# PERSONAL STATUS OF REFUGEES: THE ORIGINAL INTERNATIONAL SOLUTION

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**Abstract:** In science, it is always an inner pleasure to find and explore topics that are not yet known or are entirely marginal. The personal status of refugees belongs to a problem not sufficiently scrutinised by legal science. The question was an inseparable component of the legal status of Russian and Armenian refugees. The primary problem of how to stabilise the situation of Russian and then Armenian refugees was the issue of identity certificates. After a series of recommendatory arrangements the intergovernmental conference adopted the Arrangement Relating to the Legal Status of Russian and Armenian Refugees in the summer of 1928. The Arrangement did not become an internal constituent of international law. Its nature was meta-juristic. The standard contained in § 2 governed the personal status of Russian and Armenian refugees. The normative scheme of the provision was of an alternative nature. The standard included three connecting factors: domicile, habitual residence and residence. The former and the last were recognised as legal concepts. Their content absolutely depended upon the context of each national legal order. The concept of habitual residence was closely associated with reality. Habitual residence was a full derivative of reality.

**Resumé:** Ve vědě je vždy vnitřní potěchou nalézat a zkoumat témata dosud neznámá nebo zcela okrajová. Osobní postavení uprchlíků bylo problémem, který stál stranou analytického zájmu mezinárodněprávní vědy. Téma bylo neoddělitelnou součástí právního postavení ruských a arménských uprchlíků. Prvořadým problémem, jak řešit situaci ruských a posléze arménských uprchlíků, bylo vydání průkazů totožnosti. Až po sérii ujednání bylo mezivládní konferencí připraveno Ujednání o právním postavení ruských a arménských uprchlíků. Ujednání nebylo vnitřní součástí mezinárodního práva ani se neřídilo jeho pravidly. Doporučení obsažené v ustanovení § 2 upravilo osobní postavení uprchlíků. Jeho normativní schéma bylo malým alternativním řadem, který zahrnul tři hraniční určovatele: domicil, obvyklé bydliště a bydliště. Domicil a bydliště byly ustálenými právními pojmy. Oba pojmy zcela závisely a kontextu vnitrostátního práva. Kdežto obvyklé bydliště byl odvozeninou reality.

**Key words:** contextual analysis, legal concept, factual concept, refugee, legal status, personal status, citizenship, nationality, domicile, habitual residence, residence, sojourn.

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## 1. The problem or the question

The legal status of refugees was depicted by the League of Nations and its member states as a question and a problem at the same time. Routinely, a problem does not eliminate questions but poses them. Adversely, questions articulate a problem. Sometimes they set up a circle or chain of problems. Questions are always of problematic configuration. The states and organs of the League of Nations initially delimited the identity of the problem of refugeehood. Immediately after the High Commissioner for Refugees of the League of Nations took office he was entrusted with defining the legal status of refugees.[1] Member states and non-member states of the League of Nations were meeting in inter-governmental conferences in order to seek solutions for singular aspects of the refugee problem. They employed a non-binding recommendation rather than a valid international treaty as the method of an internationally legal solution. They named the recommendation "*arrangement*" without taking into consideration inconsistent usage of this term in international practice. The first arrangements based on a political consensus regulated the issue of identity certificates. These papers issued to the refugees acquired international validity on the basis of such an agreed instrument. Then the *ad hoc* definition of Russian and Armenian refugee came into light. Not until 1928 was the Arrangement relating to the Legal Status of Russian and Armenian Refugees accepted by the states.[2]

The personal status of refugees is one of the structural components of their legal status. Three forms of personal status emanated in the state practice. The first form refers to two fundamental capacities: legal capacity and capacity to act. Whereas the second form includes legal issues on marriage and family matters, such as entering into marriage, dissolution of marriage, divorce, responsibility towards children, adoption, guardianship unless they are under the contractual regime. The third form of legal status covers succession of movable as well as immovable property.

The object of this contextual analysis refers solely to the first form of personal status – the legal capacity and capacity to act – in respect to Russian and Armenian refugees. The mere presence of these refugees on the territory of the receiving state which provided them with surrogate protection could result in a conflict of laws. The legal status of migrants and the status of stateless persons[3] were not uniform. Their situation in receiving states was unstable and legally precarious. The law of their original nationality (*ancienne loi nationale*) could have applied to the personal status of refugees. Therefore, the question was if the applicable law should refer to the former tsar or actual soviet legal order. Soviet law of those times was a combination of the revolutionary conscience determined by class thought.

The law of domicile, residence, habitual residence or the law of sojourn could have been applied to the personal status of refugees too. The 1928 Arrangement should have remedied the lack of uniformity and eliminated the legal uncertainty of Russian and Armenian refugees'

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1 August 20, 1921 Dr. Fridtjof Nansen was appointed by the Council of the League of Nations to become High Commissioner on behalf of the League in connection with the problem concerning Russian Refugees in Europe. He accepted the appointment as of September 1, 1921. See HOPE SIMPSON, J. *The Refugee Problem.* London: Oxford University Press, s. 199.

2 Arrangement Intergouvernmental du 30 juin 1928 relatif au statut juridique des réfugiés russes et arméniens.

3 The text uses the concept of "nationality" and "citizenship" in respect to their direct context of national or international law.





living conditions. However, the state parties were not willing to change national laws; they were not prone to any binding legal action. A conflict between the objective purpose and subjective intention of states occurred and was not overthrown.

The national laws of the respective states referred to different interconnecting factors. These terms (such as nationality or citizenship, domicile, residence) were relative legal concepts. Their content was ultimately linked to certain legal rules and their normative context. Moreover, these concepts usually played different roles. Their conceptual role was subject to the purpose of the specific rules of the national legal order. The sole concept of non-legal character appeared in § 2 of the Arrangement relating to the Legal Status of Russian and Armenian Refugees. This was habitual residence and served as an alternative to domicile. The content of the concept of habitual residence was the result of reality; it was quite dependent on the real facts.

The legal and personal status of Russian and Armenian refugees is intentionally presented in the Czechoslovak normative and social context and confronted with the non-binding international standards. After World War I, not only the foundations of the Czechoslovak state were in progress but also its legal order, taken from the Austrian-Hungarian state, had to be gradually amended. The state was identical to the legal order, in accordance with the normative doctrine then so strong in some academic circles. This was indeed a radical doctrinal approach. In the noetic perspective, to examine the state meant to examine its legal order.

## 2. Various sources

In the 20s of the preceding century no special national rules (*leges speciales*) governing the legal status of Russian and Armenian refugees existed. As of April 12, 1926 the Council of Ministers of Egypt (*Conseil des Ministres*) pronounced its binding decision to the Minister of the Interior to draft legal measures for Russian refugees. The Minister ordered approval of two national instruments (*arrêtés*), however, with restricted personal competence.[4] These regulations related only to the status of Russian refugees. The status of Armenian refugees was totally different.[5] Some Armenian refugees located in Egypt who possessed Turkish passports were under the consular protection of Turkey. Despite this passport, their legal status was not certain. On the other hand, there were other Armenians regularly resident in Egypt who possessed passports of the Great Powers. They were of no interest to the Turkish consular offices.

Both Egyptian regulations constituted evidence to the contrary of the uncertain and brittle legal status of refugees in almost all states of their actual stay. National rules of private international law, which were dispersed in various legal sectors, were applicable to Russian refugees. Moreover this international legal particularism considerably influenced the legal status of refugees despite the dualistic relationship of international and national law. The political and ideological isolation of the Soviet socialist state was not unconditional. Sometimes the countries regulated the legal status of refugees by the agreement entered into

4 *Arrêté du* 11 Mai 1926, relatif aux personnes dorigine russe habitant le territoire égyptien, Journal Officiel No 45 du 13 Mai 1926, annexe II; *Arrêté du* 31 Mars 1926, portant tarif des droits à percevoir par les chefs de la communauté russe en Egypte, Journal Officiel No 58 du 3 juin 1926 Egypte, Journal Officiel No 58 du 3 Juin 1926, annexe II.

5 Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 65.

with the tsar state. Some states, mainly in the neighbourhood, negotiated post revolution agreements with the Russian Soviet Federative Socialist Republic (RSFSR), with the Ukrainian Soviet Socialist Republic (USSR) or with the Soviet Union after 1922.

Notwithstanding the customary rules on succession of states in relation to international treaties, the legal status of Russian refugees in Switzerland conditioned the trade convention concluded between the tsar Russia and Switzerland in 1873. The entrance and residence of Russian refugees was governed by the regime of tolerance (*regime de tolérance*).[6] The peace treaty signed in Riga on March 18, 1921 among RSFSR that was mandated to act on behalf of the USSR and the Belorussian Soviet Socialist Republic (BSSR) and Poland, specified the modes of acquiring nationality in Article 6. The interests of Russian nationals were under the diplomatic and consular protection of the Soviet government. Certainly *de iure* or *de facto* recognition of the Soviet government might have aggravated the legal status of Russian refugees. Nevertheless, Russian and Ukrainian refugees residing in Poland could have accepted or refused the protection of the Soviet state. If they by their choice refused the protection, they enjoyed the right of asylum in Poland and could not have been extradited for political reasons.[7]

Czechoslovakia negotiated the preliminary treaty both with Russia[8] and Ukraine in two subsequent days.[9] Czechoslovakia recognized the governments of both states *de facto*. Czechoslovakia was hoping for democratic changes in both soviet countries. Based on these two treaties, the legal status of refugees was mutually recognized. Both instruments set up the identical provision (Article 9), based on reciprocity (*quid pro quo*).[10] This provision is the most favoured nation clause offered to the citizens of both states.

First Russian refugees were entering Czechoslovakia before the preliminary treaty was signed and immediately after the restoration of the statehood.[11] A significant part of the refugees was composed of soldiers from the western part of Ukraine. Of course these soldiers were immediately repatriated. Further inflow of refugees came from the Baltic areas. Major groups of Russian refugees came into the Czechoslovak territory after 1921 when the white

6 League of Nations. Russian Refugees. Summary of the Documents received by the Secretariat on this subject since the 12th Session of the Council, C.126.M.72, 1921, Annex 8, 12.727, May 12 1921.

7 League of Nations. Russian Refugees. Summary of the Documents received by the Secretariat on this subject since the 12th Session of the Council, C.126.M.72, 1921, Annex 9, No 664, May 25 1921.

8 Regulation of the Czechoslovak government as of August 7, 1922 on provisional entering into force of the interim treaty between the Czechoslovak Republic and Russian Soviet Federalist Socialist Republic; (Nařízení vlády republiky Československé ze dne 7. srpna 1922, jímž se uvádí v zatímní platnost prozatímní smlouva mezi republikou Československou a Ruskou socialistickou federativní sovětskou republikou (No. 258/1922 Collection of laws and regulations).

9 Regulation of Czechoslovak government as of August 7, 1922 on provisional entering into force of interim treaty between Czechoslovak Republic and Ukrainian Soviet Socialist Republic; (Nařízení vlády republiky Československé ze dne 7. srpna 1922, jímž se uvádí v zatímní platnost prozatímní smlouva mezi republikou Československou a Ukrajinskou socialistickou sovětskou republikou. (No. 259/1922 Collection of laws and regulations).

10 Article 9 of Preliminary Treaty: "RSFSR and CSR nationals shall enjoy on the territory of the other state all general civil rights and favours which are reserved or will be reserved to the nationals of third countries except for rights and favours which are reserved to the nationals of neighbouring countries to the RSFSR in it."

11 To the Czech peoples; National Letters magazine (Českým lidem, Národní listy), 12 March 1919: "I am healthy, and regrettably alive!" was recently written by one of the noblest Russians, former speaker of the Russian Duma, Chomjakov. There is no more horrible tragedy than such an exclamation of an old man whose father was the apostle of Russian Slavicity."





guards were defeated in the southern part of Russia. Charitable assistance was taken mainly by non-governmental organisations, out of which the Czechoslovak Red Cross was quite prevalent. According to the Czechoslovak government, Russian refugees should have been regarded as guests of the Czechoslovak nation. The government offered help to the refugees by organizing the so called *Russian action* which lasted almost until the end of the 20s. Such assistance was a part of the long-term foreign policy of reconstruction not only for humane reasons but also because of brotherly sentiment and Slavic ideology.[12]

Russian students[13] and farmers, mainly Don Cossacks, were invited into the Czechoslovak Republic from Constantinople, Gallipoli or Lemnos in 1921 in organized groups. In accordance with circular No. 22382 of the Ministry of the Interior, dated March 24, 1921, the Russian nationals were provided with interim documentation immediately after their arrival: identity certificates for the purpose of their stay in the Czechoslovak Republic. The certificate had legal effect exclusively within the national jurisdiction; it lacked international validity. Subsequently, these certificates did not allow refugees to move freely, even though this was a recommendation requested by the League of Nations and its High Commissioner for Refugees. Refugees were not allowed to travel to other states in order to seek occupational positions or support from their friends.

Other Russian refugees came individually with travel documents or without any identity cards. They often avoided duties to report to local authorities. Many of them stayed illegally in the Czechoslovak territory for a long time. Some Russian refugees tried to obtain identity certificates at the so-called Russian diplomatic missions before and after the entry into force of the preliminary agreement. Unofficial representation was led by General Leonthev and V. Rafalski. Neither of these two personalities was a recognized RSFSR representative and the Czechoslovak Ministry of Foreign Affairs did not officially accredit either representation. Any identity certificates of foreign persons could have been legalised only at the Russian Department of this Ministry. The Ministry of the Interior, responsible for state security, had emphasized a search for persons who had not been properly issued valid or any identification documents.

Based on notification No. 47129-II., dated December 21, 1921, the Ministry of Foreign Affairs was requested by the League of Nations[14] to report the exact number of refugees in Czechoslovakia. The High Commissioner for Refugees F. Nansen was charged with executing this task. Based on the circulars of the Ministry of the Interior dated March 24, 1921, No. 22382 and of August 25, 1921, No. 64722 all Russian and Ukrainian citizens living in the territory of Czechoslovakia should possess a certificate. The certificate permitted refugees to stay there. According to the legal principle of promulgation, the ministerial circulars had to be made public in order to avoid misunderstandings.

Both instructions were updated at the end of the same year by the circular for registration of Russians and Ukrainians. According to the Ministry of the Interior, circular No. 99884-5, dated December 30, 1921, all Russian and Ukrainian citizens had to be in possession of a passport issued by the Russian Department of the Ministry of Foreign Affairs.[15] The certificate entitled

12 BENEŠ, E., *Úvahy o slovanství: hlavní problémy slovanské politiky*. Praha: Čin, 1947, 2. vydání, p. 234.

13 BENEŠ, E., *Pět let zahraniční politiky československé*. Praha: Orbis, 1924, p. 18.

14 The text of the circular used the wording "Union of Nations" (*Svaz národů*).

15 Gazette of the Ministry of Interior of the Czechoslovak Republic, 1922, year IV., p. 9.

its holder to stay in Czechoslovakia. Those individuals who did not possess the certificate were obliged to request one as soon as possible.

Russians and Ukrainians living in Prague who had some Russian or Ukrainian personal certificate could address themselves directly to the Russian Department. They had to present their certificate accompanied with two pictures. Those Russians and Ukrainians who had no personal identity certificate and lived in Prague were obliged to personally submit the Czech or Russian application for issuance of such a certificate. The request had to be recommended either by an officially authorized Russian or Ukrainian organization or by at least two Czechoslovak citizens. The application contained the following information: name and surname, birthplace, date and year of birth, previous and current employment (if possible, employer confirmation), exact address, place from where the person arrived and when he or she arrived in Czechoslovakia. Refugees living outside Prague filled out an application with the Ministry of Foreign Affairs through the relevant district political administration. In Slovakia, refugees addressed themselves to the county offices. District or county offices attached a reference to their file stating whether they recommend their stay or not.

Even the government regulation dated June 9, 1921, which was the basis for interim legal police provisions on passports, did not rectify the provisional status.[16] The regulation conserved the general passport and visa obligation. The inferior legal act in its § 2 stipulated the requirements which the passport of the alien must comply with. However, these requirements stipulated by the regulation were less requiring than those stipulated by the 1922 Arrangement.[17] A government regulation issued at a later time[18] allowed exceptions from the general visa obligation for some states.[19] However, the states from where the refugees arrived into Czechoslovakia were not among those exceptions to the general visa obligation. The regulation did not simplify the arrival of Russian refugees in any way, and their number had been rising sharply at that time. Legal instruments for the residence of foreign individuals and refugees were not affected by the regulation.

Refugees had to comply with the general visa requirement. The government had been empowered to issue a regulation that restricted the passport obligation in full or in relation to certain states. If exceptional circumstances or important public interests, such as state security, important economic interests of the state, or the principle of reciprocity with other countries occurred, the government would be able to repeal the visa waiver completely or in part.[20] The general passport obligation implied that the alien was allowed to stay in the territory of Czechoslovakia only during the period of validity of the visa. Once the visa expired, the foreign individual could have been extradited. There was no legal recourse to the issue or extension of the visa. The competent authorities had proceeded to issue a visa at their discretion.[21] No remedy existed to appeal against the decision to not grant the visa.

16 Regulation of the Government No. 215/1921 Collection of Laws and Regulations.

17 Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922. *League of Nations, Treaty Series*, Vol. XIII, p. 237.

18 Regulation of the Government No. 207/1923 Collection of Laws and Regulations.

19 Gradually, the visa obligation with France including Algeria and Morocco, Gdansk, Luxemburg, Portugal or Switzerland had been abrogated.

20 Provision § 9 paragraphs 1 a 2 Act. No. 55/1928 Collection of Laws and Regulations.

21 LAŠTOVKA, K., *Československé správní právo. Část zvláštní. I díl.* Praha: Melantrich, 1936, p. 47.





In the matter of the visa obligation, circular No. 18354/21 of the Ministry of Foreign Affairs was rigid. It stipulated high consular fees, which had become almost an insurmountable barrier to legal entry into the Czechoslovak territory. That was why the refugees resorted to crossing the state border outside of the border checkpoints. By this government regulation, the foreign nationals were obliged to report themselves within 24 hours of their arrival in each municipality. Foreign nationals had to report to the police office, to the notary in small municipalities in Slovakia and Sub-Carpathian Russia or to the police captain in cities.

Circular No. 9700-5, dated February 12, 1922 reported a high number of immigrating Russian nationals.[22] Ships with Russian nationals who had transit visas from the Czechoslovak consulates in Athens, Belgrade and Constantinople were arriving by the Danube river daily. Passage through the territory was allowed for a maximum of three days. The state authorities suspected refugees of having the intention to work in Czechoslovakia and to settle permanently. In accordance with the notification of the Ministry of Foreign Affairs No. 6026/II, dated January 20, 1922, the border control authorities were ordered not to impose any obstacles on Russian and Ukrainian nationals entering and leaving the Czechoslovak territory. They had to keep their free movement into other European countries, or further to non-European countries. Because, apart from naturalization *en masse* or repatriation of refugees, the idea of colonization was considered by F. Nansen to be one of the solutions.

Those Russian refugees who had chosen illegal crossing of the state border had not become welcome guests but could have been considered undesirable by the Czechoslovak authorities. Nevertheless, the issue of a residence permit was not rejected in this case either. The rejection of the request was subsequently linked to the problem of extradition. The political authorities did not have sufficient means to expel undesirable persons during this period.

The Russian Department of Foreign Affairs addressed the problem of refugee residence on a case-by-case basis. The department allowed a short-term stay for a period of one month for unsuspicious individuals who did not commit serious misdemeanours. Applicants had to meet the requirement to get a job within a specified time. Refugees were not allowed to live on state support or to be dependent on charity. Refugees who fulfilled the conditions were granted a one-year residence permit.

The circular of the Ministry of the Interior No. 23501-5, dated April 10, 1922, on registration of Russians and Ukrainians contained the conditions for the renewal of one-year residence permits. The Ministry of Foreign Affairs proposed through notification No. 39.016/22-II, dated March 11, 1922, that the authorities empowered to extend the validity of one-year passes were to be district political administrations and county offices in Slovakia and the Sub-Carpathian Russia territory.[23] They charged the state police offices with this agenda. The competent authorities extended the residence permit for another year, though revocable, unless there were any serious objections to the residence of persons of Russian and Ukrainian origin. Based on this circular, the authorities were obliged to quarterly draw up lists of extended permits as well as the denials of extension. The decisions denying residence to foreign nationals had to be briefly reasoned separately in each case.

22 Gazette of the Ministry of Interior of the Czechoslovak Republic (Věstník ministerstva vnitra Republiky Československé), 1922, year IV., p. 39.

23 Gazette of the Ministry of Interior of the Czechoslovak Republic, 1922, year IV., p. 95.

The Austro-Hungarian regime of legal dualism was abolished by the Act of March 29, 1928 on passports that removed the previously scattered provisions in this field.[24] The Act abrogated the basic statutes for Bohemia, Moravia and Czech Silesia: two imperial regulations[25] and the vast Ministry decree on police passport rules.[26] The Hungarian Act on passports of 1903, detailed by the accompanying decree of the Ministry of the Interior issued the following year, was still in force in the territory of Slovakia and Sub-Carpathian Russia until the new act came into force.[27] These statutes did not contain any provisions on refugees who were deprived of their nationality. The law removed the lack of uniformity in the passport regime and complied with two international passport conventions concluded in Paris on October 21, 1920 and on May 18, 1926 in Geneva. The Act replaced the existing provisions introduced by notifications and circulars of ministries as well.

This Act introduced a more rigorous passport regime not only for security reasons but also for economic and social grounds.[28] One of the aims of the law was to protect the labour market. According to provision § 2, aliens were not allowed to cross the border and stay in the republic without a passport. Without a distinction between Czechoslovak citizens and aliens, the general passport obligation was in force for any journey abroad. However, this statute responded favourably to the recommendations of the intergovernmental conferences on refugees. Provision § 5 contained an exceptional rule to facilitate freedom of movement for refugees. The reasons for its approval were practical.[29] The provision entrusted the provincial authorities with the competence to issue documents similar to a passport to stateless persons and to persons whose nationality could not be ascertained. Based on this competence rule the provincial authorities – political authorities of II instance – were authorized to issue special passports: Nansen Passports.[30]

The law corrected the institutional relations of cooperation among the central state administration bodies, but also the powers of the provincial and district offices. The law was based on the principle of competence that passport matters fall within the authority of the Ministry of the Interior. The Ministry of Foreign Affairs ruled over diplomatic passports as well as passports issued to foreign employees in accordance with the customary rules of general international law.

Nansen's passports for Russian and Armenian refugees (*certificat d'identité pour les réfugiés*) differed from regular travel documents. These passports were identity certificates with international validity.[31] They replaced the national passports issued to citizens residing in the country for their travel to certain countries. These passports were issued subject to the regular stay of refugees in the territory of Czechoslovakia. Those certificates ceased to be valid at the moment of entering the territory of the state of origin. However, these passports allowed refugees to travel among states. Their holders were permitted to leave the state that

[24] Act No. 55/1928 Collection of Laws and Regulations.

[25] Regulation No. 31/1857 Collection of Laws and Regulations and No. 116/1865 Collection of Laws and Regulations.

[26] Decree No. 80/1867.

[27] Circular of the Ministry of Interior No. 70.000 ai 1904 B. M.

[28] Důvodová zpráva, vládní návrh zákona o cestovních pasech, Senát Národního shromáždění, 1927, II. volební období, 5. zasedání, tisk 535.

[29] *Ibid.*

[30] KALOUSEK, V. Pasy cestovní. In: HÁCHA, E., HOETZEL, J., WEYR, F., LAŠTOVKA, K. *Slovník veřejného práva československého*. Svazek III., P až Ř. Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 29.

[31] Mexico and Germany as non-members states to the League of Nations accepted their vigour in 1922.





issued them. They were allowed to enter and stay in another country. Keeping alive the general visa regime was a continuing consequence of the World War. The visa was still the equivalent of a permit to cross the border and to reside.[32]

Visas were issued very carefully to refugees by states unless such a passport allowed the refugee to return to the country of its issuance. In accordance with the Arrangement of May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Czechoslovakia accepted a political commitment to issue return visas if the states concerned applied the same principle.[33] Subsequently, according to the 1928 Arrangement relating to the Legal Status of Russian and Armenians Refugees, some states had introduced a return clause into Nansen's passports. The clause simplified the process of granting the visa. Otherwise, it was always difficult for refugees to be granted the permission to enter or reside.

International identity certificates (*instrumenta publica*) had produced a variety of legal effects. The passport validated the identity of the person for whom it was issued. It contained details of its holder: name, first name, date and place of birth, father's and mother's surname, occupation, former residence in Russia and current residence. The latter, as well as the fact that the person is of Russian origin, were essential for determining the legal and personal status of refugees. Besides, the passport included a photograph of the holder and his detailed description (age, hair, eyes, face, nose and other personal traits).

The passport had not only of the effects of a genuine refugee certificate of identity. It allowed the holder to access social security or employment in the country of asylum.[34] It also ensured a residence permit in the state where the passport had been issued by the competent authority. Nevertheless, the system of international identity certificates had never reached universal application. The practice of states that recognized Nansen's passports[35] had turned away from the expected uniformity, particularly in terms of the rights and benefits granted to refugees. The recommendations resulting from the Arrangement were executed by the states in a non-homogeneous and lenient way. The issuance of these certificates had been undermined by the rigid and formal approach of the state organs in many countries. The cautious attitude of states towards issuing these passports was later reflected in the discussions on their extension to stateless persons.[36]

## 3. Form of the normative result

The practical situation of Russian and Armenian refugees was so far based on the content of the concept of law.[37] National legal orders predominantly included *leges generales*. In particular, civil codes governed the legal status of foreign or stateless persons, sometimes also

[32] Důvodová zpráva, vládní návrh zákona o cestovních pasech, Senát Národního shromáždění, 1927, II. volební období, 5. zasedání, tisk 535.

[33] Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922, and May 31, 1924, May 12th, 1926. *League of Nations, Treaty Series*, Vol. LXXXIX, s. 47.

[34] HOLBORN, L. W. The Legal Status of Political Refugees, 1920-1938. *American Journal of International Law*, 1938, Vol. 32, No. 4, p. 683.

[35] As many as 155 000 Nansen Passports were issued.

[36] League of Nations Documents, Transit. 1927.VIII.15.III.

[37] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 5.

of persons whose nationality was unknown, on the basis of reciprocity or without it.[38] The general principles or rules of private law disregarded the unique situation of Russian and Armenian refugees. The application of the general rules caused the unfavourable consequence of their unequal position *vis-à-vis* foreign persons. Czechoslovak central authorities, the Ministry of Foreign Affairs and the Ministry of the Interior, frequently utilized circulars or decrees to regulate the situation of refugees in the long run. Obviously, no rights or claims could arise from such instructions.[39] The laws are only the proper source of certain rights or claims. The stable legal status of refugees, which would provide legal certainty, was lacking.

The establishment of the legal status of refugees turned out to be a vital task for part of the international community. Solving the problem extended beyond single state borders. In the opinion of the Czechoslovak Minister of Foreign Affairs, the question of Russian refugees could not be satisfactorily solved without concerted action (*action concertée*).[40] The Ministry suggested that the Secretariat should develop a scheme for dealing with all legal questions as well as private law issues. A collective solution should have established the stability and the unity of the legal status of refugees. The accomplishment of the task could bring stability to the public relations of refugees with the host state as well as to the confusing network of private law relations between refugees and natural and legal persons in their country of residence. Its realization should have established legal certainty as the formal value of law and overcome possible injustice.

The Advisory Committee for Refugees (*Comité Consultatif pour les Réfugiés*) required that the legal status of refugees should be clearly defined and established. Russian organizations associated within the Advisory Committee of Private Organizations proposed a resolution to conclude a convention under the auspices of the League of Nations for this purpose. The concept of a *convention* was fundamental and quite decisive in its meaning. Irrespective of the diversity of the names of the consensual sources of international law, the term "convention" referred to a legally binding instrument. The term had traditionally been found within the linguistic framework of international law. The term assumed the negotiation of an international treaty. It clearly referred to one of the forms of international law. Article 38 of the Statute of the Permanent Court of International Justice included the main term in plural.[41] The Statute mentioned both general and particular conventions.

The draft of the Resolution of the Advisory Committee of Private Organizations was approved and submitted to the Assembly of the League of Nations. The plenary body called on its 8th regular session of the High Commissioner to convene only a small conference.[42] The intergovernmental conference could rather result in a particular convention and not a general convention. The conference took over the assignment to prepare resolutions on the refugee status issue and to submit them to the Council. The invitations to the conference were sent to seventeen governments. The common interest as a reflection of political need to

[38] Compare the civil codes of France and Italy.

[39] See WEYER, F., Instrukce. In: HÁCHA, E., HOETZEL, WEYR, F. J., LAŠTOVKA, K., *Slovník veřejného práva československého*. Svazek II, I až O. Brno: Polygrafia – Rudolf M. Rohrer, 1932, p. 12-13.

[40] League of Nations. Russian Refugees. Summary of the Documents Received by the Secretariat on this subject since the 12th Session of the Council, C.126.M.72, 1921, VII, Annex 6 (45/12692/12334), letter No 16065/21, May 10, 1921.

[41] *League of Nations, Treaty Series*, Vol. VI, s. 380.

[42] League of Nations. Legal Status of Refugees, Note by the Secretary-General, Geneva, December 6, 1928, O.392.M.103.1928.VIII, s. 2.





resolve the refugee problem brought together the invited states. However, representatives of only 15 governments of predominantly European countries attended the Geneva meeting.[43]

One of the first questions that required a preliminary or subsequent answer was about the form of the negotiated result.[44] The purpose of intergovernmental negotiations was either to prepare a recommendation or a convention. The form of the result became initial and decisive as well; it predetermined the purpose of the conference. The Convention was supposed to include commitments to which the parties would have reached an agreement. A properly negotiated and valid international convention would enjoy legal effect in mutual relations among the parties. The valid convention would be under control of the principle *pacta sunt servanda*. The Convention would thus create a binding scope for legislative actions of state authorities towards refugees as well as for the mutual behaviour of the parties. On the other hand, the recommendation would not become an inner part of international law.

The memorandum prepared by the Committee of the Russian and Armenian Expert Lawyers (*Comité des experts juristes russes et arméniens*) was taken as the basis for discussions.[45] The Memorandum offered clarification of the situation of refugees that had been characterised by the absence of a stable and clearly defined legal status.[46] The Memorandum included proposals to prepare the presupposed amendments in national legislation.[47] However, the states were not determined to accept international legal commitments that would oblige them to prepare legal measures. According to the chairman of the conference, Mr Delaquise, it was easier to approve a resolution in the form of a recommendation that would not oblige states to legislate changes.[48] On the other hand, the form of the recommendation allowed states to continue to regulate the status of refugees freely on the basis of laws, by-laws and internal instructions.

During the exchange of views, an argument of rationality or prudence was used to justify the preparation of the recommendation rather than the convention. A convention concluded in full required ratification by national parliaments, which would have been difficult to achieve.[49] Nevertheless, an argument in favour of the negotiation of an international convention, the validity of which would lead to effective stability of the legal and personal

[43] Belgium, Bulgaria, Czechoslovakia, Estonia, Egypt, Finland, France, The Kingdom of Serbs, Croats and Slovenes, Lithuania, Germany, Poland, Austria, Rumania, Greece and Switzerland.

[44] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28 – 30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 110: "Le president souligne que M. Martius a soulevé une question sur laquelle la Conférence peut prendre une décision ultériurement, à savoir: la forme de recommandation ou de convention à donner aux résultats de la Conférence."

[45] Mémorandum élaboré par le Comité des experts juristes russes et arméniens sur le statut juridique des réfugiés russes et arméniens, Document LSC/I-1928.

[46] League of Nations. Legal Status of Refugees, Note by the Secretary-General, Geneva, December 6, 1928, O.392.M.103.1928.VIII, p. 3.

[47] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28 – 30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 110: "En effet, les propositions contenues dans le mémorandum des experts touchent à la législation nationale et pourraient entraîner modifications à apporter à la législation existante."

[48] *Ibid.*, p. 110.

[49] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28 – 30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 111.

status of refugees, had risen in the discussion.[50] The convention would be capable of instituting legal effects in the national order. In addition, it would be possible to commit all the organs of the state, mainly by regulation of the legal status of persons and the resulting rights or claims. Under required legal conditions, the courts could directly apply the rules of the ratified and promulgated international treaty.[51] At the same time, the recommendation could not oblige any addressee to make legislative amendments or could not even result in the direct applicability of the provision.

The delegations of the participating countries voted in favour of the recommendation.[52] They relied on the practice of existing arrangements that were prepared at intergovernmental conferences under the auspices of the League of Nations.[53] All arrangements relating to Russian and Armenian refugees included only recommended standards as reasons for non-binding conduct.

Despite its nature, the 1928 Arrangement was listed in the League of Nations Treaty Series. Under Article 18 of the Covenant, none of the international treaties negotiated by a member of the League of Nations could become binding unless it was registered by the Secretariat.[54] The registration did not introduce any of these arrangements into international law. The registration was not able to ensure a radical change in the form of the Arrangement and its particular provisions. Through this registration the Arrangement did not revert to a particular convention binding the States.[55]

The content and concepts used therein determined the nature of the Arrangement. The binding international treaty and the content of its normative sentences usually enumerate international legal obligations. Yet it emerged from the text of the Arrangement that government representatives agreed on the need to define the legal status of Russian and Armenian refugees more clearly. To that end, nine resolutions were adopted which contain principles. Each resolution begins with the phrase *il est recommandé*. The passive voice used in conjunction with these words expressed the common intention of the representatives of states not to impose any international rights and obligations as subjective normative modes.

The final part of the 1928 Arrangement expressed the hope that the representatives of individual governments would announce at the meeting of the Assembly of the League of Nations what measures the participating states had taken to implement the provisions. Czechoslovakia implemented the recommendations in the following manner. On May 16, 1929, the Ministry of Foreign Affairs sent letter No. 102/29 to the Secretary General through a permanent representative at the League of Nations. The letter, being

[50] *Ibid.*, pp. 111–112.

[51] *Ibid.*, p. 112.

[52] *Ibid.*, p. 112: «Toutefois, il convient de relever que les délégations de la Conference se sont surtout exprimées en faveur *d'une re*commandation.»

[53] Ratification of agreements and conventions concluded under the auspices of the League of Nations. Annex to the Supplementary Report on the Work of the Council and the Secretariat to the Fourteenth Ordinary Session of the Assembly of the League of Nations. Official No. A. 6(a). 1933, Geneva, September 15th, 1933.

[54] Art. 18 of the Covenant of the League of Nations reads as follows: "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."

[55] VICHNIAC, M., Le statut international des apatrides. *Collected Courses of the Hague Academy of International law.* Leiden: Martinus Nijhoff, 1933, Vol. 43, p. 220.





a part of diplomatic correspondence, was classified as political and general. It was registered under the number 1A /12086/11812 and its object was completed in handwriting: *Réfugiés, Arrangement du 30 Juin 1928. Adhésion de la Tchécoslovaquie.*[56] The French expression *adhésion* used therein could be confusing in its meaning. Such a legal concept belonged to a linguistic class of international treaty law. In international practice, such an approach represented an act by which the state in the international environment agrees to be bound by a treaty.[57] Nevertheless, the meaning of the concept, or the meaning of a term, had already been settled in relation to other ways of expressing such an agreement with an international treaty.

The diplomatic letter of the permanent representative mentioned the decision implemented by the Czechoslovak government. The government decided to accede (*décidé d'adhérer*) to the Arrangements on Refugees of July 5, 1922, May 31, 1924, May 12, 1926, and June 30, 1928. The personal scope of application of the Arrangement was strictly limited. The declaration included only persons who lost their Russian or Turkish nationality before January 1, 1923 without acquiring any other nationality. The declaration applied to Russian refugees who were deprived of their nationality under a decree issued on December 15, 1921. Other Russian refugees who lost their nationality after the decisive date were excluded from the national implementation of specific provisions. The last Soviet law was issued no sooner than April 22, 1931. In the case of Armenians, the Turkish law of April 15, 1923 confiscated all of their property first. Another law promulgated on March 23, 1927 decided on deprivation of Turkish citizenship. Moreover, many Armenian refugees were deprived of their nationality on the basis of an individual administrative decision after the given date.

The permanent representative announced to the Secretary General that the Czechoslovak government accepts the obligations, unless they constitute a derogation from the current legislation. The unilateral declaration is quite linguistically contradictory because it contains the term *obligation*. The declaration mingled political language with legal language. However, in the penultimate paragraph, the Ministry reserved the possibility to withdraw the acceptance of the recommendation.[58] In the opinion of the Czechoslovak Ministry of Foreign Affairs, it was not possible to see anything other than a manifestation of the agreement with the principles of the Arrangement; it was an expression by which Czechoslovakia did not accept any legal obligations. The unilateral declaration to accept the list of arrangements on refugees was considered as an expression of consent that did not result in any international legal obligation to implement the principles agreed during the intergovernmental conference. In any case the declaration was not subordinated to the principle of *acta sunt servanda*.

The report of January 11, 1930 to the President of France noted that the intergovernmental conference held at the end of June 1928 studied various issues of the legal status of refugees and proposed measures to improve their regime that should be applied. The report stated that the Arrangement significantly improves the legal situation of the refugees.[59] On this basis,

[56] *Société des Nations*, archives 1928-1932, registry No. 1A/12086/11812.

[57] MASTNÝ, V., Kodifikace mezinárodního práva. In: HÁCHA, E., HOETZEL, J., WEYR, F., LAŠTOVKA, K., *Slovník veřejného práva československého*. Svazek II, I až O. Brno: Polygrafia – Rudolf M. Rohrer, 1932, p. 209.

[58] *Société des Nations*, archives 1928–1932, registry No. 1A/12086/11812: "En ce qui concerne l 'arrangement de 1928 le gouvernement tchécoslovaque se réserve la possibilité de retirer à n 'importe quel moment son acceptation de la récommandation conférant au Haut Commisaire le droit d'assurer par son représentant aux réfugiés les services mentionnés dans l'arrangement en question."

[59] *Journal Officiel de la Republique Française*, 17 janvier 1930, No. 14, p. 570.

the Assembly of the League of Nations approved a number of resolutions requiring Member States to bring the previous arrangement and agreement into practice.[60] The President subsequently signed the decree. Article 1 of the Decree, dated January 11, 1930, provided that the 1928 Arrangement relating to the Status of Russian and Armenian Refugees would be published in the Official Journal and would enter into force on February 1, 1930 in full, in so far as it was compatible with the laws and regulations, with the exception of Article 1 of the Agreement concerning the Functions of Representatives of the League of Nations High Commissioner for Refugees, on June 30, 1928.[61]

The requirement of compatibility characterized the approach of the Czechoslovak and French authorities to the 1928 Arrangement. Compatibility was a unilateral and absolute condition for the national implementation of the Arrangement. The national law of both states was in a primary and irreplaceable position. National law was superior to non-binding arrangements. The principles of the 1928 Arrangement could only be implemented within the limits of national law. However, the French President signed the decree as a unilateral administrative act of a regulatory nature which bound specific members of the government. The decree contained no general rule applicable to an unspecified class of addressees. On the other hand, the individual ministers referred to in Article 4 were responsible for the execution of the decree.

Unlike a decree, the declaration was a diplomatic act. The declaration of Czechoslovakia could not have the same effect as a decree. Even with the ratification of the 1933 Convention relating to the International Status of Refugees, which was concluded on the day of the Czechoslovak national holiday, none of these arrangements became an integral part of this Convention and thus were not binding on Czechoslovakia.[62] Although Article 16 of that Convention provides that the Arrangements and Agreement of July 5, 1922, May 31, 1924, May 12, 1926, and June 30, 1928 should, in so far as they had been adopted by the Contracting Parties, remain in force as regards such of their provisions as are compatible with the present Convention.

## 4. Memorandum

The preparation of the Arrangement was based on the mutual cooperation of the political and expert bodies of the League of Nations. International expert bodies had been effectively involved in the drafting of the Arrangement. At a meeting held on September 7, 1927, the Consultative Committee on Refugees addressed the legal situation of Russian and Armenian refugees. The Consultative Committee was working with the documents provided by the Central Commission for the Study of the Status of Russian Refugees (*Commission Centrale pour l'étude de la condition des réfugiés russes*).[63] The Consultative Committee reiterated that the legal status of refugees lacked stability. As regards the personal status of refugees, the Consultative Committee had worked on the requirements of the Central Commission. The Consultative Committee proposed to use the law of factual domicile (*la loi de leur domicile de fait*).[64] It was not clear from the proposal whether there was a semantic equality between the concept of factual domicile and the concept of actual domicile. The concept of actual domicile (*domicile actuel*) was originally used in relation to the personal status of an individual at a session of the Institute of International Law (*Institut de Droit International*) held in 1870.

The factual domicile (*domicile de fait*) played the role of a leading concept in the draft prepared by the Consultative Committee. The concept was proposed to be the sole connecting factor for the personal status of refugees and questions of their marriage. A specific proposal required the possibility of a refugee being the guardian of a refugee of the same origin.[65] On the other hand, actual domicile took only a supportive position in the drafts of the Institute. The role of the concept was to solve the conflict of law of a citizen of a federal state where different civil laws applied in the lands. Nationality became the governing concept to regulate the personal status of an individual. The principle of nationality acquired superior status in the contemporary legal thinking of many distinguished lawyers. The concept was incorporated into the rules of the private international law of a number of countries. Definitely, the principle of nationality referred to the laws of the state of which a person was a national.

Russian and Armenian refugees were without diplomatic and consular protection. In case of unknown nationality, the Institute prepared another solution during the Brussels meeting in 1879. Under Article VI of the proposal, the laws of his domicile governed the status and capacity of a person whose nationality was unknown. The participants of the Institute meeting in Oxford in 1880 reached final acceptance of the general principle governing the personal status of individuals.[66] The principle adhered to the proposal and retained a subsidiary place of domicile for persons who were unilaterally deprived of nationality.

In the methodological framework, solving the problem implied the obtaining of legal knowledge from individual states. The High Commissioner for Refugees sent letter No. R 409/0/6 dated January 31, 1928 to the governments of sixteen states.[67] The High Commissioner stressed *inter alia* that the problem of the legal status of refugees is not the exclusive matter of these individuals.[68] The letter was accompanied by a set of six questions, where the first and second question included an array of sub-questions.[69] The first sub-

[60] Accord du 30 juin 1928 relatif au fonctionnement des Services du Haut-Commissaire de la Société des Nations pour les Réfugiés.

[61] *Journal Officiel de la Republique Française*, 17 janvier 1930, No. 14, p. 571: «L'arrangement relatif au statut juridique des réfugiés russes et arméniens, signé à Genève, 30 juin 1928, arrangement dont la teneur suit, sera inséré du *Journal officiel* et sera mis en viguer, le 1er fevrier1930, dans toute la mesure compatible avec les lois et règlements, à l'exception du paragraph 1er, auquel est substitute l'accord signé le même jour, à Genève, par la France et la Belgique, relatif au fonctionnement des Services du Haut-Commissaire de la Société des Nations pour les Réfugiés.»

[62] *League of Nations, Treaty Series*, Vol. CLIX.

[63] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 7.

[64] *Ibid.*, p. 8.

[65] *Ibid.*, p. 9.

[66] Institut de Droit International, Session d'Oxford, 1880, Principes généraux en matière de nationalité, de capacité, de succession et d'ordre public, p. 1.

[67] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, pp. 10-12.

[68] *Ibid.*, p. 11.

[69] *Ibid.*, p. 12.

question of Question II concerned the personal status of refugees. The question was worded as follows:[70]

*Quelle est la loi qui régit le statut personnel des réfugiés russes et arméniens, notamment dans le cas où le statut de l'étranger est déterminé par sa loi nationale?*

*What is the law applicable to the personal status of Russian and Armenian refugees, namely in the case where the status of a foreign person is determined by the law of nationality?*

The fundamental part of the question was meaningful and targeted. This constructively asked question required an explanation as to which law is applicable to the personal status of Russian and Armenian refugees. That part of the question envisaged a statement of what connecting factor would be used to determine the personal status of refugees. The auxiliary part of the question contained the presumption that the national law applied to the legal status of the foreign individual. In many countries, the main connecting factor was nationality (*lex patriae*).

The answers of governments to this question were, by way of exceptions, totally incomplete. There prevailed short answers as to the legal status of foreigners and in addition a depiction of the situation of Russian and Armenian refugees in general. Some replies were supplemented by texts of laws or other legal regulations. Nevertheless, the Committee of the Russian and Armenian Expert Lawyers prepared, on their basis, a critical analysis of the legal situation. The Committee found that no general rule (*lex generalis*) applicable to the personal status of refugees existed. The continental legal system was characterized by the diversity of solutions and that was the main cause of instability and legal uncertainty. Such a heterogeneous condition did not touch only refugees but it also impaired the position of natural and legal persons with whom they entered into private legal relations.

In many states, the law of the country of origin was applicable to the personal status of refugees, although their bond of nationality had been disrupted. The Committee therefore distinguished two contrasting situations. The personal status of Russian refugees was regulated in the country of asylum by the Tsarist or Soviet laws. In Belgium, in principle, foreign laws could have been applied unless they were contrary to public policy. However, Soviet law was not recognized in Belgium. Nonetheless, Russian refugees could not claim the application of the Tsarist laws because of their personal status. The local law (*la loi locale*) was applicable to both Russian and Armenian refugees and to other stateless persons.[71]

According to the reply of the government of Germany, the problem of applying either the Tsarist (*la loi ancienne*) or the Soviet law (*le droit actuel*) was not solved uniformly. The practice in the Weimar Republic was prone to applying the law of the Soviet state.[72] The Introductory Act to the Civil Code of August 18, 1896 contained in Article 7 (1) a rule, the structure and purpose of which were established on the penetrating idea of nationality. The law of the state to which the person belonged was applicable to legal capacity.[73] Recognizably,

[70] *Ibid.*

[71] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 33.

[72] *Ibid.*, p. 73.

[73] Einführungsgesetz zum Bürgerlichen Gesetzbuche. Vom 18. August 1896. Reichsgesetzblatt, Band 1896, Teil I, Nr. 21, p. 605: „Die Geschäftsfähigkeit einer Person wird nach den Gesetzen des Staates beurteilt, dem die Person gehört."





such a general legal solution was paramount and corresponded to the recommendations of the Institute of International Law of 1880.

The situation of an individual who was not in any bond of nationality with the state or such a bond could not be ascertained had to be absolutely certain and legally balanced. The legal relationship of a person who did not belong to any state was governed by the law of the state to which he previously belonged. If a person had not previously belonged to any state, his legal status was governed by the law of residence (*Wohnsitz*). If a person had no residence, his legal status was governed by current sojourn (*Aufenthalt*) or sojourn during the reference period.[74]

The German Introductory Act provided for a safe legal situation for distinct situations. The concepts of residence and sojourn had a subsidiary conflict role in relation to the concept of nationality. The Introductory Act regulated the legal relations of refugees in Article 29 without using the term *heimatlos*, which refers to stateless persons. The act had thoroughly created a descending scale of legal concepts. All the concepts used were of a legal nature. Their content was exclusively linked to the conceptual system of German law. These linguistic units were concepts of a relative rather than absolute nature. Concepts of an absolute nature should have had only one clear-cut and universal meaning in law as a whole.[75]

The Committee considered the least perfect solution where the legal relations of refugees were governed by newly enacted laws.[76] The application of Soviet laws was contrary to the public order or created difficult situations in succession questions of a deceased refugee. Article 29 of the German Introductory Act referred to the use of Soviet law in succession matters. The Soviet law on succession was incompatible with the German legal system. It was only the Act on German-Russian Agreements of October 12, 1925 which regulated the inheritance of persons who had lost Russian nationality before the Act's entry into force and had not acquired any other nationality in its Article 4. The German law was applied to the succession of the rights of the testator under this Act if the deceased had his residence or sojourn in the territory of the Weimar Republic.[77] Only the legal concept of residence and sojourn as connecting factors were applicable to determine the law.

Switzerland also relied on the principle of nationality for a long time. The Private Law of the Canton of Zurich in 1853 distinguished between the personal status of citizens and aliens. The personal status of both groups of individuals was administered by *lex patriae*. Private international law in force in Switzerland referred to the application of laws in accordance with the principle of nationality (*la loi nationale*). Art. 7a of the federal law on questions of

[74] Einführungsgesetz zum Bürgerlichen Gesetzbuche. Vom 18. August 1896. Reichsgesetzblatt, Band 1896, Teil I, Nr. 21, p. 609: „Gehört eine Person keinem Staat an, so werden ihre Rechtsverhältnisse, soweit die Gesetze des Staates, dem eine Person angehört, für maßgebend erklärt sind, nach den Gesetzen des Staates beurteilt, dem die Person zuletzt angehört hat, und wenn sie auch früher einem Staat nicht angehört hat, nach den Gesetzen des Staates, in welchem sie ihren Wohnsitz und in Ermangelung eines Wohnsitzes ihren Aufenthalt hat oder zu der maßgebenden Zeit gehabt hat."

[75] KRČMÁŘ, J., *Úvod do mezinárodního práva soukromého. Část I. Propedeutická*. Praha: Bursík & Kohout, 1906, p. 224.

[76] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Societé des Nations, XIII. Réfugiés 1930, p. 20.

[77] Gesetz über die deutsch-russischen Verträge von 12. Oktober 1925. Vom 6. Januar 1926. Reichsgesetzblatt, Band 1926, Teil II, Nr. 1, p. 1.

the civil law of settled or resident citizens had stipulated that the status of persons whose nationality could not be determined is governed by Swiss civil law.

The Committee favoured the application of the laws of the former nationality of refugees. It considered such a solution of the personal status of a refugee to be the most favourable and in accordance with the concept of law.[78] This concerned in particular the rights of refugees acquired under the laws previously in force in their homeland. On the other hand, a large circle of European states applied domicile to determine the status of stateless persons. According to the legal opinion of the Latvian government, Russian and Armenian refugees should not be subject to any legal effects of the former state's legislation. This view was also justified by a moral argument. After all, these individuals were deprived of their bond of nationality by the will of the state. Therefore the status of these refugees was governed by the Latvian acts based on the principle of their place of residence.[79]

Also, English law in principle used domicile and not nationality to regulate the personal status of individuals. Such a rule might not have caused any adverse consequences or any questions of application. In practice, however, there might have been cases where refugees had domicile in a state where the law applicable to personal status was determined by nationality. In these anticipated cases, the English courts would hear evidence of the law in force in the country of residence and apply the same law as the local courts.[80]

Egyptian law differed from civilian or Anglo-Saxon legal solutions. In this country of Islamic law, the legal and personal status of individuals was determined according to their religious affiliation. Citizens of the Egyptian state, the former subordinates of the Ottoman Empire, but non-Muslims, could bring their case to courts founded by the religious community. The Armenians were guaranteed access to such a court of confession. But the questions of custody and guardianship were dealt with by special courts of general jurisdiction to which all Egyptians had access. Russian refugees confessing to the Orthodox faith were not under any court jurisdiction. However, there was no jurisdiction gap as Russian refugees could seek protection in the same court as Muslims (*Charés*).[81]

The Committee noted another exceptional formation of international legal relations between sovereign states and dependent territories. Refugees who resided in the territory under an international protectorate or a mandate set up under Article 22 of the Covenant on the League of Nations had been in an anomalous situation. The allied powers split mandates into three groups. Group A included some territories of the former Ottoman Empire, such as Palestine, Iraq, Syria, Lebanon and Armenia. In the case of Group A, the mandate provided advice and assistance and did not exercise sovereignty over the territory.[82] The United Kingdom administered Palestine and Iraq, while France took care of Syria and Lebanon. The Committee suggested that the law of the protector or mandatary should be applied to the

[78] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Société des Nations, XIII. Réfugiés 1930, p. 20: «C'est la solution la plus favourable aux réfugiés et la plus conforme à leur notion de droit.»

[79] *Ibid.*, p. 56.

[80] *Ibid.*, p. 60.

[81] *Ibid.*, p. 65.

[82] OSUSKÝ, Š., Společnost národů. In: HÁCHA, E., HOETZEL, J., WEYR, F., LAŠTOVKA, K., *Slovník veřejného práva československého*. Svazek IV, S až T. Brno: Polygrafia – Rudolf M. Rohrer, 1938, p. 503.





personal status of refugees who were residing in these territories.[83] As far as stateless persons were concerned, French or English laws regulated their personal status according to their domicile.

The diversified legal status led to extremely unfavourable consequences as soon as the refugee moved and resided in the territory of several states for short periods. With the exception of the natural rights guaranteed by civil codes or laws, the refugee could not have been the bearer of rights stemming from his personal status; particularly when the laws of a number of states diversely regulated the age of acquisition of legal capacity. An individual refugee was considered a minor in one territory and an adult in another territory. The national rules on the status of refugees could refer to Tsarist or Soviet laws. Recognition of this legislation should not hinder public order.

The Committee wanted to remove the causes of the insecure and dangerous personal status of refugees. In contrast to the Advisory Committee, an international body composed of Russian and Armenian legal experts did not work with the concept of factual domicile (*domicile de fait*). The Committee decided to resolve the legal problem in a different way. The Committee proposed that habitual residence (*résidence habituelle*) should be applied to determine the personal status of refugees.[84] Adoption of such a proposal would mean a breakthrough solution to the destabilized personal status of refugees as individuals deprived of their bond of nationality. Habitual residence was meant to be the only and homogenous connecting factor and no other subsidiary connecting factor should have been employed.

The idea of utilizing habitual residence in unification conventions was born during the Hague Conference on Private International Law. Since the outset of the conference process, it aimed at a determination of the conflict of laws in personal status. Natural persons should have enjoyed legal certainty and security in private law situations that combined two or more legal orders. The idea of using habitual residence as a connecting factor was an atypical and original act at the same time. Even though the conference took over the notion from a social sphere in which habitual residence fulfilled a different conceptual role.[85]

Originally, the concept of habitual residence (*gewöhnliche Aufenthalt*) was an elemental component of the descriptive definition of support domicile (*domicile de secours, Unterstützungswohnsitz*). Residence of that kind was a precondition for the acquisition of rights under the German Support Residence Act of June 6, 1870. The empire act was not applicable in Alsace, Bavaria and Lorraine. Consequently, the partial notion of poverty law was transferred to the bilateral agreement concluded between Belgium and Germany in 1878 on social matters. The concept gained international recognition at least between two states. The agreement modified the competency issue of the matter of a person's pauper certificate for social purposes. In all cases, the authority empowered to issue the declaration or confirmation to the foreign individual was determined by his habitual residence.

Article 15 of the 1896 Convention on Civil Procedure, prepared by the Hague Conference on Private International Law, corresponded to a bilateral arrangement with a sole significant distinction. In addition to the concept of habitual residence, the concept of actual residence

[83] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Société des Nations, XIII. Réfugiés 1930, p. 21.

[84] *Ibid.*, p. 20.

[85] See § 10 of the act (Gesetz *über den Unterstützungswohnsitz, Bundesgesetzblatt des Norddeutschen Bundes, 1870, Nr. 20, p. 360).*

(*résidence actuelle*) appeared in the provision if habitual residence could not be established. Both concepts were related to each other. Jointly they shared one basic element, the place where the person resides or where he returns.

However, Article 2 of the 1902 Hague Convention on Guardianship did not refer to habitual residence as a connecting factor.[86] Article 7 of the Hague Convention required the adoption of urgent measures in the interest of a minor alien that could be decided by a competent local authority on the basis of the habitual residence of the minor. The purpose of the provision rested on the principle of proximity, which was dependent on a reasonable settlement of the legal relationship. The provisions linked the child to a local authority empowered to take measures to protect the best interest of the child.

At the Hague conference session in 1928, unifying attention was also paid to amendments in the conflict-of-law regime of marriages.[87] It was proposed that the law of the place of habitual residence should govern the capacity of stateless persons. On the other hand, the Geneva intergovernmental conference intended that habitual residence should take on a new conceptual role. The concept, the content of which is the result of the facts, should clearly define the legal order governing both the personal status and the family relations of Russian and Armenian refugees. According to a memorandum drawn up by the Committee, habitual residence should have eliminated the varying legal status of refugees and guarantee their secure legal position.[88]

The Committee proposed that the laws of habitual residence should govern the personal status of refugees. At the end of the drafted sentence, the concept of domicile appeared next to habitual residence. Both interrelated concepts share one characteristic: the ability to govern the status of stateless refugees. The Memorandum placed the concept of domicile in parentheses, but only after the notion of habitual residence. The Committee did not enlighten the semantic relationship between these two concepts. The course of the negotiations revealed that there was rather a semantic inequality between them. They were not interchangeable, totally or even partially. These concepts were not synonyms at all.

## 5. The Preparation of Provisions

The question of involvement of Russian and Armenian legal experts was included among the preliminary issues at the negotiations of the intergovernmental conference. Even though the Committee of Russian and Armenian legal experts had compiled a memorandum, the attendance of this body and its direct participation in the preparation of the arrangement was by default problematic. The extent of the participation of individual Russian and Armenian legal experts was being considered based on the formal nature of the conference. The conference meetings could have been publicly accessible or held *in camera*.

According to the chairman, complicated or technical legal issues, difficult for the general public's comprehension, were the object of these discussions. In addition, the chairman was

[86] Convention du 12 juin 1902 pour régler la tutelle des mineurs.

[87] Convention du 12 juin 1902 pour régler les conflicts de lois en matière de mariage.

[88] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28 – 30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Société des Nations, XIII. Réfugiés 1930, p. 20: «Vu l'absence de la loi nationale le statut personnel du réfugié apatride devrait être régi, non par les lois qui varient selon les déplacements de l'intéressé, mais par une loi certaine et fixe: cele du lieu de sa résidence habituelle (domicile).»





expecting a more open debate if the public was not in attendance at the discussions. Despite this reasoning, an acceptable solution was proposed which was in line with the objective of the participating representatives of states and the anticipated result of the intergovernmental conference. Based on the proposal of the chairman, the public could attend the opening of the conference, the general debate, decision-making and the final part of the conference. Whereas, the debate on detailed issues was to take place with the exclusion of the public. Russian and Armenian lawyers were allowed to join in the discussions.[89]

The proposal of the first paragraph of provision § 2 in the memorandum was with the following wording:[90]

*Que le statut personnel des réfugiés apatrides russes et arméniens, dans les pays où leur ancienne loi n'est plus reconnue, soit régi par la loi de leur résidence habituelle, ou, à défaut de résidence de résidence habituelle, par la loi de leur résidence.*

*The personal status of Russian and Armenian stateless refugees in countries where their former law is no longer recognized shall be governed by the law of their habitual residence or, in the absence of their habitual residence, by the law of their residence.*

The proposal retained the refugees' relationship to the former law to which the refugees have been linked by the principle of nationality. The proposal did not seek a negative purpose of total exclusion of any effects of the former law on the personal status of the refugees. It did not condemn the broken bond of nationality by the states' will to do so as an immoral deed. The proposal allowed the application of the former law to the personal situation of the refugees. As soon as the former laws were not accepted, whether on the basis of public order or any other reason, the personal status of the Russian and Armenian refugees was governed by the laws of their habitual residence. Habitual residence became the basic connecting factor of the personal status of the refugees. The conceptual role of habitual residence lay in the consolidated designation of the law by which the status of these persons, without diplomatic and consular protection, was governed. Residence was only in a secondary, auxiliary position.

The content of the concept of habitual residence was descriptive and factual. The concept referred to specific facts. Such facts, or circumstances, were described and sorted out by it. The concept had immediate contact with reality as a referent. The main objective of the concept was to designate the precise place where the person stayed. Its personal status was governed by the laws set by this place. The content of the concept did not depend on national law. It did not get into direct sematic collision with concepts whose content was of a legal nature. Not even with the concept of residence, which was purposefully found to be subsidiary. Residence could have been applied only when refugees did not settle and did not establish a habitual residence. Contrariwise, the concept of residence retained its legal content. Residence was a legal construct dependent on the legal order in which it was formed by using it. The proposed hierarchical ratio between the factual and the legal concept had not been verified until then.

During the discussion, the representatives mainly evaluated the compatibility of the proposal with the national regulation on the personal status of the refugees. The proposal did not fully correspond with such a national solution. Nevertheless, it was not in stark

[89] *Ibid.*, p. 108.

[90] *Ibid.*, p. 117.

disagreement with the private law legislation of most of the participating countries. The proposal was closest to the Romanian legislation, as was proven by two ministerial letters dated April 17 and May 1, 1928. The second letter stated that in the scope of private international law the laws of their domicile or habitual residence governed the personal status of stateless persons, even if it may have been forced.[91]

As long as the Russian and Armenian refugees stayed on Romanian territory their personal status was governed by its national laws.[92] However, other states did not incorporate habitual residence into their private law, not even Germany, in whose pauper laws the concept had been first introduced. This happened despite the fact that the Hague conference on private international law started to apply the concept during the *fin de siècle, even though not as a connecting factor at first. The legislation of the individual states prescribed domicile for the regulation of the eligibility of stateless persons and their family relations.* Nevertheless, neither nationality nor residence or sojourn were excluded as connecting factors.

The Polish representative pointed out the difficulty of the task with which none of the meetings of the Hague conference was able to deal with.[93] During the VI meeting of the Hague conference the use of habitual residence as the sole connecting factor for regulation of the legal capacity to marry in relation to stateless persons was proposed.[94] The proposal came from the German delegate. The task of presenting a final solution to the problem of personal status seemed to be an insurmountable barrier when different legal regimes still persisted.

A number of delegates pointed out the fact that the national law in force is not fully in line with the proposal of provision § 2. The French representative thought it only natural and practical that the law of domicile governs personal status.[95] His statement fully corresponded to the wording of the French Civil Code of 1803. The Civil Code uses domicile in Art. 102-105 as a legal concept. Domicile is a place where a person has primarily settled (*principal établissement*) with the intention of residing there. The French provision did not define domicile as the centre of the person's activity.

The Civil Code adopts the Roman legacy in relation to the two conceptual assumptions. The Code maintains conceptual continuity and unity. The binary content of the concept is formed by generally known components – *factum et animus*. However, the French representative added that the situation of refugees tends to be unlike than of other persons. Determining the domicile of these people may be more complex. In the case of absence of domicile, the personal status of refugees was to be governed by the laws of their habitual residence.

Most representatives were of the opinion that the proposal was acceptable and so it was not necessary to change the national laws based on the provision. Nevertheless, the French

[91] *Ibid.*, p. 51: «Les réfugiés russes et arméniens entrent, du point de veu du droit international privé dans la catégorie générale des sans-patrie (heimatlos), de sorte que leur statut personnel est gouverné par la loi de leur domicile, ou de leur, résidence habituelle (ou même forcée).»

[92] *Ibid.*, pp. 51-52.

[93] *Ibid.*, p. 118.

[94] Expectations were not met even at the 7th Hague conference of international private law.

[95] Documents préparatoires et procès-verbaux de la conférence intergouvernmentale pour le statut juridique des réfugiés 28–30 Juin 1928. Arrangement et Accord du Juin 1928. Série de Publications de la Société des Nations, XIII. Réfugiés 1930, p. 117: «Il est à la fois naturel et pratique de considérer que les personnes sont soumises à la loi du pays de leur domicile.»





representative summed up the findings of the speakers and suggested the laws of the country of domicile be referenced. During the upcoming meetings, the chairman of the conference added domicile to the proposal of provision § 2. He justified the amendment by easier acceptance of the draft.[96] Following this change, the proposal of the provision stated as follows:

*Que le statut personnel des réfugiés apatrides russes et arméniens dans les pays où leur ancienne loi n' est plus reconnue soit régi soit par la loi de leur domicile, soit par la loi de leur résidence habituelle, ou, à défaut de résidince habituelle, par la loi de leur résidence.*

*The personal status of Russian and Armenian stateless refugees in countries where their former law is no longer recognized shall be governed by the law of their domicile or by the law of their habitual residence or, in the absence of their habitual residence, by the law of their residence.*

The proposal was accepted with no opposing vote. With regard to the dissolution of the marriage of spouses analogous changes were made to the draft of the arrangement. The Latvian delegate noted that the use of concepts with related meanings might cause misunderstandings. He referred to domicile as the actual residence, but not to the actual domicile (*domicile de fait*) and residence. He raised the question about the meaning of the two latter concepts to the authors of the proposal.[97] In this regard, it was recalled that in Poland the personal status of refugees was governed by one connecting factor, namely domicile.

According to the French representative, a sensitive issue had been revived. Once again, he repeated that determining domicile might be a strenuous process. Therefore, the introduction of habitual residence was permanently desired. The authors of the proposal replied that the concept of "domicile" was removed from the memorandum intentionally as it is a concept of civil and public law.[98] The one and the same concept fulfilled a different task in various areas of national law, which corresponded with its content. Therefore, the proposed solution may have seemed to be ill-suited when national law governed the dissolution of marriage of spouses in accordance with their nationality; such as was the case in Estonia.[99]

The structure of the provisions governing the personal status of the refugees did not track its compatibility with national legislation. The proposal of Russian legal experts was focused on the compatibility of the arrangements with the emerging legislative work of the Hague conference: with its unification conventions that governed personal, marital and family matters. However, the representatives of governments had deliberately set the interest of the negotiation on the compatibility of the proposal with their national laws, so that the parliaments would not have to make any legislative changes.

At the end of the meeting, the chairman submitted a proposal of § 2, which had been redrafted into the following wording:

*Il est recommandé que le statut personnel des réfugiés russes et arméniens soit régi dans le pays où leur ancienne loi n'est plus reconnue, soit par la loi de leur domicile ou de leur résidence habituelle, soit, à défaut, par la loi de leur résidence.*

[96] *Ibid.*, p. 138.

[97] *Ibid.*, p. 143: «M. DUZMANS souligne les malentendus que pourrait entraîner l'emploi de l'expression dont le sens est aussi rapproché, comme domicile, résidence de fait et résidence.»

[98] *Ibid.*, p. 144: "Me RUBINSTEIN fait observer que le terme « *domicile* » avait été écarté du mémorandum des experts parce qu'il n'est pas seulement une notion de droit civil, mais encore une notion de droit public."

[99] *Ibid.*

*It is recommended that the personal status of Russian and Armenian stateless refugees in countries where their former law is no longer recognized shall be governed by the law of their domicile or their habitual residence or, in their absence, by the law of their residence.*

The proposal gained unanimous support. The Czechoslovak delegate, whose involvement in the debate held no public record, signed the agreement with the other representatives of governments at the conclusion of the conference. The preparatory documents state an inaccurate date of the final accession (*l'ahésion définitive*) of Czechoslovakia.[100] The adhesion was dated a year earlier than diplomatic letter n. 102/29 was sent, in which the government expressed its decision to accede to not only this arrangement, but also to all the previous arrangements on the refugees.

The adhesion was supplemented by three political reservations. The arrangements would apply only to refugees who have been deprived of their original nationality before January 1,1923. The arrangement was accepted under the absolute condition that it would not derogate any rule of valid legislation.[101] Recommendations could not enforce any amendments to the relevant Czechoslovak laws. The last reservation related to the introductory article of the arrangements. The government could revoke the adhesion to this provision at any time.

## 6. The Game of Concepts

The Arrangement allowed the application of laws of the original nationality of the refugees. In cases where the former law of the refugee was not recognized on the basis of public order, the competent authorities could apply the laws of their domicile or habitual residence. The application of domicile excluded the use of habitual residence and *vice versa*. Both aspects took on an alternative, but equal, position. The international provision was first and foremost adapted to the national legislation. If such a domicile or habitual residence did not exist, the personal status of Russian and Armenian refugees would be governed by the laws of their residence. Residence was applied in second place only. It fulfilled a subsidiary conceptual role. The provision relied on three concepts, application of which was intended to lead to a reasonable and fair regulation of the personal status of the refugees. Two of these concepts were of purely legal nature.

The concept of nationality could not be explicitly used in the recommendation since the refugees were stateless. The first and second draft of the provision characterized Russian and Armenian refugees as stateless persons (*apatrides*). Both concepts of domicile and residence were relative abstract units. Their content had been progressively refined in Roman law. Sometimes, doubts have risen as to the nature of these concepts. The doubts had been reliably eliminated by legal theory and judicial practice. The content of both concepts depended entirely on the national law of each party to the arrangement.[102]

The national legislation that determined residence varied in individual states.[103] None of these legal concepts had been unified, nor had it become absolute in the sense that it had

[100] *Ibid.*, p. 198.

[101] *Ibid.*: «L'Arrangement n'est accepté qu'en tant qu'il ne déroge pas à la législation en vigueur.»

[102] KRČMÁŘ, J., op. cit. 75, p. 224: "The concept of residence and the concept of citizenship are both legal concepts, however of relative nature, i.e. depending on the legal order; they are not of absolute nature." („Pojem bydliště je právě tak jako pojem státního občanství pojmem právním, a sice pojmem právním relativním, tedy na formaci právních řádů závislým, a nikoli pojmem absolutním.")

[103] *Ibid.*, p. 225.





the same content in any legal context. That would have established a semantic ideal. On the other hand, the concept of habitual residence was of a factual category. The concept had always been the result of an evaluation of reality. The concept had been inextricably adjacent to immediate and continuous circumstances. Whereas these facts are verifiable, substantive and provable. These facts are divided as well as grouped in the concept.

Provision § 34 of the General Civil Code from June 1, 1811, which was taken into Czechoslovak law, governed the personal capacity of foreigners for legal acts. The capacity of the foreigner was regulated by his residence. If the foreigner did not have his own residence, his capacity was governed by his birthplace. The section regarding the rights of aliens did not reference stateless persons. Otto's Educational Dictionary (*Ottův slovník naučný*), published in 1893, elucidated the meaning of the concept of domicile with a nominal definition.[104] Both concepts mentioned could have been looked upon as synonymous pairs in the lexicon. In fact, it could have seemed that "domicile (*domicilium*)", derived from the Latin language, had "residence" as its sole linguistic equivalent.

Nevertheless, the concept of domicile was not unknown to Austrian and subsequently Czechoslovak law. Domicile was applied in commercial paper law and canon law regulating relations between state and denominations. In commercial paper law, domicile designated the place where a note was to be paid. Whereas in canon law, domicile maintained continuity with Roman law, insisting on the necessity of both components (*factum et animus*). Domicile referred to a place where someone had settled with the intention of residing there permanently. Canon law distinguished between domicile (*domicilium verum*) and quasi-domicile (*quasi domicilium*). If a person had the capacity to choose, they could determine the place they would settle in. In such cases, this was *domicilium voluntarium*. The opposite was mandatory domicile (*domicilium necessarium, legale*). A person could have had several domiciles and quasi-domiciles concurrently, or both simultaneously.[105]

The subordination of a person under religious jurisdiction was derived from domicile. However, its conceptual role, not even the conceptual role of domicile in commercial papers law, could fulfil the purpose of provision § 2 contained in the Arrangement. The only possible solution could have been derived from partial synonymy. The concept of "domicile" had to be replaced with the concept of "residence". That is why the unparalleled interchangeability (*salva veritate*) in the sematic relationship of the two linguistic units could not be employed. Neither did the same frequency of occurrence of both legal concepts appear in distinct legal contexts. Even though, as in domicile, the content of the concept residence was made up of two identical components: *factum* and *animus*.

Residence did not mean merely the physical presence or short-term stay of a person in some place. Residence was a place where a person evidently resided with a clear or circumstantial intention to remain there permanently.[106] Residence was a decisive aspect for establishing court jurisdiction in the Czechoslovakian procedural rules. Residence determined both general and specific local jurisdiction in both contentious and non-contentious legal

[104] *Ottův slovník naučný: illustrovaná encyklopaedie obecných vědomostí*. 7. díl, Dánsko-Dřevec. Praha: J. Otto, 1893, p. 805.

[105] *Ibid.*

[106] HOETZEL, J., Bydliště In: HÁCHA, E., HOBZA, A., HOETZEL, J., WEYR, F., LAŠTOVKA, K., *Slovník veřejného práva československého*. Svazek I, A až Ch. Brno: Polygrafia – Rudolf M. Rohrer, 1929, p. 149.

proceedings.[107] In the matters of dissolution of marriage and separation of spouses, the last joint residence of the spouses had been decisive on such jurisdiction. The juridical rule under which certain provisions on guardianship and custody have changed determined the competence of authorities according to the residence of the guardian or the ward.[108]

If residence had to replace domicile, the concept had to fulfil a new, not yet tested in practice, role based on provision § 2 of the Arrangement. Residence determined the legal order that would govern the personal status of the refugee. However, residence was employed as a subsidiary connecting factor in the mentioned provision. Anyway, provision § 2 was proposed as an alternative rule, based on the exclusion of either the first or second legal possibility. The alternative to domicile was habitual residence. However, Czechoslovak laws did not regulate habitual residence at all, neither was it a valid concept there.[109] Nevertheless, habitual residence was known by academic circles as a factual condition for pauper care as regulated by German law until 1924.[110]

As to the personal status of Russian refugees, it follows from the foregoing that the concept of domicile was inapplicable in the Czechoslovakian legal framework. Domicile did not correspond with provision § 34 of the General Civil Code, which chose residence as a basic legal fact. In harmony with the Czechoslovakian laws the concept of domicile had to be surrogated by the concept of residence. In cases where domicile was replaced with residence, it could not be applied as a subsidiary connecting factor according to provision § 2 of the Arrangement. Therefore the sojourn of the refugee could become such a subsidiary connecting factor. The content of the concept of sojourn included a single and unique objective component: *factum*. The concept did not cover intention as a necessary subjective component. It referred only to the place where a person resided without a clear or circumstantial intention to remain there permanently.

Provision § 2 did not bring any change to Czechoslovak laws. However, the provision contained a rule that could have been tested by practice. In some states, large groups of refugees were concentrated in receiving centres. In Gallipoli, 20 000 refugees were surviving there at one point. More than 6 000 people were living in Tuzla. These centres were sometimes denoted as concentration camps.[111] The authorities of some states were forcing the incoming migrants to live in certain districts, certain places or placed them under police surveillance. For some refugees, a prison cell was their long-term refuge. Many refugees were sentenced to imprisonment ten to fifteen times. Some spent more than nine years in prison.[112]

Neither domicile nor residence could have been applied to the situation portrayed. The refugees stayed at the places described without their own intention and preponderantly

[107] Act April 1, 1921, that changed the provision of laws on the jurisdiction and civil proceedings and on the proceedings of inheritance, No. 161/1921 Collection of laws and regulations (zákon ze dne 1. dubna 1921, kterým se mění ustanovení zákonů o soudní příslušnosti a soudním řízení v občanských věcech a o projednání pozůstalostí – č. 161/1921 Sb. z. a n.).

[108] Compare § 1 of the Act dated December 20, 1922 on changes of several provisions on guardianship and custody (No. 391/1922 Collection of laws and regulations).

[109] See HATSCHEK, J., *Lehrbuch des deutschen und preußischen Verwaltungsrechts*. Leipzig: Deichert, 5. und 6. Auflage, p. 288.

[110] LAŠTOVKA, K., Domovské právo. In: HÁCHA, E., WEYR F., HOETZEL, J., LAŠTOVKA, K., *Slovník veřejného práva československého*. Svazek I, A až Ch. Brno: Polygrafia – Rudolf M. Rohrer, 1929, pp. 436-437.

[111] MACARTNEY, C. A., *Refugees. The Work of the League*. London: League of Nations Union, 1931, p. 14.

[112] RUBINSTEIN, J. L., The Refugee Problem. *International Affairs*, September-October 1936, Vol. XV, No. 5, p. 723.





involuntarily. This was also the case in more dignified and human cases. For example, the Organisational Committee for the Enablement of Study for Russian Students in the Czechoslovak Republic housed more than 800 students in a Prague building of the poorhouse at St. Bartholomew in 1921. At the end of 1921 the Organisational Committee was taking care of 1 200 students, who were accommodated in four buildings. A smaller number of students, approximately 300, lived in private accommodations.

Even in these cases, residence could not be applied as the connecting factor for the determination of their personal status under Czechoslovak law. Some students were minors and the law did not afford them the capacity to establish their own residence. Their residence, as dependent persons, was of a derived nature. The residence of minors depended on the residence of their father or mother. Many Russian and Ukrainian students stayed in Czechoslovakia without their parents. The personal status of these students had to have been determined by their sojourn. The laws of the place of their sojourn governed their personal status.

## 7. Conclusions: *Negotium* and *Instrumentum*

The non-binding Arrangements on Refugees of July 5, 1922, May 31, 1924, May 12, 1926 and June 30, 1928 might be reflected on as dialectic phenomena. Each arrangement embodies one pair of forms. That is *instrumentum* and *negotium* side by side. Scrutiny of an arrangement as an instrumental object was addressed to its purpose in a dynamic timeline. The purpose of the first series of arrangements was to establish a system of identity documents issued to Russian and later also to Armenian refugees. Their fundamental function was to grant a residence permit to a refugee. The system should have been universally applied across all continents. The target of the international community, or any part of it, had never been achieved. The operative effects of the system had never relied either on unity or on relative stability. State authorities had been adopting these passport practices differently.

Issuing identity documents recognized by each country as internationally valid was characterized by a long-term situation of uncertainty and volatility. Under the Arrangement, States had deliberately preserved their freedom of action. Instruments as a bulk of recommendations had not forced states to take any legislative action. The Czechoslovak authorities had not implemented a valid passport regime for a long period of time. Legislation on the level of law and by-laws in passport issues had not regulated the case of Russian refugees. The central competent offices, the Ministry of the Interior and the Ministry of Foreign Affairs, acted quite autonomously. The ministries were guided by circulars that, like all arrangements concerning Russian and Armenian refugees, were a formal expression of an *adhocratic* solution. According to an array of ministerial circulars, each refugee must have been provided with an identity document which was the predominant basis for a residence permit.

The ministerial circulars as instructions did not confer any subjective rights or claims to the refugees. It was only in 1928 that the act on passports removed this undesirable status. However, the act was adopted too late in relation to those refugees. The inflow of refugees had already long been at its peak. Since the law came into force, the state authorities could have issued passport-like identity documents to stateless persons and to those whose nationality could not have been ascertained (Nansen Passports). Passports entitled individuals to stay in Czechoslovakia.

The normative architecture of the Arrangement on the Legal Status of Russian and Armenian Refugees was compact and comprehensive, unlike the previous arrangements. It covered all the necessary constituents in order to solve their weak legal situation. The Arrangement as *negotium* and *instrument* differed from previous recommendations. The personal status of Russian and Armenian refugees had become the structural component of their status. Legal capacity and capacity to act had been subject to heterogeneous regulation in individual countries. Legislation of some states enshrined the principle of nationality. In this case, there was an alternative normative solution to be applied. The personal status of Russian refugees was governed either by invalid Tsar law or valid Soviet law.

In other states, the personal status of stateless persons was governed by their domicile, residence, habitual residence or even sojourn. Paragraph 2 of the Arrangement was proposed to be a binary downward order of connecting factors. The solution was not based on a single connecting factor, as originally envisaged in one proposition to the draft. Such a unifying proposal lacked practicality. The non-binding standard incorporated both domicile and habitual residence, and residence as the last connecting factor. Without doubt, the incorporation of habitual residence into the provisions governing the personal status of individuals meant progress in the perspective of *de lege ferenda*. Although the normative reference to habitual residence coincided in fact and in time with the unification work of the Hague Conference on Private International Law.

Czechoslovakia acceded to the Arrangement absolutely subjugated to the condition that the recommendation in no way interfered in the legislative *status quo*. Any recommendations arising from the Arrangement might have only been incorporated within the rigid limits of national law. Any proposed change would constitute a negation of valid national legislation. The Arrangement as *negotium* was entirely under the domination of national law. The sovereignty of Czechoslovak law over the non-binding arrangement was strict and indefeasible — even if the recommendation contained in § 2 of the Arrangement was definitely no less than an unwise or unreasonable solution.

As a paradox, the valid Czechoslovak legislation on the status of refugees as stateless persons was uncertain, ambiguous and gap-like. Domicile or habitual residence were not applicable connecting factors to determine the personal status of Russian refugees. Instead, the competent authorities had to rely on the place of permanent residence or sojourn of refugees. Both concepts belonged to one semantic family; they were in a tight correlation. The content of the former was *factum* and *animus*. At the same time, the content of the latter was constituted by a single constituent (*factum*). In terms of residence, it had to be proven that the refugee resided in that actual place, although he did not have any intention of staying there.





# FAILURE TO REACT AS EVIDENCE OF *OPINIO IURIS* (A COMMENT TO THE ILC'S FIRST DRAFT CONCLUSIONS ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW)

***Pavel Caban****

**Abstract:** This article is focused on the general proposition that "failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction", formulated in conclusion 10, paragraph 3 of the draft conclusions on identification of customary international law, adopted by the International Law Commission on first reading in 2016. The article examines whether this conclusion appropriately reflects the practice of states, *i.e.* various ways in which states react to the conduct of other states in different circumstances, and whether this conclusion, in certain contexts, could not lead to legal misrepresentation of the significance of the States' failure to react.

**Resumé:** Tento příspěvek se zaměřuje na posouzení obecné teze, podle níž „opomenutí reagovat v průběhu času na praxi jiných států může sloužit jako doklad přijetí dané praxe jako právně závazné (*opinio iuris*), jestliže státy byly schopny reagovat a okolnosti reakci vyžadovaly". Tato teze je obsažena v závěru 10, odst. 3 návrhu závěrů k identifikaci mezinárodního práva obyčejového, jejž přijala Komise pro mezinárodní právo v prvním čtení v roce 2016. V článku je diskutována otázka, zda tento závěr náležitě odráží praxi států, tj. různé způsoby, jimiž státy reagují na chování jiných států za různých okolností, a zda takovýto obecný závěr nemůže v určitých případech zkreslit právní význam opomenutí států reagovat na praxi jiných států.

**Key words**: customary international law; *opinio iuris*; failure to react; acquiescence; specially affected state; particular (local) customary international law.

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