

**COMMENTARY ON THE REFUGEE CONVENTION**  
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**FOREWORD**

The late Professor Atle Grahl-Madsen was above all a pre-eminent international lawyer. During the eighteen months he spent as a Special Consultant in the Office of the High Commissioner for Refugees in 1962-63, he also proved to be a completely independent researcher. His Commentary was unequivocally his, the result of his own findings and his own reasoning.

Professor Grahl-Madsen insisted on approaching refugee issues from a legal perspective. He believed that the discussion of the social and political dimensions of refugee flows while important, could not conclude the debate and would rarely lead to consistent and principled solutions. He always considered that the law was a beacon in that darkness, and preferred to give priority to legal analysis.

Written in the early sixties, that crucial time for refugee law when the *1951 Convention* had been in existence for just a few years, and had not yet been complemented by the *1967 Protocol*, Grahl-Madsen's Commentary has not, surprisingly, become obsolete. On the contrary, it continues to provide valuable insights into the preparatory work of the *1951 Convention* and the circumstances surrounding its elaboration and opening for signature. These insights, and Grahl-Madsen's principled legal approach, can be particularly useful in today's climate, where some contracting states are increasingly interpreting the refugee definition in more, some would even say unduly, restrictive ways.

Grahl-Madsen's work, which has been out of print for many years, helps us to see refugee law in its proper historical perspective and to identify its essential continuity. And it reminds us above all of a very important common sense, as well as legal, principle, namely, what has been signed and ratified must be respected in good faith.

Dennis Mc Namara  
Director of International Protection  
Office of the United Nations  
High Commissioner for Refugees  
Geneva, October 1997

**ARTICLE 2**  
**GENERAL OBLIGATIONS<sup>(1)</sup>**

Every refugee<sup>(2)</sup> has duties<sup>(3)</sup> to the country in which he finds himself,<sup>(4)</sup> which require in particular<sup>(5)</sup> that he conform to its laws and regulations<sup>(6)</sup> as well as to measures<sup>(7)</sup> taken for the maintenance of public order.<sup>(8)</sup>

Comments

(1) No provisions similar to the one contained in Article 2 are found in earlier arrangements and conventions relating to the status of refugees.

The Secretariat of the United Nations proposed in its preliminary draft convention, which was submitted to the Ad Hoc Committee, an article 10 to read as follows:

"Refugees (and stateless persons) authorized to reside in a country must conform to the laws in force."

The Secretariat commented on this provision in the following words: "This paragraph constitutes a reminder of the essential duties common to nationals as well as to foreigners in general."<sup>a</sup>

The proposed article was subjected to a number of amendments until it was given its final form at the second session of the Ad Hoc Committee.<sup>b</sup>

(2) The term "refugee" as used in Article 2 is in accordance with the definition contained in Article 1. That is to say, that every refugee who is benefitting under the terms of the Convention is also subject to the provisions of Article 2.

(3) Article 2 partly states only the obvious, namely that a refugee, like any other person, must obey the laws and regulations in force in the country where he is.

The Ad Hoc Committee "fully appreciated that the provision [contained in Article 2] was axiomatic and need not be explicitly stated. However, it was considered useful to include such a provision in order to produce a more balanced document as well as for its psychological effect on refugees and on countries considering admitting refugees."<sup>c</sup>

At the Conference of Plenipotentiaries the view was expressed, that the Article "constituted, not a formal and positive rule providing for punishment of offenders, but rather a moral rule."<sup>d</sup>

Article 2 in fact only lays down an imperfect obligation. It does not provide any sanctions in the case of a refugee who does not fulfil his duties. He will not forfeit his status as a refugee, and he will not - by virtue of the present Article - forfeit any of the rights and benefits which the Convention confers on refugees.

The Article does not prejudice sanctions which may be applied by virtue of other Articles, e.g. Articles 26, 32 and 33.<sup>e</sup>

It is noteworthy that the Conference of Plenipotentiaries turned down proposals to the effects that a refugee who was guilty of a grave dereliction of duty and who constitutes a danger to the internal or external security of the country, might be declared to have forfeited the rights pertaining to the status of refugees as defined in the Convention.<sup>f</sup>

The refugee who violates laws or regulations may be subjected to penalties of the same footing as other persons in the territory, provided there is no rule exempting refugees from penalties, e.g. Article 31 (1).

Vattel said: "Being ... subject to the laws, foreigners who violate them should be punished accordingly. The purpose of penalties is to enforce respect for the laws and to maintain public order and security (l'ordre & la sûreté)."<sup>g</sup>

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<sup>a</sup> UN Doc. E/AC.32/2, p.31.

<sup>b</sup> UN Doc. E/AC.32/L.42, p.1.

<sup>c</sup> E/AC.32/5 (E/1618), pp. 40-41.

<sup>d</sup> A/CONF.2/SR.3, p. 23, statement by Egyptian delegate.

<sup>e</sup> Cf. Statements in E/AC.32/SR.34, p. 4; A/CONF. 2/SR.3, p. 21.

<sup>f</sup> Cf. A/CONF.2/10; A/CONF.2/18; A/CONF.2/SR.3, pp. 18-24; A/CONF.2/SR.4, pp. 4-12; A/CONF.2/SR.24, p. 19.

<sup>g</sup> Vattel, vol. III, p. 145; cf. vol. I, p. 330.

(4) Article 2 only speaks of the "country in which [the refugee] finds himself". Underlying this phrase is apparently the old notion of "territorial allegiance", cf. 6. However, the phrase should not be interpreted too narrowly. A refugee may certainly also have duties towards other countries than that where he is physically present; e.g. towards the country where he is "lawfully staying", even if he is temporarily absent from that country.

(5) This phrase implies that the refugee may have other duties towards his country of refuge than those enumerated in Article 2, but the *travaux préparatoires* give no indication as to which these duties may be, cf. in this connection 6.

(6) It is a well-established rule of public international law that every State may demand all persons in its territory to obey its laws and regulations, provided this does not infringe on the personal - as opposed to territorial - supremacy of another State. Article 2 is only a restatement of this rule in so far as it sets forth that refugees like any other alien shall obey the laws and regulations in force in the country where they are.

However, in view of the fact that refugees, being without effective nationality and without diplomatic protection, Article 2 may be read to imply that the State in whose territory a refugee finds himself may also subject him to such laws and regulations which normally would not apply to aliens, e.g. rules relating to military service and discriminatory measures which are not prohibited by express provisions of the Refugee Convention.

Vattel stated the general rule in the following words:

"But even in States which freely admit foreigners it is presumed that the sovereign only grants them access on the implied condition that they will be subject to the laws - I mean to the general laws established for the maintenance of good order and not operative only in the case of citizens and subjects. The public safety and the rights of the Nation and of the sovereign necessarily impose this condition, and foreigners impliedly submit to it as soon as they enter into the country, and can not presume to obtain admittance on any other footing. Sovereignty is the right to command throughout the whole country; and the laws are not limited to regulating the conduct of the citizens with one another, but they extend to all classes of persons in every part of the land."<sup>h</sup>

Statements to the same effect were made in the Ad Hoc Committee.<sup>i</sup>

(7) The expression "measures" as used in Article 2 apparently means other measures than laws and regulations. The latter include common law, formal laws (Acts of Parliament, Statute Laws), and decrees of a general nature (legislative decrees), but probably not administrative orders directed to one or more specified individuals.<sup>j</sup>

The *travaux préparatoires* contain little indication as to what kind of measures the drafters had in mind. It seems that the provision covers any measures which are aiming at the maintenance of "public order" (for the meaning of this term, see *infra*).

However, the Article only provides that the refugee shall conform to such measures; it does not confer on the States rights which they would not otherwise have, to take special measures against refugees.

The indications as to what kind of measures the drafters had in mind are very slight indeed:

The Venezuelan representative suggested that the paragraph "should be interpreted to mean that laws prohibiting or restricting political activity for foreigners generally would be equally applicable to refugees."<sup>k</sup> There may therefore be justification for considering that

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<sup>h</sup> Vattel, vol. III, p. 144; cf. Oppenheim (Lauterpacht), vol. I, pp. 679 ff.

<sup>i</sup> Cf. E/AC.32/SR. 11, pp. 10-11; E/AC.32/5 (E/1618), pp. 40-41; E/AC.32/SR.34, p. 7.

<sup>j</sup> Cf. E/AC.32/2, p. 31; E/AC.32/SR.23, P. 11; E/AC.32/SR.34, p. 4; E/AC.32/L.42, p. 1.

<sup>k</sup> UN Doc. E/AC.32/SR.23, p. 11.

among the measures referred to one may include orders prohibiting or restricting the political activity of refugees. Cf. in this connection the Report of the first session of the Ad Hoc Committee: "The representative of France proposed a second paragraph to this article, explicitly permitting Contracting States to restrict the political activity of refugees ... In an effort to meet at least in part the view of the representative of France, the phrase 'including measures for the maintenance of public order' was included".<sup>l</sup>

The French representative found occasion to "mention the assassination of the Head of a State by refugees in France" and that "often, too, the refugees exploited the community."<sup>m</sup> This may perhaps be construed so that refugees are obliged to obey orders restricting their freedom of movement during the visits of foreign Heads of State and even submit themselves to detention on such occasions. It must, however, be clear that the present Article does not prejudice Articles 26 and 31 (2) in this respect.

One may also mention a statement by the Venezuelan representative in the Ad Hoc Committee; when discussing Article 32 he mentioned that if the peace and stability of the State were threatened, "the Government was enabled, on grounds of public order, to take such measures as the suspension of certain constitutional guarantees, the banning of public meetings, or the imposition of restrictions of movement. If such measures were taken, they would be applicable to aliens as well as nationals, and no exception could or should be made in the case of refugees."<sup>n</sup>

(8) The expression "public order" as used in Article 2 had an entirely different meaning from that of the term "public order" in Article 32.

"Public order" in Article 2 seems to mean approximately the same as "national security" in Articles 32 and 33. Consequently "measures taken for the maintenance of public order" are "security measures", or in other words measures for the suppression of political activities on the part of any group of foreigners, whether or not they are refugees, which are considered as dangerous to the State.

Infractions of the penal code are violations of "laws and regulations" and not of "measures taken for the maintenance of public order".

There was no mention of "public order" in the Secretariat draft.<sup>o</sup> The expression was brought into the debate by the representative of the United States of America, "because he regarded it as undesirable to include in a United States document a clause prohibiting political activities - a very broad and vague concept indeed. While 'public order' was likewise a vague term, and not one to be invoked indiscriminately, it would probably cover most of the cases envisaged."<sup>p</sup>

The lead was taken up by the Turkish representative, who thought that refugees should not have "an untrammelled right to political activities" and to this end suggested the addition of the words "and to measures taken for the maintenance of public order."<sup>q</sup> He was supported by the Belgian representative.<sup>r</sup>

The French representative stressed that his intention was not to introduce "a discriminatory measure against refugees but rather ... a security measure."<sup>s</sup>

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<sup>l</sup> UN Doc. E/AC.32/5 (E1618) p. 41.

<sup>m</sup> UN Doc. E/AC.32/SR.34, p. 8.

<sup>n</sup> UN Doc. E/AC.32/SR.40, p. 13.

<sup>o</sup> UN Doc. E/AC.32/2, p. 31.

<sup>p</sup> UN Doc. E/AC.32/SR.23, p. 8; cf supra sub 7, b, i.

<sup>q</sup> UN Doc. E/AC.32/SR.23, p. 9.

<sup>r</sup> Loc. cit.

<sup>s</sup> UN Doc. E/AC.32/SR.23, p. 9.

The Danish representative made it clear that what the members of the Ad Hoc Committee had in mind was measures for the suppression of "political activity on the part of any group of foreigners, whether or not they were refugees, [which] might be considered as dangerous to the State."<sup>t</sup> Cf. statements by the United States, Belgian, Chinese, Turkish and Venezuelan representatives, discussing restrictions of political activity.<sup>u</sup>

The Report of the first session of the Ad Hoc Committee did not only mention "the political activity of refugees" but also the wider concept of "any activities on the part of an alien which it considers objectionable."<sup>v</sup>

At the Conference of Plenipotentiaries the French delegate stressed that "it was necessary that the countries receiving clandestine refugees should have at their disposal adequate means for repressing the activities of certain refugees liable to threaten internal or external security."<sup>w</sup>

The French representative also made it clear "that the measures in question related to extremely serious - and, incidentally, rare - cases, and came within the category of counter-espionage operations."<sup>x</sup>

The Swedish representative supported the French point of view by referring to the problem of persons "who, after entering [the territory] under the cover of flight from political persecution, proceeded to engage in activity prejudicial to Sweden's national security."<sup>y</sup>

The United Kingdom representative also expatiated on "the cases of refugees constituting serious threats to national security" and stated that "there was a definite danger that some of the many refugees flocking into certain countries might be tempted to indulge in harmful activities on behalf of foreign Powers."<sup>z</sup>

The Israeli representative also spoke of "threats to internal and external security constituted by refugees. It was clear that the intention ... was to take care of such serious threats to security as were not covered by national criminal codes."<sup>aa</sup>

There is little support for the contention that measures - for the maintenance of public order, in the sense of Article 2, refers to peace and tranquillity in the society at large ("the King's peace") and suppression of common (non-political) crimes.

The United Kingdom representative excluded "criminal offences" from his consideration, implying that that matter was satisfactorily dealt with in municipal penal laws and aliens laws,<sup>ab</sup> cf. also the statement by the Israeli representative, *supra*.

The French representative brought some ambiguity into the expression "activities constituting a danger to the security of the countries receiving [refugees]" by using as his example "certain disturbances provoked by organized bands. He also mentioned that "as to making any distinction between the internal and external security of a country, any such distinction seemed rather artificial at the present time."<sup>ac</sup>

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<sup>t</sup> UN Doc. E/AC.32/SR.23, pp. 9-10.

<sup>u</sup> UN Doc. E/AC.32/SR.23, pp. 10-11.

<sup>v</sup> UN Doc. E/AC.32/5 (E/1618), p. 41.

<sup>w</sup> UN Doc. A/CONF.2/SR.3, p. 23.

<sup>x</sup> UN Doc. A/CONF2/SR.4, p. 9.

<sup>y</sup> UN Doc. A/CONF2/SR.4, p. 9.

<sup>z</sup> UN Doc. A/CONF2/SR.4, p. 10.

<sup>aa</sup> UN Doc. A/CONF.2/SR.4, p. 12.

<sup>ab</sup> UN Doc. A/CONF.2/SR.4, p. 10.

<sup>ac</sup> UN Doc. A/CONF.2/SR.4, p. 11.

However, it will be recalled that Article 2 differentiates between "laws and regulations" and "measures", and as criminal activities as a rule are violating the former, there is no need for the latter to cover such activities.

It is noteworthy that in discussing Article 32, the Venezuelan representative stated that "in his country, 'public order' was synonymous with internal order, while 'national security' implied 'international order', for the two ideas complemented each other and were closely linked."<sup>ad</sup> He later elaborated this statement by explaining that "so far as his own country was concerned, 'public order' was directly related to the maintenance of the peace and stability of the State. If they were threatened, the Government was enabled, on grounds of public order, to take such measures as the suspension of certain constitutional guarantees, the banning of public meetings, or the imposition of restrictions of movement. If such measures were taken, they would be applicable to aliens as well as to nationals, and no exception could or should be made in the case of refugees. In fact, the inclusion of the reference to public order ... could be constructed as a warning to refugees not to indulge in political activities against the State."<sup>ae</sup>

It is quite clear that Article 2 cannot be construed as constituting approval of limitations on areas of activity for refugees which are in themselves unobjectionable.

This was clearly stressed in the Report of the first session of the Ad Hoc Committee (on the other hand the Committee was of the opinion "that in the absence of any provision to the contrary every sovereign Government retained the right it has to regulate any activities on the part of an alien which it considers objectionable").<sup>af</sup>

The representative of the United States of America stated that he regarded it as undesirable to include in a United Nations document a clause prohibiting political activities - a very broad and vague concept indeed."<sup>ag</sup>

The Turkish representative indicated that one of the purposes of Article 2 was to prevent the invoking of the Convention by refugees "in order to sanction undesirable political activity."<sup>ah</sup>

The Venezuelan representative thought that the paragraph "should be interpreted to mean that laws prohibiting or restricting political activity for foreigners generally would be equally applicable to refugees."<sup>ai</sup>

The French representative suggested that the purpose was to "ensure that their conduct [i.e. the conduct of refugees] and behaviour was in keeping with the advantages granted them by the country of asylum."<sup>aj</sup>

What the French representative had in mind were apparently "extremely serious - and, incidentally, rare - cases, [which] came within the category of counterespionage operations."<sup>ak</sup>

It is interesting to note that Article 23 of the French Aliens Ordinance of 2 November 1945 provides that "l'expulsion peut être prononcée ... si la présence de l'étranger constitue une menace pour l'ordre public ou le crédit public." The term is here clearly used in a sense which differs from the meaning given the term in Article 2 as well as from that given it in

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<sup>ad</sup> UN Doc. E/AC.32/SR.20, p. 18.

<sup>ae</sup> UN Doc. E/AC.32/SR.40, p. 13.

<sup>af</sup> UN Doc. E/AC.32/5 (E/1618), p. 41.

<sup>ag</sup> UN Doc. E/AC.32/SR.23, p. 8.

<sup>ah</sup> UN Doc. E/AC32/SR.23, P. 11.

<sup>ai</sup> UN Doc. E/AC.32/SR.23, P. 11

<sup>aj</sup> UN Doc. E/AC32/SR.34, p. 4.

<sup>ak</sup> UN Doc. A/CONF.2/SR.4, p. 9.

Article 32 of the present Convention. "Ordre public" as used in the French Ordinance comprises "national security" as well as "public order" in the latter sense.

There are a few judgements of the Austrian Verwaltungsgerichtshof (Administrative High Court) which deal with Article 2.

In *Stojanoff v. Sicherheitsdirektion für das Bundesland Oberösterreich* (judgement of 12 December 1956, ref. 1949/55/2) the Court held:

"Nach Artikel 2 der Konvention über die Rechtsstellung der Flüchtlinge, BGBl. Nr. 55/1955, hat jeder Flüchtling gegenüber dem Land, wo er sich aufhält, Pflichten, die insbesondere darin bestehen, dass er sich dessen Gesetzen und Verordnungen sowie den Massnahmen, die zur Erhaltung der öffentlichen Ordnung getroffen wurden, unterwirft. Nach Artikel 32 Z. 1 sollen die vertragsschliessenden Staaten keine Flüchtlinge, die sich erlaubter Weise auf ihrem Gebiet aufhalten, ausweisen, es sei denn aus Gründen der Staatssicherheit oder öffentlichen Ordnung. Der Beschwerdeführer hat sich, wie aus seiner Bestrafung feststeht, nicht den Massnahmen, die zur Erhaltung der öffentlichen Ordnung getroffen wurden, unterworfen. Es würden daher auch die Bestimmungen der Konvention der Erlassung des Aufenthaltsverbotes gegen den Beschwerdeführer nicht entgegenstehen ..."

In this case the plaintiff had been convicted for sexual offences, and an expulsion was probably justified under the terms of Article 32. The mention of Article 2 is, on the other hand, hardly in keeping with the intentions of the Convention drafters. As we have seen supra sub 3, Article 2 is only laying down an imperfect rule, and there are no sanctions in the case the duties mentioned therein are not fulfilled. Furthermore, a criminal conviction is proof of a violation of "laws and regulations." The Court has apparently not been aware of the special connotation of "public order" in Article 2.

In *Grochot v. Sicherheitsdirektion für Steiermark* (judgement of 23 March 1959, ref. 1752/57/3) the Austrian Verwaltungsgerichtshof used the same line of reasoning. In this case, however, there was no criminal conviction; the plaintiff had merely been fined 30 Austrian Schilling for 13 days illegal presence in Austria. In this case too, there was a violation of "laws and regulations", but hardly of "measures taken for the maintenance of public order" in the sense of Article 2. The Court's assimilation of the expression "public order" in Article 2 to the term "public order" in Article 32 - and the interpretation of the term "public order" in the light of the Austrian expression "öffentliche Ordnung" - was rather unfortunate in this case, because it apparently led the Court to approve of an expulsion order which hardly met the text of Article 32.

In this connection it is interesting to note a statement by Mr. Christian Broda, Austrian Minister of Justice, in the Consultative Assembly of the Council of Europe: "There were often misunderstandings as to the scope of treaties and their place in a given municipal law as a whole. The common obligations assumed by States were usually defined in international agreements themselves but not always in the same way. Under the constitutional system of some States conventional [i.e. treaty] law overrode legislative [i.e., municipal] law. Yet a common legal norm [as for instance the municipally accepted notion of 'domicile'] could be regarded as legislative law. It followed that any international convention which derogated from a common [municipal] legal norm would be valid and would prevail over that norm."<sup>al</sup>

### **ARTICLE 3** **NON-DISCRIMINATION<sup>(1)</sup>**

**The Contracting States shall apply the provisions<sup>(2)</sup> of this Convention to refugees without discrimination<sup>(3)</sup> as to race, religion or country of origin.<sup>(4)</sup>**

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<sup>al</sup> Council of Europe News, New Series, No. 23, November 1962, p. 14.

## Comments

(1) No provision similar to the one contained in Article 3 is found in earlier arrangements and conventions relating to the status of refugees.

The Universal Declaration of Human Rights sets forth in its Article 2.

The Belgian delegate in the Ad Hoc Committee proposed that the Refugee Convention should contain “a provision reaffirming as applicable to [the refugees] the principle of non-discrimination proclaimed in the Universal Declaration of Human Rights.” He therefore submitted the following text for the Committee’s consideration: “The High Contracting Parties shall not discriminate against refugees on account of race, religion or country of origin, nor because they are refugees.”<sup>1</sup>

Whereas the Committee was in favour of the Belgian proposal in general, the proposed wording met opposition on several counts.

The words “nor because they are refugees” were deleted by the Conference at an early stage, so that what originally might have been interpreted as a prohibition of discrimination against refugees (as compared with other aliens, perhaps also nationals of the State concerned), was reduced to a prohibition of discrimination *between* refugees.<sup>2</sup>

In order to make it clear that the Article should not apply to admission of refugees (including immigration policies), the words “shall not discriminate against refugees” were deleted and substituted by the words “shall apply the provisions of this Convention to refugees without discrimination.”<sup>3</sup>

(It will be noted that the Convention does not deal either with the admission of refugees (in countries of first or second asylum) or with their resettlement (in countries of immigration).<sup>4</sup>

(2) The rule of non-discrimination laid down in Article 3 relates only to the provisions of the present Convention.

There is no prohibition of discrimination with regard to rights and benefits over and above those provided for by the Convention. An original proposal to the effect that “the Contracting States shall not discriminate against a refugee” was defeated by the Conference.<sup>5</sup>

(3) It is the purport of Article 3 that if a State has acceded to the Refugee Convention, it shall grant the benefits mentioned therein to all refugees and not make any difference between various racial, religious or national groups among them.

As far as mandatory provisions are concerned, Article 3 is not saying anything but the self-evident; only with regard to those articles which contain a recommendation or lays down a flexible standard (e.g. “treatment as favourable as possible”) is Article 3 of real import.

(In its original form of Article 3 “discrimination might be taken as referring to

- (a) discrimination between refugees and nationals;
- (b) between various classes of refugees and other aliens; or
- (c) between various classes of refugees themselves.<sup>6</sup>

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<sup>1</sup> E/AC.32/SR.24, p. 11.

<sup>2</sup> A/CONF.2/SR. 1, pp. 16-19.

<sup>3</sup> A/CONF.2/72, cf. A/CONF.2/SR.24, pp. 20-21.

<sup>4</sup> Cf. A/CONF.2/72.

<sup>5</sup> An original proposal to the effect that “the Contracting States shall not discriminate against a refugee” was defeated by the Conference (A/CONF.2/72; A/CONF.2/SR.24, pp. 20-21).

<sup>6</sup> A/CONF.2/SR.5



(As Article 3 is now worded, there can be no doubt that only the last interpretation is possible; this in spite of the fact that it was pointed out by some delegates that this in fact meant that “a Contracting State would only need to reserve prejudicial treatment for all refugees in order to avoid contravening the provisions of the Convention”.<sup>7</sup>)

(4) The enumeration of grounds on which discrimination must not take place must be considered as exhaustive.

A proposal to add words “or for other reasons” was rejected by the Conference. Similarly the inclusion of the word “particularly” before the enumeration was opposed.<sup>8</sup>

It was found impracticable to mention all the reasons set forth in the Universal Declaration of Human Rights,<sup>9</sup> and a suggestion to include a reference to sex was defeated, because it was felt “that the equality of the sexes was a matter for national legislation”<sup>10</sup> and “to include the reference to sex might bring the Convention into conflict with national legislation” (cf. vote reserved for men in certain countries, guardianship laws, different working hours and/or wage scales for men and women, etc.).<sup>11</sup>

Reasons for discrimination such as age, health and the holding of certain political opinions were mentioned, but the Conference apparently did not wish to consider them.<sup>12</sup>

As Article 22 does not provide for elementary education in the language of the parents (except possibly in multilingual countries) the fact that language has been omitted from the enumeration of grounds in Article 3 will hardly be of any consequence.<sup>13</sup>

It was felt by the Conference that “non-discrimination on grounds of race or religion did not raise any difficulties. “On the other hand, some apprehension was felt with regard to non-discrimination on the ground of country of origin.

However, there can be no doubt that the Conference accepted that as far as the provisions of the Convention go, the Contracting States are bound not to discriminate between various national groups of refugees, e.g. refugees from a culturally related neighbouring country and refugees from a more distant and alien country.<sup>14</sup>

Contracting States which have only accepted the definition in Article 1 (B) (1) (a) (“events occurring in Europe before 1 January 1951”) are certainly only obliged with regard to “refugees” in this more limited sense.<sup>15</sup>

## **ARTICLE 4** **RELIGION** <sup>(1)</sup>

**The Contracting States shall accord to refugees within their territories <sup>(2)</sup> treatment at least as favourable as that accorded to their nationals <sup>(3)</sup> with respect to freedom to practise their religion <sup>(4)</sup> and freedom as regards the religious education of their children. <sup>(5)</sup>**

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<sup>7</sup> Ibid.

<sup>8</sup> A/CONF.2/SR.5, p. 12.

<sup>9</sup> A/CONF.2/SR.5, p. 9.

<sup>10</sup> Loc. cit.

<sup>11</sup> A/CONF.2/SR.5, p. 10-12

<sup>12</sup> Loc. Cit.

<sup>13</sup> Cf. commentary to Article 22 infra; also what has been said supra on the scope of Article 3 with regard to mandatory provisions.

<sup>14</sup> A/CONF.2/72.

<sup>15</sup> Cf. A/CONF.2/SR.24, pp. 19-20.

## Comments

(1) No provision similar to that contained in Article 4 is found in the earlier agreements relating to the status of refugees, and the Ad Hoc Committee did not either consider any such provision.

Urged by the representative of Pax Romana, who was allowed to address the Conference of Plenipotentiaries, the Conference decided to include an article in the Convention, and a proposal for such an article was filed by the Luxembourg delegation.<sup>a</sup>

The provision is not without precedent.

The Universal Declaration of Human Rights states, in its Article 18, that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

The Geneva Convention of 12 August 1949 also provide for religious freedom. Thus Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War sets forth that protected persons - that is to say persons who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hand of a Party to the conflict or Occupying Power of which they are not Nationals (Article 4 (1)) - “are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.”

Article 38 of the same Convention, which is placed in Section II, which relates to Aliens in the Territory of a Party to the conflict, stipulates that alien protected persons inter alia “shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith”.

The Conference agreed that the provisions contained in Article 4 are “subject to the requirements of public order”, and that the general obligations of refugees towards their country of refuge, as set forth in Article 2, also extend to this field.<sup>b</sup>

Article 4 is to a certain extent supplementing the provisions contained in Article 22.<sup>c</sup>

(2) The words “shall accord” indicate that Article 4 contains a legal obligation. The corresponding right is due to all refugees “within the territory”; that is to say that it is not conditioned on the presence of the refugee being lawful, nor is there any residence requirements. The illegal entrant whose case is pending and the refugee who is under an expulsion order are equally entitled to the benefits of Article 4 as is the well-established and law-abiding refugee. The visitor and the traveller are also falling within the scope of the present Article.

(3) The original Luxembourg proposal for an article on religious freedom<sup>d</sup> stipulated that the Contracting States should grant refugees “complete freedom” to practise their religion, etc.

This wide formulation met some opposition, and it was felt that it had to be circumscribed in some way or other. The President of the Conference thought that this best could be done by drafting the article so “that States would undertake to extend the same treatment in respect of religion and religious education to refugees as to their own nationals”.<sup>e</sup>

However, it was pointed out that there was “a danger that in countries where religious liberty was circumscribed, refugees would suffer.” The representative of the Holy See therefore

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<sup>a</sup> A/CONF.2/94.

<sup>b</sup> A/CONF.2/SR.30, pp. 14 ff.

<sup>c</sup> Cf. 5 below.

<sup>d</sup> A/CONF.2/94.

<sup>e</sup> A/CONF.2/SR.30, p. 17.

proposed the insertion of the words “at least”, “in order to guarantee refugees a minimum of religious liberty in such countries”<sup>f</sup>

In the course of the further discussion, it was agreed that this insertion “embodied a moral principle - perhaps somewhat in the nature of an abstract recommendation, but one which was nevertheless entirely consonant with the Universal Declaration of Human Rights”.<sup>g</sup>

The legal effect of the formulation is that the freedom accorded to refugees in this respect must be in no way inferior to that accorded to nationals.<sup>h</sup>

(4) Whereas Article 18 of the Universal Declaration of Human Rights speaks of “freedom, either alone or in community with others, to manifest his religion or belief in teaching, practice, worship and observance,” the present Article more modestly grants refugees “freedom to practise their religion”.

This wording does not necessarily call for a more restrictive interpretation. A clue to the meaning of the phrase before us is found in the clause that refugees shall enjoy “treatment at least as favourable as that accorded to nationals”, and in the circumstance that refugees are obliged - as stated in Article 2 - to conform to laws and regulations of their country of refuge as well as to measures taken for the maintenance of public order.

If nationals of all creeds are allowed to erect churches or temples, to stage religious processions and outdoor meetings, to profess their beliefs publicly, etc. etc., then refugees will have the same rights. If, on the other hand, all but the followers of a predominant religion, are subjected to restrictions with regard to public manifestations of their creed, and the sentiment of the majority of the population is such, that public ceremonies related to or public teaching of minority beliefs are likely to cause public concern or even riots, the refugees who do not share the majority’s creed may have to accept curbs on their public religious activities.

However, it would be entirely against the spirit of the Convention if it were prohibited for refugees to practise their religion in private, or to arrange religious ceremonies for fellow believers without staging a public spectacle.<sup>i</sup>

(5) The original Luxembourg proposal<sup>k</sup> provided that the Contracting States “shall grant refugees ... complete freedom ... to ensure that their children are taught the religion they profess”.

It was felt, however, that this text was liable to misunderstanding. Several delegates stressed that the Contracting States could not assume financial or other obligations to ensure the religious education of refugee children. This was particularly underlined with a view to States with an established Church vis-à-vis refugee children of another faith.<sup>l</sup>

The Conference adopted the present formulation in order to make it clear that the Article only aims at guaranteeing refugee parents freedom to refuse religious education of their children which they do not want, and to choose between existing alternatives, or to make such arrangements for the religious upbringing of their children as they see fit to make. It was considered to be in conformity with the Convention if in a country where a State religion

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<sup>f</sup> A/CONF.2/SR. 33, p. 7.

<sup>g</sup> Cf. statement by the French delegate, A/CONF.2/SR., pp. 7 ff.

<sup>h</sup> Cf. statement by the representative of the Holy See, A/CONF.2/SR.33, p. 8.

<sup>i</sup> See 3 above.

<sup>j</sup> Cf. statement by representative of the Holy See, A/CONF.2/SR.30, p. 13.

<sup>k</sup> A/CONF. 2/94.

<sup>l</sup> A/CONF.2/SR.30, pp. 12 ff.

is taught in State schools, parents who belong to another church have freedom to withdraw their children from the classes in religious instruction.<sup>m</sup>

The question of whether atheist parents must have the same rights was touched upon, and answered in the negative.<sup>n</sup>

## **ARTICLE 5**

### **RIGHTS GRANTED APART FROM THIS CONVENTION<sup>(1)</sup>**

**Nothing in this Convention<sup>(2)</sup> shall be deemed to impair<sup>(3)</sup> any rights and benefits<sup>(4)</sup> granted by a Contracting State to refugees<sup>(5)</sup> apart from this Convention.<sup>(6)</sup>**

#### Comments

(1) This article Originated in the Ad Hoc Committee, and the wording adopted by the Committee is identical with the final wording, only with the addition of the words “prior to or” between “refugees” and “apart from.” Said words were deleted by the Conference because they were felt to be redundant.<sup>a</sup>

There is a certain overlapping between Article 5 and Article 7 (3). However, the former applies regardless of the time factor and the question of reciprocity, whereas the latter is containing an express obligation where the former is only to be construed as a rule of interpretation.

(2) The provisions of the Convention which are of greatest interest in this context are the following:

- (a) Article 7 (1) which lays down the general that except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally; and
- (b) Article 37, according to which the present Convention replaces, as between parties to it, the former arrangements and conventions relating to the status of refugees.

It must be the meaning of Article 5 that those two (and as the case may be) other Articles must be understood subject to the provision in Article 5.

(3) The purport of Article 5 is that refugees may by virtue of the Convention get a more favourable position than they otherwise would have had, while on the other hand the Convention shall not be able to serve as an excuse for reducing or taking away rights and benefits which otherwise are granted to refugees by certain States.

In this connection it is well to remember that certain provisions of the Convention are results of compromises, arrived at for the purpose of making accession to the Convention possible for a great number of States, without their having to make too many reservations, and that those provisions consequently fall short of the treatment accorded to refugees in some States with an advanced social legislation and an enlightened view on the status of refugees.

The phrasing “nothing in this Convention shall be deemed to impair” indicates that what the drafters were concerned about was that refugees should not lose any rights and benefits so to speak automatically that is to say by way of interpretation.

The Article does not, however, prohibit the Contracting States to withdraw or reduce any rights and benefits which they may have granted to refugees apart from the Convention.

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<sup>m</sup> Cf. statement by the Swedish delegate, A/CONF.2/SR.30, p.12.

<sup>n</sup> Loc.cit.

<sup>a</sup> Cf. E/AC.32/L.42/Add. 3; E/AC.32/8 (E/1850); and A/CONF.2/SR.5, p..

Article 5 is therefore more of a guide for the understanding of the provisions of the Convention than a restriction on the freedom of the Contracting States to regulate the status of refugees outside the Convention.

(4) Rights may be conferred upon refugees either by treaty or by provisions of a municipal law (directly by the operation of the law, or by way of an administrative or judicial decision based on the law), or by way of contract between the refugee and the appropriate authority.

The Article applies equally to laws and regulations by virtue of which rights and benefits are bestowed on refugees, and to rights and benefits granted under any such laws or regulations, whether they may be considered as vested or acquired rights, or are subject to withdrawal at the discretion of the authorities.

(5) Laws and regulations as well as rights and benefits conferred upon refugees by virtue thereof, may apply to all refugees, particular categories of refugees, or individual refugees.

As far as rules pertaining to all refugees are concerned, the Article in fact contains a recommendation to the effect that all Convention refugees shall continue to benefit from those rules.

As far as rules pertaining to all refugees are concerned, the Article in fact contains a recommendation to the effect that all Convention refugees shall continue to benefit from those rules.

If certain rights and benefits are granted only to particular categories of refugees, Article 5 must be considered to depart from the principle laid down in Article 3, by allowing the continued privileged treatment of the categories of refugees in question, even if the criteria by which the categories concerned are defined are any of those mentioned in Article 3, that is to say race, religion or country of origin. For example, if at the time of entry into force of the present Convention in a particular country the law of that country provided for privileged treatment of refugees from a neighbouring country, this discriminatory measure might be continued without contravening Article 3.

Similarly, in the case of rights and benefits granted to individuals, a Contracting State may let the person enjoying these continue to do so, even if it finds difficulty in extending the rights and benefits to an increased or increasing number of individuals.

The former arrangements and conventions which were abrogated – as between the parties to the present Convention - by Article 37, in some cases contained provisions more beneficial to refugees than the corresponding provisions in the present Convention. The problem created in this case will be discussed below.

(6) The original English draft version of Article 5 referred to rights and benefits granted “... prior to or apart from this Convention”, whereas the French text contained the expression “droits et avantages accordés, indépendamment de la présente Convention.” In order to bring the two texts *au pair*, and because the words “prior to or” were felt to be redundant, they were deleted by the Conference. No change of meaning was intended.<sup>b</sup> “Apart from” obviously included past, present and future provisions.<sup>c</sup>

It seems that:

Article 5 only has in mind the rights and benefits granted to refugees as such; and does not concern itself with rights and benefits enjoyed by persons prior to their becoming refugees. If a person becomes *réfugié sur place* he acquires an entirely new status *vis-à-vis* the country where he finds himself, and he may hardly invoke Article 5 in order to preserve rights and benefits which he enjoyed before he became a refugee, e.g. most favoured nation treatment.

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<sup>b</sup> A.CONF. 2/SR. 5, p.

<sup>c</sup> Cf. Robinson, p. 80.

“Rights and benefits granted ... to refugees apart from this Convention” may result from international as well as municipal legal instruments. With regard to the latter, sufficient has been said above.

As we have seen in note 2 above a number of arrangements and conventions relating to the status of refugees were abrogated by Article 37 as between the parties to the present Convention. The meaning of this provision will be discussed in connection with that Article. Here it shall only be mentioned that certain of those Conventions contained rules more beneficial to refugees than the corresponding rules in the present Convention. For example, Article 3 of the 1933 Convention contained the rule of “non-refoulement” to a country of persecution which is also set forth in Article 33 (1) of the present Convention, but the former did not contain the exceptions to the rule which are found in Article 33 (2) of the present Convention. It seems fair to imply that Article 33 of the present Convention does not impair the absolute right of non-refoulement which a person who qualified as a refugee under the terms of the 1933 Convention could claim by virtue of Article 3 of that Convention, which means that Article 33 (2) is not applicable in his case.

## **ARTICLE 6**

### **THE TERM “IN THE SAME CIRCUMSTANCES”<sup>(1)</sup>**

**For the purpose of this Convention, the term “in the same circumstances”<sup>(2)</sup> implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee must be fulfilled by him with the exception of requirements which by their nature a refugee is incapable of fulfilling.<sup>(3)</sup>**

#### Comments

(1) The origin of this Article may be traced back to the Ad Hoc Committee. In its original version, it included also an explanation of the expression “same treatment [as] accorded to nationals,” but this was dropped by the Conference.

Unlike the other articles of the Convention, Article 6 is clearly of an interpretative nature and not laying down any obligation.

(2) The term “in the same circumstances” is used in the following articles of the Convention:

13 (movable and immovable property);

15 (right of association);

17 (wage-earning employment);

18 (self-employment);

19 (liberal professions);

21 (housing);

22 (public education).

Articles 13, 18, 19, 21 and 22 assimilate refugees to “aliens generally in the same circumstances,” whereas Article 15 and 17 refer to “nationals of a foreign country, in the same circumstances”.

(3) In most countries certain rights are only granted to persons satisfying certain criteria, for example with regard to age, sex, health, nationality, education, training, experience, personal integrity, financial solvency, marital status, membership of a professional association or trade union, or residence, even length of residence within the country or in a particular place. There may also be strict rules for proving that one possesses the required qualification, e.g. by way of specified diplomas or certificates.

Most of these requirements may be satisfied by a refugee just as well as by any other person (e.g. age, sex, health, etc.). In other respects the refugee may be at a disadvantage, at least for a time (e.g. length of residence in a particular place), need to have passed an examination at a university of the country in which he finds himself, etc. (but his refugee status does not prevent his overcoming the difficulty in due course). Finally there are some requirements which he as a refugee is unable to fulfil. Firstly, he is unable to produce a certificate of nationality. Secondly, he may be unable to document the examination he has passed and the experience he has gained in his country of origin.

It is the purport of Article 6 to help the refugee overcome difficulties of the last mentioned kind. Consequently, if for example the requirement for practising a certain profession is to have passed an enabling examination in the country of residence, the refugee must, like everybody else, prove that he has passed that examination. But if the requirement is simply that one must have graduated from some reputable university, and the refugee is unable to produce a certificate from the university in his country of origin where he graduated, he must be allowed to prove his possession of the required academic degree by other means than the normally required diploma.<sup>a</sup>

## **ARTICLE 7**

### **EXEMPTION FROM RECIPROCITY<sup>(1)</sup>**

**(1) Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.<sup>(2)</sup>**

**(2) After a period of three years' residence,<sup>(3)</sup> all refugees<sup>(4)</sup> shall enjoy exemption from legislative reciprocity<sup>(5)</sup> in the territory of the Contracting States.<sup>(6)</sup>**

**(3) <sup>(7)</sup>Each Contracting State shall continue to accord<sup>(8)</sup> to refugees<sup>(9)</sup> the rights and benefits<sup>(10)</sup> to which they<sup>(11)</sup> were already entitled,<sup>(12)</sup> in the absence of reciprocity,<sup>(13)</sup> at the date of entry into force of this Convention for that State.<sup>(14)</sup>**

**(4) <sup>(15)</sup>The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity,<sup>(16)</sup> rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3,<sup>(17)</sup> and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.<sup>(18)</sup>**

**(5) <sup>(19)</sup>The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in Articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.<sup>(20)</sup>**

## Comments

(1) Provisions to the effect that refugees should be exempted requirement of reciprocity are to be found in all the international instruments dealing with the status of refugees:

Article 4 of the Arrangement of 30 June 1928;

Article 14 of the 1933 Convention;

Article 17 of the 1938 Convention.

The present Article is the result of much discussion and several drafting changes in both the Ad Hoc Committee and the Conference of Plenipotentiaries.

The heading of the Article is "Exemption from Reciprocity." This may be a proper heading for paragraphs 2 to 5; but paragraph 1 is wider in scope, and in fact contains an omnibus

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<sup>a</sup> Cf. in this connection Article 25.

clause, extending to all kinds of rights, privileges and benefits enjoyed by aliens generally in the various countries, and which have not been specifically mentioned in the Convention.

(2) The omnibus clause contained in this paragraph is in a sense one of the most important of all the provisions of the Convention.

Still the *travaux préparatoires* do not contain any reference to the meaning of this provision, which appeared for the first time in the draft submitted by the Drafting Committee in the second session of the Ad Hoc Committee.<sup>a</sup> It passed through all instances without any comment at all.

The import of Article 7 (1) is twofold:

If aliens generally are enjoying certain rights, or benefits in any given country, refugees living in, visiting or dealing with that country shall be entitled to the same rights, or benefits.

It goes without saying that if a State is obliged by international law to accord a certain treatment to aliens generally, it cannot free itself from according such treatment to refugees by showing that it is falling short of its obligations towards other aliens. Thereby Article 7 (1) achieves great importance, particularly from a doctrinal point of view: it gives the refugees the full protection of international law. Whenever customary international law prescribes that aliens generally shall enjoy a certain treatment, refugees may by virtue of Article 7 (1) claim such treatment.

The minimum standard of treatment of aliens, the right to leave the territory of a State, the prohibition of confiscation of property without compensation and the general rule that aliens shall not be expelled without cause consequently all apply to refugees.

Refugees are not protected by the State from which they have fled, even if they may formally possess the nationality of that State. Article 7 (1) places, however, refugees on an equal footing with persons with an effective nationality, only with the difference that whereas the latter may be protected by their national State by virtue of customary international law; the Convention makes it a contractually recognized interest for the Contracting States to see that refugees get the treatment which is their due.<sup>b</sup>

The status of refugees in general is further ameliorated by virtue of the provisions contained in paragraphs 2, 3 and 5 of Article 7; see *infra*.

The expression "aliens generally" is not a well defined term. In the present context it seems to denote aliens who "could not claim the special treatment enjoyed by some foreigners under the condition of reciprocity",<sup>c</sup> or by virtue of municipal laws instituting preferential treatment of certain groups of aliens.<sup>d</sup>

(3) Whereas paragraph 1 applies to all refugees, whether they are resident in the territory of the Contracting State in question or not, and irrespective of their period of sojourn in that territory; paragraph 2 only applies to refugees who have been residing for three years in the territory of the Contracting State in question.

The calculation of the period of residence is subject to the provisions of Article 10.

Paragraph 2 does not provide for continuous residence. It is particularly clear that shorter trips abroad will not disqualify a refugee from the benefit of paragraph 2. If, however, a refugee moves his residence to another country and stays there for a protracted period, it is doubtful whether he may claim the benefit of paragraph 2 immediately upon his return to his former country of residence. This doubt seems to be particularly appropriate in the case of a

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<sup>a</sup> E/AC.32/L.42, pp. 2-3.

<sup>b</sup> To the same effect, Robinson p. 83.

<sup>c</sup> Cf. statement of Mr. Giraud of the UN Secretariat, E/AC.32/SR. 11, p. 6.

<sup>d</sup> Cf. Robinson p. 82 and note 24.



refugee who has stayed in a second country of residence for three years or more and thus has acquired the benefit of paragraph 2 in that country (if that country were a party to the Convention) before his return to his former country of residence.

(4) The Convention does not treat differently those refugees who are *de jure* stateless, and those who formally possess the nationality of their country of origin.

As the latter are not protected by their national State, they hardly are able to invoke treaties which might exist between their country of origin and their country of residence.<sup>e</sup> Actually, “all refugees should be treated as such whether they had a nationality or not”<sup>f</sup>

(5) In certain countries a number of rights and benefits may be enjoyed by aliens “subject to reciprocity. “The concept of reciprocity is rather simple in principle: if State B grants nationals of State A a certain benefit, State A grants in return the same benefit to nationals of State B. On the other hand, if State C refuses to grant the benefit in question to nationals of State A, the latter on its part refuses to grant the benefit to nationals of State C.

However, as soon as we leave the basic principle and turn to consider the practical implications, the matter becomes more confused:

The rule of reciprocity is invariably used as a means of improving the lot of one’s own nationals vis-à-vis foreign Governments. But the rights and benefits to which it is applied range from those which a State is prepared to grant to any alien - and any number of aliens - to those which it would only consider to grant to persons belonging to a State with which the former has particularly close ties.

In the first case the “refusal to accord national treatment to foreigners in the absence of reciprocity is merely an act of mild retaliation. The object is to reach, through the persons of the nationals concerned, those countries which decline to adopt an equally liberal regime”.<sup>g</sup> In the latter case, the issue is preferential treatment, which is not available to every alien whose Government is asking for it and offering reciprocity.

The discrimination exercised in the latter case may be based on a variety of considerations, from high politics, through popular sentiments, to the (absolute or relative) number of aliens involved.

Rights and benefits which a State basically is prepared to accord to any alien, may justly be claimed by refugees. It was pointed out by the Committee of Russian and Armenian Legal Experts already in 1928 and later repeated by various bodies: “Which country or which Government can be reached through the person of a refugee? Can the refugee be held responsible for the legislation of his country of origin? Clearly, the rule of reciprocity, if applied to refugees, is pointless and therefore unjust.”<sup>h</sup>

The same does not, however, apply to privileges granted especially to nationals of one or a few particular States, e.g. by virtue of a treaty of friendship or a regional arrangement as for example Benelux or between the Scandinavian countries. The above-mentioned Committee of Legal Experts was keenly aware of this difference, and consequently proposed that the rule of exemption from reciprocity “ne pourrait s’étendre aux privilèges résultant de la clause de la nation la plus favorisée”.<sup>i</sup>

However, the 1928 Arrangement which resulted, contains only a number of recommendations, and it was therefore thought proper only to state the main rule without any exception. By the entry into force of the 1933 Convention the rule of exemption from

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<sup>e</sup> A/CONF.2/SR.10, p. 6.

<sup>f</sup> E/AC.32/SR. 11, p. 5 (statement by Dr. Weis).

<sup>g</sup> E/AC.32/2, pp. 28-29.

<sup>h</sup> Ibid.

<sup>i</sup> League of Nations Doc. 1930. XIII. 1, p. 28.

reciprocity was converted into an international obligation, but three of the six States which were a party to that Convention made important reservations to the Article in question.

The phrasing of Article 7 (2) constitutes an attempt to restore a balance between those rights and benefits which a State may be prepared to grant to any alien (and where consequently the rule of reciprocity only is a means of achieving equal rights and benefits for one's own nationals abroad); those rights and benefits which are meant to be an exclusive privilege for certain foreign nationals.

The Conference of Plenipotentiaries chose to draw the dividing line between legislative reciprocity and other kinds of reciprocity, more particularly diplomatic or conventional reciprocity.

This distinction is altogether not very precise. In many countries rights and benefits are granted by way of legislation, irrespective of whether they are to be enjoyed by everybody or only by special categories of persons.

The relevant provisions may be differently worded: One law may provide that a certain right shall be accorded to any alien, provided, however, the State of which he is a national grants the same right to nationals of the State passing the law. Another law may set forth that the right in question may be extended to aliens on the condition of reciprocity. A third law may lay down that a certain right may be accorded to foreign nationals, provided an agreement securing the same right for one's own nationals is concluded with the foreign Government in question. A fourth law may simply state that a certain right shall (or may) be accorded to aliens, subject to reciprocity. A fifth law may provide that a certain right may be accorded to nationals of specified countries. In the latter case it will normally be clear that the legislator wants that the right in question shall be an exclusive privilege. But in the other cases, the difference in wording may be incidental, due to legislative practice or simply considerations of style.

The requirement of reciprocity may be satisfied, according to the circumstances, by way of a formal convention or treaty, an informal change of letters, or simply by establishing the fact that one's own nationals actually - by virtue of law or administrative practice - enjoy the right or benefit under consideration in a particular foreign country. If a certain foreign country grants national treatment to all persons in its territory, it may be sufficient to throw a look at its relevant law to see that the requirement of reciprocity is fulfilled. If, however, the foreign law also mentions reciprocity, it may be deemed desirable to ensure reciprocity by way of an exchange of letters or even a more formal international instrument. The reciprocity which is assured by the simple working of the foreign law must undoubtedly be classified as legislative. Where some kind of agreement is deemed necessary or at least desirable, there will be an element of conventional or diplomatic reciprocity. Still it is the same right, and it will be understood from this that "legislative reciprocity" and "diplomatic reciprocity" are not necessarily antitheses.<sup>1</sup>

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<sup>1</sup> The French delegate in the Ad Hoc Committee pointed to a peculiar complication which he thought feasible: "If a single country granted a favour to aliens by its legislation, reciprocity would be established. Must France grant that right to all refugees? She might be unable to accept such a result, in many types of cases, as it would lay intolerable burdens on her ... France was prepared to give refugees the treatment given to aliens generally, but she did not intend to give better treatment to refugees than that given to the majority of aliens" (E/AC.32/SR.34, p. 12). It seems that the French delegate overlooked the distinction between rights and benefits which a country is prepared to accord to all aliens, but *which* it makes subject to reciprocity in order to give other countries a motive to accord similar treatment to its own nationals; and rights and benefits which are meant to be the exclusive privilege of certain foreign nationals. If this distinction is made clear, the problem posed by the French delegate will hardly arise; in fact the refugees will probably be entitled to the right or benefit in question without being obliged to prove that reciprocity has actually been established with any foreign country. If this latter view should not be accepted, the reply to the French delegate's question must in any case be "Yes". It will be noted that he used the expression "aliens generally" in the sense of "the majority of aliens". This is not the sense in which the expression is used in the Convention. It would have been more relevant to speak of "aliens belonging to the majority of States". It is entirely feasible that "the majority of aliens" belong to a single foreign State with which a treaty of favoured treatment exists; in spite of their number those foreign nationals would not be "aliens generally".

The expression “legislative reciprocity” was undoubtedly meant to restrict the scope of Article 7 (2). The expression was introduced by the Belgian delegate at the Conference of Plenipotentiaries, and its meaning can best be understood by ascertaining what kinds of reciprocity he intended to exclude. He stated: “The Belgian Government could not agree to confer on refugees the rights which certain aliens enjoyed in Belgium by virtue of a bilateral treaty concluded between Belgium and another State. Belgium, in fact had signed a number of regional agreements, and would find it impossible to grant all refugees the benefits of the rights laid down therein without running the risk of placing herself in a difficult position“.<sup>k</sup>

It is also interesting to note the statement of the Belgian delegate in the Ad Hoc Committee, to the effect that exemption from reciprocity should only be granted “in cases where the right or privilege in question was granted solely as a result of an international agreement between two countries . . . (it should only refer) to internal laws and regulations whereby all foreigners were granted certain rights subject to reciprocity”.<sup>l</sup>

It may be concluded that the expression “legislative reciprocity” excludes refugees from rights and benefits which are granted for the purpose of placing nationals of particular foreign States in a privileged or favourable position, e.g. within the framework of regional arrangements, alliances, treaties of friendship, etc.

The choice of the word “legislative” further suggests that in cases of doubt, one may put emphasis on the origin of the right or benefit in question. If the origin is found to be in an internal law, so that the international agreements concluded to ensure reciprocity may be considered merely as means to give effect to the provisions of the law, it will probably be correct to talk of “legislative reciprocity”.

On the other hand, if the right or benefit stems from a bilateral treaty or a convention between a limited number of countries it will probably be right to consider them as falling outside the scope of “legislative reciprocity.” This seems particularly true in the case of treaties which secure rights and benefits for nationals of the Contracting States within a greater contractual framework, e.g. a regional arrangement or an alliance. It may also be a test whether the treaty is open to accession by a great or even unrestricted number of States, in which case the exclusive character of the rights and benefits for which it provides may be hard to prove (cf. statement by the U.S. delegate).<sup>m</sup>

Finally, the nature of the rights and benefits in question may serve as a guide. If they are such which in a majority of countries are granted to aliens on some condition or other, it seems natural to classify the reciprocity which may be required in any particular country as “legislative reciprocity. “The same must apply to the right or benefit in question is guaranteed by a widely accepted convention, e.g. some ILO Convention.

On this test, it would seem that industrial property rights, copyright, right of succession, social security benefits must nowadays be considered as subject only to legislative reciprocity. On the other hand, a right to enter a country without visa must obviously be considered as subject to diplomatic or conventional reciprocity, and the same would as a rule seem to apply to compensation for war damages and war pensions.<sup>n</sup>

(6) Considering that the paragraph only applies to refugees who have completed a period of three years’ residence, the addition of the words “in the territory of Contracting States” is of no special significance.

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<sup>l</sup> E/AC.32/SR.23, p. 4.

<sup>m</sup> E/AC.32/SR.34, p. 16.

<sup>n</sup> E/AC.32/SR.41, P. 6.

(7) The origin of Article 7 (3) may be traced back to the French proposal for a Draft Convention.<sup>o</sup>

Article 5 and Article 7 (3) are to a certain extent overlapping. However, the drafters of the Convention apparently were desirous to state in one and the same Article under what circumstances and conditions refugees should be exempt from the requirement of reciprocity.

There are some noteworthy differences between Article 5 and Article 7 (3):

- (1) Whereas Article 7 (3) contains a firm undertaking to “continue to accord” to refugees the rights and benefits to which it applies, Article 5 is only in the form of a guide to the interpretation of the provisions of the Convention.
- (2) The scope of Article 5 is, however, perhaps wider than originally envisaged because it *inter alia* ameliorates treatment provided by the omnibus clause in Article 7 (1). Unlike Article 7 (3), Article 5 is not limited to rights and benefits existing at a certain date, namely that of entry into force of the Convention for the State in question, and because it is not limited to rights and benefits accorded to refugees “in the absence of reciprocity”. Just like Article 5, Article 7 (3) must be considered when interpreting Article 37.

(8) This phrasing indicates that Article 7 (3) lays down a binding obligation. Its purport is to safeguard the rights and benefits which were available to refugees at the time of entry into force of the Convention for the State in question, in particular those granted under agreements which exempt refugees from the requirement of reciprocity (e.g. 1933 and 1938 Conventions).

(9) Unlike paragraph 2 the present paragraph does not refer to “all refugees”, and for a good reason.

It goes without saying that the word “refugee” is used in paragraph 2 in the sense of Article 1; nevertheless the preceding phrase “continue to accord” indicates that paragraph 2 only applies to those categories of refugees which were entitled to some right or benefit at the date of entry into force of the Convention for the State concerned.

It follows that Article 7 (3) makes it possible to discriminate between various categories of refugees, notably “old” (or statutory) and “new” refugees, and to maintain distinction in laws, etc. which are older than the Convention, even if this on the face of it would contravene the provisions of Article 3.

(10) The paragraph refers to all kinds of rights and benefits, irrespective of whether they have been established by international agreement (treaty, convention) (to this extent Article 7 (3) prejudices Article 37), by municipal law, or by administrative practice.

(11) Foremost in the mind of the drafters of the Convention was a desire to safeguard the status which was acquired by those refugees who fell under the terms of the previous Arrangements relating to the status of refugees, notably the 1933 and 1938 Conventions.

However, Article 7 (3) is not restricted to those categories of refugees, but applies to all refugees who enjoyed rights and benefits of some kind or other “in the absence of reciprocity” at the time when the present Convention entered into force for the State concerned.

It depends on the terms of the individual treaty, law or administrative act who “they” are, who are entitled to the right or benefit in question. If, for example, a law accords a right to Russian, Armenian or assimilated refugees, to whom the 1933 Convention applied, and/or to refugees from Germany as defined in the 1938 Convention and the 1939 Protocol, it is only refugees belonging to those categories who may invoke Article 7 (3) with regard to the right in question. The same applies, *mutatis mutandis*, if the law accords a right to some

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<sup>o</sup> E/AC.32/L.3, P. 4.

other category of refugees, e.g. to refugees who arrived in the country before a certain date. If, on the other hand, a law, according to its own wording or the interpretation given to it, applies to all who reasonably may be described as refugees, then all Convention refugees must be able to insist that the State continues to accord the right to them.

At the other extreme, if a benefit is accorded to an individual refugee by an administrative act, only he (and possibly his successors) will be able to insist on that benefit. It may be denied to all newcomers.

(12) It is often difficult to determine who is entitled to a right or benefit, and who is not.

If the law of a State before the entry into force of the Convention accorded national treatment to refugees in some respect or other, it is certain that those refugees who had taken advantage of the provision and actually enjoyed the right or benefit in question, may insist that the right or benefit cannot be taken away from them.

For all other refugees, however, the right which the law accorded, was not an acquired right, but merely an eventual right. If the provision assimilating refugees to nationals was repealed, the immediate well-being of those refugees who had not already taken advantage of the law would hardly be affected. In spite of this, it might, however, mean a serious setback for them, and it might certainly change their status and their prospects considerably (e.g. an absolute prohibition of refoulement to country of origin (cf. Article 3 of 1933 Convention); right to engage in liberal professions on equal footing with nationals).

Unlike Article 12 (2) the present paragraph does not speak of "rights previously acquired by a refugee", and it seems most reasonable to assume that Article 7 (3) actually prohibits the repeal of provisions giving rights to refugees "in the absence of reciprocity." The phrase "continue to accord", which indicates a continual process of granting rights and benefits, seems also to warrant this interpretation.

In other words, Article 7 (3) is based on the presumption that once a right for refugees has been enacted, the refugees who fulfil the legal requirements are "entitled" to that right, irrespective of whether they have taken advantage of the law or not.

One has, however, to abide by the conditions laid down in the treaty, law or regulation establishing the right. If it is said or understood that the right shall be a temporary one, or that the provision is subject to revocation at any time, the right is clearly a precarious one, if a right in the strict sense of the word at all.

One may have to distinguish between the revocation of the provision extending a right to refugees, and the abrogation or repeal of the entire treaty, law or regulation, which would mean that nationals would lose the right also. It may be held that in certain cases the latter may be permissible, while the former is not. After all it is not the purpose of the Convention to give refugees a position so sheltered that it will interfere with the general legal policy of the State concerned.

(13) As pointed out supra, it is not possible to apply the requirement of reciprocity to refugees, on the grounds that the treatment to which they are subjected is not likely to influence the Government of their country of origin, and that they are not in a position to invoke treaties which might exist or be concluded between their country of origin and the country of asylum.

When the present paragraph speaks of rights accorded "in the absence of reciprocity" it clearly refers to such rights which normally only are granted to aliens subject to reciprocity, but where the State concerned unilaterally, or by virtue of some international arrangement - has decided to accord to refugees as well.

(14) Article 43 determines the date of entry into force of the Convention.

Article 7 (3) does apparently not prohibit the revocation of rights and benefits in the period of ninety days between the deposit of the instrument of ratification and the entry into force of the Convention for the State concerned.

(15) Unlike the preceding paragraphs, which lay down substantive, although perhaps somewhat ambiguous, obligations, Article 7 (4) only obliges the Contracting State to “consider favourably the possibility” of giving refugees rights and benefits beyond those which are guaranteed by paragraphs 2 and 3.

Because there is not question of already existing rights and benefits as in paragraph 3, it is clear that paragraph 4 must be applied subject to the rule of non-discrimination which has been laid down in Article 3.

(16) See note 13 above.

(17) This refers to rights and benefits which are normally granted to aliens by virtue of more or less exclusive treaty provisions ..., and to rights and benefits to which refugees were not entitled at the relevant date.

(18) Refugees who do not fulfil the conditions provided for in paragraphs 2 and 3 are those who have not completed a period of three years’ residence in the country concerned, or who were not entitled to specific rights or benefits at the date of entry into force of the Convention for the State concerned.

If a State finds it possible to give full effect to the recommendations contained in paragraph 4, it will be tantamount to giving all Convention refugees the treatment which otherwise is reserved for most favoured foreign nationals.

(19) Article 7 (5) contains a substantive provision. The rights and benefits referred to in Articles 13, 18, 19, 21 and 22 are the following:

Art. 13: Acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property;

Art. 18: Right to engage on one’s own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies;

Art. 19: Right to practice a liberal profession;

Art. 22 (2): Education other than elementary education.

In all these fields the Convention provides that refugees shall be accorded “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”<sup>p</sup>

This provision institutes an upper and a lower limit for the obligations of the Contracting States.

The meaning of the upper limit (“treatment as favourable as possible”) shall be discussed elsewhere.

In the present context it is important to note that Article 7 (5) ameliorates the treatment due to refugees with regard to the rights and benefits mentioned in Articles 13, 18, 19, 21 and 22 (2) by raising the lower limit.

As we have seen above the “treatment accorded to aliens generally” is that which is accorded to ordinary aliens who are not receiving any benefits based on reciprocity.

The import of Article 7 (5) is that it makes it clear beyond doubt that if a refugee has completed “a period of three years’ residence”, (cf. paragraph 2), he shall not be treated in

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<sup>p</sup> There was much discussion in the Ad Hoc Committee as to whether the exemption from reciprocity clause applied only to rights and benefits not mentioned in the Convention; or only to rights and benefits which are mentioned in the Convention, and in the latter case, whether it applied to those provisions which assimilate refugees to aliens generally, or to those which provide for most favoured treatment; or if it applied to several of these categories (cf. E/AC.32/SR. 11, p. 2 ff.; E/AC.32/SR.23, pp. 2 ff.; (particularly statement by Dr. Weis, p. 4); E/AC.32/5 (E/1618), pp. 41-42; E/AC.32/L.40, pp. 32-36; cf also memorandum of the Committee of Russian and Armenian Legal Experts, League of Nations Doc. 1930 XIII 1, pp. 21 ff.). Article 7 (5) resolves this problem.

the same way as “aliens generally” but enjoy exemption from legislative reciprocity. Similarly, if refugees were entitled to rights or benefits in the territory of a Contracting State at the date of entry into force of the Convention for that State, the State concerned shall continue to accord them those rights or benefits.

In other words, Article 7 (5) substitutes the treatment provided for in paragraphs 2 or 3 for the “treatment accorded to aliens generally” with respect to those rights and benefits which are mentioned in Articles 13, 18, 19, 21 and 22 (2).<sup>9</sup>

(20) The phrase “rights and benefits for which this Convention does not provide” is not quite accurate. What is meant are “rights and benefits which are not specifically mentioned in this Convention”, because, as we have seen, Article 7 (1) provides for rights and benefits of any description which are not specifically mentioned in other Articles of the Convention.

The import of Article 7 (5) is the same with regard to these rights and benefits as with regard to those mentioned in Articles 13, 18, 19, 21 and 22 (2); that is to say if the conditions of paragraphs 2 or 3 are fulfilled, the Contracting States are, in every respect obliged to give Convention refugees the treatment for which those paragraphs provide, and not only that due to “aliens generally.”

## **ARTICLE 8**

### **EXEMPTION FROM EXCEPTIONAL MEASURES<sup>(1)</sup>**

**With regard to exceptional measures<sup>(2)</sup> which may be taken against the person, property or interests of nationals of a foreign State<sup>(3)</sup> the Contracting States shall not apply such measures to a refugee<sup>(4)</sup> who is formally<sup>(5)</sup> a national of the said State solely on account of such nationality.<sup>(6)</sup> Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article,<sup>(7)</sup> shall,<sup>(8)</sup> in appropriate cases,<sup>(9)</sup> grant exemptions in favour of such refugees.**

#### Comments

(1) Whereas Article 7 has as its basis the fact that refugees are unprotected persons who cannot enjoy rights and privileges which are due to certain aliens by virtue of treaties, etc. based on a condition of reciprocity, and therefore aims at finding another basis for refugees to enjoy the rights and benefits in question (exemption from reciprocity); Article 8 takes note of the fact that many refugees after all formally possess the nationality of the country from which they have fled, and therefore may be subjected to certain measures imposed on nationals of that country, particularly in times of war or international tension. It aims at exempting refugees from such unwanted effects of a nationality which at best is in effective.

A provision similar to the one contained in Article 8 is not found in the earlier Arrangements and Conventions relating to the status of refugees.

However, during and after the Second World War, many refugees who had been persecuted by the Governments of the Axis countries were subjected to exceptional measures taken in the Allied countries against 41 enemy nationals” (e.g. internment, sequestration of property, blocking of assets) because of the fact that formally (de jure) the refugees in question were still nationals of the Axis countries. The injustice of such treatment was finally recognized and many administrative measures (screening boards, special tribunals, creation of a

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<sup>9</sup> It is noteworthy that Article 26 is not mentioned in the enumeration of Articles in paragraph 5. Article 26 guarantees freedom of movement “subject to any regulations applicable to aliens generally in the same circumstances.” The omission of Article 26 is hardly accidental, because considerations of national security may be involved. The position of refugees in this respect is, however, ameliorated by virtue of Articles 8 and 9 (cf. Robinson p. 89)

special category of “non-enemy” refugees, etc.) were used to mitigate the practice followed in the first years of the war.<sup>a</sup>

The diplomatic Conference held at Geneva in 1949 included the following provision as Article 44 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War:

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.<sup>b</sup>

The Secretary-General of the United Nations stated to the Ad Hoc Committee, that “if this rule is to be applied in time of war, a similar rule must a fortiori be applied in time of peace” and he therefore proposed for inclusion in the Refugee Convention a provision to the effect that any exceptional measures which a High Contracting Party may be called upon to take against the person, property or interests of nationals of a foreign State, shall not be applied to refugees who are de jure nationals of the said State, solely on account of the fact that they belong legally to that State.<sup>c</sup>

It will be seen that this is in fact the provision which is found in the first sentence of Article 8. The original proposal was subjected to certain drafting changes but got its final form already in the first session of the Ad Hoc Committee.<sup>d</sup>

During the discussion of this provision in the Ad Hoc Committee it became apparent that it was felt desirable for States to make an exception to the rule, with regard to “time of war or other grave and exceptional circumstances.” It was, however, agreed to make this exception the object of a separate Article (Article 9).

The second sentence of Article 8 was added in the Conference of Plenipotentiaries after a prolonged and seemingly confused discussion.<sup>e</sup> According to the President of the Conference, the main difference between the provisions contained in the first and second sentence respectively was “whether the [non -] application of certain measures should be ensured by means of automatic legislation or by means of exemption. In either case the obligations of the State would be the same”.<sup>f</sup> The representative of France went even further in stating “that the last clause of Article 8 was very far from suggesting measures of an illiberal nature. It laid upon the States the obligation to grant certain exemptions at times when they were unable to observe the general principle enunciated in the article”.<sup>g</sup>

(2) The “exceptional measures” which the drafters had in mind were above all such measures which during and after hostilities are applied to enemy nationals: internment, sequestration of property, blocking of assets, etc.<sup>h</sup> Within the same category come such measures as restrictions on movements, prohibition of possessing radio sets, debarring from certain occupations.

However, it was made plain that the Article also applies to measures taken in peace-time, e.g. during crises of a non-military type (economic or financial crises),<sup>i</sup> or retaliation and

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<sup>a</sup> UN Doc. E/AC.32/2: Arts 25.

<sup>b</sup> The IRO had been introducing this provision.

<sup>c</sup> UN Doc. E/AC.32/2: Art. 25.

<sup>d</sup> UN Doc. E/AC.32/5 (E/1618): Art.5.

<sup>e</sup> UN Doc. A/CONF.2/SR.27, pp. 30 ff.; SR.28 pp. 5 ff.; SR.34 pp. 18 ff.; SR.35, pp. 4-5.

<sup>f</sup> UN DOC. A/CONF.2/SR.34, p. 19.

<sup>g</sup> UN Doc. A/CONF.2/SR.34, p. 20.

<sup>h</sup> Cf. UN Doc. E/AC.32/2: Comment to draft article 25.

<sup>i</sup> UN Doc. E/AC.32/SR.35, p.



retortion against subjects of States with which a temporary disagreement exists, for example over the payment of a substantial sum as damages.<sup>j</sup>

Some of the measures considered may have a hearing on national security (e.g. internment restriction on movements), while others have nothing to do with national security (e.g. measures relating to enemy property).<sup>k</sup> Measures of the former category are subject to the provisions of Article 9, those of the latter category not.

(3) Article 8 only applies to measures “which may be taken against the person, property or interests of nationals of a foreign State”.

The reference to “nationals of a foreign State” considerably restricts the applicability of the Article. It does not apply to measures which may be taken against stateless persons as such, or against aliens generally not to speak of measures which are directed at one’s own nationals and aliens without discrimination.

Article 8 does not mention former nationals of a foreign State. If, however, measures are taken against persons solely because they are, have been (at any time) or are suspected of being nationals of a certain State, it goes without saying that the case will fall within the scope of Article 8.<sup>l</sup>

(4) There can be no doubt that the Article applies to all Convention refugees, irrespective of whether they are present in the territory of the Contracting State concerned, and irrespective of the duration and character of their presence (legal or illegal). Consequently country A may not apply exceptional measures (for example sequestration of property) to a refugee from country B who has found asylum and is living in country C.

There was some confusion in this respect among the drafters. It was thus mentioned by one delegate that the Article referred to “refugees already in the country and regarding whom enquiries had already been made”,<sup>m</sup> that in fact it “concerned refugees who had the status of refugees, and who had lived for months or years in the countries where they were to be found, and whose antecedents had been amply investigated. Any suspicious element among such refugees would constitute a small minority, and there would have been time to discover it. In others words, [the] article ... concerned refugees with the status of refugees, not candidates for that status”.<sup>n</sup> The wording of Article 8 lends no support for this assertion. It was rightly pointed out that the dateline in Article I does not prevent late arrivals from claiming refugee status.<sup>o</sup> Furthermore the case of “suspicious elements” or persons who are not “bona fide” refugees<sup>p</sup> is subject to the provisions of Article 9.

(5) The word “formally” means “legally” or “de jure”, that is to say “according to the municipal law of the State concerned”.<sup>q</sup>

(6) The proviso “solely on account of such nationality” restricts further the scope of Article 8.

If, for example, a refugee, in spite of his genuine fear of persecution by the regime in power in his country of origin, contributes or has contributed to the war effort of that country, or otherwise carries on or has been participating in activities which the measure in question aims at suppressing, this may justify the application of the measure in his case. It was, in

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<sup>j</sup> UN Doc. E/AC.32/SR.21, p.

<sup>k</sup> UN Doc. A/CONF.2/SR.28, pp. 4 ff.

<sup>l</sup> Cf. UN Doc. E/AC.32/SR.35, p.

<sup>m</sup> UN Doc. E/AC.32/SR.34, p.

<sup>n</sup> UN Doc. E/AC.32/SR.35, p.

<sup>o</sup> UN Doc.

<sup>p</sup> UN Doc. E/AC.32/SR.34, p.

<sup>q</sup> Cf. UN Doc. E/AC.32/SR.35, p.

fact, firmly stated at the Conference of Plenipotentiaries that the Contracting States “would be at liberty to advance a variety of reasons, other than that of nationality, why refugees should be subjected to the measures in question”.<sup>f</sup>

(7) The second sentence of Article 8 was adopted by the Conference following a Swedish proposal<sup>g</sup>; which “was designed to meet the case of legislative systems similar to that of Sweden”<sup>t</sup>: The Convention as such would not become municipal law in Sweden, and it could not be ratified by the Swedish Parliament without the prior introduction of a bill bringing domestic legislation into line, where necessary, with the provisions of the Convention.<sup>u</sup> It might not be appropriate to introduce any amendment to the enemy property legislation, but as the decision whether that legislation should be brought to bear on a particular individual would as a rule rest with the Government, it might be possible to grant exemptions in favour of refugees without amending the law.

A Contracting State is “prevented” [under its legislation] from applying the general principle expressed in this article” if the relevant law does not expressly exempt refugees from the working of the law.

(8) If that is the case, the State must grant exemptions in favour of refugees.

The Conference posed the questions whether the word “shall” should be interpreted as being mandatory or permissive and came out firmly in favour of the first interpretations.<sup>v</sup> With regard to substance if not to form, the obligations of the Contracting States would be the same whether they based themselves on the first or the second sentence.<sup>w</sup>

(9) The expression “in appropriate cases” may seem vague, but in view of what is said supra under 8, it seems clear that it refers to any and all cases where measures are taken against aliens solely on account of their nationality.

## **ARTICLE 9**

### **PROVISIONAL MEASURES<sup>(1)</sup>**

**Nothing in this Convention<sup>(2)</sup> shall prevent a Contracting State, in time of war or other grave exceptional circumstances<sup>(3)</sup> from taking provisionally<sup>(4)</sup> measures which it considers to be essential to the national security<sup>(5)</sup> in the case of a particular person,<sup>(6)</sup> pending<sup>(7)</sup> a determination by the Contracting State<sup>(8)</sup> that that person is in fact a refugee<sup>(9)</sup> and that the continuance of such measures is necessary in his case in the interests of national security.<sup>(10)</sup>**

## Comments

(1) The origin of this Article may be traced back to a United Kingdom proposal in the Ad Hoc Committee.<sup>a</sup> The proposal was intended to allow derogation from the provision contained in Article 8 in case of war or other national emergency<sup>b</sup> but the scope of the proposal was soon widened to encompass all the provisions of the Convention.<sup>c</sup>

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<sup>f</sup> UN Doc. A/CONF.2/SR.27, pp. 31-32.

<sup>g</sup> A/CONF.2/37.

<sup>t</sup> A/CONF.2/SR.27, pp. 28-29.

<sup>u</sup> A/CONF.2/SR.28, P. 8.

<sup>v</sup> A/CONF.2/SR.34, pp. 19 ff.

<sup>w</sup> Loc. cit.

<sup>a</sup> E/AC.32/SR.21.

<sup>b</sup> E/AC.32/L.40: Art. 5.

<sup>c</sup> E/AC.32/SR.34.

From a doctrinal point of view, Article 9 is particularly interesting in view of what it does not expressly say. An antithetic interpretation inevitably leads to that the Convention is to be applied not only in normal peace time, but also in time of war or national emergency, and that in the latter case the Contracting States may only derogate from the provisions of the Convention within the limits of the present Article.

(2) Article 9 does not apply only to the provisions contained in Article 8, but qualifies all the provisions of the Convention. It is particularly important with regard to Articles 5, 15, 26, 28 and 31, that is to say provisions which may have a bearing on national security, and where the measures a government may take will not be irrevocable (as they may easily be if resort is taken to expulsion or reconduction, cf. Articles 32 and 33, which, however, allow the measures mentioned therein to be taken on grounds of national security).

(3) War may be declared or undeclared. The expression implies open conflict between the armed forces of the Contracting State and those of one or more other countries.

The expression "other grave and exceptional circumstances" suggest conditions bordering on war, e.g. a state of neutrality in a conflict between important or neighbouring countries; a period when the State is threatened with armed aggression by another State, or the existence or threat of civil war.

If one only is aware of the fact that the Article only applies to such serious conditions, a complete enumeration of circumstances is not essential. There are other important provisions (infra: notes 4, 5, 6 and 9) which delimitates the applicability of Article 9.

(4) The Article authorizes two kinds of measures: short-time measures and measures of greater consequence. We shall here deal with the former category; while the latter will be discussed infra sub 9.

The word "provisionally" indicates that the measures envisaged should be temporary ones, but that they on the other hand may be taken without full knowledge of all relevant facts, that is to say, they may be taken on the basis of suspicion and not only full proof.

On introducing his proposal, the United Kingdom delegate recalled "the critical days of May and June 1940, when the United Kingdom had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them".<sup>d</sup> The United Kingdom "had deemed it necessary to intern most enemy aliens, whether claiming to be refugees or not ...,"<sup>e</sup> "simply because they were enemy aliens, after internment they had been screened and within a year only a very small proportion of them had remained in detention".<sup>f</sup>

However, it is not merely a question of internment: in time of war or other emergency certain aliens may be forbidden to have cameras or wireless apparatus, to reside in certain districts, etc. However, with regard to refugees, even such measures must only be applied provisionally, that is to say pending investigation for reasons of security.<sup>g</sup>

(5) Once the situation envisaged in Article 9 ("war or other grave circumstances") exists, the Convention leaves it to the Contracting State concerned to decide for itself whether any particular measure is essential to its national security.

However, the words chosen indicate that one may not resort to any measure which for some far-fetched reason may be considered desirable with a view to a marginal aspect of national security. The Contracting State must act in good faith and only apply measures which it really finds essential for the maintenance of its national security.

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<sup>d</sup> E/AC.32/SR.21.

<sup>e</sup> E/AC.32/SR.32.

<sup>f</sup> E/AC.32/SR.35.

<sup>g</sup> E/AC.32/SR.34.

“National security” is a rather well-defined term. It is used in a number of international agreements, e.g. the 1933 and 1938 Conventions and the European Convention on Establishment. The term and its equivalent (“sécurité nationale”, “Staatsicherheit”, “rikets sikkerhet” etc.) are also used in municipal laws and touched upon in decisions by international as well as national tribunals.

Anything which threatens a country’s sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations may be construed as a threat to “national security”.<sup>h</sup>

Such a threat may - or may not - constitute a crime.

The concept of “national security” will be discussed in greater detail in connection with Article 32. (6) The United Kingdom representative in the Ad Hoc Committee proposed an article to the effect that “a Contracting State may at a time of national crisis derogate from any particular provision of this Convention to such extent only as is necessary in the interests of national security” or, alternatively, that “at a time of national crisis a Contracting State may apply provisionally any such measure (as is mentioned in Article 8) to a refugee on account of his nationality until it is determined that the measure is no longer necessary in the interests of national security.”<sup>i</sup>

The Committee felt that the first alternative was drafted in too wide terms, and it decided in favour of a provision more along the lines of the second alternative. The expression “a refugee” was changed into “any person”<sup>j</sup>, which in turn was amended by the Conference to “a particular person”, the meaning clearly being to restrict the applicability of provisional measures to individual persons, thus ruling out large scale measures against groups of refugees.<sup>k</sup>

It follows that provisional measures may only be applied in cases where there is some, however vague, reason for suspecting a particular person as being a threat to national security.

The scope of Article 9 is somewhat obscured by the use of the word “person” and the proviso “pending a determination ... that that person is in fact a refugee.” The Convention only applies to refugees as defined in Article 1, and it is clear that it does not place any obligation on the Contracting States with regard to persons who are not refugees. The word “person” in Article 9 must therefore mean a person who claims to be a refugee, who prima facie is a refugee, or whom there is reason to believe is a refugee.

(7) The word “pending” stresses the provisional character of the measures envisaged in Article 9. It is only for the period which is necessary for the investigation of the person in question that provisional measures may legally be applied.

(8) This makes it clear that it is the Contracting State concerned which itself will have to determine whether a particular person is entitled to enjoy the benefits of the Convention, including the freedom from restrictive measures which Article 9 in fact lays down.

The word “determination” suggests something more than a preliminary finding - cf. note 6 supra.

(9) The determination envisaged in Article 9 has a twofold scope: it regards both the refugee character of the person concerned, and whether he represents any danger to the national security.

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<sup>h</sup> Cf. Bourquin 16 RCH pp. 127-128.

<sup>i</sup> E/AC.32/SR.35; E/AC.32/L.41.

<sup>j</sup> E/AC.32/8 (E/1850).

<sup>k</sup> Such measures may, however, be permissible by virtue of Article 31 (2), with regard to newly arrived refugees. Cf. also Article 26.

However, the screening will not in all cases have this double purpose:

Provisional measures may in certain circumstances be applied not only to persons whose refugee status had not been determined, but also to persons who have actually been recognized as refugees. In the latter case, it is hardly the meaning of Article 9 to provide for a complete review of the eligibility of the person concerned - it can at the most be an enquiry as to whether the refugee status has been fraudulently obtained or whether any of the cessation clauses in Article 1, C applies.

In the case of an already recognized refugee the determination provided for in Article 9 will consequently largely depend on the requirements of national security.<sup>l</sup>

If it is found that a person is in fact not a refugee, it is clear that he does not benefit from the provisions of the Convention, and it is not - as far as the Convention is concerned - necessary to go into the question whether the measures in question may be necessary in the interests of national security.

(10) This finding is - as explained in note 9 - only necessary if the person in question is in fact a refugee.

“Such measures” are “measures which (the State concerned) considers to be essential to the national security”,<sup>m</sup> and the provision that the State must find “the continuance ... necessary” clearly places a considerable onus on the State concerned. Mere convenience is no necessity. In order to continue such measures, the State concerned must feel convinced that its national security will be prejudiced if it ceases to apply certain measures to an individual concerned, e.g. because they fear that the refugee concerned will let his feeling of allegiance to his country of origin precede his fear of being persecuted by the regime in power there, or because there is serious reason to believe that he may be willing to serve as an enemy agent to avoid a threat to close relatives whom he has left behind.

The necessity must have a bearing on national security. If the measure is deemed desirable or even necessary for any other purpose (e.g. public order, enemy property legislation), the continuance of the measure is not warranted by Article 9.

The reference to “his case” rules out en bloc measures against refugees.

## **ARTICLE 10**

### **CONTINUITY OF RESIDENCE(1)**

**1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.**

**2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.**

### Comments

(1) During the Second World War (1939-1945) millions of persons were forcibly displaced by the Axis Powers. They were removed from their own country and brought either to Germany or to some other territory under German control, as prisoners of war, political prisoners, forced labourers, evacuees, etc.

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<sup>l</sup> See note 10 infra.

<sup>m</sup> Note 5 supra.

The international community has taken steps to prevent a repetition of such forced movements, notably with regard to civilians. Article 49 (1) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 provides that “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”.

The only exception to this rule is that the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. However, such evacuations may not involve the displacement of protected persons outside the boundaries of the occupied territory except when for material reasons it is impossible to avoid such displacement. The evacuated persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased (Article 49 (2)).

According to Article 49 (6) of said Geneva Convention the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

The drafters of the Refugee Convention found it important to include in the present Convention a provision which would remedy some of the ill-effects of the forced displacements which had taken place during the Second World War.

It was pointed out in the Secretariat draft that “a number of provisions in the preliminary draft make the enjoyment of certain rights subject to the condition of regular [or even uninterrupted] residence. In order to eliminate any doubts regarding the case of displaced persons, that is to say persons introduced by force into another country, it should be expressly laid down that the time spent in the country to which they were deported is reckoned as regular residence”.<sup>a</sup>

This is the situation dealt with in the first paragraph of Article 10. The second paragraph refers to a different situation. It happened that persons (inter alia pre-war refugees) were forcibly removed from their country of residence during the war, and returned to that country only after the end of hostilities. For them it was important that the period before and after such enforced displacement should be regarded as one uninterrupted period of residence.

Articles 6, 7 (2) and 17 (2) (a) contain references to periods of residence. Article 10 also applies to requirements as to length of residence laid down in other international agreements or in municipal laws and regulations, e.g. with regard to naturalization, self-employment or the exercise of liberal professions.<sup>b</sup>

The provisions contained in Article 10 are clearly of a transitional nature. It was understood that paragraph 1 applied “on condition that the person concerned had been authorized to reside regularly after the end of the war”.<sup>c</sup> Paragraph 2 only applies to refugees who have returned to the territory of the State concerned “prior to the date of entry into force of this Convention”.<sup>d</sup> This expression is at variance with the one used in Article 7 (3), which refers to “the date of entry into force of this Convention for that State”, and it may therefore safely be presumed that Article 10 (2) refers to the date when the Convention as such entered into force, that is to say 22 April 1954. As nearly a decade has passed since that time, and as there is hardly any right of importance which is conditioned on uninterrupted residence of more than 10 years, Article 10 may now on the whole be considered as obsolete, and we may therefore refrain from a detailed analysis of its provisions.

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<sup>a</sup> E/AC.32/2, p. 52: comment on Article 29 in the Secretariat draft.

<sup>b</sup> Cf. E/AC.32/SR.22, p. 7; A/CONF.2/SR.7, pp.4-5; A/CONF.2/SR.10, p. 7.

<sup>c</sup> E/AC.32/SR.22, p. 6.

<sup>d</sup> Cf. A/CONF.2/SR.7, pp 4-5.

## **ARTICLE 11**

### **REFUGEE SEAMEN<sup>(1)</sup>**

**In the case of refugees regularly serving as crew members<sup>(2)</sup> on board a ship flying the flag of a Contracting State, that State<sup>(3)</sup> shall give sympathetic consideration<sup>(4)</sup> to their establishment on its territory<sup>(5)</sup> and the issue of travel documents to them<sup>(6)</sup> or their temporary admission to its territory<sup>(7)</sup> particularly with a view to facilitating their establishment in another country.**

#### Comments

(1) The provisions of this Article were included in the Convention on the suggestion of the International Labour Organisation. The question of refugee seamen had been brought to the notice of that Organisation by the International Refugee Organization, and was subsequently studied by ILO's Joint Maritime commission, which adopted a resolution which was later approved by the Governing Body of ILO. Under that resolution the Director-General of ILO had been instructed to bring the matter to the notice of the High Commissioner for Refugees and of Governments, urging them to take measures to alleviate the situation of refugee seamen.

The matter was raised at the Conference of Plenipotentiaries in connection with issue of travel documents, but the Conference saw that the issue was wider than that dealt with in Article 28, and it was agreed to make the matter the subject of a separate Article.

The situation of refugee seamen has subsequently been greatly improved by the Hague Agreement relating to Refugee Seamen of 23 November 1957 which came into force on 27 December 1961 and to which a number of the more important seafaring nations are parties. It is noteworthy that the Preamble specifically refers to Article 11 of the Refugee Convention.

(2) The original draft provision submitted by the International Labour Organisation referred to refugees who are bona fide seafarers.<sup>a</sup> There was, however, some doubt as to the meaning of this expression. The question whether it meant that the refugee in question had to be a sailor by profession, was left unanswered.<sup>b</sup> It was, however, emphasized at the outset that the "provision was, of course, intended to benefit only genuine seamen and not refugees who were escaping by sea from their country".<sup>c</sup>

This rules out the stowaways from the application of the Article. On the basis of a liberal interpretation of Article 11, it would seem justified to exclude persons who are escaping by sea and are given work to earn their passage to a port where they may be disembarked. The same probably applies even if the escapee is given the status of an enlisted seaman for the duration of the voyage. However, it is noteworthy that Article 1 (b) of the Hague Agreement defines a "refugee seaman" as a refugee who "is serving as a seafarer in any capacity on a mercantile ship, or habitually earns his living as a seafarer on such a ship". The latter alternative clearly is intended to comprise the habitual seafarer who is temporarily on shore, whereas the former does not exclude the temporarily enlisted crew member from the application of the Agreement.

In any case, if it proves impossible to get a landing permit for the refugee concerned, and he has to stay on board the ship and work as a crew member for a protracted period, he is to be considered as a regular crew member in the sense of Article 11.

In any case the expression "regularly serving" does not imply any kind of recognition of his status as a seaman by the authorities of the Flag State. It was firmly stressed by the Norwegian delegate that "when refugee seamen were employed in a Norwegian merchant

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<sup>a</sup> A/CONF.2/67;A/CONF.2/89.

<sup>b</sup> A/CONF.2/SR.30, p. 6.

<sup>c</sup> A/CONF.2/SR.12, p. 5.

ship, sole authority for selecting or refusing them lay with the master of the vessel, the ... Government authorities had no powers in the matter".<sup>d</sup>

(3) The obligations undertaken by virtue of Article 11 rest upon the Flag State; that is to say the State whose flag the ship concerned is flying. The ownership and the seat of the shipping company do not matter.

Reference is made to Articles 4 ff. of the Convention on the High Seas of 29 April 1958.<sup>e</sup>

(4) Article 11 contains more than a recommendation. On the other hand, it does not oblige the Hag State to grant the refugees concerned specific rights or benefits. It is only provided that the Flag State shall give sympathetic consideration to certain measures which will be discussed below. This means that the State cannot refuse such measures out of hand or as a matter of principle, moreover that the State has obliged itself to weigh carefully the interest of the refugee in the measure under consideration against other legitimate interest which the State has to consider, and that it shall regard the situation of the refugee with sympathy and understanding. In other words, the State has undertaken to let itself be guided by considerations of humanity, as far as other important interests do not stand in the way.

(5) In the early post-war period there was a number of refugees who, in their eagerness to get away from refugee camps and from countries where they could not find any livelihood, enlisted as seamen on ships flying different flags, without ensuring that they would be allowed to establish themselves in the territory of the Flag State. Others have stowed away on a ship in order to escape from the country in which they found themselves (either the country of origin or some other country) and have later been enlisted as crew members. The plight of refugees of these categories can only be overcome if they eventually are allowed to land and establish themselves in some country or other.

(6) If a refugee is allowed to establish himself in a country and takes up residence there, he is lawfully staying in the country and thus entitled to a travel document by virtue of Article 28 (1), first sentence. Article 11 authorizes the issue of travel documents to non-resident refugees serving on the ships flying the flag of the country concerned. The conjunction "and" implies that the travel document envisaged shall contain a clause allowing the refugee to enter the territory of the issuing State at any time throughout the period of the document's validity. The issue of a travel document with such a clause virtually amounts to the granting of a permit for the refugee to establish himself in the territory of the issuing State.

In this connection it is noteworthy that Articles 2 and 3 of the Hague Agreement provide that certain refugee seamen shall be "regarded, for the purpose of Article 28 of the Convention, as lawfully staying in the territory of a Contracting State".

(7) Refugee seamen without papers may be refused leave to go on shore in any port of call. They will thus not be able to get in touch with the authorities, e.g. consuls, of any country which might be willing to admit them. Article 11 suggest that the Flag State at least should allow such refugee seamen to go on shore and take up contacts which may lead to their being admitted for settlement in some country or other.

Temporary admission may also be granted for other purposes, such as hospitalization, recreation, rehabilitation, vacationing or visits to friends or relatives.

Articles 6 and 7 of the Hague Agreement regulate this matter in some detail with regard to refugee seamen who hold a valid issued by another Contracting State than the one in whose territory the refugee requests temporary admission. Article 9 sets forth that "no refugee seaman shall be forced, as far as it is in the power of the Contracting Parties, to stay on board a ship if his physical or mental health would thereby be seriously endangered"; and Article 10 lays down the rule that "no refugee seaman shall be forced, as

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<sup>d</sup> A/CONF.2/SR.30, p. 8.

<sup>e</sup> In force since 30 September 1962. Text in UN Doc. A/CONF. 13/38 (Sale. No. 58.V.4, vol. II), p. 135.



far as it is in the power of the Contracting Parties, to stay on board a ship which is bound for a port, or is due to sail through waters, where he has well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.”

### **ARTICLE 13**

#### **MOVABLE AND IMMOVABLE PROPERTY**

**The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.**

#### **I. Scope of Article**

##### **A. General remarks**

1. No provision similar to the one contained in Article 13 is found in earlier arrangements and conventions relating to the status of refugees.

The Secretariat of the United Nations proposed in its preliminary draft Convention an article 5 which read:

“The High Contracting Parties undertake to accord to refugees (and stateless persons) whose regular residence is in their territory the most favourable treatment accorded under treaty to foreigners (or the treatment accorded to foreigners generally) with regard to the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.”<sup>1</sup>

2. Two resolutions were proposed:

(i) To accord to refugees the most favourable treatment accorded under treaty to foreigners.

(ii) To accord to refugees the treatment accorded to other foreigners generally. The Secretariat noted that in certain countries foreigners are not covered by rent laws for the protection of tenants save by virtue of treaties. If therefore, refugees, who are usually destitute were not to enjoy the treatment accorded under treaty to foreigners, they would be debarred from the benefits of such laws, which would spell disaster for them. The treatment accorded to other foreigners generally on the other hand said the Secretariat was useful to waive the condition of reciprocity which cannot be satisfied by refugees.

France submitted the following draft Article:

“The High Contracting Parties shall give favourable consideration to the possibility of granting after a certain period to refugees permanently settled in their territories treatment similar to that accorded to their nationals in respect of:

- (a) the possession, acquisition, occupation and renting of all movable or immovable property and
- (b) the establishment of non-profit-earning associations.”<sup>2</sup>

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<sup>1</sup> E/AC.32/2, 3 January 1950, pp. 26-27.

<sup>2</sup> E/AC.32/L.3, p. 4.

## **B. Field covered by Article**

Acquisition of movable and immovable property securities (stocks), money as well as the rights pertaining thereto and to leases and other contracts relating to movable and immovable property are covered by the Article while industrial property such as rights on inventions, designs or models, trade marks, trade names and rights in literary, artistic and scientific works, which come under the heading of copyright are outside of the field covered by the Article.

To receive compensation in case of expropriation or nationalization is a right pertaining to acquisition of movable and immovable property.

## **C. Relationship to other Articles**

The notion of “treatment accorded to aliens generally” is to be found in Article 7 (1). This is minimum requirement of Article 13. The maximum is treatment as favourable as possible. “In the same circumstances” is defined in Article 7.

## **D. Relationship to other international Agreements**

The European Human Rights Convention, Protocol, Article 1, and the European Convention on Establishment Arts. 4, 5, 6, 23 and Protocol, Section 1, A (4), have provisions on property; The European Human Rights Convention, Protocol, Article 1 reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions of international law.

“The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>3</sup>

Article 4 of the European Convention on Establishment adopts the national treatment. Article 5 is exception to Article 4 for reasons of national security or defence, Article 6 requires the transmittal of a list of restrictions by any Contracting Party which has reserved for its nationals or conditioned upon reciprocity or made subject to regulations the acquisition, possession or use of certain of its municipal law are the basis of such restrictions. Article 23 adopts also the national treatment in case of expropriation or nationalization. Protocol, Section 1, A (4) reads that each Contracting Party shall have the right to judge by national criteria the reasons specified in the Convention for which a Contracting Party may reserve for its own categories of property or the exercise of certain rights and occupations or may make the exercise thereof by aliens subject to special conditions.<sup>4</sup>

## **II. Development**

All four systems existing in the Convention relating to the status of refugees: treatment accorded to aliens generally, treatment as favourable as possible, the most favourable treatment accorded and the same treatment as a national were proposed at one stage or another during the discussions of this Article. In the preliminary draft Convention the most favourable treatment accorded under treaty to foreigners was proposed, the Ad Hoc Committee proposed the treatment as favourable as possible and the treatment accorded to aliens, IRO (with the reservation of any special regulations excluding aliens, based on security considerations) asked

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<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol, 1950. CE Treaty Series No. 6.

<sup>4</sup> European Convention on Establishment CE Treaty Series No. 25.

for the same treatment as a national. Furthermore a fifth system not adopted in the Convention was proposed by France. This was treatment resembling as closely as possible that accorded to nationals.

The most favourable treatment was put aside on the arguments that in countries which had no reciprocity treaties, the refugees, under the proposed text would get preferential treatment compared to other aliens,<sup>5</sup> that the most favourable treatment was not possible for refugees because some countries which were linked to certain other countries by special economic and customs agreements did not accord the same treatment to all foreigners.<sup>6</sup> Another argument was that acceptance of the most favoured nation as accorded to nationals.<sup>7</sup> One view was that while the Committee tried to protect the refugees against discrimination, it should not go to the other extreme of establishing discrimination in favour of refugees.<sup>8</sup> It was said that the most favoured nation clause had been introduced by countries as a mean of obtaining equal treatment for their nationals abroad.<sup>9</sup>

Then the Conference adopted the following draft article:

“The High Contracting Parties undertake to accord to refugees (and stateless persons) whose regular residence is in their territory the treatment accorded to foreigners generally with regard to the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.”

The upper limit of this rule is treatment as favourable as possible while the lower limit is not less favourable than that accorded to aliens generally in the same circumstances. The absolute ceiling of upper limit is either

- (b) national treatment or
- (b) most favourable treatment accorded to nationals of a foreign country.

The relative ceiling may be reached by answering to the question what is “possible.” The treatment as favourable as possible being a recommendation<sup>10</sup> the determination of possible is left to the discretion of each Contracting State.

Treatment accorded to aliens generally is an important provision particularly in those countries which did not give any status to persons without nationality.

Treatment accorded to aliens generally does not cover cases where the rights are given by legislative reciprocity. In other words, in the absence of any legislative restrictions for example on the acquisition of movable and immovable property refugees enjoyed the same status as aliens. But if a country's legislation concerning the right of acquiring immovable property stipulated that aliens were not accorded that right except where reciprocity existed, it meant that that particular right was likewise not accorded to refugees.<sup>11</sup>

Some writers consider acquisition of movable and immovable property as part of the minimum standard of treatment.<sup>12</sup> According to them as these rights are recognized to aliens by customary

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<sup>5</sup> Argument forwarded by Turkish representatives See E/AC.32/SR.10, p. 4.

<sup>6</sup> Argument forwarded by Belgian representative. See E/AC.32/SR. 10, p. 5.

<sup>7</sup> Argument of French representative. See E/AC.32/SR. 10, p. 6.

<sup>8</sup> Argument forwarded by English representative.

<sup>9</sup> Argument forwarded by Danish representative.

<sup>10</sup> E/AC.32/SR.36, p. 10.

<sup>11</sup> See the statement of French representative to this effect E/AC.32/SR 36, p. 18

<sup>12</sup> Albert de la Pradelle, *Recueil de la Jurisprudence des Tribunaux mixtes*, vols 4, Paris 1927, p. 90, note 5. Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York, 1915, p. 12. A.P. Fachini "Expropriation and International Law" *British Year Book of International Law*, 1925, p. 168. Fachini does not really include acquisition of movable and immovable to minimum standard but he claims that this *is* due to international recognition of some legal principles. While

international law, refugees shall benefit from them even if the legislative reciprocity restricts them for other aliens.<sup>13</sup>

### III. Acquisition of movable and immovable property

It was proposed that with regard to the substance of the matter, some of the rights mentioned in the Article should be considered separately.<sup>14</sup> At the present stage of legal development the right to acquire property was often granted to aliens under the same conditions as to nationals. There were, however, specific laws which had developed since 1914 and under which rights were restricted for emergency reasons and a distinction was made between nationals and aliens for such questions as rent control, etc. It would be worthwhile considering whether the same provisions should cover all those rights, or whether a distinction should be made with regard to the treatment which aliens should have in regard certain rights.

No amendments had been submitted to Article on movable and immovable property and Article was unanimously adopted without comment, and the Drafting Committee drafted the present form of it.

## **ARTICLE 14** **ARTISTIC RIGHTS AND INDUSTRIAL PROPERTY**

**In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.**

### I. Scope of Article

#### A. General remarks

1.

(a) No provision similar to the one contained in Article 14 is found in earlier arrangements and conventions relating to the status of refugees. This Article refers to the creation of the human mind.<sup>1</sup> Many international conventions covered the subject but the existing conventions applied to nationals rather than to refugees, hence a clause was needed for the protection of the latter.<sup>2</sup>

(b) Field covered by the Article.

The rights more attached to personality and creativeness of its authors such as inventions, designs, models, and rights in literary, artistic and scientific works as opposed to the ordinary property rights.

(c) Persons to whom Article applies.

All refugee who have a habitual residence in one of Contracting States and have created something in the sense of this Article are protected. These refugees do not have to have a permanent residence or domicile. With the exception of new refugees who have not yet habitual residence anywhere, it is difficult to envisage a refugee having no habitual residence.<sup>3</sup>

(d) Relationship to other international agreements. Many international agreements were

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in the seventeenth and eighteenth centuries it was a custom to include in treaties between states to grant reciprocally right to acquire all kinds of movables and immovables, this custom is dropped now, because this principle - acquisition of movables and immovables by foreigners - is universally accepted. *Ibid*

<sup>13</sup> See Art. 7 (1) on this point.

<sup>14</sup> See statement by IRO representative, E/AC.32/SR.36, p. 11.

concluded on artistic rights and industrial property such as Bern Convention on Intellectual Property 1886; Paris Additional Act and Imperative Declaration 1896; Berlin Convention, 1908; Bern Additional Protocol, 1914; Rome Convention, 1928; Brussels Convention 1948, and European Convention on Establishment 1955; (ETS. 19). Arts 4, 5, 6, 22, 23 and Protocol Section 1.

## II. Development

First Draft of Ad Hoc Committee was as follows: "In respect of literary, artistic and scientific rights, and of industrial property as patents, designs, models, licences, trade marks, trade names etc ... the Contracting States shall accord to refugees the most favourable treatment accorded to nationals of foreign countries." This draft Article was found "less liberal" on one hand<sup>4</sup> and too liberal on the other hand.<sup>5</sup>

It was pointed out that it would be unfair if merely by becoming a refugee a person were to receive better treatment than a citizen of his refuge.

The proposal to accord to refugees the same protection as to nationals of the country in which they are resident, subject to the same conditions and formalities as apply to such nationals was accepted and the Article was drafted accordingly in the present form.

Art. 14 does not deal with the rights of a refugee illegally in a Contracting State. The rights of such a refugee are contained rather in Art. 7(l).<sup>6</sup>

### **ARTICLE 15 RIGHT OF ASSOCIATION**

**As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.**

Article 11 of the 1933 Convention and Article 13 of the 1938 Convention provided setting up of associations for mutual relief and assistance.

Ad Hoc Committee's draft Article 7 entitled Right of Association was as follows:

"Refugees (and stateless persons) shall have the right to join non-profit-making associations, including trade unions."<sup>a</sup>

Article 20 of the Universal Declaration of Human Rights lays down that: "Everyone has the right to freedom of peaceful assembly and association".

Non-profit-making associations are those pursuing cultural, sports, social or philanthropic aims, as distinct from associations for "pecuniary gains whose aim is the making of profits".

Political associations come under Article 7 (1) and associations for pecuniary gains come under Article 18.<sup>b</sup>

Instead of the most favourable treatment accorded to aliens generally was proposed.<sup>c</sup>

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<sup>a</sup> E/AC.32/2.

<sup>b</sup> Robinson, Commentary, p. 109.

<sup>c</sup> See statements by representatives of Venezuela and Belgium (E/AC.32/SR.37 p. 6).

## **ARTICLE 16**

### **ACCESS TO COURTS**

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

#### **I**

In certain countries persons have only access to law courts as plaintiffs if they are nationals of that country or of another country with which there exists a reciprocity arrangement.

Other countries admit foreigners to their courts of law, but request them, in the absence of reciprocity, to deposit an amount which at the court's discretion is sufficient to cover the costs he will be compelled to pay the other party if he loses the case (*cautio judicatum solvi*).

In some countries legal aid and legal assistance, if available at all, are limited in similar ways.

Refugees having no effective nationality, do not as a rule qualify under reciprocity arrangements, and even if access to courts may be available to everybody, the requirement of *cautio judicatum solvi* and the non-availability of legal aid may in practice jeopardize their pursuing their legal rights. It is the purpose of Article 16 to remedy this situation.

#### **II**

Paragraph 1 applies to any refugee, wherever he has his habitual residence, and is not limited to refugees having such residence in one of the Contracting States. If he has his habitual residence in a non-Contracting State, he shall nevertheless have access to courts of law in any of the Contracting States, subject only to the rule underlying the Convention that each Contracting State must determine for its own purposes whether a person is to be considered as a refugee or not.

Paragraph 2 confers an obligation on a Contracting State only in respect of refugees who have their habitual residence within its territory.

Paragraph 3 refers only to countries other than that in which a refugee has his habitual residence. Just as paragraph 1, this paragraph also applies to refugees residing in non-Contracting States.

#### **III**

According to Article 42, no reservation may be made to paragraph 1 of Article 16. However, reservations may be made to paragraphs 2 and 3.

Article 16 should also be read in conjunction with Article 29, according to which refugees shall not be obliged to pay higher or other charges than nationals of the State concerned.

#### **IV**

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in its Article 6 contains provisions which are of a certain interest in connection with the present Article.

Article 6 paragraph 1 of the Human Rights Convention "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", in

respect of the determination of his civil rights and obligations or of any criminal charge against him.

Paragraph 3(c) of the same Article lays down the rule that “everyone charged with a criminal offence” shall have the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

Paragraph 3(e) provides for the free assistance of an interpreter if the defendant cannot understand or speak the language used in court.

The European Convention on Establishment of 13 December 1955, Articles 7, 8 and 9, and Protocol, Section IV, lay down important rules with regard to access to court, legal aid and assistance, and exemption from *cautio judicatum solvi*.

According to Article 7, nationals of any Contracting Party shall enjoy in the territory of any other party, under the same conditions as nationals of the latter party, full legal and judicial protection of the persons and property and of their rights and interests. The Article further provides that they shall have access to the competent judicial and administrative authorities and the right to obtain the assistance of any person of their choice who is qualified by the laws of the country.

Article 8 sets forth that nationals of any Contracting Party shall be entitled to free legal assistance in any other contracting country on the same footing as nationals of that country.

Article 9 provides that no security or deposit of any kind may be required by reason of their status as aliens or of lack of domicile or residence in the country, from nationals of any contracting party having their domicile or normal residence in the territory of a party, who may be plaintiffs or third parties before the courts of any other party.

Article 9 further contains an interesting rule that in case a person has been exempted from the security requirement, an order to pay the costs and expenses of a trial shall be rendered enforceable in the country where the person in question has his residence.

Reference should also be made to the Hague Convention on Civil Procedure.

## V

The present Article is the result of long development. In the arrangement relating to the legal status of Russian and Armenian refugees of 30 June 1928, Article 5, contained a recommendation to the effect that Russian and Armenian refugees without regard to reciprocity should enjoy legal aid and if possible also exemption from the *cautio judicatum solvi*.

The Convention relating to the International Status of Refugees of 28 October 1933 in Article 6 laid down the rule that refugees should have free and immediate access to law courts in the territories of the Contracting States. The Article further provides that in the countries where the refugees had their domicile or their habitual residence they should, in this respect have the same rights and privileges as nationals, and also that refugees should be assimilated to nationals with regard to legal aid and exemption from *cautio judicatum solvi*.

In the Convention relating to the Status of Refugees coming from Germany of 10 February 1938 Article 8 confers the same rights as are laid down in Article 6 of the 1933 Convention.

## VI

As one will see, paragraph 1 of Article 16 has been taken over from the 1933 and 1938 Conventions with the modification that the present Convention does not refer to “immediate” access. The rule is interesting because it is of an absolute character and does not refer to any standard relating to nationals or most favoured aliens or any other group or category of aliens. The reference to free access does not imply that refugees should be freed from paying the normal charges which plaintiffs may have to pay in order to start legal proceedings; it only means that there should not be any additional obstacles for refugees. The paragraph is limited to courts

of law and does, therefore, not apply to access to administrative authorities. However, in certain other articles of the Convention a right to appear before administrative authorities has been established. In this respect Article 16 of the Refugee Convention has more limited scope than Article 17 of the European Establishment Convention. Article 16 paragraph 1 applies to any refugee with regard to law courts in the territory of any Contracting State, that is to say the State in which he lives as well as any other Contracting States, even if he has his habitual residence outside any Contracting State it seems that the refugee will have the rights mentioned in paragraph 1 with regard to law courts in the Contracting States and paragraph 1 also applies to refugees who have not yet established habitual residence anywhere.

## VII

Paragraphs 2 and 3 of Article 16 are based on the same principle, namely that refugees with regard to the rights within the scope of the Article shall be assimilated to nationals of the country in which they have their habitual residence.

Within the country where they have such residence they shall enjoy the same treatment as persons having the nationality of the country, that is to say that they will be considered more favourably than aliens who are not enjoying such favourable treatment. It follows from paragraph 1 that in countries where nationals have not free access to courts the refugees will in this respect be treated even more favourably than nationals. The rule that refugees should be treated as nationals of the country has, therefore, mostly bearing on their eligibility for legal assistance and exemption from *cautio judicatum solvi*.

With regard to legal aid or legal assistance, it is clear that the Article can only apply to such benefits which are granted by the State under a State - supported scheme. In countries where legal aid is solely granted by bar associations the Article will certainly not apply.

## VIII

The treatment refugees will enjoy in Contracting States other than that in which he has his habitual residence shall be the same as is granted to nationals of the country of his habitual residence.

This implies that refugees who have not established habitual residence in any country will not benefit from the provisions of paragraphs 2 and 3. With regard to refugees who have habitual residence in another country than that in which they are starting legal proceedings will have their rights determined by any reciprocity or other arrangement in force in the latter country, with regard to nationals of the country of habitual residence. In this respect the above-quoted international conventions are of particular interest because the treatment which they provide for everybody or for nationals of the Contracting States will have a direct bearing on the status of refugees in this respect. However, insofar as Article 7 of the European Establishment Convention refers to administrative authorities and not law courts, it will not be applicable to refugees by virtue of Article 16 of the Refugee Convention.

On the other hand, the rule in para. 3 of Art. 9 of that Convention, according to which orders to pay costs and expenses of a trial shall be enforceable in the country where the person in question has his residence, will also be applicable to refugees. This paragraph makes no difference with regard to the application of para. 3 of Art. 16 where the refugee has his residence in a country party to the Refugee Convention or in some other country. In any case his rights within the scope of Art. 16 will be determined by the rules in force in the country of the forum with regard to nationals of the country of his habitual residence.



## **ARTICLE 17**

### **WAGE-EARNING EMPLOYMENT <sup>(1)</sup>**

- 1. The Contracting States shall accord to refugees lawfully staying in their territory <sup>(2)</sup> the most favourable treatment accorded to nationals of a foreign country in the same circumstances, <sup>(3)</sup> as regards the right to engage in wage-earning employment. <sup>(4)</sup>**
- 2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market <sup>(5)</sup> shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned <sup>(6)</sup>, or who fulfils one of the following conditions:**
  - (a) He has completed three years' residence in the country; <sup>(7)</sup>**
  - (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse; <sup>(8)</sup>**
  - (c) He has one or more children possessing the nationality of the country of residence. <sup>(9)</sup>**
- 3. The Contracting States shall give sympathetic consideration <sup>(10)</sup> to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, <sup>(11)</sup> and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes. <sup>(12)</sup>**

#### Comments

(1) Article 17 is the first of three articles which deal with the economic activities of refugees. Article 17 deals with wage-earning employment, Article 18 with self-employment, and Article 19 with the exercise of liberal professions.

In many countries a aliens who have not been granted a work permit not allowed to work. The issue of work permits to aliens is sometime based on reciprocity. As a rule aliens - in particular those aliens who do not fulfil the reciprocity requirement - will not be allowed to compete for work with nationals of the country concerned.

In the early period after the First World War refugees were subject to the same restrictions as alien manpower generally. However, the Committee of Russian and Armenian Legal Experts pointed out in their memorandum of 21 May 1928 that in view of their comparatively small number, the refugees did not on the whole constitute any serious threat to the national manpower, while on the other hand it is clearly in the interests of the country of asylum to allow the refugees to work for their livelihood. The Committee therefore suggested that the restrictive rules relating to alien manpower should not be applied in all their severity to refugees in their country of residence,<sup>a</sup> and this proposal was adopted as Recommendation 6 of the 1928 Arrangement.

A provision to the same effect was incorporated as Article 7 (1) of the 1933 Convention. The drafters of the Convention felt, however, that this was far from satisfactory, and in spite of the economic depression of the time, they proposed and won support for a second paragraph, to the effect that the laws and regulations for the protection of the national labour market should be automatically lifted in favour of regularly resident refugees who had a special link with the country of refuge, namely refugees who had completed three years residence in the country; refugees who had a spouse or a child possessing the nationality of the country, and refugees who had fought in the First World War.

The entire Article, with the exception of the reference to war veterans, was reproduced as Article 9 of the 1933 Convention.

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<sup>a</sup> League of Nations. Doc. 1930. XIII 1, pp. 23-24 and 28.

In the Secretariat draft it was proposed that the same provision should be included in the present Refugee Convention, with the addition of a third paragraph to the effect that the Contracting States reserve the right to accord the treatment given to national wage-earners to specified categories of refugees.<sup>b</sup>

This proposal was, however, subjected to a number of changes, the outcome being the present Article.

(2) Paragraph 1 contains a mandatory obligation. It applies to refugees lawfully staying in the territory of the Contracting State concerned. For the meaning of this term, see *supra*, p.

(3) This provision was included in a French draft proposal,<sup>c</sup> and the French delegate explained that his Government “thought that it was legitimate and desirable to accord the most favourable treatment to refugees as regards the rights to engage in wage-earning employment and not only the treatment accorded to aliens generally because refugees by their very nature were denied the support of their Government and could not hope for governmental intervention in their favour in obtaining exceptions to the general rule by means of conventions.” In other words, “the purpose ... was to obtain for refugees the advantages which Governments sought to have granted to their own subjects”.<sup>d</sup>

The meaning of the provision is clearly that if a country concludes an international agreement, passes a law or institutes a practice, whereby nationals of a certain foreign State are entitled to an especially favourable treatment with regard to wage-earning employment, refugees shall be entitled to the same treatment. It does not matter if there are special ties between the two States, as long as they both are States in the eyes of international law.

For the meaning of the expression “in the same circumstances”, see Article 6.

(4) The Convention does not define the term “wage-earning” employment, but there can be no doubt that it must be understood in its broadest sense, so as to include all kinds of employment which cannot properly be described as self-employment,<sup>e</sup> or falls within the scope of Article 19 (liberal professions).

It seems that the term “wage-earning employment” comprises employment as factory workers, farmhands, office workers, salesmen, domestics and any other work the remuneration for which is in the form of a salary as opposed to fees or profits.

It seems reasonable to include waiters, salesmen and others who are remunerated to a greater or smaller extent in the form of tips, commissions or percentages; the crucial point is apparently whether they may be said to have an employer and are not free agents.

State employees are clearly wage-earning employees. This is particularly clear in the case of persons engaged in State enterprises such as railroads, the postal service, State factories etc.; but it is hardly justifiable to exclude employment in the State Administration proper, cf. however note 5 *infra*.

The term also applies to persons with professional qualifications who are assisting practicing members of the liberal professions. In other words, Article 17 applies to assistant dentists, assistant architects, law clerks and assistant attorneys, etc., subject to the proviso discussed in note 5 *infra*.

(5) The provisions contained in paragraph 2 were originally formulated in a Report from a Commission of Experts to the Intergovernmental Consultative Committee for Refugees, dated 9

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<sup>b</sup> E/AC.32/2, pp. 34-35: draft Article 13.

<sup>c</sup> E/AC.32/L.3 and E/AC.32/L.3/Corr. 2.

<sup>d</sup> E/AC.32/SR.13, pp. 2-3.

<sup>e</sup> Cf. Article 18.

January 1933, in an attempt to achieve the lifting of the labour restrictions in favour of those refugees who have a special link with their country of refuge.<sup>f</sup> Via the 1933 and 1938 Conventions the provisions have found their way to the present Convention.

The only changes which the provisions have undergone are those discussed in notes 6 and 9 infra.

It must be noted that the present paragraph only deals with measures for the protection of the national labour market. Measures which have another purpose, e.g. prohibition of employment of aliens in industries working for the national defence, based on considerations of national security, are not affected by the present provision.

Furthermore, the political considerations which may lead to certain posts in the Civil Service being reserved for nationals are unaffected; and the same applies to the rules which aim at ensuring that persons exercising certain occupations possess the necessary qualifications; this applies particularly to persons employed as salaried assistants to members of the liberal professions, cf. Article 19.

(6) This provision goes - within its limited field - further than those contained in Articles 5 and 7 (3), because it is mandatory and does not only apply to treatment granted "in the absence of reciprocity".

However, Article 17 (2) speaks of "exemption from measures", and it is clear that no exemption has been granted if the measure has not existed measures to refugees too.

The date referred to is defined in Article 43 (1) and (2).

(7) Paragraph (a) aims at giving favourable treatment to those refugees "qui sont établis dans le pays depuis un certain temps" (L.o.N. Doc. L.S.C. - 2-1933, p. 7). it seems that the term residence must be interpreted as liberally as possible, so as to include anyone who has been physically present in the country for a period of three years, irrespective of whether he has been there as a refugee, or in any other capacity, and irrespective of whether his presence has been lawful or not. The period of residence will not be interrupted by short periods spent in travelling or visit 9 other countries.

(8) Any refugee who has a spouse possessing the nationality of the country where he resides is entitled to the benefit of this provision. It clearly applies if a refugee marries a national, provided the latter does not lose his (her) nationality by marriage. The provision is part of the packet which the drafters of the first Refugee Convention presented to the 1933 Conference, and must clearly be interpreted as liberally as possible.

The second sentence, which contains an exception to the main rule, was the result of an amendment proposed by the representative of Belgium in the Conference of plenipotentiaries,<sup>g</sup> who stated that "a stipulation obviously had to be made that, in order to be exempt from the application of the restrictive measures imposed on aliens, the refugee must reside with the spouse of the country on whose account he or she enjoyed that exception".<sup>h</sup> The French delegate, however, pointed out that it -might be physically impossible for a refugee to reside with his wife, in which case the wording of the Belgian amendment, if adopted, would be unfair to him". In order to avoid that danger, he proposed a wording similar to the one finally accepted.<sup>i</sup> This wording was, however, accepted on the basis that it should not be interpreted without understanding. For example, a refugee might not abandon his wife, but he might treat her with such cruelty that she was forced to leave him. "Moreover, if the wife were able to obtain from the courts a maintenance order against

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<sup>f</sup> League of Nations, Doc. G.A. C.2/1933, p.6. Cf. note supra.

<sup>g</sup> League of Nations, Doc.L.S.C. 2-1933, p. 7.

<sup>h</sup> A/CONF.2/47.

<sup>i</sup> A/CONF.2/SR.9,p.8

her husband, it would clearly be desirable that the husband should continue to enjoy rights in respect of employment so as to be able to support her.”<sup>j</sup>

It was pointed out that the amendment did not say “that the marriage of a refugee should be followed by lasting cohabitation”,<sup>k</sup> and the Belgian delegate stressed that his main concern was that “marriages were at times contracted solely with a view to securing certain advantages. It would be paradoxical if a refugee was able to benefit from his marital status without observing his marital obligations.”<sup>l</sup>

On this basis it seems that a refugee may invoke Article 17 (2) (b) if he is married to a national of the country concerned, also if they live apart, and even if they are factually or legally separated; but not after a divorce, for in that case he (she) has no spouse any longer.

If the refugee is not residing together with his spouse, it is a condition for his (her) invoking the provision, that there still is a certain community of interests between them, e.g. that the refugee supports the spouse.

(9) This provision, too, calls for a liberal interpretation. In spite of the fact that it was pointed out that it would operate quite differently as between countries whose nationality laws are based on the *jus sanguinis* and those whose laws are based on the *jus soli*, the United States delegate in the Ad Hoc Committee thought that “it was clearly in the national interest that the mother of a citizen of the country should have some means of sustenance”,<sup>m</sup> and that “his delegation would certainly consider it proper that the parent of a citizen should be granted privileges in regard to the right to work” (op. cit. p. 19).

The President of the Conference of Plenipotentiaries voiced the assumption “that sub-paragraph 2 (c) covered illegitimate as well as legitimate children, in view of the provision contained in Article 25 (2) of the Universal Declaration of Human Rights”.<sup>n</sup> The cited provision says *inter alia* that “All children, whether born in or out of wedlock, shall enjoy the same social protection.” Cf. also Principle 1, set forth in the Declaration of the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1959.<sup>o</sup>

It would seem that a father, who has never made any attempt to support his illegitimate child, and maybe never shown any interest in it, could hardly invoke the present provision.

Also, if the child concerned, whether born in or out of wedlock, has been given away for adoption, there is hardly any strong case for invoking Article 17 (2) (c). This situation would be rather similar to the case of the child dying - a case for which the Convention does not provide.

It seems, however, that one will best serve the purpose of Article 17 (2) if one submits that a refugee who once has enjoyed the benefits of that provision, shall continue to do so, except in the special case mentioned in sub-paragraph (c), second sentence.

(10) For the meaning of this phrase, see note to Article 7.

(11) Whereas paragraph 2 only aims at guaranteeing certain categories of refugees a right to earn their living by some kind of work, paragraph 3 purports to give all refugees national treatment in this respect.

(12) Refugees are, generally speaking, entering a country of refuge in one of the following ways:

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<sup>j</sup> A/CONF.2/SR.9, PP. 16-17.

<sup>k</sup> Statement by United Kingdom delegate, A/CONF.2/SR.9, p. 17.

<sup>l</sup> Statement by the Netherlands delegate, A/CONF.2/SR.9, p. 17.

<sup>m</sup> A/CONF.2/SR.9, pp. 17-18.

<sup>n</sup> E/AC.32/SR.37, P. 17.

<sup>o</sup> A/CONF.2/SR.9, p. 15.

- (a) Coming more or less directly from a country for fear of persecution in order to ask for asylum;
- (b) Migrating on their own initiative between countries of refuge;
- (c) Under resettlement or labour schemes.

The admission of refugees of the latter category is fully controlled by the government of the country of immigration, and it is clearly undesirable that the Government should recruit refugees under such schemes and subsequently deny them the right to work, particularly if one considers that by accepting such resettlement or migration for labour, the refugee concerned is prevented from taking advantage of other resettlement opportunities.

During the period of International Refugee Organization operations (1947-1952) the IRO concluded agreements with a number of governments with a view to their resettlement, whereby inter alia the refugee's right to work was guaranteed. Article 17 (3) of the present Convention is primarily of importance with regard to such schemes which are not covered by the IRO agreements.

It is understood that nothing in Article 17 speaks against the practice of certain States, to admit refugees under resettlement schemes on the condition that they sign a work contract, which obliges them to work in a particular position throughout a period, normally of two years' duration.<sup>p</sup>

## **ARTICLE 18**

### **SELF-EMPLOYMENT<sup>(1)</sup>**

**The Contracting States shall accord to a refugee lawfully in their territory<sup>(2)</sup> treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances,<sup>(3)</sup> as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.<sup>(4)</sup>**

#### Comments

(1) Whereas provisions relating to wage-earning employment are found in all substantive international agreements relating to refugees from the 1928 Arrangement onwards, a provision relating to self employment appeared for the first time in the Secretariat's Draft Convention which was submitted to the Ad Hoc Committee.<sup>a</sup>

(2) A refugee may be "lawfully in the territory" of a Contracting State, even if he is not "lawfully staying there". The expression used in the present Article, and also in Articles 26 and 32, comprises all refugees who are physically present in the territory, provided that their presence is not unlawful. It includes short-time visitors and even persons merely travelling through the country.

(3) This is the same expression as is used in Article 13 - to which reference is made.

(4) The Secretariat draft only used the phrase "right to engage in..." The words "on his account" were added by the Conference of Plenipotentiaries, because it was felt "that the word 'engage' was not very appropriate in an article relating to self-employment" and "that the text would be improved by the insertion" of said words (A/CONF. 2/SR.9, p. 19).<sup>b</sup>

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<sup>p</sup> Resolution 1386 (XIV).

<sup>a</sup> E/AC-32/2, p. 35: draft Article 14.

<sup>b</sup> A/CONF.2/SR. 9, p. 19.

The enumeration of fields of activity is taken from the Secretariat draft. It is apparent that the expression used must be given the widest possible interpretation.

## **ARTICLE 19**

### **LIBERAL PROFESSIONS<sup>(1)</sup>**

1. Each Contracting State shall accord to refugees lawfully staying in their territory<sup>(2)</sup> who hold diplomas recognized by the competent authorities of that State<sup>(3)</sup> and who are desirous of practising a liberal profession<sup>(4)</sup> treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.<sup>(5)</sup>

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.<sup>(6)</sup>

#### Comments

(1) This Article, too, is a novelty in an international instrument dealing with refugees. The deliberations of the Ad Hoc Committee were based on proposals contained in the Secretariat draft convention<sup>a</sup> and the French draft.<sup>b</sup>

(2) This is the same expression as is used in Article 17 and several other Articles.

(3) It is a condition for invoking Article 19 that the refugee concerned holds a diploma, and that that diploma is recognized by the competent authorities of the State in whose territory the refugee is lawfully staying. The word "diploma" must not be understood too narrowly. In the present context it comprises any degree, examination, admission, authorization, completion of course which is required for the exercise of a profession. Thus the admission to the Bar in England constitutes a diploma in the sense of the present article.

A diploma must be considered as recognized if it is obtained at a university or an equivalent institution in the country concerned. The same applies to diplomas obtained in universities etc. outside that country, if the competent authorities have made a general ruling to the effect that diplomas from said universities etc. give a right to exercise liberal professions in their country.

A diploma obtained otherwise, will be recognized in the sense of Article 19 if the competent authorities of the country where the refugee is lawfully staying make a ruling to the effect that they consider it equivalent to the diplomas which entitle their holders to exercise liberal professions in their country.

(4) The expression "desirous of practising a liberal profession" is rather vague.

The "liberal professions" are traditionally understood to encompass practice as a:

lawyer (barrister or solicitor);

physician or surgeon;

dentist;

veterinarian;

engineer;

architect.

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<sup>a</sup> E/AC.32/2, pp. 35-36.

<sup>b</sup> E/AC.32/L.3, pp. 6-7.

Nowadays certain other callings may probably be included: e.g. accountants, authorized translators, interpreters.

The term comprises two elements: “liberal” and “profession”.

The word “profession” suggests that the person concerned must possess certain qualifications, normally confirmed by a diploma from a university, or a similar institution, or a licence from a State agency, a chartered society or some other legally competent body allowing him to practise.

The word “liberal” or “free” suggests that the person concerned acts on his own, not as an agent of the State or as a salaried employee. Therefore, certain holders of academic diplomas are excluded from the application of the term, e.g. the clergy, judges, teachers, scientists, in so far as they are not practising a profession in addition to any such post.

Persons working as salaried assistants to solicitors, dentists, architects etc. are undoubtedly “wage-earning employees” in the sense of Article 17 and falling within the scope of that Article. However, as stated in note 5 to Article 17, a State is free to impose regulations to such persons to ensure that they possess a certain minimum of qualifications, and in so far as that is the case, it would seem that they should be treated at least as well as independent members of their profession, in other words they should also receive the benefit of Article 19

The expression “practising a liberal profession” therefore may be understood to comprise not only those who are engaged in work of the described nature on their own account, but also their qualified assistants.

The *Comments* to the Secretariat draft suggest that the Article should be given an even wider application, so as to comprise scientists and others, who in the widest sense may be called “professional men”.<sup>c</sup>

(5) This is the same expression as is used in Article 13 *Comments* to that Article.

(6) This paragraph must be read in conjunction with Article 40.

“Many countries were under pressure not to admit to their metropolitan territories refugees who might compete with professional workers resident there. In some colonial areas, however, there was an urgent need for qualified persons, and nationals of the metropolitan country were often reluctant to respond to that need. Colonial Governments which would not be willing to give refugees the opportunity of gainful employment in their professions in the metropolitan country might be quite prepared to send them into overseas territories. The retention of a provision encouraging such settlement would therefore be advisable”.<sup>d</sup>

The wording of the paragraph was chosen in order “not to offend the local authorities”. It should be “flexible enough not to be embarrassing”; it provided simply that the signatory States would do their best to convince the administrations of overseas territories that it was in their interest to attract refugees belonging to the liberal professions.<sup>e</sup>

At the Conference of Plenipotentiaries the view was expressed, that the provision contained in paragraph 2 “would have to be interpreted in a reasonable spirit, as the territories to which reference was made included desert areas where the settlement of refugees was impossible”.<sup>f</sup>

It was also stated that in certain cases, as for example in the case of the United Kingdom, “adjacent territories, like the Channel Islands, . . . the settlement of refugees must of

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<sup>c</sup> E/AC.32/2, p. 36.

<sup>d</sup> Statement by the representative of Israel, E/AC.32/SR. 14, p. 3.

<sup>e</sup> Statement by the representative of France, E/AC.32/SR. 13, p. 20.

<sup>f</sup> Statement by the representative of France, E/CONF.2/SR.34, p. 25.

necessity be governed by the same conditions as those obtaining in the United Kingdom itself".<sup>9</sup>

## **ARTICLE 20** **RATIONING<sup>(1)</sup>**

**Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply,<sup>(2)</sup> refugees shall be accorded the same treatment as nationals.<sup>(3)</sup>**

### Comments

(1) A similar provision to that contained in Article 20 is not found in earlier international instruments relating to the status of refugees.

A provision on rationing was included in the Secretariat draft, because "where it exists, rationing is intended to ensure that the inhabitants of a country receive some item of prime necessity. It is therefore essential that refugees should be admitted to the benefits of the rationing system."<sup>a</sup>

(2) It goes without saying that Article 20 is only applicable where a rationing system exists.

The meaning of the phrase after the comma is intended to restrict the application of the Article to rationing of more or less essential goods for personal use, thus excluding rationing of "commodities for commercial or industrial use, such as common or precious metals",<sup>b</sup>

Article 20 does not only apply to foodstuffs, but also to such things as textiles, soap, petrol, and so forth.<sup>c</sup>

Article 20 does not apply to housing, which is dealt with in Article 21.<sup>d</sup>

(3) It was stressed by the representative of China that in certain countries the needs and habits of refugees were different from those of the indigenous population, and he expressed the hope "that the use of the words adopted would not mean that Governments would not give rations to refugees in accordance with their needs, even if such rations were larger than those given to nationals".<sup>e</sup> The Chairman of the Ad Hoc Committee thought the meaning of the phrase was sufficiently clear: "it should be taken to mean that refugees would not be treated less favourable than nationals."<sup>f</sup>

## **ARTICLE 21** **HOUSING<sup>(1)</sup>**

**As regards housing<sup>(2)</sup> the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities,<sup>(3)</sup> shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.<sup>(4)</sup>**

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<sup>9</sup> Statement by the representative of the United Kingdom, loc. cit.

<sup>a</sup> E/AC.32/2, p. 38.

<sup>b</sup> E/AC.32/SR.15, p. 5.

<sup>c</sup> E/AC.32/SR. 15, p. 3.

<sup>d</sup> F/AC.32/SR.15, pp. 3-4.

<sup>e</sup> E/AC.32/SR. 15, p. 3; E/AC.32/SR.41, pp. 18-19.

<sup>f</sup> E/AC.32/SR. 15, p. 3.



## Comments

(1) Article 6 of the Migration for Employment Convention (Revised), 1949<sup>a</sup> provides that each Party to that Convention “undertakes to apply, without discrimination in respect to nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of ... accommodation” in so far as this matter is regulated by law or regulations, or is subject to the control of administrative authorities.

A similar provision was proposed by the UN Secretariat for inclusion in what is now Article 24 (1) (a) of the Refugee Convention. The Ad Hoc Committee found, however, that it did not want to include a reference to housing accommodation in that Article.<sup>b</sup> It was understood, however, that “a person covered under both Conventions [i.e. the Migration for Employment Convention and the present Convention] would get whichever treatment was the better, and a person covered by only one would receive the treatment conferred by that convention.”<sup>c</sup>

(2) Whereas the Migration for Employment Convention speaks of “accommodation”, the present Convention uses the word “housing.” The latter has wider connotations; it implies not only the obtaining of dwelling place, but also participation in schemes for financing of the construction of dwelling places (cf. the expression “housing schemes”).

(3) This phrase has been borrowed from the Migration for Employment Convention (Revised), 1949, which had taken it over from the Migration for Employment Convention, 1939. If housing is left entirely to private enterprise, the State is not obliged to interfere and pass laws simply in order to ensure that refugees will find suitable accommodation. But if there are laws and regulations relating to housing, or if housing schemes are subject to control by the authorities, the State is obliged to see to it that those laws and regulations and the control measures ensure the refugees “the most favourable treatment possible”.

(4) This is the same phrase as is used in Article 13.

It is noteworthy that it was stressed in the Ad Hoc Committee that it required the High Contracting Parties not only to act merely not to discriminate against refugees, but to ensure them “the most favourable treatment possible.”

## **ARTICLE 22** **PUBLIC EDUCATION<sup>(1)</sup>**

**1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.<sup>(2)</sup>**

**2. The Contracting States shall accord to refugees<sup>(3)</sup> treatment as favourable as possible, and, in any event, not less favourable than <sup>(4)</sup> that accorded to aliens generally in the same circumstances, with respect to education other than elementary education<sup>(5)</sup> and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees,<sup>(6)</sup> the remission of fees and charges and the award of scholarships.<sup>(7)</sup>**

## Comments

(1) Article 12 of the 1933 Convention and Article 14 of the 1938 Convention provided that refugees shall enjoy in the schools, courses, faculties and universities of each of the Contracting Parties treatment as favourable as other foreigners in general, and that they shall benefit in particular to the same extent as the latter by the total or partial remission of fees and charges and the award of scholarships.

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<sup>a</sup> ILO Convention 97.

<sup>b</sup> E/AC.32/SR.14, p. 10.

<sup>c</sup> Statement by the Chairman of the Ad Hoc Committee, E/AC.32/SR.38. p. 15.

The present Article deals only with education, including admission to examinations and eligibility for diplomas, but not with the right to exercise a profession once a diploma has been acquired. The latter matter is the subject of Article 19. It was expressly stated in the Ad Hoc Committee that a State ought not to “refuse a refugee the right to obtain an education only on the ground that he would be unable as an alien to practise his profession”.<sup>a</sup>

It was agreed by both the Ad Hoc Committee and the Conference of Plenipotentiaries that the present Article is intended “to apply only to education provided by public authorities from public funds, or to scholarships derived from them”.<sup>b</sup>

In addition to the provisions of the present Article, refugees may benefit from the provisions of the European Convention on the Equivalence of Diplomas leading to Admission to Universities of 11 December 1953 (notably Article 1, cf. Article 4); the European Convention on the Equivalence of Periods of University Study of ... (notably Article ...); and the European Convention on the Academic Recognition of University Qualifications of 14 December 1959 (notably Articles I through 6).

(2) This provision is derived from Article 26 (1) of the Universal Declaration of Human Rights, which lays down that “everyone has the right to education; education shall be free, at least in the elementary and fundamental stages; elementary education shall be compulsory ...”<sup>c</sup>

(3) Article 22 applies to “refugees” - there is no condition as to residence, lawfulness of presence in territory, etc. With regard to paragraph 2, the necessary check on the obligation of the Contracting States is provided by the reference to “the same circumstances”, cf. Article 6. It must be stressed, however, that Article 22 (2) is not only of importance to refugees as defined in Article 1, but even more so with regard to the children of refugees. In this connection attention is called to Recommendation B of the Final Act of 28 July 1951, in which the Conference of Plenipotentiaries is “noting with satisfaction that, according to the official commentary of the Ad Hoc Committee on Statelessness and Related Problems (E/1618, p. 40) the rights granted to a refugee are extended to members of his family”.

As a matter of fact, the present paragraph will on the whole only be meaningful if it is interpreted to give children of refugees the rights for which it provides, unless they have greater rights in their own right, i.e. as nationals of the country of residence.

Once a child of a refugee has been given the benefit of Article 22 (2), he should continue to do so until he has finished the school to which he has been admitted, and until his diploma etc. has been superseded by another one of higher standing.

(4) This is the same phrase as is used in Article 13 to which reference is made.

(5) “Education other than elementary education” is normally understood as education beyond the grade school. The phrase comprises general higher education as well as vocational training.

(6) The recognition of foreign school certificates, diplomas and degrees is mentioned in this Article solely for the purpose of admission to advanced courses of study, which is normally conditioned on the applicant’s possession of some school certificate, diploma or degree.<sup>d</sup>

In Article 4 of the European Convention on the Equivalence of Diplomas leading to Admission to Universities of 11 December 1953, the term “diploma” is defined as comprising “any diploma, certificate or other qualification, in whatever form it may be awarded or recorded, which entitles the holder or the person concerned to apply for admission to a university.” It is reasonable to understand the expression used in Article 22 in the same wide manner.

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<sup>a</sup> E/AC.32/SR.37, p. 27.

<sup>b</sup> E/AC.32/5, p. 50.

<sup>c</sup> E/AC.32/2, p. 40; E/AC.32/5, p. 50.

<sup>d</sup> A/CONF.2/SR.35, p. 6.

(7) In many instances this provision will have to give way to the more favourable one in Article 29; more particularly:

In cases where a fee or charge is remitted in the case of nationals in general or those in certain circumstances by way of statute, regulations or established practice, a refugee will be entitled to the same remission by virtue of Article 29.

## **ARTICLE 23** **PUBLIC RELIEF<sup>(1)</sup>**

**The Contracting States shall accord to refugees lawfully staying in their territory<sup>(2)</sup> the same treatment with respect to public relief and assistance<sup>(3)</sup> as is accorded to their nationals.<sup>(4)</sup>**

(1) Whereas Article 9 of the 1933 Convention only provided for the most favourable treatment accorded to nationals of a foreign country, in respect of such relief and assistance as they may require, including medical attendance and hospital treatment, the present Article goes a step further and gives refugees national treatment with respect to public relief and assistance.

(2) The provision contained in Article 23 is mandatory. With regard to the meaning of the phrase "lawfully staying in their territory", see *supra*, page ...

(3) The Secretariat draft referred to "the relief and assistance accorded to nationals ... who ... are unemployed, suffering from physical or mental disease and incapable because of their condition or age of earning a livelihood for themselves and their families, and also to children without support".<sup>a</sup> In its comment the Secretariat states that "public relief can hardly be refused to refugees who are destitute because of infirmity, illness or age".<sup>b</sup>

During the discussion in the Ad Hoc Committee it was firmly stressed that public relief encompasses hospital treatment, measures of relief for the blind, as well as emergency relief.<sup>c</sup>

It may be taken for granted that the Article also covers the cases specified in Article 6 of the 1933 Convention.

It was agreed to delete the enumeration of instances in which refugees should be entitled to public relief, because "a complete enumeration was always difficult to achieve".<sup>d</sup> The present text is therefore clearly meant to be given a wide interpretation.

A guide to the understanding of the term "public relief and assistance" may be found in the European Convention on Social and Medical Assistance of 11 December 1953.

Article I of that Convention provides that persons eligible under its terms (nationals of the Contracting States as well as refugees (cf. Protocol to the Convention), provided they are lawfully present in the territory of the State concerned), who are without sufficient resources, shall be entitled equally with nationals of the latter State and on the same conditions to social and medical assistance provided by the legislation in force from time to time in the territory in question.

"Social and medical assistance" (also referred to as "assistance") apparently means the same as "public relief and assistance", and in Article 2 (a) (i) of the Assistance Convention it is defined to mean "in relation to each Contracting Party all assistance granted under the laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition,

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<sup>a</sup> E/AC.32/2, p.39.

<sup>b</sup> Loc. cit.

<sup>c</sup> E/AC.32/SR. 15, pp. 5-8.

<sup>d</sup> Loc. cit.

other than non-contributory pensions and benefits paid in respect of war-injuries or injuries due to foreign occupation”.

(4) Article 23 gives refugees the same right to public relief and assistance as is accorded to nationals of the country in which they are lawfully staying.

However, what interested the drafters was the material situation, not procedure. It does not matter whether the relief and assistance is provided out of national (federal), cantonal or communal funds, and through other agencies than those which provide relief and assistance to nationals, as long as the refugees get the same material benefits with the same minimum of delay.<sup>e</sup>

## **ARTICLE 24**

### **LABOUR LEGISLATION AND SOCIAL SECURITY**

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

- (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the enjoyment of the benefits of collective bargaining;
- (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
  - (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
  - (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State. ate.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees as far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

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<sup>e</sup> Cf. E/AC.32/SR.38, p. 5.

## Comments

1. In the modern industrialized society labour regulations and social security legislation are matters of prime importance for almost all individuals. The matters have been made the subject of a number of international arrangements, notably within the framework of the International Labour Organisation.

Provisions relating to the subject matter were found in Articles 8, 9 and 10 of the 1933 Convention and in Articles 10, 11 and 12 of the 1938 Convention.

Refugees may benefit under a number of other Conventional provisions.<sup>a</sup>

It is noteworthy that the ILO Equality of Treatment (Social Security) Convention of 28 June 1962 provides for almost complete equality of treatment in the fields of social security between nationals and non-nationals, and Article 10 (1) of said Convention gives refugees and stateless persons the benefit of the provisions of the Convention without any condition of reciprocity. In so far as the Convention applies, its provisions, in so far as they are more favourable for refugees, will take precedence over the provisions of the present Article.

As pointed out in the *Comments* to the Secretariat draft, "the placing of foreigners and national workers on the same footing not only meets the demands of equity but is in the interests of national wage-earners who might have been afraid that foreign labour, being cheaper than their own, would have been preferred".<sup>b</sup>

2. This paragraph 1s on the whole a replica of Article 6 of the Migration for Employment Convention (Revised), 1949.<sup>c</sup>

Article 24 (1) of the present Convention applies to refugees lawfully staying in the territory of a Contracting State. For the meaning of this term, see *supra*, p.

3. This expression has been explained in note ... to Article 21.

4. This enumeration is identical with the one in Article 6 (a) (1) of the Migration for Employment Convention.

5. Article 6 (1) (a) (ii) of the Migration for Employment Convention mentions not only "the enjoyment of the benefits of collective bargaining" but also "membership of trade unions." The latter right is regulated in Article 15 of the Refugee Convention, which, however, only provides for "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances." It is clear that if a refugee comes under the provisions of the Migration for Employment Convention, he may invoke the more favourable treatment provided for in that Convention with respect to membership of the trade unions.<sup>d</sup>

6. This enumeration is the same as the one found in Article 6 (1) (b) of the Migration for Employment Convention, with the exception that said Article does not refer to "occupational diseases", and uses the word "invalidity" instead of "disability." It was pointed out that "disability" has wider connotations than "invalidity"; "invalidity" means permanent disability, while "disability" also covers temporary disability.<sup>e</sup> The belief, expressed in the first session of the Ad Hoc Committee, to the effect "that no change of substance but only a textual improvement was intended by the substitution of the word 'disability' for 'invalidity'"<sup>f</sup> was apparently dropped in favour of the broader understanding of the term "disability" given above.

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<sup>a</sup> Cf. notes 2 and 10 below.

<sup>b</sup> E/AC.32, p. 37.

<sup>c</sup> ILO Convention 97.

<sup>d</sup> Cf. *supra*, note ... to Article 21.

<sup>e</sup> Cf. the definition of "invalidity" in paragraph 11 of ILO Recommendation 67; E/AC.32/7, p. 3; E/AC.32/SR.38, p. 9; E/AC.32/SR.38, p. 16

<sup>f</sup> See E/AC.32/SR.25, p. 8; E/AC.32/5, p. 52.

For the meaning of Article (6) (1) (b) of the Migration for Employment Convention, reference is made to ILO: Migration for Employment (Report X1 (1) to the 32<sup>nd</sup> session of the International Labour Conference, Geneva, 1948), p. 19 and Report XI (2) to the same Conference, pp. 70-71 and pp. 155-156.

7. Sub-paragraph (b) (i) applies to social security schemes based on contributions by workers and/or employers, which may possibly be subsidised out of public funds.

It must be read in conjunction with paragraph 3.

Sub-paragraph (b) (i) betrays the origin of Article 24, namely that it is taken from a Convention relating to migration for employment.

Whereas the main provision contained in sub-paragraph (b) lays down as a general rule that refugees shall enjoy the same social benefits as nationals in the State in whose territory they are lawfully staying, sub-paragraph (i) provides an exception to this rule.

The Permanent Migration Committee of the ILO proposed in 1948 a text for Article 6 of the Migration for Employment Convention, providing national treatment in respect of

“(b) social security, including appropriate arrangements for the payment of contributions and the maintenance of acquired rights and rights in course of acquisition.”<sup>9</sup>

The International Labour Office substituted this text by the following:

“(b) social security, except in so far as such treatment is inconsistent with appropriate arrangements being made for the maintenance of acquired rights and rights in course of acquisition.”<sup>h</sup>

The Office *Comments* that “this change is designed to express what was doubtless the intention of the Committee, namely that appropriate arrangements should be made for assuring to migrants the benefit of a social security system, which would not in practice necessarily be the same as those applied to nationals”.<sup>i</sup>

In the continued drafting process, sub-paragraph (b) was given its present, more elaborate form, only that it was proposed that the limitations contained under (i) and (ii) should only apply “in the case of compulsory pension schemes”<sup>j</sup> This restriction was deleted by the International Labour Conference.

The meaning of sub-paragraph (b) (i) seems to be the following: It follows from sub-paragraph (2) (b) a refugee shall as a rule receive national treatment with regard to social security in the country where he is lawfully staying. That is to say, if nationals, by virtue of being nationals, are entitled to the full benefits of a social security scheme even if they have spent most of their life abroad and only resided in the country for a marginal period, whereas aliens must have resided in the country and contributed to the scheme for a considerable period of time in order to become eligible, refugees shall be assimilated to the former.

An example may clarify the situation. According to the Norwegian Old Age Pension Act of 6 July 1957 (No. 16), Article I (a), a Norwegian citizen who is 70 years old is entitled to a pension, if he has resided in the country or has served on a Norwegian ship for the last five years before he claims the pension. According to Article I (c) an alien must have completed 15 years of residence or service on a Norwegian ship, of which 5 years must be immediately prior to the filing of the application.

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<sup>9</sup> Report XI (1), p. 19.

<sup>h</sup> Loc. cit.

<sup>i</sup> Loc. cit.

<sup>j</sup> Report XI (2), p. 153.

By virtue of Article (24) (2) (b) of the Refugee Convention, a refugee shall as a rule be treated as a national, which means that he shall be entitled to a pension upon completion of five years residence or service only. The cited Act quite correctly mentions "Alien refugees" along with "Norwegian citizens" in the cited Article I (a).

However, Article 24 (2) (b) (i) of the Refugee Convention introduced an exception to the main rule above: A refugee cannot invoke Article 24 (2) (b) to claim national treatment, if he comes under a bilateral or multilateral international arrangement pertaining to the scheme in question, and aiming at giving a person the benefit of contributions he has paid or residence requirements he has fulfilled in another country before he came to stay in the country where he claims social security payments.<sup>k</sup>

States which are parties to the Maintenance of Migrants' Pension Rights Convention, 1935<sup>l</sup> will apply the provisions of that Convention; cf. Migration for Employment Recommendation (Revised), 1949,<sup>m</sup> Article 21 (3), which lays down the principle that any bilateral arrangements shall be framed with due regard to the principles of said Convention.

In cases where no international arrangement applies, the wording of sub-paragraph (b) (i) lends itself to the interpretation that this provision does not detract anything from the general rule that refugees shall receive national treatment.<sup>n</sup>

On the other hand, the case will normally be covered by sub-paragraph (b) (ii).

Article 3 (3) of said Convention provides that if a person has to fulfil certain requirements as to periods of residence or contribution in order to get the benefits of a social security scheme (cf. the example above) and he does not fulfil these requirements in any one country, the periods spent in the countries to which the Convention applies shall be totalized. For the sake of simplicity we may presume that an alien becomes eligible for old age pension in all the countries concerned if he has completed a period of 15 years residence in the country concerned. If he has stayed for 8 years in country A, for 10 years in country B, and for 12 years in country C, where he claims the pension, these periods shall be totalized as follows:

The total of the above periods, that is the periods counted for the purpose of reclaiming benefits, is 30 years. Country A is then responsible for 8/30, country B for 10/30 and country C for 12/30 of the total pension.

He will not receive the full pension under the laws and regulations of country C, but a pension computed as follows:

8/30 of a pension from country A,

10/30 1/3) of a pension from country B, and

12/30 4/10) of a pension from country C.

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<sup>k</sup> According to Article 34 of the above-cited Norwegian Old Age Pension Act the Kyr in Council may enter into arrangements with other countries with regard to old age pensions and in this connection depart from the provisions laid down in the Act

<sup>l</sup> ILO Convention 48.

<sup>m</sup> ILO Recommendation 86.

<sup>n</sup> To this effect: Statement by the U.S. delegate, E/AC.32/SR.23, p. 12; to the contrary statements in E/AC.32/SR.24, pp. 3-4. This interpretation is supported by the provisions of Article 21 (2) of the Model Agreement annexed to ILO Recommendation 86, which lays down the rule that the international arrangements in question shall "ensure ... treatment not less favourable than that afforded to ... nationals". To be sure, Article 21 (2) of the Recommendation makes an exception with regard to social security schemes where particular residence qualifications apply to nationals. This seems to mean, however, schemes where the benefits are conditioned on residence rather than nationality, even if the possession of citizenship may be a condition too. But this means that we are not faced with a real exception to the main rules. What is meant is that the persons covered by the provisions shall get treatment not less favourable than that afforded to nationals, but if nationals have to prove that they stayed in the country for a certain period in order to get a certain benefit, persons covered by the Recommendation must also prove such residence.

There was a general consensus among the drafters of the Refugee Convention that a refugee may come under an international arrangement if he has migrated from one country of refuge to another. On the other hand, an arrangement in force between the refugee's country of origin and the country of residence does not apply to the refugee.<sup>o</sup> See in this connection note 11 infra.

8. Sub-paragraph (b) (ii) applies to benefits and such parts of benefits which are "payable wholly out of public funds", including "allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension", which phrase refers to allowances paid over and above the partial pension to which a person may be entitled by virtue of contributions paid, so that his total benefit shall be equal to a normal (or only slightly less than a normal) pension.

With regard to benefits of the category covered by sub-paragraph (b) (ii) refugees may be subjected to "special arrangements", which means that they may receive less than a national. But the provision does not give the State a pretext to refuse such benefits altogether. The refugee cannot, on the other hand, complain if the benefit he receives is (for example) fixed on the basis of the length of his period of sojourn in the country prior to his applying for the social security benefit in question.

9. Prompted by statement by the ILO Representative in the first session of the Ad Hoc Committee,<sup>p</sup> the Committee stated in its report of the first session that "it was agreed that in cases of fatal employment injuries the beneficiaries of the injured person should receive benefits even if they are not resident in the country where the injury occurred".<sup>q</sup> In his *Comments* on the Article, the Director-General of ILO found, however, occasion to point out "that the present draft ... makes no such provision" and that consequently "if the ad hoc Committee considered that the beneficiaries should receive the benefits in question even in the case contemplated, an express provision to that effect should be included in the body of the article itself."<sup>r</sup> Following a proposal by the U.S. delegate, the present paragraph was consequently included in the Article, and it was apparently intended to mean the same as what was stated in the report of the first session of the Ad Hoc Committee.<sup>s</sup>

Paragraph 2 of Article 24 therefore goes beyond national treatment. Even if the survivor's dependants of nationals are not entitled to benefit if they stay outside the country concerned, surviving dependants of refugees shall be allowed to enjoy such benefits and have them transferred out of the country.

10. The present paragraph 1s based on a proposal made by the Representative of the American Federation of Labor and formally introduced by the Belgian representative. It was accepted by the Ad Hoc Committee in its first session.<sup>t</sup>

Paragraph 3 refers to the kind of international arrangements mentioned in paragraph 1, sub-paragraph (b) (i).

The phrase "agreements concluded between them" apparently comprises not only bilateral and multilateral agreements to which only Contracting States are parties, but also such international agreements which are in force between two or more Contracting States, even if other States are parties to the agreements too. However, in the latter case paragraph 3 only applies to rights acquired or in the process of acquisition in countries parties to the present Convention. With regard to rights acquired etc. in other countries, paragraph 4 applies.

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<sup>o</sup> E/AC.32/SR.14, P. 9; E/AC.32/SR.24, p. 4.

<sup>p</sup> E/AC.32/SR.14, pp. 6 and 11.

<sup>q</sup> E/AC.32/5, p. 52.

<sup>r</sup> E/AC.32/7, p. 3.

<sup>s</sup> E/AC.32/SR.38, pp. 9 and 15.

<sup>t</sup> E/AC.32/SRs23, p. 12; E/AC.32/SR.24, pp. 3-4; E/AC.32/L.32, p. 9; E/AC.32/SR.25, pp. 7-8; E/AC.32/5, p. 20.



The final phrase of paragraph 3 means that refugees shall be given the treatment due to nationals of the country in which they are lawfully staying. If a refugee acquires certain social security benefits in country A, then moves to country B, becomes lawfully staying there, and acquires certain rights in that country too, and finally claims his social security benefits there, his rights shall be totalized as if he were a national of any one of the countries concerned.

An important implication of paragraph 3 is that refugees get the full benefit of the Maintenance of Migrants' Pension Rights Convention, 1935.<sup>u</sup>

There can be no doubt that a refugee may claim the benefit of Article 10 (1) (b) of that Convention, in so far as the countries concerned are parties to the present Convention, that is to say, the refugee "shall be entitled to the entirety of the benefits the rights to which has been acquired in virtue of their insurance ... [as] if they are nationals of a member, irrespective of their place of residence".

It is doubtful whether Article 3 (1) (b) of the below-mentioned European Conventions and Article 2 of the Protocols thereto add anything to the rule expressed in paragraph 3.

European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors, of 11 December 1953, and Protocol thereto.

European Interim Agreement on Social Security Other Than Schemes for Old Age, Invalidity and Survivors of 11 December 1953; and Protocol thereto.

11. Paragraph 4 is particularly interesting because it aims at giving the refugees the benefit of treaties concluded between the country of refuge and the country of origin for the mutual benefit of the nationals of both. Refugees, not enjoying the protection of their country of origin, do not in law benefit from such treaties.

12. Paragraph 4 originated in the same way as paragraph 3. However, in the original draft, it referred to benefits of "agreements which may have been concluded by ... Contracting States with the country of the individual's nationality or former nationality".<sup>v</sup>

During the preceding discussion it had been stressed that "a refugee who refused to recognise the government of his country of origin could not expect to enjoy benefits earned there",<sup>w</sup> and the Belgian delegate mentioned the following example to illustrate this point:

"He took as an example the case of a Polish miner in France. If the miner had worked 10 years in Poland and 20 in France, under the existing bilateral agreement Poland would pay one-third and France two thirds of his pension. If the miner became a refugee, however, Poland could hardly be asked to pay its share or normally ought to have been France to pay the share which paid by Poland. The miner would therefore receive in France only the two thirds which that country has originally undertaken to pay."<sup>x</sup>

It was in order to overcome this unfortunate aspect of a refugee's position as an "unprotected person" that the Convention fathers agreed to include the provision presently under consideration.

Following a United Kingdom proposal in the Conference of Plenipotentiaries<sup>y</sup> the paragraph got its present wording it being understood that the paragraph would apply to the cases which it was originally envisaged to cover, but that the amendment also meant a widening of the scope of the paragraph, namely that it "would result in the benefits of any agreement

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<sup>u</sup> ILO Convention 48.

<sup>v</sup> E/AC.32/L.32, P. 9.

<sup>w</sup> E/AC.32/SR.23, p. 12.

<sup>x</sup> E/AC.32/SR.24, p. 4.

<sup>y</sup> A/CONF.2/50.

concluded between a Contracting State and a non-Contracting State being extended to all refugees” lawfully staying in the territory of the Contracting State concerned.<sup>z</sup>

With respect to the meaning of the phrase “will give sympathetic consideration” see note ... to Article 7.

## **ARTICLE 25**

### **ADMINISTRATIVE ASSISTANCE<sup>(1)</sup>**

- 1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse,<sup>(2)</sup> the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him<sup>(3)</sup> by their own authorities or by an international authority.<sup>(4)</sup>**
- 2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision<sup>(5)</sup> to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.<sup>(6)</sup>**
- 3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary.<sup>(7)</sup>**
- 4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.<sup>(8)</sup>**
- 5. The provisions of this article shall be without prejudice to articles 27 and 28.<sup>(9)</sup>**

#### Comments

(1) When a person is outside the country of which he is a national, he will often have to ask the authorities of his State of nationality for assistance in various forms, particularly in order to be able to exercise rights or engage in activities in the country where he finds himself.

For various acts of civil life persons are requested to produce documents to prove their identity, when and where they were born, who their parents were, whether they are married, divorced or widowed, what education, skills and diplomas they have, etc. They may also have to prove that a foreign document is genuine and drawn up in conformity with the laws of the foreign country in question, or to prove their title to property or rights of various descriptions.

For the indigenous citizen it is normally easy to get the documentary proof he needs. He applies to the Registrar of Births for a birth certificate, or to the Registrar of Marriages for a marriage certificate. He can get a certified copy from the appropriate Law Court of a judgement of divorce, and he can get a death certificate from the Health Authorities or the Probate Court or some other authority.

An alien or a naturalized citizen is able to get the same sort of documents from local authorities with regard to acts which have taken place and are recorded in the country of residence. With regard to acts which are recorded in their home country or country of origin, aliens with an effective nationality, as well as certain naturalized citizens and stateless persons, can apply to the territorial or consular authorities of the country in which the records are, and they will as a rule get what they want maybe with a certain delay - but without exceptional difficulty.

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<sup>z</sup> A/CONF. 2/SR. 11, p. 8

Refugees, whose ties with their country of origin are severed, will, however, often be unable to enlist the co-operation of the authorities of that country, and they cannot even as a rule be expected to try.<sup>a</sup>

In order to fulfil the documentation requirements which they are faced with, they must therefore be allowed to produce substitute documents.

In certain countries, primarily those in which the common law applies, persons who cannot produce original documents are, as a rule, allowed to present an affidavit, that is to say a sworn statement, in which they set out the relevant facts, in lieu of the original document.<sup>b</sup>

In other countries the affidavit system is not in use, and there persons must submit documents or certificates issued or at least legalized by a public authority.

Already at an early point in the period after the First World War it was felt necessary to remedy the unfortunate situation in which many refugees found themselves, owing to the fact that they were unable to obtain documents from the authorities of their country of origin, and it was found that a system whereby substitute documents could be issued had to be instituted by international agreement.

There are two possibilities for the issue of such documents. The task of issuing them can be entrusted to an international body, as for example the Office of the High Commissioner for Refugees, or the documents can be issued by authorities of the country of refuge. Both approaches have been tried.<sup>c</sup>

In Article 1 of the 1928 Arrangement<sup>d</sup> it is recommended that the High Commissioner for Refugees through his representatives "in the greatest possible number of countries" shall (a) certify the identity and the position of the refugees; (b) certify their family position and civil status, in so far as these are based on documents issued or action taken in the refugees' country of origin; (c) testify to the regularity, validity, and conformity with the previous law of their country of origin, of documents issued in such country; (d) certify the signature of refugees and copies and translations of documents drawn up in their own language; (e) testify before the authorities of the country to the good character and conduct of the individual refugee, to his previous record, to his professional qualifications and to his university or academic standing; and (f) recommend the individual refugee to the competent authorities, particularly with a view to his obtaining visas, permits to reside in the country, admission to schools, libraries, etc.

The 1933 Convention<sup>e</sup> provides in Article 15 for the setting up of Committees for Refugees, which "may be entrusted with the powers enumerated in Article I of the Arrangement and

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<sup>a</sup> It is not only the formal lack of protection, but the refugee's fear of persecution and the unwillingness of the authorities of the country of origin to co-operate even in small affairs of everyday life, which necessitates provisions for substitute documentation. The dual national and the stateless person who does not fear persecution are both unprotected by the country of former residence, yet they may get all the documents and certifications they need from the authorities of that country.

<sup>b</sup> Cf. statements of Sir Leslie Brass (E/AC.32/SR.19, pp. 3, 7 and 8), Dr. van Heuven Groedhart (A/CONF.2/SR. 11, p. 14), and Sir Samuel Hoare (A/CONF.2/SR. 11, p. 15 and SR.35, p. 9). Cf. also the observation of the representative of the International Refugee Organization, Dr. Paul Weis, to the effect that the application of the article "depended upon the legal system in force in a given country. In common law States, like the United Kingdom, no new legislation or administrative procedures were required to protect refugees. In other countries, however, like France or Belgium, special provisions had to be made" (E/AC.32/SR.19, p. 3).

<sup>c</sup> It will be appreciated that depending on whether administrative assistance is afforded by a national or an international authority, this subchapter should be placed under the headings of "Protection by country of refuge" or "International Protection" respectively. As, however, under Article 25 of the Refugee Convention the primary responsibility rests on the country of residence, it has been found appropriate to include the present subchapter under the first-mentioned heading.

<sup>d</sup> Arrangement relating to the Legal Status of Russian and Armenian Refugees, signed at Geneva, 30 June 1928, League of Nations Treaty Series, No. 2005, vol. 89, pp. 53 ff.

<sup>e</sup> Convention relating to the International Status of Refugees, signed at Geneva, 28 October 1933. League of Nations Treaty Series, No. 3663, vol. 159, pp. 199 ff.

Agreement<sup>f</sup> of June 30<sup>th</sup>, 1928, in countries in which those instruments are in force, in so far as these powers are not exercised by representatives of the Secretary-General of the League of Nations”.

Article 16 sets forth that the Arrangements and Agreement of 1922, 1924, 1926 and 1928 shall, in so far as they have been adopted by the Contracting Parties, remain in force as regards such of their provisions as are compatible with the Convention.

The 1938 Convention does not contain any provisions in respect of substitute documentation.

(2) Paragraph 1 deals with “administrative assistance.” This concept is wider than the expression “documents or certifications” which is used in paragraph 2. Administrative assistance may be rendered by issuing documents and certifications, but it can also take other forms, e.g. correspondence, investigations, recommendations, counselling, personal assistance.

Article 25 only applies to assistance which should normally be given by the authorities of a country different from the country of residence. If an act has taken place in the country of residence, the refugee will be able to get a certificate from the appropriate authority just like anybody else.

It is a condition for invoking Article 25 that the refugee cannot have recourse to the authorities who should otherwise have afforded the administrative assistance. A refugee cannot be expected to ask the authorities of his country of origin for assistance, and the authorities of the country of residence consequently cannot refuse to afford assistance, on the ground that the refugee has not first tried if the former can help him. The same must apply if the refugee needs documentation relating to acts which have taken place in countries with a regime similar to that prevailing in his country of origin, e.g. if a refugee from Hungary need a certificate from Czechoslovakia or Romania.

If, on the other hand, administrative assistance is required from some other country, where a refugee cannot fear any persecution, e.g. a country where he formerly enjoyed asylum, the refugee must try and get what he needs from that country. If, however, the issue of certifications etc. in that country is dependent on a request through official channels, the authorities of the country of residence or the international authority mentioned in paragraph 1 (see note 4 below) are obliged (and entitled) to channel such a request. In this case those authorities are in fact affording the refugee assistance which normally should be rendered by the State of nationality and which comes under the heading of diplomatic protection or consular assistance.<sup>g</sup>

(3) The State “in whose territory he is residing”, or the country of residence, is not the same as the country where a refugee has his domicile or where he is “lawfully staying” or allowed to settle. A refugee may have a travel document issued by State A, in whose territory he has his domicile or lawful residence, and yet he may be residing (more or less permanently) in country B, for example for the purpose of studying. It seems to be the opinion of the drafters that in such a case the refugee may invoke Article 25 against State A or State B, whichever is most convenient for him. On the other hand, if a refugee is outside his country of lawful residence only for a travel, or for a short visit to another country, it is only the country of (lawful) residence which has an obligation to afford assistance according to Article 25. In order to get the assistance he needs, the refugee will in such a case be entitled to enlist the assistance of the diplomatic or consular authorities of his country of residence.<sup>h</sup>

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<sup>g</sup> Convention concerning the Status of Refugees coming from Germany, signed at Geneva, 10 February 1938. League of Nations Treaty Series, No. 4461, vol. 192, pp. 59 ff. A/CONF.2/52 and A/CONF.2/SR.11 pp. 11 -16. With regard to Article 25 cf. also E/AC.32/2, E/AC.32/5, E/AC.32/L.3 Art. 18, E/AC.32/L.2l, E/AC.32/L.32 Art. 20, E/AC.32/L.4o, p. 50, E/AC.32/SR.19, pp. 2-9, E/AC.32/SR.24 pp. 5-6, E/AC.32/SR.25 p. 8 (para 29), E/AC.32/SR-38, pp. 20-21 A/CONF.2/1, A/CONF.2/46, A/CONF.2/48, A/CONF.2/SR.35, p. 9.

<sup>h</sup> Cf. Paragraph 16 to the Schedule.

(4) Article 25 of the 1951 Convention makes it principally the responsibility of the country of residence to render what is being termed as "Administrative Assistance." The State may provide that its own authorities shall render the assistance, or it may conclude an agreement with an international authority to the effect that the latter shall afford such assistance to refugees residing in the territory of the State concerned. If no such agreement is being concluded, the State must render the service through its own organs.<sup>i</sup>

The application of Article 25 is in no way limited to the territorial authorities of the country of residence.

Under Article 25 the diplomatic or consular authorities of the country of residence may therefore have to render a refugee assistance of a kind which is normally put under the heading of "protection." Article 25 does not specify any particular international authority. A Contracting State is therefore free to choose any international authority it likes, which is able and willing to carry out the task. It is, however, clear that the drafters of the Convention had in particular the Office of the High Commissioner for Refugees in mind. It was decided, however, not to mention this Office by name, because it was felt that the Contracting States should not impose any tasks on it, this being a matter for the United Nations to decide, and because there was a possibility that the Convention would survive the Office.<sup>j</sup>

(5) Paragraph 2 differs in scope somewhat from paragraph 1. Its scope is wider in so far as it envisages acts by other bodies than the authority or authorities mentioned in paragraph 1, provided there is supervision by said authority or authorities. The word "authority" clearly refers to an international authority and "authorities" refers to the authorities of the country of residence. There were statements in the Conference of Plenipotentiaries to the effect that the mention of supervision means "that if the papers and documents concerned were issued by a national authority there would be international supervision, whereas if they were issued by an international authority, there would be national supervision".<sup>k</sup> It cannot, however, be seen that this interpretation has any support in the text of the paragraph. It cannot even be seen to contain a requirement of legalization by the competent authority.<sup>l</sup>

Actually paragraph 2 allows a flexible system to be established, on the only condition that there is some supervision by a competent authority.

As pointed out by the delegate of the United Kingdom, Sir Samuel Hoare, the documents referred to in Article 25 "would not be required to enable refugees to exercise rights in that country (i.e. the United Kingdom). Affidavits would be sufficient."<sup>m</sup> The article could therefore not be interpreted "as mandatory in the sense that it would require the United Kingdom Government to invent and introduce a system for supplying documents of the type which would be supplied by other countries." According to Sir Samuel Hoare "the United Kingdom Government would, however, render every assistance to refugees by continuing to apply its own system - which was based on the personal affidavit - and to other countries by seeing that documents of that type were duly legalized if required by refugees for transmission to other countries."<sup>n</sup>

These statements by the British delegate were met with no objection by other delegates.

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<sup>i</sup> Cf. Statement by the Belgian representative : A/CONF/2/SR. pp. 12 ff.

<sup>j</sup> Cf. E/1618, E/AC.32/5, p. 53, also E/AC.32/SR. 19, pp. 2 ff.

<sup>k</sup> Statement by the French delegate, Mr. Rochefort, A/CONF.2/SR. 11, p. 15.

<sup>l</sup> Statement by the Belgian delegate, Mr. Herment, loc. cit., to the effect that papers were to be "regarded as authentic by the national authorities if the signature of the Director of the (international branch) Office was attested by the (national) authorities".

<sup>m</sup> A/CONF.2/SR. 11, p.15.

<sup>n</sup> A/CONF.2/SR.35, p. 9.

Considering that the documents and certifications envisaged in paragraph 2 shall have to be made on the basis of statements by the refugees, corroborated by other evidence only if available, the difference between such a paper and an affidavit is more a question of form than of substance.<sup>o</sup> As pointed out above, the purpose of Article 25 (at least as far as documents are concerned) is primarily to overcome difficulties which occur in Civil Law and other countries where the affidavit system is not used. It can also be taken into account that since affidavits are being used in a very important part of the world, the authorities of other countries regularly have to accept them. It follows also from the rule *locus regit actum* that a duly legalized affidavit must be recognized by the Contracting States on an equal footing with "documents or certifications" issued in countries not using affidavits.

This is of importance in connection with paragraph 3.

(6) Whereas paragraph 1 deals with administrative assistance of any description, paragraph 2 is restricted to "documents or certifications." Furthermore it only applies to such papers as would normally be delivered by or through national authorities to their citizens; the word "aliens" suggests that one even may restrict it to papers normally delivered to citizens who are away from their own country; in other words paragraph 2 applies in particular to documents or certifications normally delivered by or through the diplomatic or consular authorities to nationals of the sending State.

Article 5 of the Vienna Convention on Consular Relations of 24 April 1963 gives an indication as to some of the documents in question.

Apart from Article 5 (d) which deals with passports etc., and is not applicable to refugees (cf. Articles 25 (5) and 28 of the present Convention), said Article of the Vienna Convention sets forth that the consular functions comprise:

- (f) acting as notary and civil registrar and in capacities of a similar kind ... ;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory ...

However, considering that paragraph 2 speaks of "national authorities", the paragraph may also be applied to documents issued by or through other authorities than diplomatic and consular ones. The enumeration in Article I of the 1933 Convention may serve as guidance in this respect (cf. note I above). As a matter of fact that enumeration was only deleted from the Ad Hoc Committee draft because it was felt that a general statement was preferable and that the enumeration "appeared to have been based largely on the relevant administrative practices of a very small number of countries." Many of the documents mentioned were not at all necessary in certain countries. It was not, however, intended to detract anything from the substance of the Secretariat draft which contained this enumeration.<sup>p</sup>

(7) Whereas paragraphs 1 and 2 deal with the administrative assistance to be afforded to refugees and more particularly the issue of documents and certifications, paragraph 3 provides that the papers issued in accordance with the preceding paragraphs shall be accepted as documentary proof in lieu of the documents which would normally be required by an alien in similar circumstances, who have recourse to the authorities of his State of nationality.

In the Secretariat draft it was proposed that "the certificates so delivered shall take the place of the original acts and documents and shall be accorded the same validity".<sup>q</sup>

In the Ad Hoc Committee's draft it was proposed that the documents or certifications delivered in accordance with paragraph 2 "shall stand in the stead of and be accorded the

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<sup>o</sup> Cf. the statement of the Austrian delegate, Mr. Fritzer, to the effect that the Government of the country of residence would "have to provide documents covering legal situations and circumstances unknown to (that country's) law and custom". (A/CONF.2/SR. 11, p. 11.)

<sup>p</sup> A/CONF.2/1, p. 14.

<sup>q</sup> A/CONF.2/SR. 11, p. 14.

same validity as would be accorded to similar instruments delivered to aliens by their national authorities”<sup>f</sup>

The Belgian delegation at the Conference suggested that the proposed text “should be replaced by some text more easily capable of dispelling any doubts arising out of such documents; that was why it had suggested that they should be regarded as authentic in the absence of proof to the contrary”.<sup>g</sup>

Taking into consideration the basis on which the document etc. often shall have to be issued (corroborated or uncorroborated statements by the persons concerned) it seems that the Conference has made a sound ruling.

(8) Paragraph 4 may be considered self-explanatory.

(9) Although the issue of identity papers and travel documents may be said to fall within the term “administrative assistance”, they are not documents which would “normally be delivered to aliens by or through their national authorities”.<sup>h</sup> Paragraph 5 makes it clear that such documents are falling outside the scope of Article 25.

## **ARTICLE 26**

### **FREEDOM OF MOVEMENT<sup>(1)</sup>**

**Each Contracting State shall accord<sup>(2)</sup> to refugees lawfully in its territory<sup>(3)</sup> the right to choose their place of residence<sup>(4)</sup> and to move freely within its territory<sup>(5)</sup> subject to any regulations applicable to aliens generally in the same circumstances.<sup>(6)</sup>**

#### Comments

(1) Article 26 is regulating an old and controversial problem relating to the treatment of refugees, namely, their freedom of movement within the country where they have found refuge.

It is interesting to note that the ancient French law relating to alien refugees residing in France, of 21 April 1832, authorized the Government to confine the refugees living in France to certain cities which it designated.<sup>a</sup>

A forerunner for the provision contained in Article 26 is found in Article 2 of the 1938 Convention:

“Without prejudice to the power of any High Contracting Party to regulate the right of sojourn and residence, a refugee shall be entitled to move about freely, to sojourn or reside in the territory the present Convention applies to, in accordance with the laws and internal regulations applying therein.”

As a matter of fact, the Ad Hoc Committee was invited by the Belgian representative to adopt this provision *expressis verbis* for inclusion in the present.<sup>b</sup>

It was, however, deemed appropriate to subject the proposed text to certain changes, and the outcome was the present text.<sup>c</sup>

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<sup>a</sup> The present French Aliens Ordinance of 2 November 1945 contains a similar provision, which, however, only applies in the cases of aliens, whose presence in the country is illegal or who are under an expulsion order, but who cannot be sent out of the country. Provisions to the same effect as the present French law are found in a number of countries.

<sup>b</sup> E/AC.32/SR. 15, p. 13

<sup>c</sup> Cf. E/AC.32/5 (E/1618), p. 21. and E/AC.32/8 (E/1850), p. 23.

(2) The words “shall accord” imply that Article 26 contains a mandatory obligation, not merely a recommendation.

However, there is made an important inroad on this obligation, by subjecting the freedom of choice of residence and of movement, for which the Article provides, to any regulations applicable to aliens generally in the same circumstances (see note 6 *infra*). On the face of it, it might seem as if Article 26 is superfluous in view of Article 7 (1), which provides that except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

However, it might not be incompatible with the treatment due to aliens, and consequently it might not be a contravention of Article 7 (1) if the State concerned passed special regulations restricting only the freedom of movement of refugees. Article 26 makes it clear beyond doubt that a Contracting State may not impose such restrictions applicable only to refugees.

This provisions of Article 26 may be derogated from under the terms of Article 9.

(3) For the meaning of this expression, see above.

The expression “refugees lawfully in (the) territory” as used in Article 26 must, however, be seen in conjunction with the provision contained in Article 31 (2). The latter provision subjects a refugee who enters or is present in the territory “without authorization”, i.e. unlawfully, to certain movement restrictions, until his status is “regularized”. It seems that when the status of an illegal entrant is “regularized”, he will be not only “lawfully” but also “lawfully staying” in the country - in other words, in his case it will not be sufficient to show a “*récépissé provisoire*” in order to enjoy the benefit of Article 26; something more is required.

With this exception, however, Article 26 applies to any refugee “lawfully in the territory” in the sense this term has been interpreted above.

(4) Article 26 refers only to two different rights:

- (a) the right to choose one’s place of residence, and
- (b) freedom of movement within the territory of a particular State.

It does not relate to employment. The rules regulating employment are found in Articles 17 through 19. It will be appreciated that in so far as there are restrictions on the freedom to seek whatever employment one might desire, the right to choose one’s place of residence may be restricted in fact though not in law.

The choice may also be limited because of lack of housing cf. in this respect Article 21.

The right to choose one’s place of residence certainly implies the right to continue living in that place.

(5) The right to move freely is limited to the territory of the Contracting State concerned. It does not include a right to enter, leave or re-enter the national territory, in this respect the provisions of Article 28 and the Schedule apply.

The freedom of movement as circumscribed in Article 26 is not dependent on any particular purpose. The refugee may move around for business or for pleasure.

(6) By subjecting the refugee’s right to choose his place of residence and to move freely within the national territory to “any regulations applicable to aliens generally in the same circumstances”, the latter part of the Article makes important inroads on the rights proclaimed in its first part.

During the deliberations in the Ad Hoc Committee one “pointed to the existence in most countries of frontier or strategic zones, access to which was forbidden to aliens”,<sup>d</sup> and

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<sup>d</sup> E/AC.32/SR. 15, p. 14.



sometimes “even to nationals of the country concerned”.<sup>e</sup> It goes without saying that it is entirely reasonable to apply such a prohibition to refugees too.

The same seems to apply if admission to an area is forbidden for some other reason, e.g. because of a natural catastrophe, or because of a rebellion, civil war or large scale police operations, that is to say areas where strangers may be in the way, or where their safety cannot be guaranteed.<sup>f</sup>

In some countries certain classes of aliens (e.g. immigrant workers) may only be admitted on the condition “that for a given period they confine themselves to specified occupations or specified regions of the country”.<sup>g</sup> The law may also provide for “successive stages, a progressive expansion of both place and time, by means of which the alien (is) eventually authorized to reside anywhere he wished and to move about freely”.<sup>h</sup> If this is the regime applied to aliens generally in certain circumstances, it may be applied to refugees in the same circumstances.

It must, however, be noted that the Contracting States in applying such restrictive rules to refugees, may not discriminate against them or between them because of their race, religion or country of origin, cf. Article 3. Discrimination because of the formal possession of a certain nationality is only allowed under the terms of Articles 8 and 9.

## **ARTICLE 27** **IDENTITY PAPERS<sup>(1)</sup>**

**The Contracting States shall issue<sup>(2)</sup> identity papers<sup>(3)</sup> to any refugee their territory<sup>(4)</sup> who does not possess(s) a valid travel document.<sup>(6)</sup>**

### Comments

(1) The early arrangements relating to the status of refugees, which were made under the auspices of the League of Nations and its High Commissioner for Refugees, provided for the issue of Certificates of Identity. Similar papers were later called Nansen certificates,<sup>a</sup> travel documents which are dealt with in Article 28 of the present Convention.

The identity papers to which Article 27 refers are documents of a different nature. They are simply papers which show the identity of the refugee, without conferring on him any rights at all.

The origin of this Article can be traced back to the Secretariat draft.

The provision which the first drafters had in mind was apparently of somewhat different scope. It should obligate the Contracting States “to issue identity papers (residence card, identity card, etc.) to refugees ... authorized to reside in their territory”.<sup>b</sup>

However, the Ad Hoc Committee could not agree to such a Provision, and decided instead on a formulation practically identical to the one in the final text.

(2) The extent of the obligation which Article 27 places on a Contracting State depends on whether it is the practice to issue identity papers in the country.

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<sup>e</sup> Op. cit.p. 15.

<sup>f</sup> Cf. E/AC.32/SR.38, p. 22.

<sup>g</sup> E/AC.32/SR.15, p. 17: cf also A/CONF.2/SR.1 1, p. 16.

<sup>h</sup> E/AC.32/SR.15, p. 20.

<sup>a</sup> Cf. Article 2 of 1933 Convention.

<sup>b</sup> E/AC.32/2: Article 21.

In certain countries the law provides that all persons must carry some sort of identity paper, and are liable to penalties if they do not carry it. In other countries, people are not supposed to carry identity papers, except possibly for their own convenience, e.g. in order to prove their identity when collecting registered mail etc. at post offices where they are not personally known.

It is clear that whereas a refugee may have a desperate need for an identity paper in a country of the former category, he will rarely feel any need for it in a country of the latter type.

Whereas the obligation to issue identity papers to refugees must be absolute, as far as a State requiring its inhabitants to carry such papers is concerned; a State of the other type will fulfil its obligation by making some sort of identity paper available to refugees requesting it.

(3) The identity papers envisaged in Article 27 are simply papers showing the identity of the person concerned, so as to enable him to conform to laws and regulations requiring the inhabitants of a territory to carry identity cards, or to prove his identity whenever that might be requested; e.g. for postal purposes.

In countries where the inhabitants are obliged to carry identity cards, the identity papers issued to refugees by virtue of Article 27 must be such that the bearer will conform to the law or regulation in question. In other countries, the identity papers may take a number of different shapes. The Conference of Plenipotentiaries agreed that as an "Immigrant's Record of Landing" is the only paper which immigrants in Canada are supposed to hold, Canada would discharge its obligation under Article 27 by continuing the issue of such Records to refugees.<sup>c</sup> In other countries it may be sufficient that a refugee gets a driving licence or a postal identity card. The State must, however, be considered obliged to issue, if necessary, a document certifying the identity of the refugee, (which might serve in lieu of a certificate of birth, a certificate of baptism or a comparable certificate) so that the refugee will be able to fulfil the formal requirements for the issue of any of the just-mentioned cards.<sup>d</sup>

The idea underlying Article 27 is that any refugee, whether he is legally or illegally in a country, should possess at least "a provisional document which he could produce if, say, he were stopped in the street; such a document [might] be purely provisional and its owner's stated identity might even prove to be false, but he would hold a provisional document enabling him to be identified".<sup>e</sup>

The document envisaged in Article 27 would not imply any right of residence or any claim to a prolonged sojourn. In the words of the United States delegate, the purpose of it is that even "a refugee illegally present in any country, though still subject to expulsion [or refoulement], would be free from the extra hardships of a person in possession of no papers at all".<sup>f</sup> In other words, "every refugee should be provided with some sort of document certifying his identity, without prejudice to the right of the Government of any country, in which he might be illegally present to expel him."<sup>g</sup>

(4) The identity papers envisaged in Article 27 shall not only be available to refugees lawfully in the territory, but also to those whose entry was illegal or whose position has not been regularized, however temporary their stay. Cf. note 3 supra.

(5) This clearly comprises the case of a refugee to whom no travel document has been issued, or whose travel document has expired or been lost. But it must also cover the case of a

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<sup>c</sup> A/CONF.2/SR. 11, p. 17.

<sup>d</sup> Cf. Article 25.

<sup>e</sup> Statement by French representative, E/AC.32/SR.38, p.24.

<sup>f</sup> E/AC.32/SR.38, p. 24.

<sup>g</sup> Statement by representative of International Refugee Organization, E/AC.32/SR.38, p. 24.

refugee who has temporarily surrendered his travel document, for example to have it renewed, to have its validity extended, or in order to get a visa. The meaning of Article 27 is that a refugee shall not be obliged to go - for any period, however short - without any document showing his identity.

It will be appreciated that in the last mentioned case it will suffice - in some countries at least - to give the refugee a receipt showing that his travel document has been temporarily handed in to this or that authority.

(6) The draft adopted by the Ad Hoc Committee referred to “a valid travel document issued pursuant to Article [28]”.<sup>h</sup>

The words “issued pursuant to Article 28” were, however, deleted by the Conference of Plenipotentiaries, in order not to exclude “travel documents issued by countries which, though non-Contracting States, nevertheless wished to accept refugees outside the framework of the Convention”. It was felt that the quoted words were redundant in view of Article 28 (2).<sup>i</sup>

It is therefore clear that the expression “travel documents” in Article 27 does not only mean Convention travel documents issued pursuant to the provisions of the present Convention (Articles 11 and 28; also Paragraph 6 of the Schedule), but also “travel documents issued to refugees under previous international agreements by parties thereto”.<sup>j</sup>

The expression - as used in Article 27 - probably also applies to aliens’ passports, if duly visaed.

It is important to note that Article 27 does not require that the travel document must be issued by the State in whose territory the refugee is present, and upon whom the duty to issue an identity paper would devolve if the refugee possessed no valid travel document. In other words, the State in whose territory a refugee finds himself is not obliged to issue identity papers if the refugee possesses a valid travel document, issued by the authorities of that State or of a foreign State.

Emphasis must, however, be put on the word “valid”. This does not only mean that the document must be valid for the territory concerned, and that its period of validity must not be expired. The travel document must be considered valid by the State in whose territory the refugee is present, that is to say it must be duly visaed or at least stamped by that State, or entitle its bearer to be present in the territory by virtue of a visa exemption agreement. In other words, it must be able to serve the purpose for which identity papers issued by virtue of Article 27 are intended, notably to let its bearer pass unchallenged if stopped by the police and requested to show his identity.

## **ARTICLE 28**

### **TRAVEL DOCUMENTS<sup>(1)</sup>**

**1. The Contracting States shall issue<sup>(2)</sup> to refugees lawfully staying in their territory<sup>(3)</sup> travel documents for the purpose of travel outside their territory,<sup>(4)</sup> unless compelling reasons of national security or public order otherwise require,<sup>(5)</sup> and the provisions of the Schedule to this Convention shall apply with respect to such documents.<sup>(6)</sup> The Contracting States may issue<sup>(7)</sup> such a travel document to any other refugee in their territory,<sup>(8)</sup> they shall in particular give sympathetic consideration<sup>(9)</sup> to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.<sup>(10)</sup>**

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<sup>h</sup> E/AC.32/5 (E/1618), p. 21.

<sup>i</sup> A/CONF.2/SR.35, p. 9.

<sup>j</sup> Cf. Article 28 (2).

**2. Travel documents issued to refugees under previous international agreements<sup>(11)</sup> by parties thereto<sup>(12)</sup> shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this Article.<sup>(13)</sup>**

## Comments

(1) One of the greatest difficulties which faced refugees in the early period after the First World War, was the necessity of possessing a passport in order to cross from one country into another, together with the fact that for refugees it was impossible to get any national passport, and that no other document was internationally recognized.

One of Nansen's first tasks, as High Commissioner for Refugees, was to overcome this difficulty, and for this purpose he convened a conference of government representatives at Geneva from 3 to 5 July 1922.<sup>a</sup>

This conference adopted an "Arrangement relating to the issue of certificates of identity to Russian refugees".<sup>b</sup> The certificates of identity were later to be known as "Nansen passports".

A largely similar arrangement of 31 May 1924 applied to Armenian refugees.<sup>c</sup>

The 1922 and 1924 arrangements were "supplemented and amended" by an "Arrangement relating to the issue of identity certificates to Russian and Armenian refugees", adopted by a conference of government representatives at Geneva on 12 May 1926.<sup>d</sup>

Four recommendations relating to Identity and Travelling Documents for Persons without Nationality or of Doubtful Nationality were adopted on 2 September 1927 by the Third General Conference on Communications and Transit.<sup>e1</sup> It appears that these documents could in certain circumstances also be issued to refugees.<sup>e2</sup>

An intergovernmental conference convened at Geneva from 28 to 30 June 1928 drew up an arrangement by which the benefits of the 1922, 1924 and 1926 arrangements were extended to Assyrian, Assyro-Chaldean and Turkish refugees.<sup>f</sup>

On 30 June 1928 the conference also adopted an Arrangement relating to the Legal Status of Russian and Armenian Refugees,<sup>g</sup> which also contains certain provisions concerning the issue of travel documents.

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<sup>a</sup> For details about the development which led to the adoption of the "Nansen passport" arrangement by 53 countries, see IGCR Preliminary Documents, pp. 17-19; also Simpson pp. 239 ff.; Schmieden pp. 226 ff.; and Institut für Besatzungsfragen: Das DP. Problem, pp. 9- 10.

<sup>b</sup> League of Nations Treaty Series, No 355, vol. 13, pp. 237 ff.

<sup>c</sup> Plan for the Issue of a Certificate of Identity to Armenian Refugees; League of Nations Doc. C.L. 72 (a) 1924. This plan was not the result of an intergovernmental conference, but a plan conceived by Dr. Nansen, the High Commissioner for Russian Refugees, and submitted by him for the consideration of interested governments. It was adopted by 35 governments. Cf. IGCR Preparatory Documents pp. 19-21. The text of the Plan can also be found in League of Nations Doc. C. 558 (b), M. 200 (b), 1927, VIII. pp. 49-50.

<sup>d</sup> League of Nations Treaty Series, No. 2004, vol. 89, pp. 47 ff. See also League of Nations, Conference on Russian and Armenian Refugee Questions, Report by the High Commissioner, 5 June 1926, Doc. C. 327, 1926. Cf. IGCR Preparatory Documents, pp. 21-24; Schmieden pp. 227 ff. The 1926 Arrangement was adopted by 23 countries.

<sup>e1</sup> League of Nations Doc. C. 558 (b), M. 200 (b), 1927, VIII: Third General Conference on Communications and Transits Volume 111, Records and Texts relating to Identity and Travelling Documents for Persons without Nationality or of Doubtful Nationality, Geneva 1927, pp. 57-58.

<sup>e2</sup> Op. cit. p. 62, cf. p. 33.

<sup>f</sup> League of Nations Treaty Series, No. 2006, vol. 89, p. 63. See also IGCR Preparatory Documents pp. 24. This Arrangement was adopted by 13 countries.

<sup>g</sup> League of Nations Treaty Series, No. 2005, vol. 89, pp. 53 ff. Cf. IGCR Preparatory Documents pp. 24-25; Simpson pp. 243-244; Schmieden p. 229. The Arrangement was accepted by 10 countries and the Saar.

In the autumn of 1933 another intergovernmental conference was convened at Geneva with the object of making an international agreement of a more solemn character than the various Nansen arrangements. The outcome of this conference was the Convention relating to the International Status of Refugees, of 28 October 1933.<sup>h</sup> This Convention came into force on 13 June 1935 after having been ratified by Belgium, Denmark, France, Italy, Norway, United Kingdom, and given effect in certain British colonies, protectorates and mandated territories.<sup>i</sup>

Under Article 2 of the Convention, each of the Contracting States undertook to issue Nansen certificates, valid for not less than one year, to refugees residing regularly in its territory. This Article further provided that the text of Nansen certificates should include a formula authorizing exit and return,<sup>j</sup> and also that the respective consuls of the Contracting Parties should be qualified to extend the validity of the certificates for a period not exceeding 6 months.

By an Arrangement of 30 July 1935 and a Provisional Arrangement of 4 July 1936, provisions were made for the issue of travel documents ("Nansen passport") to refugees from the Saar and from Germany respectively.<sup>k</sup>

On 10 February 1938 a Convention concerning the Status of Refugees coming into Germany was concluded.<sup>l</sup> It entered into force on 26 October 1938 upon the ratifications by Belgium and the United Kingdom. It was later acceded to by France.<sup>m</sup>

Articles 3 and 4 of the 1938 Convention relate to the issue of a travel document.<sup>n</sup>

The Second World War and its aftermath created new groups of refugees, and a conference, convened in London by the Intergovernmental Committee on Refugees, adopted on 15 October 1946 an Agreement relating to the Issue of a Travel Document to Refugees.<sup>o</sup> Sixteen countries became parties to this Agreement, upon which the provisions of Article 28 and the Schedule of the Refugee Convention of 28 July 1951 have been modelled. Provisions relating to travel documents, largely similar to those contained in the

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<sup>h</sup> League of Nations Treaty Series, No. 3663, vol. 159, pp. 199 ff. - Cf. IGCR Preparatory Documents pp. 25-26; Simpson pp. 244 ff., Schmieden pp. 229 ff.

<sup>i</sup> See League of Nations Treaty Series, No. 3663, vol. 159, pp. 199 ff.; also Simpson pp. 594. When IGCR Preparatory Documents p. 26 and others state that the Convention entered into force upon ratifications by Bulgaria, Czechoslovakia and Norway, that is based on an error. According to Article 20 only two ratifications were necessary. Bulgaria ratified on 19 December 1934, Czechoslovakia on 14 May 1935 and Norway on 26 June 1935. The following States, although not feeling called upon to sign the Convention, expressly declared that they had, in fact, put its provisions into effect: Estonia, Finland, Greece, Iraq, Latvia, Sweden, Switzerland, United States, and Yugoslavia (cf. IGCR Preparatory Documents p.26).

<sup>j</sup> This rule (Article 2, paragraph 2) was novel. The 1922 Arrangement stipulated that the grant of a Nansen certificate did not confer on the holder the right to return to the issuing country. The 1924 Arrangement contained a provision to the same effect, but also a recommendation "to grant such authorization in all cases where there are no special reasons to the contrary". Article 3 of the 1926 Arrangement set forth: "In order to facilitate freedom of movement of refugees, the Conference approves the principle of the affixing of return visas on identity certificates for refugees leaving a country, on the understanding that Governments shall be free to make exceptions to this principle in special cases". The 1928 Arrangement contained a recommendation to the effect that the word. "This certificate is not valid for the return journey" should be replaced by the words: "This certificate is valid for the return journey to the country by which it was delivered during the period of its validity. It shall cease to be so valid if at any time the bearer enters the territory of the Union of Socialist Soviet Republics (in the case of Russian refugees) or of Turkey (in the case of Armenian refugees)". The 1933 Convention completed this development by including the right of return in binding terms. For the limitations considered to be understood, see IGCR Preparatory Documents, p. 25, note 1.

<sup>k</sup> See IGCR Preparatory Documents, pp. 26-33. The 1935 Arrangement was adopted by 13 countries and the Provisional Arrangement of 1936 by 7 countries.

<sup>l</sup> League of Nations Treaty Series, No. 4461, vol. 192, pp. 59 ff.

<sup>m</sup> The other signatory States, Denmark, Netherlands, Norway and Spain never got around to ratify the 1938 Convention.

<sup>n</sup> Cf. IGCR Preparatory Documents, pp. 33-34.

<sup>o</sup> United Nations Treaty Series, No. 1, 150, vol. 11, pp. 73 ff. See also next chapter, note 46.

Refugee Convention, were included in the Convention relating to the Status of Stateless Persons of 28 September 1954.

On 23 November 1957 the governments of the eight countries bordering the North Sea<sup>p</sup> concluded an Agreement relating to Refugee Seamen,<sup>q</sup> under the terms of which the Contracting States agreed to issue Refugee Convention travel documents to certain refugees serving on merchant vessels, flying the flag of one of those States.

Within the framework of the Council of Europe an European Agreement on the Abolition of Visas for Refugees was signed at Strasbourg on 20 April 1959.<sup>r</sup>

For those persons who for some reason or other could not benefit from the various intergovernmental arrangements, agreements and conventions, the International Committee of the Red Cross instituted, after the Second World War, a travel document of its own. This travel document is being issued to any person who can show that he is without a valid passport, has the right to leave the country where he is staying, and has a promise of a visa from the diplomatic or consular authorities of the country where he wishes to go. The CICR travel document, which is being de facto recognized by most governments, including parties and non-parties to the London Agreement of 1946, the Refugee Convention and the Status of Stateless Persons Convention, has enabled more than 100,000 people to move from one country to another for resettlement or other purposes.<sup>s1</sup>

(2) To a refugee who is lawfully staying in its territory, a Contracting State shall issue a travel document, if he applies for it for the purpose of travel outside the country. This is a definite obligation on the part of States provided they have made no reservations with regard to Article 28.<sup>s2</sup>

(3) It is understood that when Article 28 speaks of "refugees", it refers to refugees as defined in Article I of the Refugee Convention. It is only those refugees who have a right to travel documents and to the treatment provided for holders of such documents. Persons who may qualify as refugees under the Statute of the High Commissioner's Office, but are not covered by the terms of Article I of the Convention, have consequently no claim to Convention travel documents.

We shall first consider the problem caused by the fact that each Contracting State may choose whether it will apply the Convention to persons who are refugees as a result of "events occurring in Europe or elsewhere" or only those who are refugees as a result of "events in Europe" (Article 1, B, of the Convention). It is apparent that non-Europeans who are considered as Convention refugees in countries which have chosen the first mentioned alternative will as a rule not be considered eligible in countries which have chosen to give the Convention the more narrow scope.

It follows from Article 1, B, of the Convention that if a State chooses the narrower alternative ("events occurring in Europe") its obligations under the Convention are limited to refugees from European countries, and in so far as that Contracting State is concerned, the word "refugee" as used throughout the Convention must be understood in the more limited sense. However, by virtue of paragraph 7 of the Schedule, it seems inescapable that all Contracting

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<sup>p</sup> Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden and the United Kingdom.

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<sup>r</sup> European Treaty Series No. 31.

<sup>s1</sup> Cf. Coursier Handbuch p. 307; and Ribaupierre: "Le CICR et le problème des Réfugiés" in *Revue internationale de la Croix Rouge*, 1950, p. 332.

<sup>s2</sup> This is clearly apparent from the Summary Records of the Conference of Plenipotentiaries, see for example A/CONF.2/SR.12, p. 7, where the Belgian delegate criticized a Yugoslav proposal:

"The substitution of the words 'may issue' for the words 'shall issue' would deprive paragraph 1 of all force". Cf. also the statement of the Netherlands delegate, *op. cit.* pp. 5-6 and his withdrawn proposal, A/CONF.2/49. Robinson p. 135 is in agreement with the view stated in the text above.

States are bound to recognize travel documents which any other Contracting State has issued to persons who are falling within the definition of the term "refugee" which the latter State has accepted. In other words, where there is a difference between two States on the basis of Article 1, B, the term "refugee" in Article 28 must be understood in the sense accepted by the issuing State.<sup>t</sup>

As a matter of fact, this has become the established practice of States. There is no known example to the effect that a State having accepted only the narrower alternative, has refused to recognize a travel document issued by a State which has accepted the wider obligation, to a refugee from a non-European country.

If, on the other hand, a State which has chosen the "Europe only" alternative, for some reason or other should decide to issue a travel document to a person who is a refugee as a result of events outside Europe, what then? The issuing State would have it in its power unilaterally to adopt the wider alternative by means of a notification addressed to the Secretary-General of the United Nations (Article 1, B (2)), but failing this it has no Conventional title to issue a travel document to a person of the mentioned category.

If both the issuing State and the State called upon to recognize the travel document have chosen the "Europe only" alternative, there seems to be a case for the latter State refusing to recognize a travel document issued to a non-European refugee by the former State.

If the latter State has chosen the "Europe or elsewhere" formula, it will probably have no occasion to protest, because the holder of the document is a Convention refugee within the definition accepted by that State; but it is nevertheless clear that the issuing State has no *locus standi* to insist on the document being recognized.

Because there is no international eligibility procedure and it is left to each State to decide whether it considers a particular person as a refugee within the meaning of Article I (cf. particularly paragraph A, (2), and the exclusion and cessation clauses) of the Convention, there may be differences of opinion between governments with regard to factual circumstances as well as on points of law. A person who is considered a *bona fide* refugee in one country, may on factual or legal grounds be considered ineligible in another country.

Paragraph 7 of the Schedule must be considered in view of the fact that the drafters were fully aware that such differences of opinion might occur; nevertheless they made it an unconditional obligation on the part of Contracting States to recognize travel documents issued by one of them.

This unconditional rule is particularly understandable on the background that the issuing State takes on itself the greatest responsibility, namely an obligation to readmit the holder of the document to its territory (Paragraph 13 of the Schedule). The obligations to issue transit visas and to charge only visa fees of the lowest scale, and the undertakings in other instruments (e.g. the European Agreement on Abolition of Visas for Refugees), are of much minor importance or are entered upon with open eyes.<sup>u</sup>

This leads us directly up to a consideration of the applicability of Recommendation E of the Final Act of 28 July 1951. With regard to the issue and recognition of travel documents, Recommendation E reads as follows:

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<sup>t</sup> Robinson (R) p. 56 is obviously of the same opinion: "the travel documents of a refugee of 'extra-European events' granted by a country of broad application must be recognized in all Contracting States as valid travel papers, although in all other respects the particular person would not be treated as a 'refugee' in countries adhering to the restricted application of the Convention".

<sup>u</sup> Under certain European Agreements and Protocols thereto Convention refugees are assimilated to nationals of the parties and enjoy certain rights in several countries. It may well happen that one State grants the benefits of such agreements to a person on the strength of his holding a Convention travel document issued by another State. However, this is only a practical expediency, and the rights in question are not in principle based upon the possession of a travel document.

“The Conference expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”

If a State assimilates extra-Convention refugees to refugees within the definition of Article I of the Convention with regard to exemption from reciprocity, right of association, employment, public relief, social security etc., it is good and well. Because all these are purely municipal measures, they do not in any way affect the relationship between States, and no international problems are posed.

With regard to travel documents, however, the situation is different, because the very purpose of such documents is to enable the holder to travel outside the issuing country. By issuing a travel document, a State is - by the very nature of the thing - imposing at least some, if may be minor, obligations on the other Contracting States.

In the travaux préparatoires for the Refugee Convention there is nothing to be found with regard to the relationship between Recommendation E and Article 28. However, in answering, the Netherlands delegate at the Conference, who had firmly advocated the inclusion in Article I of a provision for the extension of the scope of the Convention to new categories of refugees arising as a result of events occurring after 1 January 1951, the United Kingdom delegate, obviously expressed a general sentiment when he stated that “serious technical difficulties would arise if Contracting States were allowed unilaterally to adapt the Convention so as to extend its scope to persons who became refugees as a result of events occurring after 1 January 1951. The whole definition would have to be reviewed, and consideration would have to be given to the extent to which Paragraph E of Article I and other sections of the definition which were of a limitative character would apply, and to the question of the restriction which such provisions might involve on the sovereign rights of States”.<sup>v</sup>

Nevertheless, it was the British delegate who proposed Recommendation E of the Final Act, because he “felt that a general recommendation was called for to cover those classes of refugees who were altogether outside the scope of paragraph A of Article 1”.<sup>w</sup>

The recommendation which was unanimously adopted by the Conference, is not legally binding on any government; nevertheless it may be said to express the spirit of the Convention, and if governments do issue Convention travel documents to certain extra-Convention refugees, they may claim to be acting in keeping with that spirit.

Also, there is no provision in the Convention which prohibits the issue of Convention travel documents to extra-Convention refugees; and with a view to Recommendation E of the Final Act, it would not seem right to consider such issue of travel documents to be against international law.

On the other hand, whereas Paragraph 7 of the Schedule must be interpreted so broadly as to include all travel documents issued in accordance with the Convention or the Schedule, and not only those issued pursuant to the express provisions in Article 28, it can hardly be stretched so far as to compel governments to recognize the validity of Convention travel documents issued to refugees who are clearly outside the scope of Article I of the Convention.

However, if the issue of Convention travel documents to extra-Convention refugees is not against international law, it is not either based on international law, but is outside the scope of international law. The recognition of such travel documents therefore comes within the sphere of comity, that is to say that the Contracting States are under no legal obligation to

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<sup>v</sup> A/CONF.2/SR.34, p. 11, cf. p. 10.

<sup>w</sup> A/CONF.2/107 and A/CONF.2/SR., pp. 43-44.



treat extra-Convention holders of Convention travel documents this way or the other; in other words: the issuing State has no *locus standi* to request their recognition.

On the face of it, every refugee who is lawfully staying in the territory of a Contracting State may invoke Article 28 (1), first sentence.

There can be no doubt that a refugee who is lawfully staying in only one country, may claim a travel document under the terms of that provision. If a refugee was not lawfully staying in the country where he first found refuge, it would seem that he may demand a (new) travel document from the authorities of the country to which he has migrated and where he has been given a residence permit, however temporary, because the latter country-is the only one in which he is lawfully staying.<sup>x</sup>

On the other hand, if the status of the refugee was regularized in the first country of refuge, the situation with regard to the responsibility for the issue of a travel document may be different.

It seems to be quite clear that a refugee who is lawfully staying in more than one country at the same time,<sup>y</sup> may not claim a travel document from each of the States concerned. This follows from Paragraph 12 of the Schedule to the Refugee Convention, which sets forth that the authority issuing a new travel document shall withdraw the old document and either cancel it or return it to the authority which issued it. In other words, a refugee may only hold one travel document at any time.<sup>z</sup>

As we shall see, the refugee cannot either at will surrender the travel document which he possesses, and which is issued by a State in whose territory he is lawfully staying, in order to get a new one from another State in whose territory he is also lawfully staying. The rule contained in Article 28 (1), first sentence, of the Refugee Convention is namely modified by Paragraphs 6 and 11 of the Schedule to the Convention, with respect to those refugees who, simultaneously or consecutively, are lawfully staying in more than one country.

Paragraph 6 (1) and (2) and Paragraph 11 of the Schedule to the Refugee Convention correspond on the whole with Articles 8 and 13 of the London Agreement of 15 October 1946. Paragraph 6 (3) is new, but only of a facultative character.

(4) The travel document to which a refugee is entitled under Article 28, paragraph 1, is a Convention travel document, modelled on the specimen annexed to the Schedule, not a travel document as specified in any previous international agreement, e.g. the London Agreement 1946.

It follows from Article 37 of the Refugee Convention that as a rule, the Contracting Parties shall discontinue the issue of older types of travel documents. It is, however, at least theoretically thinkable that a refugee, living in a Convention country, wishes to travel to a country which is only party to one of the previous Agreements and only willing to recognize travel documents issued according to that Agreement.

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<sup>x</sup> According to Article 2 of the Copenhagen Convention passport control is carried out at the outer Nordic frontiers. The Contracting States shall employ control cards (entry and exit cards) for the control of (a) aliens who require a visa to enter the territory of any of the Contracting States (provided that State requires a control card), and (b) aliens whom a Contracting State has expelled and forbidden to return unless he has special permission.

<sup>y</sup> In order to bring this rule into line with Article 1 of the European Abolition of Visa Agreement, each of the Scandinavian States has, in accordance with Article 2 of that Agreement, declared that the entire territory covered by the Copenhagen Convention, that is to say the territory of the four States, shall be considered as its territory for the purposes of the Visa Agreement: "En ce qui concerne les réfugiés domiciliés dans un Etat qui n'est pas lié par l'Accord entre les Etats Nordiques concernant la suppression du contrôle des passeports aux frontières internordiques, signé à Copenhague le 12 juillet 1957, le terme 'territoire' signifiera, quant à leur droit de séjourner en Danemark sans visa ou permis de séjour, le territoire sur lequel s'applique ledit Accord Nordique, en vertu de son article premier, alinéa 2". Communication of 29 December 1960 from Danish Ministry of Foreign Affairs to the Secretary-General of the Council of Europe. Cf. the communications of 13 December and 10 November 1960 respectively from the Norwegian and Swedish Ministries of Foreign Affairs.

<sup>z</sup> According to Article 5 the permit-free period shall be counted from the day of entry; however, any time spent in the relevant territory during the foregoing six months shall be deducted from the permit-free period.

If the issuing country is also a party to that older Agreement, it should be feasible for the refugee to get the older type travel document, provided he is eligible under the terms of the Agreement in question.

The document instituted by Article 28 is neither called a "Certificate of Identity", as in the early Nansen Arrangements, nor a "Nansen Passport", but simply a "Travel Document", and it is expressly stated that its purpose is to enable the refugee to travel outside the territory where he is "lawfully staying". It is not intended that travel documents shall be issued as identity papers for use within the territory of the issuing State the issue of such identity papers is dealt with in Article 27.<sup>ba</sup> If travel documents should, as it happens in at least some countries, be issued "for registration purposes only", such document will not - in spite of the booklet blank used - be a proper travel document, but should rather be classified as an identity paper to which the provisions of Article 28 and the Schedule do not apply.

However, it is apparent from the wording of Article 27 that a travel document, valid for travel to one or more foreign countries, may incidentally also serve as an identity paper.

(5) Only if "compelling reasons of national security or public order" require it, a Contracting State may refuse to issue travel documents. This exception to the main rule was considered necessary by a number of delegates to the Conference of Plenipotentiaries.<sup>bb</sup> The Belgian delegate proposed that the main rule in paragraph 1, first sentence, should be "subject to the requirements of national security or public order",<sup>bc</sup> and the matter was extensively discussed on this basis.<sup>bd</sup> The Belgian representative explained that by mentioning "public order" along with "national security" his intention was to cover the case of a refugee who was being prosecuted for an offence under civil law.<sup>be</sup> The Italian delegate, who withdrew his own proposal<sup>bf</sup> in favour of the Belgian, obviously did this on the understanding that the term "public order" covered what he had described as "engaging in illicit traffic".

On the other hand, it seems clear, on the basis of the firm statement of the Belgian representative, that the Belgian proposal would not justify the refusal of issuing a travel document in the cases enumerated by the Norwegian delegate, viz. "for reasons of insolvency, failure to pay taxes and so on".<sup>bg</sup>

In order to prevent that "the holding of extremist views was accepted as a valid ground for not issuing travel documents", and that "certain States might take advantage of that facility in order to put obstacles in the way of legitimate travel on the part of a refugee", in short "to avoid any abuse of the formula finally adopted", the United Kingdom delegate proposed that the phrase suggested by the Belgian delegate should be replaced by the words "except where imperative reasons of national security or public order otherwise require".<sup>bh</sup> This proposal was adopted by 22 votes to none, with 3 abstentions. The word "imperative" was changed to "compelling" by the style committee without any reason being given<sup>bi</sup> and it was clearly nobody's intent that this change of words should imply a change of substance.

It is apparent from a statement by the Belgian delegate, that his proposal also allows "for the temporary discontinuance of the issue of such documents. "He explained, however, "that the

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<sup>ba</sup> See *infra* p.

<sup>bb</sup> See A/CONF.2/SR.12, pp. 4-13.

<sup>bc</sup> A/CONF.2/61.

<sup>bd</sup> A/CONF.2/SR. 17, pp. 4-12.

<sup>be</sup> *Op. cit.* p. 7.

<sup>bf</sup> A/CONF.2/56.

<sup>bg</sup> See A/CONF.2/SR. 17, pp. 5-7.

<sup>bh</sup> A/CONF.2/SR. 17, pp. 10- 11.

<sup>bi</sup> A/CONF.2/102. Add.1 and SR.35 p. 10. It is noteworthy that in the French text the word "impérieuses" has been retained.

limiting clause in the Belgian amendment did not mean that the issue of travel documents to refugees would be categorically refused.” The temporary suspension of the issue of travel documents “would no longer be necessary once the considerations of national security or public order which had led States to suspend the issue of travel documents had ceased to hold”.<sup>bj</sup>

In any case, it seems quite clear that it is only in grave and exceptional circumstances that a Contracting State may refuse to issue a travel document to a refugee lawfully staying in its territory, provided he applies for it for the purpose laid down in Article 28.<sup>bk</sup>

(7) When the second sentence of Article 28, paragraph 1 provides that the Contracting States “may issue” travel documents to the person mentioned therein, this is mainly of importance with regard to the obligation on the part of other Contracting States to recognize travel documents so issued.

The Contracting States may furthermore issue travel documents by virtue of Article 11 (cf. the Hague Agreement of 23 November 1957) and Paragraph 6 (3) of the Schedule.

(8) The second sentence of Article 28, paragraph 1, mentions “any other refugee” in the territory of a Contracting State. This expression comprises any person who is a refugee as defined in Article 1, who is physically present, legally or illegally, in the territory of a Contracting State, provided he has not his “lawful residence” there. It is not prescribed that the presence shall be of any duration, a stay just long enough to call on the issuing authority is sufficient.

A person against whom an expulsion order has been issued qualifies just like anybody else.

(9) The Contracting States “shall give sympathetic consideration” to the issue of travel documents to the categories of refugees specified in those provisions.

This means that the authorities of the country concerned are obliged not to reject an application out of hand, without considering its merits, or to make it their policy to reject such applications. On the other hand, a State is not obliged to issue travel documents to persons covered by the provisions here considered. The obligation entered into is only to consider applications fairly and with understanding for the difficult situation of the persons involved.

(10) The second sentence of Article 28 (1) of the Convention, and Paragraph 6 (3) of the Schedule, pose a special problem, in so far as these provisions encourage the issue of travel documents to refugees “who are unable to obtain a travel document from the country of their lawful residence”.

It is clear that this provision applies if the country of lawful residence is not a party to the Refugee Convention or any of the other arrangements relating to travel documents for refugees (cf. Article 28 (2)), or if the country of lawful residence has made reservations to the effect that it will not issue Convention travel documents to refugees.<sup>bl</sup>

A similar situation arises with regard to persons who are refugees as a result of events which occurred outside Europe before 1 January 1951 in relation to those Convention countries which have chosen alternative (a) in Article 1, B (1) of the Convention.

But what if the country of lawful residence has refused to issue travel documents by invoking “compelling reasons of national security or public order”? The question was, possibly by an oversight, not discussed by the Conference; actually the provision was left untouched while the limitation to the main rule was incorporated in the first sentence.

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<sup>bj</sup> A/CONF.2/SR.17, p. 5.

<sup>bk</sup> The Contracting States are under no similar obligation with regard to refugees who are not “lawfully staying” in their territory, that is to say the categories mentioned in Article 28, paragraph 1, second sentence, or Article 11 of the Convention, or in paragraph 6, sub-section 3 of the Schedule.

<sup>bl</sup> For example Australia is a party to the Refugee Convention, but has made the reservation that it will not issue travel documents, even if it will recognize travel documents issued by other countries.

Robinson states: "It could hardly be the intention of the Conference to request one State to issue a travel document to a resident of another State if the latter refuses to issue the document for compelling reasons of national security or public order".<sup>bm</sup> This opinion has considerable virtue. However, if a person is considered a "security risk" or worse in one country, another State may consider him otherwise, and two different States do not necessarily have to see eye to eye on matters listed under the admittedly vague term "public order". Very often one State will not be able to know why a travel document has not been issued by another State.

It seems justified to submit that if the country of lawful residence, for reasons which it considers valid, has refused to issue a travel document, other States shall not have to feel themselves obliged to consider sympathetically an application submitted to them in accordance with Article 28 (1), second sentence, of the Convention, or Paragraph 6 (3), of the Schedule. However, if a country chooses to issue a travel document under any of these provisions, it seems that it has every right to do so, and that the validity of the travel document will not be the least affected by the fact that the issue of a travel document has been refused for cogent reasons by the country of lawful residence.

(11) This paragraph assimilates travel documents ("Certificates of Identity", "Nansen Passports" etc.) issued under any of the international agreements mentioned above<sup>bn</sup> with the travel document instituted by the Refugee Convention and issued in conformity with the Specimen Travel Document annexed to the Schedule. Paragraph 2 mentions "international agreements. "As a matter of fact it was only an Agreement of 1928 and the London Agreement 1946 which was called an "Agreement". In 1922, 1924, 1926, 1928, 1935 and 1936 the word "Arrangement" was chosen and in 1933 and 1938 "Conventions" were adopted. The plural form used in paragraph 2 makes it, however, clear beyond doubt that all the mentioned international instruments are included.

(12) The undertaking contained in paragraph 2 applies equally to travel documents issued by any country which is a party to the relevant Agreement, regardless of whether the issuing country is a party to the Refugee Convention or whether any Party to the latter is a Party to the Agreement according to which the travel document in question has been issued.<sup>bo</sup>

(13) It is well to remember that all those who may still qualify for a travel document under any of the earlier agreements are considered to be refugees under Article 1, A (1) of the Refugee Convention.

Article 28 (2) of the Refugee Convention must be read in conjunction with Recommendation A, contained in the Final Act of 28 July 1951, according to which the parties to the London Agreement 1946 and the countries which recognize travel documents issued in accordance with that Agreement, were urged "to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in Article I of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under Article 28 of the said Convention".

This is formally only a recommendation to States who are not parties to the Refugee Convention, but it goes without saying that if any State follows this recommendation and issues London travel documents to refugees who are falling within the definition in Article I of the Refugee Convention, although they are not covered by the terms of the London Agreement 1946, the States parties to the Refugee Convention must be bound by Article 28

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<sup>bm</sup> Robinson (R) p. 137.

<sup>bn</sup> See supra p.

<sup>bo</sup> Cf. Robinson pp. 137-138 and sources there referred to. If a travel document is issued by a country not being party to the relevant agreement, it seems clear that the States parties to the Refugee Convention are not bound to recognize it.

(2), to recognize such travel documents just as if they were issued to refugees who are falling within the scope of Articles I and 2 of the London Agreement 1946.<sup>bp</sup>

## SCHEDULE

### Paragraph 1

- 1. The travel document referred to in Article 28 of this Convention shall be similar to the specimen annexed hereto.**
- 2. The document shall be made out in at least two languages, one of which shall be English or French.**

The paragraphs of the Schedule dealing with its appearance (Paragraph 1 and attached specimen), inclusion of children (Paragraph 2), fees to be charged (Paragraph 3), and withdrawal or cancellation of old travel documents (Paragraph 12) do not give rise to any important problems, and we shall not discuss them here.<sup>a</sup>

It may, however, be mentioned that, following up a request by certain members of his Executive Committee, the High Commissioner prepared a model travel document with a blue cover, and that the Committee of Ministers of the Council of Europe in paragraph 2 of its Resolution (58) 5 of 27 March 1958 recommended "that Member Governments which are Parties to the 1951 Convention relating to the Status of Refugees shall issue a uniform travel document in conformity with the provisions of that Convention, including those concerning the period of validity of the document and of the return clause".

Almost all the States which are issuing Convention travel documents, whether they are Members of the Council of Europe or not, have now adopted the model travel document prepared by the High Commissioner's Office, with only very slight alterations. It is also an interesting development that Contracting States which commence issuing travel documents or change the appearance of their travel documents are sending specimen copies to the High Commissioner's Office, not only for the information of the Office, but distribution to all other Convention Parties, so that the High Commissioner's Office has become a clearing house in this respect.

### Paragraph 2

**Subject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.**

### Paragraph 3

**The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.**

This provision corresponds to the provisions of Articles 25 (4) and of the Convention, cf. also Paragraph 10 of the Schedule.

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<sup>bp</sup> Recommendation A does not ask non-parties to the Convention to recognize Convention travel documents. However, Recommendation E, contained in the Final Act, "expresses the hope ... that all nations will be guided by it in granting so far as possible ... the treatment for which (the Convention) provides", and it is probably not stretching the words too far to assume that this includes an appeal to non-parties to recognize the Convention travel documents.

<sup>a</sup> Robinson (R) p. 141 mentions that "Paragraph 2 leaves it to the individual countries to define the word 'children', i.e. to prescribe the age at which a person may obtain his own document and below which he may be included in the travel document of another, adult refugee". With regard to the mentioned paragraphs, reference may be made to IGCR Preparatory Documents, pp. 92-99 and 111.

## Paragraph 4

**Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.**

Paragraph 4 lays down the rule that "Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries."<sup>b</sup>

Unlike certain of the earlier arrangements relating to travel documents, the Schedule does not contain any provision to the effect that the Convention travel document will lose its validity if the holder enters the territory of his country of origin.<sup>c</sup>

However, in that case Article I C of the Convention may apply.

## Paragraph 5

**The document shall have a validity of either one or two years, at the discretion of the issuing authority.**

Period of Validity and Withdrawal

The purpose of this provision is twofold: to increase the usefulness of the document by securing that it will not be valid only for very short periods, e.g. 3 or 6 months, and to establish a certain uniformity with regard to periods of validity. During its period of validity the holder may use his travel document for one or more travels or for staying in other countries, provided that the travel document is not issued for any special purpose or with any particular limitations (cf. Paragraph 13 (3)), and subject to his getting the necessary visas.

The Convention and the Schedule do not contain any provision for the withdrawal of travel documents except in the case of a new document being issued to replace the old one.

The question of withdrawal may arise if the holder ceases to be a refugee, or if "compelling reasons of national security or public order" which might have "required" a refusal with regard to the issue of a travel document, should occur (cf. Article 28 (1), first sentence).

When suggesting that the period of validity should be one or two years, the Head Office of the Intergovernmental Committee on Refugees mentioned that the Passport Conference had recommended that all countries should adopt a minimum validity of two years for national passports, but it went on to say that "the special nature of the proposed document makes it necessary to exercise more frequent supervision than in the case of ordinary passports".<sup>d</sup>

This may be interpreted as an indication to the effect that the Contracting Parties would rely on the opportunity to review the status of the holder every time the validity of his travel document expired, but that during the period of validity one should not resort to withdrawal. This interpretation is supported by the absence of any provision for withdrawal, which it would be sensible to include if withdrawal should be mandatory or permissible for any of the reasons mentioned above.

It seems quite clear that if the holder of a travel document is travelling or sojourning outside the issuing country, it is not possible for the authorities of that country to withdraw the document. If the holder should be willing to surrender the document, the State on whose territory he was staying might protest on the ground that the withdrawal of a travel document with a return clause was contrary to the interests of that State.<sup>e</sup>

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<sup>b</sup> This provision is identical with Article 6 of the London Agreement 1946. Cf. IGCR Preparatory Document., p. 99.

<sup>c</sup> Cf. the 1922, 1924 and 1936 Arrangements and the 1938 Convention, also IGCR Preparatory Documents, pp. 103-104.

<sup>d</sup> IGCR Preparatory Documents, p.100.

<sup>e</sup> Cf. A/CONF.2/SR. 18, p. 15, particularly the President's statement to the effect that "care should be taken to ensure that countries admitting refugees for short periods were not penalized or placed in difficulties by the regulations of the States issuing the travel documents." See also League of Nations Doc. C. 558 (b), M. 200(b), 1927, VIII (Third General

If, on the other hand, the holder is physically present in the territory of the issuing State, no such open conflict of interests of States would occur. However, in the absence of any provisions to that effect, and taking into account that such an obligation cannot exist if the refugee is in another country, it cannot be held that the issuing State is obliged to withdraw a rightfully issued travel document if the holder should cease to be a refugee. This, as well as the wording of Paragraph 7 of the Schedule which speaks about "documents issued" in accordance with the relevant provisions, makes it clear that the Convention and the Schedule have established a system under which a travel document lawfully issued can be used until it expires, irrespective of whether the holder continues or ceases to be a refugee. However, if it becomes evident that the holder is no longer a refugee, the issuing State cannot demand another State to recognize the travel document in question. On the other hand, a State having granted a transit visa must be able to insist on the validity of a visa for a country of ultimate destination or on the return clause, even if the holder of the travel document should have ceased to be a refugee.

The remaining question is whether the issuing State has a right to withdraw a travel document in the case of changed circumstances. If a refugee is charged with murder he may obviously be refused a travel document on the ground that "compelling reasons of national security or public order" so require. If on the other hand a refugee has got a travel document and thereafter commits a murder, it would seem strange indeed if the authorities were not allowed to withdraw the document.

Taking into consideration that if a person ceases to be a refugee, as defined in Article I of the Convention, the Convention will not apply to him, and the Contracting States will consequently have no *locus standi*, no right to intervene or provide "contractual protection" with regard to such a person.<sup>f</sup> It seems reasonable to submit that if circumstances should occur which would allow a State to refuse the issue of a travel document, the issuing State has a right to withdraw a travel document, provided the withdrawal will not cause any difficulties for another State.

Paragraph 6

**1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.<sup>(1)</sup>**

**2. Diplomatic or consular authorities, specially authorized for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.<sup>(2)</sup>**

**3. The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents, or issuing new documents to refugees no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.<sup>(3)</sup>**

(1) Paragraph 6 of the Schedule deals with the renewal and extension of the validity of travel documents. The difference between renewal and extension is that whereas an expired travel document must be renewed, a travel document which is still valid may have its validity extended. The extension may be temporal (cf. Paragraph 5) or territorial, i.e. with regard to the countries for which the travel document is valid (cf. Paragraph 4).<sup>9</sup>

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Conference on Communications and Transit, Vol. 111, Records and Texts) p. 61: "The Committee desires to draw attention to other points. An identity and travelling document can only be withdrawn by a diplomatic or consular authority if it was issued by the Government *which appointed* that authority, and only if a new document is issued. The territorial authorities of the country *which issued* such a document can withdraw it at any time, even if it has not expired, during the visits which the bearer makes to that country, but the withdrawal in this case must be material; a decision involving cancellation would not suffice, even if it were published."

<sup>f</sup> Cf. for example Schwarzenberger.

<sup>9</sup> In the report, dated 13 January 1927, of the League of Nations Advisory and Technical Committee for Communications

The word “authority” must not be understood too narrowly. If a travel document has been issued by the Chief Constable in one district and the refugee moves to another district within the same “territory” (i.e. country) the Chief Constable in the latter district will be able to renew or extend the document. He will be the same “authority” as his colleague in the sense of Paragraph 6. Similarly Paragraph 6 (1) is no obstacle to administrative changes in the issuing country. When, for example, France by a law of 25 July 1952<sup>h</sup> established the French Office for the Protection of Refugees and Stateless Persons (OFPRA), or Norway by passing a new Aliens Act of 27 July 1956 created a State Aliens Office to supersede the former Central Passport Office, the new Office must be considered to be the same authority as its predecessor. In other words “authority” may be read as “government” or “Contracting State”.

Paragraph 6 (1) lays down two conditions:

- (a) The holder must be lawfully residing in the territory of the issuing State; and
- (b) he must not have established lawful residence in another territory.

The first condition is taken over from Article 8 (1) of the London Agreement of 15 October 1946; and it hardly says anything but the obvious; it neither adds anything to, nor subtracts anything from, the meaning of Article 28 (1), first sentence, of the Refugee Convention: only so long as a refugee is lawfully staying (“résidant régulièrement”) in the territory of a Contracting State is he in a position to demand a travel document from that State. Nevertheless, it is important to keep this condition in mind, for it means that if a refugee loses his legal or factual link with the State which has issued his travel document, so that he may no longer be considered as being lawfully staying in its territory, that State is no longer under any obligation to furnish him with a valid travel document.

The second condition was added by the Ad Hoc Committee. It was originally meant as a substitute for the first condition, in order to cover the case of a refugee who has left the territory of a Contracting State, but who has not established lawful residence in another country.<sup>i</sup> However, the wording which was eventually adopted implies that the second condition is no alternative to the first, but that they both must be met. In other words, the second condition represents a limitation of the obligation on the part of Contracting States contained in Article 28 (1), first sentence, of the Refugee Convention.

What then, is the meaning of the provision mentioned under (b) above: that the refugee must not have “established lawful residence” in another country?

It seems that something more than acquisition of a residence permit, and the refugee’s consequent becoming lawfully staying in another country, is required. This appears clearly from the French text, which provides that the refugee “ne s’est pas établi régulièrement dans un autre territoire.” In other words, we are here not facing the familiar concept of “résidence régulière.” If the French wording should be literally translated into English, it would say that the refugee must not have “lawfully established” himself in another territory. This brings to our mind the distinction, which was drawn at the Conference of Plenipotentiaries, “between aliens to whom a right of establishment was granted, and aliens possessing only a right of temporary residence”<sup>j</sup> and also the meaning of the term “regularization of status” which is implied in Article 31 (2) of the Convention.

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and Transit, it was stated that “the validity of a passport can only be prolonged if the latter has not yet expired.” On the other hand, once the validity of the document has expired, it has to be “renewed”. Cf. IGCR Preparatory Documents, pp. 101 ff., which accepts this distinction.

<sup>h</sup> Law No. 52-893, Journal Officiel No. 180 of 27 July 1952.

<sup>i</sup> Passverordnung as amended, Paragraph 3 (2) (k) By an Order issued on 13 March 1957 (Ref. I B 3 13532 B - 128/57) by the Federal Ministry of the Interior, the benefits of this provision were suspended with regard to Hungarian refugees, provided their travel documents were issued after 10 November 1956. This Order was revoked in connection with the entry into force of the European Abolition of Visas Agreement in Germany.

<sup>j</sup> Passverordnung as amended, Paragraph 3 (2) (k), cf. Paragraph 3 (2) (f) (3).



A doctrine to the effect that a refugee has not “established lawful residence” in a country in the sense of Paragraph 6 (1) of the Schedule, until he has acquired - explicitly or implicitly - a “right of establishment” in the country would, however, bring us into a vicious circle: country A would be obliged to renew the refugee’s travel document, including its return clause, until the refugee acquires a “right of establishment” in country B; but the refugee does not, as may well be the case, acquire any such right so long as he has not lost his right to return to country A.<sup>k</sup>

To be sure, this vicious circle will be broken if the refugee no longer fulfils the condition set out under (a) above, that is: if he cannot any longer be considered as lawfully staying in country A, and the circle will also be broken if the refugee is being granted a “right of establishment” in country B by way of an indefinite residence permit or a residence permit valid for a period which goes beyond the expiration of the return clause in his travel document issued by country A.<sup>l</sup>

We may also take a certain comfort in the fact that if the refugee’s residence permit in country A has expired,<sup>m</sup> he must have a factual link with that country in order to be considered as lawfully staying there. This factual link reminds us of the doctrine of “the centre of his personal interests” which is given prominence in the Franco-Swiss Agreement of 12 April 1960<sup>n</sup> and it would altogether be rather fitting to submit that a refugee has “established lawful residence” in a country to which he has migrated, if the “centre of his personal interests” has been shifted to that country.

Nevertheless, we are left with an important case unsolved: that of a refugee who has maintained the vital (legal or factual) link with country A, so that he still may be considered as lawfully staying in its territory, but who desires to stay on in country B, where he has been unable to obtain a residence permit of the kind which - according to what has been said above<sup>o</sup> - would entail a “right of establishment” in that country.

It seems that this is a case which cannot be solved by interpretation (analysis of the wording) of Paragraph 6 (1), and we shall therefore turn our attention to the second sub-paragraph of Paragraph 6.

The second sentence of Subparagraph 1 provides that “the issue of a new document is, under the same conditions, a matter for the authority which issued the former document”. Apart from the special case mentioned in Subparagraph 2, it is a purely practical matter whether an old travel document should be renewed or extended, or a new document should be issued in its place.

It goes without saying that in the case of refugees physically present in the territory of the issuing State, it is the territorial authorities who shall have to renew or extend the travel document. The territorial authorities may also be competent if the refugee is temporary abroad, but in this case the refugee may also rely on Subparagraph 2, according to which a Contracting State is obliged to authorize at least a limited number of its diplomatic or consular authorities to extend the validity of travel documents issued by the sending State.

(2) This provision is identical with the one contained in Article 8 (2) of the London Agreement of 15 October 1946.

Whereas Paragraph 6 (1) deals with renewal or extension of the validity of travel documents by the territorial authorities of the issuing country, the present subparagraph lays down the rules for extension of the validity of travel documents by diplomatic or consular authorities.

However, the obligation undertaken by the Contracting States by virtue of Subparagraph 2 is awkward in several respects. The Contracting States are obliged to empower some of their

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diplomatic or consular authorities, but not necessarily all of them <sup>p</sup>; and the period for which the validity of travel documents shall be extended shall not be "exceeding six months", which means that a government in theory at least may get around its obligation by authorizing only diplomatic or consular authorities in very remote places and by limiting the extension to a very brief period.

In its Preliminary Report of May 1945, the Head Office of the Intergovernmental Committee on Refugees pointed out: "It is felt that the above-mentioned period of six months should be the maximum, so that a refugee should not stay for too long a period in any given country with an identity and travel document issued by another country. There are two alternatives: either the refugee intends to return to the country where the document was issued, in which case the period of six months seems reasonable, or he has left that country with no intention of returning, in which case he has only to apply for a new document to the authorities of the country in which he intends to settle; if he wishes to return to the former country for a relatively short stay, he will have to obtain an entry visa, which will be affixed on his new document".<sup>q</sup>

This argumentation does not take account of all cases which may occur, but it seems difficult to avoid the conclusion that under the terms of Paragraph 6 (2), a State which has issued a travel document to a refugee who has left its territory and become lawfully staying also in another country, is only obliged to renew it once, and then only for a period "not exceeding six months". (If the refugee is lawfully staying only in the territory of the State which has issued the travel document in question, it seems to follow from Article 28 (1), first sentence, and what has been said above,<sup>r</sup> that he may request a renewal, an extension or a new travel document from that State, in spite of his prolonged stay abroad. This is particularly important in the case of refugees who travel on business, or who are temporarily unable to return through no fault of their own, e.g. illness, and also with regard to refugee seamen.<sup>s</sup>

It must be noted that Paragraph 6 (2) does not provide for a stay abroad of 1 or 2 years (which is the normal period of validity of a travel document and its return clause) plus 6 months (which is the maximum extension granted under Paragraph 6 (2)), but is based on the assumption that the responsibility for the issue of a travel document should be transferred to the authorities of the country where the refugee is physically present, when the refugee has stayed in that country for whatever time might be left of the original period of validity of his travel document (that is: from one day up to two years), plus the extension "not exceeding six months." However, the authorities of said country clearly have it in their power to insist that they will only issue residence permits to refugees who are in possession of newly issued travel documents, enabling them to return to the territory of the issuing State within a period of two years,<sup>t</sup> so that the refugees may remain in the first-mentioned country for nearly two years plus six months on a travel document issued by the first country of refuge.

If the refugee has "established lawful residence" in the country of immigration before the original period of validity of his travel document expires, it follows from Paragraph 6 (1) that the issuing State is freed from its obligation to extend the validity of the document, and Paragraph 6 (2) will consequently not apply.

It is noteworthy that this obligation only applies to extension, not renewal; that is to say that a travel document which has already expired cannot be revalidated with reference to Subparagraph 2.

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<sup>p</sup> Cf. Robinson (R) p. 141: "In this respect Paragraph 6 provides for the obligatory assignment of some consular or diplomatic services, leaving it to the Contracting State to fix their numbers. In other words, Paragraph 2 is mandatory insofar as authorization to some consulates or embassies is concerned."

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The plural for “travel documents” used in Subparagraph 2 seems to indicate that the authority to extend the validity shall be of a general nature, that is to say that the duly designated diplomatic or consular authorities shall be empowered to extend the validity of any travel documents issued by the sending State, without having to refer the matter to their superiors in each individual case.<sup>u</sup>

(3) The wording of Paragraph 6, Subparagraph 3 of the Schedule invites the interpretation that under this provision travel documents may be issued to persons who are not covered by the provisions of Article 28 of the Convention. Literally it encourages the issue of travel documents to refugees who formerly had their lawful residence in the issuing country, but now have become lawful residents of another country, which however, for some reason or other will not provide them with travel documents.

Robinson is, however, not inclined to accept this interpretation. He expresses the view that the provision must either refer “to refugees mentioned in the last phrase in Article 28 (1)”, or “to refugees who have forfeited their lawful residence in the country by overstaying the period for which they were admitted”.<sup>v</sup> As pointed out by Robinson, there was no agreement in the Ad Hoc Committee as to which category of persons the provision envisaged, but Robinson tends to agree with the statement of the Belgian representative, to the effect that it only refers to persons who “after having resided in the country, continued to reside there unlawfully”,<sup>w</sup> because “if applied to the first category there would be no need for it, in view of the explicit provision of Article 28 (1) second sentence”.

It is, however, equally difficult to see how there is any need for the provision if the interpretation offered by the Belgian delegate is correct. Furthermore, this interpretation is hardly reconcilable with the wording of the sub-paragraph, because the persons envisaged by the Belgian delegate will hardly have another country of lawful residence.

As pointed out by the Chairman of the Ad Hoc Committee, there is a discrepancy between the provisions of Article 28 and Paragraph 6 (3).<sup>x</sup>

However, it was only with 5 votes to 7, with 2 abstentions, that the Committee decided to retain the words “in their territory” in Article 28,<sup>y</sup> and the desirability of permitting governments to issue travel documents to certain non-resident refugees was expressed by several delegates, representing both the majority and the minority vote.<sup>z</sup> It seems that the United Kingdom delegate, touched on the crucial point when he voiced the fear “that the Article would be weakened if it were framed so as to permit Contracting States to issue travel documents to refugees who were in no way connected with them”.<sup>ba</sup>

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<sup>u</sup> It is not a condition for the extension of the validity of a travel document in accordance with Subparagraph 2, that the document contains a valid return clause (cf. Paragraph 13 of the Schedule). The IGCR proposal to include such a condition was not accepted by the London Conference 1946, cf. IGCR Preparatory Documents pp. 102 and 120 (draft Article 8, paragraph 2).

<sup>v</sup> Robinson (R) p. 142.

<sup>w</sup> Statement of Mr. Herment, in E/AC.32/SR.42, pp. 8-9: "Paragraph 6 (3) referred to refugees who, after residing lawfully in a territory, continued to reside in that territory unlawfully. For instance, the case might arise of a person who had received a permit to stay in a territory for a certain time and who remained there unlawfully on the expiry of that period. In such a case, the authorities of the territory should, in virtue of the paragraph 1n question, renew or extend the validity of this travel documents. He believed that that was how many States would interpret the paragraphs. In any event, it did not, in his view, refer to a refugee who was no longer resident in the territory in question".

<sup>x</sup> E/AC.32/SR.42. p. 7.

<sup>y</sup> E/AC.32/SR.42, p. 7.

<sup>z</sup> E/AC.32/SR.42, pp. 5-7.

<sup>ba</sup> E/AC.32/SR.42, p. 6. The Canadian delegate, Mr. Winter, in his statement supporting Sir Leslie, went so far as to say that "the inclusion of the words ('in their territory') would not prevent States from issuing travel documents to refugees outside their territories if they thought fit". Mr. Henkin, the United States delegate, who advocated the deletion of the words "in their territory", felt he could not accept the interpretation offered by the Canadian delegate.

Refugees who are “no longer lawfully resident” in the territory of a Contracting State, cannot be said to be “in no way connected” with that State, and it is natural to consider the adoption of Paragraph 6 (3) as a compromise, which makes it possible for governments to issue travel documents to certain refugees, who have had their lawful residence in the country, but later have acquired lawful residence in another country which is not prepared to issue a travel document to them. As stated above, this seems to be the only interpretation consistent with the wording of the sub-paragraph. And it seems as if the delegates agreed with the Chairman when he stated as a conclusion: “No harm would be done if it were left as it stood”.<sup>bb1</sup>

Just as Paragraph 6 (3) of the Schedule, the provision for issue of travel documents in Article 11 of the Convention goes beyond the explicit provisions of Article 28. However, like the persons mentioned in Paragraph 6 (3), refugees regularly serving as crew members on board a ship flying the flag of a Contracting State “have a certain connection with the State concerned”, and “no harm would be done” if they receive travel documents from the Flag State.

As mentioned above, travel documents to persons mentioned in Paragraph 1, first sentence, of Article 28, may have to be issued by a diplomatic or consular representative of the issuing State, and Article 11 of the Convention and Paragraph 6, Subparagraph 3 of the Schedule do not, therefore, institute a procedure which is unknown with regard to cases falling under Article 28.

#### Paragraph 7

The Contracting States shall recognize the validity of the documents issued in accordance with the provision of Article 28 of this Convention.

This provision was modelled on Article 9 of the London Agreement 1946, which runs as follows: “Each contracting government shall recognize the validity of the documents issued in accordance with the provisions of the present Agreement”.

It seems that this Article was introduced by the Head Office of the Intergovernmental Committee on Refugees with the possibility in mind “that certain governments of the Western Hemisphere may be unwilling to undertake to issue special documents”, and for the purpose that in such cases “it might be suggested to the governments concerned that they should stipulate, when signing the Arrangement, that their signature only entails an obligation on their part to recognize the validity of the document referred to therein”.<sup>bb2</sup>

It is noteworthy that Paragraph 7 of the Schedule to the Refugee Convention was adopted without comment by the Ad Hoc Committee<sup>bc</sup> before it had agreed on how to word the Article on travel documents (Article 28 of the Convention; Article 23 of the Committee’s draft) and Paragraph 6 (3) of the Schedule, and long before the Article on refugee seamen (Article 11 of the Convention) had even been proposed.<sup>bd</sup>

It is apparent from the drafting history of Article 28 and the Schedule, that Paragraph 6 (3) of the Schedule may be considered as a compromise to the effect that whereas a Contracting State as a rule shall not issue travel documents to refugees not lawfully resident or physically present in its territory, it is desirable to make an exception from this rule with regard to refugees who have after all some connection with the State concerned.<sup>be</sup>

It was not, however, the intention of the Conference to establish two classes of travel documents: viz. those issued under the express terms of Article 28, which the Contracting States are obliged

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<sup>bb1</sup> E/AC.32/SR.42, p. 9. It is noteworthy that as late as in 1961 and 1962, the Belgian Government issued travel documents to refugees in the Congo, obviously in virtue of Paragraph 6, Subparagraph 3 of the Schedule, and because the Republic of Congo is not a party to the Refugee Convention.

<sup>bb2</sup> IGCR Preparatory Documents, p. 92.

<sup>bc</sup> E/AC.32/SR.41, p. 21 and E/AC.32/L.42/Add.1, p. 10.

<sup>bd</sup> Article 11 on Refugee Seamen was suggested at and drafted by the Conference of Plenipotentiaries, cf. A/CONF.2/SR.12 pp. 4-5, SR.17 pp. 15-16, SR.30 pp. 6-10. S R.34 p. 23, et al.

<sup>be</sup> See... supra p.

to recognize, and those issued according to Article 11 of the Convention or Paragraph 6 (3) of the Schedule, which the Contracting State are not obliged to recognize. The fact that Paragraph 7 was not changed was, as it seems, only due to an oversight.

As we have seen, it may happen that diplomatic or consular authorities are called upon to issue travel documents to persons falling within the scope of Article 28 (1), first sentence. Furthermore, there is no space in the Specimen Travel Document annexed to the Schedule for stating the provision according to which the document has been issued. Consequently it is not possible to see on the face of a travel document whether it has been issued pursuant to the express provisions of Article 28, or according to Article 11 or Paragraph 6 (3).

The conclusion seems inevitably 53 to be that the Contracting States are obliged to recognize on an equal footing travel documents issued under any of the cited provisions.

#### Paragraph 8

The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him and if a visa is required, affix a visa on the document of which he is the holder.

It is quite clear that Paragraph 8, which is practically identical with Article 10 of the London Agreement 1946, does not oblige any Contracting State to admit a refugee to its territory. The importance of the paragraph is primarily of a practical nature; the obligation to "affix a visa on the document" can - by the nature of the situation - hardly be relied upon if a particular State refuses to affix a visa to a document which has already been visaed by another State to which the first-mentioned State is hostile.<sup>bf</sup>

#### Paragraph 9

**1. The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination.<sup>(1)</sup>**

**2. The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.<sup>(2)</sup>**

(1) Unlike Paragraph 8, Paragraph 9 contains a real obligation:

Subparagraph 1 of Paragraph 9 corresponds with Article 11 of the London Agreement 1946.<sup>bg</sup> Subparagraph 2 is new.

The purpose of Paragraph 9 is to facilitate refugee travel. It is important for mass movement of refugees as well as for individual journeys. Once a refugee has obtained a visa for a country of final destination, his going there shall not be jeopardized by the need for transit visas. If for example a refugee living in Austria has got an immigration visa for the United States, he must either go through Germany, or through Switzerland and France, or through Italy, in order to get on a ship. In such a case either of these countries is obligated under the terms of Paragraph 9 to grant him a transit visa, and it would not be acceptable if any of the countries refused on the ground that the refugee might as well go via one of the other countries mentioned, or that he could go directly by air. The situation may look differently if a refugee living in, for example, Italy wanted to embark in Germany for Australia, but once he could show that he had a valid ticket for passage from a German port to a port in the country of final destination, it seems that the countries concerned could not validly refuse to issue transit visas.<sup>bh</sup> This is particularly true if the

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<sup>bf</sup> Cf. IGCR Preparatory Documents, p. 104.

<sup>bg</sup> Cf. IGCR Preparatory Documents, p. 105.

<sup>bh</sup> Cf. A/CONF.2/SR. 18, p. 18, where one will find a statement by the Venezuelan delegate, Mr. Montoya, which seems to support this view: "He wondered whether that practice (i.e. to produce an air or sea ticket to the country of final destination as evidence of good faith) should not be endorsed and an explicit statement included in Paragraph 9 to the effect that transit visas would be issued to bona fide refugees producing a valid ticket for their final destination". This proposal was not carried, but as the provision proposed by Mr. Montoya would mean a limitation on the obligation to issue transit visas, it seems clear that the obligation as it stands comprises the case Mr. Montoya had in mind.

refugee is going by a ship chartered by the Intergovernmental Committee for European Migration or some other organization providing for mass transportation of migrants. The very fact that the country where a refugee is staying and the country of his final destination are both bordering on the sea cannot be a sufficient ground to refuse a transit visa. The important thing is that the refugee or the organization arranging his transportation can show that it is a reasonable and convenient way for him to travel through the country for which a transit visa is desired.<sup>bi</sup>

Robinson goes so far as to suggest that "the possession of a visa for a territory of final destination cannot always be requested as Paragraph 8 explicitly states, that such a visa is to be affixed only if required; therefore, if the country of final destination does not require a visa, the transit country must issue a transit visa, once the refugee can prove admission to the country of final destination".<sup>bj</sup> As pointed out by Robinson, "Paragraph 9 was copied from Art. 11 of the 1946 Agreement whose Art. 10 provided for an obligatory entry visa", but instead of supporting Robinson's argument, this raises rather the problem why Paragraph 9 was not changed accordingly. However, Robinson is certainly right in so far as the word "visa" should not be taken literally, but must be considered to cover any entry permit or other document showing that the refugee will be admitted to the country concerned.

The words "final destination" may be interpreted so as to suggest a country where the refugee will be resettled and ultimately integrated. However, it will not always - not even as a rule - be apparent from the visa or entry permit what the purpose of the refugee's admittance is. On the other hand the country from which the refugee sets out on his journey in the first place, can hardly be described as a country of final destination, which means that the obligation contained in Paragraph 9 does not extend to the issue of a return transit visa. The practical implication seems to be that Paragraph 9 should as a rule only be invoked if the refugee has some serious travel purpose, not for holiday trips or other pleasure travels.

(2) Subparagraph 2 of Paragraph 9 restricts to a certain extent the obligation to issue transit visas undertaken in Subparagraph 1. The second subparagraph was proposed by the Yugoslav delegate at the Conference of Plenipotentiaries,<sup>bk</sup> and when introducing this amendment, he pointed out that "the general practice of all countries represented at the Conference was to issue transit visas without delay. On the other hand, governments could not assume an unconditional obligation in that sense. The Yugoslav Government would, of course, continue to follow its general practice of issuing transit visas expeditiously, as hitherto, and of refusing them only in exceptional cases."<sup>bl</sup>

The wording of Subparagraph 2 makes it clear that a State cannot refuse to grant a transit visa simply because it considers such a visa as a privilege which it may grant or refuse at will without having to give reasons for a refusal.<sup>bm</sup> The State in question must show grounds which can justify its refusal in the individual case or in the special circumstances. That is to say that the refusal must refer to a specific exclusion ground in its Aliens Law or pertinent regulations, or at least be rooted in a general policy.

For example, in the United Kingdom leave to land can as a rule not be given to an alien who is of an unsound mind or a mentally defective person, or who for medical reasons is undesirable, or who has been sentenced in a foreign country for any extradition crime, or who is subject to a

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<sup>bi</sup> Robinson (R) p. 143 thinks "It is doubtful whether Paragraph 9 goes so far as to obligate a State to issue a transit visa if the country of final destination can be reached more easily through another country".

<sup>bj</sup> Op. Cit. P. 143.

<sup>bk</sup> A/CONF.2/31, p. 4.

<sup>bl</sup> A/CONF.2/SR.18, pp. 5-6. It appears that the Conference felt that the Yugoslav amendment covered "considerations of public security" in the case of mass immigration as well as requests for "firm evidence that they (the refugees) possessed the means of reaching their countries of destination". Op. cit. pp. 6-7

<sup>bm</sup> The interpretation offered by Dr. van Heuven Goedhart, the High Commissioner for Refugees, to the effect that the inclusion of Subparagraph 2 in Paragraph 9 meant "that any law applied to aliens in respect of the issue of transit visas would also be applicable to refugees" (A/CONF.2/SR.32 p. 7) therefore needs some qualification.

deportation or an expulsion order, or who does not fulfil such other requirements as may be prescribed by any general or special instructions of the Secretary of State.<sup>bn</sup>

Exclusion grounds of a similar nature are contained in the United States Immigration and Nationality Act of 27 June 1952<sup>bo1</sup> as amended.

As pointed out by Gordon and Rosenfield "A person seeking classification as a transit alien must establish that he is entitled to this classification and that he is not otherwise inadmissible to the United States. Specifically he must show that he is coming to this country solely for the purpose of passing through in immediate and continuous transit; that he has a ticket for, or other assurance of, transportation to his destination; that he has permission to enter some foreign country, if such permission is required by that country."<sup>bo2</sup>

The American Immigration and Nationality Act also contains provisions for restrictions on entry to and departure from the country in times of war or national emergency.<sup>bp</sup> Although the United States is not a party to the Refugee Convention, the cited legislation gives a good impression of grounds for refusal which are to be considered valid in respect of Subparagraph 2 of Paragraph 9 of the Schedule.

Robinson expresses the opinion that the words "any alien" in subparagraph 2 assimilates the refugee "to the alien enjoying the least privileges". This conclusion is by no means self-evident. Robinson thinks the words "any alien" in Paragraph 9 mean the same as the term "aliens generally" in Article 7, paragraph 1 of the Convention. This seems doubtful, but if this equation was correct, it is noteworthy that Weis cites authority for his view that the "treatment accorded to aliens generally" means "treatment accorded to the average alien in the country concerned, rather than minimum treatment".<sup>br</sup>

Robinson's contention is hardly borne out by the text of Subparagraph 2. "Any alien" is here used in the negative sense, and particularly in view of the arguments used by the Yugoslav delegate in proposing the amendment<sup>bs</sup> and the interpretation given above, it seems reasonable to understand the phrase so as to comprise even foreign nationals enjoying most-favoured treatment, with the clear exception of persons who do not need a visa or maybe not even a passport. A further exception must obviously be made with regard to certain categories of aliens, such as diplomats, members of the armed forces of certain allied countries, and persons specifically exempted from normal entry restrictions by the appropriate authority.<sup>bt</sup>

However, it does not seem that very much can be deduced from the words "any alien" in subparagraph 2. More important are the general wording of the provision, and its purpose, as set out above.

Paragraph 10

**The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports.**

This paragraph is identical with Article 12 of the London Agreement 1946, and it supplements the provisions in Article 29 of the Refugee Convention, cf. Article 25 (4), Paragraph 3 of the Schedule.

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<sup>bn</sup> Halsbury: *The Laws of England*, Third Edition, vol. 1, pp. 511-512.

<sup>bo1</sup> Public Law 414, 82nd Congress, 2nd Session, see particularly Section (United States Code, Title 8, Paragraph 1182).

<sup>bo2</sup> Gordon and Rosenfield, *Immigration Law and Practice*, p. 133.

<sup>bp</sup> U.S.C. 8, Paragraph 1185.

<sup>br</sup> Weis: *International Protection*, p. 201, and E/1618, p. 42.

<sup>bs</sup> See supra p.

<sup>bt</sup> See for example Halsbury's. *The Laws of England*, Third Edition, vol. 1, pp. 514-515 (para. 995).

In this connection one may mention that the Committee of Ministers of the Council of Europe in Paragraph 1 (a) of its Resolution (58) 5 of 27 March 1958 recommended “that Member Governments, pending signature of the Multilateral Agreement on the abolition of visas for travel between member countries for refugees lawfully residing in the territory of any one of them, issue entry visas free of charge at least for visits of up to three months’ duration”.

Paragraph 11

**When a refugee has lawfully taken up residence in the territory of another Contracting State, the responsibility for the issue of a new document, under the terms and conditions of Article 28, shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply.**

Whereas Paragraph 6 deals with the responsibility of the State which has issued a travel document, with respect to its renewal or extension or the issue of a new document, Paragraph 11 of the Schedule lays down the conditions on which another State becomes responsible for the issue of a travel document to the refugee concerned.

Paragraph 11 sets forth that “when a refugee has lawfully taken up residence in the territory of another Contracting State<sup>bu</sup> that State shall be responsible for the issue of a new travel document.<sup>bv</sup> This provision has been taken over from Article 13 of the London Agreement of 15 October 1946.

As in the case of Paragraph 6 (1), there is a certain discrepancy between the English and the French text. The latter speaks of “le cas d’un réfugié changeant de résidence et s’établissant régulièrement dans le territoire d’un autre Etat Contractant.”

Just as the wording of Paragraph 6 (1), the wording of Paragraph 11 seems to call for something more than lawful stay, namely that the refugee in question has “lawfully established” himself in the country of immigration.

However, we must never lose sight of the provision, contained in Article 28 (1), first sentence, of the Refugee Convention, according to which “the Contracting States shall issue to refugees lawfully staying in their territory travel documents . . .” As we have seen, a refugee who is lawfully staying in more than one country, cannot claim a travel document from each of the States concerned. On the other hand, it seems reasonable to submit that one or the other State must be obliged to provide him with a valid travel document. Otherwise the refugee might fall between two stools.

If a refugee has migrated from country A to country B on a travel document issued by the authorities of the former, and he has become lawfully staying in the latter, the refugee must be able to get a new travel document from the authorities of country B, when the authorities of country A are no longer obliged (under the terms of Paragraph 6 (1) and (2) of the Schedule) to renew or extend the validity of the travel document which they have issued. This commonsensical interpretation, rather than an attempt at analysis of the wording, seems to provide the key to the meaning of Paragraph 11.

In other words, if the authorities of the country of immigration agree to let the refugee stay in their territory beyond the expiration of the extension “not exceeding six months” provided for in Paragraph 6 (2) of the Schedule, they have in fact let him take up (or establish) lawful residence in the sense of Paragraph 11, and they have become responsible for the issue of a new travel document. That is to say, that if they are willing to let the refugee stay on, they cannot make the prolongation of the residence permit dependent on a second extension of the validity of his travel document.

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This means that when the authorities of the country of first refuge are no longer obliged to extend the validity of the refugee's travel document by virtue of Paragraph 6 (1) and (2), the authorities of the country of immigration must either outright refuse to prolong his residence permit, or they must unconditionally allow him to stay on and thus grant him a "right of establishment".

Paragraph 12

**The authority issuing a new document shall withdraw the old document and shall return it to the country of issue, if it is stated in the document that it should be so returned; otherwise it shall withdraw and cancel the document.**

Paragraph 12 of the Schedule lays down the procedure to be followed when a new travel document is being issued to replace an old one.

Article 14 of the London Agreement only provided for withdrawal of the old document, but the drafters of the Refugee Convention found it desirable to provide that the old document should be returned to the issuing authority if this was so desired.

Paragraph 12 makes it clear that a refugee may only hold one travel document at any one time.

Paragraph 13

**1. Each Contracting State undertakes that the holder of a travel document issued by it in accordance with Article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity.<sup>(1)</sup>**

**2. Subject to the provisions of the preceding subparagraph, a Contracting State may require the holder of the document to comply with such formalities as may be prescribed in regard to exit from or return to its territory.<sup>(2)</sup>**

**3. The Contracting States reserve the right, in exceptional cases, or in cases where the refugee's stay is authorized for a specific period, when issuing the document, to limit the period during which the refugee may return to a period of not less than three months.<sup>(3)</sup>**

(1) The principle underlying this subparagraph was not new. A provision ensuring the right of a holder of a travel document to return to the territory of the issuing State was contained already in the 1933 Convention. However, the wording in Paragraph 13 differs from that in the previous instruments including Article 15 of the London Agreement 1946.

Paragraph 13 (1) contains an undertaking on the part of the State issuing a Convention travel document.

From the wording of the subparagraph 1 it is, however, difficult to ascertain whether the provision applies to all Convention travel documents issued by the State concerned. As we have seen above, the provisions of Article 28 are supplemented by provisions in Article 11 of the Convention and Paragraph 6 (3) of the Schedule.

Subparagraph 1 of Paragraph 13 would have been grammatically complete even without the words "in accordance with Article 28 of this Convention"; that is to say that those words were unnecessary from the point of view of style or grammar. This being so, it would be possible to claim that the words in question must have legal significance or no meaning at all. If they have any import, that must be of a restrictive nature; limiting the application of the subparagraph to travel documents issued under the express provisions of Article 28, as opposed to those issued by virtue of Article 11 or Paragraph 6, subparagraph 3, not to mention those which might be issued pursuant to Recommendation of the Final Act.

There is, however, no support for such a linguistic interpretation to be found in the travaux préparatoires. The Conference of Plenipotentiaries set up a Working Group to study Paragraph 13, and it was this group, whose report was adopted unanimously and without comment, which gave the paragraph 1 its present form.<sup>bw</sup> By this time Paragraph 6 (3) was already adopted. In

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<sup>bw</sup> A/CONF.2/SR.18, pp. 9-16 and SR.31 p. 4, also A/CONF.2/95.

spite of the fact that Article 11 was not yet formulated, it is therefore difficult to claim an oversight in the same way as with regard to

Paragraph 7.<sup>bx</sup> On the other hand, it seems to be clear that the Conference had not in mind to create two different categories of travel documents some with a compulsory return clause and some which might be without such a clause.<sup>by</sup>

It is also noteworthy that the Specimen travel document, annexed to the Schedule, contains the following sentence: "The holder is authorized to return to ... (state here the country whose authorities are issuing the document) on or before ... unless some later date is hereafter specified. (The period during which the holder is allowed to return must not be less than three months.)"

There is no provision for the deletion of this paragraph. In spite of the unfortunate wording of Subparagraph 1 of Paragraph 1 it seems as if it has been the intent of the drafters not to make any difference between travel documents issued under the express provisions of Article 28 and those issued by virtue of other provisions.<sup>bz</sup>

(2) This subparagraph does not affect the substance of Subparagraph 1, that is to say that it does not in any way limit the obligation of the issuing State to readmit the holder of a valid travel document. It does not either allow the issuing State to refuse the holder of a valid document to leave the country, except in such cases when the issue of a travel document could be refused.<sup>ca</sup> The subparagraph was the outcome of a proposal by the French delegate, to the effect that the issuing State should "be able to exercise supervision over the comings and goings of the refugees in its territory, whom it was sometimes unwise to trust blindly".<sup>cb</sup> The French delegate stressed his point more firmly by stating that "it was not so much a question of controlling the re-entry of a refugee into French territory as of controlling his exit. Obviously, exit implied subsequent return. As things were at present, a travel document which had no return clause would be completely meaningless".<sup>cc</sup>

On the strength of these utterances, the scope of Subparagraph 2 seems rather clear. The issuing State may demand that it is not valid for exit without an exit visa. However, once an exit visa has been granted, the issuing State is obliged to issue a re-entry visa (if required) valid for the same period as the travel document itself, provided that the visa may expire on the holder's return to the territory of the issuing State. If the holder desires to leave that country again, new exit and re-entry visas may be required.

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<sup>bx</sup> See supra p. it will also be appreciated that whereas a State called upon to recognize a travel document will as a rule not know under which provision it has been issued, the issuing State will always be in a position to know this. A distinction is consequently not so impracticable with respect to Paragraph 13 as with regard to Paragraph 7.

<sup>by</sup> Cf. for example A/CONF.2/SR.18, p.11: "The President stated that any holder of a Danish travel document was entitled to re-enter Denmark, provided the document was still valid". This was not a singular remark, but completely in line with the consistent view on travel documents expressed by the President, Mr. Knud Larsen, on several occasions, e.g. cf. A/CONF.2/SR. 12, p. 5, where he suggested the issue of a travel document to a resident refugee's wife, "even though she happened to be in another country at the pertinent time". See also Mr. Larsen's statement as Chairman in the Ad Hoc Committee, to the effect that "it was in their own interests for States not to issue such documents (i.e. to nonresident refugees) freely, as they contained a return clause". (E/AC.32/SR.42, p. 5.)

<sup>bz</sup> Robinson (R) p. 145 mentions that "Paragraph 13 may, on the face of it, create a problem in the instances dealt with in the second sentence of Article 28 (1) and in Paragraph 6 (3)". He finds that the issuing State is obligated "to readmit the refugee, at least within three months", and he goes on to state: "This is not an oversight on the part of the Conference but a well conceived provision". However, Robinson's following argumentation applies only to cases covered by Article 28. It appears that Robinson has not analysed Subparagraph 1 of Paragraph 13 but only presupposes the "well conceived provision".

<sup>ca</sup> Cf. supra p.

<sup>cb</sup> A/CONF. 2/SR.18, p. 10.

<sup>cc</sup> A/CONF. 2/SR. 18, p. 12. Cf. also A/CONF.2/SR. 18, p. 14: "The French amendment related solely to a visa establishing the refugee's exit."

(3) Whereas Subparagraph 1 lays down the general rule that the holder of a travel document shall be entitled to return to the territory of the issuing State throughout the period for which the travel document itself is valid, Subparagraph 3 makes it possible for the Contracting States to deviate from the general rule

(a) in exceptional cases, or

(b) in cases where the refugee's stay is authorized for a specific period.

The cases envisaged under the first heading may be listed as exceptional for a variety of reasons. Thus a State may issue a travel document with a limited return clause to a refugee who might have been refused a travel document "for compelling reasons of national security or public order" (Article 28 (1), first sentence) or whose movements the issuing State for other reasons might like to control more closely than in normal cases (cf. Paragraph 13 (2)).<sup>cd</sup> Similarly a refugee who would otherwise have been expelled may receive a travel document with a limited return clause which will enable him to resettle in another country, but not to go back to the issuing country after a rather brief period. The limitation seems also permissible in certain resettlement cases, particularly if the issuing State has had to let in vast numbers of refugees, and it would be likely to cause serious difficulties for that State to take back important numbers of refugees who for some reason or other could not be smoothly integrated in the country of resettlement. An illustration of this situation is Austria after the influx of Hungarian refugees in 1956/57. However, the word "exceptional" makes it quite clear that the provision of Subparagraph 3 is not one which should be easily invoked, and a Contracting State cannot make it its practice or policy to issue travel documents with a limited return clause.<sup>ce</sup>

The reference to refugees whose stay "is authorized for a specific period" ties in with the provision in Article 31 (2) relating to asylum-seekers whose status has not been regularized in the country of first asylum, but who are advised to seek admission to another country.

The words "when issuing the document make it quite clear that it is only at that time, not during the period of the document's validity, that the issuing State may use its right to limit the period during which the refugee may return.

#### Paragraph 14

Subject only to the terms of Paragraph 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

This paragraph is similar to Article 16 (1) of the London Agreement 1946.<sup>cf</sup> According to Sir Herbert Emerson, the Director of the Intergovernmental Committee on Refugees, "all the provisions of this agreement are subject to Article 16".<sup>cg</sup> It was later decided to exclude Article 15 (which corresponds to Paragraph 13 of the Schedule) from this general rule, by inserting in Article 16 the words "Subject only to the terms of Article 15".

There can be no doubt that Article 11 of the London Agreement, which is identical with Paragraph 9 (1) of the Schedule, was considered to be subject to Article 16. The words "transit through"

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<sup>cd</sup> Cf. A/CONF.2/SR. 18, pp. 11 ff.

<sup>ce</sup> Cf. IGCR Preparatory Documents, pp. 107-108.

<sup>cf</sup> It is, however, at variance with the draft submitted to the London Conference. Article 16, paragraph 1 in the preliminary draft ran: "The present provisions in no way affect the laws and regulations governing the conditions of admission to, and residence and establishment in, the territories of the Contracting Party to which the present Arrangement applies". The Committee of Experts inserted the words "and departure from". IGCR Preparatory Documents, pp. 121 and 147. The words "transit through" were added by the Conferences. The preliminary draft is practically identical to Recommendation IV, paragraph 3 of 2 September 1927.

<sup>cg</sup> IGCR Intergovernmental Conference on the Adoption of a Travel Document for Refugees, Verbatim Record of the Third Session, October 9th (1946), p. 31.

were added in Article 16 at the suggestion of the Canadian delegate, with that particular purpose in mind.<sup>ch</sup>

However, what the Canadian delegate had in mind, was not to render the undertaking in Article 11 meaningless, but merely “the possible situation where, for example, a refugee might be suffering from some serious contagious disease and naturally it would not be desirable to have such a person passing through a country possibly spreading that disease. Now that case may never arise.

“But on the other hand to safeguard our regulations in that respect the words transit through were added to Article 16.”<sup>ci</sup>

It seems fair to submit that what the drafters of Article 16 of the London Agreement had in mind, were exactly the same considerations which prompted the drafters of the Schedule to include the second subparagraph 1n Paragraph 9. It may therefore be held that Paragraph 14 cannot be invoked as a separate ground for refusal of a transit visa, or be presumed to be of wider scope than Subparagraph 2 of Paragraph 9 with respect to such visas.<sup>ci</sup>

This interpretation is supported by the drafting history of Paragraph 14. In connection with the Recommendations adopted by the Third General Conference on Communications and Transit on 2 September 1927 the attention of governments was drawn to certain points, one of which was to the effect that the recommendations “in no way affect the laws and regulations in the different countries governing the conditions of admission to, and residence and establishment in, their respective territories. Nor do they affect the special provisions of the laws and regulations concerning persons to whom the said recommendations apply.”<sup>ck</sup> It was natural to make this point because the Recommendations only dealt with the issue, contents, appearance, validity and other more or less technical, aspects of travel documents, or, in the words of the Small Committee, appointed by the Second Committee of the Conference; “the question of visas does not come within the proposals studied and adopted” so that “each Government (is) retaining its entire liberty of action in this respect”.<sup>ci</sup>

The point made by the 1927 Conference was included as Article 16 in the Preliminary Draft of the London Agreement, and retained by the Commission of Experts, with the addition of the words “and departure from”, as it seems, in order to safeguard “the interests of the countries of first refuge”.<sup>cm</sup> As mentioned above, the exclusion of Article 15 from the scope of Article 16 was agreed on at a later stage. It will seem that the exclusion of the Article which deals with exit (departure) from being subject to Article 16, left the words inserted by the Commission of Experts redundant.<sup>cn</sup>

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<sup>ch</sup> Op. cit. p. 31.

<sup>ci</sup> IGCR, Intergovernmental Conference on the Adoption of a Travel Document for Refugees, Verbatim Report, Fifth Meeting, 10th October, 1946, p. 8.

<sup>cj</sup> Cf. Robinson (R) p. 147: “it is doubtful whether the words ‘subject only to the terms of paragraph 13’ are in conformity with the real situation. It is obvious that, insofar as transit is concerned, paragraph 9 is a restriction on paragraph 14. Similarly Article 14 of the Convention has a bearing upon ‘residence’ of refugees”. Cf. also Robinson (R) p. 147 note 235. The wording of Paragraph 14 may suggest that the Transit State may designate special transit routes. Such regulations fall, however, within the scope of Article 26 of the Convention.

<sup>ck</sup> League of Nations, Doc. C. 558 (b), M. 200 (b), 1927, VIII (Third General Conference on Communications and Transits Volume III. Records and Texts relating to Identity and Travelling Documents for Persons without Nationality or of Doubtful Nationality), p. 58.

<sup>cl</sup> Op. cit. p. 62s Cf. also the Report of the Committee of Experts, op. cit. pp. 32 and 34 and the Minutes of the Second Committee, op. cit. p. 9. It was, however, recommended that “every endeavour should be made to grant visas under as simple and favourable conditions as possible (Recommendation III, paragraph 3).

<sup>cm</sup> IGCR Preparatory Documents, pp. 108-109, 121, 139-140 and 146-147.

<sup>cn</sup> Robinson (R) p. 147 is hardly right when he assumes that “if under existing laws, other requirements are prescribed for exit (for instance, compliance with the tax laws, police certificates, etc.), they may be applied to refugees in the same way as to others”. As pointed out supra p ... this is something to which the drafters of Article 28 took exception. It is neither correct that “Paragraph 14 covers much the same grounds as do Paragraphs 13 (2) and 9” (Robinson (R) p. 147).

Paragraph 14 can therefore actually only relate to “laws and regulations governing the conditions of admission to, and residence and establishment in the territories of the Contracting States”, just as the paragraph of 1927 from which it stems.

Paragraph 14 only refers to “the provisions of this Schedule.” As pointed out by Robinson, “Paragraph 14 cannot be in contradiction to Article 28, i.e., no other conditions for the issuance of travel documents can be laid down than prescribed in Article 28 (1). In other words, Paragraph 14 cannot be interpreted as extending to refugees the specific legislation or regulations governing the issuance of national passports, including instances in which issuance of a passport may be refused”.<sup>co</sup>

To sum up, it is submitted that Paragraph 14 only makes it clear that the Contracting States have retained their full freedom of action with regard to the granting of visas, other than transit visas, and in general the admittance of refugees for residence, establishment or any other purpose. This freedom does not, however, extend to the issuing State with regard to a refugee holding a travel document with a valid return clause.

#### Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

This provision is taken nearly word by word from point 2 adopted in connection with the 1927 Recommendations. Point 2 contained, however, also the following explanatory remark: “as this document, though based on presumptions worthy of consideration, cannot prevail against legally established status”.

Similar provisions were included in the 1935 and 1936 Arrangements and in the 1938 Convention. Article 17 of the London Agreement 1946 is identical with Paragraph 15 of the Schedule.<sup>cp</sup>

The Convention travel document itself contains the following paragraph:

“1. This document is issued solely with a view to providing the holder with a travel document which can serve in lieu of a national passport. It is without prejudice to and in no way affects the holder’s nationality.”<sup>cq</sup>

Paragraph 14 of the Schedule and Paragraph 1 of the Specimen Travel Document confirm what is implied in other provisions. The travel document is issued for the purpose of travelling outside the issuing country. It is not designed to be a proof of refugee status or any other status, and it is not at all certain that the holder of a travel document at any given time is a refugee according to the definition in Article 1 of the Refugee Convention.

It is noteworthy that in contrast with the London travel document, which sets out that the holder “is the concern of the Intergovernmental Committee of Refugees,”<sup>cr</sup> the Convention travel document contains no confirmation of the holder’s eligibility under the Convention or the Statute of the High Commissioner’s Office.

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<sup>co</sup> Robinson (R) p. 146 and note 234.

<sup>cp</sup> Cf. IGCR Preparatory Documents, p. 109: “Certain refugees who have been denationalized may consider that their denationalization was as illegal as it was unjust; again, refugees of doubtful nationality may, rightly or wrongly, lay claim to a certain nationality. In consequence, it is advisable to avoid giving refugees the impression that their acceptance of the proposed document would imply a renunciation of their nationality, or of what they consider to be their nationality. Since the Arrangement is to be drawn up solely for practical purposes, it has seemed necessary to point out that neither the issue of the document nor the entries made thereon determine or affect the actual status of the holder and that, in particular, they can in no way influence the legal determination of his nationality”.

<sup>cq</sup> Specimen Travel Document, annexed to Schedule, p. 1.

<sup>cr</sup> Later changed to “the International Refugee Organization”.

If some authority - within or without the territory of the issuing State - wants to ascertain whether a person is a refugee according to some relevant definition, that authority would be well advised not to make its decision solely on the basis of a travel document presented to it.

On the other hand, the fact that a person possesses no Convention travel document cannot be considered as proof to the effect that the person is not a refugee.

#### Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

In a communication of 15 August 1927 to the Third General Conference on Communications and Transit, the Netherlands Legation in Berne proposed the inclusion of a paragraph to the effect that "the holder of the passport shall not derive therefrom any right to protection abroad by the Government which issued his passport".<sup>cs</sup> This proposal was supported by the British delegate,<sup>ct</sup> and the Small Committee included in its Recommendations the following paragraph:

"(1) The issue of an identity and travelling document does not entitle the holder to claim the protection of the diplomatic and consular authorities of the country which issued it and does not confer on these authorities a right of protection."<sup>cu</sup>

Article 18 of the London Agreement which is based on the quoted paragraph in the 1927 Recommendations, is identical with Paragraph 16 of the Schedule.<sup>cv</sup>

When Paragraph 16 was discussed by the Ad Hoc Committee, there were certain doubts about its purpose. It was, however, clear that the paragraph "neither conferred any right on, nor took any right away from, the refugee". In conjunction with this statement, the United States delegate went on to say that "he thought the Committee might quite well examine the question of the right of protection from the viewpoint, not of stateless persons, but of refugees, stateless or not, who did not enjoy any diplomatic protection".<sup>cw</sup> The Committee never undertook this study, but merely decided to retain the paragraph because the provision was found in the London Agreement and one did not want to delete it without knowing its significance.<sup>cx</sup>

It seems that the key word in Paragraph 16 is "issue." By the issue of a travel document no claim or right to protection is created. However, the paragraph does not prevent a country of refuge from exercising various kinds of protection in accordance with other relevant rules of law or comity, e.g. contractual protection or the lending of consular good offices, cf. Article 25 of the Refugee Convention.

## **ARTICLE 29**

### **FISCAL CHARGES <sup>(1)</sup>**

**1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.<sup>(2)</sup>**

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<sup>cs</sup> League of Nations Doc. C. 558 (b), M. 200 (b), 1927, VIII, p. 53.

<sup>ct</sup> Op. cit. p. 21.

<sup>cu</sup> Op. cit. p. 58, cf. also the explanation given on p. 61.

<sup>cv</sup> Cf. IGCR Preparatory Documents, p. 110.

<sup>cw</sup> E/AC.32/SR. 18, p. 14.

<sup>cx</sup> The British delegate, Sir Leslie Brass, "was equally willing to agree to the retention or deletion of the paragraph" (E/AC.32/SR.18, p. 14). See also E/AC.32/SR.24, pp. 4-5, and Robinson (R) p. 147.

**2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.<sup>(3)</sup>**

## Comments

(1) Article 29 corresponds to Article 8 of the 1928 Arrangement and to Article 13 of the 1933 Convention. The provisions of the present Article are supplemented by Article 25 (4) and Paragraphs 3 and 10 of the Schedule.

(2) This paragraph is practically identical with Article 13 (1) of the 1933 Convention, the major difference being that the latter only applied to refugees resident in the territory of the State concerned, while the present provision applies to all refugees irrespective of their place of residence.

The paragraph is on the whole self-explanatory. The refugees may be obliged to pay any and all taxes etc. which are levied on nationals of the State concerned, even if other aliens in similar situations are not obliged to pay them.<sup>a</sup>

On the other hand, refugees may not be required to pay taxes etc. which are levied solely on aliens, provided the test is non-possession of the nationality of the country concerned. If, however, a tax etc. is levied on persons residing outside the country, and nationals of that country resident abroad are not exempted, non-resident refugees may also be required to pay the tax or duty in question.<sup>b</sup>

Article 13 of the 1933 Convention contained a paragraph allowing the Contracting States to impose on refugees a stamp duty payable on identity cards, residence permits or travel documents (the "Nansen stamp" duty), the proceeds of which should be wholly applied to the relief work of refugees. It was discussed at great length whether such a provision should be included in the present Article, but the proposed paragraph in question was finally deleted by the Conference. There can be no doubt that the Contracting States are thereby prohibited from imposing any such surcharge for the stated (or any other) purpose.<sup>c</sup>

(3) Paragraph 2 related to charges for the issue of administrative documents, and must be read in conjunction with Article 25 (4) and Paragraphs 3 and 10 of the Schedule, which means that there is not much scope for the present paragraph. The provision it contains was of some import in the context of the 1933 Convention, because Article 13 was the only Article in that Convention relating to fiscal matters.<sup>d</sup> As Article 29 of the present Convention is not of the same exclusive nature, paragraph 2 is actually largely redundant.

## **ARTICLE 30** **TRANSFER OF ASSETS<sup>(1)</sup>**

**1. A Contracting State shall, in conformity with its laws and regulations,<sup>(2)</sup> permit refugees to transfer assets which they have brought into its territory,<sup>(3)</sup> to another country where they have been admitted for the purposes of resettlement.<sup>(4)</sup>**

**2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.<sup>(5)</sup>**

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<sup>a</sup> Cf. League of Nations, Doc. G.A.C. 2/1933, p. 7.

<sup>b</sup> UN Doc. A/CONF.2/SR.12, p. 16.

<sup>c</sup> UN Docs. E/AC.32/2, pp. 31-32, E/AC.32/SR. 11, pp. 12-15; E/AC.32/5, p. 59; E/AC.32/L.40, p. 53; E/AC.32/SR.39, pp. 7-10 and 21-26, A/CONF.2/SR.12, pp. 14-17.

<sup>d</sup> League of Nations, Doc L.S.C. 1-1933, p. 6.

## Comments

(1) The provisions contained in Article 30 were included in the Convention thanks to a Belgian proposal in the Ad Hoc Committee.<sup>a</sup> There is no similar provision in the earlier instruments relating to the status of refugees.

Article 30 must be read in conjunction with Article 7 (1). Should the regime established for refugees by virtue of Article 30 in any set of circumstances not correspond to the same treatment as is accorded to aliens generally, he may invoke the provision set forth in Article 7 (1). This was expressly stated by the Belgian delegate at the Conference.<sup>b</sup>

(2) Paragraph 1 sets forth a mandatory obligation.

The phrase “in conformity with its laws and regulations” was inserted by the Working Group of the Ad Hoc Committee, because the original draft which only made the transfer of funds “subject to the application of the formalities prescribed by the legislations”, met some opposition on the ground that it seemed “to imply that a refugee need only apply, in accordance with the formalities prescribed by law, for authorization to export funds belonging to him, for the Government concerned to be obliged to grant him such authorization”.<sup>c</sup> Even if it was agreed to soften the original phraseology, it was clearly not the intention of the drafters to weaken the provision so much that it would make transfer of the assets concerned wholly subject to the discretion of the authorities. It is essential to note that paragraph 1 does not make the obligation to allow transfer of funds subject to laws and regulations, but merely provides that permits shall be granted “in conformity with ... laws and regulations.” It was clearly pointed out by the Belgian delegate at the Conference of Plenipotentiaries “that the purpose of Article [30] was in fact to lift in the case of the refugee the restrictions imposed ... on the transfer of assets”.<sup>d</sup>

The meaning of the chosen phrase seems to be that the Contracting States are allowed to prescribe a reasonable transformation of the assets to be taken out of the country. The President of the Conference speaking as the representative of Denmark - expressed the view “that the attitude of countries towards the export of funds by resident nationals or aliens inevitably depended on the currency position; for instance, States which suffered from a dollar shortage could not allow the export of dollars. Thus, a refugee who owned property in Denmark would not be able, on emigrating, to change the Danish currency he got from the sale of that property into dollars, but ... it would be unfair to deprive a refugee of dollars which he had brought into Denmark and wished to take with him on emigrating, even if he had in the meantime sold those dollars in accordance with the Danish currency regulations.”<sup>e</sup>

A provision of a similar nature is found in Article 36 (2) of the Vienna Convention on Consular Relations of 24 April 1963. This paragraph says that “the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended”.<sup>f</sup> It seems that a proviso to the same effect should be read into Article 30 of the Refugee Convention.

(3) Paragraph 1 applies to any and all assets which the refugee concerned has brought into the territory of a Contracting State, regardless of whether he brought the assets with him when he

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<sup>a</sup> UN Doc. E/AC.32/L.24.

<sup>b</sup> UN Docs E/CONF.2/SR.24, p. 13.

<sup>c</sup> UN Doc. E/AC.32/SR.24. p.

<sup>d</sup> UN Doc. A/CONF.2/SR. 13, pp. 5 ff.

<sup>e</sup> UN Doc. A/CONF.2/SR. 13, pp.8-9.

<sup>f</sup> A/CONF.25/12



came to apply for asylum, or if he has brought the assets into the country concerned before or after that time.

A proposal to restrict the right of transfer to assets which he had “brought with him” or more precisely “brought into the country of asylum as a refugee” was expressly rejected by the Conference.<sup>9</sup>

On the other hand the paragraph 1s not applicable to assets which the refugee has acquired in the country concerned. They are not brought into the country, and the Government is not obliged to permit their transfer. The underlying idea is clearly that a State shall be neither richer nor poorer as a result of the fact that a refugee has spent a transitory period in the country until he found a possibility for resettlement in another country.<sup>h</sup> In other words, the provision takes account of the special position of refugees, who should receive more favourable treatment than other persons in this respect.

It is noteworthy that paragraph 1 does not specify that the refugee concerned must himself be staying in the country where his assets are. The Contracting States have the same obligations towards refugees who have never set foot on its territory, but merely brought funds into it, as it has towards refugees who have stayed for a shorter or longer period in the country.

(4) The Contracting States are not obliged to permit transfer of assets to any country of the refugee’s choice, but merely to a country where the refugee concerned has been admitted for the purpose of resettlement.

It follows from what has been said above, that once a refugee has been admitted for resettlement in some country, he may apply to any and all Contracting States into whose territories he has brought assets and ask for the transfer of those assets to the country of resettlement.

(5) Whereas paragraph 1 sets forth a mandatory obligation, paragraph 2 only obliges the Contracting States to give “sympathetic consideration” to applications for transfer of assets in certain cases not covered by paragraph 1.

The original draft of paragraph 1 implied that it only applied to refugees who were for a shorter or longer period physically present in the country concerned. As we have seen, this implication is not warranted by the final text of paragraph 1. The meaning of the words “wherever they may be” in paragraph 2 is therefore more or less redundant, nota bene with regard to funds which the refugee has brought into the country concerned. The chief importance of paragraph 2 is that it comprises assets other than those which the refugee has brought into the territory concerned. Such assets may be acquired by labour, inheritance, or in any other lawful way.

The application of paragraph 2 is limited to such assets “which are necessary for their resettlement”; in this respect paragraph 2 is more restrictive than paragraph 1, although it is a flexible standard which is laid down in paragraph 2.

## **ARTICLE 31**

### **REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE<sup>(1)</sup>**

1. The Contracting States shall not impose penalties<sup>(2)</sup> on account of their illegal entry or presence<sup>(3)</sup> on refugees who, coming directly<sup>(4)</sup> from a territory where their life or freedom was threatened in the sense of Article 1,<sup>(5)</sup> enter or are present in their territory without authorization,<sup>(6)</sup> provided they present themselves without delay to the authorities<sup>(7)</sup> and show good cause for their illegal entry or presence.<sup>(8)</sup>

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<sup>9</sup> UN Doc. A/CONF.2/SR. 13, pp. 7 ff.

<sup>h</sup> UN Docs A/CONF.2/SR.13, particularly p. 8.

**2. The Contracting States shall not apply to the movements of such refugees<sup>(9)</sup> restrictions other than those which are necessary<sup>(10)</sup> and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.<sup>(11)</sup> The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>(12)</sup>**

## Comments

(1) States have jealously guarded their sovereign right to decide which persons shall be admitted into their respective territories. So far they have only recognized the international obligation to admit their own nationals.

However, recognizing the plight of refugees, certain States have been willing to restrain their absolute freedom in the matter by undertaking not to reconduct refugees to territories where they are likely to suffer serious persecution.<sup>a</sup>

Because of similar considerations, the provisions contained in Article 31 were included in the Refugee Convention of 1951.

There is no similar article in the 1954 Convention relating to the Status of Stateless Persons.

It will be clearly seen that Article 31 does not obligate any State to admit any refugee into its territory.

Article 31 relates to the treatment of refugees who are already in a country of refuge, although unlawfully so. It is the usage of States to penalize illegal entry into and illegal stay in their territory. The first paragraph of Article 31 exempts under certain conditions refugees from penalties for such reasons. The second paragraph deals with the restrictions which may and may not be placed on the movements of refugees whose stay in the country has not been regularized, and also with the facilities which shall be available to refugees in that position, in order that they may be able to obtain lawful admission into another country.

(2) The first paragraph of Article 31 has no precedent in earlier conventions. The inclusion of a provision of this kind was proposed in the Secretary-General's Memorandum to the Ad Hoc Committee because "a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a bona fide refugee".<sup>b</sup>

The term "penalties" includes imprisonment and fines, meted out as a punishment by a judicial or semi-judicial body and must also be construed to include measures, such as preventive detention of mentally deficient persons, which may be resorted to in lieu of punishment. On the other hand it does not include confinement or detention for the purpose of investigation or as a security measure, but such measures are subject to the provisions of paragraph 2.

The British delegate expressed the view of the Conference of Plenipotentiaries when he "thought that all would agree that the reference in paragraph 1 to penalties did not rule out any provisional detention that might be necessary to investigate the circumstances in which a refugee had entered a country, but simply precluded the taking of legal proceedings against him".<sup>c</sup>

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<sup>a</sup> Article 3 (2) of 1933 Convention, Article 5 (3) of 1938 Convention, Article 33 of the 1951 Convention.

<sup>b</sup> E/AC.32/2, p. 46.

<sup>c</sup>

In the Ad Hoc Committee as well as in the Conference of Plenipotentiaries it was clearly stated and agreed that measures such as expulsion or deportation were not to be considered as “penalties” in the sense of Article 31, even if in some countries expulsion is normally considered as a penalty.

The Canadian delegate at the Conference dismissed any “anxiety about the interpretation to be placed on the word ‘penalties’ in paragraph 1 of Article 31, an anxiety which centred round the question whether a State would by virtue of that article forfeit its right to expel refugees who had illegally entered its territory”.<sup>d</sup>

The Belgian delegate, summed up the view of the Conference by stating that “the purpose of paragraph 1 was to exempt refugees from the application of the penalties imposable for the unlawful crossing of a frontier ... The government concerned would nevertheless retain its right to expel an alien who had entered its territory illegally”.

By prohibiting the imposition of penalties, Article 31 does not prohibit that a refugee is being charged or indicted for illegal frontier crossing or unlawful presence.

The Belgian delegate at the Conference of Plenipotentiaries pointed out that cases of such refugees may “be submitted to the Courts, which would decide whether extenuating circumstances should or should not be taken into account in any given case”.<sup>e</sup>

Article 31 (1) obligates, however, the Contracting States to amend, if necessary, their penal codes, to ensure that no person entitled to benefit from the provisions of this paragraph shall run the risk of being found guilty of an offence. If proceedings should have been instituted against a refugee, and it becomes clear that his case is falling under the provisions of Article 31 (1), the public prosecutor will be duty bound to withdraw the case or else see to it that the refugee is acquitted. In no case may a judgement be executed, if the offence is one to which Article 31 (1) applies.

(3) Cf. above, p.

At the Conference of Plenipotentiaries, the Austrian delegate proposed an amendment to the effect that paragraph 1 “shall not apply, however, to a refugee against whom an order of expulsion or of refusal of residence has been issued under a judicial or administrative decision of the State in which he seeks asylum”.<sup>f</sup>

This amendment was rejected, largely because it was felt unnecessary. Sir Samuel Hoare observed that “a refugee who had been expelled from a country and who knew that an expulsion order had been issued and he was subject to penalties, could not ordinarily show ‘good cause’.”<sup>g</sup>

It seems, however, that the text finally adopted does not allow for any exception with regard to persons against whom an expulsion order has been issued, or who have otherwise been refused admission. In view of the strict criteria contained in the final version of Article 31, a refugee who meets the requirements explicitly laid down in Article 31 (1) must be exempt from penalties.<sup>h</sup>

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<sup>f</sup> A/CONF.2/SR.18, pp. 5-6. It appears that the Conference felt that the Yugoslav amendment covered “considerations of public security” in the case of mass immigration as well as requests for “firm evidence that they (the refugees) possessed the means of reaching their countries of destination”. *Op. cit.* pp. 6-7.

<sup>g</sup> The interpretation offered by Dr. van Heuven Goedhart, the High Commissioner for Refugees, to the effect that the inclusion of Subparagraph 2 in Paragraph 9 meant “that any laws applied to aliens in respect of the issue of transit visas would also be applicable to refugees” (A/CONF.2/SR.32 p. 7) therefore needs some qualification.

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According to the text of Article 31 (1), the Contracting States are only obligated not to impose penalties on refugees, whose entry or presence was illegal; there is no mention of persons who have assisted refugees in connection with their illegal entry or presence.

The question whether such assistance too should be explicitly made exempt from imposition of penalties was raised in the Ad Hoc Committee by the Swiss observer, who mentioned that according to Article 23 (2) of the Swiss Aliens Act of 26 March 1931 as amended,<sup>i</sup> not only the illegal entry by a refugee, but "Hilfe hierzu ist ebenfalls straflos soweit sie aus achtenswerten Beweggründen geleistet wird"<sup>j</sup> He pointed out that "the provision was of some importance for voluntary organizations for aid to refugees".<sup>k</sup>

It was found that it would be extremely difficult to draft a provision along the lines of the Swiss rule for inclusion in the Convention, but it was agreed that the Swiss observer's *Comments* be given due attention in the records of the meeting, and the hope was expressed by several delegates, including the American and the French, "that Governments would take note of the very liberal outlook embodied in the Swiss federal laws and follow that example".<sup>l</sup>

(4) This proviso was not at all considered by the Ad Hoc Committee, but was inserted by the Conference of Plenipotentiaries.

At the first reading of Article 31 (1) the High Commissioner, Dr. van Heuven Goedhart, expressed the desire that the provision should include the following two categories of refugees:

- (a) "Refugees who after leaving one country of persecution, arrived in another country where they might possibly remain unmolested for a certain period, but would then again be in danger of persecution. If, as a result, they moved on again and reached a country of true asylum.... it would be very unfortunate if [they were] ... penalized for not having proceeded direct to the country of asylum."<sup>m</sup>
- (b) "Refugees who fled from a country of persecution, direct to a country of asylum; they might not, however, be granted the right to settle there, even though the country in question was a Contracting State."<sup>n</sup>

The Conference considered a number of different formulations, and following a French proposal - on the first reading agreed to restrict the application of Article 31 to "a refugee ... being unable to find asylum even temporarily in a country other than the one in which his life or freedom would be threatened".<sup>o</sup>

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<sup>i</sup> Halsbury: *The Laws of England*, Third Edition, vol. 1, pp. 511-512.

<sup>j</sup> Public Law 414, 82nd Congress, 2nd Session, see particularly Sections (United States Code, Title 8, § 1182).

<sup>k</sup> Gordon and Rosenfield, *Immigration Law and Practice*, p. 133.

<sup>l</sup> U.S.C. 8 § 1185.

<sup>m</sup> IGCR Preparatory Documents, p. 100.

<sup>n</sup> Cf. A/CONF.2/SR. 18, p. 15, particularly the President's statement to the effect that "care should be taken to ensure that countries admitting refugees for short periods were not penalized or placed in difficulties by the regulations of the States issuing the travel documents." See also League of Nations Doc. Cs 558 (b), M. 200 (b), 1927, VIII (Third General Conference on Communications and Transit, Vol. 111, Records and Texts) p. 61: "The Committee desires to draw attention to other points. An identity and travelling document can only be withdrawn by a diplomatic or consular authority if it was issued by the Government which appointed that authority, and only if a new document is issued. The territorial authorities of the country which issued such a document can withdraw it at any time, even if it has not expired, during the visits which the bearer makes to that country, but the withdrawal in this case must be material; a decision involving cancellation would not suffice, even if it were published."

<sup>o</sup> Robinson (R) p. 141 mentions that "Para. 2 leaves it to the individual countries to define the word 'children', i.e. to prescribe the age at which a person may obtain his own document and below which he may be included in the travel document of another, adult refugee". With regard to the mentioned paragraphs, reference may be made to IGCR Preparatory Documents, pp. 92-99 and 111.

In the High Commissioner's opinion this text did not exclude the two categories of refugees<sup>p</sup> he had in mind.

There was, however, general dissatisfaction with this text, on a number of grounds, largely, however, because it was felt that it was not sufficiently beneficent for refugees, and on the second reading the discussion of Article 31 (1) was reopened.<sup>q</sup>

In the course of this renewed discussion, those who wished more liberal provisions eventually had to yield to those delegates whose main concern was to protect the Contracting States against an influx of refugees entering clandestinely from intermediate countries. The text which was finally adopted was also due to a French proposal, and the French delegate made it quite clear "that a failure on the part of a refugee to secure a residence permit in a State bordering on France should not constitute grounds for claiming exemption from penalties which the French authorities might wish to impose on such refugee for illegally entering French territory".<sup>r</sup>

This text would clearly in the words of the President, Mr. Knud Larsen, "not exempt from penalties a refugee who had fled from a country of persecution to Switzerland and who subsequently entered France clandestinely, since it was hardly likely that he would be able to prove that his life or freedom was endangered by his remaining in Switzerland".<sup>s</sup>

On the whole, he was of the opinion that the benefit of the provision would not be due to a Convention refugee who "escaped to a second country where his life or liberty was again in danger, but not for any of the reasons specified in Article 1", and who "for those irrelevant reasons ... fled to a third country".

On the other hand the President interpreted the final text so as to exempt from penalties "for example, a Polish refugee living in Czechoslovakia, whose life or liberty was threatened in that country and who proceeded to another country".<sup>t</sup>

It is clear that the wishes of the High Commissioner were not fully met. On the other hand, it seems that the above-quoted statements by Messrs. Knud Larsen and Rochefort are soundly based on the text finally adopted.<sup>u</sup>

It is clear that Article 31 (1) applies to a refugee who sneaks across the frontier, "direct" from the country when he is threatened with persecution.

But it is equally certain that it applies to a seaman, a passenger or a stowaway, who uses his first opportunity to jump ship, even if this is not the ship's first port of call in a country of refuge, and it can hardly be said therefore that he is coming "direct" from the country of

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<sup>p</sup> Cf. For example Schwarzenberger.

<sup>q</sup> Documents, p. 99.

<sup>r</sup> This provision is identical with Article 6 of the London Agreement 1946. Cf. IGCR Preparatory Cf. The 1922, 1924 and 1936 Arrangements and the 1938 Convention, also IGCR Preparatory Documents, pp. 103-104.

<sup>s</sup> Law No. 52-893, Journal Officiel No. 180 of 27 July 1952. It is interesting to note that in Belgium it is an established practice to consider a refugee as "coming directly" if he arrives in Belgium within a fortnight after his departure from his country of origin; cf. in this connection the Belgo-German Refoulement Agreement of 19 January 1952.

<sup>t</sup> E/AC.32/SR.16, p. 17. This had connection with the adoption of the Danish proposal for a second sentence in paragraph 1 of the Draft Article 22: "The Contracting States may issue such a travel document to a refugee not lawfully resident in their territory". Cf. op. cit. pp. 11-15, and (E/1618 E/AC.32/5) p. 22.

<sup>u</sup> It is interesting to note that whereas the word "direct" was used in certain of the proposed texts, the final text contains the word "directly". Now "direct" and "directly" are two different adverbs in English; the former meaning "straight, not crooked or round about", whilst the latter means "in a direct manner; at once, without delay; presently, in no long time". It would hardly be justified to put too much emphasis on this linguistic points. But on the basis of the discussion which took place at the Conference, and more particularly: the statements quoted above, it seems permissible to reflect that the drafters' choice of word was not entirely incidental. The adverb "direct" with its more limited range of meanings would not have been able to convey the intentions of the Conference.

persecution. He is nevertheless coming “directly” in the sense that he is coming “without [undue] delay.”

Likewise Article 31 (1) will apply to defecting participants in sports competitions, meetings etc., even if they have had to pass through other countries before they found their opportunity to apply for asylum.

(5) Article 31 refers to “a territory where their life or freedom was threatened”. By doing so, it looks as if the provision only applies if the refugee in question was threatened with persecution directed against his life or freedom.

A phrase to the same effect will be found in Article 33.

Such a limitation as to the applicability of Article 31 was apparently not intended. It was first proposed by the French delegation that the provision should only apply to refugees “coming direct from his country of origin”,<sup>v</sup> but it was felt that this would limit the scope of the Article too much. The President therefore suggested that the words just quoted should be replaced by the phrase “coming direct from a territory where his life or freedom was threatened”.<sup>w</sup> Thus it was quite unwittingly that the concept of “life and freedom” was introduced with regard to Article 31, and it seems that the widening of scope of the provision in the just-mentioned sense must not lead us to restrict its meaning with regard to the kinds of persecution which warrant exemption from penalties. It is likewise inadmissible to use the language of Articles 31 and 33 to restrict the meaning of “persecution” in Article 1. The word “freedom” must be understood in its widest sense.

The reference to Article I in the text of Article 31 is of double significance. Firstly, it makes it clear that the person in question need not have been actually persecuted. It suffices if he had “well-founded fear of being persecuted” for any of the reasons set forth in Article 1 (A) (2).

Secondly, the threat to his life or freedom must be “a result of events occurring before 1 January 1951.” This point was repeatedly stressed by the French delegate, and was apparently accepted by the Conference.

(6) Cf. above, p.

(7) The requirement that refugees must “present” themselves without delay to the authorities “in order to claim the benefit of Article 31 (1)”, is a very important proviso, which was discussed at some length in the Ad Hoc Committee.

Some delegates stressed the point that this requirement implies a voluntary act on the part of refugees. The delegate of France went so far as to state that “the first paragraph of the article involved a voluntary act ... whereas, in the case ... the act was no longer voluntary ... the refugee could ... no longer benefit by the provisions of Article [31]”.<sup>x</sup> The delegate of Canada expressed himself along the same lines: “If a refugee presented himself to the authorities involuntarily, namely, only when he had been detained, he would naturally come under the law of the country”.<sup>y</sup>

These statements are basically correct, but seem to need some qualification. If a refugee is apprehended on his way to present himself to the authorities, or before he has even had a

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<sup>v</sup> E/1618 (E/AC.32/5) p. 29, and E/AC.32/SR.32, p. 2.

<sup>w</sup> It is not a condition for the extension of the validity of a travel document in accordance with subparagraph 2, that the document contains a valid return clause (cf. Paragraph 13 of the Schedule) The IGCR proposal to include such a condition was not accepted by the London Conference 1946, cf. IGCR Preparatory Documents, pp. 102 and 120 (draft Article 8, paragraph 2).

<sup>x</sup> Cf. Robinson (R) p. 141: “In this respect paragraph 6 provides for the obligatory assignment of some consular or diplomatic services, leaving it to the Contracting State to fix their number. In other words, paragraph 2 is mandatory in so far as authorization to some consulates or embassies is concerned.”

<sup>y</sup> IGCR Preparatory Documents, p. 103.

chance to give himself up, for example by a frontier guard in an uninhabited border area, he cannot be considered excluded from claiming the benefit of Article 31 (1).

The time element is obviously more important than the voluntariness of the act of presenting oneself to the authorities, but there is a certain interrelationship between the two things.

The paragraph does not require that a refugee shall present himself to any particular authority. A person crossing the frontier illegally may have reasons for not giving himself up at the nearest frontier control point or to a local authority in the border zone. If he succeeds in finding his way to the capital or another major city and present himself to the authorities there, it seems that he has met the requirement, and the same ought to apply if he was unsuccessful, but could prove that such was his intention.

A person jumping ship or defecting from a visiting group may have reasons for hiding until the ship or his party has left the town, or for going to another city to give himself up there. If the time spent in hiding or en route is not unreasonable in view of the particular circumstances, his presenting himself should still be considered as "without delay." In any such cases the voluntariness of the act must be considered an exonerating circumstance.<sup>z</sup>

On the other hand Article 31 (1) is not applicable if the refugee chooses to remain in a country for a period of time with no intention of presenting himself to the authorities. If he then learns that he is about to be discovered and for that reason gives himself up, Article 31 (1) cannot be invoked.<sup>ba</sup>

Robinson divides "those who are present in the territory of a Contracting State, but have no authorization to stay there" into two sub-groups: "(1) persons who had a dated residence permit but were unable to depart from the country within this period and (2) persons who entered and resided illegally in the country before the Convention came into force for the particular country".<sup>bb</sup> There may be doubts as to the advisability of maintaining Robinson's distinction.

One shall not here go into the general problem of the intertemporal effects of the Convention. It must be sufficient to state that until the Convention entered into force in the country in question, no refugee illegally present there might claim exemption from penalties by virtue of Article 31 (1). The requirement to present oneself "without delay" must be seen in relation to the commencement of the illegal presence and not in relation to the entry into force of the Convention. For such refugees who fulfil this and the other requirements, Article 31 (1) may, however, have the force of an amnesty, in so far as their offence of illegal entry or presence has not been adjudicated or the penalty has not been served at the time when the Convention became effective in the particular country.

(8) The importance of the proviso that refugees must "show good cause for their illegal entry or presence" is more doubtful.

The Secretariat draft which formed the basis for the deliberations of the Ad Hoc Committee, contained in draft Article 24 (2) a clause for the exemption of penalties for illegal entry. This applied to any "refugees seeking to escape from persecution" and therefore surely some kind of qualification was needed. It was therefore provided that in order to benefit from the exemption from penalties, refugees "must present themselves without delay to the authorities of the reception country" and "Show good cause for their entry".<sup>bc</sup>

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<sup>z</sup> In its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, the Intergovernmental Court of Justice mentioned the need for functional protection with particular reference to stateless persons. There is in principle nothing to prevent a refugee from being employed by the United Nations or some other international organization, while desiring to maintain his links with the country which issued his travel document.

<sup>ba</sup> See supra p.

<sup>bb</sup> See supra p.

<sup>bc</sup> See supra p.

As we have seen supra, the first of these two provisos has retained its importance. The limitation of the applicability of the penalty exemption provision to refugees “coming directly from a territory where their life or freedom was threatened in the sense of Article I” has, however, deprived the second proviso of almost all of its original meaning.

The Australian delegate at the Conference reflected that “some representatives had contended that the words ‘good cause’ should be given a wide interpretation, a contention which had gone unchallenged. . . .<sup>bd</sup> and indeed they did: the United Kingdom delegate, voiced the opinion that “the fact that a refugee was fleeing from persecution was already a good cause. But ... there might be cases where a refugee could show good cause even though he had not fled direct from a country where his life was endangered”.<sup>be</sup>

Dr. van Heuven Goedhart, the High Commissioner, drew the logical conclusion and suggested that the words “and shows good cause” should be amended to read “or shows other good causes”.<sup>bf</sup>

The French delegate made it clear that it was difficult to rely on the good cause” clause, and that “it was precisely on account of that difficulty that it was necessary to make the wording of paragraph 1 more explicit”.<sup>bg</sup>

In the course of the continued discussion, the President of the Conference, Mr. Knud Larsen expressed the view “that the words ‘good cause’ would oblige the refugee to show why he had failed to secure asylum in a country adjacent to his country of origin”,<sup>bh</sup> but that this obligation should not be enforced to the limit was made very plain by Dr. van Heuven Goedhart, who found it unacceptable to place on a refugee “the very unfair onus of proving that he was unable to find even temporary asylum anywhere outside the country or countries in which his life or freedom would be threatened”.<sup>bi</sup> The High Commissioner suggested that the requirement should be restricted to showing good cause “for believing that his illegal entry or presence is due to the fact that his life or freedom would otherwise be threatened”.<sup>bj</sup>

It seems that the main objective of the “good cause” proviso was to prevent that the obligation to exempt refugees from penalties should be extended to such “refugees who wished to change their country of asylum for purely personal reasons”.<sup>bk</sup>

However, the requirement to “show good cause for their illegal entry or presence” cannot wholly be ignored. It seems that in view of the wording chosen, a refugee may be obliged to explain - not why he has chosen any particular country - but why his entry or presence was illegal and not regularized beforehand. Thus the requirement to show “good cause” in the present text is closely related to the requirement of presenting oneself without delay.<sup>bl</sup>

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<sup>bd</sup> Cf. supra p. - See also A/CONF.2/SR.32, pp. 9-12.

<sup>be</sup> Cf. Robinson (R) pp. 141 and 143-144.

<sup>bf</sup> For a discussion of Paragraph 12, see A/CONF.2/SR. 18, pp. 7-8, and SR.32 pp. 8-9.

<sup>bg</sup> Cf. IGCR Preparatory Documents, p. 104.

<sup>bh</sup> Cf. IGCR Preparatory Documents, p. 105.

<sup>bi</sup> Cf. A/CONF.2/SR. 18, p. 18, where one will find a statement by the Venezuela delegate, Mr. Montoya, which seems to support this view: “He wondered whether that practice (i.e. to produce an air or sea ticket to the country of final destination as evidence of good faith) should not be endorsed and an explicit statement included in Paragraph 9 to the effect that transit visas would be issued to bona fide refugees producing a valid ticket for their final destination”. This proposal was not carried, but as the provision proposed by Mr. Montoya would mean a limitation on the obligation to issue transit visas, it seems clear that the obligation as it stands comprises the case Mr. Montoya had in mind.

<sup>bj</sup> Robinson (R) p. 143 thinks “It is doubtful whether Paragraph 9 goes so far as to obligate a State to issue a transit visa if the country of final destination can be reached more easily through another country”.

<sup>bk</sup> Op.cit. p. 143.

<sup>bl</sup>



(9) Paragraph 2 of Article 31 does not deal with exemption from penalties, but with restrictions which may be applied to the movements of illegally entered or illegally present refugees.

Article 31 (2) must be read in conjunction with Article 26, which provides that “each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances”.<sup>bm</sup>

Articles 26 and 31 apply to different categories of refugees: whereas Article 26 lays down the rule to be followed by a Contracting State with regard to refugees “lawfully in its territory”, Article 31 (2) applies to certain refugees whose presence is not lawful, or in the words used in the paragraph itself, whose status is not regularized.

The reference in the first sentence of paragraph 2 to “such refugees” implies on the face of it that that paragraph applies to the same category of refugees as those who may benefit from the provisions of paragraph 1. This would lead to the conclusion that paragraph 2 applies to “refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in [the] territory [of a Contracting State] without authorization”.

Taking into account, however, that the first sentence of paragraph 2 achieved its final form already in the Ad Hoc Committee, whereas the proviso “coming directly from a territory where their life or freedom was threatened in the sense of Article I” was added by the Conference, and that there is no indication in the travaux préparatoires to the effect that the Conference had any intention of restricting the applicability of paragraph 2 in the same way as that of paragraph 1, it seems justified to conclude that the term “such refugees” in the first sentence of paragraph 2 means “refugees who enter or are present in [the] territory [of a Contracting State] without authorization”.<sup>bn</sup>

In view of the way in which paragraph 1 has been worded, it cannot be seen to be a condition for the application of paragraph 2 that the person in question has presented himself without delay or that he shows “good cause” for his illegal entry or presence. All the three mentioned provisos apparently only apply to the exemption from penalties.

In another respect too, Article 31 (2) applies to persons who may not qualify under Article 31 (1). When it comes to imposing penalties, or exempting refugees from penalties, for illegal entry or presence, as a rule sufficient time will have lapsed to establish whether the person in question is a bona fide refugee or not.<sup>bo</sup>

On the other hand, the measures referred to in paragraph 2, may have to be considered at a much earlier stage, that is to say as soon as the person in question has reported himself or has been apprehended. Article 31 (2) would be to a great extent a dead letter, if a person who prima facie appears to be a refugee could not claim the benefit of the provision right from the outset. This seems also to have been the view of the drafters of the Convention. If they did not think that even the refugee whose status as a refugee has not yet been ascertained, could benefit from Article 31, it would have been rather meaningless to discuss in the way it was done, whether the text of paragraph 1 “would prevent a government detaining a person who entered the country illegally, pending a decision whether that person was to be regarded as a bona fide refugee”.<sup>bo</sup>

It seems that by virtue of Article 31 (2) the Contracting States have undertaken certain obligations for the benefit of any illegal entrant who prima facie is a refugee and that such

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<sup>bm</sup> Weis: International Protection, p. 201, and E/1618, p. 42.

<sup>bn</sup> Robinson (R) p. 143: Subpara. 2 of para. 9 assimilates refugees, in regard to the issuance of transit visas, to “any alien”. The wording is different from Art. 7 but the sense is apparently the same: the assimilation is to the alien enjoying the least privileges.

<sup>bo</sup>

persons may claim the benefits of paragraph 2 as long as it is not clear that they are not bona fide refugees. Thus in the case of a mass influx, of persons supposed to be Convention refugees, a Contracting State must apply Article 31 (2) to all prima facie refugees who ask for asylum, until their status is clarified.

(10) By virtue of Article 31 (2), first sentence, a Contracting State is obligated not to apply other than necessary restrictions to the movements of the refugee to which it applies.

As we have seen supra, the drafters of the Convention agreed that Article 31 (1) does not prohibit detention for the purpose of investigation.<sup>bp</sup> It may undoubtedly be considered necessary for the authorities to investigate the identity of a person whose entry or presence is unauthorized and who claims to be a refugee, and to check the details of the story he tells. For this purpose it may also be necessary to detain him.

But according to Article 31 (2), detention may not be resorted to just for the convenience of the authorities, this measure must, in order to be legal, really be deemed necessary, for example because the police fears that the person will disappear if not detained (it will be remembered that he does not need to have presented himself voluntarily in order to invoke paragraph 2), or that he may destroy or falsify evidence, or that he may undertake activities contrary to national security.

It is not sufficient that detention is convenient for the police or immigration authorities. Under the terms of Article 31 (2) the authorities have to accept inconvenience, as long as it does not prevent them from carrying out their task.

Restrictions on the movements of refugees may also be applied for other purposes than investigation, for instance in order to safeguard national security, public order or public health.

It follows from what has been said that the measures applied must not go beyond what is necessary in the particular situation facing the authorities. If there are few illegal entrants, strict measures such as detention will be less easily justified than in the case of a mass influx in which case the task of the authorities may become overwhelming and necessitate a special ad hoc screening procedure.<sup>bq</sup>

Article 31 (2) obligates Contracting States to differentiate their restrictive measures according to the circumstances. If a less severe restriction, such as ordering the person in question to stay in a particular town or within a limited area, can be considered sufficient, the authorities are stopped from applying more severe measures, such as restricting the refugee to stay in a certain house or in a camp, or outright detaining him. Keeping him incommunicado must only be resorted to in very special cases, when the situation really dictates it. Even such measures as requiring the person in question to report to police headquarters at certain intervals must be imposed judiciously.

(11) The first sentence of paragraph 2 further provides that the restrictions applied to the movements of the refugees concerned shall be of a temporary nature, or more precisely that they

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<sup>bp</sup> See supra p.

<sup>bq</sup> In the Federal Republic of Germany a "Verordnung Ober die Anerkennung und die Verteilung von aushändischen Flüchtlingen (Asylverordnung)" of 6 January 1953 provides that aliens who enter the Federal Territory or the Land Berlin without authorization and seek refuge there, have to present themselves without delay in an assembly centre for aliens. [See for example Halsbury's Laws of *England*, Third Edition, vol. 1, pp. 514-515 (paragraph 995)]. In the special situation which prevails in the Federal Republic, with a steady and important influx of refugees, not only international refugees, but also refugees from other parts of the partitioned Germany, there can be no doubt that the measure thus prescribed is lawful, that is to say in conformity with Article 31 (2). But should it happen that the number of asylum-seekers should dwindle to a small fraction of the 1953 figure, the question may be raised if it is really necessary to require refugees to report to an assembly centre for screening and that their freedom of movement should be restricted to the area of that camp; and if this question must in all honesty be answered in the negative, said measure will no longer be justifiable. (Supra p.). In this connection it is interesting to note that an increasing number of asylum-seekers are allowed to be screened by the local authorities - only documents are sent to the central screening authority.

shall only be applied until the status of the refugees is regularized or the refugees obtain admission into another country.

In a preliminary draft which at one stage was adopted by the Ad Hoc Committee, it was set forth that necessary restrictions on the movements of refugees might be “applied until such time as it is possible to make a decision regarding their legal admission to the reception country or to another country”.<sup>br</sup>

This wording was criticized by the Danish delegate who wondered whether the country where the refugee was present “would be obliged to release the refugees as soon as they had obtained entry visas to another country. Some refugees might possibly use such an opportunity to remain in the country illegally”, and at the prompting of the Chairman, Mr. Leslie Chance of Canada, the present wording was substituted for the just quoted one. It is apparent from this that in the case of a refugee whose admission into another country has been authorized, necessary restrictions on his movements may be applied until such time as he actually leaves for that country.

The words “until their status in the country is regularized” are causing greater difficulty. It seems that “for the Ad Hoc Committee that phrase had meant the acceptance by a country of a refugee for permanent settlement, and not the mere issue of documents prior to a final decision as to the duration of his stay”.<sup>bs</sup>

If therefore, the authorities of a given country first recognize an illegal entrant as a bona fide refugee, and only later grant him permission to reside in the country, his status is not “regularized” in the sense of Article.<sup>bt</sup>

31 (2) until this latter decision has been taken.

(12) The second (final) sentence of Article 31 (2) sets forth that the Contracting States shall allow “such refugees” a reasonable period and all the necessary facilities to obtain admission into another country.

A precedent for this provision will be found in Article 5 (1) of the 1938 Convention, which reads as follow:

“In every case in which a refugee is required to leave the territory of one of the High Contracting Parties to which the present Convention applies, he shall be granted a suitable period to make the necessary arrangements.”

Like the first sentence of Article 31 (2), the second sentence contains the expression “such refugees.” It seems that this expression denoted refugees to whom the first sentence applies, with possible exclusion of illegal entrants whose refugee status has not yet been determined, because whereas it is necessary that asylum seekers benefit from the provision contained in the first sentence right from the outset, there is maybe no similar necessity with regard to the application of the provision of the second sentence.

It will be noted that the second sentence of Article 31 (2) is practically identical with the first sentence of Article 32 (3); the latter does not, however, provide for “all the necessary facilities” which are mentioned in the former.

As it stands today, the second sentence of Article 31 (2) seems to be based on the assumption that a State dealing with refugees whose entry to or presence in its territory was illegal and who cannot simply be turned back to the country from which they come,<sup>bu</sup> has a

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<sup>br</sup> A/CONF.2/SR. 18, pp. 9-16 and SR.31 p. 4, also A/CONF.2/95.

<sup>bs</sup> See supra p. It will also be appreciated that whereas a State called upon to recognize a travel document will as a rule not know under which provision it has been issued, the issuing State will always be in a position to know this. A distinction is consequently not so impracticable with respect to Paragraph 13 as with regard to Paragraph 7.

<sup>bt</sup> Cf. supra p.

<sup>bu</sup>

choice between regularizing their status, i.e. allowing them to stay lawfully in the country, or giving them an opportunity to gain admission into another country, which might be prepared to grant them asylum.

Here is obviously a gap. An order to leave the territory is the logical opposite of a permission to stay in the country. Merely to give a person an opportunity to gain admission to another country is not an alternative of the same quality.

A State choosing the latter solution must give the refugees concerned the benefits provided in the second sentence of Article 31 (2).

As pointed out by Robinson, "a 'reasonable period' is one which, under existing circumstances, is sufficient for a person without (an effective) nationality and possessing given qualifications (skills, age, etc.), who earnestly makes all possible efforts."<sup>bv</sup>

The obligation to allow a refugee "all necessary facilities" does not rule out keeping him in detention, provided it is not too remotely situated, but he must be permitted to communicate with consuls, voluntary agencies and others; he must also be allowed to get in personal contact with persons who may help or advise him, and he must be allowed to receive or study any relevant information material.<sup>bw</sup>

## **ARTICLE 32 EXPULSION<sup>(1)</sup>**

- 1. The Contracting States shall not expel<sup>(2)</sup> a refugee lawfully in their territory<sup>(3)</sup> save on grounds of<sup>(4)</sup> national security<sup>(5)</sup> or public order.<sup>(6)</sup>**
- 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.<sup>(7)</sup> Except where compelling reasons of national security otherwise require,<sup>(8)</sup> the refugee shall be allowed to submit evidence to clear himself,<sup>(9)</sup> and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.<sup>(10)</sup>**
- 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country.<sup>(11)</sup> The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.<sup>(12)</sup>**

### Comments

(1) In the period immediately following the First World War, it became the habit of certain States to expel refugees - not only because of minor infractions of the law, but also because of more indigency - and to push those so expelled across the frontier to a neighbouring country. This practice caused considerable hardship to the refugees, who were very often pushed back and forth between two or more countries and punished each time for illegal entry, but it caused also considerable inconvenience for the countries into whose territory the expelled refugees were sent in the first place.<sup>a</sup>

It is therefore quite natural that expulsion of refugees became a matter of concern to the international community. The question has been dealt with in all international instruments

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<sup>bv</sup> This solves the problem Robinson envisages, (R) p. 146. It is noteworthy that in special circumstances seems to allow the return clause to be excluded: "There would, however, seem to be no reason why, under separate agreements, with the admitting State, the obligation of the issuing State to readmit the refugee could not be excluded provided the travel document is made valid for the one country and the condition of issuance is stated clearly".

<sup>bw</sup> Cf. Supra p.

<sup>a</sup> Cf. Trachtenberg, in *Revue de droit international et de législation comparée*, 1936, vol. XVII, pp. 552 ff. Also League of Nations, *Official Journal*, 1930, No. 11, p. 1464 - Fatou, in *nouvelle revue de droit international privé*, 1934, pp. 143 ff.

relating to the status of refugees (the 1928 Arrangement, the 1933, 1938 and 1951 Conventions) and has been the subject of several League of Nations resolutions.

There are two clearly distinguishable approaches to the problem. One trend has been to prevent hardship to refugees by limiting the grounds which could justify expulsion. The other tendency has been to safeguard the interests of neighbouring States by prescribing that expulsion should only be effected if another State is obliged or willing to admit the refugee.

Article 7 of the Arrangement relating to the Legal Status of Russian and Armenian Refugees, signed at Geneva on 30 June 1928, contains the following recommendation:

“Il est recommandé que les expulsions ou les mesures analogues soient évitées ou suspendues à l’égard des réfugiés russes et arméniens lorsque celui qui en est frappé est dans l’impossibilité d’entrer régulièrement dans un pays voisin. Cette recommandation ne vise pas le réfugié qui a pénétré sur un territoire en enfreignant intentionnellement les prescriptions nationales. D’autre part, il est recommandé que, dans tous les cas, les pièces d’identité ne soient pas retirées.”<sup>b</sup>

An Intergovernmental Conference to establish a convention for the protection of refugees was convened in Geneva on 26 October 1933. It based its deliberation on a Draft Convention and an “Exposé des motifs” prepared jointly by the President of the Advisory Commission and the President of the Governing Body of the Nansen Office.

The motifs relating to provisions on expulsion and reconduction (refoulement) deserve to be quoted in full:

“Les dispositions relatives à l’expulsion et au refoulement sont basées sur les recommandations de l’article 7 de l’Arrangement du 30 juin 1928 et sur les résolutions de la XIII<sup>ème</sup> Assemblée de la Société des Nations et de la V<sup>ème</sup> session de la Commission intergouvernementale en date du 24 janvier 1933.<sup>c</sup> Elles traitent une question des plus difficiles et pénibles que suscite la présence des réfugiés dans les pays de refuge.

Abstraction faite des considérations humanitaires dont chaque Gouvernement tient compte en cherchant à éviter l’expulsion et le refoulement des réfugiés - qui, de tous les étrangers, sont le plus gravement atteints par ces mesures - il faut reconnaître que l’expulsion des réfugiés apatrides se heurte à des difficultés d’ordre international souvent insurmontables.

L’expulsion d’un étranger comprend l’ordre de quitter le territoire.

Le réfugié ne peut obtempérer à cet ordre sans entrer dans un pays voisin. Or, tous les pays, sans exception, lui interdisent l’accès de leur territoire à moins qu’il ne soit muni d’une autorisation spéciale, d’un visa d’entrée.

L’obtention d’un tel visa est chose impossible lorsqu’il s’agit d’un expulsé.

Des difficultés analogues peuvent se produire à l’occasion d’une expulsion de tout autre étranger. Mais, dans ce cas, reste toujours ouverte la voie du rapatriement.

Dans le cas du réfugié cette voie est impraticable. L’U.R.S.S. ne considère plus les réfugiés comme ses ressortissants. Elle se refuse de les admettre sur son territoire et l’article 71 de son Code pénal menace de peine de mort le réfugié qui, sans y être autorisé, retournerait en Russie. La situation des autres catégories de réfugiés est sensiblement égale.

Cet état de choses crée un impasse.

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<sup>b</sup> This text was translated by the Secretariat of the League of Nations as follows: "It is recommended that measures for expelling foreigners or for taking other such action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner. This recommendation does not apply in the case of a refugee who enters a country in intentional violation of the national law. It is also recommended that in no case should the identity papers of such refugees be withdrawn" (League of Nations Treaty Series, vol. 89, p. 57).

<sup>c</sup> C.266. A 136. 1933. No. III.

Le conflit de deux droits souverains rend l'expulsion légalement inexécutable et oblige à y renoncer.

Ainsi, la Preussische Polizeiverordnung über die Behandlung der Ausländer du 27 avril 1932 contient la règle suivante: 'Un étranger frappé d'un arrêté d'expulsion ou de refoulement et qui est sans nationalité ou dont la nationalité n'est pas connue ou ne peut être établie, ne doit être conduit à la frontière d'un pays non allemand qu'à condition que ce pays lui ait accordé l'autorisation d'entrer sur son territoire' (Article 3 1).

C'est également la règle formulée par la XIII<sup>ème</sup> Assemblée de la Société des Nations qui s'est adressée aux Gouvernements, les priant 'instamment de n'expulser aucun réfugié qui n'ait pas obtenu l'autorisation d'entrer dans un pays voisin'.<sup>d</sup>

Malheureusement, cette règle n'est pas suivie et la méconnaissance de la condition particulière des réfugiés en matière d'expulsion et de refoulement produit des résultats qui compromettent l'ordre et la sécurité et qui lèsent les intérêts des pays voisins.

Evidemment, comme dans toute multitude humaine, il se trouve parmi les réfugiés des éléments vis-à-vis desquels les autorités ne sauraient rester désarmées. Mais, comme l'a justement suggéré la Commission intergouvernementale, il y aurait lieu de recourir dans ces cas à des mesures d'ordre interne et de ne pas contindre le réfugié dangereux à entrer en fraude dans un pays voisin.

C'est là le sens de l'Article 2 du projet.<sup>e</sup>

On the basis of these motifs, the drafters proposed the following provisions relating to expulsion and refoulement (Draft Article 2):

"Chacune des Parties Contractantes s'engage à ne pas éloigner de son territoire par application de mesures de police, telles que l'expulsion ou le refoulement, les réfugiés, à moins que les dites mesures ne soient dictées par des raisons de sécurité nationale ou d'ordre public. Elle s'engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d'origine et à suspendre les mesures dont il s'agit aussi longtemps que les réfugiés visés par celles-ci n'auront pas reçu, sur leur requête ou grâce à l'intervention des institutions s'occupant d'eux, les autorisations et visas nécessaires leur permettant de se rendre dans un autre pays. Elle se réserve le droit d'appliquer aux réfugiés, dont l'expulsion motivée par des raisons de sécurité nationale ou d'ordre public se trouvera suspendue, telles autres mesures d'ordre interne qu'elle jugera nécessaires."<sup>f</sup>

This draft struck a balance between the two approaches to the problem; it restricted expulsion and refoulement to those cases where measures were dictated by reasons of national security and public order, and provided that - even if such reasons existed - an expulsion order should not be executed unless the refugee concerned was lawfully admitted to another country.

On the first reading of this article, it became, however, apparent that certain governments were not prepared to restrict their freedom of action in this way.

Upon a statement by the Polish delegate, Mr. Kulski, to the effect that his Government could not bind itself to refrain from reconducting refugees who were unlawfully staying in the territory; the President of the Conference, Mr. de Navailles, proposed that one should

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<sup>d</sup> C.709.1932.

<sup>e</sup> League of Nations, Inter-Governmental Advisory Commission for Refugees and Nansen International Office for Refugees: Exposé des motifs du projet de la Convention établissant le statut international des réfugiés (Doc. L.S.C. - 2 - 1933). Also Doc. C. 113. M.41. 1934, pp. 73-74.

<sup>f</sup> League of Nations, Inter-Governmental Advisory Commission for Refugees and Nansen International Office for Refugees: Projet d'une Convention relative au statut international des réfugiés (Doc. L.S.C. - 1 - 1933). Also Doc. C. 113.M.41. 1934, p. 67.

“maintenir dans le texte les mots expulsion et refoulement, en précisant que le contenu de cet article ne s’applique qu’aux réfugiés autorisés à séjourner sur le territoire”.<sup>9</sup>

A number of delegates were opposed to the provision to the effect that expulsion orders should not be executed unless the refugee was lawfully admitted to another country of refuge, and apparently to save the clause prohibiting forcible return to the country of origin, the President seconded a proposal by the Czechoslovak delegate, Mr. Künzl-Jizersky, to the effect that the last part of the second sentence should be deleted.<sup>h</sup>

On the second reading the Conference adopted a revised draft. In the first paragraph the words “les réfugiés” was substituted by the phrase “les réfugiés ayant été autorisés à y séjourner régulièrement”, and the second paragraph only provided that each Contracting Party “s’engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d’origine.” The provision for the suspension of the measures in case a refugee was not lawfully admitted to another country of refuge, had disappeared. The third paragraph had only undergone certain editorial changes.<sup>i</sup>

In the final text the provisions relating to expulsion and refoulement were included in Article 3, which reads:

“Chacune des Parties Contractantes s’engage à ne pas éloigner de son territoire par application de mesures de police, telles que l’expulsion ou le refoulement, les réfugiés ayant été autorisés à y séjourner régulièrement, à moins que les dites mesures ne soient dictées par des raisons de sécurité nationale ou d’ordre public.”<sup>j</sup>

Elle s’engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d’origine.

Elle se réserve le droit d’appliquer telles mesures d’ordre interne qu’elle jugera opportunes aux réfugiés qui, frappés d’expulsion pour des raisons de sécurité nationale ou d’ordre public, seront dans l’impossibilité de quitter son territoire parce qu’ils n’auront pas reçu, sur leur requête ou grâce à l’intervention d’institutions s’occupant d’eux, les autorisations et visas nécessaires leur permettant de se rendre dans un autre pays.”

The third paragraph takes note of the factual situation, that it may prove impossible for a State to rid itself of an undesirable refugee, but it is clearly not imposing any obligation on the Contracting States not to effectuate expulsion orders in case the refugee concerned is not lawfully admitted to another country.

The Convention concerning the Status of Refugees coming from Germany, signed at Geneva on 10 February 1938, provides in Article 5:

“1. In every case in which a refugee is required to leave the territory of one of the High Contracting Parties to which the present Convention applies, he shall be granted a suitable period to make the necessary arrangements.

“2. Without prejudice to the measures which may be taken within any territory, refugees who have been authorized to reside therein may not be subjected by the authorities to measures of expulsion or reconduction unless such measures are dictated by reasons of national security or public order.”

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<sup>9</sup> Procès-verbaux de la Conférence Intergouvernementale pour les Réfugiés, League of Nations Doc. C. I 13.M.41. 1934, p. 23.

<sup>h</sup> League of Nations Doc. C. I 13.M.41. 1934, pp. 23-24.

<sup>i</sup> League of Nations Doc. C. 113.M.41. 1934, pp. 47-48 and 82 (also Doc. L.S.C. 14. 1933).

<sup>j</sup> The Secretariat of the League of Nations translated this paragraph in the following way: “Each of the Contracting Parties undertakes not to remove or keep from its territory by application of *police* measures, such as expulsion or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order”. (League of Nations Treaty Series, Vol. 159, p. 205.)

Paragraph 3 of the same Article lays down the rule of non-refoulement to German territory (discussed in connection with Article 33 of the 1951 Convention).

In the Secretariat draft<sup>k</sup> which was presented to the Ad Hoc Committee, Article 24 (1) repeats word for word Article 3 (1) of the 1933 Convention. The draft proposed also a paragraph 4, reading as follows:

“A refugee (or stateless person) authorized to reside regularly in the territory of any of the High Contracting Parties may not be expelled save in pursuance of the decision of a judicial authority.”<sup>l</sup>

The Ad Hoc Committee decided, however, not to base its deliberations on either the Secretariat draft or on a French proposal,<sup>m</sup> but on a draft submitted by the Agudas Israel World Organisation.<sup>n</sup> The relevant provisions of this draft read as follows:

“2. A refugee authorized to reside regularly in the territory of any of the High Contracting Parties may not be expelled save in pursuance of the decision of a judicial authority. (Alternative: on grounds of national security.)

“3. A refugee whose expulsion has been ordered shall be entitled to submit evidence to clear himself, and to be represented before the competent authority.”

A number of amendments were considered and several drafting changes made by both the Committee and the Conference of Plenipotentiaries.

There are a number of treaties and multipartite Conventions which limit the right of Contracting States to expel or otherwise remove certain categories of persons. Some of those Conventions are of importance for refugees.

The Convention concerning Migration for Employment, adopted by the General Conference of the International Labour Organisation at its Twenty-fifth Session, 1939, and revised at the Thirty-second Session on 8 June 1949, provides in Article 8:

“1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorized to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.

“2. When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants.”

The benefits of this Convention are not restricted to nationals of the Contracting States, and its provisions may therefore also prove beneficial for refugees.

Article 6 of the European Convention on Social and Medical Assistance sets forth:

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<sup>k</sup> The *travaux préparatoires* for Article 32 comprise the following UN Docs: E/AC.32/2, pp. 4547 (Art. 24); E/AC.32/L.3 (Art. 19); E/AC.32/L.15; E/C.2/242; E/AC.32/SR.20, pp. 2-3, 6-23; E/AC.32/L.22; E/AC.32/L.23; E/AC.32/L.25; E/AC.32/SR.22, pp. 22-24; E/1618 (E/AC.32/5) pp. 27 and 60 (Art. 27); E/1850 (E/AC.32/8) p. 25 (Art. 27); E/AC.32/SR.25, pp. 10-11; E/AC.32/SR.40, pp. 10-30; E/AC.32/41, p. 24; A/CONF.2/1, p. 16 (Art. 27); A/CONF.2/44; A/CONF.2/57; A/CONF.2/60; A/CONF.2/63; A/CONF.2/SR.14, pp. 18-25; A/CONF.2/68; A/CONF.2/SR.15, pp. 4-17; A/CONF.2/102, A/CONF.2/SR.35, p. 20 (Art. 32).

<sup>l</sup> UN Doc. E/AC.32/2, p. 45.

<sup>m</sup> E/AC.32/L.3.

<sup>n</sup> E/C.2/242.



- (a) A Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance.
- “(b) Nothing in this Convention shall prejudice the right to deport on any ground other than the sole ground mentioned in the previous paragraph. 11

The principle laid down in Article 6 is modified by Article 7, which reads as follows:

- “(a) The provisions of Article 6 (a) notwithstanding, a Contracting Party may repatriate a national of another Contracting Party resident in its territory on the sole ground mentioned in Article 6 (a) if the following conditions are fulfilled:
- (i) the person concerned has not been continuously resident in the territory of that Contracting Party for at least five years if he entered it before attaining the age of 55 years, or for at least ten years if he entered it after attaining that age;
  - (ii) he is in a fit state of health to be transported; and
  - (iii) has no close ties in the territory in which he is resident.
- “(b) The Contracting States agree not to have recourse to repatriation except in the greatest moderation and then only where there is no objection on humanitarian grounds.
- “(c) In the same spirit, the Contracting States agree that, if they repatriate an assisted person, facilities should be offered to the spouse and children, if any, to accompany the person concerned.”

Articles 8, 9 and 10 contain procedural provisions.

According to Article 3 (1) of the Protocol (of the same date) to this Assistance Convention, “the provisions of Section 11 [Articles 6 through 10] of the Assistance Convention shall not apply to refugees”.<sup>o</sup>

This means that the Assistance Convention is not intended to abridge the conditions of expulsion laid down in Articles 32 and 33 of the Refugee Convention.

Paragraph 2 of the same Article sets forth:

“In the case of a person who has ceased to qualify for the benefits of the Geneva Convention in accordance with the provisions of paragraph (c) of Article I thereof, the period for repatriation laid down in Article 7 (a) (1) of the Assistance Convention shall begin from the date when he has thus ceased to qualify.”

This rule may not seem very favourable to former refugees, but is a clear indication as to the drafters’ view on the ineffectiveness of the nationality of refugees.<sup>p</sup>

The Convention on the Status of Stateless Persons, signed at New York on 28 September 1954, contains in Article 31 provisions entirely similar to those found in Article 32 of the Refugee Convention.

The European Convention on Establishment, signed in Paris on 13 December 1955, provides in Article 3:

- “1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against ordre public or morality.
- “2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the

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<sup>o</sup> Article 2 of the Protocol provides that the provisions of Section I of the Assistance Convention shall apply to refugees. The term “refugee” is defined in Article 1 of the Protocol as having “the meaning ascribed to it in Article 1 of the Geneva Convention”, with due respect to the provisions of Article 1 (B). The “Geneva Convention” means the Refugee Convention of 28 July 1951.

<sup>p</sup> PCE infra

territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

“3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this Article are of a particularly serious nature.” Section I of the Protocol to the Establishment Convention lays down:

- “(a) Each Contracting Party shall have the right to judge by national criteria:
  - “(3) the circumstances which constitute a threat to national security or an offence against ordre public or morality.
- “(b) Each Contracting State shall determine whether the reasons for expulsion are of a ‘particularly serious nature’. In this connection account shall be taken of the behaviour of the individual concerned during his whole period of residence.
- “(c) A Contracting Party may only restrict the rights of nationals of other Parties for the reasons set forth in this Convention and to the extent compatible with the obligations assumed by the Parties.”

Section II of the Protocol sets forth:

- “(a) Regulations governing the admission, residence and movement of aliens and also their right to engage in gainful occupations shall be unaffected by this Convention in so far as they are not inconsistent with it.
- “(b) Nationals of a Contracting Party shall be considered as lawfully residing in the territory of another Party if they have conformed to the said regulations.”

Section III provides:

- “(a) The concept of ‘ordre public’ is to be understood in the wide sense generally accepted in continental countries. A Contracting party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits.
- “(b) The Contracting Parties undertake, in the exercise of their established rights, to pay due regard to family ties.
- “(c) The right of expulsion may be exercised only in individual cases.

“The Contracting Parties shall, in exercising their right of expulsion, act with consideration, having regard to the particular relations which exist between the Members of the Council of Europe. They shall in particular take due account of family ties and the period of residence in their territory of the person concerned.”

The Establishment Convention applies only to nationals of the Contracting States, not to refugees. Nevertheless its provisions are of interest, because they highlight questions relating to expulsion, and may help to throw light on similar provisions in the Refugee Convention and other instruments concerning refugees.

The Treaty establishing the European Economic Community, signed at Rome on 25 March 1957, contains certain interesting provisions which in fact restrict the right of Member States to expel certain aliens.

Article 48 of the Treaty provides:

- “1. La libre circulation des travailleurs est assurée à l’intérieur de la Communauté au plus tard à l’expiration de la période de transition.

“2. Elle implique l’abolition de toute discrimination, fondée sur la nationalité, entre les travailleurs des Etats Membres, en ce qui concerne l’emploi, la rémunération et les autres conditions de travail.

“3. Elle comporte le droit, sous réserve des limitations justifiées par des raisons d’ordre public, de sécurité publique et de santé publique:

- c) de séjourner dans un des Etats membres afin d’y exercer un emploi conformément aux dispositions législatives, réglementaires et administratives régissant l’emploi des travailleurs nationaux,
- d) de demeurer, dans des conditions qui feront l’objet de règlements d’application établis par la Commission, sur le territoire d’un Etat membre, après y avoir occupé un emploi.

“4. Les dispositions du présent article ne sont pas applicables aux emplois dans l’administration publique.”

It will be seen that the object of the Article is the free movement of workers. According to Article 49, the Council of the European Economic Community shall decide “par voie de directives ou de règlements, les mesures nécessaires en vue de réaliser progressivement la libre circulation des travailleurs, telle qu’elle est définie à l’article précédent”.

The term “travailleurs des Etats membres” is ambiguous; it may or it may not include persons working in the territories of Member States without being a national of either of them. To what extent refugees will benefit under the terms of Article 48 depends, however, above all on the directives or regulations issued by the Council by virtue of Article 49.

(2) Article 3 (1) of the 1933 Convention obligated the States Parties to it not to apply “de mesures de police, telles que l’expulsion ou le refoulement.” Article 32 of the 1951 Convention only provides that the Contracting States “shall not expel”. Moreover, Article 33 makes it clear that the concept of “refoulement” and the difference between “expulsion” and “refoulement” were not alien to the drafters of the latter Convention.

Nevertheless, the difference in this respect between Article 3 (1) of the 1933 Convention and Article 32 (1) of the 1951 Convention is more apparent than real.

Firstly, it must be remembered that it was the intention of the drafters of the 1933 Convention that the Article in question should apply to any refugee, not only those lawfully staying in the territory. The latter restriction was in fact added by the Conference.<sup>9</sup>

Secondly it is not without significance that in France (and possibly some other countries) the distinction between expulsion and refoulement was not at all clear in 1933,<sup>1</sup> and that the concept of refoulement and expulsion has been profoundly changed by post-war legislation.

The Law Decree of 2 May 1938 on Aliens Police provided in Article 8 (1) that “le ministre de l’intérieur pourra, par mesure de police en prenant un arrêté d’expulsion, enjoindre à tout étranger domicilié en France ou y voyageant de sortir immédiatement du territoire français et le faire conduire à la frontière.” By virtue of Article 8 (2), the Prefect in a frontier Département has the same right, but he must report the case immediately to the Minister of the Interior.

A new Aliens Ordinance which was passed on 2 November 1945 changed the picture completely.

According to Article 23 (1) of this Ordinance “l’expulsion peut être prononcée par arrêté du ministre de l’intérieur si la présence de l’étranger sur le territoire français constitue une menace pour l’ordre public ou le crédit public.” Article 23 (2) authorizes prefects in frontier

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<sup>9</sup> Cf. Supra.

<sup>1</sup> Cf. statement by the President, Mr. de Navailles, in League of Nations Doc. C. 113.M. 14. 1934, p. 23.

départements to issue expulsion orders on the same grounds, on the condition that the Minister of the Interior is immediately informed.

The term “refoulement” is not used in the Ordinance of 1945 or the Aliens Regulations of 1946. In modern doctrine, however, “le refoulement est la mesure par laquelle le préfet du lieu où est domicilié ou réside un étranger retire à cet étranger sa carte de séjour en cours de validité et le met en demeure de quitter le territoire”.<sup>s</sup>

According to Delebré, “le refoulement ne peut donc s’appliquer qu’aux résidents temporaires ou aux étrangers à qui la carte de séjour n’a pas encore été accordée”.<sup>t</sup>

This statement needs some qualification, in so far as not all “résidents temporaires” are liable to refoulement, cf. the decision by the Conseil d’Etat in the Molinelli-Wells case cited above.<sup>u</sup>

According to Batiffol, the Aliens Ordinance of 1945 “rétablit une différence de fond entre le refoulement et l’expulsion par une innovation implicite mais remarquable: elle ne prévoit pas, à la différence de la loi antérieure (D. 2 mai 1938, Art. 2) que la carte de séjour puisse être discrétionnairement retirée”, and this reform “modifie sur un point fondamental l’économie traditionnelle du système et rend sa signification à l’expulsion: pendant la durée de validité de sa carte de séjour l’étranger ne peut être refoulé; s’il paraît franchement indésirable il faudra procéder contre lui par la voie de l’expulsion avec le débat contradictoire qu’elle comporte”.<sup>v</sup>

As the law stands today, a refugee “lawfully in the territory” may only be removed from France by way of expulsion. The measure of refoulement is no longer applicable in respect of this category of aliens.

Surely French law is not decisive for the interpretation of an international Convention. However, the fact remains that “refoulement” is basically a French concept,<sup>w</sup> and it was necessary to mention refoulement in Article 3 (1) of the 1933 Convention, because at that time all aliens in France could be subjected to this measure. In 1951 there was no similar necessity.<sup>x</sup>

It is therefore submitted that the omission of the word “refoulement” in Article 32 does not in any way restrict the scope of that Article, which clearly must be understood in the sense that “expulsion” is the only way by which a refugee “lawfully in the territory” may be removed from the territory of a Contracting State. In other words, if a refugee is “lawfully in the territory” he is entitled to the benefits of Article 32. He may only be removed for reasons of national security or public order, and subject to the procedural provisions of Article 32 (2) and (3).

This does not mean, however, that the measure by which a refugee is removed from the territory necessarily has to be called “expulsion” or its equivalent (“deportation”, “Ausweisung”, etc.). It is the substance, not the name that matters.<sup>y</sup>

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<sup>s</sup> Delebré p. 96

<sup>t</sup> Delebré p. 96

<sup>u</sup> See supra p.

<sup>v</sup> Batiffol pp. 189-190.

<sup>w</sup> Cf. UN Doc. E/AC.32/SR.21 pp. 4-6; A/CONF.2/SR.35, p. 21.

<sup>x</sup> The remark of Mr. Girard (Secretariat) to the effect that “the reference to non-admittance at the frontier (refoulement) ... applied only to refugees who had already been authorized to reside in the territory in question” (E/AC.32/SR.21, p. 4) is hardly to the point, because it places too much emphasis on the “non-admittance” aspect of refoulement and does not take into consideration the change which the concept has undergone in French law.

<sup>y</sup> As we have seen supra p. a refugee “lawfully staying in the territory” may not be refused a renewal of his residence permit. On the other hand, French law provides that renewal of a “carte de résident ordinaire” may be refused (Article 8 (6) of the Aliens Regulations 1946), in which case the alien concerned will be liable to the simple measure of refoulement.

The obligation not to expel refugees lawfully in their territory except on the grounds and in the manner prescribed in Article 32 is incumbent on the Contracting States, irrespective of the country to which they wish to expel the refugee concerned. Article 32 is not restricted to those cases which are not falling within the scope of Article 33.

In *Psunkowicz v. Stadt München* the German Federal Administrative Court has expressed the same meaning a little differently: "Die sich rechtmässig im Staatsgebiet aufhaltenden Flüchtlinge können nur aus Gründen der Staatssicherheit oder der öffentlichen Ordnung ausgewiesen werden (Art. 32). Bei den Flüchtlinge, die sich unrechtmässig aufhalten, fällt diese Einschränkung fort. Für beide Gruppen von Flüchtlingen gilt Art. 33 der Konvention."<sup>z</sup>

If a Contracting State desires to send a refugee to a country of persecution, and that refugee is "lawfully in the territory" of the Contracting State, it may only do so in accordance with the provisions of Article 32.

To be sure, if any of the provisions of Article 33 (2) may be applied to an individual refugee, grounds of national security or public order may be said to exist, and Article 32 (1) does not, therefore, constitute any additional safeguard for the refugee concerned. On the other hand, the procedural provisions in Article 32 (2) and (3) do constitute such safeguards.

Only refugees who are not or no longer "lawfully in the territory" of a Contracting State, may be subjected to "return" or "refoulement", to a country of persecution under the terms of Article 33, or to some other country by virtue of a Refoulement Agreement or on any other basis.

According to Oppenheim, "expulsion is ... an administrative measure consisting in an order of the Government directing a foreigner to leave the country".<sup>aa</sup>

The same general idea was expressed in the travaux préparatoires for the Refugee Convention of 1933:

"L'expulsion d'un étranger comprend l'ordre de quitter le territoire."<sup>ab</sup>

There can be no real doubt that in Article 32 the term "expel" includes the act of issuing an expulsion order. The refugees who may not be expelled by virtue of Article 32 are consequently not only safe from being removed from the territory of the State concerned, but may not be the subject of expulsion orders with all the inconveniences that follow.<sup>ac</sup>

(3) For the meaning of this expression, see p. above.

(4) Whereas Article 3 (1) of the 1933 Convention did not allow expulsion "à moins que les dites mesures ne soient dictées par des raisons de sécurité nationale ou d'ordre public", Article 32 (1) of the 1951 Convention only says that refugees shall not be expelled "save on grounds of national security or public order. "Dictée par" - dictated by - is certainly much stronger language than "save on grounds of".

However, there was hardly any intention behind the change of wording. And in view of the meaning of the terms "national security" and "public order", it seems possible to submit that the change of wording has not caused any change of meaning.

If the concepts of national security and public order are to be understood in the sense that they imply a public necessity to rid oneself of the objectionable person, it is clear that it does

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Being a refugee lawfully staying in the territory, he will perhaps not be able to claim the benefits of Articles 23 through 6 of the Aliens Ordinance 1945, but he may insist on observance of the provisions of Article 32 of the Convention.

<sup>z</sup> Entscheidungen des Bundesverwaltungsgerichts, vol. 9, p. 83, at p. 84.

<sup>aa</sup> Oppenheim p. 694.

<sup>ab</sup> League of Nations, Doc. C. 113.M.41. 1934, p. 73.

<sup>ac</sup> Cf infra p.

not make any difference whether one uses the words “dictated by” or simply says “on grounds of.” There is authority for this view.

In the Hodzic case as well as in subsequent cases the German Bundesverwaltungsgericht has held that “die Ausweisung muss das geeignete und unter dem Gesichtspunkt des Verhältnismässigkeit gerechtfertigte Mittel zur Aufrechterhaltung oder Wiederherstellung der öffentlichen Sicherheit und Ordnung ... sein”.<sup>ad</sup>

By stating that the expulsion must be the appropriate means for the maintenance or re-establishment of national security or public order, the Court actually says that expulsion is not justified unless it will have a salutary effect with regard to those public goods. It is not something to which one shall resort lightly, but rather that one must consider whether the measure will serve its end - in order words, that it is necessary.

The requirement for establishing the necessity of the measure is further underscored by the Court’s insistence that the expulsion must be just, and that one must weigh the public utility of the measure against its ill effect on the refugee.

It is clear that by establishing this standard, the honourable Court has bridged the gap between Article 3 (1) of the 1933 Convention and Article 32 (1) of the 1951 Convention, if such a gap ever existed.

If the measure of expulsion is justified only if it will be conducive to the public good, more particularly if it is considered necessary for the maintenance of national security or public order, one might be tempted to deduce that one should not resort to this measure unless the expulsion order may be carried out - that is to say - not unless another State is obliged or willing to admit the expellee to its territory.

However, in view of the drafting history of the provision under consideration, it seems clear that such a meaning may not be read into it.

The 1933 Conference expressly rejected the idea that the Contracting States should bind themselves “à suspendre les mesures (telles que l’expulsion ou le refoulement) dont il s’agit ... que les réfugiés visés par celles-ci n’auront pas reçu ... les autorisations et visas nécessaires leur permettant de se rendre dans un autre pays”.<sup>ae</sup> It was not even suggested that the Contracting States should completely refrain from issuing the expulsion orders in such cases.

It is therefore clear that the authorities are free to decide that the expulsion of a refugee is justified because of considerations of national security or public order, that is to say that his removal would have a salutary effect on those public goods, without having to consider whether it is possible to send him out of the country, either to another country of refuge, or to his country of origin (by virtue of Article 33 (2)).

It is only after the expulsion has been decided that it is necessary to deal with the question of where to send the refugee concerned, or what to do with him if there is no country to which he may be sent.

It is quite another matter that in many countries prudent authorities will only proceed to the issuing of an expulsion order if there is a reasonable certainty to the effect that they may actually rid themselves of the person whose continued presence they consider undesirable. As far as the Refugee Convention is concerned, this is a practical matter, not a matter of law.

(5) Article 32 (1) only prohibits expulsion of lawfully staying refugees “save on grounds of national security or public order”.

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<sup>ad</sup> Hodzic v. Land Rheinland-Pfalz, in Entscheidungen des Bundesverwaltungsgerichts, vol. 3, p. 355 (at p. 358). Also Goldberger v. Stadt München (second case) (B Verw G I C 169.55).

<sup>ae</sup> Supra p.

The term “national security” is used in a number of international agreements, viz. the 1933 and 1938 Conventions, and the European Convention on Establishment.

The term and its equivalents (“sécurité nationale”, “Staatssicherheit”, “rikets sikkerhet” etc.) are also used in municipal laws and touched upon in decisions by international as well as national tribunals.

In spite of the widespread use of the term, there is little indication to be found as to its exact meaning. The judgement of the French Conseil d’Etat in the Salom case is rather typical in so far as it declares that when a measure of removal of an alien “est provoquée par des motifs touchant a l'ordre public ou à la sécurité nationale, dont le ministre de l'intérieur et les préfets des départements frontières restent seule juges”.<sup>af</sup>

But if it is difficult to establish the exact meaning of the term, and even whether it has any exact meaning at all within any given legal reference system, the general meaning conveyed by the expression “national security” is rather clear.

Anything that threatens a country’s sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations may be construed as a threat to the national security”.

If one wants to bring the matter closer down to solid ground, the enumeration of crimes in Chapters 8 and 9 of the Norwegian Criminal Code of 22 May 1902 may be of some help.<sup>ag</sup>

Chapter 8, on crimes against the independence and security of the State, contains inter alia provisions relating to the following acts:

- (a) Illegal attempts at (i) bringing the country or any part of it under foreign domination, (ii) incorporating the country or any part of it in a foreign State, or (iii) the secession of any part of the realm (Section 83);
- (b) Illegal attempts at involving the country in war or hostilities (Section 84);
- (c) Violation of regulations which are lawfully issued to safeguard the neutrality of the country in a war between foreign powers (Section 85);
- (d) Illegal publicizing of anything that should be kept secret in order to safeguard the security of the country against another State (Section 90);
- (e) Illegal taking possession of any such secret, i.e. espionage (Section 91);
- (f) Public insults of the flag or coats of arms of a foreign State, or of a foreign Head of State (Sections 95 and 96);
- (g) Wilful public distribution or transmittal to a foreign power of false rumours or untrue information, if it may endanger the internal or external security of the State or its relationships to foreign powers (Section 97b).

Chapter 9 on crimes against the Constitution and the Head of State comprises among others the following offences:

- (h) Attempts at changing the Constitution by illegal means (Section 98);

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<sup>af</sup> Recueil Sirey, 1941, Part 111, p. 6 - [(1941) 3 S.61 - Whether the Conseil d'Etat considers itself entitled to examine the facts of such cases at all seems a bit doubtful. An affirmative answer might be implied in the decision in the *Persager* case - (1950) 3 S.72 - where the Court reflected that "le requérant n'établit pas que les faits sur lesquels reposent les motifs de la décision attaqué soient matériellement inexacts". On the other hand, the Conseil d'Etat stated most emphatically in the *Eckert* case - (1953) 3 S.51 - that in finding whether "la présence du sieur Eckert sur le territoire français constituait une menace pour l'ordre public [which term in this case apparently also includes national security], le ministre de l'Intérieur s'est livré à une appréciation de fait qui n'est pas susceptible d'être discutée devant le Conseil d'Etat". Cf. the note by Gilbert Tixier, loc. cit.

<sup>ag</sup> L.N.O.J. 1931, pp. 1880-1881.

- (i) Attempts at preventing the King, the Regent, the Cabinet, the Parliament or any of its Divisions, the Supreme Court or the Constitutional Court<sup>ah</sup> by force or other illegal means from the free and undisturbed carrying out of their authority (Section 99);
- (j) Use of armed force or utilisation of fear of intervention by a foreign power to prevent public authorities from carrying out their business, or to commit serious offences against civil servants, the press, associations or institutions, or otherwise to place important public interests in jeopardy (Section 99a);
- (k) Regicide (Section 100);
- (l) Insults, assaults, etc. against the Head of State and members of his family (Sections 101 through 103);
- (m) Organizing of, participation in or support of private organizations of a military nature or which have the purpose to disturb the public order or gain influence in public matters by sabotage, use of force or other illegal means (Section 104a).

Certainly this enumeration - which only contains acts punishable in peacetime - cannot be considered as comprehensive, but it may nevertheless indicate a number of situations where the concept of "national security" may justly be invoked.

In this connection it may be well to remember Bourquin's words "La distinction entre les intérêts essentiels (that is to say those implied in the concept of 'national security') et les autres est plus ou moins arbitraire et nécessairement mouvante. Elle varie suivant les époques et les milieux; elle dépend de la forme du gouvernement et des idées régnantes; elle peut se modifier selon les circonstances et prendre, par exemple en temps de guerre ou de crise aiguë, une consistance toute différente de celle qu'elle possède en temps de paix. Mais, quelles que soient les fluctuations de son contenu, cette distinction est faite partout et repose d'ailleurs sur un fondement logique. Ainsi, la trahison, crimes contre la sûreté de l'État, parce qu'on peut affirmer qu'ils mettent vraiment l'État en péril."<sup>ai</sup>

It must also be stressed that an alien may offend against national security even if he cannot be considered guilty of any crime. If for example a refugee persists in producing or disseminating propaganda against a foreign government, the case may be such as to justify expulsion under the terms of Article 32.<sup>aj</sup>

This was the situation in the Trotsky case in Norway.<sup>ak</sup>

In *Nikic v. Sicherheitsdirektion für das Bundesland Kärnten* the Austrian Verfassungsgerichtshof (Constitutional High Court) found that the fact that the plaintiff was active as an elected officer of the Croat National Committee (Hrvatski Narodni Odbor - HNO) could mean a threat to the national security of Austria, particularly in view of Article 9 of the Austrian "Staatsvertrag" of 1955. The court consequently concluded that the expulsion order did not violate Article 32 of the Refugee Convention.<sup>al</sup>

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<sup>ah</sup> "Riksstretu" which is composed of members of the Supreme Court and the "Lagtiugot" (the Smaller House of the Parliament) and has jurisdiction in cases of impeachment.

<sup>ai</sup> 16 RCH pp. 127-128.

<sup>aj</sup> Cf. in this connexion the decision of the Upper Silesian Arbitral Tribunal in *Hochbaum v. Regierungspräsident in Oppeln*. It was held that alleged membership in the Federation of Friends of the Soviet Union "was sufficient reason to expel the plaintiff on ground of national security". (5 Schiedsgericht fuer Oberschlesien, Amtliche Sammlung, 140, particularly pp. 162-164). On the other hand the same Court held in *Diedrichs v. Staroste w Pszczynie* that the alleged activities of the plaintiff (agitation among Polish workers for a German minority school and distribution of proclamations from the Deutscher Volksbund), were "weder inhaltlich bestimmt genug, noch in ausreichender Weise aufgeklärt, um dem Schiedsgericht die Feststellung zu ermöglichen, dass die Ausweisung aus Gruenden der Sicherheit des Staates erfolgt ist". (2 Schiedsgericht fuer Oberschlesien, Amtliche Sammlung, 84, at p. 90.)

<sup>ak</sup>

<sup>al</sup> Austrian Verfassungsgerichtshof, judgement 22 June 1922, ref. B251/62.



On the other hand, there was general agreement at the Conference of Plenipotentiaries to the effect that a refugee should not be considered as a danger to national security only because he was wanted by another State, notably the one from which he has fled. As a general rule it is the acts and behaviour of the refugee in his country of refuge - not the public image of his personality - which may justify expulsion under the provisions of Article 32.

In general terms, a person may be said to offend against "national security" if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned, or in activities which are directed against a foreign government, which as a result threatens the former government with intervention of a serious nature. In short, the concept of "national security" may be invoked in the case of acts of a rather serious nature threatening directly or indirectly the government, the integrity, the independence or the external peace of the country.<sup>am</sup>

It would seem that the decision of the Upper Silesian Arbitral Tribunal in *Hochbaum v. Regierungspraesident in Oppeln* does not meet this test, unless it is to be understood in the sense that the proven facts justified the authorities to purport that the plaintiff was seriously involved in subversive activities.<sup>an</sup>

(6) The term "public order" as used in Article 32 of the Refugee Convention is an international concept - a technical term with its own meaning which does not necessarily coincide with the concept of public order (*ordre public*, *öffentliche Ordnung*) in any particular municipal system of law.

As we have seen, the expression public order or *ordre public* is in itself ambiguous, and is used for a number of different purposes. As pointed out by the Secretary-General of the United Nations, the term is, however, capable of being given a technical and fairly well-defined meaning for special purposes.<sup>ao</sup>

The drafters of the 1951 Convention were on the whole keenly aware of the vagueness of the term public order in general. However, they expressed clearly their desire to delimitate the meaning of the term as used in Article 32. Mr. Rochefort's emphatic statement in the Conference of Plenipotentiaries, to the effect that it would not be worth while to take part in the work of the Conference if it were not clear that "public order" could not justify expulsion of indigent refugees, is clear proof that one desired to give the term a technical meaning, without regard to the interpretation given the term in the municipal law of various countries.<sup>ap</sup>

Mr. Cuvelier's statement "that the discussion should be recorded in the summary record of the meeting so as to make clear what the Committee meant by the concept of public order", is another expression of the same tendency.<sup>aq</sup>

As has been pointed out above, the meaning of "public order" in Article 32 is different from the meaning of "*ordre public*" in Article 23 of the French Aliens Act of 2 November 1945.<sup>ar</sup> The term, as used in the French law, comprises clearly national security, whereas "national security" is not covered by the term "public order" as used in Article 32 of the Convention, even if there may be a certain overlapping between the two terms.

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<sup>am</sup> Cf. Bourquin. "L'infraction contre la sûreté de l'Etat implique un caractère de gravité qui n'appartient pas à toutes les infractions politiques. Pour que celles-ci soient érigées à la hauteur d'infractions contre la sûreté d'Etat, il faut qu'elles portent atteinte à une institution ou à un intérêt politique considéré comme *essentiel*". (16 *RCH* p. 127.)

<sup>an</sup> 5 Schiedsgericht fuer Oberschlesien, *Amtliche Sammlung* 140; cf. *supra* note 324 d. Cf. Also Lauterpacht's note in *Annual Digest, 1933-1934*, p. 327.

<sup>ao</sup> Cf. The U.N. Secretary-General's memorandum, *supra* p.

<sup>ap</sup> IPCf. *supra* p.

<sup>aq</sup> Cf. *supra* p.

<sup>ar</sup> *Supra* p.

Furthermore, it is not at all certain that the meaning of "public order" in Article 32 corresponds with the meaning given the term by the Venezuelan delegate.<sup>as</sup>

On the other hand it is important to keep in mind that the public order to be safeguarded is the public order of each of the Contracting States.

One finds an interesting reminder of this fact in the Report of the Second Session of the Ad Hoc Committee: "The Committee felt that this provision would permit the deportation of aliens who had been convicted of certain serious crimes where in that country such crimes are considered violations of 'public order'."<sup>at</sup>

This does not, however, necessarily amount to giving each State an entirely free hand to decide what it considers a violation of "public order" in the sense in which it is used in Article 32. The statement may rather serve as a warning to the effect that the committal of and conviction for even "certain serious crimes" does not automatically give the State a right to expel a refugee by virtue of Article 32.

The statement of the Austrian delegate, Mr. Fritzer, to the effect that "the term "public order" had a quite specific connotation in Austria, and would present no difficulties to the Austrian Federal Government"<sup>au</sup> is peculiarly out of tune with the general effect of the work of the Conference. There can be no doubt that just as the concept of "public order" as adopted by the drafters differs from the French concept of "ordre public" in the sense of the French Aliens Act of 1945, it may very well differ from the Austrian concept of "öffentliche Ordnung".<sup>av</sup>

The international character of the term "public order" as used in Article 32 has been clearly expressed by the German Bundesverwaltungsgericht in *Hodzic v. Land Rheinland-Pfalz*: "Bei der Auslegung dieser Begriffe (national security and public order) ist daher auf die Genfer Konvention zurückzugreifen. . . . Darauf, ob diese Begriffe den entsprechenden Begriffen im Polizeirecht des Landes Rheinland-Pfalz gleichzusetzen sind, kommt es also nicht an".<sup>aw</sup>

There can be no doubt, therefore, that the term "public order" as used in Article 32 of the Refugee Convention is an international, technical term, the meaning of which has to be delimited by international criteria.

The concept of "public order" in Article 32 of the Refugee Convention differs consequently basically from the concept of "ordre public" used in the European Convention on Establishment of 13 December 1955, the Protocol to which clearly sets out that "Each Contracting State shall have the right to judge by national criteria ... the circumstances which constitute ... an offence against ordre public".<sup>ax</sup>

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<sup>as</sup> Cf. supra p.

<sup>at</sup> Cf. supra p.

<sup>au</sup> UN Doc. A/CONF.2/SR.14, p. 22.

<sup>av</sup> Cf. in this connection a statement by Mr. Christian Broda, Austrian Minister of Justice, in the Consultative Assembly of the Council of Europe: "There were often misunderstandings as to the scope of treaties and their place in a given municipal law as a whole. The common obligations assumed by States were usually defined in international agreements themselves but not always in the same way. Under the constitutional system of some States conventional law overrode legislative law. Yet a common legal norm (as for instance the municipally accepted notion of 'domicile') could be regarded as legislative law. It followed that any international convention which derogated from a common (municipal) legal norm would be valid and would prevail over that norm" (Council of Europe News, New Series No. 23, November 1962, p. 14).

<sup>aw</sup> Entscheidungen des Bundesverwaltungsgerichts, vol. 3, p. 355 (358).

<sup>ax</sup> Section I (a) 3 of the Protocol. The definition of "ordre public" contained in Section III (a) of the Protocol clearly does not correspond with the concept of "public order" in the sense of Article 32 of the Refugee Convention, if for no other reason, because the former allows expulsion for reasons of indigency, the latter does not. Cf. supra p.

It being established that “public order” as used in Article 32 of the Refugee Convention is an international technical term, its meaning must be sought in internationally relevant documents and in Court decisions interpreting the term.

The recommendation which the Inter-Governmental Advisory Commission adopted on 9 September 1930 may serve as a starting-point.<sup>ay</sup> By urging that “an order for the expulsion of a refugee should only be issued when national safety and public policy necessitate so serious a step” and stressing that “refugees should not, therefore, be expelled because they have contravened police regulations or have been sentenced; (because) in such cases, the punishment applied to nationals would seem to be sufficient”, the Commission has clearly stated that in its opinion, the committing of a crime and a criminal conviction do not in themselves justify the expulsion of the refugee in question for reasons of “public order” (or “public policy” as they called it). It is implied that there must be a separate finding as to whether the continued presence of the refugee is upsetting the maintenance of public order and tranquillity<sup>az</sup> or “the King’s Peace”.

Among the many replies received from Governments, with regard to the application of the Recommendations of 1930, only those from Finland and Yugoslavia seem to shed light on the meaning of the concept of “public order” as then understood.

The Finnish Government expressed the opinion that expulsion on grounds of national security or public order was justifiable, if the “political or social morality” of refugees should turn out “to be such as to render this essential.” Taking into consideration the basic tenor of the Finnish reply, that “expulsion of refugees ... should in general be avoided”, it is clear that the word “essential” must be understood in a rather restricted sense.<sup>ba</sup>

The Yugoslav Government likewise stressed that expulsion should take place only in “certain exceptional cases” and by spelling out that (apart from illegal entrants) refugees should only be expelled if “they have committed acts constituting a menace to the safety of the State or likely to disturb public order” and restating that this means that “an expulsion order cannot be made against a refugee for a mere infringement of police regulations or for having served a sentence”, it made it quite clear that an infringement of the law did not in itself constitute a violation of public order, “provided that the punishment inflicted on Yugoslav citizens in similar circumstances seem adequate.”<sup>bb</sup> The interpretation offers itself, that only where normal punishment could not save the maintenance of public order or help to restore it would one resort to the measure of expulsion.

The Advisory Committee of Private Organizations reflected - in its Resolution of 15 December 1932 - that by the recent practice of certain States with regard to expulsion of refugees, a measure designed to safeguard security and order has been transformed into a cause of disorder and insecurity, and implied that this practice was a greater hazard to the maintenance of public order than almost anything the individual refugee could do. It would therefore like to see expulsion reserved for “les cas d’extrême gravité”.<sup>bc</sup>

The Inter-Governmental Advisory Commission referred in its subsequent Report to “refugees who ... constitute a danger to security and public order”.<sup>bd</sup> It is clear - particularly in view of its previous Recommendations - that when speaking of “danger”, it did not have in mind the trivial offender.

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<sup>ay</sup> See supra p.

<sup>az</sup> Cf. the expression used in the French Passport Act of the year VI.

<sup>ba</sup> Cf. supra p.

<sup>bb</sup> Cf. supra p.

<sup>bc</sup> See supra p.

<sup>bd</sup> See supra p.

After having stressed the extremely unfortunate effects of the existing practice with regard to expulsion, the drafters of the 1933 Convention went on to treat “des éléments vis-à-vis desquels les autorités ne sauraient rester désarmées”.<sup>be</sup> Again, the trivial offender was hardly in the mind of the authors.

This was in fact the material on which Article 3 (1) of the 1933 Convention was based. There can be no doubt that the concept of public order in that Convention was not intended to justify expulsion of any refugee who became a burden on the public purse or who had been convicted to at least three months imprisonment. As a matter of fact the provisions of Article 3 were conceived to bring to an end the prevailing practice of almost automatic expulsion of refugees in such situations.<sup>bf</sup>

Taking into consideration that refugees as a rule had nowhere to go, once they were expelled, it was obviously the intention of the drafters that expulsion should only be resorted to in those extreme cases where the continued presence of the refugee would to some extent upset the very equilibrium of society.

There is nothing to indicate that the drafters of the 1951 Convention intended to deviate from the concept of public order as implied in the 1933 Convention. As a matter of fact, their deliberations only amounted to stressing certain aspects of the concept, in order to make sure that expulsion should not be resorted to too lightly in the case of refugees. Therefore it seems justifiable to submit that the sense in which the term was apparently understood by the drafters of the earlier Convention is still valid.

In this connection it is very interesting to note at the same time as the 1951 Convention was discussed, the Belgian authorities discussed a new Aliens Police Act, which was passed on 28 March 1952 and clearly distinguishes between persons whose presence is “nuisible pour l'ordre public” and persons who are “objet de poursuites on a été condamné”.<sup>bg</sup>

Considering the active part which the Belgian delegate played in the drafting of the Convention, a mention of the provisions of the Belgian law is not totally irrelevant in the present context.

There is one thing that stands out with great clarity of the travaux préparatoires for the 1951 Convention. Public order may not be invoked to justify expulsion of refugees whose only “sin” is that they are indigent.

This was stressed by so many delegates, and not opposed by anyone, so that there can be no doubt on this score.

Different delegates used different words:

Mr. Cuvelier of Belgium stressed that it was “impossible to expel a refugee for economic reasons”.<sup>bh</sup>

Mr. Henkin of the United States referred to the “sick and indigent”,<sup>bi</sup> and stressed that the formula chosen should not allow expulsion of “social cases”.<sup>bj</sup>

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<sup>be</sup> See supra p.

<sup>bf</sup> It will be remembered that between 1849 and 1945 there was no legal restriction on the Administration's right of expelling aliens from France, (cf. supra p.) and it seems that the practice of expulsion in that country had gone completely out of hand. According to Donnedieu de Valres an average of 16,000 persons were expelled every year from France (Revue critique de droit international, vol. 30, 1935, p. 586). Lachase states that “en pratique, conformément à une circulaire ministérielle en date du 17 août 1908, l'administration expulse tous les étrangers condamnés à une peine au moins égale à trois mois de prison sans sursis” (Lachase, p. 66).

<sup>bg</sup> See supra p.

<sup>bh</sup> Supra p.

<sup>bi</sup> Supra p.

<sup>bj</sup> Supra p.

Mr. Juvigny of France excluded the possibility “of expelling refugees because, by reason of their state of health, for instance, they were a burden on the public purse”.<sup>b<sup>k</sup></sup>

In its Report the Ad Hoc Committee stressed that “the phrase ‘public order’ would not . . . permit the deportation of (refugees) on ‘social grounds’ such as indigence or illness”.<sup>b<sup>l</sup></sup>

The Ad Hoc Committee was evidently of the opinion that “grounds of mental and physical disability” should not justify expulsion by virtue of the concept of public order.<sup>b<sup>m</sup></sup> And it apparently agreed with Mr. Shaw, the Australian delegate, who emphatically stated “that expulsion should not be ordered, if, for example, a refugee became an inmate of a charitable institution or a mental asylum, even if this was not regarded as grounds of indigency” in a strict sense.<sup>b<sup>n</sup></sup>

This does not leave much to be said.

The assertion of the British Home Office (in 1958) that “any refugee who ... by his own fault becomes a continual charge on public funds, faces the risk of deportation”<sup>b<sup>o</sup></sup> must clearly be interpreted restrictively. The refugee who is able to work and still continually refuses to do so with the clear intent of living off public funds, may under certain circumstances set such a bad example that it might seem necessary to apply sanctions of some kind or another. But it goes without saying that the situation must be nothing short of extraordinary in order to justify the invoking of public order - as understood in the Refugee Convention - in such a case.

As we have seen, the Inter-Governmental Advisory Commission expressed in 1930 the view, that refugees should not be expelled “because they have contravened police regulations or have been sentenced”,<sup>b<sup>p</sup></sup> and it may be held that this view was in fact underlying the provisions of Article 3 of the 1933 Convention.<sup>b<sup>q</sup></sup>

However, there were dissenting voices already at that time.<sup>b<sup>r</sup></sup>

The picture presented by the travaux préparatoires for the 1951 Convention is much more confused.

The Ad Hoc Committee did not accept Dr. Weis’s suggestion to the effect “that if it had in mind criminal offences, it should say so clearly”.<sup>b<sup>s</sup></sup>

Mr. Herment of Belgium reflected that “if a refugee were convicted of a fairly serious offence, his presence might well be considered undesirable”,<sup>b<sup>t</sup></sup> whereas Mr. Juvigny of France was of the opinion that the Convention should provide no shelter for refugees guilty of “ordinary offences punishable by law”.<sup>b<sup>u</sup></sup> Mr. Henkin of the United States thought that refugees “should be expelled only on the grounds that they had committed crimes, which should be as

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<sup>b<sup>k</sup></sup> Supra p. The Convention therefore prohibits expulsion for reasons of “crédit public”, which otherwise is a reason for expulsion under Article 23 of the French Aliens Act of 2 November 1945

<sup>b<sup>l</sup></sup> Supra p.

<sup>b<sup>m</sup></sup> Statement by the Chairman of the Ad Hoc Committee, see supra p.

<sup>b<sup>n</sup></sup> Supra p.

<sup>b<sup>o</sup></sup> Supra p.

<sup>b<sup>p</sup></sup> See supra p.

<sup>b<sup>q</sup></sup> Cf. supra p. also Hackett's reflections, supra p.

<sup>b<sup>r</sup></sup> Cf. reply from the Czechoslovak Government (1930), supra p. and Lachase, supra p.

<sup>b<sup>s</sup></sup> Supra p.

<sup>b<sup>t</sup></sup> Supra p.

<sup>b<sup>u</sup></sup> Supra p.

explicitly defined as possible.<sup>bv</sup> However, he offered no more explicit terms than “the commission of illegal acts”,<sup>bw</sup> but in spite of the fact that he would restrict the interpretation of this phrase to mean “any serious crime”, his proposal was rejected as too vague, that is to say not beneficial enough for refugees.<sup>bx</sup>

In its Report the Ad Hoc Committee expressed the view that Article 32 “would permit the deportation of aliens who had been convicted of certain serious crimes where in that country such crimes are considered violations of ‘public order’”.<sup>by</sup>

As an example of such crimes the Chairman had previously mentioned offences which had led to convictions under the (Canadian) Opium and Narcotic Drugs Act, because “in view of the public injury which resulted from traffic in drugs, there could be no possible objection to that interpretation”.<sup>bz</sup>

On the other hand, Mr. Braun, the spokesman of Caritas Internationalis, followed in the footsteps of the ancient Advisory Committee of Private Organizations, when he stressed the danger involved if a State could expel a refugee who had been condemned to a term of three months imprisonment.<sup>ca</sup> And just as his predecessors, he met no opposition from the representatives of States.

The lesson to be learnt from the judgements of the German Bundesverwaltungsgericht is - as we have seen - that the habitual criminal may be expelled, provided his offences are so serious (aggravated larceny) or so numerous (18 convictions during 7 years)<sup>cb</sup> as to make its perpetrator a real nuisance. An expulsion order may, however, not be issued more or less automatically after a certain number of convictions. The Court calls for reflection on the part of the Administration: Nur wenn überwiegende Interessen des Staates... vorliegen, soll der Staat ...das Recht haben, gegen einen solchen Ausländer eine Ausweisung zu verfügen”.<sup>cc</sup>

But, if such interests of State are present, the authorities may proceed to expulsion even if there is only one conviction, as in the case where the Court found that the danger to the public order is apparent in the disposition of the refugee.<sup>cd</sup>

The early judgements by the Austrian Verwaltungsgerichtshof are hardly relevant. It seems that the Court has applied Austrian law, particularly the Austrian concept of “öffentliche Ordnung”, without reflecting on the peculiarity of the corresponding term in the Refugee Convention.

The Tersieff case is noteworthy because it reveals that even under Austrian law, an offence which has led to a conviction of no more than three months imprisonment, will as a rule not be classified as a violation of public order.<sup>ce</sup>

The Senica case points towards a more liberal and flexible attitude on the part of the High Court.<sup>cf</sup>

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<sup>bv</sup> Supra p.

<sup>bw</sup> Supra p.

<sup>bx</sup> Supra p.

<sup>by</sup> Supra p.

<sup>bz</sup> Supra p.

<sup>ca</sup>

<sup>cb</sup> Cf. the Hodzic, Goldberger and Bark cases, supra p.

<sup>cc</sup>

<sup>cd</sup> Nagy case, supra p.

<sup>ce</sup> Cf. supra p.

<sup>cf</sup> Cf. supra p.

A survey carried out in 1958 shows that those countries covered, which so far had proceeded to expulsion of refugees by virtue of Article 32, only had done so “bei wirklich schwerem Sachverhalt”; as a rule only if the refugee had been guilty of offences which had led to a conviction to at least two years imprisonment.<sup>cg</sup>

In spite of the many facets of the matter, the conclusion seems to present itself, that not any offence and not any criminal conviction may justify expulsion under the terms of Article 32.

Firstly, it seems possible to rule out offences against police regulations. Even in France it seems, according to Lachaze, that such infractions do not justify expulsion.<sup>ch</sup>

Secondly, it seems that such infringements of the law which are classified as misdemeanours should, as a rule, not be considered as violations of public order. This is particularly true if they have not led to a conviction to no more than three months imprisonment, cf. Lachaze<sup>ci</sup> and the Tersieff case in Austria.<sup>ci</sup>

However, exceptions to this rule are thinkable. The Chairman of the Ad Hoc Committee suggested that “illegal distillation of spirits was in some countries merely a fiscal problem, but in others a problem of public order”.<sup>ck</sup> There are in fact certain misdemeanours which are of such a character that they may be said to upset the normal life of the citizens at large, and may cause considerable trouble for the police authorities, particularly if they are committed repeatedly or even habitually, as for example vagrancy, loitering, and illegal manufacture and distribution of alcoholic beverages, also prostitution, if committed in such a way as to cause public “scandal” or if it is likely to endanger public health.

One seems, however, to be on safe ground, if one submits that a single misdemeanour shall not lead to expulsion by virtue of Article 32, and that only such habitually or repeatedly committed misdemeanours which amount to a real public nuisance may at all be considered as a possible justification for such a serious step.

Traffic in drugs which was especially mentioned in the Ad Hoc Committee, is probably normally classified as a felony, not a misdemeanour, and is in certain countries subject to extreme punishment, in some, as for example Turkey, even the death penalty. In any case narcotics peddling is such a serious offence as to warrant treatment separate from misdemeanours in general.

Thirdly, it depends on the circumstances whether a single felony or even several felonies may justify expulsion under the terms of Article 32. As pointed out by Lachaze, one must consider

- (a) the nature of the offence,
  - (b) the circumstances in which it has been committed,
  - (c) whether it has been perpetrated by a first-time offender or by a habitual criminal (recidivist), and
  - (d) the punishment which has been meted out, and particularly whether it has been suspended or not.
- (a) Certain crimes are of such a nature that they do not constitute any danger to the public at large at all. Crimes which only may be prosecuted at the express request of the victim belong to this category. It seems that in such cases public order will as a rule not be involved. With respect to certain other crimes the public prosecution

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<sup>cg</sup> *Supra p.*

<sup>ch</sup> *Supra p.*

<sup>ci</sup> *Supra p.*

<sup>ck</sup> UN Doc E/AC.32/SR.40, p. 24 - Cf the special mention of laws concerning vagrancy and alcoholic beverages in Article 13 of the Norwegian Aliens Act 1957, *supra p.*

authority may only prosecute if it declares that this is in the public interest. In such a case it will largely depend on the circumstances whether public order may be invoked. Crimes which are subject to unconditional public prosecution may also be of such a nature that as soon as a conviction has been secured, the matter is of no further public interest. On the other hand, certain crimes are particularly dangerous, because they demonstrate contempt for normal human and social values or at least a clear antisocial or reckless attitude on the part of its perpetrator, e.g. poisoning, arson. One may also have to draw a distinction between wilful and negligent acts.

- (b) The circumstances in which a crime has been committed may be of decisive importance.<sup>cl</sup> If a crime has been committed out of pity, for example, (euthanasia), for some deeply personal or emotional reason, or in a moment's weakness, public order will normally be satisfactorily safeguarded if the offender serves the punishment meted out to him by the Courts. The provision, found in certain legal systems (e.g. the English, the Austrian) to the effect that the Court passing sentence may or may not recommend (or order) deportation of a convicted alien is of particular interest. In cases where the Court has not recommended (or ordered) deportation, as for example, in the Austrian Stojanoff case,<sup>cm</sup> it would seem that one may not easily invoke public order; however, it is hardly possible to submit that in such cases the Administration is stopped from ordering expulsion.
- (c) The question whether a felony has been committed by a first-time offender, or by a person who has already a criminal record, is an important one. The judgements of the German Bundesverwaltungsgericht in the Hodzic, Goldberger and Bark<sup>cn</sup> cases more or less turned on this point. Cf. also the reply from the British Home Office to the effect that "any refugee who ... builds up a criminal record ... faces the risk of deportation".<sup>co</sup> It is clear that as a rule the continued presence of the more or less habitual criminal will be more prejudicial to the maintenance of public order than that of a person who has only broken the law once. However, as we have seen, even a habitual criminal may not automatically be labelled as a danger to public order. A special finding to this effect is necessary.
- (d) When we turn to consider the severity of the punishment meted out, it seems that as a rule, we may place convictions of no more than three months imprisonment in the same category as convictions for misdemeanours.<sup>cp</sup> The rule will therefore be the opposite of the one prevailing in France at the time Lachaze wrote his book (1928): Convictions of no more than three months imprisonment will as a rule not justify expulsion by virtue of Article 32. Other cases must be judged on their merits.<sup>cq</sup>

If the punishment has been suspended, that is to say if the offender has been placed on probation, the Court's decision will as a rule imply that the person concerned will not be endangering the maintenance of peace and order if he is left at large, and expulsion will accordingly hardly be justifiable.

As we have seen above, certain countries, as for example Belgium, will not proceed to the expulsion of a refugee unless he has been condemned to at least

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<sup>cl</sup> Cf. in this connection an Instruction issued by the French Direction de la Sûreté générale on 17 August 1908: "La nature du délit (vol, coups, blessures, etc.), ne fait pas suffisamment pour la sécurité publique, seule l'indication précise des conditions dans lesquelles ce délit a été commis peut permettre de s'en rendre compte, surtout lorsqu'il s'agit d'un condamné primaire" (Quoted from Martini p. 58).

<sup>cm</sup> Supra p.

<sup>cn</sup> Cf. supra p.

<sup>co</sup> Supra p.

<sup>cp</sup> Cf. supra p.

<sup>cq</sup> Cf. supra p.



two years imprisonment. Just like the three months term discussed above, the two years minimum is clearly arbitrary. And it goes without saying that even a long-term conviction does not either automatically imply that the continued presence of the convict is prejudicial to public order. As we have seen, the nature of the crime or the circumstances in which it has been committed may be such, that there is no public interest in having him removed from the country once his punishment has been served.

On the whole it seems that the Inter-Governmental Advisory Commission's recipe of 1930 was an excellent one. In most cases the same punishment as applied to nationals "would seem sufficient",<sup>cf</sup> and if so, the maintenance of public order is not at stake.

It is therefore submitted that the concept of public order as used in Article 32 of the Refugee Convention does not automatically justify the expulsion of any refugee who has committed or been convicted for a crime, however serious. A separate finding is required, to the effect that the continued presence of the offender is prejudicial to the maintenance of public order, that is to say the preservation of peace and tranquillity in the society at large.

The lapse of time between the committing of a crime, the conviction, and the time when an order of expulsion is considered, is not entirely irrelevant. If a refugee who has committed an offence has behaved well for a considerable period after the deed, the chances that he will cause trouble again will normally be so reduced, that maintenance of public order will not be promoted by expelling him. It is also hardly reconcilable with the notion of the rule of law to let the threat of expulsion hang like a sword of Damocles over the head of a refugee who once upon a time has offended against the law or the established order.

In view of the fact that the drafters of the 1951 Convention reflected the idea of instituting conviction of a criminal offence as a reason for expulsion, and preferred to stick to the concept of public order,<sup>cs</sup> it seems clear that just as a conviction does not - as we have seen - in itself justify expulsion, a criminal conviction cannot be considered as a condition sine qua non for expulsion by virtue of Article 32.

Persons may instigate riots, or create considerable unrest among parts of the population, even if they are beyond the reach of criminal laws. If the persons in question clearly have acted mala fide, that is to say conscious of the fact that their activity or behaviour has caused or given impetus to the rioting or unrest, or if they do not do what may reasonably be expected of them in order to prevent recurrences or continuation of the unrest, it seems that the authorities may justly invoke considerations of public order to rid themselves of the persons in question.<sup>ct</sup>

In this connection it is interesting to note the statement of the British Home Secretary, Mr. Henry Brooke, in the House of Commons on 28 November 1962:

"If an alien was discovered to be an intelligence agent for a foreign power, expulsion was the appropriate and the sensible course. Court procedure would be inappropriate."

Another type of case was illustrated by the circumstances surrounding the deportation of Rockwell, the fascist who slipped through the immigration net and arrived in Britain. The

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<sup>cf</sup> *Supra p.*

<sup>cs</sup> *Cf. supra p.*

<sup>ct</sup> *Cf. statement by the Belgian delegate, Mr. Herment, supra p.*

Home Secretary had taken the view that Rockwell's presence in Britain was objectionable. If Rockwell had gone before a court of law it would not have been possible to find him guilty of an offence. But it was simply not conducive to the public good that a man of his character and with his declared objectives should stay in Britain.

There were a number of cases for which the court procedure was not adequate or easy.<sup>cu</sup>

In other ways too, a person may compromise the "moral and material order of society", for example by "immoral practices or vicious habits indicating incorrigible moral depravity", as pointed out by Irizarry y Puente, such as pimping, prostitution, illicit traffic, maintenance of brothels, selling of cocaine, and the like.<sup>cv</sup>

On the other hand, it would hardly be in keeping with the ideas underlying the Refugee Convention if one proceeded to expel refugees for the other reasons set out by the same author, particularly illness (infectious or not),<sup>cw</sup> and "harmfulness to religion".

The confessed (or proven) criminal may be expelled on the same footing as the convicted criminal. Even a strong suspicion, corroborated by the facts of the case, may justify expulsion.<sup>cx</sup>

As pointed out by Lachaze, "même si la culpabilité d'un individu ne fait pas de doute, le gouvernement peut reculer devant des poursuites qui seraient de nature à passionner l'opinion publique ou à entraîner des répercussions dans les relations internationales".<sup>cy</sup> It may also happen that all the facts of a case are pointing to a certain individual as the perpetrator of the crime, but that it may seem difficult to secure a Court conviction, perhaps because of some moot point of law, or the fear and consequent reluctance of witnesses to give testimony.

The point that a criminal conviction is not necessary in order to justify an expulsion by virtue of Article 32 may seem to be the basic difference between the concept of public order and the last-mentioned reason for forcible return to a country of persecution in Article 33 (2). This point makes the procedural provisions of Article 32 (2) particularly important.

Expressions like public necessity and danger occur in several of the documents relating to expulsion of refugees.

According to the 1930 Recommendation of the Inter-Governmental Advisory Commission, an expulsion order should only be issued "when national safety and public policy necessitate so serious a step".<sup>cz</sup>

In the Report of its fifth session in 1933 the Commission referred to refugees who "constitute a danger to security and public order".<sup>da</sup>

The drafters of the 1933 Convention spoke of "des éléments vis-à-vis desquels les autorités ne sauraient rester désarmées".<sup>db</sup>

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<sup>cu</sup> *The Times*, 29 November 1962, under the heading: "Home Secretary rejects an aliens tribunal".

<sup>cv</sup> *Supra* p.

<sup>cw</sup> Cf. *supra* p.

<sup>cx</sup> Cf. Article 4 of the Refugee Convention, which guarantees freedom of religion.

<sup>cy</sup> Lachaze P. 67

<sup>cz</sup> *Supra* p. Cf. also the Finnish reply: "...if necessary ... should their political or social morality prove to be such as to render this essential" (*supra* p. ). Also the Yugoslav remarks with regard to the adequacy of a normal punishment (*supra* p.).

<sup>da</sup> *Supra* p.

<sup>db</sup> *supra* P.

The representative of Caritas Internationalis, Mr. Braun, pleaded at the Conference of Plenipotentiaries that only those refugees “who became dangerous, truly dangerous, to the security of the State and of its citizens” should be expelled.<sup>dc</sup>

All these statements tend to restrict the applicability of the concept of public order.

However, it must be remembered that there has been a tendency to widen the meaning of the concept of danger to the community. French doctrine may serve as a good example.

Whereas the law of the year VI soberly authorized the Directoire exécutif to expel aliens “s’il juge leur présence susceptible de troubler l’ordre et la tranquillité publique”,<sup>dd</sup> subsequent authors spoke lightly of dangers to State and society. Pillet found that “la conservation de l’état est menacée” if a Court would apply a foreign law which did not correspond with French public policy,<sup>de</sup> and Lachaze stated that “l’étranger qui transgresse la loi pénale constitue évidemment pour la collectivité un danger qu’il est salubre d’éloigner”.<sup>df</sup>

The latter statements truly seem to be exaggerated. Peace and order are not easily upset. Crimes are no rarity in modern society, still the everyday life of the great mass of citizens is rarely disturbed, and the machinery of Government is not upset. In other words, it takes rather extraordinary acts to disturb the existing state of affairs. A common thief among a thousand other thieves will surely not do the trick. Similarly the person who kills for passionate reasons may be dealt with effectively by police, Court and prison authorities.

It seems to go like a red thread through the various international instruments leading up to the Refugee Convention that only when these normal means of dealing with criminals do not suffice, or if his acts are particularly hideous, the authorities may invoke public order to rid itself of his person. The case of the narcotics peddler has been mentioned. The incorrigible criminal is another example; the instigator of riots and unrest a third. The common criteria seems to be that public order is at stake only in cases where a refugee constitutes a threat to an uncertain number of persons carrying out their lawful occupations (habitual criminals, wanton killers), or to the society at large, as in the case of riots and unrest, or traffic of drugs.

Only in one respect it seems right to lower the requirements for claiming that a refugee constitutes a threat to the public order.

If a refugee visits the country only for a short period, for business or pleasure, and has not established residence anywhere in the country, the authorities may be justified in seeing a threat to public order if such a person resorts to crime, vagrancy or other disagreeable acts, because it tends to reduce the respect for the law, and also because the surveillance in such cases is more difficult, and the authorities have only slight possibility of knowing the background of such a person.

It seems that the situation cannot be summed up in a better way than done by Vattel:

“(The State) has the right to send (the asylum seekers) off elsewhere if it has good reason to fear that they will corrupt the morals of its citizens, or cause religious disturbances or any other form of disorder hurtful to the public welfare. In a word, it has the right, and is even obliged, to follow in this matter the rules of prudence. But this prudence should not take the form of suspicion nor be pushed to the point of refusing an asylum to the outcast on slight grounds and from unreasonable or foolish fears. It should be regulated by never losing sight of the charity and sympathy which are due to the unfortunate. We should entertain these

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<sup>dc</sup> Supra p.

<sup>dd</sup> Supra p. The same phrase was used in the Alien Refugee Law of 1832, supra p.

<sup>de</sup> Supra p.

<sup>df</sup> Supra p. Cf. also Suarez’s contention that every violation of law presents a danger to the community, and Hackett’s comment thereon, supra p.

sentiments even for those whose misfortune is their own fault, for by the law of charity which bids men love one another we should condemn the crime but love the victim of it”.<sup>d9</sup>

With slight alterations, the rule set forth by the great jurist two hundred years ago may serve as guidance for modern statesmen and lawyers in their application of the rules pertaining to expulsion of refugees.

(7) The meaning of this phrase is simply that a refugee may only be expelled in accordance with the substantive and procedural rules which apply to expulsion of aliens generally from the country in question. With regard to due process of law in expulsion matters, cf. the following United States cases:

U.S. ex rel. Accardi v. Shaughnessy;

U.S. ex rel. Dolenz v. Shaughnessy.

This meaning is clearly expressed in the French text, which provides that “l’expulsion de ce réfugié n’aura lieu qu’en exécution d’une décision rendue conformément à la procédure prévue par la loi”.

In the Secretariat draft it was proposed that “a refugee authorized to reside regularly in the territory of any of the High Contracting Parties may not be expelled save in pursuance of the decision of a judicial authority”.<sup>dh</sup>

In support for this proposal it was stated that “experience has shown that a large number of expulsion orders are due to false accusations and the malice of ousted competitors. Sometimes the orders are due to an error de persona. So long as expulsion proceedings are secret and so long as the expelled person is deprived of any means of presenting his case, mistaken decisions are inevitable”.<sup>di</sup>

It was also pointed to the fact that the Commission on Human Rights included the following provisions (Article 12) into the Draft International Covenant on Human Rights which it adopted at its fifth session:

“No alien legally admitted to the territory of a State shall be expelled therefrom except on such ground and according to such procedure and safeguards as are provided by law”.<sup>dj</sup>

In view of the fact that in many important countries the question of expulsion is decided by administrative authorities and not by courts of law, adoption of the Secretariat draft would mean that these countries would have to set up separate machinery or institute a special procedure to deal with cases of expulsion relating to refugees. This the Ad Hoc Committee found unacceptable. The decision referred to in Article 32 (2) may therefore be made by an administrative or a judicial authority, whichever the law of the country provides for.

The Ad Hoc Committee agreed that refugees liable to expulsion should have opportunity to present their case, with one exception; cf. note 8 below.

(8) This exception only refers to cases where expulsion is dictated by considerations of national security, as opposed to public order. And even if the refugee is to be expelled for reasons of national security, he shall have a right to present his case, provided that “compelling reasons” of national security do not override the consideration of fairness to the individual.

It is difficult to see that this exception is of much relevance in a system where the power to expel lies exclusively with administrative authorities. Even if they have reached their decision on the basis of confidential material, the nature of which may not be disclosed

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<sup>d9</sup> Vattel III, p. 92.

<sup>dh</sup> E/AC.32/2, p. 45: draft article 24 (4).

<sup>di</sup> E/AC.32/2, p. 47.

<sup>dj</sup> ECOSOC Official Records: Fourth Year, Ninth Session, Supplement No. 10, p. 20.

without endangering national security, there is hardly any reason why the refugee should not be allowed to submit evidence, appeal or be represented. This will after all not force the authorities to disclose their sources of information.

If, on the other hand, the law provides for hearings before or appeals to a judicial or semi-judicial authority, it may be necessary for the administration to plead that certain evidence, an appeal or presentations by counsel are non-receivable by the tribunal, because if the latter received such pleas, the administration would be forced to counter them by submitting classified material.<sup>dk</sup>

Being an exception, this provision is subject to restrictive interpretation.

(9) This provision lays down a minimum standard for expulsion procedure relating to refugees. Even if the relevant municipal laws and regulations do not give an alien in general any of the rights set forth here, a refugee is nevertheless entitled to the treatment outlined here.

The second sentence of paragraph 2 provides for three different ways in which the refugee may try to clear himself:

- (a) he shall be allowed to submit evidence;
- (b) he shall have a right of appeal; and
- (c) he shall have a right to be represented.

The provision does not specify that a formal hearing shall take place.

If due process of law does not call for a hearing, the evidence which the refugee is entitled to submit may have to be in the form of written testimonies.

The provision that a refugee shall have a right of appeal applies equally, irrespective of whether the expulsion procedure is purely administrative or if there is a mixed administrative-judicial system. However, the provision will have different significance in the various systems.

If an expulsion order is issued by the Ministry of the Interior, the Department of Justice, the Home Office, or its equivalent, the appeal provision means that the refugee shall have recourse to a higher level within the Ministry etc. against an expulsion order issued at a lower level.<sup>dl</sup>

If the expulsion order is made by a local chief of police, Chief Constable, prefect, or the like, the refugee shall have a right to appeal to a higher authority, e.g. the appropriate Ministry or a Central Aliens Authority,<sup>dm</sup> and if the decision is taken by the latter authority, he shall have an appeal to the Ministry, to a review board, an administrative court, or whichever appeals instance the law of the country provides for.<sup>dn1</sup>

Only if the expulsion order is made by the highest competent administrative authority, e.g. the Minister of the Interior, the Attorney General, the Home Secretary personally, or by one of his immediate subordinates who is specifically designated by the Minister to deal with such cases in the final instance, and provided there is no recourse by law to a judicial or semi-judicial body, the right of appeal may become redundant. However, if the decision has been made by such authority without giving the refugee the benefit of the provisions mentioned under (a) and (c) above, the refugee may request the matter to be reconsidered in the light of evidence he is able to submit and with the advice of counsel.

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<sup>dk</sup> Cf. the French judgements in the *Eckert* case; the *Marcon* case, the *Mavromatis* (expulsion) case; *Ministre de l'Interieur v. van Peborgh* case; *Persager* case; the *Salom* case.

<sup>dl</sup> This is for example the practice in the United Kingdom; cf. the Aliens Order, 1953.

<sup>dm</sup> Cf. Articles 13 ff. and 20 of the Norwegian Aliens Act of 27 July 1956.

<sup>dn1</sup> Cf. the systems in Austria, France, Germany.

Article 32 (2) does not specify whom the refugee may choose to represent him. It seems clear that he may choose any reputable member of the legal profession, and if the law so allows, a voluntary agency or any other person of good repute.

In the Ad Hoc Committee draft there was only mention of “competent authority.” The Conference of Plenipotentiaries added the words “or a person or persons specially designated by the competent authority”.<sup>dn2</sup>

This was thought desirable on the background that although the final decision might be taken by the competent Secretary of State, he “could not grant a personal interview to every refugee threatened with expulsion”.<sup>do</sup>

The drafters did not have in mind a system whereby a local chief of police etc. may order expulsion and even delegate this authority to certain of his subordinates.

It may therefore be submitted that “competent authority” means the highest competent authority in the country.

The meaning of the provision is that the Minister (Secretary of State) does not need to study the case personally, but that it shall at least be dealt with by persons under his immediate control.

(11) This provision corresponds with the one in Article 31 (2), second sentence. It has been taken over from Article 5 (1) of the 1938 Convention.<sup>dp</sup>

The present Convention does not indicate what would be a reasonable period. According to the judgement of the German Bundesverwaltungsgericht in *Hodzic v. Land Rheinland-Pfalz* a period of two months is too short.<sup>dq</sup>

The provision does not apply if another country of refuge has a duty to readmit the refugee, in which case he may be returned to that country without delay. On the other hand, the provision does apply, if no other country of refuge is obliged to readmit him, and the authorities of the expelling State wish to return the refugee to his country of origin by virtue of Article 33 (2).

(12) This provision corresponds with the one in Article 31 (2), first sentence. A similar provision was found in Article 3 (2) of the 1933 Convention.

The application of internal measures is restricted to the period mentioned in the first sentence of Article 32 (3), and to such measures as the authorities deem necessary, cf. *Comments to Article 31 (2)*.

Unlike the 1933 Convention the present provision does not authorize the application of restrictive measures after the expiration of said period. However, a Contracting State may apply such measures also later, provided that there is no rule in customary international law (cf. Article 7 (1)) or conventional law which forbids such treatment of aliens in general and refugees in particular.

According to Article 5 (1) (f) of the European Human Rights Convention, deprivation of liberty may only be resorted to for the purpose of ensuring the alien's removal from the territory. If it is impossible to remove him, it would contravene the cited provision to detain him.<sup>dr</sup>

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<sup>dn2</sup> E/AC.32/8, p. 25.

<sup>do</sup> Statement by United States delegate, E/AC.32/SR.40, p. 29.

<sup>dp</sup> Cf. E/AC.32/5, p. 60.

<sup>dq</sup> Bundesverwaltungsgericht 355.

<sup>dr</sup> Cf. in this connection: The Brozoza case; Heredia-Mendez case; Ministère public v. Bucur; ynger case.

## **ARTICLE 33**

### **PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)<sup>(1)</sup>**

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever<sup>(2)</sup> to the frontiers of territories<sup>(3)</sup> where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>(4)</sup>

2. The benefit of the present provision may not<sup>(5)</sup> however, be claimed by a refugee whom there are reasonable grounds<sup>(6)</sup> for regarding as a danger<sup>(7)</sup> to the security of the country in which he is<sup>(8)</sup> or who, having been convicted by a final judgement of a particularly serious crime<sup>(9)</sup> constitutes a danger to the community of that country.<sup>(10)</sup>

#### Comments

(1) The principle of “non-refoulement” or non-reconduction of refugees to a country of persecution was already expressed in Article 3 (2) of the 1933 Convention, and then in an absolute form:

“(Chacune des Parties contractantes) s’engage dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d’origine.”<sup>a</sup>

A basic consideration which brought about the adoption of this provision was that “l’URSS ne considère plus les réfugiés comme ses ressortissants. Elle se refuse de les admettre sur son territoire et l’article 71 de son Code pénal menace de peine de mort le réfugié qui, sans y être autorisé, retournerait en Russie. La situation des autres catégories de réfugiés est sensiblement égale.”<sup>b</sup>

In article 5 (3) (a) of the 1938 Convention the prohibition against reconduction was qualified in certain respects.

“The High Contracting Parties undertake not to reconduct refugees to German territory unless they have been warned and have refused, without just cause, to make the necessary arrangements to proceed to another territory or to take advantage of the arrangements made for them with that object.”<sup>c</sup>

Article 33 is among the Articles to which the Contracting States, according to Article 42, may not make any reservation.

(2) Article 33 applies to any Convention refugee who is physically present in the territory of a Contracting State, irrespective of whether his presence in that territory is lawful or unlawful,<sup>d</sup> and regardless of whether he is entitled to benefit from the provision of Article 31 or not.<sup>e</sup>

Just like Article 31 (2), Article 33 must also be considered to apply to persons who are *prima facie* refugees, pending a decision whether they come within the definition in Article 1.<sup>f</sup>

In spite of the apparently all-comprising phrase “return . . . in any manner whatsoever”, it is quite clear that the drafters did not intend Article 33 to affect the question of extradition. The French delegate, demanded that it be placed on record “that Article 33 was without prejudice to the right of extradition”,<sup>g</sup> and there was no opposition to this.

The British delegate, stressed in the same connection that “the style Committee had considered that the word ‘return’ was the nearest equivalent in English to the French term ‘refoulement’.” He “assumed” that the word return as used in the English text had no wider meaning.<sup>h</sup> This interpretation is supported by the fact that the French text simply states that “aucun des Etats Contractants n’expulsera ou ne refoulera . . .”, and in order to make it even clearer the French word “refouler” was included in brackets after the English word “return”.<sup>i</sup>

Against this background it seems surprising that Robinson should pose the problem of “the relative significance of this Convention and a treaty of extradition between two Contracting States” and come to the conclusion that in such a conflict “this Convention would (under the

general principles of international law) have precedence over earlier extradition treaties, unless the States entered a reservation to Article 33 stipulating that their obligations under previous treaties were to be maintained.<sup>l</sup> Extradition apart, it was, however, the intention of the Ad Hoc Committee as well as the Conference that the phrase “expel or return (“refouler”)<sup>k</sup> “should be broad enough to cover the different practice followed in various countries”<sup>k</sup> with regard to removal of persons whose presence for some reason or other is considered as undesirable.

The term “expulsion” refers to a formal measure, which in some countries may only be carried out in pursuance of a decision by a judicial authority, although in other countries expulsion may be ordered by administrative authorities. In many countries an expulsion order does not only provide for the removal of the person concerned from the territory of the issuing State, but it also contains a prohibition of returning to the country for ever or for a certain period. As a rule expulsion is only resorted to in case where a person has committed some offence or has become a charge on public funds. What, however, really and basically distinguishes expulsion from other measures amounting to removal of persons from the territory is that it is the only measure which may be used against aliens who so far have been lawfully staying in the country.<sup>l</sup>

The word “expulsion” is used in Belgium and France to denote a formal procedure of removing undesired aliens from the national territory. For the purposes of the Refugee Convention the term “expulsion” may be considered as an equivalent of the Anglo-American concept of “deportation.” It corresponds to “Ausweisung” in German and “utvisning” (“udvisning”) in the Scandinavian languages.

With regard to refugees lawfully staying in the territory of the Contracting State concerned, it follows from Article 32 that expulsion is the only lawful measure of removal, and the simple expedient of “refoulement” may therefore not be applied to such refugees.

The word “refoulement” is used in Belgium and France to describe a more informal way of removing a person from the territory and also to describe non-admittance at the frontier. It may be applied to persons seeking admission, persons illegally present in a country, and persons admitted temporarily or conditionally, in the latter case, however, only if the conditions of their stay have been violated.<sup>m</sup>

It was suggested in the Ad Hoc Committee that “the practice known as refoulement in French did not exist in the English-speaking countries,<sup>n</sup> but this is hardly correct. It seems that the term corresponds to the Anglo-American concepts of “reconduction”, “exclusion” and “refusal of leave to land”. It also corresponds to “Abweisung” and “Abschub” in German and to “avvisning” and “bortvisning” or “förpassning” in the Scandinavian languages.

(3) Even though “refoulement” may mean “non-admittance at the frontier” (“refusal of leave to land”, “exclusion”, “Abweisung”, “Avvisning”), and that the term was understood in this sense by the Secretariat of the League of Nations when translating (unofficially) the text of the 1933 Convention<sup>o</sup> it is quite clear that the prohibition against “refoulement” in Article 33 of the 1951 Convention does not cover this aspect of the term “refoulement”.

Mr. Zutter, as Swiss observer at the Conference, stressed that Article 33 “could not ... be applied to a refugee who had not yet entered the territory of a country. The word ‘return’ used in the English text, gave that idea exactly”<sup>p</sup>. This view was supported by other delegates.

That Article 33 forbids return and not “non-admittance” is also made clear by the words “to the frontiers of territories ...” in the English text and even more so by the words “sur les frontières des territoires ...” in the French text.

There may, however, be borderline cases in both the figurative and the literal sense of the word.



If a Contracting State has placed its frontier guards right at the frontier, and has fenced off its territory, so that no one can set foot on it without having been permitted to do so, the State may refuse admission to any comer without breaking its obligations under Article 33.<sup>q</sup>

Article 33 produces the strange result, as pointed out by Robinson, that, "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck".<sup>r</sup>

And if the frontier control post is at some distance (a yard, a hundred meters) from the actual frontier, so that anyone approaching the frontier control point is actually in the country, he may be refused permission to proceed farther inland, but he must be allowed to stay in the bit of the territory which is situated between the actual frontier line and the control post, because any other course of action would mean a violation of Article 33 (1).

However strange these results may seem from a logical point of view, they are nevertheless not devoid of merit. It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation's territory and thus is within the power of the national authorities, than with people only seen as shadows or moving figures "at the other side of the fence." The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.

The opinion that there is a vital difference between the person who is actually in the territory, and the one who is not, is also borne out inter alia by the judgement by the Court of Appeal in the United Kingdom in the Sohlen case. In this case which related to the validity of a deportation order the Master of the Rolls said that "habeas corpus was available to anyone within the realm . . ."<sup>s</sup>

(4) Whereas Article 3 (2) of the 1933 Convention only prohibited refoulement to "the frontiers of their (i.e. the refugees) country of origin" and Article 5 (3) (a) only referred to "German territory", the Ad Hoc Committee substituted the wider concept of "territories where [the refugee's] life or freedom would be threatened on account of his race, religion, nationality or political opinion".<sup>t</sup> The Conference added the words "membership of a particular social group",<sup>u</sup> so that Article 33 refers to the same reasons for persecution as those enumerated in Article 1.

By these changes it has been made quite clear that Article 33 prohibits reconduction "not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned".<sup>v</sup>

There is a difference of meaning between the just-quoted passage in Article 33 (1), and the provision in Article 31 (1) referring to "a territory where their [that is: the refugees'] life and freedom was threatened in the sense of Article 1". The reference to Article I was included in Article 31 to make it clear that the dateline requirement in Article I applies to the persecution which entitles one to enter the territory of a Contracting State without authorization but nevertheless with impunity.<sup>w</sup> It is quite clear that the applicability of Article 33 is not limited in the same respect. It prohibits the returning of a Convention refugee to "any territory in which a threat to his life or security would exist",<sup>x</sup> irrespective of whether this threat is a result of "events occurring before 1 January 1951", and regardless of whether it is expulsion or return to a European country or to a country "elsewhere" which is considered.<sup>y</sup>

Whereas Article I (A) (2) of the Refugee Convention defines as a refugee a person who is outside his country of origin "owing to well-founded fear of being persecuted", Article 33 refers to "territories where his life or freedom would be threatened" on account of the same grounds as set out in Article I (A) (2).

In the Secretary-General's memorandum, the Ad Hoc Committee, it was proposed, in Article 24 (3), that refugees should not be turned back "to the frontiers of their country of origin, or to territories where their life or freedom would be threatened ..."<sup>z</sup>

In the *Comments* to this proposal the country of origin is referred to as "the country where his life or liberty is threatened. . ." and it is explained that "the text of paragraph 3

reproduces that of the 1933 Convention (Article 3, paragraph 2) but with an addition which takes into account not only the country of origin, but also other countries where the life or freedom of the refugee would be threatened for the same reasons".<sup>ba</sup>

The Ad Hoc Committee decided to delete the words "their country of origin or to" from the draft, but there is no indication to the effect that any change of substance was meant. As a matter of fact, the Committee's comment to its draft Article 28 is entirely along the lines of the just quoted *Comments* by the Secretary-General.<sup>bb</sup>

When the provision was discussed by the Ad Hoc Committee the United Kingdom delegate, Sir Leslie Brass, reflected that "threat to freedom was a relative term and might not involve severe risks",<sup>bc</sup> and the Chairman of the Committee found that there was "agreement on principle that refugees fleeing from persecution ... should not be pushed back into the arms of their persecutors."<sup>be</sup>

It may therefore be held that the reference to "territories where his life or freedom would be threatened" does not lend itself to a more restrictive interpretation than the concept of "well-founded fear of being persecuted"; that is to say that any kind of persecution which entitles a person to the status of a Convention refugee must be considered a threat to life or freedom as envisaged in Article 33.<sup>bf</sup> Furthermore, the drafting history of Article 33 leads to the conclusion that the threat to life or freedom must be considered to exist as long as the person concerned does not cease to be a refugee under the terms of Article 1 (c).<sup>bg</sup>

At the Conference of Plenipotentiaries the Swedish delegation proposed an amendment which aimed at prohibiting expulsion or return to territories where the refugee would be exposed to the risk of being sent to a territory where his life or freedom would be endangered.<sup>bh</sup>

This proposal was met with certain misgivings by other delegates.<sup>bi</sup>

In the end the Swedish delegate withdrew his proposal "stressing, however, that, as the President had also urged, the text of the Article should be interpreted as covering at least some of the situations envisaged in that part of the amendment".<sup>bj</sup>

It seems that this is a fair assertion. If a country makes it its policy to turn back to their country of origin all or certain categories of refugees who set foot on its territory, then this may amount to persecution, for example on account of nationality, membership of a particular social group or political opinion, and Article 33 must be construed so as to forbid expulsion or return to such a country.

The prohibition against expelling or returning a refugee to a country of persecution does not in itself constitute an obligation to allow the refugee in question to take up residence in the territory of the State concerned.<sup>bk</sup> Nevertheless the fact remains that a refugee who may not be sent back must be allowed to stay somewhere in some way or another.

(5) Article 33 (2) sets forth the exceptions to the main rule of nonrefoulement which is laid down in Article 33 (1).

The 1933 Convention did not contain any such exceptions, and the exceptions set forth in the 1938 Convention were, as we have seen *supra*, of an entirely different nature.<sup>bl</sup>

Draft Article 24 (3) in the Secretary-General's Memorandum (E/AC. 32/2) did not provide for any exceptions to the general rule of non refoulement to a country of persecution, but in Draft Article 24 (5) one had suggested internal police measures in lieu of expulsion, along the lines of Article 3 (3) of the 1933 Convention. Article 28 in the Ad Hoc Committee's Draft corresponds to the present Article 33 (1); and the Draft does not contain any provisions similar to the one in Article 33 (2).<sup>bm</sup> This provision is therefore exclusively a result of the deliberations of the Conference of Plenipotentiaries, more particularly an amendment proposed jointly by the delegates of France and the United Kingdom, and adopted with very slight alterations.<sup>bn</sup>

(6) Article 33 (2) does not require any strict proof for regarding a refugee as a danger to the national security. The provision applies to “a refugee whom there are reasonable grounds for regarding as ‘such a danger’.” This wording was chosen deliberately because, in the words of the United Kingdom delegate, “it must be left to States [i.e. the State concerned] to determine whether there were sufficient grounds for regarding any refugees as a danger to the security of the country”.<sup>bo</sup>

It goes without saying that in assessing the facts of the individual case, the State concerned must act in good faith. The provision does not give the State a freed hand. If it resorts to expulsion or return in cases where “reasonable grounds” cannot be said to exist, the State may be held responsible as in the case of any other breach of treaty obligations.

(7) By virtue of Article 33 (2) a refugee may be expelled or returned to a country of persecution for either of two different reasons:

- (a) If “there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is”, or
- (b) if he “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

One must emphasize the word “danger”.

In his support for the joint French/United Kingdom amendment, the United Kingdom delegate indicated that one would have “to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay”.<sup>bp</sup>

It seems to be a fair interpretation that the word “danger” must mean a “present or future danger”. Apart from the fact that a conviction is not necessary for expulsion for reasons of national security, a conviction for espionage or some other activity which is traditionally considered as a threat to the national security, will not in itself warrant the application of Article 33 (2). This is particularly true if the act for which he is convicted has been committed in a distant past. Only if his continued presence is regarded as a danger to the security of the country, the authorities may expel him to a country of persecution. But if such a danger may be said to exist, it is immaterial for the application of the provision whether the State may safeguard its interests by other measures than expulsion, cf. the United Kingdom delegate’s statement page ... supra.

This restrictive interpretation of the word “danger” seems to be supported by the fact that certain delegates were reluctant to impair the principle of non-refoulement to countries of persecution at all.<sup>bq</sup>

It is noteworthy that the United Kingdom delegate, who was one of the sponsors of the provisions now contained in Article 33 (2), stressed that “the authors of the joint amendment had sought to restrict its scope, so as not to prejudice the efficacy of the article as a whole”.<sup>br</sup>

The suggested interpretation will also strike a good balance between the two grounds for expulsion or return in Article 33 (2). As we shall see, in case expulsion to a country of persecution is contemplated with regard to a refugee who is considered as “a danger to the security of the community” (not the State), a conviction is an essential precondition, but it is the danger he constitutes which is the decisive factor.

This can clearly not refer to a past danger, but only to a present or future danger.

It is therefore not the acts the refugee has committed, which warrant his expulsion, but these acts may serve as an indication as to the behaviour one may expect from him in the future, and thus indirectly justify his expulsion to a country of persecution.

Because Article 33 (2) is concerned with the present and future more than with the past, it seems that the authorities in many cases ought to give a refugee fair warning and a chance

to amend his ways, before expulsion to a country of persecution is seriously considered. It must be emphasized that Article 33 (2) clearly calls for deciding each individual case on its own merits.

In support of the provisions now contained in Article 33 (2) the United Kingdom delegate stressed what he saw as the current dangers to the national security of countries of refuge: "Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency. To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution (than expulsion or return to a country of persecution)".<sup>bs</sup>

The delegate of Denmark, whose Government was willing to accept the rule of non-refoulement to countries of persecution without exception, stated that "if a country of origin, which might perhaps be a great Power demanded the return of a refugee, to refuse the demand might provoke a political crisis. He did not imagine that it was the intention of the joint [French/United Kingdom] amendment [Document A/CONF.2/69] and the Swedish amendment [A/CONF.2/70] to cover such a case by the use of the words 'reasonable grounds for regarding as a danger to the security of the country in which he is residing' and 'constitute a danger to national security or public order' respectively, but he wished to be assured that there was no possibility of the texts being interpreted in that manner".<sup>bt</sup>

This assurance he got from the United Kingdom delegate, who considered "that the Danish representative's point that refusal to return a refugee might provoke political disturbance did not fall within the scope of [draft] Article 28. The matter of extradition treaties between countries of refuge and countries of persecution was outside the purview of the Convention".<sup>bu</sup>

He might have added that it is generally recognized in international law that the granting of asylum is not an unfriendly act and has to be respected by other States including the country of origin.<sup>bv</sup>

It will therefore be understood that it is the behaviour of the refugee in his country of refuge, and not the fact that he is wanted by the authorities in his country of origin, which justifies his being regarded as a danger to the security of the former country.

(8) The expression "the security of the country" is equivalent to the well-known term "national security" which is used in Article 32.<sup>bw</sup> The meaning of this term is rather clear. If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g. falsification of election results, coercion of voters, etc.), or if he engages in activities which are directed against a foreign Government, which as a result threatens the Government of the country of residence with repercussions of a serious nature.<sup>bx</sup> Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to the national security.

Generally speaking, the notion of "national security" or "the security of the country" is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned.

(9) A final judgement will say a judgement against which there may be lodged no appeal, either because it has been pronounced by a Court of the last instance, or because the term of appeal has expired.<sup>by</sup> A judgement must be considered to be final in the sense of Article 33 (2) if all ordinary means of appeal have been exhausted, or if the normal statutory period for filing appeals has lapsed without any appeal being filed.

If, according to the law of some countries a case may be reopened, perhaps many years later, if new evidence which may lead to an acquittal is brought to light, this does not detract anything from the finality of the original judgement, as long as it stands, and permission to reopen the case has not been granted or at least requested.

Also, if there is a legal possibility to file an appeal in certain circumstances even after the normal statutory period has expired, a judgement must be considered final until a belated appeal has been allowed by the appropriate Court. If such an appeal or a request for permission to lodge such an appeal has been filed, it would hardly be in keeping with the spirit of Article 33 to expel the refugee as long as the matter is pending before the Court, but it seems to depend on the municipal law of the country concerned whether the existing judgement in such a case shall be considered as final or not.

In the original version of paragraph 2 (the joint French/United Kingdom amendment, A/CONF.2/69) it was a condition for expulsion or refoulement that the refugee had "been lawfully convicted in that country", that is to say in the country from which he is to be expelled or returned.

The reference to "that country" was, however, deleted as a result of a Swedish proposal.<sup>bz</sup>

The Swedish delegate explained that his amendment had been intended "to cover such cases as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country".<sup>ca</sup>

It will be seen that this contingency is covered by the provision in Article I (F) (b), according to which a person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee", is not entitled to any of the benefits of the Convention.<sup>cb</sup> On the other hand, there can be no doubt that the deletion of the words "in that country" is important in other respects. If the Polish refugee in the Swedish delegate's example already had been admitted to and resided in Sweden, and then went on a visit to Denmark and committed a crime there, the fact that the crime was committed and a final judgement passed outside Sweden would not prevent the Swedish authorities from expelling the refugee by virtue of Article 33 (2).

The French delegate went even further in stating that "once the possibility had been recognized by Article I that the status of refugee could be denied to a person who had committed a (serious non-political) crime in his country of origin, there could be no objection to allowing the expulsion of a refugee if it transpired after his admission to the country of asylum that he had committed a crime in his country of origin. Moreover, the possibility of a refugee committing a crime in a country other than his country of origin or his country of asylum could not be ignored. No matter where a crime was committed, it reflected upon the personality of the guilty individual, and the perpetrator was always a criminal".<sup>cc</sup>

However archaic this view on crimes and criminals may seem, it appears that the French delegate considered it immaterial where and when the crime was committed, or the final judgement was passed, which could lead to expulsion or refoulement of a refugee according to Article 33 (2).

The travaux préparatoires do not give much lead as to the understanding of the expression "a particularly serious crime" or (in the French text) "un crime ou délit particulièrement grave".<sup>cd</sup> It appears that in the English version of the joint French/United Kingdom amendment (A/CONF.2/69), one used the expression "particularly serious crimes or offences", but during the discussion in the conference, the United Kingdom delegate agreed to the deletion of the words "or offences".<sup>ce</sup> On the other hand, it was agreed to retain both the word "crimes" and the word "délits" in the French text.<sup>cf</sup>

The President, Mr. Knud Larsen of Denmark, pointed out "that the French and English texts were not intended merely for French-speaking and English-speaking countries respectively; ... Other countries might interpret the words 'crimes or offences' in different ways. Since the

words had a general sense in all countries, each individual legal system would have to place its own interpretation on them”.<sup>cg</sup>

The delegate of Israel pursued the same line of reasoning by stating that “the joint amendment was undoubtedly intended to be applied by a given country in the light of its national legislation, provided that a convicted refugee had been convicted for some serious act”.<sup>ch</sup>

It is true that there is no real correspondence between the terms used in different countries to describe various classes of punishable offences, e.g. felonies and misdemeanours in Anglo-American law, “crimes”, “infractions”, and “contraventions” in French law, “Verbrechen”, “Vergehen” and “Versehen” in German law, “forbrytelse” and “forseelse” in Norwegian law, etc.

The President’s and the Israeli delegate’s statements are interesting because they make it clear that the applicability of Article 33 (2) is not dependent upon whether the act for which a refugee is convicted is classified under this or that category; the important factor is that the act is “particularly serious”, so that its perpetration justly may be described as “a danger to the community”.

The Office of the United Nations High Commissioner for Refugees has expressed the opinion that “it is clear that the expression ‘particularly serious’ was intended to narrow the meaning of the word ‘crime’. Although the decision whether the crime is a particularly serious one would depend on the merits of the case, the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.) It is however not possible to establish a list of such crimes because, according to the general principles of criminal law, it is not the crime but the criminal who is punished”.<sup>ci</sup>

It must be remembered that irrespective of how the expression “ a particularly serious crime” can be interpreted, expulsion or return to a country of persecution may only be effected if the refugee “constitutes a danger to the community”.

(10) The wording of Article 33 (2) - “who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger. . .” invites the interpretation that there must be some link between the crime, the conviction, and the fact that the refugee in question “constitutes a danger to the community”.

Such a link may hardly be said to exist if a considerable time has passed between the commission of the crime and the time of decision. Five years, three years, even one year of impeccable behaviour will, depending on the circumstances, extinguish any valid reference to public order as a ground for expulsion. It is hardly consistent with the rule of law and decent administration to use a threat of expulsion like a sword of Damocles, to strike down the refugee at any time.

One must also all the time keep in mind that the only valid reason for applying Article 33 (2) is that the refugee in question is regarded as a danger to the country or constitutes a danger to the community. Only if a crime committed and a final judgement passed in a distant past or in a foreign place is of such nature that it justifies the conclusion that the refugee represents such a danger, Article 33 (2) may be applied.

The concept of “danger to the community” is different from the concept of “danger to the country”. This is borne out by the French delegate’s statement when introducing the joint French/United Kingdom amendment (A/CONF.2/69): The amendment was submitted “in order to make it possible for States to punish activities . . . directed against national security or constituting a danger to the community”.<sup>ci</sup>

The travaux préparatoires are not very informative with regard to the exact meaning of the words “danger to the community”.

Already in the Ad Hoc Committee there was, however, an exchange of views relating to the subject. The United Kingdom delegate, voiced the difficulty “that the United Kingdom

Government did not know exactly how to deal with cases where a refugee was disturbing the public order of the United Kingdom. He referred not to ordinary crimes, but to such activities as inciting disorder. In such cases, without the declaration of a state of emergency, the presence of a refugee might still be deemed highly undesirable. The United Kingdom Government had no thought of acting harshly in such cases and hoped indeed that the mere existence of the power to expel a man making trouble might serve to keep his behaviour within reasonable bounds.<sup>ck</sup>

The Israeli delegate thought "that the problem to which the United Kingdom representative had referred was a real one. It was the problem of a socially dangerous individual still legally entitled to liberty. He understood that under United Kingdom law such an individual, once he has served a prison sentence, retained unimpaired his power to do more evil."<sup>cl</sup>

Introducing the French/United Kingdom amendment at the Conference, the French delegate made it clear that "France and the United Kingdom ... had no intention of opposing the right of asylum on ground of indigence. Reasons such as the security of the country were the only ones that could be invoked against that right."<sup>cm</sup>

As threats against the "national security" (the State, its constitution, organs and external peace) are covered by the term "danger to the country". it will seem that the word "community" as used in Article 33 (2) denotes the population at large, and that a "danger to the community" means a danger to the peaceful life of the population in its many facets. In this sense a man will be a danger to the community if he sabotages means of communication, blows up or sets fire to houses and other constructions, assaults or batters peaceful citizens, commits burglaries, holdups or kidnapping etc., in short if he disrupts or upsets civil life, and particularly if this is done on a large scale, so that the person concerned actually becomes a public menace.

However, a single crime will in itself not make a man a danger to the community. This is especially true if the crime is committed against an individual to whom the criminal had a special relationship, as for example a crime passionelle. If, however, the one and only crime which a person has committed is clearly antisocial and demonstrates a complete or near complete lack of social and moral inhibitions, e.g. the blowing up of a passenger airplane in order to collect life insurance, or wanton killing in a public place, then it may be appropriate to classify the perpetrator as a danger to the community.<sup>cn</sup>

On the other hand, a man who has committed a number of crimes, should not be considered as a danger to the community on the sole ground that he is a recidivist. This was firmly stressed by the United Kingdom delegate, who, hoping "that the scope of the joint amendment would not be unduly widened ... wished to point out that to be classified by the courts as a hardened or habitual criminal, a person must have committed either serious crimes, or an accumulation of petty crimes. The first case would be covered by the joint amendment, and he was quite content to leave the second outside the scope of the provision".<sup>co</sup> His view was apparently accepted by the Conference, which did not adopt an Italian proposal to insert the words "or having been declared by the Court a habitual offender" (after the word "crime") in the text of Article 33 (2).<sup>cp</sup>

The Office of the United Nations High Commissioner for Refugees has expressed a similar view:

"Whether the commission of a crime by a refugee makes him a danger to the community is *quaestio facti*. It may be that a person who has been convicted for a major crime or several times for a minor, but nevertheless serious, offence, constitutes, as a habitual criminal, a danger to the community, while a person, who, on the other hand, has been convicted for a capital crime - which he has committed in a state of emotional stress or in self-defence - would not constitute a danger to the community."<sup>cq</sup>

The word "serious" must clearly be underlined. A common thief is only one among a thousand thieves in a country, and any one of them will hardly deserve to be called a "danger to the community",<sup>ct</sup> if those words shall be attributed "their natural and ordinary

meaning”, with due regard to “the context in which they occur”, cf. the Advisory Opinion of the International Court of Justice on the Competence of the General Assembly for the admission of a State to the United Nations.<sup>cs</sup>

The above quoted statement by the delegate of Israel with regard to “the problem of a socially dangerous individual still legally entitled to liberty”,<sup>ct</sup> suggests a refugee is only a danger to the community if he cannot lawfully be imprisoned or otherwise detained in his country of refuge, provided that he is not a habitual and successful jailbreaker.

It must, however, be remembered that the authors of the joint French/United Kingdom amendment also had in mind the general preventive effects of a rule allowing expulsion or return to a country of persecution in special cases.<sup>cu</sup> The preventive effect of a rule which only allows expulsion etc. of a person who has served a - perhaps extremely long - prison term and who may no longer be subject to other preventive measures - would be very little indeed. As a matter of fact, apart from the Israeli delegate’s statement, there is nothing in the travaux préparatoires which leads to the conclusion that a man only constitutes a danger to the community if he cannot lawfully - and effectively - be locked up. Quite to the contrary the United Kingdom delegate suggested - so it seems at least - that return to a country of persecution might in certain circumstances be an alternative to (lifelong?) imprisonment.<sup>cv</sup>

On the other hand, it is well to remember the United Kingdom delegate’s statement stressing that “the authors of the joint amendment had sought to restrict its scope, so as not to prejudice the efficiency of the article as a whole”.<sup>cw</sup>

Whereas, in the words of the Canadian delegate the provisions of Article 33 (1) were regarded “as of fundamental importance to the Convention as a whole”,<sup>cx</sup> the same cannot be said of the exceptions to the rule, contained in Article 33 (2).

States have been able to live with the unconditional rule in Article 3 (2) of the 1933 Convention for years and years, and it is quite clear that the provisions now contained in Article 33 (2) of the 1951 Convention were only meant to be applied in extremely rare occasions.

To be sure, the “danger to the community” may be the same, irrespective of what fate awaits the refugee upon his return to a country of persecution, but the Contracting States are nevertheless well advised to consider this aspect of the individual case to be decided.<sup>cy</sup>

It seems legitimate to reflect that just as the death penalty threatened the Russian refugees who returned to the territory of the Soviet Union brought about the adoption of the absolute rule of non-refoulement in the 1933 Convention,<sup>cz</sup> the more “flexible” system of sanctions subsequently practised in countries of origin have caused the countries of refuge to make exceptions to the rule of non-refoulement. At least historically, therefore, the fate expecting the refugee upon expulsion or refoulement is relevant; and the Convention cannot be considered in a vacuum, without any regard to historical and social facts.

## **ARTICLE 34**

### **NATURALIZATION<sup>(1)</sup>**

**The Contracting States shall as far as possible facilitate<sup>(2)</sup> the assimilation<sup>(3)</sup> and naturalization<sup>(4)</sup> of refugees. They shall in particular make every effort to expedite naturalization proceedings<sup>(5)</sup> and to reduce as far as possible the charges and costs of such proceedings.<sup>(6)</sup>**

#### Comments

(1) Naturalization in a country of refuge is one of the possibilities for putting an end to a person’s refugee character.



As a matter of fact hundreds of thousands of refugees have been naturalized in various countries of refuge since the end of the First World War.

The previous arrangements and Conventions relating to the status of refugees did not contain any provision pertaining to naturalization of refugees.

But the General Assembly mentioned in Article I of the Statute of the Office of the High Commissioner for Refugees the “assisting Governments ... and private organizations to facilitate ... assimilation [of refugees] within new national communities” as one of the tasks of said Office.<sup>a</sup>

The first drafters of the present Convention found occasion to include in their draft an article concerning facilitation of assimilation and naturalization of refugees, largely along the lines of the final text.<sup>b</sup>

It was stressed that naturalization is a matter of such delicate nature that in every case the final decision must rest with the organs of the State concerned. The State “cannot be compelled to grant its nationality, even after a long waiting period, to a refugee settled in its territory since naturalization confers on the naturalized citizen a series of privileges including political rights”.<sup>c</sup>

Apart from formal difficulties there may be practical difficulties, as illustrated by the Austrian *Comments* on the draft of the first session of the Ad Hoc Committee: “Because of the exceedingly large number of refugees in Austria, in proportion to Austrian nationals, the ‘assimilation and naturalization’ of all refugees living in Austria cannot be guaranteed”.<sup>d</sup>

Nevertheless it was felt, that “without establishing formal obligations in this respect, States can be requested to facilitate to the fullest possible extent, the naturalization of refugees, inter alia by giving favourable consideration to requests for naturalization received from refugees and by reducing the financial obstacles which procedural charges and costs may represent to destitute refugees”.<sup>e</sup>

“In connection with this Article the idea has been suggested that after a fairly long lapse of time (e.g. fifteen years) the authorities of the country in which the refugee or stateless person had settled might propose to him that he should apply for naturalization. If he failed to do so within a year, or did not give valid reasons for such failure, the Contracting Party would be entitled to consider itself as released from the obligations of the Convention.

“1. In favour of this idea the following arguments may be advanced: The position of a de jure or de facto stateless refugee is abnormal and should not be regarded as permanent. If after fifteen years the refugee is unwilling or unable to return to his country of origin and the country where he is established is prepared to grant him its nationality, he should become naturalized. If, indeed, it is recognized that an individual has the right to a nationality, as a counterpart it should be the duty of the stateless person to accept the nationality of the country in which he has long been established - the only nationality to which he can aspire - if it is offered him.

“If a political change subsequently occurred in the refugee’s country of origin nothing would prevent him from returning and regaining his first nationality. The fact that it was not he who had taken the initiative would make it all the more difficult to reproach the refugee with his change of nationality.

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<sup>a</sup> General Assembly Resolution No. 428 (V) of 14 December 1950.

<sup>b</sup> E/AC.32/2, p. 50: Article 28.

<sup>c</sup> Op. cit. p. 50: Article 28.

<sup>d</sup> E/AC.32/L.40, p. 58, cf. also the reflections of the Italian delegate: E/AC.32/SR.39, p. 29.

<sup>e</sup> E/AC.32/2, P. 50: Comment to draft Article 28.

"In conclusion, if this idea were adopted it would no longer be possible to accuse certain refugees - as has been done in the past - of 'settling down in a condition of statelessness'.

"2. The following arguments may be advanced against this proposal: even after fifteen years a refugee may remain fundamentally attached to his country of origin and cherish the hope of returning. For example, the Italians who sought asylum abroad after the establishment of the Fascist régime in 1922 were able to return to their country twenty years after. Nationality should not be imposed on a refugee in violation to his inmost feelings.

"Compulsory naturalization would be particularly inappropriate and the case of persons who have been prominent politically and represent a cause or a party.

"Finally, it is not always true that after a change of régime the Government of the country of origin will at once reinstate in their original nationality refugees who have in the meantime acquired a new one. This may necessitate formalities and entail delays. In some cases the new Government may keep political opponents at a distance by preventing or delaying reinstatement."

However, the Ad Hoc Committee felt that this question was part of the problem of elimination of statelessness, and therefore fell outside the scope of the present Convention.<sup>9</sup>

(2) The word "shall" makes it clear that Article 34 imposes a duty on the Contracting States, not only a recommendation. It is, however, a qualified duty.

The article does not lay down an obligation to naturalize refugees, but merely a duty to facilitate "as far as possible" their assimilation and naturalization.

It goes without saying that a State must judge for itself whether it is "possible" for it to naturalize a particular individual or any number of refugees. On the other hand, the decision must be taken in good faith. If for example a Contracting State outright fails to allow any refugee to be assimilated or naturalized, and is not able to show any other reason than unwillingness, the other Contracting States may have a ground for complaint.

A Contracting State may also be prevented from lengthening the period of residence required for naturalization. In such a case a State must show good cause why it is not possible any longer to grant refugees naturalization at the expiration of the period which hitherto has been prescribed.

(3) Article 34 obligates the Contracting Parties to facilitate "assimilation" and "naturalization." "Whereas the word "naturalization" has a rather clear meaning in legal texts, the same cannot be said of the word "assimilation." The representative of Israel expressed the view that "the word 'assimilation', well known in sociology, bore a rather unpleasant connotation closely related to the notion of force".<sup>h</sup>

The Ad Hoc Committee discussed at some length what was meant by facilitation of assimilation. It was agreed that attempts at forced assimilation of refugees were undesired, and in fact harmful: "an attack upon the spiritual independence of the refugee".<sup>i</sup>

What it meant in Article 34 is in fact the laying of foundations, or stepping stones, so that the refugee may familiarize himself with the language, customs and way of life of the nation among whom he lives, so that he - without any feeling of coercion - may be more readily integrated in the economic, social and cultural life of his country of refuge.

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<sup>f</sup> E/AC.32/2, pp. 50-51.

<sup>g</sup> E/AC.32/SR.22, p. 4, and E/AC.32/SR-26, p. 18.

<sup>h</sup> E/AC.32/SR.39, p. 26.

<sup>i</sup> E/AC.32/SR.39, p. 26.

Language courses, vocational adaptation courses, lectures on national institutions and social pattern, and above all stimulation of social contacts between refugees and the indigenous population, are but some of the means which may be employed for the purpose.

By facilitating "assimilation" the Contracting State is to a certain extent also facilitating the naturalization of refugees: In the sense the word is used in Article 34, "assimilation" is "an apt description of a certain stage in the development of the life of the refugee and of the general refugee problem"; indeed it "clearly corresponded to the conditions the refugee should fulfil in order to qualify for naturalization".<sup>j</sup>

(4) Each State decides under its own law who are its "citizens" or "nationals".<sup>k</sup> Nationality may be conferred on a person at birth, either by virtue of being born in the territory of the State concerned, or because one or both of the parents possess the nationality in question. Nationality may also be conferred upon a person later, either by operation of law or by granting an application filed by the individual concerned. The term "naturalization" is normally reserved for acts of the latter nature.<sup>l</sup>

The term "naturalization" is used in English laws since the early seventeenth century,<sup>m</sup> its meaning being that the person concerned shall be considered as being "for all intents, constructions and purposes a natural-born subject" of the Sovereign or State.<sup>n</sup>

The naturalization laws of most countries are laying down a number of conditions for the granting of letters of naturalization, e.g. conditions relating to the age of the applicant, the length of sojourn in the country, his conduct, his ability to support himself and his dependents, and his being released from his former nationality.

Naturalization may be facilitated in a number of different ways, of which only two are mentioned particularly in Article 34 (see notes 5 and 6 *infra*).

It may greatly facilitate the naturalization of great numbers of refugees if the State concerned is willing to lower its normal requirements in any or some of these respects. For example, most refugees are indigent, and too rigid implementation of financial criteria may prevent the naturalization of many of them. Similarly, refugees may be debarred from naturalization if the authorities insist on proof that they have been released from their former nationality. Shortening of the period of residence required for naturalization may also be an important means of facilitating naturalization.

In a wider sense, naturalization may be facilitated if refugee children born in the country of refuge acquire its nationality at birth, and if refugee youngsters may opt for the nationality of the country of refuge upon reaching a certain age, e.g. 18 years, on the condition that they have stayed in the country for a certain period, e.g. three or five years.

Article 10 has important bearing on the matter of naturalization. If a refugee was forcibly removed to the territory of a Contracting State during the Second World War and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory, in spite of the fact that the lawful authorities of the country had no say in the matter during the war.<sup>o</sup>

Similarly, if a refugee who was forcibly removed from the territory of a Contracting State, "were to return to the country in which he had previously resided . . . the time he had spent in the country prior to deportation would be added to the period of residence subsequent to

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<sup>j</sup> Cf. statement by the French delegate, E/AC.32/SR.39, p. 27.

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<sup>o</sup> Article 10 (1).

his return". In this respect "his period of residence in that country might be considered to have been uninterrupted by the fact of his deportation". However, "a State could not be required to take into account time spent outside the country".<sup>p</sup>

In this particular context, the treatment due to refugees may be more favourable than that accorded to other applicants for naturalization. However, Article 34 does not in a general way prescribe that refugees shall be better treated than other aliens with respect to naturalization. Commenting on the draft prepared by the first session of the Ad Hoc Committee, the Government of Chile reflected that "such exceptional treatment would not appear to be based on a just appraisal of the situation of a foreign refugee as compared with that of a foreigner not in that category.

"Indeed, a refugee arrives in the country by chance, and in many instances only because he was not able to go anywhere else at the time when he was forced to leave his own country or the country of his former residence. As against this, other foreigners come to the country of their own choice and to contribute their labour or capital. There would not appear to be any justification for placing such people in a position of manifest inferiority as compared with refugees."<sup>q</sup>

In short, Article 34 requires fair treatment of refugees, but no better treatment than that accorded to other aliens, if that treatment is a favourable one.

(5) The second sentence of Article 34 mentions but two of several modes of facilitating naturalization.<sup>r</sup> The words "in particular" make it clear that the scope of the Article is by no means limited to the two kinds of measures mentioned in the second sentence, but also that the drafters considered those measures as being of very great importance.

It was the French delegation who proposed to include a specific reference to the expediting of naturalization proceedings.<sup>s</sup>

It was explained that this provision "did not apply to the duration of the period of residence [required for naturalization], but solely to the administrative formalities taking place between the submission of the application and the decision."<sup>t</sup>

It was "pointed out that in some countries the process of naturalization was neither as rapid nor as inexpensive as it was [for example] in the United Kingdom. It might be desirable, therefore, to include in the article an appeal to such countries to accelerate their procedure and agreed to reduce the charges for refugees."<sup>u</sup>

(6) Whereas the Secretariat draft only referred to destitute refugees,<sup>v</sup> the French draft "extended the reduction of costs to all refugees",<sup>w</sup> and the latter was considered preferable for this reason.<sup>x</sup>

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<sup>p</sup> Cf. Article 10 (2); also statements by the Belgian representative and the Chairman of the Ad Hoc Committee E/AC.32/SR.22, p. 7.

<sup>q</sup> E/AC.32/L.40, p. 58.

<sup>r</sup> Cf. note 4 supra.

<sup>s</sup> E/AC.32/L.3, p. 10; E/AC.32/SR.21, p. 11; and E/AC.32/SR.22, p. 2.

<sup>t</sup> Statement by French delegate, E/AC.32/SR.22, p. 3.

<sup>u</sup> Statement by Belgian delegate, E/AC.32/SR.22, p. 3.

<sup>v</sup> E/AC.32/2, p. 50: Article 28.

<sup>w</sup> E/AC.32/L.3, p. 10.

<sup>x</sup> Cf. statement by Turkish delegate, E/AC.32/SR.22, p. 2.

**ARTICLE 35**  
**CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS<sup>(1)</sup>**

1. The Contracting States undertake to co-operate<sup>(2)</sup> with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it,<sup>(3)</sup> in the exercise of its functions,<sup>(4)</sup> and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.<sup>(5)</sup>
2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations,<sup>(6)</sup> the Contracting States undertake to provide them in the appropriate form with information and statistical data requested<sup>(7)</sup> concerning:
  - (a) the condition of refugees,<sup>(8)</sup>
  - (b) the implementations of this Convention, and
  - (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.<sup>(9)</sup>

**Comments**

(1) A provision to the effect that the Contracting States should facilitate the work of the United Nations High Commissioner for Refugees was included (as Article 26) in the Secretariat draft convention which was submitted to the Ad Hoc Committee.<sup>a</sup>

However, the Ad Hoc Committee chose to base its deliberations on a more elaborate French draft.<sup>b</sup> This draft was, however, subjected to a number of amendments in the Committee as well as at the Conference.

(2) Their obligation is “to co-operate” with the United Nations organ charged with protection of refugees. The expression used bears some resemblance to the phraseology used in Article 56 of the Charter of the United Nations, which reads:

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”

According to Article 55 the United Nations shall promote:

- “a. higher standards of living, full employment, and conditions of economic and social progress and development;
- “b. solutions of international economic, social, health, and related problems, and international cultural and educational co-operation; and “c. universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion.”

There can be no doubt that the Convention falls within the scope of Article 55. Taking into consideration Resolution 538 (VI) of 2 February 1962, by which the United Nations General Assembly expressed its satisfaction at the conclusion of the present Convention, and invited “member States and non-member States which have demonstrated their interest in the solution of the refugee problem to become parties to that Convention as soon as possible”; it seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter. This brings the observance of the material provisions of the present Convention within the orbit of the vested interests of the United Nations, with the effects set forth by the International Court of

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<sup>a</sup> E/AC.32/2, p. 49.

<sup>b</sup> E/AC.32/L.3, p. 10: Articles 21 and 22; cf. E/AC.32/SR.21, p. 9.

Justice in its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations.<sup>c</sup>

Whereas the Secretariat draft used the word “facilitate”, the final text contains the word “co-operate”, which suggests a more active participation in the functions of the United Nations Agency. Moreover, a State may only “facilitate” the work of the United Nations within its own domain. It may be requested to “co-operate”, however, also vis-à-vis a third party. It seems that by virtue of Article 35 the High Commissioner may, in given circumstances, ask a Contracting State to intervene with another Contracting State, whose application of the Convention is not agreeable to the High Commissioner, and in case of the intervention being unsuccessful, ask the State concerned to bring the matter before the International Court of Justice according to Article 38. It must nevertheless be kept in mind that one thing is a right of asking - the requested State must be allowed to use its own judgement and to refuse if it finds that this kind of co-operation with the High Commissioner would run contrary to its own interests.

(3) The United Nations General Assembly decided by its Resolution 319 (IV) of 3 December 1949 to establish, as of 1 January 1953, a High Commissioner’s Office for Refugees. By Resolution 428 (V) of 14 December 1950 it adopted a Statute for the Office.

The High Commissioner’s Office was originally established for a period of three years. Its mandate has subsequently been extended for three periods of five years each. The present mandate expires on 31 December 1968.

Because of this basically temporary nature of the High Commissioner’s Office both the Ad Hoc Committee and the Conference of Plenipotentiaries thought that reference should also be made to possible successor bodies.<sup>d</sup>

It will be seen from the text, that as long as the High Commissioner’s Office exists, the Contracting States are only obliged by virtue of Article 35 to co-operate with that body. Should the High Commissioner’s Office be discontinued, the Contracting States may be obliged to co-operate with one or more successor bodies, as the case may be.

The obligation refers only to agencies of the United Nations, which means that organizations established entirely outside the framework of the United Nations will not be covered by the terms of Article 35. An agency of the United Nations may be any kind of organ or organization as envisaged in the Charter of the United Nations, e.g. the Secretariat or a branch thereof, a subsidiary organ established by virtue of Articles 7 (2); 22 or 68; or a specialized agency.<sup>e</sup>

(4) The functions of the High Commissioner are laid down in Chapters I and 11 of the Statute of the High Commissioner’s Office (see note 3 supra). The enumeration of functions is subsequently supplemented by a number of General Assembly Resolutions, and it has become an established practice that if acute refugee problems arise, the High Commissioner is entitled to take action first and have it sanctioned by the General Assembly afterwards.<sup>f</sup>

It is particularly noteworthy that in spite of the provision in Article 2 of the Statute, to the effect that “the work of the High Commissioner ... shall relate, as a rule, to groups and categories of refugees” rather than to individual refugees, it is long established that the High Commissioner may - and does - intervene on behalf of individual refugees.

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<sup>c</sup> L.C.J. Reports (1949) 174.

<sup>d</sup> E/AC.32/SR.21, pp. 9 ff.; A/CONF.2/SR-25, pp. 10 ff.; A/CONF.2/SR.35, pp. 25 ff.

<sup>e</sup> Cf. Articles 57 and 63 of the Charter.

<sup>f</sup> Cf. Res. A/1039 (XI) on emergency situation created by the problem of Hungarian refugees; Res. A/1165 (XIII); etc.

As Article 35 does not limit itself to functions laid down in some international instruments it is clear that it obliges the Contracting States to co-operate in any and all of the functions of the High Commissioner's Office, irrespective of their legal basis.

(5) Supervision of the application of "international conventions for the protection of refugees" is only one of the duties of the High Commissioner's Office.<sup>9</sup>

The carrying out of this duty may be facilitated in a number of different ways. The submission of information and statistical data as mentioned in Article 35 (2) is, however, one of the means to this end.

Readiness to reply to the High Commissioner's enquiries about individual refugees or particular conditions is another important aspect of this obligation.

(6) Whereas Article 35 (1) contains a general and a particular obligation, Article 35 (2) provides for a second particular obligation, namely to submit information and statistical data "in order to enable the Office of the High Commissioner [etc.] to make reports to the competent organs of the United Nations".

As the tasks of the High Commissioner have been defined in the Statute of his Office, this is but another aspect of the general obligation contained in Article 35 (1). Article 11 (2) of the Statute provides that "the High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly".

Article 35 (2) of the Convention makes it clear that the Contracting States are obliged to furnish him with necessary information and data for this report.

However, as we have seen above, the same information and data may be of importance also for his supervision of the application of the Convention. It is consequently only in so far as the reporting is not considered an integral part of the High Commissioner's functions, that Article 35 (2) and the purpose set forth there creates a separate legal obligation.

(7) The Contracting States are only obliged to provide the High Commissioner's Office (or its successor(s)) with information and statistical data upon request, which may be a standing request or an ad hoc request.

The material shall be submitted in "appropriate form" which seems to indicate that the High Commissioner (etc.) may indicate the form in which he desires the information and data.

(8) The enumeration of material in Article 35 (2) must be considered exhaustive. On the other hand, each of the items listed may be given a wide interpretation, subject to the proviso that the material must be needed for the purpose set forth in the paragraph.

The expression "the condition of refugees" will as a rule apply to groups and categories of refugees, or refugees in general; only in those extreme cases when the High Commissioner considers it necessary to report on an individual case, will he be entitled to request information on an individual case under this heading.<sup>h</sup>

(9) There is a certain overlapping between these two provisions. The one under (b) has independent importance only in so far as it applies to implementation in other ways than by promulgation of laws, regulations, and decrees. Also statistical data will be covered by (b) but not by (c).

Letter (c) does not apply only to laws, etc. especially passed in order to implement the present Convention, but also to any law, etc. which has an effect on the status and welfare of refugees.

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<sup>9</sup> Cf. Article 8 (a) of the Statute.

<sup>h</sup> However, if he wants the information for the purpose set forth in Article 35 (1), no similar limitation applies.

It will be seen that letter (c) overlaps with Article 36, but letter (c) is wider in scope than the latter, for the reasons just mentioned.

## **ARTICLE 36** **INFORMATION ON NATIONAL LEGISLATION<sup>(1)</sup>**

**The Contracting States shall communicate to the Secretary General of the United Nations<sup>(2)</sup> the laws and regulations which they may adopt to ensure the application of this Convention.<sup>(3)</sup>**

### Comments

(1) The draft convention submitted by the Secretary-General of the United Nations to the Ad Hoc Committee, contained an Article providing that “each of the High Contracting Parties shall take all the legislative or other measures necessary under the rules of their constitution for the application of the present Convention”.<sup>a</sup>

A slightly different Article was adopted by the Ad Hoc Committee.<sup>b</sup>

The provision in question, which was not entirely without precedent (cf. Article 27 of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, of 2 December 1949; Article V of the Convention on the Prevention and Punishment of the Crime of Genocide; and provisions in the Geneva Convention of 12 August 1949) was fiercely attacked at the Conference of Plenipotentiaries, on the ground that “it was an accepted principle in international law that once a convention had been ratified it immediately came into force in the territory of the Contracting State concerned”.<sup>c</sup> The view was expressed “that States which ratified a convention were obliged to apply it. If they could not do so because their national legislation was not adopted to the needs of the Convention, then they were in default. The adoption of [draft] Article 31 would mean that defaulting States would be allowed to invoke the excuse of a reasonable delay in order to avoid applying the convention in their territory”.<sup>d</sup>

The criticized draft article was thereupon rejected by a solid majority.<sup>e</sup>

The Netherlands delegate proposed instead “a clause which would make it obligatory for the Contracting States to notify the Secretariat of the texts of the laws and regulations which they had adopted with a view to implementing the Convention. With such a clause there would be some check on the position”<sup>f</sup>

A similar provision to the one contained in Article 36 of the present Convention is found in the Geneva Conventions of 12 August 1949.<sup>g</sup>

There is - in fact if not in form - a certain overlapping between Article 35 (2) (c) and the present Article.<sup>h</sup>

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<sup>a</sup> E/AC.32/2, p. 52: Article 30.

<sup>b</sup> Cf. E/AC.32/5 (E/1618), p. 61; E/AC.32/8 (E/1850), p. 26: Article 31.

<sup>c</sup> Statement by United Kingdom delegate, A/CONF.2/SR.25, pp. 22 ff.

<sup>d</sup> Statement by Netherlands delegate, A/CONF.2/SR.25, pp. 26-27.

<sup>e</sup> A/CONF.2/SR.26, P. 7.

<sup>f</sup> A/CONF.2/SR.25, p. 27.

<sup>g</sup> Article 48 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 49 of same relating to armed forces at sea; Article 128 of the Convention relative to the treatment of prisoners of war, and Article 145 of the Convention relative to the protection of civilian persons in time of war.

<sup>h</sup> Cf. note 3 below.



It will be seen that the material submitted by virtue of the present Article is omitted in the enumeration in Article 46.<sup>i</sup>

(2) Whereas Article 35 provides for co-operation with the Office of the High Commissioner for Refugees (or its successor agencies), Article 36 prescribes that the material to which it relates shall be submitted to the Secretary-General of the United Nations.

In view of the fact that the Conference found it logical to consider the present Article in connection with the article of notifications by the Secretary-General, it is noteworthy that the latter Article, Article 46, does not mention material submitted by virtue of the present Article in the enumeration of material of which the Secretary-General shall inform all Members of the United Nations and certain non-Member States. In theory at least, the Secretary-General may be considered a “dead-end” in respect of the material mentioned in Article 36.

Unlike Article 35 (2) the present Article provides that the material shall be communicated to the Secretary-General. The obligation is absolute, and not subject to request.

(3) It was pointed out at the Conference - and admitted by the Netherlands delegate who had proposed the present Article - “that there was a certain amount of overlapping between his amendment and Article 35 as adopted ... [however, Article 35 (2)] might be consequentially revised at the second reading ... [and in any case, whereas Article 35] specified that Contracting States should provide appropriate agencies of the United Nations with any data, statistics and information requested concerning the implementation of the Convention.... the Netherlands amendment provided that Contracting States should communicate the entire texts of the relevant law and regulations”,<sup>j</sup> and it was on this understanding that the Article was adopted.<sup>k</sup>

However, said statement is hardly an accurate reflection of the difference between the two provisions.

Article 35 (2) (c) speaks of “laws, regulations and decrees” where Article 36 only mentions “laws and regulations”. The drafters apparently had the same substance in mind, and no difference may be inferred on this basis either.

The only difference between the material mentioned in Article 35 (2) (c) and that mentioned in Article 36 seems to be that whereas the former relates to all legal instruments affecting the status or welfare of refugees, the latter only applies to such which are adopted “to ensure the application of this Convention”.

It will be appreciated that certain minimum rights must be assured for refugees before or not later than the ratification of the present Convention,<sup>l</sup> but many Articles of the Convention provide for a gliding scale (e.g. “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”). If a State at the outset only grants refugees the latter treatment, it may later adopt more favourable rules. The rules in force at the time when this Convention enters into force for any particular State as well as the new rules which may be adopted and ameliorate the status of refugees, all clearly fall within the scope of Article 36 and must be communicated to the Secretary-General by virtue of this Article.

## **ARTICLE 37**

### **RELATION TO PREVIOUS CONVENTIONS<sup>(1)</sup>**

**Without prejudice to Article 28, paragraph 2, of this Convention,<sup>(2)</sup> this Convention replaces, as between parties to it,<sup>(3)</sup> the Arrangements of 5 July 1922, 31 May 1924, 12 May**

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<sup>i</sup> Cf. note 2 below.

<sup>j</sup> Statement by the Netherlands delegate, A/CONF.2/SR.26, pp. 6-7.

<sup>k</sup> Loc. cit. and A/CONF.2/SR.35, p. 26.

<sup>l</sup> Cf. note 1 above.

**1926, 30 June 1928 and 30 July 1935, the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.<sup>(4)</sup>**

## Comments

(1) The draft convention submitted by the Secretary-General of the United Nations to the Ad Hoc Committee contained a provision reading as follows:

“In the case of Parties to the Conventions of 28 October 1933 and 10 February 1938 the present Convention shall not apply to the refugees covered by these Conventions.”<sup>a</sup>

The Ad Hoc Committee found this provision completely unacceptable, because “it would deprive refugees covered by the Conventions of 1933 and 1938 of the advantages of the draft convention on which the Committee was working”.<sup>b</sup> The Committee favoured the idea that all categories of refugees should enjoy the advantages of the new Convention, which should replace the former Conventions.

However, it was thought inadvisable for Contracting States to denounce the former Conventions, at least until all the Parties to them had become Parties to the present Convention. Thus the earlier Conventions would remain in force between the States Parties to them, principally for the benefit of refugees living in countries which are Parties to the earlier Conventions but have not ratified or acceded to the present Convention.

The present Article is subject to the provisions of Articles 5, 7 (3) and 28(2).

Whenever an earlier agreement or Convention contains more favourable provisions than those of the present Convention, the States which were Parties to those earlier instruments are bound by Articles 5 and 7 (3) to continue to grant refugees covered by those instruments the more favourable treatment to which they were entitled by virtue of those agreements and conventions. On the other hand, where the present Convention contains more favourable provisions, the provisions of this Convention prevail.

(2) Article 28 (2) binds the Contracting States vis-a-vis each other to recognize even such travel documents which are being issued by virtue of previous agreements by States which are not Parties to the present Convention.

It also allows Contracting States to issue travel documents of the kinds provided by earlier agreements to which they were Parties, whenever this may be necessary because the country to which a refugee intends to go recognizes no other travel document.

(3) The effect of the present provision is that the Contracting States may not invoke the earlier international agreements relating to the status of refugees and the issue of travel documents vis-a-vis each other. Those Contracting States which still are Parties to the older agreements may, however, invoke them vis-a-vis such agreement partners which have not become Parties to the present Convention.

As we have seen the rights and benefits due to refugees under the earlier agreements have been preserved by virtue of Articles 5, 7 (3) and 28 (2).

(4) This enumeration covers the previous arrangements, agreements, conventions and protocols relating to the status of refugees and the issue of travel documents, except the Recommendations adopted by the Third General Conference on Communications and Transit on 2 September 1927, which serve as the basis for the issue of aliens passports in a number of countries.

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<sup>a</sup> E/AC.32/2, p. 52: draft Article 31.

<sup>b</sup> Statement by Danish delegate, E/AC.32/SR.22, p. 14.

It is an open question whether Article 37 applies to the Agreement relating to the functions of the High Commissioner's Office of 30 June 1928, between Belgium and France. It was called an Agreement (Accord), not an Arrangement, and a literal interpretation of Article 37 would exclude it from the operation of the present Article. However, the matter is of minor importance, because the 1928 Agreement may be considered as superseded by more or less formal agreements between the Governments of Belgium and France respectively at the one side, and the Office of the United Nations High Commissioner for Refugees at the other side.