Article 36 of the 1951 Convention/Article III of the 1967 Protocol

Information on National Legislation = Renseignements Portant sur les Lois et Règlements Nationaux

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Article 36 of the 1951 Convention/ Article III of the 1967 Protocol

Article 36 (Information on National Legislation/ Renseignements Portant sur les Lois et Règlements Nationaux)

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Les États Contractants communiqueront au Secrétaire général des Nations Unies le texte des lois et des règlements qu'ils pourront promulguer pour assurer l'application de cette Convention.

Article III (Information on National Legislation/ Renseignements Portant sur les Lois et Règlements Nationaux)

The State Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Les États parties au présent Protocole communiqueront au Secrétaire général de l'Organisation des Nations Unies le texte des lois et des règlements qu'ils pourront promulguer pour assurer l'application du présent Protocole.

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Select Documents

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Travaux Préparatoires

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A. Function of Article 36 and Article III

Article 36 forms part of Chapter VI of the 1951 Convention which comprises 'Executory and Transitory Provisions': Art. 35 (Co-operation of the National Authorities with the United Nations), Art. 36 (Information on National Legislation), and Art. 37 (Relation to Previous Conventions). **1**

Article 36 requires States parties to communicate to the Secretary-General the laws and regulations which they may adopt to ensure the application of the 1951 Convention. It has been observed that this obligation stems from the right of parties to a treaty to be informed about its application by other parties.[1] The drafting history of this particular provision suggests, however, another function of Art. 36. The original purpose of Art. 36 was to allow States time to adjust their domestic legislation to the obligations they would incur upon ratification or accession to the 1951 Convention, taking the various constitutional methods of giving effect to international law into consideration. In view of the fact, however, that international law not only requires but proceeds from the fact that domestic legislation is in conformity with obligations incurred upon ratification (and subsequent entry into force) or accession, the wording of Art. 36 was adjusted; it nonetheless gives States some temporal latitude to secure this conformity albeit restricted by the obligation to demonstrate it. **2**

The same applies, *mutatis mutandis*, to Art. III of the 1967 Protocol.[2] The structure of the 1967 Protocol, however, differs from that of the Convention: it is not divided into Chapters, **3**

[1] Robinson, *Commentary*, p. 168.
[2] *Cf.* UN Doc. A/AC.96/346 (1966), para. 14.

consequently the categorization of Art. III as belonging to the category of executory provisions is lacking. Article I, para. 1 incorporates into the 1967 Protocol the substantive provisions of the 1951 Convention laid down in its Arts. 2 to 34. The remaining provisions of the 1951 Convention have been given separate articles in the 1967 Protocol in accordance with the decision to position the Protocol as an independent instrument adherence to which would not be limited to States parties to the 1951 Convention, but which would also be open to other States.[3]

4 The function of Art. 36 of the 1951 Convention and Art. III of the 1967 Protocol is identical. The drafting history of Art. 36, however, differs of necessity from that of Art. III and that may, in theory, affect the interpretation of Art. III in the sense that the *travaux préparatoires* of the 1951 Convention are *stricto sensu* not available as supplementary means of interpretation with respect to the 1967 Protocol, with the exception of the substantive articles of the 1951 Convention—Arts. 2 to 34 inclusive—which are incorporated by reference in the 1967 Protocol.[4] In view of the fact that the 1967 Protocol, even while explicitly drafted to constitute an independent instrument, was meant merely to remedy one specific limitation of the 1951 Convention, *i.e.* to extend the personal scope of the 1951 Convention, such a strict view seems overly legalistic.[5] Moreover, it is hardly sustainable in view of the fact that the *travaux préparatoires* pertaining to Art. III in essence consist merely of the observation that Art. III reproduces, *mutatis mutandis*, Art. 36 of the 1951 Convention.[6] The *travaux préparatoires* of Art. 36 are consequently indispensable to Art. III. Unless indicated otherwise, the following analysis proceeds therefore throughout from the identical function, purport, and meaning of Art. 36 of the 1951 Convention and Art. III of the 1967 Protocol and focuses on Art. 36.

B. Historical Development

I. Instruments Prior to the 1951 Convention

5 None of the treaties pertaining to refugees preceding the 1951 Convention and 1967 Protocol contained a provision comparable to Arts. 36 and III.

II. Drafting History of Articles 36 and III

6 The first (Secretariat) draft of what eventually became Art. 36 provided that '[e]ach of the High Contracting Parties shall take all the legislative or other measures necessary under the rules of their constitution for the application of the present Convention',[7] a provision that was modelled on Art. 27 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[8] It was meant to remind States

[3] *Cf. inter alia* UN Docs. A/AC.96/INF.40 (1965), para. 5 lit. a; A/AC.96/346 (1966), para. 12.
[4] *Cf.* Art. 32 VCLT.
[5] It is in addition a rather academic view, since most States are both party to the 1951 Convention and the 1967 Protocol.
[6] *Cf. infra*, MN 12.
[7] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 52 (draft Art. 30, part of a chapter entitled 'Transitory and General Provisions').
[8] Text of Art. 27: Each Party to the present Convention undertakes to adopt, in accordance with its Constitution, the legislative or other measures necessary to ensure the application of the Convention.

of their obligation to ensure the fulfilment of their obligations by taking any measures necessary for that purpose.[9] A French draft included a virtually identical provision.[10] Both draft articles were considered jointly since they dealt with the same subject in practically the same way.[11]

7 The ensuing debates focused on the implication of having national legislation conform to newly incurred obligations following ratification or accession to a treaty under public international law, in particular on differences between the constitutional practices of various States. In view of that implication, the representative of the United Kingdom objected to the proposed draft article that merely asserted that, on an unspecified date, States should adopt the measures necessary for the implementation of the 1951 Convention, and proposed the following wording: 'Ratification or accession to this convention by a High Contracting Party implies that its legislation and administrative arrangements are in conformity with the provisions of the convention.'[12] The representative of the United States observed that the provisions of draft Art. 30 had been included for the benefit of States for which the ratification of a convention did not automatically or *a priori* entail a modification of the relevant legislation, adding that it should be examined whether the text proposed by the United Kingdom would place such States in an impossible position.[13] The proposal of the Chairman to adopt the Secretariat draft, albeit adjusted to replicate the text of Art. 27 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, was adopted.[14]

8 The United States nonetheless proposed amending the article—meanwhile renumbered draft Art. 31, and entitled 'Measures of implementation of the Convention'—to read:

> Each of the Contracting States shall, within a reasonable time and in accordance with its constitution, adopt legislation or other measures to give effect to the provisions of this convention, if such measures are not already in effect.[15]

This amendment was adopted,[16] however this did not mean the issue was resolved. The United Kingdom drew attention, once more, to the principle that ratification of or accession to the 1951 Convention implied that a State was already in a position to give effect to its provisions, and it could not, therefore, accept this article.[17]

9 The United Kingdom accordingly proposed deleting the article when the draft was discussed in the Conference of Plenipotentiaries because it would create a bad precedent, and have harmful effects in practice:[18]

[9] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 52.
[10] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/L.3 (1950), p. 10 (draft Art. 25).
[11] Statement of the Chairman, Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.22 (1950), p. 8.
[12] *Ibid.*, p. 9.
[13] *Ibid.*, p. 12.
[14] *Ibid.*, p. 13. For the text of Art. 27, see *supra,* fn. 8.
[15] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/SR.25 (1950), p. 12.
[16] *Ibid.*
[17] Ad Hoc Committee on Refugees and Stateless Persons, UN Doc. E/AC.32/SR.40 (1950), pp. 36–37; *cf.* also UN Docs. E/AC.32/L.40 (1950), p. 60, and E/1703 (1950), p. 5.
[18] Conference of Plenipotentiaries, UN Docs. A/CONF.2/85 (1951), A/CONF.2/SR.25 (1951), p. 23.

> It was an accepted principle in international law that once a convention had been ratified it immediately came into force in the territory of the Contracting State concerned. Advantage was taken of the interval which elapsed between signature and ratification to make any adjustments necessary in domestic legislation. The same applied to accession. In the present case, however, it was provided that the Contracting State should, within a reasonable time and in accordance with its constitution, adopt legislative or other measures, it being therefore pre-supposed that ratification would take place before the appropriate domestic legislative measures had been introduced. It was further pre-supposed that such measures would be taken at the discretion of the State within a reasonable time. Such latitude constituted a departure from existing practice.... If any legal adjustments had to be made, they should not be left for an undetermined interval after ratification of the Convention.[19]

10 Its proposal was countered on account of the implication that there is only one method of giving effect to international obligations in domestic law, ignoring the method where ratification or accession precedes the taking of appropriate domestic legislative measures. For States practising the latter method, inclusion of Art. 31 was essential.[20] A method, the representative of the United Kingdom explained, that would entail that no State would know what the position was with regard to the enforcement of a multilateral treaty:

> States would be in a position of inequality *vis-à-vis* one another. How was it possible that one State should be able to defer the application of a Convention which it had already ratified, while other States were bound forthwith by its terms?[21]

In response, it was observed that this particular method would not disappear along with deletion of draft Art. 31. Draft Art. 31 would, moreover, constitute a hold over the States concerned which would be used like a whip.[22]

11 In view of the fact that draft Art. 31 would thus boil down to 'exhortation under an escape clause',[23] the Netherlands representative suggested that it would be better to replace draft Art. 31 with a clause which would make it obligatory for contracting States to notify the Secretariat of the texts of the laws and regulations which they had adopted with a view to implementing the 1951 Convention:[24] 'Each of the Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which it may adopt to ensure the application of this Convention.'[25] The representative of Belgium thereupon asked whether draft Art. 30 (*i.e.* Art. 35) would not be sufficient to achieve the intentions of the Netherlands amendment.[26] Conceding overlap between draft Art. 30, para. 2 (b) and proposed Art. 31, the Netherlands representative thought it nevertheless useful to retain

[19] Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.25 (1951), pp. 22–23.
[20] *Ibid.*, p. 23 (representative of Israel).
[21] *Ibid.*, p. 24.
[22] *Ibid.*, p. 25 (representative of Israel); but see the concerns expressed by the Belgian representative, *ibid.*
[23] *Ibid.*, p. 26 (representative of the United Kingdom).
[24] *Ibid.*, p. 27 ('With such a clause there would be some check on the position').
[25] Conference of Plenipotentiaries, UN Doc. A/CONF.2/86 (1951). The text of the amendment originated in a similar article in each of the four 1949 Geneva Conventions (Art. 48 Geneva Convention I; Art. 49 Geneva Convention II; Art. 128 Geneva Convention III; Art. 145 Geneva Convention IV), which provides that signatories should communicate certain laws and regulations to the Government of the Swiss Confederation, Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.26 (1951), p. 7.
[26] Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.26 (1951), p. 6.

his amendment as a separate article. In addition, Art. 30 specified that contracting States should provide appropriate agencies of the UN with any data, statistics, and information requested concerning the implementation of the 1951 Convention, whereas the Netherlands amendment provided that contracting States should communicate the entire texts of the relevant laws and regulations.[27] The Netherlands amendment was adopted.[28]

As to the counterpart of Art. 36 in the 1967 Protocol, Art. III, UNHCR observed that it reproduces *mutatis mutandis* Art. 36 of the 1951 Convention concerning information on national legislation.[29] UNHCR explained that it had not felt at liberty to make any change in the provisions of the Convention which were reproduced (namely, Arts. 35 and 36) with the substitution of the word 'Protocol' for 'Convention'.[30] This rather dry summary of the drafting process is indicative of the time spent by the drafters on the reproduction of those provisions in the 1967 Protocol: none.[31] **12**

C. Declarations and Reservations Made with Regard to Article 36 and Article III Respectively

Article 42 of the 1951 Convention prohibits reservations to Art. 36, and so does Art. VII with respect to Art. III of the 1967 Protocol. Accordingly, no State has made a reservation (nor a declaration) with respect to either Art. 36 or Art. III.[32] **13**

D. Interrelationship of Article 36 and Article III with Other Provisions

Article 36 itself is included in Chapter VI of the 1951 Convention which is entitled 'Executory and Transitory Provisions'. This Chapter includes, besides Art. 36, Art. 35 (Co-Operation of the National Authorities with the United Nations) and Art. 37 (Relation to Previous Conventions). In terms of substance, Arts. 35 and 36 are the executory provisions of Chapter VI, and Art. 37 clearly constitutes the transitory part. **14**

Article 36 is related to Art. 35, para. 2 (b) of the 1951 Convention: both provisions overlap,[33] and the same applies to Art. III and Art. II, para. 2 (b) of the 1967 Protocol. Both require information with respect to implementation of the 1951 Convention and the 1967 Protocol in **15**

[27] *Ibid.*, pp. 6–7.

[28] After the original text of draft Art. 31 had been rejected (Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.26 (1951), p. 7). The new text of draft Art. 31—meanwhile turned into Art. 36, Conference of Plenipotentiaries, UN Doc. A/CONF.2/102/Add.1 (1951)—was retained in the second reading, Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.35 (1951), p. 26.

[29] UN Doc. A/AC.96/346 (1966), para. 14 and Annex II, pp. 1–2.

[30] UN Doc. A/AC.96/SR.141–152 (1966), pp. 69, 70.

[31] Art. II was, however, discussed in the context of Art. VII, para. 1 on reservations, on which *cf.* Zieck on Arts. 35/II, MN 18.

[32] UNTC, <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> and <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en>, accessed on 24 June 2022.

[33] The overlap was noted in the drafting process and the suggestion was made to revise Art. 35, para. 2 (b) in the light of Art. 36, Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.26 (1951), p. 6. This revision did not, however, take place. *Cf.* also Zieck on Art. 35/Art. II, MN 23.

the domestic legal order. Article 36 and Art. III, however, require submission of the relevant laws and regulations,[34] and Art. 35, para. 2 (b) and Art. II, para. 2 (b) merely 'information' about implementation of the 1951 Convention and 1967 Protocol. A second overlap pertains to Art. 36 and Art. 35, para. 2 (c) in the 1951 Convention, and likewise to the pertinent provisions in the 1967 Protocol.[35] By virtue of Art. 36, States parties have to communicate laws and regulations they may adopt to ensure the application of the 1951 Convention, and by virtue of Art. 35, States parties have to provide information about laws, regulations, and decrees which are, or may hereafter be, in force relating to refugees. Although the former provision focuses on future laws and regulations and the latter on positive law, this distinction is arguably substantively irrelevant, and so is the fact that Art. 36 requires that laws and regulations should be submitted to the Secretary-General rather than to UNHCR.[36] The provisions nonetheless differ in scope in view of the fact that Art. 36 focuses on the means that ensure implementation of the 1951 Convention as such in the domestic legal order, in accordance with the reason why it was inserted in the 1951 Convention—the awareness of varying constitutional requirements and constraints with respect to the reception of international law in the domestic legal order—whilst Art. 35, para. 2 (c) refers to rules and regulations pertaining to refugees.[37] Practice, however, seems to obliterate this distinction.[38] Another difference between Art. 36 and Art. 35, para. 2, both (b) and (c)—and *mutatis mutandis* between Art. III and Art. II, para. 2, both (b) and (c), of the 1967 Protocol—is that the instruments that need to be communicated by virtue of Art. 36 need to be submitted *proprio motu*; Art. 36 is in that respect a standing request,[39] whilst the relevant laws, decrees, and regulations that have to be submitted in the case of Art. 35, para. 2, and the same applies to Art. II, para. 2, are to be submitted only upon a request to that effect.

16 It has been observed that Art. 41 (c) of the 1951 Convention is of the 'same character' as Art. 36.[40] It would rather seem that Art. 41 (c) partakes of both Art. 36 and Art. 35, para. 2 (b) and (c). Article 41 differentiates between articles of the 1951 Convention that come within the legislative jurisdiction of the federal legislative authority and those which do not, but come within the legislative jurisdiction of constituent States, provinces, or cantons which are not, under the constitutional system of the federation, bound to legislative action. With respect to the former, Art. 36 applies: federal or non-unitary States have to communicate the laws and regulations they may adopt to ensure the application of the 1951 Convention.[41] With respect to the latter, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces, or cantons at the earliest possible moment.[42] Article 41 (c) requires that federal States parties to the 1951 Convention supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the 1951 Convention, showing the extent to

[34] Unlike Art. 35, para. 2, Art. 36 would require the submission of the entire texts of the relevant laws and regulations, *cf. supra,* MN 11.
[35] *Cf.* also Zieck on Art. 35/Art. II, MN 23.
[36] *Cf. infra*, MN 21.
[37] *Cf.* also Zieck on Art. 35/Art. II, MN 78.
[38] *Cf. infra*, MN 24.
[39] *Ibid*.
[40] Robinson, *Commentary*, p. 174.
[41] Art. 41 lit. a of the 1951 Convention explicitly provides that the obligations of the federal government shall to this extent be the same as those of parties which are not federal States.
[42] Art. 41 lit. b of the 1951 Convention.

which effect has been given to that provision by legislative or other action: the requisite information is more extensive than required under Art. 36. Unlike Art. 36, and similar to Art. 35, para. 2, Art. 41 (c) provides that such information need only be given upon a request to that effect. Unlike Art. 35, para. 2, such a request originates with any other contracting State rather than UNHCR. The same observations apply to Art. III and the federal clause of the 1967 Protocol,[43] Art. VI (c), the text of which is geared to application of the 1951 Convention which should be applied in accordance with Art. I, para. 1 of the 1967 Protocol, *i.e.* the relevant 1951 Convention provisions need to be applied in conformity with the extended personal scope of the 1967 Protocol.

17 Article 36 is related to Art. 43 on entry into force of the 1951 Convention. States which ratified the 1951 Convention before it entered into force may have had more time to give effect to the 1951 Convention in the domestic legal order than States which acceded to the 1951 Convention after its entry into force: in that case States have 90 days before the Convention enters into force for them. A similar temporal latitude applied to States which acceded to the 1967 Protocol before it entered into force.[44] However, once it entered into force—after six accessions—any subsequent accession means the 1967 Protocol enters into force immediately upon accession.[45]

E. Other Relevant Norms of International Law

18 The substance of Arts. 36 and III is related to the customary principle of *pacta sunt servanda*, reiterated in the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[46] In addition, the VCLT stipulates that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...'[47]

F. Analysis

I. 'The Contracting States . . .'/'The States Parties to the present Protocol . . .'

19 The 'Contracting States' refers to States parties to the 1951 Convention although it could be added,[48] in view of the drafting history of Art. 36, that the obligation is of particular relevance at the moment of ratification of, or accession to, the 1951 Convention. Grahl-Madsen argues, however, that the obligation of Art. 36—and likewise Art. III of the Protocol—is an ongoing one in view of the incremental structure of entitlement of the 1951 Convention,

[43] Art. VI of the 1967 Protocol is another instance of a provision that reproduces *mutatis mutandis* the wording of Art. 41 of the 1951 Convention, *cf.* UN Doc. A/AC.96/346 (1966), para. 18.
[44] Art. V of the 1967 Protocol only refers to accession.
[45] The omission to include a period of time between accession and entry into force is the result of the desire for simplicity and speed on the part of the drafters, *cf.* UN Doc. A/AC.96/346 (1966), para. 23.
[46] Art. 26 VCLT.
[47] Art. 27 VCLT.
[48] On the notion of 'Contracting States', see Zieck on Art. 35/Art. II, MN 42.

more in particular when a State—in contravention of the Convention, it should be added—initially only grants refugees treatment on a par with aliens.[49] It is not a convincing argument: when ratifying or acceding to the 1951 Convention (and/or 1967 Protocol), it is clear what entitlements are due to refugees and when, and that means that domestic legislation should be adjusted accordingly. Leaving this particular argument aside, it would seem that the obligation of Art. 36 is inherently an ongoing one: any laws and regulations States may adopt now or in future to ensure the application of the Convention should be communicated to the Secretary-General.

II. '…to the Secretary-General…'

20 The reference to the Secretary-General, and the corresponding function of the Secretary-General is not reinforced by Art. 46 of the 1951 Convention and Art. X of the 1967 Protocol on notifications. It is not surprising, therefore, that '[i]n theory at least, the Secretary-General may be considered a "dead-end" in respect of the material mentioned in Art. 36',[50] and the same applies *mutatis mutandis* to Art. III. It seems that practice confirms this observation as far as the Secretary-General is concerned since although Art. 36 nominally mentions the Secretary-General, in practice these communications are directed to UNHCR.[51] As far as informing other States in the sense of Art. 46 is concerned, UNHCR can be considered to be a dead-end too, but quite the opposite in terms of its supervisory function,[52] and the communications of States provided on the basis of Art. 36 enable it to exercise that function.[53]

III. '…laws and regulations…'

21 The wording of Art. 36 originates in a proposal of the representative of the Netherlands at the Conference of Plenipotentiaries, based on the text of a provision on translations and implementing laws and regulations included in each of the four Geneva Conventions:[54]

> The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.[55]

The commentary to this provision explains that the reference to 'laws and regulations' should be understood in its broadest sense:

[49] Grahl-Madsen, *Commentary*, Art. 36, para. 3; on the structure of entitlement, see Hathaway, *Rights*, Chapter 3.1.

[50] Grahl-Madsen, *Commentary*, Art. 36, para. 2.

[51] The Secretariat of the UN was asked about the role of the Secretary-General with respect to Arts. 36 and III: an informal response indicated that Arts. 36 and III should be taken to refer to UNHCR. See also Türk, 'UNHCR's Supervisory Responsibility', *RQDI* 14 (2001), pp. 135, 140.

[52] See Zieck on Art. 35.

[53] *Cf. infra,* MN 21 and 24.

[54] *Cf. supra*, fn. 25.

[55] Arts. 48 Geneva Convention I; 49 Geneva Convention II; 128 Geneva Convention III; 145 Geneva Convention IV.

> It covers all legal instruments emanating from either the executive or the legislative authorities, which have anything to do with the application of the Convention. States will have, for example, to communicate to one another legislative measures adopted in virtue of [specific] Articles… But they will also have to communicate laws and regulations which they have adopted without being obliged to do so under the Convention.[56]

The meaning and purport of the provision that lies at the basis of Art. 36, and hence Art. III, are manifestly more encompassing than the concern which induced the drafters of the 1951 Convention to insert Art. 36. In view of the fact, however, that Art. 36 cannot be disposed of by means of a once-only adjustment of domestic legislation but requires ensuring compliance with the 1951 Convention at the domestic level on an ongoing basis, the reference to 'laws and regulations' should similarly be taken as a generic reference that comprises any kind of law and regulation that relates to or touches upon ensuring the application of the 1951 Convention, and the same applies to Art. III of the 1967 Protocol. The questions posed by UNHCR in the questionnaires it sent to States parties in 1968 and 1990 confirm this inference.[57]

IV. '…the application of this Convention'/'…the present Protocol'

22 The object of Art. 36 is ensuring that the 1951 Convention is implemented in domestic law: it is up to States parties to choose how this is to be achieved. The purpose is to ensure that the 1951 Convention can actually be applied in practice, *i.e.* be brought to bear on those for whom it has been drafted: refugees. Art. III of the 1967 Protocol shares the same purpose.[58] The subject of Art. 36 and Art. III respectively is the 'how', the means to that very end: it focuses on enabling implementation in the domestic legal order of States parties. As indicated in the drafting history, Art. 36 meant to give States parties—whose constitutional make-up prevented them from ensuring the application of the 1951 Convention preceding ratification or accession—temporal latitude. Ensuring implementation is not, however, a single act, and States parties are required to ensure the application of the 1951 Convention on a continuing basis, and the same applies to States parties to the 1967 Protocol.

G. Evaluation

23 ExCom identified several obstacles which impede the full and proper implementation of the 1951 Convention and the 1967 Protocol.[59] Of special relevance are the legal impediments:

[56] Pictet, 'Article 48—Translations. Laws in Application', in *The Geneva Conventions of 12 August 1949: Commentary, vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), p. 350; *cf.* ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, *Commentary of 2016* (2016), para. 2785: 'The purpose of the communication of … laws and regulations ensuring their application is to enable all High Contracting Parties to inform themselves of the way in which other States understand their obligations under the Conventions and how they have implemented them. Such knowledge may help to avoid or reduce discrepancies and may also encourage States to increase their efforts in the … implementation of the Conventions.'

[57] *Cf.* Zieck on Art. 35/Art. II, MN 71–72, and in particular MN 77.

[58] *Cf.* also Zieck on Art. 35/Art. II, MN 68, 77.

[59] UN Doc. EC/SCP/54 (1989), paras. 8–22; UN Doc. EC/1992/SC.2/CRP.10 (1992), para. 9; *cf.* also UNHCR *Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, Chairperson's Report on Roundtable 1*, p. 1.

> Legal problems arise in the first instance where no specific legislative arrangements are made to incorporate the Convention and Protocol into national law. This may be a less significant factor where international instruments are constitutionally self-executing, but may become of greater significance where national legislation is required in order to give international obligations the force of law domestically.[60]

> Even where legislation does not directly contravene specific provisions of the Convention or Protocol, there are, in a number of countries, laws in force which, in their application, may well be inconsistent with the object and purposes of those instruments, as well as, on occasion, basic principles of refugee protection.[61]

Whilst the second impediment relates to the requirement of ongoing compliance with the 1951 Convention and 1967 Protocol, the first-mentioned impediment touches directly on the original rationale of Art. 36 and hence of Art. III. Although States parties were given temporal latitude to give effect to the 1951 Convention and the 1967 Protocol in the domestic legal order, ultimately all States parties are obliged to implement the 1951 Convention and the 1967 Protocol. The Agenda for Protection translated this particular impediment—under the heading of 'universal accession to the 1951 Convention and the 1967 Protocol'—into an objective: 'States Parties, which have not already done so, to ensure that the fundamental principles of the 1951 Convention are incorporated, where this is necessary according to the national legal system, into domestic legislation'.[62] To assess progress made in the implementation of the Agenda for Protection at the national level, a questionnaire—'Matrix'[63]—was sent to States.[64] A preliminary report on feedback by (42) States on their implementation of the Agenda for Protection was issued on 1 October 2008,[65] and there was a further update in 2009.[66] Neither resulted in concrete suggestions or plans regarding this particular impediment. On the occasion of the 50th anniversary of the 1951 Convention, States parties to the 1951 Convention or its 1967 Protocol issued a declaration,[67] urging all States 'to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or the 1967 Protocol'.[68] This call was not repeated in the 2016 New York Declaration for Refugees and Migrants,[69] or in the attached Comprehensive Refugee Response Framework. The Framework, along with a Programme of Action, became an integral part of the Global Compact on Refugees that was adopted in 2018:[70] but the Compact does not address ways to strengthen the implementation of the 1951 Convention and/or 1967 Protocol either. At least part of those omissions could be remedied by UNHCR's simply reminding States of the obligation contained in Art. 36 and

[60] UN Doc. EC/SCP/54 (1989), para. 13.
[61] *Ibid.*, para. 15.
[62] UN Doc. A/AC.96/965/Add.1 (2002) (Goal 1 sub (1)).
[63] The Matrix was made available at <http://www.unhcr.org/ExCom> (*cf.* UN Doc. EC/59/SC/CRP.12 (2008), para. 7) but unfortunately it has now been removed.
[64] UN Doc. EC/59/SC/CRP.12 (2008), para. 5.
[65] UNHCR observed that the reports 'have tended to be mainly descriptive rather than analytical', UNHCR, *Preliminary Summary Report on Feedback*, 1 October 2008, p. 11.
[66] UN Doc. EC/60/SC/INF.1 (2009).
[67] UNHCR, *Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/MMSP/2001/09 (2002).
[68] *Ibid.*, p. 3, paras. 8–9.
[69] GA Res. 71/1 (2016).
[70] UN Doc. A/73/12 (Part II) (2018), Global Compact on Refugees.

Art. III. Unfortunately, the calls made by its ExCom on this issue are needlessly cast in an indistinct manner without any reference to Art. 36 of the 1951 Convention or Art. III of the 1967 Protocol.[71]

24 UNHCR routinely receives proposed legislation from States parties to the 1951 Convention and the 1967 Protocol, and otherwise actively reviews proposed legislation. It comes as no surprise, therefore, that UNHCR's supervisory function is often referred to as one that is based both on Art. 35 and Art. 36 of the 1951 Convention and Art. II of the 1967 Protocol:[72] the questionnaires UNHCR sent to States Parties in 1968 and 1990 were accordingly based both on Arts. 35 and 36 of the 1951 Convention and Arts. II and III of the 1967 Protocol.[73] The active stance of UNHCR with respect to the materials submitted on the basis of Arts. 36 and III is dependent on the extent to which States parties actually submit (draft) laws and regulations in a timely manner to UNHCR.[74] If need be, UNHCR should simply remind States of the nature (*i.e.* a standing request) of their obligation to observe Art. 36 of the 1951 Convention, and Art. III of the 1967 Protocol.

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[71] *Cf.* ExCom Conclusions No. 11 (1978), (h); No. 41 (1987), (g); No. 14 (1979), (f); No. 49 (1988), (d); No. 57 (1990), (b), (c); No. 71 (1993), (c); No. 90 (2001), (b); No. 103 (2005), (a).

[72] Türk, *supra*, fn. 51, pp. 135, 140 (Türk considers Art. 36 a specification of Art. 35, para. 1).

[73] UN Doc. A/AC.96/508/Add.2 (1974); UNHCR, *The Convention of 28 July 1951 Relating to the Status of Refugees and Its Protocol of 31 January 1967: Questionnaire on Implementation Prepared by UNHCR* (1990).

[74] *Cf.* UN Doc. A/AC.96/951 (2001), p. 30, para. 114.

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