

NOTE ON REVIEW OF THE PROCESS FOR DRAFTING EXECUTIVE COMMITTEE
CONCLUSIONS ON INTERNATIONAL PROTECTION

I. INTRODUCTION

1. Over recent years, Executive Committee (ExCom) Members have increasingly expressed concern that the contents of ExCom Conclusions on International Protection as well as their application value may not match the resources and effort put into the process. In fact, re-opening of issues has on occasions resulted in the erosion of positions already achieved, given that in order to reach a consensus on the texts, compromises had to be made, leading to a dilution of standards in some instances. Additionally, the intergovernmental nature of the process has led to concerns among the NGO community about the lack of openness, with consequent suggestions for a more representative and open procedure so that the views of the international community are truly represented. While some progress has been made in this regard in recent years, attempts have now been initiated to review the process further with a view toward strengthening it, both in terms of the contents as well as the procedures involved. This Note seeks to provide some background information on the ExCom Conclusion negotiation process as well as the purpose of the Conclusions so as to guide further discussions in this matter.

II. THE EXECUTIVE COMMITTEE AND INTERNATIONAL PROTECTION

2. The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) is an informal body which was established to advise the High Commissioner in the exercise of his functions. Paragraph 4 of the Statute of UNHCR¹ provides for the establishment of an advisory committee on refugees by ECOSOC “after hearing the views of the High Commissioner”. In 1951, such an Advisory Committee was established,² and in 1954, the Committee was reconstituted as the United Nations Refugee Fund (UNREF).³ In 1958, the UNREF Executive Committee was replaced by the Executive Committee of the High Commissioner’s Programme which was formally established by ECOSOC Resolution 672 (XXV) of 30 April 1958 pursuant to a request by the General Assembly.⁴ In line with Paragraph 4 of the Statute, and as set out in the terms of reference contained in the General Assembly Resolution, the functions of the Executive Committee were advisory in nature and to be given “at the request” of the High Commissioner. At that time, the terms of reference of the Executive Committee were focused on providing advice on matters concerning primarily funding and assistance. Out of the six specific terms of reference of the Executive Committee, only one relates, indirectly, to protection: “To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office”. In practice, for the first decade after the creation of UNHCR, the

¹ UNHCR was established under General Assembly Resolution 428(V) of 14 December 1950, and the Statute of the Office is annexed to the Resolution.

² See ECOSOC Resolution. 393 (XIII)B of 10 September 1951.

³ See ECOSOC Resolution. 565 (XIX) of 31 March 1955 adopted pursuant to UNGA Resolution 832 (IX) of 21 October 1954.

⁴ See UNGA Resolution 1166 (XII) of 26 November 1957.

deliberations of the then Advisory Committee followed by the Executive Committee of UNREF and, eventually the Executive Committee of the High Commissioner's Programme, did not cover substantive issues pertaining to international protection. Rather, their work focused primarily on matters of administration and finance. The outcomes of these deliberations were in the form of "Decisions".

3. It was only in the 1960s that the Executive Committee began to take on a more active role in providing guidance on issues of international protection. The protection functions of UNHCR gained momentum in 1975 when the Executive Committee decided to establish a Sub-Committee of the Whole on International Protection".⁵ The Sub-Committee of the Whole was to "study in more detail some of the more technical aspects of the protection of refugees and would report to the Committee on its findings" and to "focus attention on protection issues with a view to determining existing shortcomings in this field and to proposing appropriate remedies".⁶ The establishment of the Sub-Committee was an important milestone in the international protection function of the Office, since for the first time, the Executive Committee gave full attention to issues relating to international protection of refugees and the role of the Office in this regard.

III. THE CONCLUSIONS DRAFTING PROCESS

4. Beginning in 1963, the Executive Committee presented the results of its deliberations on international protection as formal texts termed "Conclusions" as opposed to "Decisions" which concern funding and assistance matters. Upon the establishment of the Sub-Committee of the Whole on International Protection, it took over the practice of presenting the results of its deliberations in the form of Conclusions. The Sub-Committee met for two to three days every year immediately before the Executive Committee annual sessions in working groups to take up thematic issues for debate and issuing its decisions in "Conclusions" of a thematic nature, while the Executive Committee formulated its own Conclusion in the form a of General Conclusion, based on the Note on International Protection submitted by UNHCR. The General Conclusion is a compilation of broadly worded pronouncements on various current questions relating to international protection. In 1995, the Sub-Committee of the Whole was abolished and replaced by the Standing Committee of the Executive Committee. To some extent, the focus on international protection became diluted as the Standing Committee dealt with matters pertaining to administrative and financial matters as well as international protection, and out of the three Standing Committee sessions in March, June and September, only part of the June session is devoted to international protection. Substantial discussions on selected international protection themes take place over a limited two-month period leading up to the Executive Committee annual session, with the debate focused on reaching a consensus on draft texts of Conclusions submitted by UNHCR at the cost of more substantive and fruitful discussions on the issue.

5. The ExCom Conclusion drafting process was never meant to be a platform for a contest of States' interests. In essence, the drafting process should be guided by a collective objective to foster progressive development in areas of refugee protection which are in need of further guidance. While the legitimate interests of States need to be taken into account, refugee protection principles should underpin discussions rather than States' interests. Putting forward States' interests as issues around which refugee protection is debated risks undermining the entire refugee protection regime.

⁵ ExCom Conclusion No. 1(XXVI)

⁶ There was also a Sub-Committee on the Whole on Administrative and Financial Matters

IV. THE CONCLUSIONS ON INTERNATIONAL PROTECTION

6. The Conclusions are always adopted by consensus, and when no consensus was reached, no conclusion was adopted. The first time no conclusion was adopted after a debate took place was in 1985 when, due to the dissent of one Member State, a conclusion on irregular movements of refugees was deferred. In 1988, the Executive Committee formally approved the adoption of Conclusions which would include any “interpretative declarations or reservations relating thereto”, that is, Member States could join a consensus on adoption of a Conclusion while lodging a declaration or reservation with regard to part of the Conclusion.

7. Despite attempts made by some States in the mid-1960s to frame conclusions as “resolutions”, the Executive Committee decided to maintain the existing practice of adopting conclusions, “leaving open the possibility that resolutions ... be adopted on questions of major importance...”⁷ This is indicative that the Executive Committee had a preference for maintaining the character of its advice on international protection in the form of less formal “Conclusions”, rather than in the form of more authoritative resolutions.

8. The content of ExCom Conclusions may be broadly categorized into four major groupings, although such categorization is not clear-cut and there are overlaps:

- statements representing a certain point of view, whether positive, negative, or neutral, on a certain protection phenomenon; paragraphs with such statements would normally be prefaced by terms such as “notes”, “welcomes”, “condemns” and similar terms;
- statements representing interpretations of refugee protection principles; primary among these include paragraphs on *non-refoulement*, detention, expulsion, extraterritorial effect of determination of refugee status, safeguarding asylum, family unity; depending on the particular issue, these would normally be prefaced, inter alia, by “affirms”, “underlines”, “recalls” where a more prescriptive approach is deemed appropriate, and by terms such as “recommends” or “recognizes”, where a hortative approach is deemed appropriate;
- statements representing progressive development of international refugee law; these include provisions on determination of refugee status, protection of asylum-seekers in situations of large-scale influx, the problem of manifestly unfounded or abusive applications for refugee status, those relating to protection of refugee children and refugee women, burden and responsibility sharing, protection of asylum-seekers at sea, safeguards for interception; such statements may be prefaced, inter alia, by “recognizes”, “acknowledges”, “emphasizes”;
- statements representing guidance on the functions of UNHCR or representing guidance for States’ action; such provisions are framed in the form of recommendations (“recommends”) or encouragement (“encourages”) or simply calling upon the High Commissioner or States to pursue certain courses of action. This category may include Conclusions relating to internally displaced persons, statelessness, as well as those which pertain to the pursuit of durable solutions.

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GAOR, 222nd. Sess. Suppl. No. 11, Appendix, pg 34.

9. In regard to the style of the language of the Conclusions, there is no reason why the contents of the Conclusion should be prefaced by formal terms of expression, and why they could not be formulated in a less stylistic way. Additionally, while there is favour for having shorter and more precisely worded texts, efforts made at incorporating the varied perspectives and proposals, have tended to produce texts which are long, wordy and imprecise.

10. Prior to 2002, the themes for the Conclusions were proposed by UNHCR in consultation with ExCom Members during the Executive Committee planning sessions, although Member States also took initiatives to suggest thematic issues. The themes selected were based on key protection concerns which had arisen and in relation to which guidance was felt to be needed. Since 2002, the choice of themes for the Conclusions has been guided by the Agenda for Protection based on protection concerns raised during the Global Consultations. The final theme under the Agenda for Protection to be taken up is on “Asylum Procedures”. There is a need to review the methodology by which themes are selected to enable UNHCR to receive the guidance it seeks and, at the same time, to ensure that refugee protection principles are taken forward.

V. USE OF CONCLUSIONS

11. UNHCR has used ExCom Conclusions extensively as advocacy tools, particularly in relation to States which are not signatory to the 1951 Convention relating to the Status of Refugees, or even if they are parties to the 1951 Convention or 1967 Protocol, which have either inadequate or no functioning asylum systems. Where the State is a member of the Executive Committee, the persuasive value of the Conclusions cannot be underestimated. Even in regard to States which have acceded to the 1951 Convention, ExCom Conclusions have proven their value as advocacy tools in judicial, diplomatic and public interventions.

12. The Conclusions provide guidance for harmonized approaches to interpretative issues as well as to State practice in relation to treatment of refugees and other persons of concern to UNHCR. In this regard, they provide important basis for drafting of guidelines or other forms of operative guidance on international protection, such as UNHCR’s guidelines on cessation, on detention, on safeguards to interception, on trafficking, on maintaining the civilian and humanitarian character of asylum, and others.

VI. KEY PROBLEM AREAS

13. In general, a key element of any multilateral process which depends on consensus to arrive at a decision is the risk of a compromise reached at the lowest common denominator. In this regard, it is apparent that while the strengths of the ExCom Conclusions lie in the consensus on which they are built, this is also their weakness, as any single State could block a consensus. The value of the guidance in the Conclusions hinges upon States’ understanding of the role of the Executive Committee and their approach to the drafting process. The following have emerged as some key problem areas:

- (a) With regard to the contents:
 - over recent years there appears to have been a gradual shift on the part of ExCom Members to focus more on defending narrow national interests than on refugee protection. A clear indication is the hedging of paragraphs with conditionalities

and qualifiers, including those which concern basic refugee protection principles, thus reducing the applicability of the provisions, and more importantly, the value of the Conclusions as a whole;

- the intensive focus on language and text tends to transform the negotiation process into an exercise in semantics rather than one based on a shared vision to move forward the international protection of refugees;
 - a preference for “agreed texts” to be drawn from language in previous Conclusions hampers the development of progressive positions.
- (b) With regard to the process:
- there is little meaningful discussion over the themes or issues to be covered in the Conclusions. The themes or issues are first presented in the Conference Room papers at the June Standing Committee where a rather limited debate takes place. Shortly thereafter the first draft text of the Conclusions is presented to start the negotiation process. To a large extent therefore, the debate is then focused on the language of the text and, given the intensity of the debate and the limited time to reach a consensus, there is little room for any meaningful discussion to take place on matters of substance;
 - various factors contribute to the protractedness of the process, including the lack of manoeuvrability on the part of many delegates who have to refer to capitals for instructions, as well as the re-opening of texts at a late stage by States which have not been able to participate earlier;
 - the consensual nature of reaching agreement on the text of a Conclusion means that any one State could block the adoption of a Conclusion by preventing a consensus from being reached, putting at risk carefully negotiated texts;
 - the process does not cater for broad consensus. Smaller missions find it difficult to keep up with participating in the many negotiation sessions leading up to the Executive Committee annual session and find themselves unable to defend their proposals adequately. Additionally, non-governmental organizations (NGOs) and other qualified Observers have valuable contributions to make, but have only limited access to the process. As of 2005 they have the opportunity to present their views at the beginning of the negotiation sessions and receive successive drafts for comment through the Rapporteur. This methodology has serious weaknesses which need to be addressed if contributions are to be more effective.

VII. ISSUES TO BE ADDRESSED

14. The key issues to be addressed may be reviewed at two levels:

- (a) Contents:
- how should themes be identified for the Conclusions in a way which would take the issues forward and justify the risk of any possible regression from positions previously achieved?

- how can the format and contents of the Conclusions be formulated in a way which would strengthen their value as guidance for UNHCR and States and as advocacy tools to improve the international protection regime?
 - how could the General Conclusion be formulated in a way which would reinforce its value as an expression of the Executive Committee on key protection concerns? Need there be a General Conclusion every year?
- (b) Process:
- how can the process be conducted in a way which would permit a more in-depth debate and conceptual agreement on the themes selected prior to the negotiations for a Conclusion?
 - how can the process be made to benefit more from the special expertise needed to ensure that the focus is on providing guidance to UNHCR on the international protection of refugees, and not on State interests?
 - is consensus the only or best methodology for an agreed text?
 - how can the process be made more representative of the views and priorities of the international community?
 - how to ensure larger and more qualitative participation of Member States which do not have the capacity to prepare themselves adequately for rounds of negotiations?
 - in what way can the contribution of NGOs and other qualified Observers be made more meaningful and effective?
- (c) Use of Conclusions
- In what way could the effective use of the Conclusions be further promoted?