



Explanatory Report to the European Agreement on Transfer of Responsibility for Refugees

Strasbourg, 16.X.1980

I. The European Agreement on Transfer of Responsibility for Refugees, drawn up within the Council of Europe by an ad hoc Committee on Legal Aspects of Territorial Asylum and Refugees and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe on 16 October 1980.

II. The text of the explanatory report prepared on the basis of the committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Agreement although it may facilitate the understanding of the Agreement's provisions.

Introduction

1. The preparation, in the Council of Europe, of the European Agreement on Transfer of Responsibility for Refugees has its origins in Recommendation 775, which was adopted by the Consultative Assembly on 27 January 1976 on the proposal of its Committee on Population and Refugees.

2. In that text the Assembly, basing itself on several series of considerations set out in the preamble to the Recommendation and as regards which the explanatory memorandum in Assembly Document 3703, prepared by the Committee on Population and Refugees, provides interesting particulars, recommended the Committee of Ministers to instruct a committee of governmental experts to prepare an agreement on the transfer of responsibility.

3. Reference is made in the preamble of the Recommendation to the fact that the question of transfer of responsibility, especially with regard to the issuing of travel documents, frequently creates difficulties when refugees move from one country to another; the main reason for this is that the provisions of Article 28 of the Geneva Convention of 28 July 1951 relating to the status of refugees, and of paragraphs 6 and 11 of the Schedule thereto, admit of different interpretations.

Paragraphs 6 and 11 of the Schedule to the 1951 Convention relating to the status of refugees deal with the responsibility of States for the issuing of travel documents. Paragraph 6.1 stipulates that: "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." Paragraph 11 reads: "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." Assembly Document 3703 explains that refugees sometimes find themselves in a difficult situation because those paragraphs do not state clearly what the terms "has established lawful residence", "reside lawfully", and "has lawfully taken up residence" mean, and the interpretation of these terms in

the Schedule varies from one European country to another. The result is that it is sometimes difficult to determine which State is responsible for issuing or renewing a given refugee's travel documents.

4. The Assembly also mentions that certain Council of Europe member States have concluded bilateral agreements containing clauses on the transfer of responsibility, and Assembly Document 3703 comments generally on them. ⁽¹⁾

After examining these agreements the Committee on Population and Refugees reached the conclusion, taken up in the preamble to the Recommendation, that since these agreements differed considerably in content and were applicable only between certain member States, it was highly desirable that the matter should be settled uniformly by means of a multilateral agreement between the Council of Europe's member States.

5. In the preamble of the Recommendation the Assembly also drew attention to the importance of the European Agreement of 20 April 1959 on the abolition of visas for refugees, the aim of which is to facilitate travel for refugees residing in the territory of Contracting Parties. This agreement is in force between fourteen Council of Europe member States. ⁽²⁾

6. In 1977 the Committee of Ministers of the Council of Europe decided, after examining Assembly Recommendation 775 and other recommendations concerning refugees ⁽³⁾, to set up an ad hoc Committee on Legal Aspects of Territorial Asylum and Refugees with instructions to consider these recommendations and report back on the possibility and advisability of the Council of Europe preparing a convention or other legal instrument on the matter.

After studying Recommendation 775, the ad hoc committee expressed the opinion that the practical problems confronting refugees who wished to settle in a country other than the one which issued them with their travel documents could be solved by means of a legal instrument. Acting on the ad hoc committee's opinion, the Committee of Ministers made provision, in the organisation's 1978 Work Programme, for the drafting of an agreement on the transfer of responsibility for refugees who move lawfully from one Council of Europe member State to another. The ad hoc Committee on Legal Aspects of Territorial Asylum and Refugees was instructed to prepare the draft.

(1) These agreements are the following:

- Switzerland-France: Agreement of 12 April 1960 on the movement of refugees, plus Appendix, and Agreement of 12 April 1960 on the right of return of refugee workers;
- Switzerland-Federal Republic of Germany: Agreement of 4 May 1962 on the abolition of visas for refugees (and Protocol);
- Switzerland-Benelux: Agreement of 14 May 1964 on the movement of refugees and Agreement of 14 May 1964 on the right of return of refugee workers;
- Austria-Benelux., Agreement of 12 June 1964 on the stay of refugees within the meaning of the 1951 Convention relating to the status of refugees;
- Austria-France: Agreement of 21 October 1974 on the stay of refugees within the meaning of the 1951 Convention relating to the status of refugees;
- Draft Agreement between the Benelux countries and the Federal Republic of Germany on the right of return of refugee workers.

(2) Belgium, Denmark, France, Federal Republic of Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden, Switzerland and United Kingdom. Moreover, the Agreement has been signed, but not ratified, by Cyprus and Portugal. For the declarations and reservations reference should be made to the collection European Conventions and Agreements (Strasbourg, 1971), Volume 1, pp. 313-315.

(3) - Recommendation 773 (1976) on the situation of *de facto* refugees;
- Recommendation 787 (1976) on harmonisation of eligibility practice under the 1951 Geneva Convention relating to the status of refugees and the 1967 Protocol;
- Recommendation 795 (1977) in the 20th report on the activities of the Office of the United Nations High Commissioner for Refugees.

7. Once finalised, the draft was forwarded to the Committee of Ministers, who adopted the text of the agreement and decided to open it for signature by Council of Europe member States on the occasion of the 67th Session of the Committee of Ministers on 16 October 1980.

General considerations

8. As stated in the preamble to the Agreement, its main purpose is to facilitate the application of Article 28 of the 1951 Geneva Convention and the relevant provisions of its Schedule ⁽¹⁾, by regulating in a uniform manner the question of transfer of responsibility between Council of Europe member States. To this end, the Agreement is designed particularly to specify, in the liberal and humanitarian spirit as reaffirmed by the Council of Europe member States in the Declaration on territorial asylum adopted by the Committee of Ministers on 18 November 1977, the conditions on which responsibility for issuing a travel document is transferred when a refugee moves residence from one country to another.

9. To achieve this purpose, the Agreement endeavours to strike a balance between the interests of the refugee, whose position shall in future be more clear and more stable, and those of the first and second States.

10. In this connection, it was considered important to adopt a system which did not result in a refugee being neither able to be readmitted to the first State nor regarded as established in the second State; the provisions of the Agreement should make it possible to determine in any given case which State has responsibility for the refugee.

11. So that the matter shall be regulated in a uniform manner at European level, it has been expressly provided that, from the date of entry into force of the Agreement, the provisions of bilateral agreements entered into between two Contracting Parties on the same subject shall cease to be applicable between those Parties. However, rights and benefits acquired or in the course of being acquired by refugees under such agreements are preserved (see also paragraph 36 below).

12. The Agreement also provides for the preservation of any rights and benefits which have been or which may be granted to refugees independently of the Agreement, notably under the 1951 Geneva Convention and the 1967 Protocol, under treaties, agreements or other international instruments and under domestic law, as well as under measures taken in application thereof.

It is understood that, as regards those matters which the Agreement has in view (establishment and readmission), in relations between Contracting Parties the provisions of the Agreement prevail over the corresponding provisions of the European Agreement of 1959. On the other hand, the 1959 Agreement retains in full its significance in so far as it aims to facilitate travel for refugees by freeing them of the obligation to hold a visa.

13. It is also specified in Article 8, paragraph 2, of the Agreement that none of its provisions shall be interpreted as preventing a Contracting Party from granting the benefits of the Agreement to any person not fulfilling the conditions laid down.

(1) The Geneva Convention has been ratified by all the Council of Europe member States; for the declarations and reservations see the volume published annually by the United Nations. Multilateral treaties in respect of which the Secretary General performs depository functions.

14. To facilitate application of the Agreement, it is provided that the competent authorities of the Contracting Parties may communicate directly with each other; direct contact is also provided for to settle difficulties which may arise between Contracting Parties. Such a procedure should enable an equitable and practical solution to be found speedily in most cases. Moreover, an arbitration procedure is laid down in Article 15 of the Agreement for the settlement of disputes which cannot be resolved by negotiation.

15. The commentary which follows gives more detailed information as to the scope of the Agreement's provisions.

Commentary on the provisions of the Agreement

Preamble

16. The preamble states the object and purpose of the Agreement which are described in paragraphs 8 and following of this report.

As regards the fourth paragraph of the preamble, those responsible for drafting the Agreement considered that the terms used in paragraph 11 of the Schedule to the Geneva Convention should not be departed from, even though the French and English versions do not correspond exactly.

Article 1

17. This article contains definitions of the various expressions used in the Agreement.

18. The definition of "refugee" makes reference to the definition contained in the 1951 Convention; it is taken for granted that the refugee is the holder of a travel document provided for under Article 28, paragraph 1, of the Convention. However, it was agreed that in the case of States Parties to the Geneva Convention which, although having made a reservation concerning Article 28, have nevertheless issued other travel documents, such documents should be recognised for the purposes of the application of the Agreement.

19. Given that Article 28, paragraph 2, of the Geneva Convention provides that travel documents issued under previous international agreements shall be recognised in the same way as if they had been issued pursuant to the Geneva Convention, the travel document referred to at point b of Article 1 also covers travel documents still occasionally issued under the Agreement of 15 October 1946 concerning the issue of travel documents to refugees (London Agreement).

Article 2

20. Article 2 is one of the main provisions in the Agreement. Its purpose is to specify the various conditions under which transfer of responsibility is to be considered as having occurred; these conditions are defined on the basis of objective criteria, making it unnecessary to define as well the concept of establishment found in paragraphs 6 and 11 of the Schedule to the Geneva Convention.

21. Under the terms of this Article responsibility can be transferred in four cases, the first three of which are set out in paragraph 1 and the fourth in paragraph 3.

Paragraph 1

i. In the first case, transfer occurs on the expiry of a period of two years' actual and continuous stay with the agreement of the authorities of the second State. The requirement of an actual and continuous stay was considered to be an objective criterion for judging the refugee's intention to establish himself in the territory of the second State. As to the requirement that the stay must be continuous, the provision in Article 2, paragraph 2. d, must be borne in mind. The period of two years' stay with the agreement of the State authorities was considered to be an objective criterion implicitly showing the willingness of the second State to allow the refugee to establish himself in its territory.

The reference to staying "with the agreement of the authorities of the second State" is to be understood to mean a stay with the consent of the authorities of the second State; such consent need not necessarily be denoted by formal act.

ii. The second case of transfer is if the second State has permitted the refugee to remain in its territory on a permanent basis. This clause does not necessarily imply the issue of a permanent residence permit, which is not provided for in several Council of Europe member States, but is designed to cover also cases where, regardless of the duration of the permit's validity, the stay is in fact of a permanent nature.

iii. The third case of transfer is if the second State has permitted the refugee to remain in its territory for a period exceeding that of the validity of the travel document. It was not considered necessary to specify in this provision the period of validity of the return clause appearing in the travel document, for, as is provided for in paragraph 13, sub-paragraphs 1 and 3, of the Schedule of the Geneva Convention, the period of validity of the return clause, save in exceptional cases, is identical to that of the travel document, namely two years in the practice of the vast majority of Council of Europe member States. In such cases, as in those referred to under ii above, responsibility is transferred before the completion of a period of two years' stay and as soon as the refugee is permitted to remain in the territory of the second State.

As the legislation of some member States provides that students shall be permitted to remain in the territory concerned for longer than the period of validity of their travel documents, provision has been made for the possibility of making a reservation in respect of this provision which will enable a State with such legislation to declare that responsibility will not automatically be transferred on the strength of this provision in the case of refugees admitted solely for study or training purposes.

22. The second sub-paragraph of paragraph 1 specifies the date from which the period prescribed in the preceding sub-paragraph begins to run, in particular in cases where the date of the refugee's admission into the territory of the second State has not been established; in such cases the period will begin to run when the refugee carries out the formalities required of aliens on their entry into the territory of the second State or, at the latest, when he applies for a first residence permit. It is understood that when a refugee has entered the territory of the second State without a visa, by virtue of the provisions of the 1959 European Agreement (see paragraph 5 above), and prolongs his stay with the second State's agreement, the period begins to run from the date of entry. Moreover, it should be observed that the application of the Agreement in cases where a stay following illegal entry is subsequently regularised, is not ruled out.

Paragraph 2

23. Article 2, paragraph 2, explains how the two-year period referred to in the first sub-paragraph of paragraph 1 is calculated.

The types of stay in the territory of the second State which are not taken into account in the calculation of the two-year period are specified in sub-paragraphs a and b.

One is concerned here with stays which are not considered as reflecting any intention on the part of the refugee to establish himself in the territory of the second State or any wish on the part of the State to authorise the refugee to establish himself there. The categories of stay referred to in these provisions correspond to those generally specified in the bilateral agreements to which Council of Europe member States are Parties (see paragraph 4 above). Thus stays authorised solely for the purposes of studies, training or medical care are mentioned; the term "training" supplements the word "studies" and has been employed notably with a view to covering any course of instruction in preparation for the exercise of a profession or trade. Obviously, if the nature of the stay subsequently changes, time will begin to run. It was thought necessary to include the word "solely" to enable a refugee staying for other purposes in the territory of the second State to take up studies, to take a course of training or to undergo medical treatment (e.g. in the event of an accident) without thereby suspending the period stipulated in Article 2, paragraph 1.

In this connection it should be pointed out that no mention has been made of visits, since they are normally of short duration and, barring a subsequent change in the purpose of the stay, are consequently not of a nature to create conditions warranting the application of Article 2, paragraph 1.

Periods of imprisonment of the refugee imposed in connection with a criminal conviction are also mentioned among the stays which are not taken into account for the purposes of transfer of responsibility; this wording covers equally periods of detention pending trial, which are accordingly not taken into account if the refugee is subsequently convicted of a criminal offence. If, on the other hand, the refugee is authorised to remain despite a conviction, transfer can take place on the conditions provided for by the Agreement.

Special rules are contained in sub-paragraph c for cases in which a refugee has appealed against a decision refusing him residence or ordering his removal, it being provided that the period during which the refugee is allowed to remain in the territory of the second State pending a decision on his appeal is not taken into account; consequently the first State continues to be responsible for issuing the travel document. However, if the decision on the appeal is favourable to the refugee, the period during which he was allowed to remain in the territory pending the decision will be taken into account.

Lastly, sub-paragraph d takes account of the fact that the refugee may require to leave the territory of the second State temporarily in the course of the two-year period; it is provided that the two-year period will continue to run in the case of a single absence not exceeding three months or of several successive absences not exceeding a total of six months. On the other hand, if the refugee's absence from the territory of the second State exceeds six months, the condition in Article 2, paragraph 1, requiring two years' continuous stay will not be fulfilled and transfer of responsibility will not be able to take place until the conditions stipulated in Article 2, paragraph 1, are fulfilled again.

Paragraph 3

24. Paragraph 3 mentions a fourth case in which transfer of responsibility is deemed to have taken place. Given that Article 4 provides that readmission must be applied for within a certain period, it is obvious that, once this time has passed, responsibility must be considered as having been transferred.

25. It should be noted that it is in particular in the situations referred to in Article 2 that States are likely to have occasion to avail themselves of Article 8, paragraph 2.

Article 3

Paragraph 1

26. With the objective mentioned in paragraph 10 above in mind, it is reiterated that until transfer of responsibility takes place, it rests with the first State to renew or extend the travel document, even if the process of the refugee's integration in the second State has already commenced.

Paragraph 2

27. The wording of paragraph 2 is designed to enable the refugee to apply for an extension or renewal of his travel document to the first State's diplomatic missions or consular posts authorised to carry out such functions, instead of having to return to the first State for this purpose. If a given mission or post is not authorised to carry out such functions, it is nonetheless obliged to forward the refugee's application to the appropriate authorities in the first State. Unlike Article 6, paragraph 2, of the Schedule to the Geneva Convention, this paragraph places no limit on the length of time for which the travel document's validity may be extended by a diplomatic mission or consular post.

Article 4

28. The purpose of this Article is to secure that refugees who are not already established in the territory of the second State can be readmitted to the territory of the first State, and to fix the conditions for readmission.

Under the terms of paragraph 13 of the Schedule to the Geneva Convention, each Contracting State undertakes that the holder of a travel document issued by it shall be readmitted to its territory at any time during the period of its validity. This obligation is maintained under Article 4 of the present Agreement and its scope widened, because the period of its application is longer than that provided for in the Schedule to the Geneva Convention.

Paragraph 1

29. Under this provision the second State is able to request the first State - at the refugee's instance, should the occasion arise - to readmit the refugee after the expiry of his travel document, provided the request is submitted within six months following the expiry of that document. This provision may be applied, for example, to a refugee who has allowed his travel document to expire and neglected to apply for its renewal; in such a case the second State may request the first State to readmit the refugee before transfer of responsibility takes place. At the same time, it follows expressly from Article 2, paragraph 3, of the Agreement that if the second State does not request readmission within that time, responsibility is transferred.

Paragraph 2

30. A stay with the agreement of the authorities of the second State is a condition for transfer of responsibility. However, the search for an equilibrium between the reciprocal obligations of the first and second States made it necessary also to settle cases in which a refugee, holder of a travel document, is present in the second State without the knowledge of its authorities or evades their control. By virtue of Article 14, a reservation can be made in respect of this provision.

Article 5

31. Although this Article concerns the transfer of responsibility for the issuing of a travel document, it is implicit that following such transfer the second State must grant to the refugee the rights and advantages flowing from the Geneva Convention.

Article 6

32. This Article anticipates family reunion and refers to the refugee's spouse and minor or dependent children; however, it should not be interpreted in such a way as to prevent States from adopting or maintaining a more liberal practice in this field.

Article 7

33. This extra possibility afforded to competent authorities to communicate directly with each other does not affect the normal diplomatic relations maintained by the Contracting Parties.

Article 8

Paragraph 1

34. Those responsible for drafting the Agreement were anxious that it should not have the effect of depriving refugees of any benefits which they might enjoy, in particular under the 1951 Geneva Convention. This is the purpose of Article 8, paragraph 1, the text of which corresponds to a provision embodied in a number of Council of Europe conventions and agreements.

Paragraph 2

35. This provision of the Agreement makes it possible for the benefits of the Agreement to be granted to persons who do not fulfil the prescribed conditions, for example the persons referred to in Recommendation E of the Final Act of the 1951 Geneva Conference. Similarly, the Agreement should not be interpreted as preventing the first State, taking into account the wishes of the refugee, from readmitting the latter to its territory and renewing his travel document even after the expiry of the period necessary for the transfer of responsibility, which could be desirable in certain circumstances (see also paragraph 25 above).

Paragraph 3

36. The term "bilateral agreements" includes agreements between a State and a group of States, such as those concluded between a given State and the Benelux (see also paragraph 11 of the general considerations above).

Articles 9 to 17

37. These Articles contain the final clauses of the Agreement, which with the exception of the provisions of Article 13 - are based on those normally embodied in Council of Europe instruments, as reflected in the model clauses adopted by the Committee of Ministers of the Council of Europe.

38. As regards Article 11, it is recalled that in practice a decision of the Committee of Ministers to invite a non-member State to accede is normally taken after consulting the Contracting Parties which are not members of the Council of Europe.

39. Article 13 covers the situation arising from the fact that for some States the Geneva Convention applies subject to the limitations provided for under Section B.1. of Article 1 of the Convention, as well as subject to certain reservations.

40. As regards Article 14, it would seem appropriate to emphasise that the scope of the reservations provided for in the Annex to the Agreement is restricted to the provisions expressly referred to in the text, i.e. paragraph 1, first sub-paragraph, of Article 2 in the first case and paragraph 2 of Article 4 in the second case. A particular consequence of this is that if a State invokes the principle of reciprocity *vis-à-vis* a State having made a reservation, a State which has made the first reservation will be bound by the provisions of paragraph 1 of Article 4 concerning readmission of refugees, and a State which has made the second reservation could have opposed to it the provisions of paragraph 3 of Article 2 relating to transfer of responsibility.