Comments of the United Nations High Commissioner for Refugees on Proposed Rules from U.S. Citizenship and Immigration Services (U.S. Department of Homeland Security): "Procedures for Asylum and Bars to Asylum Eligibility", "Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements", and "Asylum Application, Interview, and Employment Authorization for Applicants"

UNHCR submits for your consideration the comments below on three new Proposed Rules from the U.S. Citizenship and Immigration Services (jointly referred to as "the Proposed Rules"). Those are: "Procedures for Asylum and Bars to Asylum Eligibility" (*hereinafter "*Proposed rule on bars"),[1] "Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements"[2] (*hereinafter* "Proposed rule on fees"), and "Asylum Application, Interview, and Employment Authorization for Applicants"[3] (*hereinafter* "Proposed rule on employment authorization").

These comments have been prepared by the United Nations High Commissioner for Refugees (UNHCR) and focus on those aspects of the proposed rules which may have a significant impact on the international legal protections available under US treaty obligations to refugees, asylum-seekers, and others of concern to UNHCR.

This submission is offered consistent with UNHCR's supervisory responsibility under the 1967 United Nations Protocol Relating to the Status of Refugees (the "1967 Protocol")[4] and the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention").[5] The United States is a signatory and State Party to the 1967 Protocol, and therefore has agreed to cooperate with UNHCR to facilitate our duty of supervising the application of the provisions of the Protocol, and, as incorporated therein, the 1951 Convention. One of the means by which UNHCR exercises its supervisory responsibility is by communicating with States Party its guidance and interpretations of the 1951 Convention, the 1967 Protocol, and other international refugee instruments. This guidance is informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system of refugee protection.

UNHCR presents these comments today out of concern that the Proposed Rules restrict asylum in a way that is at variance with international legal obligations related to refugee protection, such that required international legal protections may no longer be accessible. UNHCR has a strong interest in ensuring that United States asylum law and policy remains consistent with the international treaty obligations that the United States helped to create, and respectfully offers its guidance on those obligations.

1. Proposed Rule: "Procedures for Asylum and Bars to Asylum Eligibility"

I. Bars to Asylum Beyond the 1951 Convention Framework

The Proposed rule on bars suggests seven new bars to eligibility for asylum. These bars would apply to asylum-seekers who are convicted of:

1) A felony under state or federal law;

2) An offense under the U.S. domestic laws on smuggling or harboring non-citizens;

[1] EOIR Docket No. 18–0002; A.G. Order No. 4592–2019; issued December 19, 2019.
[2] CIS no. 2627-18; DHS Docket No. USCIS-2019-0010, issued November 14, 2019
[3] CIS No. 2648-19; DHS Docket No. USCIS-2019-0011, issued November 14, 2019
[4] Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, at Art II.
[5] July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, at Art. 35. UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." UNHCR Statute ¶ 8(a).

3) An offense under INA Section 1326 (illegal re-entry);

4) A federal, state, tribal, or local crime involving "criminal street gang activity;"

5) Certain offences concerning driving while intoxicated;

6) A federal, state, tribal, or local domestic violence offence (this category also includes a bar to asylum for those "who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted"); and

7) Certain misdemeanors under federal or state law for offenses related to false identification, unlawful receipt of public benefits, or possession of small amounts of drugs or drug-related paraphernalia.

The 1967 Protocol and 1951 Convention lay out a clear framework for determining who is a refugee and is therefore entitled to the rights enumerated in the Convention itself. That framework includes criteria for identifying persons who, while they would otherwise have the characteristics of refugees, should nonetheless be excluded from refugee status.[6] This framework divides into three categories, commonly known as "the exclusion clauses."[7] The first two categories – exclusion for persons already receiving United Nations protection or assistance,[8] and for persons not considered to be in need of international protection[9] – are not particularly germane to the issues discussed in this proposed rule. However, the third exclusion category – for persons considered not to be deserving of international protection – provides valuable guidance for the issue at hand.

The Convention sets a high threshold when defining persons considered not considered to be deserving of international protection. Article 1(F) states that persons may be excluded from refugee stats where there are "serious reasons for considering that:

> "(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> "(b) he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee;
>
> "(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."[10]

In addition, Article 33(2) of the 1951 Convention denies the benefit of *non-refoulement* to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[11] Article 1F is to be distinguished from Article 33(2) of the 1951 Convention, which provides for the exceptions to the principle of *non-refoulement*. These are distinct provisions serving different purposes. Article 1F forms part of the refugee definition in the 1951 Convention, and exhaustively enumerates the grounds for exclusion from refugee status based on criminal acts committed by the applicant. Unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection. While Article

[6] 1951 Convention, Article 1(D)-(F).
[7] UNHCR Handbook, paras. 140-141 *et seq*.
[8] 1951 Convention, Article 1(D). Such protection or assistance was given by the former United Nations Korean Reconstruction Agency and is currently given by the United Nations Relief and Works Agency for Palestine Refugees in the Near East. *See* UNHCR Handbook, para. 142.
[9] "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." 1951 Convention, Article 1(E).
[10] 1951 Convention, Article 1(F).
[11] 1951 Convention, Article 33(2).

1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country. The application of Article 33(2) affects the treatment afforded to refugees, rather than their recognition as refugees under the 1951 Convention. It permits, under exceptional circumstances, the withdrawal of protection from *refoulement* of refugees who pose a danger to the host country. A decision to exclude an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.

UNHCR is concerned that the seven new bars proposed in this Rule go far beyond the exclusion framework established by the Convention. UNHCR's general position is that, given the stark consequences of exclusion for the person concerned, the exclusion clauses in the Convention must be narrowly construed.[12] At the same time, the exclusion clauses are exhaustively enumerated in Article 1F, and while these clauses are subject to interpretation, they cannot be amended or modified[13] in the absence of an agreement by the contracting Parties. As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1F should always be interpreted in a restrictive[14] manner and applied with utmost caution[15], and in the light of the overriding humanitarian character of the 1951 Convention.

The Proposed rule on bars would exclude asylum-seekers who have committed crimes significantly less severe than those contemplated by the drafters of the Convention.[16] Because the proposed bars are overly broad, UNHCR is concerned that they risk the exclusion of legitimate refugees.

The Proposed rule on bars contemplate offenses committed in the United States after entering the country.[17] Consequently, the language in Article 33(2) – which covers "particularly serious crimes" in the country of refuge – is most relevant. UNHCR observes that in 1997 we offered comments (similar to those we offer today) on proposed rules entitled "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; and Asylum Procedures." Those comments, which spoke to proposed rules promulgated in line with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), examined discrepancies between the language of "particularly serious crime" in Article 33(2) and the notion of "aggravated felonies" in U.S. law, urging caution.

Neither the Convention nor the Handbook defines "particularly serious crime," as articulated in Article 33(2). However, the Handbook does offer some guidance in determining whether a crime is a "serious" non-political crime for purposes of the Article 1(F) exclusion clause regarding a person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." A "serious" crime must be "a capital crime or a grave punishable act," and "[m]inor offences punishable by moderate sentences are not grounds for exclusion" under Article 1(F).[18] A "particularly serious crime" is an even more restrictive category.

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[12] UNHCR Handbook, para. 149.

[13] See UNHCR, *Background Note on Exclusion*, at para. 7. As a general principle of international law, a treaty can only be modified or revised by agreement between the contracting Parties. This principle is set forth in Article 39 of the *1969 Vienna Convention on the Law of Treaties*, which stipulates that: "[...] a treaty may be amended by agreement between the Parties". Similarly, no reservations to Article 1 of the 1951 Convention are permitted by virtue of Article 42 of the 1951 Convention. For further guidance on the law of treaties, see Ian Brownlie, *"Principles of International Law",* sixth Edition, Oxford University Press, 2003, at pages 581-584.

[14] See UNHCR Handbook, para. 149.

[15] See Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are generally accepted as being declaratory of international law. In particular, under Article 31, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning given to the terms [...] in their context and in the light of its object and purpose". The object of the 1951 Convention, as stated in its Preamble, is to endeavour to ensure that refugees have the widest possible exercise of fundamental rights and freedoms.

[16] UNHCR Handbook, paras. 147-149.

[17] Proposed Rule on Bars, p. 19.

[18] UNHCR Handbook, para. 155.

The Proposed rule on bars looks to exclude individuals who have convicted relatively minor crimes, including misdemeanor crimes not serious enough to be considered felonies under U.S. law. This is at variance with the serious nature of the crimes contemplated in the Convention's framework. Additionally, the particular proposed bar excluding asylum-seekers who have "engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted," raises additional concerns. Article 33(2) only permits the removal of the protection against *refoulement* if there is a final conviction.

Moreover, in determining the refugee status of persons who have been convicted of a crime within the country of refuge, the adjudicator first must assess whether the person fulfills the criterion of having a "well-founded fear of persecution" as specified in Article 1(A)(2) of the Convention and Article I of the Protocol. It is only after the person has been considered to satisfy the above "well-founded fear of persecution" criterion that the possible applicability of any exclusion clauses should be examined.[19] At that point, a balancing test is appropriate, to weigh the nature of the offence against the severity of the feared persecution.[20] UNHCR is concerned that these new bars are to be automatically applied, leaving no room for such a balancing test.

UNHCR recommends that none of these bars be implemented, and that the Proposed rule on bars be rewritten to correspond with the exclusion framework articulated in the Convention.

II. Penalization for Irregular Entry

The Proposed rule on bars includes, as mentioned above, a new bar to asylum eligibility those convicted of illegal re-entry. This presumably affects at least two groups of asylum-seekers: First, this could affect those who re-enter irregularly in order to seek asylum, if they were first convicted on the re-entry charge. Second, this would affect those who have been convicted of illegal re-entry in the past, prior to developing a fear of persecution. If they were to present at a port of entry to seek asylum, even many years later, this bar could be effectuated against that person.

Article 31 of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entrance. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence… provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties, but includes "any administrative sanction or procedural detriment imposed on a person seeking international protection."[21] Disparate treatment between two groups of refugees – those who arrive at ports of entry and those who enter irregularly – is such a detriment, as is denying the latter group access to rights articulated in the Convention.

UNHCR recommends that the bar to asylum for those with illegal re-entry convictions be struck.

III. Compatibility with International Treaty Observations

The text of the Proposed rule on bars observes that the new framework "is consistent with U.S. obligations under the 1967 Protocol," which incorporates Articles 2-34 of the 1951 Convention.[22] Specifically, the Proposed Rule asserts that the new bars to asylum are compatible with the prohibition

[19] UNHCR Handbook, para. 176.
[20] Handbook, paras. 154, 156, and 157.
[21] UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas of 'international' zones at airports* (Jan. 17, 2019), para. 8, https://www.refworld.org/docid/5c4730a44.html.
[22] Specifically, Section D of the Proposed Rule on Bars discusses United States laws implementing international treaty obligations.

on *refoulement*, because the new bars affect the individual's eligibility for asylum, but do not affect eligibility for withholding of removal and CAT protection.

The framework for recognition (and exclusion) of refugees does not make such a distinction. Instead, an individual recognized as deserving of asylum under Article 1 is correspondingly entitled to protection from *refoulement* through Article 33. Withholding of removal, which may have its merits in other instances, is not to be seen as a substitute for asylum. Additionally, withholding of removal fails to secure numerous rights to which Convention refugees are entitled, including freedom from detention, family reunification, and pathways to naturalization.

2. Proposed Rule: "Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements"
3. Proposed Rule: "Asylum Application, Interview, and Employment Authorization for Applicants"

I. Fee for asylum applications

The Proposed rule on fees establishes a fee for asylum for the first time in U.S. history. Asylum-seekers filing an asylum claim before USCIS would need to pay USD 50, with no waivers for hardship.

The foundation of international refugee law is the prohibition on sending refugees back to persecution. Seeking asylum is a fundamental right and cannot be reserved for those who can pay.[23] Article 1 of the 1951 Convention establishes a framework for determining who and who is not a refugee. Access to that procedure must be open to anyone who seeks asylum and cannot be obstructed; fees represent an obstacle to access to asylum which is inconsistent with the humanitarian and non-discriminatory character of the 1915 Convention and with the right to seek asylum more broadly.

In UNHCR's seven decades of assisting refugees worldwide, the organization has observed that asylum-seekers are often forced to flee with few or no possessions and may be victimized by corrupt or criminal actors during their journey. When they arrive in a country of refuge, they may have next to no resources. This fee, especially when combined with additional barriers to employment (discussed below), is likely to create undue hardship.

UNHCR recommends that the proposed fee for asylum is eliminated, and that asylum applications remain without cost. If a fee is imposed, UNHCR suggests that robust fee waivers are made available for asylum-seekers in need.

II. Access to work authorization

UNHCR understands that under both the Proposed rule on fees and the Proposed rule on employment authorization, asylum-seekers' access to work authorization would be significantly more limited than in current practice.

According to the Proposed rule on employment authorization, asylum-seekers would: (1) generally be prohibited from receiving legal authorization to work for at least a year after they file for asylum; (2) would never be eligible to apply for work authorization if they fail to apply for asylum within one year of arriving in the United States, and (3) would never be eligible to apply for work authorization if they entered the country irregularly. In addition, asylum-seekers with certain criminal convictions (including

[23] *See, e.g.*, Handbook, *supra* note X, paras. 189-192 (observing that while procedures to determine refugee status will not be uniform worldwide, asylum-seekers should nonetheless "be given the necessary facilities… for submitting his case to the authorities concerned"). *See also* UN High Commissioner for Refugees (UNHCR), *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, chapter 8, pages 201-211, available at: https://www.refworld.org/docid/5a9d57554.html

foreign convictions) are to be made ineligible for work authorization, while asylum-seekers with certain pending domestic charges may be denied work authorization at USCIS's discretion.

According to the Proposed rule on fees, asylum-seekers would now need to pay USD 490 to apply for a work permit.

The 1951 Convention articulates a series of rights to which refugees are entitled – including certain rights to seek employment. Article 17 of the Convention calls for States party to accord refugees "lawfully staying… the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."[24] This applies to both permanent and temporary residence, where the stay in question is "known and not prohibited"; once an asylum application has been filed, that stay is known and not prohibited.[25] Article 18 also guarantees the right to self-employment for asylum-seekers and refugees lawfully in the country, hence, from the moment of application for recognition of refugee status. This right applies regardless of whether or not an individual has a prior criminal conviction, and certainly cannot be made conditional on pending domestic charges.

Likewise, the rights articulated in the 1951 Convention apply to all refugees, even those who have not yet been through an adjudicatory process. As UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("Handbook") details, "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one."[26]

Denying work authorization to asylum-seekers who do not file within the one-year period required by U.S. law goes against these principles. Likewise, requiring asylum-seekers to wait for a year prior to applying for work authorization does not comport with the requirements of the 1951 Convention. Seeking asylum is a fundamental right, and being able to work while waiting for asylum adjudication is a means of ensuring that individuals do not have to give up their right to seek asylum because of hardship. Access to work is central to refugees' ability to live normal lives and to contribute to their host community. Ensuring that refugees have access to work, are able to develop their skills and to use them productively is essential to the realization of other human rights and to the preservation of human dignity. Enables individuals and families to have an income, is central to the attainment of an adequate standard of living, and reduces costs to the State of social security and support; and enables refugees to be more resilient and better able to overcome future challenges than if they are compelled to rely upon humanitarian aid.[27]

Article 31 of the 1951 Convention effectively prohibits discrimination between groups of refugees based on their manner of entrance. Specifically, Article 31(1) prohibits states from imposing penalties on asylum-seekers "on account of their illegal entry or presence… provided they present themselves

[24] 1951 Convention Article 17.

[25] UNHCR, *'Lawfully Staying' – A Note on Interpretation* (May 1988), https://www.refworld.org/docid/42ad93304.html (concluding that "'stay' means something less than durable residence, although clearly more than a transit stop, while 'lawfully' normally is to be assessed against prevailing national laws and regulations; A judgement as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person.").

[26] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued most recently in 2019), para. 28, https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[27] See also UN High Commissioner for Refugees (UNHCR), *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, chapter 8, pages 201-211, available at: https://www.refworld.org/docid/5a9d57554.html

without delay to the authorities and show good cause for their illegal entry or presence." The reference to "penalties" in Article 31 is not intended to be limited to criminal penalties, but includes "any administrative sanction or procedural detriment imposed on a person seeking international protection."[28] Disparate treatment between two groups of refugees – those who arrive at ports of entry and those who enter irregularly – is such a detriment, as is denying the latter group access to rights articulated in the Convention.

UNHCR notes with concern the assertion that the proposed rule is consistent with the 1951 Convention because asylum-seekers who establish "good cause for the illegal entry or attempted entry" are exempted from the ban on access to work authorization. Yet the rule does not define what that "good cause" would be in a manner that is consistent with the 1951 Convention. The discussion of the proposed rule mentions that "good cause" for illegal entry would be "requiring immediate medical attention or fleeing imminent serious harm." This is significantly more limited than the concept established by international law. In UNHCR's view, "fleeing persecution constitutes itself a 'good cause.'" Likewise, UNHCR would take the opinion that 'good cause' is met should the asylum-seeker fail to comply with immigration requirements "due to fear of summary rejection at the border."[29]

UNHCR recommends that the proposed restrictions on work authorization be dropped, including: 1) that there be no extension of the waiting period before an asylum-seeker is eligible to apply for work authorization, and 2) that no additional fees be levied. **UNHCR further recommends that** no penalty is instituted for irregular crossing, including no penalty for access to work authorization.

III. Additional Administrative Burdens on Asylum Seekers

The Proposed rule on employment authorization would – if an asylum-seeker misses an asylum interview or a biometrics appointment – allow USCIS to dismiss that person's asylum application, deny an asylum interview, refer the case to an immigration court, and / or deny a work permit. This proposed rule also removes an important exception in current law: if the notice of interview or biometrics appointment was not mailed to the applicant's current address, and such address had been provided to USCIS prior to the date of mailing, such consequences do not apply. This means, under this proposed rule, asylum applications could be dismissed in the event that USCIS erred and sent notice of the interview to the wrong address.[30]

Further, the proposed rule on employment authorization removes the obligation on DHS to send notices of failure to appear before it dismisses a case or refers it to immigration court.[31] While the proposed rule allows for an applicant who misses an interview or biometrics appointment to show exceptional circumstances, this would be misleading, as the applicant would not have been notified of the failure to appear in the first place.

Article 1 of the 1951 Convention lays out the criteria for refugee status, and fair and efficient procedures for determining that refugee status are an essential element in the full and inclusive application of the Convention. In view of the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure.[32] In addition, Article 16 of the 1951 Convention provides for free access to the courts of law for refugees, including legal assistance. Article 32 affords refugees lawfully in the country the right to due process of the law in the context of denial and removal decisions.

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[28] UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas of 'international' zones at airports* (Jan. 17, 2019), para. 8, https://www.refworld.org/docid/5c4730a44.html.

[29] Cathryn Costello, UNHCR, *Legal and Protection Policy Research Series: Article 31 of the 1951 Convention Relating to the Status of Refugees* (July 2017), pages 31-33, https://www.refworld.org/pdfid/59ad55c24.pdf

[30] 84 Fed. Reg. at 62423.

[31] *Id*.

[32] Handbook, *supra* note X, paras. 189-194.

The above administrative burdens present as inconsistent with both articles in denying to refugees basic due process and fairness rights, based on procedural factors beyond the applicant's control. They will also disproportionately affect the applicants who cannot afford legal assistance, the number of which is likely to increase on account of restricted access to work authorization.

UNHCR recommends that the proposed additional administrative burdens on asylum seekers be dropped, and in the alternative that the exceptions as codified in existing law remain intact.

IV. Access to Naturalization

The Proposed rule on fees significantly increases the fees for naturalization and eliminates fee waivers.

UNHCR observes that the refugee law framework seeks to find durable solutions for displaced people globally. Naturalization is one of the best forms of integration into a new society and is a method through which a displaced person avails themselves once again of the protection of a state – and as such, is no longer considered displaced.

The new fees affect the path that both asylees and refugees take to a durable solution and permanent protection. They may pose an unsurmountable burden to refugees, asylees, and their families.

Article 34 of the 1951 Convention indicates that States Party "shall as far as possible facilitate the assimilation and naturalization of refugees." In particular, Article 34 calls on States Party to "make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[33] UNHCR observes that these sharp escalation in fees seem to be a move in the opposite direction from that indicated in the Convention.

UNHCR recommends that naturalization fees for asylees and refugees not be increased, and in the alternative, that fee waivers for asylees and refugees in need are put in place.

- UNHCR Multi-Country Office Washington, February 2020

[33] UNHCR is aware that the U.S. Supreme Court has, in Cardoza-Fonseca (1984), observed that Article 34 is precatory in nature.