatic Archives of the MOFA, even though the staff at the Archives have also explored the available sources. The author has also requested that the MOFA disclose any relevant administrative documents indicating communication between Tokyo and Geneva, but such documents did not exist as of 2016. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] Jouhou Koukai Dai 01498 Gou. *Heisei 28 Nen 8 Gatsu 15 Nichi* (15 August 2016).

[554] Since no administrative documents are available, the reason why Japan did not sign the 1961 Convention is not clear. See note 553.

[555] As of January 2015, Japan has no plans to accede to the 1961 Convention. ARAKAKI, *supra* note 8, at 22.

[556] Although it was not a substantial discussion, Harunori Kaya, the Director-General of the United Nations Bureau of the MOFA, stated in 1979 that it was valuable to consider the possibility of ratifying or acceding to the 1954 and 1961 Conventions if "conditions are met". *DAI 87 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 87TH SESSION OF THE DIET] (No. 8, 27 April 1979) p. 26. On a different occasion, Kaya expressed a similar view on the possibility of considering accession to the 1961 Convention. *DAI 87 KAI KOKKAI SANGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF COUNCILLORS, THE 87TH SESSION OF THE DIET] (No. 13, 28 May 1979) p. 14.

[557] For the 1984 Nationality Act, see 3.8., "The CEDAW and the 1984 Nationality Act".

[558] *DAI 94 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 94TH SESSION OF THE DIET] (No. 10, 17 April 1981) pp. 13-14. See also Article 1 of the 1961 Convention. See also the following. ARAKAKI, *supra* note 8, at 29.

provided for automatic acquisition of nationality by the *jus soli* principle.[559] This indicates that Japan did not intend to amend the 1950 Nationality Act. Rather, it desired to bring the 1961 Convention in line with the 1950 Nationality Act, which it failed to do.

3.7. The ICCPR

Japan did not find it necessary to amend the 1950 Nationality Act to make it compatible with the provision in the ICCPR on children's right to acquire a nationality. It must be noted that the ICCPR was not interpreted as aiming to prevent statelessness even though the prevention of statelessness was the main theme during its drafting process.[560] Before the discussion on the draft of the ICCPR took place in the sixteenth session of the UNGA in 1961, the MOFA prepared an instruction for the delegation. The instruction stated that drafts of the ICCPR and ICESCR were in line with the provisions and spirit of the 1946 Constitution and laws, so Japan should take a positive attitude towards the negotiation.[561] The instruction also stated that if any new legislation or budget needed to be prepared, representatives should not indicate the Japanese commitment to implementing such legislation or preparing of any budget even if the Japanese representatives voted in favour of the draft.[562] On the basis of this instruction, Japan participated in the sixteenth session of the UNGA. Japan voted in favour of Article 24(3), which provided for the rights of children

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[559] *DAI 101 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 101ST SESSION OF THE DIET] (No. 6, 10 May 1984) p. 23. For more detail, see the following. ARAKAKI, *supra* note 8, at 29.

[560] See 1.3.5., "ICCPR: Children's Right to Acquire a Nationality".

[561] The ICESCR was negotiated in the UNGA with the ICCPR. However, it was also stated that the delegation should request modification or clarification where necessary. MOFA, Kunrei Dai 30 Gou [*Instruction No. 30*], *in KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3193 (1961).

[562] MOFA, Kunrei Dai 30 Gou [*Instruction No. 30*], *in KOKUSEI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3193 (1961). This is interesting because this instruction implies that the Japanese government could have voted in favour of a provision even if Japan did not want to implement it.

to acquire a nationality.[563] After the text of the ICCPR, including an article on children's right to acquire a nationality, was finalised, the MOFA circulated drafts of the ICCPR in 1966 to the ministries of Japan to ask for comments.[564] The MOJ made comments on the draft, but it did not mention nationality matters,[565] so the MOJ did not regard the compatibility between children's right to acquire a nationality in the ICCPR and the 1950 Nationality Act, which adopted *jus sanguinis* through the paternal line, to be an issue at the time.[566]

When the MOJ examined the relationship between Article 24(3) and the 1950 Nationality Act, it paid attention to statelessness. It believed that issues of statelessness could be solved by facilitated naturalisation. One document explained the 1950 Nationality Act, and stated that a possible "issue" arose in cases of legitimate children of foreign fathers and Japanese mothers where the nationality of the father could not be conferred.[567] This "issue"

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[563] MOFA, Kokuren Dai San I niokeru B Kiyaku An Shingi Kekka to Wagakuni no Taido [*Result of the Deliberation of the Draft of the ICCPR in the Third Committee of the UN and Japan's Stance*], p. 10, *in* *KOKUSEI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3193 (n.d.).

[564] The ICCPR was scheduled to be adopted in 1966. Vice-Minister for Foreign Affairs, Koku Sha Dai 7243 Gou [Koku Sha *No. 7243*], *in* *KOKUSEI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3193 (1966).

[565] The MOJ considered the status of foreigners relevant to the ICCPR. Vice-Minister for Justice, Kokusai Jinken Kiyaku An ni tsuite (Kaitou) [*Reply: Regarding Drafts of International Covenants on Human Rights*], *Houmushou Hi Ren Dai 634 Gou* [MOJ, *Hi Ren* No. 643], *in* *KOKUSEI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3193 (1966).

[566] Just before Japan ratified the ICESCR and ICCPR, Japan considered the provisions of the two covenants in the ministries, and in December 1977, it identified eight issues, but Article 24(3) on nationality was not included among them. Article 7(a)(i) (women's equal conditions of work with men), Article 7(d) (remuneration for public holidays), Article 8(1)(d) (the right to strike), Article 8(2) (limitations on basic labour rights), Article 9 (the right to social security), Article 13(2)(a) (free and compulsory primary education), Article 13(2)(b), (c) (progressive introduction of free secondary and higher education) of the ICESCR and Article 20 of the ICCPR (a provision on propaganda) were regarded as problematic. United Nations Bureau, Ministry of Foreign Affairs of Japan, Kokusai Jinken Kiyaku no Shuyou Mondaiten, Kaishaku oyobi Shori Houshin [*Main Issues, Interpretation and Policies of the International Covenants of Human Rights*], *in* *KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3210 (1977).

[567] Translated by the author. The heading of the document stated "MOJ", and this document is filed in the section of the "Civil Affairs Bureau", so it is assumed that the document was prepared by the Civil Affairs Bureau of the MOJ. *KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN

refers to statelessness because the legitimate children of foreign fathers and Japanese mothers became stateless if the nationality of the father could not be conferred under the 1950 Nationality Act, in operation at the time. However, the MOJ added that such cases were rather exceptional.[568] Even in such cases, it stated that the requirement for naturalisation was loosened.[569] In other words, the legitimate children of foreign fathers and Japanese mothers were easier to naturalise as Japanese. The document concluded that the ICCPR did not conflict with the 1950 Nationality Act.[570] This statement indicates that the Japanese government believed that the facilitated naturalisation guaranteed the right of the children to acquire Japanese nationality.[571] On the basis of this understanding of the compatibility of the ICCPR and the 1950 Nationality Act, Japan became a party to the ICCPR after the discussions in 1979, and the ICCPR did not trigger an amendment to the 1950 Nationality Act.

From the perspective of the prevention of statelessness, there are two points to be discussed. First, the Japanese government believed that the ICCPR did not place a legal

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RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3215 (1978).

[568] *KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3215 (1978).

[569] *KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3215 (1978). This is called facilitated naturalisation. MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p.183. This document was disclosed as a result of a request to disclose administrative documents (MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[570] *KOKUSAI JINKEN KIYAKU* [INTERNATIONAL COVENANTS OF HUMAN RIGHTS]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3215 (1978).

[571] A similar view was expressed by the Minister for Justice. *DAI 87 KAI KOKKAI SHUUGIIN GAIMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 87TH SESSION OF THE DIET] (No. 8, 27 April 1979) p. 19. See also *DAI 91 KAI KOKKAI SHUUGIIN OKINAWA OYOBI HOPPOU MONDAI NI KANSURU TOKUBETSU IINKAI GIJI SOKKIROKU* [MINUTES OF THE SPECIAL COMMITTEE FOR OKINAWA AND NORTHERN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 91ST SESSION OF THE DIET] (No. 3, 7 March 1980) p. 14.

obligation on states to confer nationality.[572] This explains why the Japanese government regarded the 1950 Nationality Act as compatible with Article 24(3) of the ICCPR even though there were two major ways in which stateless children could be born in Japan: children born in Japan to parents with another nationality and children born in Japan to Japanese mothers and foreign fathers. Second, statelessness could not be prevented by facilitated naturalisation. In order to naturalise as Japanese, "permission of the Minister of Justice" was necessary.[573] In other words, naturalisation was at the discretion of the Minister for Justice. Even under facilitated naturalisation, this principle remained the same as for normal naturalisation. While a condition on residence in Japan was loosened and some conditions were not required,[574] children younger than three years of age were unable to apply for facilitated naturalisation.[575] In other words, those who applied for facilitated naturalisation might have to be stateless for three years or more. This was problematic from the perspective of the prevention of statelessness.

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[572] The MOJ expressed this view in the deliberations of the Diet. *DAI 91 KAI KOKKAI SHUUGIIN OKINAWA OYOBI HOPPOU MONDAI NI KANSURU TOKUBETSU IINKAI GIJI SOKKIROKU* [MINUTES OF THE SPECIAL COMMITTEE FOR OKINAWA AND NORTHERN AFFAIRS, HOUSE OF REPRESENTATIVES, THE 91ST SESSION OF THE DIET] (No. 3, 7 March 1980) p. 14. On a different occasion, the MOJ interpreted Article 24(3) of the ICCPR as providing that children should acquire a nationality when they are born, but it does not specify which nationality they acquire. *DAI 101 KAI KOKKAI SANGIIN HOUMU IINKAI GIJI SOKKIROKU* [MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF COUNCILLORS, THE 101ST SESSION OF THE DIET] (No. 6, 10 May 1984) p. 5. This Japanese interpretation of Article 23(4) of the ICCPR seems to be problematic when Article 2 of the ICCPR, which provide for the ensurance of rights in the ICCPR to "all individuals within its territory", is considered. By applying Article 2 in interpreting Article 24(3), Japan needs to ensure all children's right to acquire a nationality within the Japanese territory. Since stateless children's right to acquire a nationality does not seem to be ensured, the Japanese government needs to ensure the children's right to acquire a nationality pursuant to Articles 2 and 24(3) of the ICCPR. Hajime Akiyama, Jiyuuken Kiyaku niokeru Kodomo no Kokuseki Shutokuken to Kokka no Gimu: Jiyuuken Kiyaku Dai 2 Jou no Kanten kara [*Children's Right to Acquire a Nationality and States' Obligation under the ICCPR: The Perspective from Article 2 of the ICCPR*], 30 HUMAN RIGHTS INTERNATIONAL 115 (2019).

[573] Article 5 of the 1950 Nationality Act.

[574] The following conditions are not required for facilitated naturalisation but they are required for a normal naturalisation: having the capacity to act according to his or her national law, and being able to make a living. Article 5 of the 1950 Nationality Act.

[575] Having an address in Japan for three or more years is a condition for application for facilitated naturalisation. Article 5 of the 1950 Nationality Act.

3.8. The CEDAW and the 1984 Nationality Act

The CEDAW triggered the enactment of the 1984 Nationality Act.[576] Although the norm of preventing statelessness was not the basis of the enactment of the 1984 Nationality Act, the act had the effect of preventing statelessness. It must also be noted that the previous nationality acts had been in line with the provision on the norm of preventing statelessness in the CEDAW. With regard to statelessness, Article 9(1) provided that women did not become stateless as a result of marrying a foreigner or a change in their husband's nationality. Article 9(2) added that women have "equal rights with men with respect to the nationality of their children". Article 9(2) assisted in the enactment of the 1984 Nationality Act. This section begins with an explanation of the basic principle of the 1984 Nationality Act.

The 1984 Nationality Act adopted *jus sanguinis* through both the paternal and maternal lines. The MOFA regarded the principle of *jus sanguinis* through the paternal line in the 1950 Nationality Act as an issue, in light of Article 9(2) of the CEDAW,[577] and the nationality act needed to be amended to *jus sanguinis* through both the paternal and maternal lines.[578] Since 1981, the Legislative Council of the MOJ has discussed a possible amendment of the 1950 Nationality Act in order to ratify the CEDAW.[579] In an Intermediate Draft on

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[576] KIDANA, *supra* note 8, at 40. For CEDAW, see 1.3.6., "CEDAW: Women's Right to a Nationality".
[577] United Nations Planning and Administration Division, MOFA, Fujin Sabetsu Teppai Jouyaku no Kentou Joukyou [*Status of Study of the Convention on the Elimination of All Forms of Discrimination against Women*] (29 September 1980). This view was also observable in the following. United Nations Planning and Administration Division, MOFA, Shiryou 81-7 Fujin Sabetsu Teppai Jouyaku to Kokuseki Hou tono Kankei nitsuite (Shiryou) [*Document 81-7: The Relationship between the Convention on the Elimination of All Forms of Discrimination against Women and the Nationality Act*] (26 June 1981). These documents were disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01655 Gou. *Heisei 28 Nen 9 Gatsu 12 Nichi* (12 September 2016) Request number: 2016-00163.
[578] The MOFA also stated that methods to prevent multiple nationalities and the treatment of children born abroad needed to be considered. *Id*.
[579] Japan signed the CEDAW in 1980. The special ceremony to sign the CEDAW took place on 17 July 1980 (UN, *Short History of CEDAW Convention*, *at* http://www.un.org/womenwatch/daw/cedaw/history.htm (viewed Jan. 17, 2019).), and Japan signed the CEDAW at the ceremony. Nobuko Takahashi, the ambassador to Denmark at the time, stated that it was not certain whether Japan would sign the CEDAW until just before the actual signature. Many stakeholders pressed the Japanese government to sign, and signature was decided at the cabinet meeting on 15 July, a day after the opening ceremony of the special ceremony. Yasuko Yamashita, Josei Sabetsu

Amendment of the Nationality Act, announced on 1 February 1983, *jus sanguinis* through both the paternal and maternal lines was introduced.[580] After consultation for stakeholders' opinions, the 1984 Nationality Act applied *jus sanguinis* through both the paternal and maternal lines.[581] Japan ratified the CEDAW in 1985, a year after the enactment of the 1984 Nationality Act.

Enactment of the 1984 Nationality Act contributed to preventing statelessness while the norm of preventing statelessness in the CEDAW itself did not influence the Nationality Act. Since Japanese women began to be able to transmit nationality, children of Japanese women and foreign men acquired Japanese nationality under the 1984 Nationality Act although such children became stateless under the 1950 Nationality Act. This contributed to preventing statelessness among children born to Japanese mothers and foreign fathers, one of the causes of statelessness in previous nationality acts. As a result of the enactment of the 1984 Nationality Act, for instance, statelessness in Okinawa could be prevented. The children of American men, mainly those who worked for the military, and Japanese women tended to be stateless, and a number of children had become stateless in Okinawa since the 1960s.[582] In the Diet, issues of statelessness were discussed, and one member of the Diet stated that it was necessary to amend *jus sanguinis* through the paternal line.[583] Although the gender equality enshrined in the CEDAW was a major reason for enactment of the 1984

Teppai Joyaku to Nihon [*CEDAW and Japan*], 9 J. OF BUNKYO GAKUIN UNIV. DEP'T OF FOREIGN LANGUAGES AND BUNKYO GAKUIN COLL. 13 13-33 (2009). Based on this background, the compatibility between the CEDAW and Japanese laws began to be examined to ratify the CEDAW.

[580] Kiyoshi Hosokawa, *Kokuseki Hou Kaisei Chuukan Shian no Gaiyou* [Outline of the Intermediate Draft on Amendment of the Nationality Act], 788 JURISUTO 34, 35 (1983).

[581] KIDANA, *supra* note 8, at 42.

[582] Junko Kobayashi, 1985 Nen Kokuseki Hou to Okinawa no "Mukokuseki Ji" Mondai: "Haijo" to "Housetsu" no Hazama de [*The 1985 Japanese Nationality Law and "Stateless Children" in Okinawa: Between* Exclusion *and* Inclusion], 11 J. OF THE GRADUATE SCH. OF HUMANITIES AND SCI., OCHANOMIZU UNIV. 441, 443 (2008). Okinawa was under the administration of the US until 1972. Since many US bases remained in Okinawa, there were many US people there. For more detail, see 4.3.1., "The Impact of Stateless Persons in Japan".

[583] *Dai 93 Kai Kokkai Sangiin Houmu Iinkai Giji Sokkiroku* [Minutes of the Legal Committee, House of Councillors, the 93rd Session of the Diet] (No. 3, 20 November 1982) p. 9.

Nationality Act, stateless children in Okinawa were referred to in order to discuss the need to amend the 1950 Nationality Act. Under these circumstances, the 1984 Nationality Act prevented statelessness among the children of Japanese women.

The norm of preventing statelessness in the CEDAW is evident in Article 9(1), and the 1916 Amendment of the 1899 Nationality Act already complied with the article. Article 9(1) of the CEDAW provided that a woman would not become stateless as a result of marriage to a foreigner or a change in her husband's nationality. As a result of the 1916 Amendment of the 1899 Nationality Act, a woman's loss of Japanese nationality as a result of marriage or a change in her husband's nationality was conditional on her acquisition of a new nationality.[584] In the 1950 Nationality Act, a woman would not lose her nationality as a result of marriage or a change in her husband's nationality,[585] and this principle did not change in the 1984 Nationality Act. Thus, the previous nationality acts were in line with Article 9(1) of the CEDAW.

As a result of the enactment of the 1984 Nationality Act, which was influenced by the CEDAW, the children of Japanese women and foreign men ceased to become stateless. However, the possibility of statelessness remained. Children born to parents of foreign nationality in Japan became stateless if their parents' nationalities were not transmitted.

3.9. The CRC

Although the Japanese government recognised that the norm of preventing statelessness was the driving force behind the CRC's inclusion of children's right to acquire a nationality, it did not interpret Article 7 of the CRC as placing an obligation on states.[586] This stance can be seen from the anticipated questions and answers prepared by the MOFA

[584] See 2.4., "The 1916 Amendment of the 1899 Nationality Act".
[585] See 3.3., "The 1950 Nationality Act".
[586] For CRC, see 1.3.7., "CRC: The Commitment to Preventing Statelessness among Children".

and MOJ. In answer to the question about whether Article 7 of the CRC placed an obligation on states to confer nationality on all children born in the territory,[587] the MOFA and MOJ responded as follows.[588]

> Article 7(1) of this convention provides the principle that contracting parties acknowledge children's right to acquire a nationality in light of the unstable status of children without a nationality in the current international society. Thus, it does not place an obligation on contracting parties to confer their nationality on all children in the state, including cases where children are born in the state.
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> Article 7(2) also provides that contracting parties shall ensure the implementation of rights enshrined in paragraph 1 in accordance with their national law and their obligations under the relevant international instruments in this field. Thus, it does not place an obligation on contracting parties to prevent all children in the state from becoming stateless, including cases where children are born in the state.

There are two features of note in this document. On the one hand, the document recognised the issues concerning stateless children. When Article 7(1) was introduced, "the unstable status of children without a nationality" was mentioned in reference to the status of

[587] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 181. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[588] Translated by the author. MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 182. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

stateless children.[589] This illustrates the background to the development of Article 7(1). Statelessness was also mentioned to explain Article 7(2) in the anticipated questions and answers. These facts indicate that the Japanese government was aware that statelessness was a key concept of Article 7 of the CRC. On the other hand, this document stated that Article 7 of the CRC did not place an obligation on states. It asserted that the application of *jus soli* was not required because it was assumed that there were two methods of conferring a nationality: the *jus soli* and *jus sanguinis* principles.[590] This understanding was similar to the Japanese government's understanding of the ICCPR.[591]

The document asserted that statelessness could be prevented by the application of the *jus soli* principle if children were born in Japan to unknown parents or did not have a nationality pursuant to Article 2 of the 1984 Nationality Act.[592] However, it acknowledged that it was possible that statelessness would take place to a limited extent.[593] Even in such

[589] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 182. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[590] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 182. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[591] See 3.7., "The ICCPR".

[592] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 182. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[593] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 183. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

cases, it recognised that stateless persons born in Japan could acquire Japanese nationality through naturalisation, referring to Article 8(4), which provided for facilitated naturalisation.[594] However, it must be noted that facilitated naturalisation cannot be regarded as a guaranteed way of preventing statelessness because such naturalisation was regarded as being at the discretion of the Minister for Justice.[595]

A statement of explanation prepared by the MOFA before discussion of the CRC in the Diet explained that the obligation the CRC placed on Japan could be implemented by existing Japanese law, and thus, new domestic legislation was not necessary.[596] This indicates that although the Japanese government was aware of the prevention of statelessness as a central concern for the CRC, it did not interpret the CRC as placing an obligation on states. After the CRC was discussed in the Diet, Japan ratified it in 1994.

Although the norm of preventing statelessness was recognised, Japan did not adopt the *jus soli* principle in cases where children who were born in Japan would be stateless, so the possibility remained that children born in Japan to parents of a foreign nationality would be stateless when their parents' nationalities could not be transmitted.

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[594] MOFA, Jidou no Kenri ni kansuru Jouyaku Gimon Gitou (Sono Ichi) (Zembun kara Dai Nijuichi Jou) [*Anticipated Questions and Answers regarding the Convention on the Rights of the Child I (Preamble to Article 21)*] (July 1994), p. 183. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162. For facilitated naturalisation, see note 574.

[595] See also 3.7., "The ICCPR".

[596] MOFA, Jidou no Kenri ni kansuru Jouyaku no Setsumeisho [*Explanation of the Convention on the Rights of the Child*] (November 1993), p. 9. This document was disclosed as a result of a request to disclose administrative documents. MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

3.10. Conclusion on the Prevention of Statelessness under the 1946 Constitution

This chapter has shown that the norm of preventing statelessness in international law played a limited role under the 1946 Constitution. The features of the Japanese position after WWII are clear when it is compared to that before WWII. First, the Japanese stance on the UN Conference on the Elimination or Reduction of Future Statelessness, which adopted the 1961 Convention, can be compared with that on the Codification Conference, which adopted the 1930 Convention. Japan did not seem to be passionate about promoting the norm of preventing statelessness at the UN Conference on the Elimination or Reduction of Future Statelessness, while it had a strong commitment to preventing statelessness in the Codification Conference. In the Codification Conference, Japan stated its willingness to follow the new treaty to be adopted even if this required amendment of its nationality act.[597] However, in the UN Conference on the Elimination or Reduction of Future Statelessness, Japan hoped to bring the new treaty in line with the 1950 Nationality Act.[598] This indicates that Japan was less committed to preventing statelessness by international law at the UN Conference on the Elimination or Reduction of Future Statelessness than it was at the Codification Conference.

Second, the discussion on the obligations that the CRC placed on states can be compared with the Japanese position on the resolution of the IDI. On the one hand, the drafters of the 1899 Nationality Act referred to the resolution of the IDI because the resolution was regarded as being "highly influential",[599] even though the resolution did not place any legal obligations on Japan. The norm of preventing statelessness was included in the resolution, and the 1899 Nationality Act contained some articles to prevent statelessness.

[597] See 2.5.3., "The Japanese Position in the Codification Conference (1930)".
[598] See 3.6., "The 1961 Convention".
[599] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 207, at 19.

On the other hand, it was argued that the CRC did not place an obligation on states to confer a nationality on children, and the need to prevent statelessness by conferring nationality was not considered when the compatibility between the CRC and Japanese laws was examined.[600] Although Japan followed the norm of preventing statelessness, which was not legally binding at the end of the nineteenth century, it did not adopt additional measures to prevent statelessness after WWII, stating that the treaty did not place an obligation on it to confer nationality even though the prevention of statelessness was a significant theme of discussion in the CRC during the drafting process concerning children's right to acquire a nationality.[601] These two examples indicate that the Japanese commitment to the norm of preventing statelessness weakened after WWII.

[600] See 3.9., "The CRC". An article on children's right to acquire nationality in the ICCPR was also interpreted as not placing an obligation on states. See 3.7., "The ICCPR".
[601] See 1.3.7., "CRC: The Commitment to Preventing Statelessness among Children".

CHAPTER 4: ANALYSIS

4.1. Summary of the Chapter and Answer to the First Research Question

Based on the answer to the first research question as found in Chapters One to Three, this chapter answers the second research question: *What determined whether the norm of preventing statelessness in international law influenced Japanese nationality laws?* It argues that a combination of international and national factors determined the Japanese reaction to the norm of preventing statelessness in international law. When there was a certain level of either international or national necessity to follow the prevention of statelessness in international law, Japan followed the principle of preventing statelessness. Japan has not found it necessary to do so recently, and it is not passionate about preventing statelessness at the moment.

This chapter begins with the answer to the first research question by examining the results of Chapters One to Three. The first research question was: *To what extent has the norm of preventing statelessness in international law influenced Japanese nationality law?* The answers are that under the 1889 Constitution, the norm of preventing statelessness in a resolution of the IDI from 1895 influenced the 1899 Nationality Act, but under the 1946 Constitution, the norm had a limited impact.

After Chapter One indicated that there was international law which intended to prevent statelessness, Chapters Two and Three examined international law's influence on the Japanese laws. Under the 1889 Constitution, the influence of prevention of statelessness in international law is observable. The drafters of the 1889 Constitution learnt from foreign advisors that international law could cover nationality from foreign advisors, so they decided

to legislate a specific law on nationality. In addition, the norm of preventing statelessness in international law influenced the 1899 Nationality Act. In the drafting process of the Act, the IDI resolution which called for preventing statelessness was referred to, and the Act contained some provisions to prevent statelessness.

However, the norm of preventing statelessness in international law did not influence Japanese laws under the 1946 Constitution much. It must be pointed out that the norm of preventing statelessness in international law influenced the interpretation of the freedom to renounce one's nationality under the 1946 Constitution. On the one hand, the Japanese government interpreted that the constitution did not allow Japanese nationals to renounce their nationality when this resulted in statelessness, referring to the preamble of the 1930 Convention. On the other hand, the norm of preventing statelessness in other treaties did not influence Japanese nationality law. Japan participated in the conferences which adopted the 1961 Convention, the ICCPR and CRC which concerned prevention of statelessness, but no treaty triggered the argument of the necessity to prevent statelessness in the Japanese government. An analysis of international law's influence on Japanese laws under the 1946 Constitution indicates that Japan followed the 1930 Convention partly while they do not legally bind Japan. This is a case wherein a state follows international law to which it is not legally bound.[602]

[602] It must also be noted that Japan followed the resolution of the IDI, which Japan regarded very important document in international law, while it was not a legally binding document. See 2.3., "The 1899 Nationality Act". This chapter is not concerned with the prevention of statelessness in the former colonies during the colonial period because the Japanese position on the prevention of statelessness in the former colonies seems to have been driven by a completely different logic from that driving its position on the mainland of Japan. Instead, this chapter focuses on the mainland of Japan. For an analysis of the former colonies, see 2.7., "Conclusion on the Prevention of Statelessness under the 1889 Constitution".

4.2. International Factors

4.2.1. The Status of Japan in International Society

In order to answer the second research question to analyse the answer of the first research question, this chapter claims that international and national factors determined whether Japan followed the norm of preventing statelessness. This section examines two international factors: the status of Japan in international society and the status of the norm of preventing statelessness in international society. These factors can be explained by an understanding of the English School of international relations, which claims that states share "certain common interests and common values" and "conceive themselves to be bound by a common set of rules" even though there is no centralised government.[603] Manning, an early scholar from the English School, believes that states tend to comply with international law because they seek to meet the expectations of a desirable "reference group".[604] An analysis of international factors clarifies whether or not each state seeks to be a member of a desirable reference group, and what the desirable reference group's behaviour is.

First, the status of Japan in international society determines the degree to which it follows international law. On the one hand, at the end of the nineteenth century, Japan felt it necessary to catch up with the West because it was a newcomer to international society. On the other hand, Japan currently feels that it is recognised as one of the developed states. This indicates that Japan's status in international society has changed over time, resulting in a different stance towards international norms, including the prevention of statelessness, in the late nineteenth century and currently.

[603] BULL, *supra* note 6, at 13.
[604] C. A. W. Manning, *The Legal Framework in a World of Change*, *in* THE ABERYSTWYTH PAPERS: INTERNATIONAL POLITICS 1919-69 301, 323 (Brian Porter ed., 1972).

This finding can be explained by research claiming that "novice agents with few cognitive priors will be relatively open to persuasion" to a new norm.[605] Checkel refers to the impact of the principle of inclusive citizenship, such as tolerance of dual citizenship, developed by the Council of Europe, on German and Ukrainian policies. He states that Germany, which has been recognised as a member of Europe for a long time, complied with the norm through social sanctioning and instrumental choice whereas Ukraine, a new member of Europe, did so by social learning and argumentative persuasion.[606] This suggests that traditional members of international society *calculate* the benefits of complying with a norm, and act to maximise the benefits, whereas newcomers to international society, who do not have much prior knowledge, tend to *learn* international norms, including international law, and such norms determine the way to behave. They tend to follow international norms because they tend to believe that it is necessary for members of international society to follow the norms. This theory is based on constructivism, which claims that state interests are formed as a result of social interaction.[607]

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[605] Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55(3) INT'L ORG. 553, 563 (2005).
[606] *Id*, at 554-555, 567, 572-573.
[607] Jutta Brunnée & Stephan J. Toope, *Constructivism and International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF ART 119, 121 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). Note that constructivism is similar to the approach of the English School, another theoretical framework in this dissertation, in that both theories concern intersubjectivity, focusing on the "logics of appropriateness" among states. Christian Reus-Smit, *Constructivism and the English School*, in THEORISING INTERNATIONAL SOCIETY: ENGLISH SCHOOL METHODS 58, 58 (Cornelia Nevari ed., 2009). It must be noted that these are various criticisms to use the norm as a framework of analysis from realism, feminism and postcolonialism perspectives. See the following. Scott N. Romaniuk & Francis Grice, *Norms, Norm Violations, and IR Theory*, E-International Relations, *at* https://www.e-ir.info/2018/11/15/norms-norm-violations-and-ir-theory/ (visited Nov. 30, 2019). Birgit Locher & Elisabeth Prügl, *Feminism and Constructivism: Worlds Apart or Sharing the Middle Ground?*, 45 INT'L STUDIES QUARTERLY 111 (2001). Naeem Inayatullah & David L. Blaney, *Constructivism and the Normative: Dangerous Liaisons?*, *in* AGAINST INTERNATIONAL RELATIONS NORMS: POSTCOLONIAL PERSPECTIVES 23 (Charlotte Epstein ed., 2017). However, as this dissertation points out, Japan followed the norm of preventing statelessness in international law because it felt the necessary to do so as a member of international society. In other words, this dissertation indicates the validity to use the norm as a framework of analysis. Thus, this dissertation examines the role of the norm in international society.

In the late nineteenth century, Japan tended to follow international law as a rule in order to be recognised as a "civilized nation" by the West.[608] Since the middle of the seventeenth century, Japan had adopted an isolationist policy,[609] and did not have many exchanges with other states.[610] This situation changed when the black ships of the US arrived in Japan in 1853 and the US put pressure on Japan to end its isolationist policy.[611] In the following year, Japan concluded the first treaty with the West: the Convention of Kanagawa, or the Japan-US Treaty of Peace and Amity.[612] In 1858, Japan concluded Treaties of Amity and Commerce with five states: the US, the Netherlands, Russia, the UK and France.[613] These treaties can be regarded as the first step in Japan being recognised as a member of international society, but the West did not regard Japan as an *equal* member of international society. Each treaty provided advantages to the West with regard to consular courts.[614] The consul from each state was entitled to hold the court if one of its nationals was involved in any legal issue in Japan.[615] In other words, Japanese laws were not applied to foreigners living and staying in Japan, implying that Japan was not considered a 'civilized nation'.[616] At the time, "civility" was one significant criterion required to be regarded as an equal entity

[608] Matsui, *supra* note 27, at 9.
[609] For a brief history of Japan's isolationist policy, see the following. MAYUMI ITOH, GLOBALIZATION OF JAPAN: JAPANESE *SAKOKU* MENTALITY AND U.S. EFFORTS TO OPEN JAPAN 23-25 (1998).
[610] Exceptions were Japan's contact with China, the Netherlands and Korea. Matsui, *supra* note 27, at 8.
[611] Masamichi Ogawara, Nichi Bei Washin Jouyaku (1853-54 Nen): Peri Raikou to Nihon no Kaikoku [*Japan-US Treaty of Peace and Amity (1853-1854): Arrival of Perry and the Opening of Japan*], *in HANDOBUKKU KINDAI NIHON GAIKOUSHI: KUROFUNE RAIKOUKARA SENRYOUKI MADE* [HANDBOOK OF MODERN JAPANESE DIPLOMATIC HISTORY: FROM THE ARRIVAL OF THE BLACK SHIPS TO THE OCCUPIED ERA] 4, 4 (Toshihiro Minohara and Souchi Naraoka eds., 2016).
[612] *Id*, at 4.
[613] Kaoru Iokibe, Ansei Gokakoku Jouyaku (1858 Nen): Kindai Nihon no Shuppatsu [*1858 Treaties: The Departure of Modern Japan*], *in HANDOBUKKU KINDAI NIHON GAIKOUSHI: KUROFUNE RAIKOUKARA SENRYOUKI MADE* [HANDBOOK OF MODERN JAPANESE DIPLOMATIC HISTORY: FROM THE ARRIVAL OF THE BLACK SHIPS TO THE OCCUPIED ERA] 10, 13 (Toshihiro Minohara and Souchi Naraoka eds., 2016).
[614] Kaoru Iokibe, Jouyaku Kaisei Koushou (1871-1994 Nen): Kindai Nihon Gaikou no Zoukei [*Negotiation on Amendment of the Treaties: Formation of the Modern Japanese Diplomacy*], *in HANDOBUKKU KINDAI NIHON GAIKOUSHI: KUROFUNE RAIKOUKARA SENRYOUKI MADE* [HANDBOOK OF MODERN JAPANESE DIPLOMATIC HISTORY: FROM THE ARRIVAL OF THE BLACK SHIPS TO THE OCCUPIED ERA] 20, 20 (Toshihiro Minohara and Souchi Naraoka eds., 2016).
[615] *Id*, at 20.
[616] Matsui, *supra* note 27, at 9.

in international society.[617] Under such circumstances, amendment of unequal treaties, including the abolition of the consular court, was the most significant issue for the Japanese government.[618]

In order to amend unequal treaties and survive in international society, Japan adopted some approaches. One was to catch up with the Western administrative system in order to be regarded as a civilised state by the West.[619] This was a particularly significant step towards the amendment of unequal treaties with the West. Following international law was one criterion for Japanese civility, so Japan did it.[620] For example, it followed the laws of war. Some Japanese legal counsellors taught the laws of war to the military, and Japan complied with those laws, which provided for the treatment of enemies and neutrals, in the Sino-Japanese War of 1894-95.[621] As a result, Thomas Erskine Holland, the Western scholar, judged that Japan had acted "in a manner worthy of the most civilized nations of Western Europe".[622] A second example is provided by Japan's accession to the Paris and Berne Conventions. The Paris Convention concerned the copyright of industrial property and the Berne Convention concerned the copyright of literary and artistic works.[623] Japan acceded

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[617] ROBERT JACKSON, GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 121-122 (2003).
[618] Matsui, *supra* note 27, at 10.
[619] The other approach was to develop the military to save Japan from external invasion. As a result of the development of the military, Japan won the Sino-Japanese War of 1894-95. More surprisingly, Japan won the Russo-Japanese War of 1904-05. Since Russia was regarded as a "white power", Japanese victory over Russia was a major surprise for international society. Japan began to be regarded as a member of international society after this victory from the perspective of military power. GLENN D. HOOK, JULIE GILSON, CHRISTOPHER W. HUGHES & HUGO DOBSON, JAPAN'S INTERNATIONAL RELATIONS: POLITICS, ECONOMICS AND SECURITY 26 (3rd ed., 2012).
[620] The development of municipal law was also significant in Japan being regarded as a civilised state. Japan adopted two ways of learning about the municipal and international legal systems of the West. First, Japan hired foreign advisers. Gustave Boissonade, Hermann Roesler, and Albert Mosse taught law to Japanese government officials. Second, Japanese delegates visited Europe. On the basis of its studies of Western states, Japan developed laws, including the 1889 Constitution, the first constitution in Japan. Asonuma, *supra* note 195, at 34-35.
[621] Akashi, *supra* note 27, at 738.
[622] THOMAS ERSKINE HOLLAND, STUDIES IN INTERNATIONAL LAW 128 (1898).
[623] The Paris Convention was signed in 1883 and entered into force in 1884. See the following. Library of Congress, *Protection of Industrial Property available at* https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0080.pdf (viewed Jan. 17, 2019). The Berne Convention was signed in 1886 and entered into effect in 1887.

to these conventions in 1899. Accession was necessary because treaties of commerce and navigation with Western states required it.[624] Japan also began recognising rights related to copyright, and it developed a municipal copyright law to make municipal law compatible with international law.[625] Following international law helped in improving Japan's position in international society, and unequal treaties began to be amended. In 1894, the Anglo-Japanese Treaty of Commerce and Navigation was concluded, and this treaty eliminated the clause on consular courts that was advantageous to the UK.[626] The UK was greatly impressed by Japan's development of its laws, and this persuaded the UK to eliminate the clause.[627] While these cases of the laws of war and the Paris and Berne Conventions are different from the prevention of statelessness,[628] they imply that Japan had learnt to follow international law in order to be regarded as a member of international society.

In this context, international law played a role in the late nineteenth century in the issue of nationality in Japan too. The 1889 Constitution did not specify who Japanese subjects or nationals were because the foreign advisers had said that international law could have an influence on nationality issues, and the scope of nationals should be covered by a nationality act separate from the constitution.[629] In the 1899 Nationality Act, the norm of preventing statelessness was included. During the drafting process of the 1899 Nationality Act, the resolution of the IDI, which included the prevention of statelessness adopted in 1895,

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[624] FUMIO SAKKA, *CHUUKAI CHOSAKUKEN HOU* [COPYRIGHT LAW] 53-54 (3rd ed., 2004). Satoshi Tsuruoka, Kindai Nihon no Sangyou Zaisan Ken Seisaku: Pari Jouyaku Kamei wo meguru Nichi Ei Bei no Seiji Katei no Bunseki [*Modern Japanese Policy on Industrial Property Rights: Analysis of the Political Processes of Japan, the United Kingdom, and the United States when Japan Became a Party to the Paris Convention*], 21 IIP BULLETIN (INST. OF INTELLECTUAL PROPERTY) 22-3 (2012).
[625] SAKKA, *supra* note 624, at 54. Tsuruoka, *supra* note 624, at 22-5.
[626] Asonuma, *supra* note 195, at 34-35.
[627] *Id*, at 34-35.
[628] The first example, the laws of war, concerns an area regarded traditionally as a matter of international law, whereas nationality matters used to be regarded as a domestic matter, so they are different in nature. The second example, accession to the Paris and Berne Conventions, was *requested* by other states, whereas such a request seems to have been absent in the cases of nationality and statelessness issues.
[629] See 2.2., "Nationality in the 1889 Constitution".

was mentioned.[630] It is notable that Japan referred to the resolution of the IDI, which was not even legally binding. Since the Japanese government believed that international law should be followed, it referred to a "highly influential" document in international law, the resolution of the IDI.[631] This implies that the norm of preventing statelessness began to be regarded as a principle in international society, and that Japan learnt this principle, even though nationality matters had traditionally been regarded as a matter for each state.

However, this stance seems to have changed since the middle of the 1930s. Japan attempted to leave international society, and consequently the Japanese desire to be a member of international society weakened.[632] As a result, following international law became a less important issue for Japan. In the middle of the 1930s, Japan began to leave the international arena as a result of the rise of the ultra-nationalists, and the Japanese commitment to principles in international society, including international law, weakened.[633] One example is the Japanese reaction to the 1930 Convention. Japan signed the 1930 Convention, and it indicated its commitment to the Convention but did not ratify it. It is said that Japan was isolating itself from international society at the time, which explains why the Japanese government did not ratify the Convention, even though it began the procedure to amend the 1899 Nationality Act to bring it in line with the Convention soon after signing

[630] See 2.3., "The 1899 Nationality Act".
[631] MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 207, at 19.
[632] Note that members of international society share "certain common interests and common values" and feel that they are "bound by a common set of rules in their relations with one another, and share in the working of common institutions". BULL, *supra* note 6, at 13. In other words, Japan opted not to share the common values of international society in the 1930s.
[633] Some scholars argue that the ultra-nationalists became powerful in Japan because the Japanese people felt that Japan was not treated well by international society even after it had been one of the victorious states in WWI. For instance, Japan had proposed to include the prohibition of racial discrimination in the LN Covenant, fearing that non-White people, including Japanese people, would become the victims of racial discrimination, but this proposal was not realised. See note 295. In addition, the Washington Naval Treaty was adopted in 1922, according to which the US and the UK were allowed to possess bigger capital ships than Japan was. Thus, the US and UK were militarily in a more advantageous position than Japan was. HOOK, GILSON, HUGHES & DOBSON, *supra* note 619, at 27-28. It is said that these experiences frustrated Japan.

it.[634] The Japanese withdrawal from the LN in 1933 after the Mukden Incident also indicates the Japanese stance of isolating itself from international society at the time.[635]

This limited commitment to international law, compared to at the end of the nineteenth century, remained even after the end of WWII although for different reasons from the 1930s. As a result of the defeat in WWII, Japan needed to recover from devastation, and it decided to build a political alliance with the US and to pursue a rapid economic recovery based on the Yoshida Doctrine.[636] Following international law was not necessarily the tactic which Japan took to be back to international society.[637] The first element of analysis is a political one. It must be noted that it was not only Japan but also the US that intended to make Japan a part of the West.[638] In 1951, the Security Treaty between the US and Japan was signed, and it was determined that the US military would be stationed in Japan.[639] This

[634] See 2.5.3., "The Japanese Position in the Codification Conference (1930)".
[635] Officially, Japan withdrew from the LN two years after the notification of withdrawal pursuant to Article 1 of the LN Covenant. See the following. Tomoaki Murakami, Ritton Houkoku Sho, Kokusai Renmei Dattai (1931-33 Nen): "Kyouchou" kara "Koritsu" heno Tenkanten [*Lytton Report and Withdrawal from the League of Nations (1931-1933): Turning Point from "Cooperation" to "Isolation"*], *in* HANDOBUKKU KINDAI NIHON GAIKOUSHI: KUROFUNE RAIKOUKARA SENRYOUKI MADE [HANDBOOK OF MODERN JAPANESE DIPLOMATIC HISTORY: FROM THE ARRIVAL OF THE BLACK SHIPS TO THE OCCUPIED ERA] 216, 217 (Toshihiro Minohara and Souchi Naraoka eds., 2016). For the relationship between Japan and the LN, see the following. THOMAS W. BURKMAN, JAPAN AND THE LEAGUE OF NATIONS: EMPIRE AND WORLD ORDER, 1914-1938 (2008).
[636] The Yoshida Doctrine was proposed by Prime Minister Shigeru Yoshida after WWII. It claims that security issues should be entrusted to the US so that Japan can focus on its economic recovery. Japan built an alliance with the US during the Cold War era pursuant to this doctrine. Since this doctrine allowed the Japanese government not to spend much money on its military, it is considered to be one reason for the economic development of Japan after the end of WWII. HOOK, GILSON, HUGHES & DOBSON, *supra* note 619, at 29.
[637] This does not mean that Japan did not comply with legally binding international law. Rather, this means that the relationship with the US was the focus for Japan to recover from WWII. As seen in the example of the CEDAW, Japan amended its municipal law to comply with legally binding international law. See 3.8., "The CEDAW and the 1984 Nationality Act". As mentioned in "Scope and Terminology of the Dissertation" in the "Introduction", "following" international law in this dissertation means making municipal law compatible with international treaties regardless of their legally binding nature for the state.
[638] HOOK, GILSON, HUGHES & DOBSON, *supra* note 619, at 89.
[639] AKITOSHI MIYASHITA, *HANDOBUKKU SENGO NIHON GAIKOU SHI: TAINICHI KOUWA KARA MITSUYAKU MONDAI MADE* [HANDBOOK OF POST-WAR JAPANESE DIPLOMATIC HISTORY: FROM THE PEACE TREATY WITH JAPAN TO THE SECRET PROMISE] 17 (2017). From the commitment to the Security Treaty between the US and Japan, one can argue that Japan had a commitment to international law. However, Japan did not unconditionally follow the norms of international law, in contrast to its approach at the end of the nineteenth century.

indicates that Japan had become a strategic partner of the US in the context of the Cold War, and this elevated Japan's status in international society.[640] Japanese international relations with the Eastern bloc also contributed to the elevation of Japan's status in international society. In 1956, the Soviet-Japanese Joint Declaration was signed, and the USSR and Japan restored diplomatic relations. After this, Japan became a member of the UN.[641] This historical background shows how Japan began to be recognised as a member of international society around the 1960s.[642]

The second element is an economic one. Soon after the end of WWII, the Korean War took place, and the UN, headed by the US, needed arms. In these circumstances, the UN established a "direct procurement" programme, and Japan supplied arms to the UN.[643] This helped Japan's economic recovery after WWII.[644] Japan has expanded economically since then, and in 1956, the gross national product per capita was higher than the standard in the pre-war period.[645] Japan became a member of the OECD in 1964, indicating that Japan was beginning to be regarded as a developed state.[646] Since Japan needed to recover from the devastation of WWII, it focused on political and economic matters, and following international law does not seem to have been a priority for Japan at the time. In this context, Japan came to be able to calculate the costs and benefits of following international law from

[640] *Id*, at 17.
[641] *Id*, at 51.
[642] Some scholars claim that Japan did not have a high political status until the 1960s, and that one reason why Japan became a member of human rights treaties was to signal Japan's legitimacy. John M. Peek, *Japan, the United Nations, and Human Rights*, 32(3) ASIAN SURVEY 217, 217 (1992).
[643] Saburo Okita, *Japan's Economy and the Korean War,* 20(14) FAR E. SURVEY 141, 141-142 (1951).
[644] HOOK, GILSON, HUGHES & DOBSON, *supra* note 619, at 29.
[645] The Economic Planning Agency of Japan at the time famously stated that "it is not 'post-war' anymore" (translated by the author). Economic Planning Agency, *Shouwa 31 Nen Nenji Keizai Houkoku: Ketsugo* [Conclusion: Annual Economic Report 1956] (1956), *available at* http://www5.cao.go.jp/keizai3/keizaiwp/wp-je56/wp-je56-010501.html. This indicates that the Japanese economy had recovered and had even progressed beyond the standard of the pre-war period.
[646] HOOK, GILSON, HUGHES & DOBSON, *supra* note 619, at 3. It must be noted that the US in particular had a political incentive to invite Japan, an ally, to be a member of the OECD. MIYASHITA, *supra* note 639.

the 1960s, and it began to follow international law when it found it in its interests to do so, as we shall see in the following subsection.[647]

When the circumstances up to the 1930s and after the 1960s are compared, Japan's status in international society determined its stance towards international law. Japan did its best to follow international law when it was a newcomer to international society, but it did not do so unless there were substantial benefits to be derived from doing so. The Japanese stance of not focusing on following international law from the 1930s to the 1960s derived from its unique political environment, such as its desire to leave international society and its recovery after the end of WWII. Thus, it is fair to say that Japan's status in international society mainly determined its behaviour regarding international law, including the norm of preventing statelessness.

4.2.2. Status of the Norm of Preventing Statelessness in International Society

The status of the norm of preventing statelessness in international society is another international factor. If the norm is widely shared in international society, states are more likely to find it necessary to follow the norm. Finnemore and Sikkink's theory about the life of norms in international society offers a useful basis for analysis. They argue that in a phase of "norm emergence", norm entrepreneurs attempt to persuade states to comply with a norm.[648] As a result, states that are persuaded to follow it tend to do so. When a "critical mass of states" adopts a new norm and the norm reaches a tipping point, a "norm cascade" takes place, and the norm is regarded as an international norm.[649] Thus, when a certain number of states follow the norm, the norm tends to be observed by more and more states.

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[647] When it appeared to be in Japan's interest to follow a treaty, Japan became a contracting party to it. See 4.2.2., "Status of the Norm of Preventing Statelessness in International Society".
[648] Finnemore & Sikkink, *supra* note 43, at 895.
[649] *Id*, at 895. For an explanation of this theory, see the following. *Id*, at 895-902.

The following examples of human rights treaties indicate that Japan follows human rights norms or at least has become a contracting party to human rights treaties if many other developed states are contracting parties to them. When Japan ratified the ICCPR, the MOFA stated that the "main developed countries" had ratified it.[650] The document of the MOFA added that ratification of the ICCPR would mean that Japan guaranteed human rights and fundamental freedoms, and that this could improve Japan's reputation in international society.[651] In the case of the CRC, the MOFA noted that 153 states, including the UK, France and Italy, were contracting parties, and the need to respect and protect children's rights was recognised in "international society".[652] These cases indicate that following the norm or being a contracting party to human rights treaties is justified if such an action is necessary to secure a better position in international society.[653] In other words, the status of a norm in international society affects states' decision about whether to follow it.

States' limited commitment to preventing statelessness is observable when it is compared with the commitment to refugee issues, which were treated similarly until soon after the end of WWII. After the end of WWII, the norm of preventing statelessness received attention in relation to the stabilisation of the status of refugees and stateless persons in

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[650] Translated by the author. MOFA, Kokusai Jinken Kiyaku no Shuyou Mondaiten nitsuite [*Regarding the Main Issues of the International Covenants of Human Rights*], p. 3-4, *in Kokusai Jinken Kiyaku* [International Covenants of Human Rights]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3199 (1978).

[651] MOFA, Kokusai Jinken Kiyaku no Shuyou Mondaiten nitsuite [*Regarding the Main Issues of the International Covenants of Human Rights*], p. 4, *in Kokusai Jinken Kiyaku* [International Covenants of Human Rights]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. 2010-3199 (1978).

[652] Translated by the author. MOFA, Jidou no Kenri ni kansuru Jouyaku no Setsumeisho [*Explanation of the Convention on the Rights of the Child*] (November 1993), p. 2. This document was disclosed as a result of a request to disclose administrative documents (MOFA, *Gyousei Bunsho no Kaiji Seikyuu ni kakawaru Kettei ni tsuite (Tsuuchi)* [Notification: A Decision of Disclosure of Administrative Documents] (2016) Jouhou Koukai Dai 01619 Gou. *Heisei 28 Nen 8 Gatsu 29 Nichi* (29 August 2016) Request number: 2016-00162.

[653] See also 4.2.1., "The Status of Japan in International Society". The role of non-governmental organisations when Japan becomes a contracting party to human rights treaties also needs to be recognised. It is said that non-governmental organisations criticised the Japanese government in the CHR in the late 1970s, and this led the Japanese government to recognise the need to show its commitment to human rights. See the following. IWASAWA, *supra* note 8, at 6.

international society.[654] However, it was forgotten in international politics, and refugee issues were prioritised given the nature of the Cold War. Although the 1954 Convention was intended for adoption with the Refugee Convention as a protocol, the Protocol on stateless persons was not adopted with the Refugee Convention; instead, the Convention relating to the Status of Stateless Persons was adopted in 1954, three years after the adoption of the Refugee Convention.[655] The Convention on the Reduction of Statelessness was adopted even later than the 1954 Convention. Although the ILC has adopted the Draft Conventions on Elimination and Reduction in 1953, it took another six years to hold a meeting to discuss the draft.[656] In addition to the length of time to adopt each convention, the number of contracting parties to these conventions also indicates a different political commitment to the stabilisation of the status of refugees and stateless persons and the prevention of statelessness. At the end of 1989, when the Cold War was over, for instance, the number of contracting parties to the Refugee Convention was 100, while the 1954 Convention had 35 contracting parties, and the 1961 Convention had only 15 contracting parties.[657] The year that each convention was adopted and the numbers of contracting parties indicate that the

[654] See 1.3.4., "The 1961 Convention: Link with Refugee Issues". Since then, the prevention of statelessness has been regarded as a "humanitarian" matter related to refugees and migration. Author's interview with Ms. Michelle Prodromou, Program Specialist, Humanitarian Affairs, US Permanent Mission to the UN, Geneva, 1 December 2016. See the following. Hajime Akiyama, UNHCR niyoru Mukokuseki no Yobou to Sakugen nimuketa Torikumi: Sono Kouka to Kadai [*UNHCR's Role in Preventing and Reducing Statelessness: Its Effects and Challenges*], 19 THE UNITED NATIONS STUDIES 191, 200 (2018). It must also be noted that, traditionally, the norm of preventing statelessness received attention from the perspectives of maintenance of international order and the hardships faced by stateless married women at the beginning of the twentieth century. See 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children". Thus, the background to considering statelessness has shifted over time.

[655] ARAKAKI, *supra* note 8, at 21. See 1.3.4., "The 1961 Convention: Link with Refugee Issues".

[656] For the historical relationship between the status of refugees, status of stateless persons, and the prevention of statelessness, see 1.3.4., "The 1961 Convention: Link with Refugee Issues".

[657] For contracting parties to the Refugee Convention, see the following. UN Treaty Collection, *Convention relating to the Status of Refugees*, *at* https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (visited Jan.17, 2019). For contracting parties to the 1954 Convention, see the following. UN Treaty Collection, *Convention relating to the Status of Stateless Persons*, *at* https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (visited Jan. 17, 2019). For the contracting parties to the 1961 Convention, see the following. UN Treaty Collection, *supra* note 145.

norm of preventing statelessness did not attract states' attention relative to the stabilisation of the status of refugees.[658]

One reason for states' limited commitment is the limited political significance of preventing statelessness. The protection of refugees was attractive for the West for political reasons during the Cold War, while the prevention of statelessness was not necessarily so. On the one hand, US foreign policy during the Cold War was intended to challenge the legitimacy of communist states by accepting refugees.[659] Persecution based on political grounds was regarded as one of the causes of refugeehood,[660] so the West showed its legitimacy by accepting refugees who were persecuted by communist governments. On the other hand, statelessness was not politically significant for the West because it did not help the West to demonstrate its legitimacy all that much.[661] Thus, international society did not pay significant attention to statelessness for a long time.[662]

In this international political situation, Japan also prioritised the stabilisation of the status of refugees over that of stateless persons and the prevention of statelessness. In the 1970s, it accepted Indochinese refugees, and there are several reasons why. Firstly, there was pressure from other states, such as the US, for Japan to accept refugees.[663] After Japan

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[658] Given the years of adoption and the number of contracting parties to each treaty, it could be argued that the status of refugees was most important of the three issues to states, the stabilisation of the status of stateless persons came next in the order of priority, and the prevention of statelessness was regarded as the least important of the three issues.

[659] Cited in Julie Metus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20(1) MICHIGAN J. OF INT'L L. 59, 65 (1998). Arakaki, *supra* note 114, at 71.

[660] A refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or *political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" pursuant to Article 1A(2) of the Refugee Convention (emphasis added).

[661] See the following. Paul Weis, *The Convention relating to the Status of Stateless Persons*, 10 INT'L & COMPARATIVE L. QUARTERLY 255, 263 (1961).

[662] Arakaki, *supra* note 114, at 70.

[663] HIROSHI HONMA, *NANMIN MONDAI TOHA NANIKA* [WHAT ARE REFUGEE ISSUES?] 31 (1990). PETRICE R. FLOWERS, REFUGEES, WOMEN, AND WEAPONS: INTERNATIONAL NORM ADOPTION AND COMPLIANCE IN JAPAN 43 (2009). It must be emphasised that the arrival of the boat people in the late 1970s received attention in Japan, and refugees became a social issue. See HONMA, *supra* note 663, at

began accepting the Indochinese refugees, it ratified the Refugee Convention in 1981.[664] This suggests that pressure from other states was one reason why Japan ratified the Refugee Convention.[665] Secondly, Japan's identity as a "developed" state encouraged it to follow the principle of accepting refugees.[666] This implies that the Japanese government regarded acceptance of refugees and the Refugee Convention as principles that developed states needed to follow. Since the Western states found it in their interest to accept refugees, the principle of accepting refugees was regarded as a norm that developed states should follow. This indicates that the stabilisation of the status of refugees received a certain amount of attention in international society. In comparison, the norm of preventing statelessness seems to have been less influential in international society and there seems to have been less pressure for the Japanese government to be a contracting party to the 1961 Convention. As a result, Japan has not followed the norm of preventing statelessness recently.[667]

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3. Japanese commitment to the status of refugees can be explained by the impact of refugees in Japan as well. See also 4.3.1., "The Impact of Stateless Persons in Japan".

[664] For the evaluation of Japanese ratification of the Refugee Convention, see the following. OSAMU ARAKAKI, REFUGEE LAW AND PRACTICE IN JAPAN 16-18 (2008).

[665] Flowers also introduces the argument that non-governmental organisations played a significant role in the Japanese government's decision to become a contracting party to the Refugee Convention although she is critical to this argument. Petrice Flowers, *International Human Rights Norms in Japan*, 38(1) HUMAN RIGHTS QUARTERLY 85, 97-98 (2016).

[666] *Id*, at 98.

[667] The status of the norm of preventing statelessness in international society before WWII is not clear. For instance, there were not many topics that international law covered around 1930 but prevention of conflicts of nationality, including statelessness, was included in the 1930 Convention, which was the only convention that was adopted at the Codification Conference. See 1.3.1., "Awareness of the Issue of Statelessness as a Challenge to the International Order". This implies the possibility that the norm of preventing statelessness was a significant principle in international society around 1930 although this is not clear. Rather, it is more probable that Japan wanted to improve its status in international society, and it followed any international principles at the time. The norm of preventing statelessness seems to have been one of them. See also 4.2.1., "The Status of Japan in International Society".

4.3. National Factors

4.3.1. The Impact of Stateless Persons in Japan

Although international factors mainly determine whether Japan follows prevention of statelessness in international law, national factors are also relevant to the Japanese decision to follow international law. There are two circumstances that international factors do not explain the states' action. First, the 1961 Convention was adopted and initiated by European states in 1961. However, there was no necessity to prevent statelessness from the international factors argued above in Europe. European states were dominant in international society, so they did not necessarily pay attention to their status in international society unlike Japan.[668] Furthermore, the norm of preventing statelessness did not receive much attention from states compared to the norm on refugees because of the limited political interest.[669] Thus, international factors do not explain the European states' commitment to prevent statelessness. The second circumstance is observable in Japan. Since the 1899 Nationality Act, the first nationality act, the Japanese law has not allowed the deprivation of Japanese nationality although international law was not mentioned in this context.[670] Since the prohibition of deprivation of nationality contributes to the prevention of statelessness, this case indicates that a national norm which contributes to prevent statelessness is observable in Japan. These two circumstances indicate that there is a need to examine national factors as well as international ones. This section argues that the impact of stateless persons in Japan and Japanese national identity are national factors. This subsection deals with the impact of stateless persons in Japan.

Stateless persons were not of much concern in Japan. Even if international factors were not in effect, Japan might have followed the norm of preventing statelessness if the

[668] See 4.2.1., "The Status of Japan in International Society".
[669] See 4.2.2., "Status of the Norm of Preventing Statelessness in International Society".
[670] See 2.3., "The 1899 Nationality Act".

impact of stateless persons in Japan had been strong. Such an impact does not equate to the actual number of stateless persons in Japan because even a small number of stateless persons could have raised awareness of statelessness.[671] However, as will be discussed, the Japanese government did not seem to recognise the impact of stateless persons, so the national situation did not help Japan to follow the norm of preventing statelessness. This is comparable with the conditions in Europe soon after the end of WWII.

The driving force to adopting the 1961 Convention, the holistic convention to prevent statelessness, was the fact that the European states recognised stateless persons after the end of WWII.[672] It was reported that 2.7 million stateless refugees were identified after the end of WWII,[673] and solutions for refugees and statelessness were explored in this context.[674] In other words, statelessness was regarded as an issue, coupled with the issue of refugees, because there were many stateless refugees in Europe in the 1950s.[675] In response to the massive number of stateless refugees, the 1961 Convention was adopted.[676] This context indicates that the commitment to preventing statelessness in international law was triggered by the real issue of stateless persons.[677]

By contrast, the Japanese government did not recognise any major statelessness problems in Japan. For instance, the MOFA stated that Japan was not really relevant to issues

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[671] For instance, the 1916 Amendment of the 1899 Nationality Act was triggered by a small number of stateless women. With regard to the number of stateless persons the Japanese government has identified, as of June 2017, the MOJ recognises 588 stateless persons in Japan. Statistics Bureau, Ministry of Internal Affairs and Communications, *Zairyuu Gaikokujin Toukei (Kyuu Touroku Gaikokujin Toukei)* [Statistics on Foreign National Residents (former Statistics on Registered Foreign Nationals)] (June 2017), https://www.e-stat.go.jp/stat-search/files?page=1&layout=datalist&lid=000001196143. It is said that these statistics do not reflect the reality. See the following. STUDY GROUP ON STATELESSNESS IN JAPAN, *supra* note 20, at 30-32.
[672] See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[673] UN, *supra* note 110, at 7-8.
[674] See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[675] See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[676] See 1.3.4., "The 1961 Convention: Link with Refugee Issues".
[677] For instance, as a result of the dissolution of the former USSR, Czechoslovakia and Yugoslavia, statelessness was a matter of concern, and international organisations worked on stateless persons at the time. ARAKAKI, *supra* note 8, at 26. This also indicates that the existence of stateless person issues encourages states and international organisations to work on issues of statelessness.

of stateless persons in 1957.[678] Although Japan faced refugee issues when Indochinese refugees fled to Japan in the late 1970s and 1980s,[679] statelessness did not receive much attention at the time. One early exception was the 1916 Amendment. In the early twentieth century, the Japanese government recognised stateless women who became stateless as a result of marriage to Canadian men. While the number of these women may have been small, the issue received attention in the Imperial Diet, and Japanese women who were married to foreign men ceased to lose their Japanese nationality unless they acquired the nationality of their husband.[680] This was a case where the reality of statelessness encouraged the Japanese government to consider preventing statelessness. However, similar cases are not observable on other occasions in Japan.

There was another issue that could have helped the Japanese government to regard statelessness as a problem in Japan: the status of persons from the former colonies. For instance, Koreans lost their Japanese nationality after the end of WWII.[681] However, the Japanese government did not perceive their situation as an issue because it assumed that the Korean people acquired the nationality of the ROK.[682] This view was supported by Korean ethnic groups in Japan. The Korean Residents Union in Japan, a major Korean ethnic society that followed the policies of the ROK, supported the loss of Japanese nationality because it believed that the Korean people did not want to possess Japanese nationality after the end of Japanese colonial rule.[683] It must be noted that people from the colonies residing in Japan

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[678] MOFA, (Gidai Gojuuyon) Mukokusekisha no Jokyo to Genshou ni kansuru Jouyaku An [*(Agenda 54) Draft Conventions on the Elimination and Reduction of Stateless Persons*], *in Kokusei Rengou Soukai Kankei Ikken Dai Juuikkai Soukai Kankei Dai Ikkan* [The 11th Session of the General Assembly of the United Nations]. Holding of the Diplomatic Archives of the Ministry of Foreign Affairs of Japan. B'-2-1-0-1-11 (1957).
[679] HONMA, *supra* note 663, at 31.
[680] See 2.4., "The 1916 Amendment of the 1899 Nationality Act".
[681] See 3.4.2., "The 1952 Circular of the MOJ".
[682] See 3.4.2., "The 1952 Circular of the MOJ". Note that Japan does not have diplomatic relations with the DPRK.
[683] The General Association of Korean Residents, which has strong connections with the DPRK, also supported loss of Japanese nationality. Onuma, *supra* note 516, at 270.

were able to stay in Japan even if they did not possess the normal resident status generally needed for foreigners to stay legally in Japan at the time. When the Treaty of San Francisco came into effect,[684] Law No. 126 of 1952 was enacted, which provided that people who lost their Japanese nationality and who had been living in Japan before 2 September 1945 could stay in Japan without residential status.[685] As a result, Korean residents residing in Japan were not subject to deportation to Korea.[686] Thus, Korean people whose daily lives were based in Japan were not deported. As a result, neither the governments of Japan and the ROK nor major Korean ethnic societies regarded the nationality of Korean residents in Japan as an issue.

However, it must be pointed out that there were people from the colonies who felt that their status in Japan was an issue. Since Korean residents in Japan became foreigners, they could not receive the social services available to Japanese nationals, and this was a problem for some of those who were based in Japan.[687] One scholar argues that the status of Korean residents in Japan was that of stateless persons.[688] This indicates that the status of some Koreans was similar to that of stateless persons even though no major power regarded the status and nationality of Koreans in Japan as an issue.

The year 1972 saw another occasion when statelessness could have been perceived as an issue. Japan used to recognise the ROC as the legitimate government of China, but this policy changed, and in 1972, Japan began recognising the PRC as the Chinese government.[689] Some Chinese people living in Japan, in particular those who supported the Kuomintang in Taiwan, faced a problem. If they continued to possess the nationality of the

[684] For the Treaty of San Francisco, see 3.4.1., "The 1951 Treaty of San Francisco".
[685] Onuma, *supra* note 487, at 248-249.
[686] Currently, people from the former colonies who lost their Japanese nationality in 1952 and their descendants possess the residential status of "Special Permanent Resident".
[687] Onuma, *supra* note 516, at 272.
[688] See the following. Onuma, *supra* note 516, at 274. See also 3.4.2., "The 1952 Circular of the MOJ".
[689] TIEN-SHI CHEN, *MUKOKUSEKI* [STATELESSNESS] 20 (2005).

ROC, they would be nationals of a state with which Japan did not have diplomatic ties.[690] They could also have acquired the nationality of the PRC or Japan by naturalisation, but some of them did not want to take either option because they did not have any commitment to either state.[691] It was possible for them to remain a national of the ROC and for the nationality of "China" to be displayed in their Alien Registration Card in Japan because the Japanese government decided to display the nationality of both the ROC and PRC as "China".[692] However, there was rumour among some Chinese people in Japan that it was not clear how those ROC nationals whose Alien Registration Card in Japan mentioned "China" as a nationality would be treated by the PRC, which had diplomatic ties with Japan.[693] Under these circumstances, there were people who decided to renounce their ROC nationality, including the family of Tien-shi Chen (Lara), a well-known former stateless person and a scholar on statelessness in Japan.[694] As a result, these people became stateless. The Japanese government estimated that approximately 10,000 people became stateless as a result of renouncing their ROC nationality.[695] However, the available documents do not indicate that the Japanese government regarded this mass renunciation of ROC nationality in Japan as an issue relevant to statelessness at the time. Although the reasons behind this are not clear, one possible reason is that former nationals of the ROC could naturalise as Japanese easily if they so wished. When renunciation of ROC nationality and statelessness were discussed in the Diet, it was said that the process of naturalisation as Japanese would not take much time for former nationals of the ROC because the Japanese government was concerned about their

[690] *Id*, at 21.
[691] *Id*, at 21. Note that supporters of the Kuomintang do not have a commitment to Japan because they fought against Japan during WWII. They also fought against the Chinese Communist Party, the ruling party of the PRC, so they did not have any commitment to the PRC either.
[692] CHEN, *supra* note 689, at 21.
[693] *Id*, at 22.
[694] For her life-story, see the following. *Id*.
[695] *DAI 72 KAI KOKKAI SHUUGIIN HOUMU IINKAIGIROKU*[MINUTES OF THE COMMITTEE FOR LEGAL AFFAIRS, HOUSE OF REPRESENTATIVES, THE 72ND SESSION OF THE DIET] (No. 26, 24 April 1974) p. 7.

situation.[696] In other words, those who wanted to acquire Japanese nationality seem to have been able to do so without much difficulty. A measure to prevent statelessness among former nationals of the ROC was thus provided by the Japanese government, so statelessness among nationals of the ROC was not regarded as a major issue in Japanese society.

In one exceptional case, statelessness received public attention in the 1960s. There were a number of stateless children born to US fathers and Japanese mothers in Okinawa in the 1980s.[697] However, the norm of preventing statelessness did not directly influence the legislation. Rather, the Japanese women's right on the nationality of their children was at issue.[698] This indicates that although statelessness in Okinawa was recognised by the Japanese government and Japanese society, the issue of statelessness was solved by recognising the Japanese women's right on the nationality of their children in the 1984 Nationality Act, not by recognising the norm of preventing statelessness.[699] The above cases explain that stateless persons did not receive much attention socially in Japan, and even when they did, other principles than the norm of preventing statelessness influenced Japanese law.

4.3.2. Japanese National Identity

Japanese national identity also explains the Japanese attitude to the norm of preventing statelessness.[700] After the end of WWII, Japanese national identity, which had become particularly strong after the late nineteenth century, prevented the state from

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[696] CHEN, *supra* note 689, at 21.
[697] See 3.8., "The CEDAW and the 1984 Nationality Act". Note that Kobayashi argues that the issue of stateless persons in Okinawa was one trigger for the adoption of the 1984 Nationality Act. Kobayashi, *supra* note 582, at 444-445.
[698] See 3.8., "The CEDAW and the 1984 Nationality Act".
[699] Recognising Japanese women's right to transmit their nationality is theoretically different from the norm of preventing statelessness because statelessness can be prevented by the acquisition of nationality and prevention of the loss of nationality. The 1984 Nationality Act focused on the transmission of nationality, not the acquisition of nationality, which is conceptually different from the prevention of statelessness.
[700] National identity here means a collective identity as a political unit. This emotional attachment to the nation is called nationalism. See 1.2., "The Emergence of Nationality and the Nation-State Principle" for a conceptual history of nationality, national identity, and nationalism.

following the norm of preventing statelessness in international law. It particularly became an obstacle to preventing statelessness among persons who were born to foreign parents. As a result of the development of Japan's status in international society, Japanese national identity prevailed over the need to follow the norm of preventing statelessness in international law.[701]

A strong Japanese national identity began to be formed in the late nineteenth century as a result of the nation-building process mobilised by the Japanese elites. State Shintoism, which developed in the late nineteenth century, assisted in the formation of the modern Japanese national identity. Traditional Shintoism, which became the basis of State Shintoism, emerged in Japan in the first century and involved the worship of many gods in nature.[702] Since the eighth century, the Emperor had been positioned as one of the gods, and shrines worshipped the Emperor *as well as* other gods.[703] However, it must be noted that many Japanese people were not aware of the authority of the Emperor at the time.[704] By contrast, State Shintoism regarded the Emperor as the only object of worship.[705] In 1871, three years after the establishment of the modern Japanese government, the government ordered shrines to sermonise the new instruction that the Emperor needed to be respected.[706] Article 3 of the 1889 Constitution states that "The Emperor is sacred."[707] This shows that from the late

[701] For the relationship between Japan's status in international society and the need to follow international law, see 4.2.1., "The Status of Japan in International Society".
[702] SHIGEYOSHI MURAKAMI, *KOKKA SHINTOU* [STATE SHINTOISM] 17, 26 (1979). This background indicates that "the Meiji [i.e. late-nineteenth-century] elites rediscovered, reinterpreted and regenerated Japan's identity under the *Tennō* (Emperor) system" (emphasis in original). GIORGIO SHANI, RELIGION, IDENTITY AND HUMAN SECURITY 158 (2014). This means that State Shintoism was neither totally invented by the elites of the late nineteenth century nor exactly the same type of the Shintoism as that before the late nineteenth century.
[703] MURAKAMI, *supra* note 702, at 29.
[704] AKIRA FUJIWARA, YUTAKA YOSHIDA, SATORU ITO & TOSHIRO KUNUGI, *TENNO NO SHOUWA SHI* [THE SHOWA HISTORY OF THE EMPEROR] 13 (special ed., 2007).
[705] MURAKAMI, *supra* note 702, at 107.
[706] *Id*, at 107.
[707] This translation derives from the following. ITO, *supra* note 176, at 6.

nineteenth century, when Japan abolished its policy of isolationism, the Emperor was regarded as the only God in Japan.

The unique emphasis on blood in the relationship between the Emperor and Japanese nationals is observable from the explanation provided by the Japanese government, and it was substantiated in the 1899 Nationality Act.[708] The Japanese government stated that while the relationship between the Emperor and Japanese subjects was that of master and subjects, the attachment was deeper than the relationship between master and subjects; it was a relationship between father and children.[709] It was explained that this relationship between the Emperor and his subjects in Japan was unique; in the West, by contrast, individuals were emphasised.[710] Japan was then defined as "a great family state".[711] This understanding of the relationship between the Emperor and Japanese subjects was taught in schools.[712] Students learnt that, historically, Japan had been ruled over by the Emperors and that the Emperor and Japanese subjects were a family. This emotional parent-child relationship and family system seems to have influenced the "assumed nationality law", which justified the *jus sanguinis* through the paternal line, as well as the idea of the household that was dominant in the Japanese nationality.[713]

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[708] See 2.3., "The 1899 Nationality Act".
[709] MINISTRY OF EDUCATION, SCIENCE AND CULTURE, *KOKUTAI NO HONGI* [THE ORIGINAL MEANING OF THE NATIONAL POLITY] 36 (1937). It was said that the Emperor loved his Japanese subjects as if they were "babies". MINISTRY OF EDUCATION, SCIENCE AND CULTURE, *supra* note 709, at 47.
[710] *Id*, at 37.
[711] Translated by the author. *Id*, at 38. There is a view that this concept of the Emperor and his Japanese subjects as family developed between 1921 and 1939. SUSUMU SHIMAZONO, *KOKKA SHINTOU TO NIHON JIN* [STATE SHINTOISM AND THE JAPANESE] 68 (2010). However, as can be seen in the adoption of *jus sanguinis* through the paternal line, the emphasis on the family seems to have been observable since the beginning of the late nineteenth century although the concept could have been emphasised between 1921 and 1939.
[712] In Year 1, students learnt how much the Emperor loved his Japanese subjects. In Year 4, students learnt the line of unbroken Emperors who had ruled over Japan down the centuries, and they were taught to love Japan. *Id*, at 157. This reminds the author of the role of school education in nation-building, as pointed out by Gellner. GELLNER, *supra* note 55, at 65. See also SHANI, *supra* note 702, at 159.
[713] See 2.3., "The 1899 Nationality Act".

After the end of WWII, the GHQ, which ruled Japan after its defeat, abolished State Shintoism,[714] but the Japanese national identity that developed after the late nineteenth century seems to have remained. In December 1945, the GHQ published a command to abolish State Shintoism.[715] By abolishing State Shintoism, the GHQ meant to cut the link between the institutional system of Japan and Shintoism.[716] From 1900, shrines had been administered by the Shrine Bureau of the Home Ministry, not by the Bureau of Religion, which administered other religions.[717] This indicates that at that time, Shintoism had a special status in Japan, and this was not one among several religions, but *the* religion of Japan.[718] The GHQ believed that this institutional link between the state and Shintoism was problematic because such a link allowed Shintoism to be an "ideology" that was "militaristic and ultranationalistic".[719] Thus, it assumed that when the institutional link between the state and Shintoism was cut, the State Shintoism would be abolished.[720] It must be emphasised that the GHQ did not abolish the ritual activities of the imperial family,[721] and the system of the imperial family, including the Emperor, remained.[722] As a result, the Japanese national identity based on Shintoism remained even after WWII.[723]

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[714] For the role of GHQ after the end of WWII in Japan, see also 3.2., "The 1946 Constitution".
[715] SHIMAZONO, *supra* note 711, at 184.
[716] *Id*, at 79.
[717] *Id*, at 80.
[718] *Id*, at 80.
[719] Translated by the author. *Id*, at 77.
[720] *Id*, at 77.
[721] *Id*, at 79.
[722] There are two reasons why the GHQ did not abolish the Emperor system. The first is that the GHQ felt the need to secure freedom of religion by maintaining the Emperor system. Although State Shintoism, which connected the state and Shintoism, was abolished, the GHQ did not abolish Shintoism as a whole, because it intended to preserve religious freedom. Freedom of religion was provided for in Article 20 of the 1946 Constitution, which the GHQ had drafted. Although the GHQ regarded State Shintoism as an issue, it did not find a direct link between Shintoism in general and State Shintoism. *Id*, at 186. The other possible reason is political. General MacArthur, the SCAP, thought that the Emperor system should be maintained to make governance of Japan easier for the GHQ. *Id*, at 187-188.
[723] The above stories concern national identity as facilitated by the Japanese government. However, there is a case indicating that Japanese national identity is strong for (former) Japanese nationals although the relationship with the Emperor is not necessarily clear. Some Japanese acquired other nationalities for business purposes, and their Japanese nationality was denied pursuant to Article 11(1) of the 1984 Nationality Act, which provided that the voluntary acquisition of another nationality would result in the loss of Japanese nationality. However, those involved did not make the decision to

This background became obstacles to the Japanese government following the norm of preventing statelessness in cases where children were born to foreign parents. It must be emphasised that the norm of preventing statelessness played a role in the 1899 Nationality Act.[724] A possible reason for this is that following international law was regarded as a more significant matter for Japan than reflecting its collective national identity in the nationality law at the time since Japan sought to be a member of international society.[725] As a result, the 1899 Nationality Act included the norm of preventing statelessness derived from international law even though the prevention of statelessness was not necessarily in line with the view of the Japanese nation based on the principles of State Shintoism. However, as Japan began to be regarded as a member of international society, the necessity to follow international law declined,[726] and the principle of *jus sanguinis* and the Japanese national identity might have begun to prevail over the principle in international law after the end of WWII.

This emphasis on national identity among Japanese nationals can be explained by the principle of the nation-state. One feature of the nation-state principle developed in France was a horizontal relationship among nationals. This feature seems to have been different in Japan because, at least historically, a vertical relationship between the Emperor and Japanese nationals was emphasised when the Japanese national identity was under consideration.

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renounce their Japanese nationality voluntarily, and they filed a suit against the MOJ, claiming that Article 11(1) was unconstitutional from various perspectives, including the principle of the freedom to renounce one's nationality in Article 22(2) of the 1946 Constitution. In a petition, the plaintiffs claimed that they were not treated as Japanese nationals even though they were Japanese. "For the plaintiffs, their Japanese nationality, transmitted from their ancestors and parents, has a special meaning" (translated by the author). Supporters for a Lawsuit to Request Confirmation of Nationality, *Sojou Gaiyou* [Summary of a Petition] (Sep. 12, 2019), *at* http://yumejitsu.net/%e8%a8%b4%e7%8a%b6%e6%a6%82%e8%a6%81/. Note that the Emperor was not mentioned as a source of their identity, and this case did not concern a collective identity, so this is not a precise example showing that the Japanese national identity is an obstacle to Japan following the norm of preventing statelessness in international law. However, it does indicate that at least some Japanese nationals had a commitment to a nationality that was transmitted by their family.

[724] See 2.3., "The 1899 Nationality Act".

[725] See 4.2.1., "The Status of Japan in International Society".

[726] See 4.2.1., "The Status of Japan in International Society".

However, when the relationship among Japanese nationals is considered, there is a shared national identity among Japanese nationals, at least in theory, as developed by the government, as seen in the previous paragraphs. Under the 1889 Constitution, the Japanese government claimed that Japan was "a great family state", and this was a distinctive feature of Japan.[727] Although such an understanding seems to have changed when the 1946 Constitution was enforced since the Emperor was not sovereign under the new constitution, the Emperor remained in place under the new constitution. This indicates the possibility that Japanese national identity based on the Emperor system has remained in Japan, as well as the applicability of the nation-state principle. In other words, although it has a distinctive Japanese character, the nation-state principle was developed in Japan as it was in France. When Japan desired to become a member of international society, the nation-state principle was compromised with the norm of preventing statelessness. However, recently, after Japan had achieved recognition as a member of international society, the Japanese nation-state principle seems to have strengthened, and it has prevailed over the norm of preventing statelessness.

The strength of Japanese national identity does not merely cause statelessness, however. It also seems to assist in the prevention of statelessness by preventing deprivation of nationality. Since the 1899 Nationality Act, the Japanese government has not recognised its right to deprive Japanese nationals of their nationality.[728] Voluntary acquisition of another nationality has been a condition of loss of Japanese nationality.[729] One understanding is that possession of Japanese nationality is a right that Japanese nationals have,[730] even though this has not been explicitly discussed in the Diet. The motivation for avoiding the deprivation of nationality in the 1899 Nationality Act was different from the motivation to prepare clauses

[727] Translated by the author. MINISTRY OF EDUCATION, SCIENCE AND CULTURE, *supra* note 709, at 38.
[728] See the following. MOJ, Civil Affairs Bureau, The Fifth Division, *supra* note 217, at 20.
[729] See 2.3., "The 1899 Nationality Act".
[730] MINOBE, *supra* note 225, at 148.

on the prevention of statelessness by conferring nationality in the same Act. On the one hand, the prevention of statelessness by conferring nationality was included in the 1899 Nationality Act by referring to the resolution of the IDI.[731] On the other hand, international law does not seem to have been the reason for avoiding the deprivation of nationality since it was not mentioned in the drafting process of the 1899 Nationality Act. Rather, Japanese national identity might have contributed to the avoidance of deprivation of nationality. The relationship between Japanese national identity and avoidance of deprivation of nationality was neither discussed in the Diet nor in the academic literature because it seems to have been assumed by the Japanese at the time. This assumption is clarified when the basic principle of Japanese nationality is examined. Nationality acts have adopted the *jus sanguinis* principle, and this is related to the Japanese household system and the notion of the Japanese as a family state.[732] This identity as a family state seems to be why the deprivation of Japanese nationality was not permitted. The logic seems to have been that it did not make sense for the Japanese government to deprive a Japanese national of their nationality if that person did not renounce it voluntarily. Thus, no authority could deprive someone of their Japanese nationality without their consent.

This is interesting when compared to the current practice of deprivation of nationality in other states. There are practices that allow for the deprivation of nationality.[733] One reason for deprivation of nationality is a security concern.[734] Although many states do not deprive

[731] See 2.3., "The 1899 Nationality Act".
[732] See 2.3., "The 1899 Nationality Act". Article 5 of the 1899 Nationality Act indicated that the Japanese household was the basis of Japanese nationality. A substantial example indicating the relationship between Japanese nationality and Japanese household is the *koseki* or household registration system. For the relationship between nationality and *koseki*, see the following. Karl Jakob Krogness, Jus Koseki*: Household Registration and Japanese Citizenship*, *in* JAPAN'S HOUSEHOLD REGISTRATION SYSTEM AND CITIZENSHIP: KOSEKI, IDENTIFICATION AND DOCUMENTATION 145, 145-165 (David Chapman and Karl Jakob Krogness eds., 2014).
[733] See the following, Osamu Arakaki, *Kokuseki no Hakudatsu to Anzenhoshouka* [*Deprivation and Securitisation of Nationality*], 40 PRIME: INT'L PEACE RESEARCH INST. MEIJI GAKUIN UNIV. 3, 3-13 (2017).
[734] *Id*, at 3-13.

nationality if it results in statelessness, the UK reserves the right to deprive someone of British nationality even if this results in statelessness. Since 2014, British nationality can be deprived even when this results in statelessness if the person acquired it through naturalisation and the deprivation is considered to be beneficial to the public welfare.[735] When the Japanese case is compared with the UK case, it is interesting to note that security issues do not trigger deprivation of Japanese nationality. This implies that Japanese national identity is stronger than the concern for security in the context of deprivation of nationality. The above examples indicate that the strong Japanese national identity both allows and prevents statelessness.[736]

4.4. Conclusion of the Analysis

This analysis helps to explain why Japanese laws do not provide for the complete prevention of statelessness today. For example, children born in Japan to persons with other nationalities do not automatically acquire Japanese nationality under the 1984 Nationality Act, and this can result in statelessness. This is regarded as a gap between the current Japanese laws and the 1961 Convention, which is a comprehensive treaty to prevent

[735] Terry McGuinness & Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER NUMBER 06820 8 (2017). *Id*, at 6-7.

[736] However, even if deprivation of nationality is avoided, Japanese nationality can be denied, and this could result in statelessness because of denial of a parent-child relationship. There is one such case. A (a male) was born in the 1970s to B, a Korean mother, in Japan, and A was regarded as a child of B and C, B's husband, who was Japanese. At the time, the 1950 Nationality Act employed *jus sanguinis* through the paternal line, and C transmitted Japanese nationality to A. However, A's biological father was D, another Japanese male. In order to bring the legal parent-children relationship in line with the biological relationship, a lawsuit to deny the parent-child relationship between A and C was filed, and A and C's relationship was denied. As a result, there was no basis for A to acquire Japanese nationality, and Japanese nationality was denied, resulting in statelessness. Although D, A's biological father, was Japanese, he could not transmit his nationality as the father of A because the clause on nationality does not have a retroactive effect. For A, his Japanese nationality was "denied", and the situation is similar to deprivation of nationality. However, for the Japanese government, this action is not deprivation because the basis of acquisition of Japanese nationality was denied. For details on the case, see the following. STUDY GROUP ON STATELESSNESS IN JAPAN, *supra* note 20, at 78-83.

statelessness.[737] If one or several international or national factors mentioned above arise, Japan may find it necessary to prevent statelessness by conferring nationality on those who are born in Japan. However, since no conditions seem to have arisen, Japan has neither become a contracting party to the 1961 Convention nor taken further steps to prevent statelessness. Japan is now regarded as a developed state in international society, so it is not necessary for Japan to follow international law, in contrast to the situation at the end of the nineteenth century. The prevention of statelessness does not seem to be regarded as a norm that needs to be followed in international society, so Japan does not follow it. As a national phenomenon, statelessness is not regarded as a pressing matter by the Japanese government. In addition, the Japanese national identity seems to be an obstacle to Japan following the norm of preventing statelessness, but it also seems to assist in the prohibition of deprivation of statelessness among Japanese, thus preventing statelessness.

The above analysis indicates that there are cases where the Japanese government followed international norms when a certain factor or factors were present. However, at this moment, the absence of these factors explains why Japan has not fully followed the norm of preventing statelessness recently.

[737] For the gap between the current Japanese nationality act and the 1961 Convention, see the following. ARAKAKI, *supra* note 8, at 69-75.

CONCLUSION

This dissertation has examined the influence of the norm of preventing statelessness in international law on Japanese nationality law. On the basis of the empirical research in Chapters One to Three, Chapter Four explained, by referring to international and national factors, why Japan followed the norm of preventing statelessness in earlier times even though it is not necessarily influenced by the norm recently. The conclusion covers the implication of this dissertation and touches upon the possible future position of Japan in relation to the norm of preventing statelessness in international society.

This dissertation has two pieces of implication. The first piece related to international law is that the concept of nationality is heavily influenced by international law. As this dissertation proved, although the international law's influence on Japanese nationality law has not been normally discussed except that on the CEDAW, the norm of preventing statelessness in international law influenced the Japanese nationality law. This indicates the significance of international law in nationality matters. It is commonly stated that a nationality is a domestic jurisdiction, and as a result, the role of international law in nationality law can be overlooked.[738] However, this dissertation indicates that international law plays a role in nationality matters. Thus, the empirical study on the international law's influence on nationality law needs to be conducted in other states to analyse the role of international law in nationality matters.

[738] Note that it is *international law* that determines a nationality is a domestic jurisdiction. See "Statement of the Problem" in the "Introduction".

The second piece related to international relations is that newcomers to international society tend to follow international law even if there is possible domestic norm which can conflict with international law. For instance, Japan prioritised following international law over the Japanese national identity although a collective national identity is significant for each state.[739] This indicates the significance of international law for newcomers to international society. Interestingly, this dissertation indicates that the Japanese hesitation to follow international law on prevention of statelessness recently. Thus, the status of a state in international society changes the state's attitude to international law. In order to understand the role of international law in international soicety well, variety of states' attitudes to various topics needs to be examined.

This dissertation concludes with the discussion of the possible future position of Japan. As discussed already, international society's commitment to the norm of preventing statelessness is limited.[740] However, it must be noted that the norm of preventing statelessness has been receiving attention recently. In 2014, the UNHCR, which possesses a mandate on statelessness, launched the "#IBelong" campaign to end statelessness by 2024.[741] The UNHCR and some states, core members of the "Friends of the #IBelong campaign to end statelessness" in particular, are promoting the principle of preventing statelessness.[742] On the initiative of the core members of the "Friends of the #IBelong campaign to end statelessness", some resolutions of the Human Rights Council of the UN have covered statelessness.[743] In addition, the number of contracting parties to the 1961

[739] See 4.3.2., "Japanese National Identity".
[740] See 4.2.2., "Status of the Norm of Preventing Statelessness in International Society".
[741] For the "#IBelong" campaign, see the following. UNHCR, *IBELONG*, *at* http://www.unhcr.org/ibelong/ (viewed Jan. 17, 2019).
[742] Likeminded states formed "Friends of the #IBelong campaign to end statelessness" in 2015. The US, Mexico, Australia, Thailand and Finland are also the core members of the "Friends." Akiyama, *supra* note 654, at 200.
[743] See the following. UNGA, Resolution adopted by the Human Rights Council on 30 June 2016 32/7. The Right to a Nationality: Women's Equal Nationality Rights in Law and in Practice, A/HRC/RES/32/7 (18 July 2016). UNGA, Resolution adopted by the Human Rights Council on 24

Convention has recently been increasing rapidly. In 2010, only 37 states were contracting parties to the 1961 Convention, but 73 states were contracting parties to the Convention as of August 2019.[744] In the roughly 50 years from 1961 to 2010, 37 states became contracting parties, whereas 36 other states have become contacting parties in the past nine years. These examples indicate that the norm of preventing statelessness is becoming a significant theme for discussion in international society.

One interesting point is that although some states promote the norm of preventing statelessness, they are not necessarily eager to prevent statelessness by conferring their own nationality. For instance, prevention and elimination of statelessness is one diplomatic policy agenda for the US and Mexico, core members of the "Friends of the #IBelong campaign to end statelessness", but it does not seem to become a domestic policy agenda for these states. Although these states are eager to promote the norm of preventing and eliminating statelessness in international sphere, they do not take a special measure to prevent or eliminate statelessness within each state.[745] Although further and precise analysis is necessary, one possible effect of this practice is the containment of stateless persons.[746] Imagine a case in which a stateless person comes to a state that advocates the norm of preventing statelessness. If there is no state to deport the stateless person to, the state may need to admit entry to the stateless person. Some may argue that conferral of the state's nationality is necessary to reduce statelessness. However, if the stateless person acquires the nationality of another state before coming to the state that advocates the norm of preventing statelessness, the state does not need to admit that individual because he or she can be

March 2017 34/15. Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law, A/HRC/RES/34/15 (11 April 2017). *Id*, at 200.

[744] As of 19 August 2019. See the following. UN Treaty Collection, *supra* note 145.

[745] Akiyama, *supra* note 654, at 201-202.

[746] OSAMU ARAKAKI, *GUROBARUKA JIDAI NO MUKOKUSEKISHA: OUSHUU NO NINTEI, HOGO SEIDO WO CHUUSIN NI* [STATELESS PERSONS IN A GLOBAL AGE: DETERMINATION AND PROTECTION SYSTEMS IN EUROPE] 21 (2017).

deported to the state conferring nationality, at least in theory.[747] In this case, there is no need for the state that advocates the norm of preventing statelessness to confer nationality on the individual. This indicates that although some states' right to confer their nationality is affected by the international principle of the prevention of statelessness, other states' right may not be challenged. Thus, it is possible that some states advocate the norm of preventing statelessness in order to contain stateless persons while they do not prevent statelessness by conferring their own nationality.

In these circumstances, the following is a possible scenario. If an increasing number of states become contracting parties to the 1961 Convention and the commitment to preventing statelessness becomes stronger, the prevention of statelessness can come to be regarded as appropriate behaviour for states, and thus as a standard in international society.[748] If more and more states follow the norm of preventing statelessness, states that promote the norm of preventing statelessness may need to follow that norm and to confer their nationality in order to legitimate themselves in international society.[749] If such a situation arises, the response of states that promote the norm but do not commit to conferring their own nationality will be interesting to observe.

At the moment, Japan does not exhibit any particular commitment to the norm of preventing statelessness. How Japan will react to a global commitment to the norm of preventing statelessness will need to be examined. It must be noted that the UNHCR is

[747] However, it must be noted that if someone fears persecution if he or she stays the state conferring nationality upon them, they cannot be deported to that state pursuant to the *non-refoulement* principle.
[748] For this theory, see the following. Finnemore & Sikkink, *supra* note 43, at 895-902.
[749] There are also regional commitments to preventing statelessness. UNHCR, *Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean* (3 December 2014), *available at* http://www.refworld.org/docid/5487065b4.html (visited Jan.17, 2019). UNHCR & ECOWAS, *Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness* (25 February 2015), *available at* http://www.refworld.org/docid/54f588df4.html (visited Jan.17, 2019). ReliefWeb, *Abidjan Declaration on the Eradication of Statelessness: Adopted on February 2015 by the Member States of ECOWAS, the Declaration supports UNHCR's Global Campaign to End Statelessness by 2024, Achievements of the Abidjan Declaration 2 Years After* (2 March 2017), *available at* https://reliefweb.int/sites/reliefweb.int/files/resources/54536.pdf (visited Jan.17, 2019).

passionate about working on statelessness in Japan too.[750] In order to think about the future role of Japan in preventing statelessness, the statement quoted earlier from Harukazu Nagaoka, a Japanese delegate to the Codification Conference and the first speaker in the substantial discussion of the conference, offers an interesting insight.[751]

> If, in this Conference, the various States of the world find that they can, by agreement, eliminate the conflict of laws on this subject, I beg to state here and now that my Government will be prepared to introduce into its nationality law such changes as may be deemed necessary.

The government can change its policy, and the current Japanese policy is not bound by the policy of the 1930s. Since the maintenance of the international order seems to have been the main purpose of the norm of preventing statelessness,[752] the reason behind the prevention of statelessness in the 1930s is different from the current one, which focuses on human rights. However, it is worth recalling that Japan is committed to the prevention of statelessness, and it indicated its willingness to amend its municipal law to make it compatible with any new convention. The Japanese reaction to the norm of preventing statelessness will reveal whether or not *jus sanguinis* based on the Japanese household will be influenced by the norm of preventing statelessness. This analysis has implications for analysing whether the norm of preventing statelessness will prevail over the nation-state principle in the future international order.

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[750] The UNHCR Representation in Japan has commissioned two reports since 2014 to indicate that statelessness is an issue that Japan faces, even though statelessness does not receive much attention in Japan. In the foreword of each report, the UNHCR Representatives in Japan point out the need for Japan to be a contracting party to both the 1954 and 1961 Conventions. For the reports, see the following. ARAKAKI, *supra* note 8. STUDY GROUP ON STATELESSNESS IN JAPAN, *supra* note 20.
[751] LN, *supra* note 95, at 19. See 2.5.3., "The Japanese Position in the Codification Conference (1930)".
[752] See 1.3.2., "The 1930 Convention: The Emphasis on Married Women and Children".