

Global Consultations on International Protection San Jose Regional Experts Meeting, 7-8 June 2001

Conclusions and Recommendations

- I) The San José Experts Meeting emphasized three main themes for strengthening the international protection of refugees and asylum seekers in Latin America. These were:
- 1) Restrictive asylum policies and the terminological confusion between asylum and refuge (“asilo y refugio”);
 - 2) The complementarity of the Inter-American Human Rights System;
 - 3) The supervisory role of UNHCR

The conclusions and recommendations on these three themes were the following:

1) *Restrictive tendencies in asylum policy and terminological confusion in Latin America regarding asylum and refuge (“asilo y refugio”)*

- II) During the Meeting participants noted the important change in international refugee protection at the global level as countries that previously served as reference points and models are now adopting and practising restrictive policies.
- III) At present the situation is relatively calm in many countries of Latin America. However, at least one situation is causing large-scale forced displacements of persons and, unfortunately, everything would seem to indicate that this situation will further deteriorate. This situation is developing in an atmosphere in which tendencies toward more restrictive asylum policies are developing in Latin America and are manifested, for example, in limits to the right to admission and adoption of legislation and measures that only provide extremely limited protection. Furthermore, as a result of this eagerness to establish reduced protection standards, States have introduced new concepts that are incompatible with International Refugee Law, such as, “internally displaced in transit” and “persons with temporary humanitarian status”.
- IV) Confusion surrounding terminology has spread throughout Latin America and this has practical consequences for the protection of refugees and asylum seekers. According to one interpretation, there is a clear difference between *refugee* and *asylum*, the former referring exclusively to refugee law developed under the United Nations, and the latter referring exclusively to Latin American institution of asylum. Analysis of scholarly opinion indicates that there is no basis for such a distinction as asylum entails protection in of itself and the institution is not exclusive to any one system.

- V) The stagnation and abuse of the Latin American system of asylum, codified in a number of treaties since 1889, was noted, as was the importance of asylum as a *human right* in the Inter-American System of Human Rights, as established in Article XXVII of the American Declaration of the Rights and Duties of Man and Article 22(7) of the American Convention on Human Rights.

Recommendations:

- VI) The restrictive tendency in State asylum practice demonstrates the importance of further developing UNHCR's supervisory role and the practical complementarity of International Refugee Law and the Inter-American Human Rights System.
- VII) With a view to establishing clear international jurisprudence on asylum, consideration should be given to requesting an advisory opinion of the Inter-American Court of Human Rights on new concepts that seek to provide minimum protection, such as "internally displaced in transit" and "persons with temporary humanitarian status". This question should be put to the Court together with other issues contained in this set of Recommendations.
- VIII) In an effort to overcome the terminological confusion regarding the use of the terms asylum and refugee ("asilo y refugio"), UNHCR should organise an international meeting to discuss and analyse the issue with experts, academics, representatives of civil society and governments. The possibility of requesting an advisory opinion on this matter of the Inter-American Court of Human Rights should also be explored.
- IX) In any case, as things currently stand in Latin America, and until this confusion is clarified, refuge should be understood to refer to refugee status and the protection regime under the 1951 Convention and its 1967 Protocol, and not to a minimum protection regime.
- X) It would be advisable to review the Inter-American system of asylum in light of the standards of the Inter-American Human Rights System, particularly the application of the right to asylum in accordance with the principles of non-discrimination, due process of law and international criminal law.
- XI) Human rights education is essential for the protection of refugees, asylum seekers and migrant populations in general in order that all concerned institutions understand the root causes of forced migrations and are able to strengthen their capacity to provide protection. Given rising levels of violence, discrimination, racism and xenophobia, human rights education at all levels should be promoted in both formal and informal settings.
- XII) The subject of asylum and refuge ("asilo y refugio"), should be discussed in the annual courses on international law organised by the Inter-American Legal Committee in Rio de Janeiro, as well as in the III Session on International Law organised by the Under-Secretariat for Legal Affairs by mandate of the General Assembly of the Organisation of American States. The former is to take place during July and August of this year while the latter will take place in Mexico at the beginning of December.

- XIII) Recently, there has been less academic interest in refugee law, and it would be suitable to encourage a greater interest among academics in order to foster the progressive development of the law, search for new measures for its practical application, and contribute to developing a culture favourable to human rights and refugees.
- XIV) The Mexican Yearbook of International Law invited the participants and specialists to collaborate with articles dealing with subjects such as asylum, forced displacement, etc.

2) Complementarity of the Inter-American Human Rights System

- XV) Analysis demonstrated that there are no obstacles from an academic point of view to attaining a complementary relationship between the Inter-American system of human rights and international refugee law developed under the United Nations, and that therefore, the challenge lies in identifying and implementing measures that enable the achievement of this complementary relation on a practical level.
- XVI) The protection of refugees, asylum seekers and other forcibly displaced persons, requires the convergent application of the three branches of international law for the protection of persons, namely, international human rights law, international humanitarian law, and international refugee law. Furthermore, the practice developed along these lines in Central America should continue to be applied and further developed in that region and be replicated in other regions in this part of the world.
- XVII) The international law of the protection of the rights of persons has recently placed great emphasis on the individual responsibility of the perpetrators of violations, and this is undoubtedly an extremely important development. Nonetheless, both individual responsibility and State responsibility are fundamental to the defence of the rights of persons, and, by extension, of refugees and asylum seekers.
- XVIII) With few exceptions, the vast majority of countries in the American continent are party to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. However, many countries have not adopted laws, decrees or procedures for their effective application at the national level, others have done so but do not apply them and still others have only *ad hoc* procedures. Some of these dispositions are in accordance with International Refugee Law, while others are not.
- XIX) The organs of the Inter-American Human Rights System dispose of a range of mechanisms which are flexible enough to provide protection of the rights of refugees in a wide variety of circumstances. For instance, the Inter-American Commission on Human Rights has requested provisional measures of the Inter-American Court in a case analogous to the application of the principle of *non-refoulement*, specifically, the case of the collective expulsions of Haitians in the Dominican Republic. Within this context, the system has made innovations with regard to the protection of named collective groups and unnamed individuals. In

another case, consideration has been given to the right of persons to not be forcibly displaced and to live in peace, namely, the case of San José de Apartadó, Colombia. Many of the Commission's reports have addressed the situation of refugees, it has received and examined cases relating to refugees and the expulsion of individuals and it has issued precautionary measures in such cases. Furthermore, in the future the Commission could request that the Court adopt provisional measures in cases related to forced displacement of persons and could also request an advisory opinion on a series of asylum-related issues.

Recommendations:

- XX) In order to achieve the practical complementarity between the Inter-American Human Rights System and International Refugee Law, it would be appropriate to examine how to make better and more frequent use of the Commission's practice of conducting *in loco* visits, its reporting procedures, its consideration of contentious cases, its rapporteurships, and when necessary, its capacity to request precautionary measures of States. Likewise, consideration was given to the Court's contentious jurisdiction as well as its advisory jurisdiction, which would permit examination of specific asylum and refugee matters in an advisory opinion requested by an OAS Member State or an organ of the OAS such as the Commission. Consideration was also given to the importance of resorting to the binding provisional measures that the Court can order in urgent cases and its well-developed theory and practice of ordering reparations for human rights violations.
- XXI) It would be advisable for specialists and other parties interested in the subject to re-examine the exercise and supervision of State responsibility.
- XXII) It would also be advisable to request the opinion of the Inter-American Court on the issue of national mechanisms for the implementation of international refugee instruments as these are fundamental for the protection of refugees and asylum seekers. Furthermore, analysis should be conducted of the laws, decrees and procedures in force in the countries of the continent and propose reforms to make these laws, procedures and mechanisms compatible with the three branches of international law for the protection of persons and with the right to asylum.

3) UNHCR's Supervisory Responsibility

- XXIII) The meeting generated a wealth of analysis on both the past and current application of Article 35 of the Convention and Article II of the Protocol. Participants identified a dilemma inherent in the mandate granted to UNHCR by the United Nations General Assembly, as, on the one hand, the mandate establishes that the institution be apolitical and humanitarian in nature and on the other hand, it charges UNHCR with the considerably more political task of supervising the manner in which States apply international refugee instruments. This supervisory responsibility is also established in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

- XXIV) Access to refugees poses a serious dilemma for UNHCR as it must choose between a more public and forceful role that might provoke negative reactions from certain States, and the necessity of continuing to carry out daily tasks of protection and assistance to refugees in those same States together with organisations of civil society. This very real problem has led to the limited scope of application of Article 35 of the 1951 Convention, Article II of the 1967 Protocol and Paragraph 8 of the UNHCR Statute of 1950.
- XXV) There was consensus regarding the importance of international supervision of human rights-related treaties. In order to discharge its supervisory responsibility, UNHCR could consider two sets of alternatives: One, the creative development of its mandate pursuant to Article 35 of the 1951 Convention, Article II of the 1967 Protocol and Paragraph 8 of its Statute, or; two, the establishment of a new treaty or non-treaty based body. In both cases, the historical development of the Inter-American Human Rights System provides best practices that could be of assistance to UNHCR.
- XXVI) In order to overcome the limitations of the current supervisory role, the Experts Meeting also focused on exploring potential means to supplement the actions of UNHCR. The supplementary means identified were to increase the participation of the supervisory bodies of the Inter-American system of Human Rights and of civil society organisations.

Recommendations:

- XXVII) UNHCR has a unique responsibility with regard to supervision and this responsibility should be recognised, maintained and reinforced by both States, organised civil society, and other players, including international protection bodies such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.
- XXVIII) UNHCR's supervisory role is of utmost importance in the protection of refugees and asylum seekers, but it would be advisable to complement it with the work of regional organisations, in this specific case, the supervisory bodies of the Inter-American Human Rights System, as well as by the untiring work of organised civil society.
- XXIX) Pursuant to its supervisory responsibility and given its recognised authority in the realm of International Refugee Law, UNHCR should also consider a closer working relationship with the Inter-American Human Rights System as a means to support the organs of the System in dealing with refugee issues through, *inter alia*, *amicus curiae*.
- XXX) Consideration should also be given to the importance of strengthening the supervisory role of UNHCR through a more consistent use of judicial and administrative procedures (ombuds institutions, for example), with the assistance of the relevant State bodies and organised civil society organisations.

- XXXI) Organised civil society has a fundamental role to play in the protection of refugees and asylum seekers, and its increased participation in decision-making fora should be promoted, as should its role in standard setting in the area of protection of refugees and asylum seekers. Support should continue to be provided for its daily work with refugees and asylum seekers. The role of civil society organisations can be even more effective when their work is carried out in networks of civil society organisations and UNHCR. Therefore, it is advisable that UNHCR continue to support the work of so-called *protection networks* that are beginning to function in various countries and regions of Latin America and the Caribbean.
- XXXII) In order to develop its practice under with Article 35 of the Convention, Article II of the 1967 Protocol and the Statute, UNHCR should consider creating a unit within the Office or a panel of independent experts to evaluate compliance with the norms of the 1951 Convention and the 1967 Protocol.
- XXXIII) Another alternative recommended by the Meeting was to establish an independent, treaty-based body to supervise compliance with the 1951 Convention, the 1967 Protocol and related human rights obligations such as those established in Article 22 of the Convention on the Rights of the Child.
- XXXIV) Along these same lines it was recommended that an independent, *ad hoc* body be established to supervise compliance with three fundamental norms (or sets of norms), related to the right of asylum: the principle of *non-refoulement* as a norm of *jus cogens*, the principle of non-discrimination and due process guarantees.
- XXXV) Supervisory mechanisms that might be employed to further develop UNHCR's supervisory responsibility pursuant to its Statute, Article 35 of the 1951 Convention, Article II of the 1967 Protocol or under any new body include, *in loco* visits, public country reports, public annual reports with country and thematic reporting, and rapporteurships. A new body, whether treaty-based or not, should also be mandated to receive and examine individual complaints.
- XXXVI) With regard to new procedures that could be established, it was agreed that any new procedure should be independent, impartial and efficient, and, therefore, it was considered that mechanisms that depend on peer evaluation by States would be inappropriate. On the basis of the experience of the Inter-American System, it was also recommended that a sound financial base be established in order to guarantee independence and effectiveness and that the political organs of the system be given the duty to enforce the decisions.
- XXXVII) Regardless of the mechanism(s) chosen to improve UNHCR's supervisory role, structural changes are needed within the Office for the discharge of its mandate by restoring emphasis to the international protection of refugees (core activities). As well, greater resources should be allocated within UNHCR to international protection.