

I. BACKGROUND

1. It is widely recognized that there are persons who are not covered by the application of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, but who are, nevertheless, in need of international protection, and that further measures should be explored to ensure they receive it. Consensus is needed in order to identify the content and nature of such protection, without detracting from international refugee instruments. The informal consultations have also extended to situations where the interpretation of the international refugee instruments is disputed and, more generally, to inadequacies in the international legal framework for the protection of refugees.
2. The forty-fifth session of the Executive Committee of the High Commissioner's Programme considered, in detail, the concept of international protection. Then, and in subsequent years, it encouraged UNHCR to engage in consultations and discussions concerning measures to ensure international protection to all who need it, with a view to exploring the development of guiding principles to this end. The informal consultations have been perceived as a longer-term process that should be both comprehensive and standard-setting.
3. The Office has, to date, organized three informal meetings in Geneva, bringing together a limited number of Government and academic experts for informal exchanges of views on aspects of this broad subject. The first meeting, held on 2 and 3 May 1996, helped to identify the key areas in which unresolved issues have had a negative impact on persons in need of international protection.¹ The second meeting, held on 17 and 18 December 1996, focused, in particular, on temporary protection and the scope of protection in cases of large-scale influx, while the third meeting, held on 5 and 6 May 1997, advanced the discussion on UNHCR's supervisory role, statelessness and outstanding temporary protection issues. The summaries which follow synthesize the presentations and discussions on these topics, but do not reflect in detail all views expressed by the participants. They also indicate thinking to date on these issues and provide a constructive basis for their further development.

II. SUMMARY OF DISCUSSIONS ON TEMPORARY PROTECTION

4. The participants discussed in detail the concept of temporary protection and identified the following areas as a useful basis for the further development of any temporary protection regime:
 - (A) In the case of large-scale influxes in all parts of the world, not only 1951 Convention refugees, but also other persons fleeing war, civil war and generalized violence are in need of international protection as long as the danger lasts. The mechanisms for providing international protection to all who need it have, however, been different.
 - (B) Only African States have opted for a regional convention applicable to all situations of flight. In other regions, soft law instruments and/or national policies have been adopted in the context of specific situations. In doing so, European States have maintained a clear distinction between 1951 Convention refugees and so called "*de facto* refugees".
 - (C) The purpose of temporary protection is to respond to specific protection needs by enhancing:
 - (i) The effectiveness of the principle of *non-refoulement*; and
 - (ii) The protection of those who, whether or not they fall within the terms of the 1951 Convention, are forced to flee their countries due to war, civil war and generalized violence.
 - (D) Temporary protection should be conceptualized in a manner consistent with the framework of international refugee and human rights law. It should be integrated as a component in a more comprehensive approach, involving concerted efforts on the part of the international community to assist States particularly affected by an influx and to achieve a solution to the conflict or strife, and enabling those who have fled to return in safety and dignity.
 - (E) Temporary protection is appropriate in situations of mass influx for persons seeking refuge abroad from situations of general danger, such as war, civil war and generalized violence.
 - (F) These persons include:
 - (i) Persons fleeing areas affected by conflict and violence;
 - (ii) Persons belonging to groups who have been or would be exposed to danger of systematic and widespread human rights abuses; and
 - (iii) Persons who, for other reasons specific to their personal situation, are presumed to be in need of international protection.
 - (G) Mass influx refers to a significant number of sudden arrivals, in a country, of persons from the same home country who seek international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical.
 - (H) Regarding the relationship between temporary protection and asylum procedures, States parties to the 1951 Convention and/or the 1967 Protocol are obliged to ensure that Convention refugees among the beneficiaries of temporary protection fully enjoy the status rights to which they are entitled. This can be achieved by different procedural models, including:

(I) Immediate screening of all;

(li) Free choice by an individual between temporary protection or an asylum procedure; and

(lii) Determination of refugee status after a certain period (2-3 years has been suggested).

(I) If States deny or suspend access to individual status determination during the stay in the country of refuge, they should gradually increase the rights of the beneficiaries of temporary protection to the level required by the 1951 Convention. The definitive termination of temporary protection should be without prejudice to the entitlement of an individual to invoke the principle of *non-refoulement*.

(J) If it becomes apparent that the majority of people seeking protection, or discrete groups among the influx, fall under the 1951 Convention, due regard should be given to group determination under this instrument.

(K) Temporary protection requires admission to safety without discrimination and guarantees protection against *refoulement* for the duration of the crisis which has generated the mass influx. Beneficiaries of temporary protection should be provided with a positive legal status which allows them to remain and from which definite legal rights derive. Persons from the country of origin concerned, who were already in the host country before the outbreak of the crisis that generated the mass influx, should be allowed to remain, without prejudice to a more favourable legal status which they may enjoy.

(L) Beneficiaries of temporary protection should be treated in accordance with human rights standards, taking account of the context in which such protection is extended. In cases of prolonged stay, States should, to the extent possible, gradually improve treatment. The right to education, employment, freedom of movement, assistance and personal identification should be granted without discrimination, while it is understood that any restrictions imposed must be justified on grounds of legitimate national interest and must be proportional to the interest of the State.

(M) The principle of family unity should be respected and no undue restrictions should be imposed to limit the admission of close family members to rejoin beneficiaries of temporary protection. Particular attention should be given to vulnerable beneficiaries of temporary protection who, due to their personal circumstances, require the support of close family members.

(N) Temporary protection may be withdrawn when it is considered that the beneficiaries would be able to return to their country of origin in safety and with dignity. Return in safety and with dignity presupposes the existence of the following elements:

(I) Respect for and compliance with the right to return by the country of origin;

(li) Existence of conditions which ensure the physical and legal safety of returnees;

(lii) Existence of an adequate infrastructure to allow the return to be sustainable, or availability of the basic necessities of life, including food, shelter, and basic sanitary and health facilities;

(lv) Non-discrimination and respect for other fundamental human rights of returnees; and

(V) Return forms part of an international process or mechanism.

(O) If return to the former place of habitual residence is not possible, a person can only reasonably be expected to return to a part of the country where he or she would enjoy safety and dignity. Such conditions would not exist where the repatriated individual would become an internally displaced person struggling for survival. This is without prejudice to more favourable terms included in peace agreements which guarantee a right to return to homes of origin.

(P) At the end of the crisis and upon the withdrawal of temporary protection, return preferably should take place on a voluntary basis. Those who have valid claims not to be returned should be allowed to have their claims assessed within the framework of established national mechanisms.

(Q) Beneficiaries of temporary protection should not be categorically excluded from national measures which provide a mechanism for adjusting temporary protected status to lawful permanent residence after an extended period of time.

(R) If return remains impossible after a prolonged stay of not more than five years, States should review the situation of temporarily protected persons, with a view to reducing their psychological uncertainty and to identify long-term solutions, while ensuring that satisfactory standards are maintained.

(S) States will cooperate with UNHCR in respect to measures taken in the exercise of temporary protection and in the implementation of long-term solutions, taking into account UNHCR's mandate and its duty to supervise the application of international instruments for the protection of refugees.

5. The participants agreed to consider the issue of burden-sharing in future informal consultations. In general, there was agreement to keep temporary protection at the forefront of the agenda and to strive for some form of consensus at the universal level. Most participants felt that the risks in the formalization of the concept of temporary protection lie in the potential for it to dilute the protection of the 1951 Convention and reduce the incentive of States to accede to the Convention. In addition, in a restrictive international climate towards refugees, agreement on a new regime might highlight the discretion and flexibility sought by States with regard to temporary protection, rather than their obligations under human rights and refugee law. It was recommended that the binding nature of these obligations be underlined.

III. SUMMARY OF DISCUSSION ON STATELESS PERSONS

6. The general discussion on statelessness took place with the objective of identifying existing gaps in nationality legislation and practice, as well as in international instruments on statelessness. Several such gaps were identified in international law, these pertain to the categories of stateless persons actually assisted and the guarantees in place to ensure the acquisition of an effective nationality for all. It was recognized that UNHCR's role under Article 11 of the 1961 Convention on the Reduction of Statelessness was particularly important in promoting positive developments in nationality legislation and practice. Suggestions for future steps UNHCR might take reflected areas of concern dealt with by the Office on a regular basis. Participants encouraged UNHCR to develop the following areas further, including possibly through a future Executive Committee Conclusion building upon the 1995 Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons.

(A) Address, as a priority, those situations continuing to create cases of *de jure* statelessness. Promote the development of international law intended to eliminate or reduce such cases, in particular focusing on the following areas:

(I) Development of the application of Article 15 of the Universal Declaration of Human Rights, which states that everyone has the right to a nationality, should not be arbitrarily deprived of nationality, and should be able to change nationality. Reinforcement of the principles against denationalization resulting in statelessness and discrimination. Development of a legal basis for ensuring persons are not arbitrarily deprived of the right to acquire a nationality;

(Ii) Development of the recognition of the nationality of either parent for their child, in particular where statelessness might otherwise result. Promotion of the grant of nationality at birth;

(Iii) Promotion and development of the provision, outlined in the 1961 Convention on the Reduction of Statelessness and other legal instruments, that renunciation of nationality not take place without the acquisition, or the guarantee of acquisition, of an alternative nationality. Where the alternative nationality is not acquired within a reasonable time, the previously held nationality should automatically be reinstated;

(Iv) Promotion of the acquisition of nationality based upon an individual's genuine and effective link with a State, in particular through the traditionally acknowledged ties of place of birth, descent, and/or residency, to ensure that statelessness does not occur;

(V) Promotion of positive principles and practice, preferably through treaty provisions, for States following dissolution, succession, or other changes in sovereignty or transfer of territory, which alter the nationality status of individuals. Promotion, moreover, of the automatic acquisition of nationality so as to avoid cases of statelessness created by individuals who fail to confirm available nationality;

(Vi) Promotion of the principles embodied in the 1957 Convention on the Nationality of Married Women and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, safeguarding a woman's right to a nationality and her consent for alteration of the nationality;

(Vii) Review of administrative practices which may block an individual's access to a nationality through, for example, exorbitant fees, impossible deadlines, or inability to produce documents at the request of the State; and

(Viii) Promotion of consultations between States with differing legal systems or other conflicts of law problems which cause statelessness.

(B) Review of these and other problems faced by *de facto* stateless persons, those who cannot establish their nationality or those who have no effective nationality, and means of resolving these problems. Promotion of the recommendation contained in the Final Acts of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, that persons who are stateless *de facto* should, as far as possible, be treated as stateless *de jure*, to enable them to acquire an effective nationality;

(C) Further examination of cases of transfer of territory globally and the means used to resolve nationality status in these instances. Review of recently adopted nationality legislation, in particular in light of a change in responsibility for territory. Examination of decisions of the International Court of Justice in cases dealing with territorial disputes which involved a transfer of territory, insofar as these relate to nationality issues;

(D) Consideration of how principles concerning nationality, in the context of a transfer of territory, might effectively be extrapolated for use in other instances in which statelessness occurs, with particular reference to the recently finalized draft European Convention on Nationality;

(E) Consideration of the promulgation of additional international instruments to address substantive issues pertaining to the acquisition of nationality;

(F) Continued strengthening of cooperation with other interested organizations, in particular for promotion of Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 7 of the Convention on the Rights of the Child;

(G) Consolidation of UNHCR's supervisory functions in relation to international conventions concerning stateless persons.

IV. SUMMARY OF DISCUSSION ON UNHCR'S SUPERVISORY ROLE

7. The subject was introduced by setting out the legal framework relevant for UNHCR's supervisory role, which is laid down in paragraph 8 of the UNHCR Statute. It corresponds to States' treaty obligations in this area, as foreseen by Article 35 of the 1951 Convention², Article II of the 1967 Protocol, Article VIII of the OAU Convention and Recommendation (e) of the Cartagena Declaration. Most States parties have accepted, at a minimum, an advisory or consultative role for UNHCR in national refugee status determination procedures. UNHCR is usually notified of asylum applications, is informed of the course of the procedures and has access to files and decisions which may be taken up with the authorities, as appropriate. UNHCR is afforded the opportunity to submit its observations on any case. In most countries, asylum applicants and refugees are granted access to UNHCR and vice versa, either by law or administrative practice. In some countries UNHCR has a substantial involvement in special procedures at the airport or is actively consulted before expulsion or deportation of recognized refugees. To ensure conformity with international refugee law and standards, UNHCR regularly gives its input into the legislative process, with States generally requesting UNHCR comments on and technical input into draft refugee legislation and related administrative decrees.

8. During discussion, the following issues were put forward for further consideration:

(A) Differing interpretation regarding the content and application of provisions of the international refugee instruments, standards and principles;

(B) State reporting as a whole;

(C) The question of institutionalizing a constructive dialogue at regular intervals with States parties on the application of the international refugee instruments; and

(D) Measures of enforcement.

9. In the ensuing discussion, some participants felt it would be useful to catalogue the instruments and provisions that UNHCR supervises. With regard to State reporting systems, most government participants felt that it would be more feasible to consider sharing UNHCR's annual protection reports and, on this basis, pursuing an institutionalized dialogue. It was felt that periodic meetings of States parties would undesirably politicize the process. There was some discussion about the relationship between UNHCR's humanitarian assistance function, its dependency on donor countries and its supervisory responsibility, with a suggestion that the supervisory role be exercised by an independent body or carried out in a way similar to the human rights treaty monitoring system of the United Nations. Others provided examples which indicated that donor dependence did not impinge on UNHCR's supervisory responsibility, however, and that in view of UNHCR's operationality, there were clear advantages in keeping this function within UNHCR. Some participants pointed out that supervision by an international institution was in the interest of States, since a uniform eligibility practice would ensure equitable responsibility sharing and prevent secondary movements. While most government participants felt that UNHCR should proceed cautiously in this area, they nevertheless encouraged UNHCR to use the existing legal framework and its own discretion to enhance its supervisory responsibility through dialogue with States, for instance, and/or in terms of reporting to the Executive Committee or to the General Assembly through the Economic and Social Council.

V. CONCLUDING OBSERVATIONS

10. A range of issues have been considered in the course of the informal consultative process on measures to ensure international protection to all who need it. The discussions to date, while not exhaustive, have shown broad agreement on some of the key topics in this area. There is a continuing need to supplement and consolidate the various aspects of the international legal framework and to forge consensus in areas currently outside its scope of application. The consultative process is expected to continue into 1998, with the topics of detention of asylum-seekers, international cooperation, burden-sharing, internally displaced persons and capacity-building retained for further examination. UNHCR looks forward to the support and advice of the Standing Committee to advance this process for the purposes of elaborating a consolidated and broadly accepted framework of guiding principles on the different topics.

¹ The presentations and discussions of this meeting have been summarized in Executive Committee document EC/46/SC/CRP.34 of 28 May 1996.

² See also the Preamble of the 1951 Convention, which states "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner, ...".