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Standard-setting: Lessons Learned for the Future

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STANDARD-SETTING PROCESSES AT UNHCR

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LEGAL BASIS OF UNHCR MANDATE¹

1. The adoption of standards is an integral part of UNHCR's role in the development of international refugee protection principles and law, deriving from the mandate of the Office. UNHCR's mandate is grounded in General Assembly Resolution 428 (V) of 14 December 1950, to which the Statute of the Office of the High Commissioner for Refugees is annexed.²
2. The Statute of the Office of the United Nations High Commissioner for Refugees clearly sets out the activities which UNHCR is required or is authorised to carry out on behalf of persons of concern. These persons of concern in turn have been identified by both General Assembly and ECOSOC resolutions, supported by UNHCR's Executive Committee which demonstrate the underlying broad consensus of the international community to provide UNHCR with specific responsibilities in respect of certain groups of persons, extending the High Commissioner's competence to five main categories:
 - a. Refugees and asylum seekers;
 - b. Stateless persons;
 - c. Returnees;
 - d. Internally displaced persons – under certain specific circumstances;

¹ For further detail on the role of UNHCR in the development of international refugee law please see the chapter written by Volker Turk, pages 153-173, *Refugee Rights and Realities, Evolving International Concepts and Regimes*, ed. Frances Nicholson and Patrick Twomey, Cambridge University Press.

² The Statute is not the exclusive legal basis for UNHCR's operations. Numerous General Assembly and Economic and Social Council Resolutions are of relevance to UNHCR's mandate. For further information in this regard please refer to the *Thematic Compilation of General Assembly & Economic and Social Council Resolutions*, produced by the Department of International Protection, February 2003.

- e. Persons threatened with displacement or otherwise at risk – under certain specific circumstances.
3. UNHCR is institutionally linked to international conventions relating to refugees and stateless persons and also to the broader framework of human rights law. This may occur directly, as for instance in the case of UNHCR’s supervisory function under Article 35 of the 1951 Convention relating to the Status of Refugees, or indirectly, for instance in Articles 22 and 45 of the 1989 Convention on the Rights of the Child or Article 11 of the 1961 Convention on the Reduction of Statelessness.

UNHCR AS A ‘PROMOTER’ OF INTERNATIONAL LAW AND STANDARDS

4. Paragraph 8(a) of the UNHCR Statute states that the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by *inter alia*:
 - (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
 - (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection.
5. UNHCR as a subsidiary organ of the General Assembly has thus been entrusted with specific functions in the development of international law and standards relevant to persons of concern to the Office, this responsibility having been devolved upon UNHCR by the General Assembly in adopting the Statute. Furthermore the General Assembly confers an overall supervisory responsibility on UNHCR in respect of international conventions providing for the protection of refugees. This specific responsibility is directly linked to Article 35 of the 1951 Convention and Article 2 of its 1967 Protocol, as well as to Article 8 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.
6. Over the years UNHCR has fulfilled its competence in the development of international law and related standards with regard to the categories of persons of its concern through, *inter alia*, its contribution to the drafting and adoption of the 1967 Protocol Relating to the Status of Refugees; the 1967 UN Declaration on Territorial Asylum and subsequent developments; 1966 Bangkok Principles Concerning Treatment of Refugees; the 1969 OAU Convention; the 1984 Cartagena Declaration; and related legal developments in the European Union, the Council of Europe and other regional bodies.

THE ROLE OF THE EXECUTIVE COMMITTEE

7. The Executive Committee³ of the United Nations High Commissioner’s Programme was established by ECOSOC Resolution 672(XXV) of 30 April 1958. The Executive Committee in turn decided in 1975 to establish a Sub-Committee of the Whole of International Protection, the specific function of which would be to study in more detail some of the more technical aspects of the protection of refugees and report back to EXCOM.⁴ From 1975 onwards the Executive Committee has annually adopted Conclusions on different aspects of protection. This practice

³ There are currently 66 Member States of the Executive Committee, not all of them signatories of the 1951 Convention. For further information on the structure and functioning of EXCOM please refer to the EXCOM page on UNHCR’s website.

⁴ See EXCOM Conclusion 1(XXVI) adopted at the 26th Session of the Executive Committee in 1975.

has continued despite the abolition of the Sub-Committees in 1995 as part of an overall restructuring of EXCOM and their replacement with the Standing Committee. The Executive Committee is the only specialised forum which exists at the global level for the development of international standards relating to refugees and other persons of concern to UNHCR.

8. The procedure leading to the adoption of an EXCOM Conclusion is roughly as follows⁵:
 - The subject matter of the Conclusions for the year is identified through a process of discussion involving UNHCR and the members of the Executive Committee, resulting in the adoption of work plans listing proposed EXCOM Conclusions and other related matters;
 - UNHCR undertakes and presents research relating to the specific subject matter of a Conclusion – the results of such research would normally be presented to the Standing Committee in the form of a Conference Room paper
 - Through the Standing Committee, states present their views on the concepts and positions elaborated by UNHCR in the Conference Room paper;
 - Based on the debate, UNHCR crafts the Excom Conclusions in draft, ensuring that these preserve existing standards and develop them further to address existing gaps in protection law and principles, yet taking into account the views of States;
 - UNHCR presents a Secretariat Draft of the EXCOM Conclusions for the consideration of EXCOM members;
 - The draft text is negotiated among States in a series of consultations in which they present their views which normally reflect respective States' interests;
 - As the Secretariat, UNHCR facilitates the discussions and provides advice as necessary, and also defends the draft text which it has submitted;
 - Consensus is reached on a text which is then presented to and adopted by the Executive Committee at its annual session.
9. Excom Conclusions are not binding on States. However, having participated in the discussions, States have expressed their moral and political commitment to abide by the standards they have set in the Conclusions. The Conclusions also serve as basis for further progressive development of refugee law. EXCOM Conclusions are tabled at and acknowledged by the United Nations General Assembly in the Omnibus Resolution that is adopted on an annual basis following the presentation of the High Commissioner's report through the Third Committee.

CONVENTION PLUS

10. During the fifty-third session of the Executive Committee (ExCom) in October 2002, the High Commissioner called for the development of new tools, in the form of multilateral “special agreements”, to complement the 1951 Convention. The agreements are intended to set in place joint arrangements in areas where multilateral commitments are called for and where they are negotiable. The High Commissioner termed these tools “Convention Plus”. The process of negotiation of Convention Plus agreements has itself become a form of standard-setting.
11. The legal basis for these Convention Plus agreements can be found in paragraph 2(b) of General Assembly resolution 428(V) of 14 December 1950 and paragraph 8(b) of UNHCR's Statute. Their purpose is “the execution of any measures calculated to improve the situation of refugees falling within the competence of the Office and to reduce the number requiring protection”. The Convention Plus initiative intends to develop the type of agreements that will make it easier for States and UNHCR to live up to their commitments to find durable solutions to refugee problems, through international solidarity and burden – and responsibility – sharing.

⁵ This is an illustrative description; not all steps will necessarily be followed with respect to each and every conclusion.

12. While special agreements do not have to be legally binding *per se*, they must at a minimum reflect an important political commitment on the part of the concerned States to act in a particular and predictable manner. It is indeed standard practice for many Governments to agree on joint statements of policy and intentions that do not necessarily establish legal obligations, but do determine, or at least substantively influence, their decisions. While not of a “hard law” character, such agreements serve to govern the mutual relations between the States in question. “Special agreements” can generally be characterised as: (i) written arrangements worked out by UNHCR and Governments; (ii) intended, depending on their subject matter, either to be legally binding or to reflect an important degree of political commitment; (iii) reflecting the attention of those involved to act in an agreed manner towards each other; (iv) concluded for the purposes mentioned in paragraph 8(b) of the Statute, i.e. ultimately for the benefit of refugees.
13. The Convention Plus process is progressing slowly, reflecting in part the complexity of the issues being discussed, but also the reluctance of States generally to adopt new universal standards on refugee protection and solutions. Core Group of States, IGOs and NGOs have been working on developing multilateral ‘frameworks of understandings’ [e.g., on the strategic use of resettlement, or on ways to address irregular secondary movements of refugees and asylum-seekers], which are meant to inform situation- or caseload-specific plans of action. These ‘comprehensive plans of action’ – of which important precedents exist in the history of UNHCR – are to be negotiated multilaterally, will involve the broadest possible range of interested States and other stakeholders, and will encapsulate their respective and mutual commitments within one document.

UNHCR INVOLVEMENT IN OTHER STANDARD-SETTING EXERCISES

14. In addition to the standard-setting which goes on within UNHCR, the Office is additionally involved in standard-setting which takes place under the auspices of other organisations, where the document under negotiation is considered to have an impact on persons of concern to the High Commissioner. Examples of such involvement would include; UNHCR’s participation as an observer to the drafting of treaties (UN Convention against Transnational Organised Crime, Council of Europe Draft Convention Against Trafficking, etc.); participation in the drafting of General Comments by treaty bodies. UNHCR’s main objective in participating in such processes is to ensure that international refugee law is given due weight and to avoid the development of divergent or contradictory standards with respect of persons of concern to the Office.
15. UNHCR also contributes to the progressive development of refugee law and protection principles through court interventions and research activities, including the Legal and Protection Policy Research series and Guidelines on International Protection issued by the Department of International Protection