

Background

1. The issue of how to strengthen implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees has twice recently been a separate item on the agenda of the Sub-Committee of the Whole on International Protection (the Sub-Committee). During the fortieth session of the Executive Committee in 1989, the Sub-Committee discussed the matter on the basis of a background note (Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees - EC/SCP/54) which outlined certain difficulties with implementation and sought general information from the Executive Committee on successes with and obstacles to implementation at the national level. The Sub-Committee subsequently returned to the issue during the forty-second session of the Executive Committee in 1991, with discussion based on an interim report (EC/SCP/66) by the High Commissioner analysing the limited number of replies then received to the general questionnaire on implementation circulated by UNHCR in 1990.

2. At the most recent inter-sessional meeting of the Sub-Committee, held from 13-14 April 1992, UNHCR was requested to submit for further discussion certain basic questions concerning implementation which have emerged in the course of these various debates and which, among others, would benefit from more detailed analysis. The present note responds to this request by placing before the Sub-Committee the following four issues which it might wish to consider:

- (A) Better promotion of implementation;
- (B) Possibilities for monitoring implementation;
- (C) Difficulties in fulfilling Convention obligations; and
- (D) Varying interpretations and selective application of Article 1 ("Definition of the term 'Refugee'") of the Convention, and the extent to which these limit the proper application of the Convention.

Promotion and monitoring of implementation (covering points (a) and (b))

3. The utmost importance of effective implementation has been repeatedly stressed by the Executive Committee. The 1951 Convention and its Protocol together are the most comprehensive instruments adopted to date on a universal level to safeguard the fundamental rights of refugees and to regulate their status in countries of asylum. As such, they are fundamental to the international regime of refugee protection. They help in ensuring that refugees are granted basic humanitarian treatment. They also facilitate the exercise of the protection function by UNHCR.

4. UNHCR has been mandated by the international community with the particular responsibility to ensure effective implementation of the Convention and Protocol within the overall framework of its protection responsibilities. The Office is specifically called upon, pursuant to paragraph a (a) of its Statute, inter alia, to supervise the application of international conventions for the protection of refugees. Article 35 (1) of the Convention calls on States to facilitate UNHCR's "duty of supervising the application" of the Convention.

5. In the Information Note on Implementation of the 1951 Convention and 1967 Protocol relating to the Status of Refugees submitted at the forty-second session (EC/SCP/66), certain suggestions for action to strengthen UNHCR's monitoring responsibilities were put to States for discussion. These included:

- a regularized system of reporting on implementation, which could, for example, provide for a periodic reporting requirement and ongoing assessments;
- arrangements for wider distribution of States' replies to the questionnaire. In this regard, in the 1991 General Conclusion on international Protection (A/AC.96/783, para. 21 (m)), the Executive Committee acknowledged "the value of reporting by State Parties on implementation of their responsibilities under the 1951 Convention and 1967 Protocol" and requested UNHCR "to accord public access to States' replies to the afore-mentioned questionnaire with the agreement of the States concerned"; and
- developing a methodology for resolving differences of interpretation on disputed notions, e.g. resort to an advisory opinion of the International Court of Justice.

6. The Note also recognized, as a first step, the need for more States to respond to the questionnaire on implementation. The Executive Committee called for all outstanding replies to be submitted (A/AC.96/783, para. 21 (1)) but, in spite of this call, only five additional replies have been received to date.

7. Taking stock of the various recent discussions on implementation of the Convention and Protocol, it is clear that States have committed themselves to promoting and ensuring full and effective implementation and, in this regard, to facilitating UNHCR's supervisory responsibilities for the Convention, pursuant to Article 35 (see. in particular, Conclusion No. 57 (XL) of 1989). It is also clear, however, that discussion would benefit from going beyond mere restatement of this commitment to identifying practical suggestions to strengthen implementation. Accordingly, the Sub-Committee is invited to reconsider the suggestions put to the forty-second session. Other ideas which might, at the same time, be considered could include periodic meetings of States Parties to review problems and progress on implementation. There might also be appropriate steps taken at the regional level to harmonize

interpretation and application of the Convention among neighbouring countries, including giving existing regional human rights commissions, or courts, certain refugee-related responsibilities. Regional bodies are the obvious interlocutors in pursuing regional approaches to ensure respect for protection standards and to achieve harmonized approaches.

8. Improving monitoring arrangements, as suggested in previous paragraphs, would considerably facilitate better implementation. At the same time, however, there are a number of obstacles impeding full and proper implementation which monitoring will not necessarily remove. They are more appropriately addressed through clearly targeted promotion campaigns.

9. The obstacles to implementation were summarized in document EC/SCP/54 as being of three kinds: socio-economic, legal and policy or practical. As that note pointed out, there are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters. Legal obstacles to proper implementation include the clash of, or inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementing legislation; or implementing legislation which defines not the rights of the individuals but rather the powers vested in refugee officials. As to the latter, this means that protection of refugee rights becomes an exercise of powers and discretion by officials, rather than enforcement of specific rights identified and guaranteed by law. Where the judiciary has an important role in protecting refugee rights, restrictive interpretations can also be an impediment to full implementation. Finally, the maintenance of the geographic limitation by some countries is a serious obstacle to effective implementation.

10. At another level, there are bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refugees, a dearth of manpower generally or of adequately trained officials, and the non-availability of expert assistance for asylum-seekers. Finally, there are certain problems of perception at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations.

11. Strengthened training, promotion and public information activities are required to overcome these various problems. A promotion campaign could be built around implementation of the Convention which would, *inter alia*, address these difficulties and would involve intensified training of officials and other key groups (journalists, lawyers, the judiciary, non-governmental organizations (NGOs) and opinion-makers generally). In addition there is a need to build up local support bases for fair treatment of refugees, in accordance with Convention standards. One possibility in this regard is the creation of National Refugee Councils, consisting of senior Government administrators, NGO representatives and those of religious groups, as well as other prominent individuals, to sensitize national public opinion and enable UNHCR to receive counsel and advice from a broader range of interlocutors.

Difficulties in fulfilling Convention obligations (covering point (c))

12. Replies received to the questionnaire show clearly that some States have difficulties in fulfilling all of their obligations under the Convention. This is understandable, since the Convention contains comprehensive provisions concerning the rights of refugees in a number of diverse areas, including employment, labour legislation, social security, public relief and education. Even under the best of circumstances, States may occasionally find that public opinion does not understand, or support, efforts undertaken on behalf of refugees. When States are suffering from adverse economic conditions, lack of development or high unemployment, it can become all the more difficult to guarantee the basic needs of refugees, especially when those of the national population are not able to be fully met.

13. Nonetheless, although States may face constraints in implementing the Convention completely, there are certain provisions which are so fundamental to refugee protection that any deviation from them is always a matter of paramount concern to UNHCR. One such provision is Article 33 which enshrines the principle of non-refoulement. The utmost importance of this principle has been repeatedly reaffirmed by the international community, most recently in the 1991 General Conclusion on International Protection (A/AC.96/783, para. 21 (c)). In Conclusion No. 25 (XXXIII) the Executive Committee went so far as to observe that the principle "was progressively acquiring the character of a peremptory rule of international law".

14. Article 33 of the Convention and its prohibition on return of individuals to situations threatening life or liberty is a fundamental guarantee of refugee protection. It must be read together, in particular, with Articles 31 (non-penalization for illegal entry) and 32 (limits to expulsion): these three articles together are the key to initial safe haven and possibilities for realizing durable solutions.

15. It follows that certain provisions of the 1951 Convention are indeed so basic that they apply to all refugees irrespective of whether they have been granted permanent asylum in a State Party of the Convention and/or the Protocol. This is the case as regards the refugee definition (Article 1), non-discrimination (Article 3), freedom of religion (Article 4), non-penalization of refugees unlawfully in the country of refuge (Article 31), expulsion (Article 32) and the prohibition of refoulement (Article 33). Other provisions of the Convention, such as those defining the economic and social rights of refugees, are more relevant to refugees who have been granted durable asylum by a contracting State and are intended to facilitate their integration in their asylum country. There will be large-scale influx situations which may fall within the parameters of the 1951 Convention but because of their massive character and the clear feasibility of return in safety at some point, repatriation not integration is the appropriate approach.

Varying interpretations and selective application of the definition (covering Point (d))

16. UNHCR's experience over recent years, reinforced by a number of the replies received to the questionnaire on implementation, has been that differences of interpretation or application increasingly mark the approach of a number of States to Article 1 of the 1951 Convention.

17. The imprecision of the language to some extent facilitates selective interpretation or application. As some States Parties have observed, the Convention does not, for example, contain a definition of persecution. Confusion has arisen as to how direct the State's involvement in the act of persecution must be, and the Convention is sufficiently general to allow for some disagreement on whether the motives of the persecutor must go directly to the reasons for the persecution. The Convention sets no time limits as to when the persecution should have arisen. What sort of post-flight situations should be regarded as sufficient to serve as a foundation for a fear of persecution is not fully clear. Where the Convention is not precise, the courts or Refugee Boards have moved to fill the gaps. In this process, as the numbers of asylum-seekers continue to rise, divergence is apparent between the profiles of a percentage of the asylum-seekers and the classical concept of refugee.

18. This approach is often revealed in decisions on refugee status which narrow the meaning of the terms persecution and well-founded fear. Examples which have come to the attention of the Office include refusal to regard severe or repeated discrimination or harassment as persecution; reluctance to recognize situations of group persecution; rejection of draft evasion or desertion for valid reasons of conscience as a basis for a claim; little or no consideration of the situation of women as a particular social group; limiting the notion of "agents of persecution" to the authorities of the country of origin; and setting of arbitrary time limits on how recently the persecution must have occurred.

19. With respect to well-founded fear, negative decisions are taken based on subjective assessments of general credibility, with a growing inclination to see uncorroborated testimony as inherently self-serving and without acknowledging the reality that, as has always been the case, many refugees will not have been able to bring forward independent evidence to substantiate their claim. Other troubling cases include denials based on irregularities in the manner of entry, even if such an entry was the only means of escape, and rejection of status for persons fleeing from war or other armed conflict or violence, without investigating the possibility of persecution which may well exist in such situations.

20. The Office has been particularly concerned about a number of recent cases involving individual refugee status applicants whose claims have been denied essentially because they have been viewed as victims of armed conflicts rather than of specifically targeted persecution. Even where it has been accepted by the determining authorities that an individual has suffered serious human rights abuses, that he or she has a genuine fear and that there is a distinct likelihood of arrest and detention on return, the position has been taken that these factors are not attributable to any intention on the part of the authorities to persecute the individual concerned on account of one of the recognized grounds and that, accordingly, there is no issue of refugee status involved. The Office's position on this matter is that refugees are refugees when they flee, or remain outside, a country for reasons pertinent to the 1951 Convention refugee definition, whether these arise in a civil war, in international armed conflict, or otherwise. There is nothing in the definition itself which would exclude its application to persons caught up in civil war who meet the definition. A Government's interest in preserving public order must be clearly distinguished from the issue of violation of basic human rights. The interest of the Government neither explains nor excuses the use of torture or arbitrary punishment, or the discriminatory singling out of certain individuals or groups for punishment. Clearly, where a person is singled out for particularly harsh treatment and the underlying reason is this person's membership of a social group or political opinion, the position of the authorities that national security required the retaliation may not be valid.

21. This particular example of refugees in civil war situations is offered to illustrate UNHCR's concern that a selective approach to interpretation can cut to the heart of the protection afforded by the 1951 Convention. It should also be noted that, in accordance with the Vienna Convention on the Law of Treaties, States should interpret the 1951 Convention in a way which is consistent with its object and purpose. The object and purposes of the 1951 Convention are clear from the context in which the Convention was negotiated. The Convention was the international community's response to the protection requirements of a particularly vulnerable group of people; refugees who were in fear of persecution, unable to return to their own countries, and requiring international protection, asylum and a durable solution to their problems. It was an instrument designed to assure refugees the widest possible exercise of their rights, and to provide a framework within which to structure the exercise by States of their discretion to receive refugees and accord them those rights.

22. In its consideration of this issue, the Sub-Committee might judge it useful to encourage all States Parties to approach interpretation of Article 1 in a manner consistent with the object and purposes of the Convention. Methods to harmonize interpretation of the criteria, in a way reflecting internationally agreed understandings, including as reflected in UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, could also be identified.