

10.2 Summary Conclusions: supervisory responsibility

Expert roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2001



The second day of the Cambridge Expert Roundtable addressed the question of supervising implementation of the 1951 Convention Relating to the Status of Refugees. This was based on a background paper by Professor Walter Kälin of the University of Berne entitled ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’. Participants comprised thirty-five experts from some fifteen countries, drawn from governments, non-governmental organizations (NGOs), academia, the judiciary, and the legal profession. They were provided with a number of written comments on the paper,¹ as well as the report and the conclusions and recommendations of the Global Consultations Regional Meeting held in San José, Costa Rica, on 7–8 June 2001. The latter compared UNHCR’s supervisory role with that of the Inter-American human rights bodies. The morning session was chaired by Professor Chaloka Beyani of the London School of Economics and the afternoon by Professor Guy S. Goodwin-Gill of the University of Oxford.

Taking into account the breadth of the discussion and the recognized preliminary character of the inquiry, this document presents only a brief summary of the discussion, as well as a list of the varied suggestions on strengthening implementation which came up in the course of it. The document does not represent the individual views of each participant or necessarily of UNHCR, but reflects broadly the themes emerging from the discussion.

1 Comments were received by a group of African NGOs (West African NGOs for Refugees and Internally Displaced Persons (WARIPNET) (Senegal), Africa Legal Aid (Ghana), and Lawyers for Human Rights (South Africa)); Rachel Brett of the Quaker UN Office; Chan-Un Park, a lawyer from the Republic of Korea; Judge Jacek Chlebny, Poland; the International Council of Voluntary Agencies (ICVA); and the Medical Foundation for the Care of Victims of Torture, London.

Introduction

1. The focus of the wide-ranging discussion, which was more of a brainstorming session than a legal analysis, was on ways to enhance the effective implementation of the 1951 Convention. Generally, there was agreement that the identification of appropriate mechanisms should seek to preserve, even strengthen, the pre-eminence and authority of the voice of the High Commissioner. Anything that could undermine UNHCR's current Article 35 supervisory authority should be avoided.
2. The difficulties confronting international refugee protection today form the backdrop to any examination of strengthened supervision. They include major operational dilemmas obstructing proper implementation, diverging views on the interpretation of Convention provisions, and an insufficient focus in intergovernmental forums on international protection issues.

UNHCR's supervisory role

3. Under paragraph 8 of its Statute, UNHCR's function is to protect refugees including by promoting the conclusion of international refugee instruments, supervising their application, and proposing amendments thereto. This function is mirrored in Article 35 of the 1951 Convention in which States undertake to cooperate with UNHCR in the exercise of its functions, including in particular by facilitating its duty of supervising the application of the provisions of the Convention.
4. The elements of UNHCR's supervisory role can be listed as including:
 - (a) working with States to design operational responses which are sensitive to and meet protection needs, including of the most vulnerable;
 - (b) making representations to governments and other relevant actors on protection concerns and monitoring, reporting on and following up these interventions with governments regarding the situation of refugees (e.g. on admission, reception, treatment of asylum seekers and refugees);
 - (c) advising and being consulted on national asylum or refugee status determination procedures;
 - (d) intervening and making submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements or letters;
 - (e) having access to asylum applicants and refugees, either as recognized in law or in administrative practice;
 - (f) advising governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees at all stages of the

- process, and providing comments on and technical input into draft refugee legislation and related administrative decrees;
- (g) fulfilling an advocacy role, including through public statements, as an essential tool of international protection and the Office's supervisory responsibility;
 - (h) strengthening capacity, for example, through promotional and training activities; and
 - (i) receiving and gathering data and information concerning asylum seekers and refugees as set out in Article 35(2) of the 1951 Convention.
5. This broad range of UNHCR's supervisory activities is generally accepted and indeed expected by States, although implementation of the Convention remains fraught with difficulties. This has led to calls for strengthened supervisory mechanisms, including by enhancing capacity in the protection area.

Considerations and possible approaches

- 6. Supervision is not simply about ascertaining violations, but, perhaps more importantly, it is also about constructive engagement and dialogue as well as coordination to ensure the resolution of issues.
- 7. It is important to ensure that NGOs have a proper role in the process of supervision. The establishment of specialized NGOs in the field of refugee rights should be fostered, along with information dissemination, advocacy, and legal aid.
- 8. Generally, information collection, research, and analysis need to be improved. It was suggested that UNHCR's Centre for Documentation and Research should be preserved, appropriately supported, funded, and staffed. With regard to requests for reports and information from States, such requests would need to be incremental and targeted, given the limited response to earlier requests. Another possibility would be to establish a mechanism with differentiated reporting burdens. Article 36 of the 1951 Convention, which requires States to provide information on the laws and regulations adopted to ensure application of the Convention, is a reporting responsibility of States.
- 9. There is no one single model used by treaty monitoring bodies which can simply be replicated and applied to supervising implementation of the 1951 Convention. The experience gained in the human rights monitoring field and in other areas such as the International Narcotics Control Board, the World Trade Organization, or the Council of Europe is potentially useful. There is also a need to ensure complementarity with human rights

treaty-based monitoring systems and to avoid competing interpretations which might arise with several bodies with overlapping competencies. A need for confidentiality in certain circumstances need not rule out speaking out in others.

10. A number of possible approaches and suggestions were put forwards as follows:
 - (a) *Strengthen UNHCR's role.* UNHCR's role, as described above, could be enhanced by increasing significantly the number of protection staff, by further improving cooperation with regional bodies, and by UNHCR strengthening the provision of technical, legal, and other advice. One possibility which could be examined further would be for UNHCR to prepare reports for governments on implementation, which could inform and support dialogue between UNHCR and States, and could eventually be published. Such measures naturally have resource implications.
 - (b) *The Executive Committee.* The Executive Committee could complement UNHCR's supervisory role through a special mechanism which might review special problems of implementation. There is, however, a need to avoid the politicization of debate. The experience of the Human Rights Commission is salutary in this regard. A sub-committee of the Executive Committee, similar to the former Sub-committee of the Whole on International Protection, could, for instance, be constituted, to which the High Commissioner might submit problems of implementation. This would ensure a more focused debate on international protection matters generally and better quality Conclusions on protection. Such a sub-committee could also itself usefully identify obstacles to implementation of the Convention, including in specific situations, and promote solutions, not least through burden/responsibility sharing and comprehensive approaches.
 - (c) *Meetings of States Parties.* Meetings of States Parties, as undertaken in the context of international humanitarian law organized by the International Committee of the Red Cross (ICRC), could perhaps be replicated in the refugee law context, although in the human rights context such meetings have not always been so effective. The December 2001 States Parties meeting could reflect upon the utility of a review conference some years later, with UNHCR suggesting the agenda and reporting on the state of implementation of the 1951 Convention.
 - (d) *Peer review and ad hoc mechanisms.* One advantage of peer review mechanisms among States is that they allow for a more positive identification of a 'best practices' approach, as well as collective discussion of problems. Trade policy review mechanisms serve as one model. They examine implementation and problems but not in an adversarial

manner. The approach allows peer pressure to be exerted to improve implementation. Ad hoc mechanisms which do not have to be treaty-based could also be useful. For instance, the Committee of Ministers of the Council of Europe made a Declaration on compliance with commitments accepted by member States in 1994. As a result, peer review mechanisms have now been established. Thematic issues are selected, so that 'best practice' can be identified, rather than the focus being on particular countries. Confidentiality is built into the system to ensure criticism is possible.

- (e) *Judicial forums*. An informal system of review by judges could be established. For instance, the International Association of Refugee Law Judges (IARLJ) could offer a forum in which adjudicators can discuss the interpretation and implementation of the Convention on an advisory and informal basis. Establishing a judicial body as such, which could be used to provide preliminary opinions on issues, as is the case with the European Court of Justice, was proposed as a possibility in the longer term.
 - (f) *Expert advisers and/or fact-finding missions*. One possibility would be to establish a system whereby the High Commissioner appoints one or a number of expert advisers to assess implementation in relation to particular issues or particular refugee situations. A report would be made to the High Commissioner, who could then consider bringing it to the attention of the Executive Committee. Another possibility would be to set up a mechanism whereby the High Commissioner could request the organization of fact-finding missions, including government representatives and other experts, which could collect information and/or make recommendations on particular situations. It should be remembered, however, that fact-finding missions as initiated by the ICRC have tended to encounter major obstacles and their competence is only accepted by a limited number of States.
11. Participants agreed that their discussion was only the beginning of an important process to strengthen the implementation of the Convention, including through enhanced supervision. This process should continue, expanding to include other actors and taking in other perspectives. It was felt that the Ministerial Meeting in December 2001 provided an opportunity to crystallize support for moving the discussion forward.