

DRAFT CONVENTION ON DECLARATION OF DEATH OF MISSING PERSONS

Note by the Secretary-General

Pursuant to Resolution 158 (VII) adopted by the Economic and Social Council on 24 August 1948 (document E/1029) concerning the preparation of a draft convention on declarations of death of missing persons, the Secretary-General transmits herewith a draft convention on Declaration of Death of Missing Persons together with a commentary explaining the provisions of the draft.

In accordance with the request of the Economic and Social Council, the Secretary-General has held preliminary consultations with the International Refugee Organization and with several other competent organizations concerned with this problem. He wishes particularly to acknowledge the valuable contribution of the IRO, and to note that because of the short time available, he has not yet had time to receive the views of that Organization on the draft of the convention which is now submitted. Any further observations which the IRO may have upon this draft will be circulated to governments and will be taken into account by the Secretary-General in the preparation of his report to the Eighth Session of the Economic and Social Council on the draft convention.

In view of the fact that the Economic and Social Council has directed the Secretary-General to submit the draft convention together with such comments as have been received from governments to the Eighth Session of the Economic and Social Council, the Secretary-General will be greatly obliged if such observations could reach him on or before 15 January 1949 in order to enable them to be taken into account in his report to the Eighth Session of the Economic and Social Council and to be circulated to governments prior to that Session.

DRAFT CONVENTION ON THE DECLARATION OF DEATH OF MISSING PERSONS

CONSIDERING that military events and racial, religious, political or national persecutions have caused in the course of the Second World War the disappearance of persons whose death cannot be established with certainty,

CONSIDERING that this situation has produced difficulties of a legal nature which have placed a great number of human beings in a precarious position,

BEING CONVINCED that these difficulties can only be solved on an international basis,

THE STATES PARTIES TO THE PRESENT CONVENTION agree as follows:

CHAPTER I

Article 1

Scope

The present Convention is applicable to declarations of death of persons who have disappeared in the years 1939-1945, with the exception of cases in which there is no reasonable ground to infer that such disappearance was due to death as a consequence of events of war or racial, religious, political or national persecution.

Article 2

Competent Authorities

1. The following tribunals shall be competent to issue declarations of death:
 - (i) the tribunal of the place of the last domicile of the missing person;
 - (ii) the tribunal of the place of the last voluntary or involuntary residence of the missing person;
 - (iii) the tribunal of the place of the last residence of the missing person in the country of which he is a national, or, in a case where the missing person was never domiciled in that country, the tribunal of the capital of that country;
 - (iv) the tribunal of the place of residence of the applicant;
 - (v) the tribunal of the situs of property of the missing person.
2. An applicant may apply to any competent tribunal but, having made application, shall not be entitled to make a subsequent application to another competent tribunal unless the first tribunal does not regard itself as competent to deal with the application.
3. If the

3. If the law of any State Party to the present Convention confers authority to issue declarations of death upon an authority other than a tribunal, references in the present Convention to tribunals shall be applicable to such other authority.

Article 3

Application for Declaration of Death

At the instance of any physical or juridical person having a legal interest in the matter or of an authority charged with the protection of the public interest, the competent authorities in each State Party to the present Convention shall issue a declaration of death of any missing person within the scope of the present Convention provided that a period of three years has elapsed since the reception of the last news indicating that the person concerned was still alive.

Article 4

Date of Death

1. In issuing a declaration of death the competent authority shall determine the presumed date of death, taking into consideration all known circumstances.
2. In the absence of any other indication, the last day of the year in which the last news of the missing person was received shall be adopted as the presumed date of death.
3. In all cases death shall be presumed to have occurred at the last moment of the day of the presumed date of death.

Article 5

Effects of a Declaration of Death

1. In countries whose law provides for a declaration of death, a declaration in accordance with the present Convention shall have the same legal effect as other declarations of death under that law.
2. In countries whose law does not provide for a declaration of death, a declaration of death in accordance with the present Convention shall, in so far as appropriate, have the same legal effect as actual death.

Article 6

International Bureau for Declarations of Death

1. There shall be established an International Bureau for Declarations of Death. The Secretary-General of the United Nations shall determine its seat, composition, organization and method of operation.
2. A central registry shall be established in the Bureau.
3. The expenses of the Bureau shall be allocated among the States Parties to the present Convention in accordance with a scale to be established by the Secretary-General of the United Nations in consultation with such States.

/Article 7

Article 7

Communication of Applications

1. A tribunal to which an application for declaration of death is made shall, within fifteen days of the receipt of the application, communicate to the International Bureau the following information, in so far as possible:
 - (i) Full name of the missing person;
 - (ii) Names of parents, spouse and children;
 - (iii) Place and date of birth;
 - (iv) Habitual residence;
 - (v) Last known voluntary or involuntary residence;
 - (vi) Any relevant information as to nationality;
 - (vii) Date of the last news referred to in the application;
 - (viii) Name and address of the applicant;
 - (ix) Date of institution of the proceedings.
2. If the Bureau ascertains that an application is already pending, it shall immediately notify the tribunal to which the later application has been made. Such tribunal shall suspend its proceedings pending a final decision by the other tribunal and shall inform the applicant of the tribunal before which proceedings have already been instituted and of the name of the other applicant.

Article 8

Publication and Communication of Decisions

1. A tribunal issuing a decision upon an application for a declaration of death shall communicate its decision to the International Bureau within fifteen days from the date on which such decision becomes final, whether the decision is positive or negative. Such communication shall contain the date of the decision and the date established by the declaration of death as the presumed date of death.
2. The International Bureau shall publish a monthly list of all applications and final decisions which are communicated to it.
3. A declaration of death shall not be issued in accordance with the present Convention until the expiration of three months from the publication of the application by the International Bureau.

Article 9

Mutual Assistance

The States Parties to the present Convention shall afford each other mutual assistance without charge on the direct request of the authorities referred to in Article 2, without the necessity of having recourse to diplomatic channels.

Article 10

Working Languages

The working languages of the International Bureau shall be English and French.

Article 11

Recognition of Declarations of Death

All final declarations of death issued in accordance with the present Convention shall be recognized by all States Parties to the Convention, whether or not they were Parties at the time of the issuance of such declarations, and shall be given the same effect and be subject to the same rules with respect to reconsideration as declarations issued by the competent authorities of that State.

CHAPTER II

Article 12

Signatures and Acceptances

1. The present Convention of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be open for signature or acceptance on behalf of any Member of the United Nations and also of any non-Member State to which an invitation has been addressed by the Economic and Social Council.
2. Any such State may:
 - (a) Sign without reservation as to acceptance;
 - (b) Sign subject to acceptance and subsequently accept; or
 - (c) Accept.
3. Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

Article 13

Entry into Force

The present Convention shall come into force upon the expiration of thirty days following the day on which two or more States have signed it without reservation, or accepted it in accordance with Article 12.

Article 14

Parties

A State which has signed without reservation as to acceptance, or accepted pursuant to Article 12, shall become a Party to the present Convention upon its entry into force or upon the expiration of thirty days following the date of such signature or acceptance, if executed after its entry into force.

/Article 15

Article 15

Dependent Territories

Any State may at the time of signature or the deposit of its formal instrument of acceptance or at any time thereafter declare by notification addressed to the Secretary-General of the United Nations that the present Convention shall extend to all or any of the territories for which it has international responsibility, and the present Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the date of receipt by the Secretary-General of the United Nations of this notification.

Article 16

Notifications by the Secretary-General

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-Member States referred to in Article 12 of the date of entry into force of the Convention and shall notify them of all signatures and acceptances received in accordance with Article 10, and of all notifications received in accordance with Article 15.

Article 17

Applicability to Occupied Territories

The States Parties to the present Convention shall, within the limits of their authority, apply its provisions or cause them to be applied in the territories which as a consequence of the Second World War are under their occupation.

Article 18

Duration

The present Convention shall be valid for a period of five years from the date of its entry into force.

Article 19

Disputes

All disputes arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement.

Article 20

Registration

In accordance with Article 102 of the Charter of the United Nations, the present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

IN FAITH WHEREOF the undersigned duly authorized, have signed the present Convention on behalf of their respective Governments.

Done at this day of
one thousand nine hundred and forty-nine, in a single copy, which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all the Members of the United Nations and to non-Member States referred to in Article 12.

COMMENTARY ON THE DRAFT CONVENTION ON THE DECLARATION
OF DEATH OF MISSING PERSONS

The considerations which result in the need for an international convention on declarations of death are set out in document E/824 of the Economic and Social Council, on the basis of which the Economic and Social Council adopted its resolution of 24 August 1948 (document E/1029) requesting the Secretary-General to prepare a draft convention and circulate it to governments for comments prior to its consideration at the next session of the Economic and Social Council.

The draft Convention which has been prepared attempts to solve certain legal difficulties arising from the disappearance of millions of persons during the Second World War. Now, three years after the end of hostilities, it has become urgent that appropriate measures be taken to remedy this situation and to adopt a simplified and uniform procedure with regard to declarations of death so as to enable survivors to regulate legal relationships, affecting property and personal status.

Certain States have already promulgated laws which take into consideration the events of war and persecution during the Second World War, but in a majority of States affected by these events there is no special legislation in this respect. Moreover, decisions taken in one State are not recognized in other countries.

The proposed Convention has two main objectives: first, to provide for the issuance of declarations of death on the basis of a uniform period of absence and second, to provide for the recognition of such declarations made under this Convention in all States Parties to the Convention. Its scope is governed and limited by these two objectives.

The Convention does not attempt to deal with questions of substantive law as to the legal consequences of the issue of such declarations. Such matters, as well as the procedure for applying for a declaration, admissible evidence, appeals, etc., are left to the domestic law of each country.

Article 1

This Article states the scope of the Convention and makes it applicable to declarations of death of persons who have disappeared in the years 1939-1945. This period was chosen as covering the years in which were concentrated the great majority of disappearances and deaths as a result of events of war or persecution.

Many deaths occurred in circumstances of which there are no survivors or witnesses so that evidence concerning such deaths would be inconclusive and proof very difficult.

The Convention proceeds therefore on the policy that the burden of proof in such cases should be lightened. Thus the combined effect of Articles 1 and 3 is that an applicant needs to show: (1) that the missing person disappeared during the years 1939-1945; (2) that there has been no news of him for three years; and (3) that the circumstances of his disappearance were such that there is reasonable ground for inferring that the disappearance was due to death as a consequence of events of war or persecution. Mere disappearance or absence of news is of course insufficient. The circumstances in which the person disappeared or was last heard of must be such as to suggest the likelihood that the disappearance is due to death. Thus, there may be many circumstances in which a person disappeared during the years 1939-1945 but which nevertheless suggest no likelihood of death, e.g. a foreign soldier stationed in Europe at the close of the war may have been returned with his unit to his home country (such a troop movement might well be regarded as "an event of war") and never heard of again by those who knew him in Europe, i.e. he has "disappeared"; yet there is nothing in the circumstances of his disappearance to suggest that it is due to his death. The Convention is not intended to apply to such cases, and Article 1 therefore excludes cases where there is no reasonable ground to infer that the disappearance was caused by death as a consequence of events of war or persecution.

The domestic law of the country in which the application is made will determine the appropriate procedure and the evidence required to establish the necessary conditions, but on establishing those conditions the applicant is entitled to the issue of the declaration. It becomes mandatory, not discretionary, for the Tribunal to issue the declaration, provided that the necessary conditions are established in accordance with the requirements of local procedure.

The expressions "events of war" and "racial, religious, political or national persecution" are intended as broad and flexible terms to cover a wide variety of circumstances which cannot be precisely or closely defined. Any attempt at undue precision would defeat the object of the Convention. Thus, for example, a movement of a group of political prisoners and their subsequent disappearance would provide reasonable ground for the inference that they were dead.

No geographical limit is suggested in the draft Convention, since the governing consideration is disappearance in circumstances giving rise to an inference that it is due to death as a result of events of war or persecution. If that condition is fulfilled, there is no purpose to any geographical limitation since the actual place of disappearance is then

/irrelevant.

irrelevant. The Convention, however, is limited to disappearance in such circumstances, and it makes no attempt to deal with disappearance and presumption of death arising from other causes.

Article 2

This Article defines the Tribunals which are to be competent to issue declarations of death under the Convention. An applicant has five different Tribunals to choose from which are competent to deal with his application.

In order to provide as much flexibility as possible and to enable wide advantage to be taken of the Convention, all Tribunals which appear to have a reasonable connection with the case are given jurisdiction. This will reduce the burden on applicants and give a wide application to the operation of the Convention. There is no hierarchy established among the Tribunals listed in this Article, and the applicant may choose whichever is most convenient for him. However, when he makes a choice he is bound by it and the Tribunal chosen is the only one competent to make a final decision on his application, unless it should declare itself incompetent to deal with it. This provision has been inserted in order to avoid the possibility of an applicant going from one Court to another until he found one willing to grant his request.

While some consideration was given to the possibility of restricting the jurisdiction in the case of a particular missing person to the Tribunal to which the first application was made, it was felt preferable to allow different applicants to institute proceedings in different Tribunals with respect to the declaration of death of the same person since it would be unjust to prejudice an applicant merely because some other applicant had failed before some other Tribunal. The new Tribunal would be free to make its own decision on the evidence placed before it.

The last paragraph of this Article extends the Convention to institutions other than Tribunals where such other institutions are the appropriate authority under the domestic law to issue declarations of death.

Article 3

This Article provides that a competent Tribunal shall issue declarations when the conditions of the Convention are fulfilled. It is left, however, to the Tribunal to determine, in accordance with local laws, whether these conditions are met. Thus, when an applicant has, in accordance with the domestic procedure, established to the satisfaction of the Tribunal, that a case falls within the scope of the Convention, it is then mandatory for the Tribunal to issue the declaration.

/This Article

This Article also fixes the period of absence which must be established as three years from the last news indicating that the missing person was still alive. The Article deliberately refrains from referring to news "from" the missing person and refers to the more general conception of news indicating that he was still alive, which may be news either "from" or "of" him.

Article 4

The precise date of the person's death is an important factor in determining the legal effects of death, and a mere declaration of death without indicating the presumed date of death would not solve many of the problems aimed at by the Convention. This Article therefore provides that the Tribunal shall also fix the presumed date of death on the basis of all known circumstances. However, in many cases the occurrence of presumptive death cannot be fixed even approximately, and this Article therefore provides that in the absence of any other evidence the Tribunal shall adopt the last day of the year in which the last news of the missing person was received as the date of death. However, it may not be sufficiently precise in every case to fix a date as covering the whole twenty-four hours. Therefore the last moment of the day of the presumed date of death is specified as the moment of presumed death.

The Convention deliberately refrains from attempting to resolve the problem of the time of death in cases where the order in which two or more persons died cannot be established. This is a matter for the domestic law of each country, and a special provision for the cases covered by the Convention is undesirable as it would cause more difficulties than it would resolve.

Article 5

This Article provides that in countries which already recognize declarations of death, a declaration under the present Convention should have the same effect as a declaration in accordance with the existing law (i.e. that it should be treated as if it were a declaration made by the Tribunal of that country itself), and that in countries which do not have the procedure for making a declaration of death, a declaration under the present Convention should have as far as appropriate the same effect as actual death, in each case leaving to the domestic law to specify what these effects will be. The legal consequences of a declaration of death are matters of substantive law upon which the rules adopted by various countries differ, and it does not appear desirable to attempt to unify them here. The phrase "as far as appropriate" is admittedly vague, but some qualification is essential because if it were omitted then

no room would be left for the law concerned to adopt provisions to deal with the consequences of the reappearance of the missing person. The phrase "as far as appropriate" leaves it to the law of each State to determine the extent to which the automatic consequences of actual death will follow and to provide, if it wishes, for procedure in cases when the person declared dead reappears.

Article 6

The Convention provides for the setting up of an International Bureau for declarations of death as the best means to prevent contradictory decisions of two or more competent Tribunals acting on applications concerning the same missing person and to facilitate international recognition of declarations. In addition, the task of this Bureau will be to centralize the information on applications submitted to various Tribunals and the decisions of these Tribunals, and to provide an accessible and authoritative record of those declarations.

Article 7

The second paragraph of this Article is designed to have a Tribunal merely suspend its own proceedings if an application is pending elsewhere. If the decision on the first application is favourable, then the second Tribunal will recognize it in accordance with the Convention; if it is unfavourable there is no reason why the second Tribunal should not make its own decision on the evidence which is before it. This provision is thus an instance of the application of the principle that it is only declarations of death which are made authoritative and not their refusal.

Article 8

The period of three months which has to expire from the time of the publication of the application by the International Bureau before a declaration of death may be issued is necessary in order to give other persons having information about the missing person (and indeed possibly the missing person himself) an opportunity to come forward.

Article 9

This Article provides for direct contact between various Tribunals without the necessity for going through the usual diplomatic channels.

Article 10

It is felt to be sufficient to provide for the working languages of the Bureau and not to regulate the languages in which communications will be addressed by national authorities to the Bureau.

Article 11

Article 11

This Article gives international recognition of all final declarations of death issued in accordance with the present Convention. The effect of this Article is that the Tribunal of one country will recognize a declaration made by a Tribunal of another country and give to that declaration the same effect as if it were a declaration made by one of its own Tribunals. Thus it will have the same legal consequences (e.g. as to inheritance) as if it were issued by the Tribunal recognizing it. In addition, it will be subject to the same rules with respect to reconsideration as if it were made by a Tribunal, and in accordance with the law, of the country where recognition is sought; it will therefore be no more and no less effective and binding than a declaration issued in that country itself.

Articles 12-20

The formal clauses of the Convention are brought into line with the relevant provisions of the various conventions and protocols included under the auspices of the United Nations, thus unifying the procedure with regard to signatures, acceptances, entry into force, ratifications, etc.

Instead of ratification and adherence the draft Convention provides for signature without reservation as to acceptance, signature subject to acceptance followed by acceptance, and acceptance.

Article 15 is drafted in accordance with a similar provision recently adopted by the Third Committee of the General Assembly in Paris (document A/666).

In conformity with the Resolution of the General Assembly No. 1751 (III), an article has been inserted providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of this Convention.
