

COMPLEMENTARY FORMS OF PROTECTION

I. INTRODUCTION

1. The issue of complementary forms of protection is complex and multifaceted. It was discussed at the Standing Committee's eighteenth meeting in June 2000 on the basis of a conference room paper (EC/50/SC/CRP.18). As reflected in the report of the meeting¹, there are significant variations in State practice with respect to complementary protection. The consequent need for greater harmonization in the way States deal with such cases was acknowledged. Many delegations expressed the view that harmonization should reflect reasonable minimum standards, and not be at the lowest common denominator. At the same time, the need for State flexibility in responding to varying protection situations was highlighted. Following this debate, the Executive Committee noted in its Conclusion on international protection² that complementary forms of protection adopted by some States are a pragmatic response to ensure that persons in need of such protection receive it, recognizing in this context the importance of full application of the 1951 Convention and 1967 Protocol.

2. The inclusion of further consideration of this topic in the work programme of the Global Consultations was at the specific request of States at the time of the organizational meeting in December 2000, under the theme of protection of refugees in individual asylum systems. This note thus complements the above-mentioned conference room paper by providing an update on new developments that are of relevance. It is hoped that the further discussion on this issue could now lead to the formulation of a protection conclusion for adoption, in due course, by the Executive Committee. A draft conclusion based largely on the concluding observations of last year's paper is to be found in the final section of this note. Since the issue of complementary forms of protection is currently being considered in a number of regional fora, the deliberations on this topic in the context of the Global Consultations will also help to inform those discussions from a global perspective.

II. ADDITIONAL ELEMENTS FOR REFLECTION

3. As already noted³, defining and determining the beneficiaries of complementary protection is a complex undertaking. This has also become clear in related discussions in the context of the second track of the Global Consultations. Interesting developments of relevance include the revision and consolidation of the Bangkok Principles⁴ and the process of harmonization of European Union asylum law and policy. These developments, taken together, contribute to enhancing understanding both of those who should be protected by complementary protection from *refoulement*, and the procedural means by which this would be determined. The following paragraphs are a factual update in this regard. They form the background to the amended proposals for a draft conclusion set out in the final paragraph of this note.

¹ See A/AC.96/939, paras 11-12.

² See A/AC.96/944, para. 23.

³ See EC/50/SC/CRP.18, paras 6 to 11.

⁴ Originally adopted at the Eighth Session of the Asian-African Legal Consultative Committee in Bangkok, August 1966.

A. Discussions in the context of Global Consultations
expert roundtables (second track)

4. At the Lisbon Expert Roundtable held in May 2001, some consideration was given to the relevance of the cessation clauses of the 1951 Convention in respect of beneficiaries of complementary forms of protection. While it was agreed that they would not be directly applicable, it was accepted that there is an obvious parallel as regards considerations which would be relevant to the “ceased circumstances” clause of Article 1C of the 1951 Convention, and those which would be relevant for ending complementary protection. As a result, the doctrine developed with respect to the Convention cessation clauses was recognized as being one guide for the development of standards appropriate in the context of ending complementary protection.

5. At the Cambridge Expert Roundtable held in July 2001, there was general appreciation that refugee law is a dynamic body of law, informed by the broad object and purpose of the 1951 Convention and 1967 Protocol, as well as by developments in related areas of international law, such as human rights law and international humanitarian law. In addressing the scope of the principle of *non-refoulement*, the Opinion⁵ prepared as background for the discussion at this Expert Roundtable draws attention to the significant fact that the *non-refoulement* principle is increasingly articulated to apply to persons fleeing generalized danger.⁶ This is becoming an important protection complement in that the scope of protection is extended, on a firmer legal basis, to a broader number of persons.

B. Regional developments regarding the definition of a refugee

6. A revised consolidated text of the Bangkok Principles on the Status and Treatment of Refugees was adopted by the Asian-African Legal Consultative Organization (formerly Committee) at its 40th Session in New Delhi on 24 June 2001⁷. It incorporates a definition of refugee which includes persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality are compelled to leave the place of habitual residence in order to seek refuge in another place outside the country of origin or nationality.

7. While the Bangkok Principles are declaratory in nature, their provisions represent the result of serious and lengthy negotiations by member States of the Asian-African Legal Consultative Organization. They reflect an important understanding of who is a refugee in the contemporary context in parts of the world with significant experience in receiving and hosting refugees.

C. A single asylum procedure

8. There is significant divergence in practice among States with respect to procedures used for determining the need for complementary protection.⁸ In some States there are parallel procedures, whereby a person seeking protection must select which sort of application to make, and which form of protection to request. In others, there may be separate, sequential considerations of protection needs, before different decision-makers, where failed applicants for Convention refugee status may apply, in turn, for protection based on other human rights instruments or on humanitarian or compassionate grounds. In yet others, there exists one single procedure in which all protection needs are determined in a comprehensive way, taking into account all the circumstances of the asylum-seeker’s case.

⁵ See An Opinion on the Scope and Content of the Principle of *Non-Refoulement* prepared by Sir Elihu Lauterpacht and Daniel Bethlehem, available on the UNHCR website (Global Consultations page).

⁶ *Ibid.*, paras 136 to 143.

⁷ See Resolution 40/3.

⁸ See, for example, European Commission Proposal for a draft directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2000) 578(final) of September 2000).

9. The advantages of this last approach - a single consolidated asylum procedure for all protection claims - have been noted on a number of recent occasions by various stakeholders.⁹ In circumstances where asylum procedures in some parts of the world have become increasingly complex, the institution of a consolidated procedure which first assesses whether an asylum-seeker qualifies for 1951 Convention refugee status and, if not, then assesses the need for other complementary protection, is coming to be supported as the clearest, fastest and most economical means of identifying persons in need of international protection. There is also a sense among some governments that it is likely to lead to the establishment of a more coherent interpretation of international protection needs, avoiding inconsistencies that can arise in parallel or sequential procedures. UNHCR shares this understanding, as long as care is taken to ensure the full and inclusive application of the refugee definition of the 1951 Convention and 1967 Protocol, as explained in more detail in last year's conference room paper.¹⁰

10. Important elements of a comprehensive procedural system, at least some of which are already in place in some States, would include the following:

- one central and expert authority to determine, in a single procedure, the protection needs of an applicant, considering first the 1951 Convention definition and subsequently, on a sliding scale, the other grounds which might justify international protection;
- appropriate evidentiary standards and rules in place (including that the standard of proof for claims is the "reasonable possibility" of the harm occurring¹¹), with reasons for decisions provided;
- an opportunity for a meaningful review of any negative decision, with suspensive effect, so that no applicant is removed before a final determination of his or her need for protection;
- persons seeking protection being given access to UNHCR and vice-versa, and UNHCR having an opportunity to participate in the process, on account of the Office's particular expertise, should this be necessary and appropriate. Such participation could take the form of providing country of origin information or expert opinions on interpreting protection needs.

III. CONCLUDING OBSERVATIONS

11. As explained in the introductory paragraphs to this note, the draft text below is based on the concluding observations of last year's conference room paper. Amendments reflecting additional elements contained in this note are shown in bold print. This proposed text could form the basis of a conclusion on complementary forms of protection that could be presented to ExCom at its fifty-third session, with a view to promoting coherence among the approaches of States. Alternatively, delegations may wish to express their views at this Global Consultations meeting on how the debate on this topic should now be brought to an appropriate conclusion.

(a) Complementary forms of protection adopted by States to ensure that persons in need of international protection actually receive it, are a positive way of responding pragmatically to certain international protection needs.

(b) Beneficiaries of complementary protection should be identified according to their international protection needs, and treated in conformity with those needs and their human rights. The criteria for refugee status in the 1951 Convention should be interpreted in such a manner that individuals who fulfil the criteria are so recognized and protected under that instrument, rather than being treated under complementary protection schemes.

⁹ See the European Commission's Communication COM (2000) 755 final of 22 November 2000, Towards a common asylum system and a uniform status, valid throughout the Union, for persons granted asylum at section 2.2; see also the report of the seminar held in Norrköping, Sweden, 23/24 April 2001 International Protection within One Single Asylum Procedure. For discussions under the Global Consultations, see report of the 2nd meeting held in June 2001 (EC/GC/01/12, paras 24 and 48).

¹⁰ See EC/50/SC/CRP.18, paras 7-9 and 25(b).

¹¹ See The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, UNHCR, April 2001, para. 10, for a summary of the burden and standard of proof issues for refugee claims, which should apply in a comprehensive, single procedure.

(c) Measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime.

(d) The standards of treatment of beneficiaries of complementary protection should provide for the protection of basic civil, political, social and economic rights. States should, as far as possible, strive to devise harmonized approaches to the treatment provided. They should implement complementary protection measures in such a way as to ensure the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the fundamental principle of family unity.

(e) A single comprehensive procedure, before a central expert authority, for assessing whether an asylum-seeker qualifies for refugee status or other complementary protection represents an efficient means of identifying persons in need of international protection. Such a single procedure should meet all the requirements of fairness, including the right to appeal with suspensive effect, and access to UNHCR.

(f) Criteria for ending complementary protection should be objective, clearly enunciated in law and should never be arbitrary. Where it is relevant, the doctrine that has been developed regarding the cessation provisions of Article 1 of the 1951 Convention offers helpful guidance in this regard. A consultative role should be envisaged for UNHCR, given its particular expertise, when considering the appropriateness of ending complementary protection measures.

(g) Temporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from **forms of complementary protection** which are offered after a status determination **and which provide a definitive** status.

(h) The 1951 Convention and its 1967 Protocol form the cornerstone of the international protection of refugees and provide the basic framework for such protection. **Refugee law, which includes complementary forms of protection, is a dynamic body of law, informed by the broad object and purpose of the Convention and Protocol, as well as by developments in related areas of international law, such as human rights law and international humanitarian law.** The standards elaborated in the Convention, together with those developments, provide an important guide with respect to the treatment that should be afforded to persons in need of international protection.

(i) States that have not already done so should accede to these instruments and to other applicable regional refugee protection instruments, in order to ensure the widest possible, and most closely harmonized, application of the basic principles of refugee protection.