The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law

ALLISON CORKERY*

Abstract

In recent decades, the rapidly changing character of modern refugee situations has not been paralleled by similar advancements in the international protection regime, established more than fifty years ago. Aside from the *1967 Protocol*, there has been no new treaty-based response to these changes. This has created a 'gap' between the responsibilities delegated to UNHCR and the often limited treaty obligations accepted by States. As a consequence of the limited advancement of international refugee law at the treaty level, less formal 'soft law' standards are required to complement the provisions in the *1951 Convention*. This article focuses on the potential of the Conclusions on International Protection adopted annually by the Executive Committee of UNHCR to provide such standards. In particular, it examines how the normative influence of the Conclusions might be enhanced so that they may play a greater role in the progressive development of international refugee law.

Introduction

> *Where there is law and principle, so there is strength and the capacity to oppose. Where there are merely policies and guidelines, everything, including protection, is negotiable, and that includes refugees.*[1]

Since the creation of the modern refugee law system in the early 1950s, both the nature and scope of the refugee situation has changed dramatically. At the end of 2006, the total number of 'persons of concern' under the mandate of the Office of the United Nations High Commissioner for Refugees ('UNHCR') had increased to 32.9 million, with the vast majority located in developing countries.[2] However rapid changes in refugee

* Allison Corkery is a graduate from the University of New South Wales (BA LLB), currently working at the Human Rights and Equal Opportunity Commission. The views expressed in this article are those of the author, and should not be taken to reflect the position of the Commission. An earlier version of this paper was submitted as a research thesis during Bachelor of Laws coursework, based on research commenced while interning at the UNSW Centre for Refugee Research. The author would like to thank her supervisors for their comments and guidance.

1 Guy Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospects' in Frances Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) at 240.

situations have not been paralleled by similar developments in international refugee law. Aside from the *1967 Protocol to the Convention relating to the Status of Refugees*,[3] there has been no new treaty-based response to the changing refugee situation. This has created a 'gap' between the responsibilities entrusted to UNHCR by the international community and the often limited obligations that have been formally accepted by States.[4] As reflected in the opening quote, this gap has led to inconsistent interpretations of the international refugee instruments, and has left areas in the international legal framework for the protection of refugees undefined; challenging the ability of the framework created by the *1951 Convention relating to the Status of Refugees* ('*1951 Convention*') to respond to these new refugee situations.

Despite this challenge, the 1951 framework is not obsolete, although to respond more effectively to the changing character of modern refugee situations, it needs to be supplemented. However the increasing regionalisation of refugee problems and the growing membership of the United Nations ('UN') have made it difficult to achieve the consensus required for the introduction of any new universal treaty on refugees.[5] For this reason, it is necessary to consider how the development of 'soft law' standards and principles can supplement the refugee protection framework to provide an alternative means to ameliorate this gap.

This article focuses on the Conclusions on International Protection adopted annually by the Executive Committee of UNHCR, as one possible means of influencing States, to fill some of the current gaps in the international protection regime. Although the Conclusions are not binding on States, the Executive Committee is the only specialised forum for the development of international refugee law standards at a global level.[6] The Conclusions therefore have the potential to have significant normative influence as an expression of the consensus of the international community on a specific protection matter. Despite this however, they have generally been afforded relatively low status internationally. The aim of this article is to look at how the status of the Conclusions *as a whole* (while acknowledging that the specific content of a particular conclusion will affect its status) can be enhanced, so that they may play a greater role in the progressive development of refugee law.

To achieve this, Part 1 of this article provides a background for evaluating the Conclusions by looking at the role that the Conclusions were set up to play in the development of refugee law. Noting the obligation on States to advance international protection standards, it examines the development of the Executive Committee and the Conclusions process to consider how it might be a means to advance protection

2 UNHCR, *2006 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Person, and Other Persons of Concern to UNHCR* (2006).

3 *Protocol Relating to the Status of Refugees 1967*, 606 UNTS 267 (entered into force 4 October 1967); *Convention Relating to the Status of Refugees 1951*, 189 UNTS 150 (entered into force 22 April 1954).

4 Volker Türk, 'The Role of UNHCR in the Development of International Refugee Law' in Frances Nicholson & Patrick Twomey, above n1 at 165.

5 Corinne Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution' (2005) 17(1) *International Journal of Refugee Law* 67 at 77.

6 Volker Türk, above n4 at 165.

standards. As part of this examination, it analyses the status of the Conclusions as a form of 'soft' international law. Part 2 goes on to evaluate the factors that contribute to the normative significance of the Conclusions, demonstrating that there are weaknesses in the Conclusions process which detract from their potential significance. These weaknesses are considered further in the final part, which makes recommendations for how the status of the Conclusions may be enhanced.

1. Establishing the Role of the Conclusions

The international refugee protection regime consists of two key instruments: the *1950 UNHCR Statute* and the *1951 Convention*. This part begins with an overview of the development of this regime, demonstrating the disparities between the often limited, legally formalised obligations of States contained in the *Convention* and the increasingly expanded responsibilities of UNHCR. Having established that the principles in the international protection regime require further development, it then goes on to examine what obligations do exist on States to develop further standards in international refugee law.

In order to consider how this obligation might operate to require States to follow the Executive Committee's conclusions, this part then examines the history and evolution of the Executive Committee, specifically looking at the development of the Conclusions process. This examination reveals that there is nothing in the Committee's mandate which creates an obligation on States to follow the directions in the Committee's Conclusions. Although this is generally overlooked in practice, this shortcoming remains unresolved. The part concludes with an analysis of the status of the Conclusions as a form of 'soft' international law.

A. The Evolution of the International Refugee Regime

Rather than granting control over the protection system to an international authority, such power remains firmly a State prerogative under the *1951 Convention*.[7] As Professor James Hathaway argues, the result of this State-centred approach is to allow a substantial 'margin of discretion' in the interpretation of the *Convention*. In practice, the effect has been a further narrowing of the protection system, particularly since the end of the Cold War, with developed States applying increasingly restrictive interpretations of the Convention to build up a 'maze' of restrictive asylum practices, such as visa controls, deflection measures and complex determination systems.[8] In contrast to increasingly restrictive State action, the responsibilities entrusted to UNHCR have expanded significantly over the last 50 years in response to the needs of refugees in situations of large population displacement. The *UNHCR Statute* allows the UN General Assembly and the Economic and Social Council ('ECOSOC') to amend the High Commissioner's

7 Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14(2/3) *International Journal of Refugee Law* 238 at 245.

8 James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129 at 178–179.

mandate[9] and also requires the High Commissioner to follow policy directives given to him or her by the General Assembly or ECOSOC.[10] Since the inception of UNHCR, both the General Assembly and ECOSOC have made amendments pursuant to these provisions, expanding UNHCR's mandate *ratione personae*, significantly beyond the actual provisions contained in the Statute.

Events in Eastern Europe in the mid-1950s encouraged the first of what has now become a long succession of instances where UNHCR has been directed to act beyond the narrow compass of the *Convention,* when in 1956 the General Assembly passed a resolution authorising UNHCR to coordinate assistance following the uprising in Hungary.[11] The progressive development of UNHCR's mandate has expanded its competence to cover five main categories of 'persons of concern': refugees and asylum seekers; stateless persons; returnees; internally displaced persons; and persons threatened with displacement or otherwise at risk.[12] This has resulted in the establishment of a broader institutional mandate for UNHCR, covering a wider range of displaced persons not falling within the narrow Convention refugee definition[13] and allowing for UNHCR involvement in the coordination of humanitarian aid programmes in Africa and Eastern Europe.[14]

The consequence of this expansion has been that the legal basis for UNHCR's mandate has become both dynamic and fragmented. The *1950 Statute* no longer encompasses the entire mandate of UNHCR, as activities that may have originally been outside UNHCR's competence have been later integrated by General Assembly Resolutions.[15] Furthermore, the divergence between the obligations of States established in the form of treaty law, and the responsibilities entrusted to UNHCR, creates, as Hathaway describes, a 'two-tiered protection system', which gives States the authority to administer refugee law in a manner consistent with their own national interests, but that falls far short of meeting the needs of refugees in a comprehensive manner.[16]

B. States' Obligation to Advance International Protection Standards

It is clear that the further development of international refugee law is envisaged in both the *Convention* and the *UNHCR Statute*. Under paragraph 8(a) of the *UNHCR Statute*, the High Commissioner is responsible for 'promoting the conclusion and ratification of

9 *Convention Relating to the Status of Refugees 1951*, 189 UNTS 150, art 9 (entered into force 22 April 1954) ('*1951 Convention*') which stipulates that the High Commissioner is to engage in such additional activities as the General Assembly may determine.

10 Id at art 3.

11 *Hungarian Refugees*, GA Res 1129(XI), UN GAOR, 11th sess, 587th plen mtg, (1956).

12 The latter two categories do not form part of the general competence of the Office, but there is a selective and limited mandate to deal with them: Volker Türk, above n4 at 155.

13 James Hathaway, above n8 at 157–158.

14 Dennis Gallagher, 'The Evolution of the International Refugee System' (1989) 23(3) *International Migration Review* 579 at 594–595. See for example: *Assistance to Refugees, Returnees and Displaced Persons in Africa,* GA Res 59/172, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/RES/59/172 (2005).

15 Volker Türk, above n4 at 154.

16 James Hathaway, above n8 at 130, 144.

international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[17] UNHCR acted on this competence in its role in the preparation of the *1967 Protocol*; its involvement with the *1969 Organisation of African Unity Convention*;[18] and its involvement in drafting the *Convention on Territorial Asylum*.

However, since the failure to adopt the *Convention on Territorial Asylum* in 1976, no universal treaty on refugees has been drafted. Accordingly, while there are a number of human rights conventions that do apply to refugees, the international refugee regime consists primarily of three international agreements that were all created prior to 1970. As already noted, the nature of refugee movements has changed dramatically since the 1970s and relying exclusively on the *Convention* and *Protocol* to influence States to respond to this change is difficult. For this reason, the standards and principles in *the Convention* need further elaboration and it is necessary to look at means by which new legal standards can be developed to supplement the framework established in the *Convention*.[19]

Potential for such development can be found in the provisions of the *Convention* itself. States' recognition of the role UNHCR plays in the development of international refugee law, as well as their obligation to cooperate with UNHCR in its performance of such a role, is rooted in article 35(1) of the *1951 Convention*,[20] which reads:

> The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

Professor Walter Kälin interprets this duty to cooperate as requiring States to:

(1) respect UNHCR's supervisory power and not hinder UNHCR in carrying out this task; and

(2) actively cooperate with UNHCR in this regard in order to achieve an optimal implementation and harmonised application of all provisions of the *Convention* and its Protocol.[21]

This interpretation imposes a very strong obligation on States. However, it is an interpretation supported by the *travaux préparatoires* of the *Convention*, which demonstrate

17 Additionally, para 8(b) of the *UNHCR Statute* states that the High Commissioner should promote, through special agreements with governments, the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection. However, the favoured interpretation of this provision is that it relates to agreements between individual governments and UNHCR: Corinne Lewis, above n5 at 71.

18 *OAU Convention Governing the Specific Aspects of Refugee Rights in Africa 1969,* OAU Doc. No CAB/LEG/24.3 (entered into force 20 June 1974). Although UNHCR was not directly involved in the drafting of this Convention, their role in the negotiations led to the treaty taking complementary form to the *1951 Convention*: Volker Türk, above n4 at 167.

19 Corinne Lewis, above n5 at 78.

20 This provision is also mirrored in art 2 of the *1967 Protocol*, above n3.

21 Walter Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and beyond' in Erika Feller, Volker Türk & Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 617.

that the drafters were fully aware of the significance of article 35(1). Originally, the draft required States to 'facilitate the work' of UNHCR, however the stronger wording was inserted by a United States proposal, to remove the 'hesitant tone' of the original draft.[22] The obligations that this provision imposes on contracting States establish an explicit contractual link with the broader legal framework of UNHCR's functions and operations.[23] This contractual link is not strictly limited to cooperation in the application of the *Convention*, but as is clear by the wording, refers to 'any and all of the functions of the High Commissioner's office, irrespective of their legal basis.[24]

Clearly States which are not party to the *Convention* or *Protocol* have no binding obligation under article 35. However a broader duty of cooperation with UNHCR may extend to all States. Firstly, UNHCR's power to supervise the application of international refugee law under paragraph 8 of the Statute covers *all* refugees falling within its competence, with a corresponding duty of States to cooperate. Accordingly, this supervisory power would extend to require cooperation from all States that have refugees within their territory, regardless of whether or not they are a party to the *Convention*.[25] In addition, under article 56 of the UN Charter, Member States have an obligation to cooperate with the UN, a duty which extends to UNHCR given its quality as a subsidiary organ of the General Assembly. This is reflected in General Assembly Resolution 428(V), which established UNHCR, and called on States to 'cooperate with the United Nations High Commissioner for Refugees in the performance of his functions…'.[26]

C. *The History and Development of the Executive Committee*

There is support for the argument that States do have to take into account Conclusions of the UNHCR Executive Committee as part of their duty to cooperate under article 35, as the Conclusions of the UNHCR Executive Committee play a role in the exercise of UNHCR's functions. Therefore, the Conclusions may be one source of influence on State practice that helps ameliorate the gaps in the international protection regime. However, in order to evaluate how the Conclusions of the Executive Committee might play a role in the development of international refugee law standards, it is important to first understand the Committee's mandate and legal foundation.

This part assesses whether there is any legal basis for the Executive Committee to play a role in the elaboration of international standards. It looks at the purpose of the Executive Committee and how its mandate was originally conceived and specifically whether the adoption of Conclusions on Protection falls within this mandate. An important question to arise out of this discussion is the extent to which, if at all, the Committee's Conclusions may bind UNHCR and States Parties.

22 Ibid.
23 Volker Türk, above n4 at 161.
24 Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, quoted in Walter Kälin, above n21 at 2.
25 Kälin, above n21 at 618.
26 *Resolution on UNHCR Statute,* GA Res 428(V), UN GAOR, 5th sess, 325th plen mtg, (1950) at [2].

(i) Preceding Organisations

UNHCR commenced its activities in January 1951. However, the Executive Committee was not established until 1958. An overview of the two organisations that operated during this interim period, the Advisory Committee to UNHCR and the United Nations Refugee Fund ('UNREF') Executive Committee, provides context for assessing how the Executive Committee's role and mandate were originally conceived.

Under paragraph 4 of the UNHCR Statute, ECOSOC is authorised to establish an advisory committee on refugees, consisting of State representatives of members and non-members of the UN.[27] This provision was implemented in September 1951, with the adoption of ECOSOC Resolution 393(XIII).[28] In accordance with the resolution, 15 States were invited to form the Advisory Committee on Refugees, many of whom had received large numbers of refugees following World War II.[29] The Advisory Committee operated between 1951 and 1954. Its role was 'to advise the High Commissioner, at his request, in the exercise of the functions of the office'.[30]

In 1952 a decision was made to establish a voluntary emergency relief fund, known as the United Nations Refugee Fund ('UNREF').[31] In 1954 the General Assembly requested that ECOSOC either establish an Executive Committee responsible for exercising control over the use of this fund and for giving directives to the High Commissioner in carrying out his or her programme, or revise the terms of reference and composition of the Advisory Committee to enable it to carry out these duties.[32] The Council decided to reconstitute the Advisory Committee, creating the UNREF Executive Committee on 31 March 1955.[33] The UNREF Executive Committee took over from the Advisory Committee in 1955.

As its title demonstrates, the functions of the UNREF Executive Committee differed from its predecessor, as its functions now included the supervision of material assistance programmes financed by the fund. This change in focus represented a significant development for the new Executive Committee; increasing control over the budget and input into UNHCR priorities expanding its function beyond a purely advisory role. This increasing institutionalisation of the Committee reflected the realisation that the 'old' refugee problems would take longer to solve than had been envisaged when UNHCR was established.[34]

---

27 *Resolution on UNHCR Statute,* GA Res 428(V), UN GAOR, 5th sess, 325th plen mtg, (1950) at Annex ('*UNHCR Statute*'), [4].

28 *Establishment of an Advisory Committee on Refugees*, ECOSOC Res 393(XIII), UN ESCOR, 13th sess (1951).

29 These were Australia, Austria, Belgium, Brazil, Denmark, Federal Republic of Germany, France, Israel, Italy, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Vatican City and Venezuela: Louise Holborn, *Refugees: A Problem of our Time: The Work of the United Nations High Commissioner for Refugees 1951-1972* (1975) at 110–111.

30 ECOSOC Resolution 393(XIII), above n28 at [1].

31 Louise Holborn, above n29 at 136–139.

32 *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees,* GA Res 832 (IX), UN GAOR, 9th sess, 495th plen mtg (1954) at [4].

33 *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees*, ECOSOC Res 565 (XIX), UN ESCOR, 19th sess (1955) at [4].

(ii) The Legal Foundations of the Executive Committee

By 1957 the UNREF Executive Committee's mandate was coming to an end. However, the refugee situation demanded continued efforts on the part of the international community: war camps were still not cleared; new refugee situations had occurred in Austria and Yugoslavia following the Hungarian uprising of October 1956; and refugee problems were developing outside Europe, including Chinese refugees in Hong Kong, and Angolan refugees in Zaire.[35] The decision to set up the UNHCR Executive Committee, to replace the UNREF Executive Committee, was made by the General Assembly in November 1957, pursuant to Resolution 1166(XII). Responsibility for the actual establishment of the Committee was given to ECOSOC and these arrangements were contained in ECOSOC decision 672(XXV), which was adopted in April 1958. The Committee's terms of reference are contained in paragraph 5 of resolution 1166(XII) and are as follows:[36]

(a) To give directives to the High Commissioner for the liquidation of the United Nations Refugee Fund;

(b) To advise the High Commissioner, at his request, in the exercise of his function under the Statute of his Office;

(c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help to solve specific refugee problems remaining unresolved after 31 December 1958 or arising after that date;

(d) To authorise the High Commissioner to make appeals for funds to enable him to solve the refugee problems referred to in sub-paragraph (c) above;

(e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above;

(f) To give directives to the High Commissioner for the use of the emergency fund to be established under the terms of paragraph 7.

Within the terms of reference, there is a clear emphasis on financial management, particularly in advising the High Commissioner on activities and approving assistance programmes. This raises the question of whether it was intended that the Committee would play a standard setting role on substantive questions of *protection* at all.

Paragraph 5(b) possibly includes the standard setting role on protection issues, at least indirectly, as protection forms part of the High Commissioner's 'function' in paragraphs 1 and 8 of the UNHCR Statute.[37] However, this argument is not strong, given that the wording in paragraph 5(b) is considerably less forceful in comparison with

34 Daniel Warner, 'Forty Years of the Executive Committee: From the Old to the New' (1990) 2(2) *International Journal of Refugee Law* 238 at 245.

35 UNHCR, *Refworld Issue 12 (2004)*, CD1 – UNHCR Information: Category: UNHCR Information <ExCom Background>.

36 *International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees*, GA Res 1166(XII), UN GAOR 12th Sess (1957) at [5].

37 Jerzy Sztucki, 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme' (1989) 1(3) *International Journal of Refugee Law* 285 at 288–290.

the other activities of the Committee. Furthermore, advice to the High Commissioner requires the High Commissioner's request, so it appears that no independent standard setting role was envisaged. Either way the terms of reference are interpreted, it appears that protection was not originally a primary focus for the Committee, given that the Committee did not engage in any substantive discussion of protection issues during the first three years of its existence. Nevertheless, since protection first appeared as an official agenda item for the Committee in 1962, in response to a special report by UNHCR on this specific topic, the Committee's protection function has steadily grown in importance.[38]

1975 marked a significant institutional milestone in the development of the Committee's protection function, following a decision at the 26th Session of the Executive Committee to establish a Sub-Committee of the Whole on International Protection. [39] The purpose of the Sub-Committee was to 'focus attention on protection issues with a view to determining existing short-comings in this field and to propose appropriate remedies'.[40] The Sub-Committee served as a valuable forum for exchanging views on a variety of protection issues. It adopted the practice of presenting its deliberations on a specific subject matter in the form of Conclusions, which were then endorsed by the Executive Committee in plenary session. At the same time, the Executive Committee also formulated its own General Conclusions, which elaborated various current protection issues identified in the *Notes on International Protection* submitted to the Executive Committee by the High Commissioner.[41]

(iii) The Executive Committee's Adoption of Conclusions on Protection

The practice of adopting Conclusions has developed as a means of recording outcomes of Executive Committee meetings. Since 1963 the Committee has presented the results of its deliberations on protection issues as formal texts termed 'Conclusions.'[42] Despite attempts by some States in the mid-1960s to frame the decisions in the form of 'resolutions', the Committee has expressed a conscious preference for presenting its advice in a less formal character.[43] Expressing Committee decisions in the form of conclusions, which is considerably weaker than in the form of resolutions, is suggestive of the fact that the Committee's competence to address protection issues is limited. In fact, from a strictly formal point of view, it may be argued that the Committee has acted beyond its mandate in doing so.

---

38 Id at 290, 292–293.

39 Conclusion No. 1 (XXVIII) (1975) *Establishment of the Sub-Committee and General.*

40 UNHCR, above n35.

41 Jerzy Sztucki, above n37 at 294.

42 The Committee has made a distinction between the term 'conclusion', which refers to matters of international protection, and the term 'decision', which has been used to describe deliberations on budgetary and administrative matters. However, it should be noted that in 1963, 1970 and 1971 the Committee's deliberations on protection were also referred to as decisions, although the reason for this is unclear.

43 UNHCR Executive Committee, Informal Consultative Meeting, *Note on Review of the Process for Drafting Executive Committee Conclusions on International Protection* (2005) at 1–6. ('*Note on Review of the Process for Drafting*').

To begin with, the extent to which UNHCR itself is bound to follow the Committee's Conclusions, without General Assembly endorsement, can be questioned. Holborn suggests that while Resolution 1166(XII), which establishes the Committee, gives it the authority to issue directives to the High Commissioner in the field of material assistance programmes, in matters concerning international protection, its mandate is limited to giving *advice,* as requested.[44] However, paragraph 1 of the UNHCR Statute states that the High Commissioner 'shall request the opinion of an advisory committee on refugees' in the exercise of his or her functions, particularly when difficulties arise, for instance 'with regard to any controversy concerning the international status of these persons'.[45] In addition, in Resolution 1673 (XVI)[46] the General Assembly requests that the High Commissioner 'abide by directions that the Committee might give him in regard to situations concerning refugees'. Both of these provisions give the Conclusions an authoritative quality to guide UNHCR's work. Furthermore, the Committee's role in influencing the direction taken by UNHCR in response to protection issues has been affirmed as a matter of practice, given that UNHCR consistently follows the advice provided in the Committee's Conclusions.[47]

As well as directing UNHCR practice, the Conclusions aim to a great extent to influence and guide the conduct of States. While there was no expectation in the Committee's terms of reference that States would be obliged to follow the Committee's directions, as discussed above, it is arguable that States' duty of cooperation gives the Conclusions some authoritative weight over States, given the role the Conclusions play in the exercise of the UNHCR's functions. It can also be argued that the competence to address States in the conclusions has been validated by their consistent accedence to this practice.[48] Although it was not until 1972 that the Committee began to address States directly in its Conclusions (it 'appealed to States' and 'invited States'), this practice has since become routine.[49]

Taking a legalistic approach to the Committee's protection role does not reflect the realities of practice and given that the Committee's authority to address States has not been directly challenged, the question of whether it has acted *ultra vires* in this respect remains academic.[50] However, what can be seen from this discussion is that the Committee's competence to direct State practice is somewhat weak, given that this was not one of the roles envisaged in the Committees terms of reference. As the Committee's competence to address States is based on acquiescence, rather than express authorisation, it is understandable that its advice takes the more hesitant form of Conclusions, rather than Resolutions.[51] It may be the case, however, that this form may limit how effective the Conclusions are in influencing States.

44 Louise Holborn, above n29 at 92 (emphasis added).

45 *UNHCR Statute*, above n27 at [1].

46 *Report of the High Commissioner for Refugees*, GA Res 1673 (XVI), UN GAOR, 16th sess, 1081st plen mtg (1961), [1]: Passed with a vote of 69 in favour, 14 abstentions.

47 Corinne Lewis, above n5 at 80.

48 Jerzy Sztucki, above n37 at 298.

49 Id at 293.

50 Corinne Lewis, above n5 at 80.

51 Jerzy Sztucki, above n37 at 298.

D. The Status of Conclusions in International Law

Despite questions about the Committee's competence to direct States, the Conclusions are frequently described as making an important contribution to the development of international refugee law, by documenting consensus amongst the international community on a specific protection matter.[52] For this reason, they have often been described as a form of 'soft law'.[53] This proposition is examined further in this part, as the legal significance of the Conclusions is an important consideration in evaluating their ability to influence States. First however, it is necessary to consider the concept of soft law within the international legal system.

There are a diverse number of instruments often cited as soft law, preventing uniform opinion among authors as to an exact definition.[54] However, it is possible to draw out some general characteristics that are applicable to the present examination. To begin with, both legal and non-legal norms can be categorised as soft law. Legal norms may include more general 'open textured' or 'soft' provisions in an otherwise 'hard' or legally binding instrument,[55] while non-legal norms describe instruments that do not have any legally binding effect on States Parties.[56] Of course, as Sztucki describes, the 'hard' and 'soft' elements of an international agreement can occur in all possible combinations, for example:

(a) Texts 'hard' both in quality and contents;

(b) Texts 'hard' in quality, but 'soft' in contents;

(c) Texts 'soft' in quality, but 'hard' in contents;

(d) Texts 'soft' in both quality and contents.[57]

Although whether or not an instrument is legally binding is not always readily ascertainable, an important factor will be whether States have intended to declare a legally binding principle.[58] There does not appear to be any expressed intention on the part of States, either in the terms of reference of the Committee, or in the Conclusions themselves, that they should be legally binding. Accordingly, the advisory character of the Conclusions would put them in group (d) and in some cases group (c).

However, recognition that the Conclusions are not legally binding does not mean that they are irrelevant in guiding, influencing or regulating State practice and it is possible for them to have quite significant political effects. Additionally, there is debate as to whether,

52 See for example: Inter-Parliamentary Union & UNHCR, *Refugee Protection: a Guide to International Refugee Law* (2001); Volker Türk, above n4 at 165.

53 See for example: Jerzy Sztucki, above n37 at 303.

54 Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850 at 850; Also see generally: Richard Baxter, 'International Law in Her "Infinite Variety"' (1980) 29 *International and Comparative Law Quarterly* 549.

55 Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901 at 902.

56 Tad Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"' (1994) 30 *McGill Law Journal* 37 at 44.

57 Jerzy Sztucki, above n37 at 305–306.

58 Oscar Schachter, *International Law in Theory and Practice* (1991) at 87.

despite not having any legally binding effect, advisory statements may still have some 'legal significance'. Professor Michel Virally, for example, believes that because international organisations are created to develop international norms, when States become members of those organisations, they accept an obligation to cooperate with each other to do so. Following the recommendations of such organisations therefore become a means by which States can fulfil this obligation.[59] Along these lines, it is possible to argue that members of the Executive Committee, at least, are under an obligation to follow the Conclusions.

Furthermore, according to Schachter, the Conclusions represent an 'official expression of approval' by governments of a certain norm of conduct embodied in them. So, although it will not create a new law, soft law in the form of recommendations from an international body may evidence States' position on an existing legal obligation.[60] Alternatively, Conclusions, or a series of Conclusions on a particular theme may be declaratory of a customary norm or evidence of emerging principles that may represent a stage in the process of formation of a customary legal norm.[61]

Describing the Conclusions in terms of 'soft law' is therefore useful to describe their potential role as *non-legal* and *non-binding* provisions that still have normative value and possibly, some legal relevance. However, as Sztucki emphasises, it is necessary to refer to the Conclusions with tentative language such as 'possibly' and 'some', because the level of such relevance will depend on the interplay of a variety of factors.[62] Such factors are examined further in the following part.

2. Evaluating the Normative Significance of the Conclusions

Even though the Conclusions of the Executive Committee can be described as a form of soft international law, in the absence of any capacity to act as legally binding laws, their normative significance is dependent on a number of key factors. Relevant factors in determining the substantive effect of a non-binding international include: the legal basis on which they are adopted; their addressees; their subject matter; their terminology; and the ways they are adopted.[63] In recent years the effectiveness of the Committee, and as a result the normative significance of the conclusions, has been called into question; with members increasingly expressing concern that contents of the Committee's Conclusions, as well as their application, may not justify the resources and effort put into the process.[64]

This disquiet regarding the direction that the Conclusions seem to be increasingly taking, has also been reiterated by UNHCR staff. In an address to the 48th Session of the

59 Michel Virally, quoted in Grigory Tunkin, 'The Role of Resolutions of International Organisations in Creating Norms of International Law' in William Butler (ed), *International law and the International System* (1987) at 7.

60 Oscar Schachter, above n58 at 99.

61 Jerzy Sztucki, above n37 at 307.

62 Jerzy Sztucki, above n37 at 307–308 (emphasis added).

63 M. Öberg, 'The legal effect of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2006) 16(5) *European Journal of International Law* 879 at 880.

64 *Note on Review of the Process for Drafting*, above n43 at [1].

Executive Committee, former Head of the Department of International Protection, Dennis McNamara, questioned 'whether refugee protection is in any way assisted by trying too zealously, as unfortunately seems to be increasingly the case, to tip the balance towards State interests, to the point where the protection content of a number of the Conclusions is seriously marginalised', emphasising that the Committee's advisory function on protection issues becomes even more imperative in the face of new challenges to refugee protection.[65]

This part presents an evaluation of the factors that contribute to the normative significance of the Conclusions. In particular, it considers the current composition of the Executive Committee, looking at what power relations may exist between actors such as UNHCR, States and NGOs. It also examines the procedures leading to the adoption of the Conclusions, which largely take place through meetings of the Executive Committee's Standing Committee. It questions how participatory this process is and assesses any impediments to the adoption of Conclusions. Finally, it makes some general comments about the substance and language of the Conclusions and the extent to which State practice responds to the Conclusions.

A. The Composition of the Executive Committee

When the Executive Committee was established in 1958 it comprised of 25 members. These were predominantly Western European countries, reflecting the organisation's primary focus on the situation of European refugees following World War II. The Committee has changed significantly over the last 28 years both in size and scope. Its membership has grown steadily since its introduction in 1958[66] and it currently consists of 72 members.[67] However, with a membership of only 72, the Conclusions of the Executive Committee cannot claim to represent the voice of the 'international community' in the same way that resolutions of the General Assembly may do. It is therefore necessary to consider how representative the Committee may be of such voice through a closer examination of its composition.

(i) Member States

Members of the Executive Committee are elected by ECOSOC, based on the criteria that they: are a member of the UN; represent a wide geographic basis; and have a

65 Dennis McNamara, 'Opinion: The Future of Protection and Responsibility of the State, Statement to the 48th Session of the UNHCR Executive Committee' (1998) 10(1/2) *International Journal of Refugee Law* 230 at 233.

66 Although there was a sharp increase in membership at the end of the 1970s: UNHCR, *Refworld,* above n35 at Category: UNHCR Information <ExCom Member States>.

67 Current Member States are: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Germany, Ghana, Greece, Guinea, Holy See, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lesotho, Madagascar, Mexico, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia and Montenegro, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Venezuela, Yemen, Zambia (current at 7 August 2007).

demonstrated interest in and devotion to the solution of the refugee problem.[68] The involvement of States affected by the refugee problem may mean that the conclusions carry greater weight than the numbers suggest. However, it is difficult to assess how stringently this third factor is judged, if at all. If a State wishes to make an application for admission to the Executive Committee, it generally does this by a Note Verbale briefly outlining its credentials for membership. It then submits a draft decision on the enlargement of the Committee to ECOSOC for consideration during their substantive session.[69] ECOSOC refers the matter to the General Assembly, requesting they enlarge the membership of the Executive Committee and the requesting State submits a draft resolution. The General Assembly would then resolve to increase membership in the Executive Committee and refer the matter back to ECOSOC requesting it to elect the members to fill the newly created positions.[70]

Interestingly, it is not a requirement for membership of the Executive Committee that a State has ratified the *1951 Convention*. However, ratification may demonstrate a State's commitment to finding a solution to the refugee problem. This proposition is supported by the fact that of the current 72 members of the Committee, only six are not signatories. This high level of ratification also supports the proposition that the Conclusions have wider significance in custom formation, given that they have voluntarily accepted an obligation to cooperate with UNHCR in the exercise of its functions under article 35.

In recent years, the geographic spread of the Committee has broadened significantly,[71] reflecting the widening geographic scope of the refugee situation.[72] However, as the actual operating budget of UNHCR is almost entirely made up of voluntary contributions from a relatively small number of developed States, the influence of developed States over the Committee may continue, due to their 'power of the purse'.[73] In 2006, almost 90 per cent of UNHCR funding came from 20 developed States, all of whom have seats on the Executive Committee.[74] It is therefore not surprising that their influence both within and outside the Executive Committee has established the priorities that guide the UNHCR's programme direction[75] and that these

68 GA Res 1166(XII), above n36 at [5].

69 This consists of a brief paragraph stating that ECOSOC takes note of the requests and recommends the General Assembly vote to enlarge the Committee. See for example: *Enlargement of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, ECOSOC Draft Decision (from Jordan), UN Doc E/2005/L.17 (2005).

70 *Application Process Outline* <www.unhcr.org/cgibin/texis/vtx/excom?id=418b5ecc4> accessed 23 June 2006.

71 Of the 70 current members the regional division is as follows: Western Europe and others have 23 seats, African States have 21 seats, Latin American States have eight seats, as do Asian States, while Middle Easter/Arabic States and Eastern European States only have five each.

72 UNHCR, *Refworld,* above n35 at Category: UNHCR Information <ExCom Member States>.

73 James Hathaway, above n8 at 161.

74 Of these, the top 19 government contributions to UNHCR in 2006 came from Governments with Western political and economic structures. These were: United States of America, Sweden, Netherlands, United Kingdom, Norway, Denmark, Switzerland, Canada, Spain, France, Ireland, Australia, Finland, Germany, Belgium, Japan, New Zealand, Russian Federation, and Italy <www.unhcr.org/cgibin/texis/vtx/partners/opendoc.pdf?tbl=PARTNERS&id=443654fb2> accessed 22 June 2006.

75 Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (2001) at 376.

priorities reflect their own States' interests.[76] This can be seen in the discussion of the contents of the Conclusions in part 2(C).

(ii) Non-Member Observers

The annual sessions of the Executive Committee are public.[77] So in addition to member States, non-member States, organisations of the UN system, intergovernmental organisations and NGOs are also entitled to attend. Additionally, it is possible for non-member States to attend meetings of the Executive Committee's Standing Committee upon request. In 2006-07, 15 States were Standing Committee Observers, the majority of which came from African, South American and Eastern European States.[78] This broader participation is an important mechanism for allowing a more inclusive dialogue on protection issues. However, as discussed below, mechanisms for meaningful observer participation are in need of improvement.

A similar system for Standing Committee meetings operates for the participation of *UN specialised agencies, departments, funds and programmes*, and other intergovernmental organisations. Each year the Executive Committee authorises a list of intergovernmental and international organisations to be invited by the High Commissioner to attend Standing Committee meetings.[79] However, at present neither non-member governments nor observer organisations can be present at the informal preparatory consultations at which the Conclusions are drafted.[80]

(iii) Non-government Organisations

NGOs are playing an increasingly prominent role in refugee protection,[81] which means that they can offer special expertise to the Conclusions drafting process. Non-government organisations have had limited opportunity to participate in the functioning of the Executive Committee for some time.[82] However, it was not until the mid-1990s that their participation was formalised. In July 1996 ECOSOC adopted a resolution dealing with the consultative relationship between the UN and NGOs.[83] This resolution updated highly out of date arrangements and called for the governing bodies of

---

76 James Hathaway, above n8 at 161.

77 *Executive Committee of the High Commissioner's Programme Rules of Procedure*, UNHCR Ex. Comm. 55th sess, UN Doc A/AC.96/187/Rev.6 (2005) ('*Rules of Procedure*'), [Rule 33].

78 In 2006–07 these States are: Azerbaijan, Benin, Bosnia and Herzegovina, Burundi, Croatia, Cuba, Czech Republic, Dominican Republic, El Salvador, Georgia, Indonesia, Latvia, Peru, Rwanda, and Slovakia. <www.unhcr.org/excom/40111aab4.html> accessed 7 August 2007.

79 *Rules of Procedure,* above n77 at [Rule 38].

80 *Structure and Meetings* (2006) UNHCR <www.unhcr.org/cgi-bin/texis/vtx/excom?id=40dfed254> accessed 23 June 2006.

81 Elizabeth Ferris, 'The Role of Non-Governmental Organisations in the International Refugee Regime' in Niklaus Steiner, Mark Gibney & Gil Loescher (eds), *Problems of Protection: The UNHCR, Refugees, and Human Rights* (2003) at 12.

82 NGOs that had consultative status with ECOSOC were permitted to make written contributions in accordance with the Rules of Procedure permitted to deliver one oral statement to the Plenary session of the Committee. This process is described in *Report on the Informal Consultations on Non-Governmental Organization (NGO) Observer Participation in the work of the Executive Committee of the High Commissioner's Programme and its Standing Committee,* UN Doc. EC/47/SC/CRP.39 (1997) at Annex I(c),

organisations within the UN system to 'promote coherence' in the principles and practices relating to their consultations with NGOs.

In response to this, arrangements for NGO observer participation were adopted by the Standing Committee at its eighth meeting in June 1997.[84] These arrangements allow for NGOs registered at the Committee's Plenary Session to also attend Standing Committee meetings upon written request from individual NGOs. This gave NGOs greater access to Standing Committee meetings, including permission to make written contributions and one NGO statement per agenda item. However, these provisions only apply to NGOs which have consultative status with ECOSOC or who are members of the International Council of Voluntary Agencies ('ICVA'), so not all UNHCR operational and implementing partners may automatically participate in the Executive Committee.

Under the 1997 changes, the maintenance of the inter-governmental character of the decision-making processes was stressed so NGOs remained excluded from the informal consultations on decisions and Conclusions, which were limited to Executive Committee members. These arrangements have been subject to periodic review and in 2004 a decision was made by the Executive Committee to further expand the role that NGOs could play, by enabling them to make contributions to the Conclusions drafting process.[85]

NGOs are now able to submit written views on the initial, and to the extent that is possible, later drafts of the texts to the Rapporteur who will share them with members. They may also attend a meeting to be convened prior to the Informal Preparatory Consultations relating to the specific Conclusion or Decision. However, the working methods employed continue to have serious practical weaknesses which need to be addressed if these contributions are to be more effective.[86] Accordingly, the level of participation of NGOs and other qualified observers in drafting generally remains low.

(iv) UNHCR

As discussed in Part 1, UNHCR's status as a subsidiary organ of the General Assembly gives it an international 'personality'. Furthermore, the protection function granted to it in the *Convention* and *Statute* gives it a specific role in the development of international refugee law.[87] Goodwin-Gill points out that as a subject of international law, UNHCR is an actor in the relevant field whose actions count in the process of law formulation, not just a forum in which the views of States may be represented.[88] Hathaway also stresses

83 *Consultative Relationship between the United Nations and Non-Government Organisations*, ECOSOC Res 1996/31, UN ESCOR, 49th sess (1996) at [7].

84 *Decision on Non-Governmental Organization (NGO) Observer Participation in the Work of the Executive Committee of the High Commissioner's Programme and its Standing Committee*, UNHCR Ex. Comm. 48th sess, 8th stand. comm. mtg, [Annex: Decision III] UN Doc A/AC.96/888 (1997).

85 *Decision on Working Methods of the Executive Committee of the High Commissioner's Programme and its Standing Committee, including NGO Observer Participation in the Work of the Committees*, UNHCR Ex. Comm. 55th sess, [Decision E] UN Doc A/AC.96/1003 (2004).

86 *Note on Review of the Process for Drafting,* above n43 at [13]–[14].

87 See: *UNHCR Statute*, above n27 at [8(a)]; *1951 Convention*, above n9 at art 35(1).

88 Guy Goodwin-Gill, above n1 at 132.

that while UNHCR's role in world politics is constrained by States, it is incorrect to assert that it is a passive mechanism with no independent agenda.[89] Consequently, UNHCR is itself a key actor within the Executive Committee. This is evident when looking at its role in the Conclusions adoption process, which is outlined further below.

B. The Process of Adopting Conclusions

The manner in which soft law is developed is also an important consideration when evaluating its impact. State participation in the creation of soft law, either directly, or through an international organisation which it has helped to create and which it supports financially, demonstrates some intention to follow its recommendations. Furthermore, if a norm is created as the result of constructive negotiation, where various interests have been addressed and reconciled, then the final result is likely to be an effective formulation of common intent to follow it.[90] Without constructive negotiation, the dominance of State interests will weaken the normative significance of the conclusions.

As discussed in Part 1, the Sub-Committee of the Whole on International Protection took over the practice of developing Conclusions as a means of presenting the results of its deliberations following its establishment in 1975. The Sub-Committee generally met in working groups for two or three days prior to the Executive Committee's annual session, in order to take up thematic issues for debate, while the Executive Committee formulated its own General Conclusions. However, in 1995 the Sub-Committee of the Whole was merged with the Sub-Committee of the Whole on Administrative and Financial Matters to form the Standing Committee of the Executive Committee.[91] The purpose of this change was to ensure more rational debate, more timely adoption of decisions and Conclusions, and stronger linkages between the annual plenary session and the work of the sub-committees, to ensure greater coherence in the Committee's annual cycle of meetings.[92]

Following this change, the Standing Committee has largely taken over the role of drafting the decisions and Conclusions to be adopted. To allow them to do this, the Executive Committee's annual cycle of meetings was reconstituted to comprise of one annual plenary session and roughly four inter-sessional meetings of a Standing Committee of the Whole.[93] The procedures leading to the adoption of Conclusions generally proceed along the following steps, although it should be noted that this description is illustrative only and each step will not necessarily be followed.[94]

---

89 Gil Loescher, above n75 at 6.

90 Tad Gruchalla-Wesierski, above n56 at 47.

91 Pursuant to *Decision on Executive Committee Working Methods,* UNHCR Ex. Comm. 46th sess [Decision H(1)], UN Doc A/AC.96/860 (1995).

92 *Review of Executive Committee Working Methods*, UNHCR Ex. Comm. 47th sess, UN Doc A/AC.96/868 (1996) at [6].

93 *Decision on Executive Committee Working Methods*, above n91 at [32].

94 UNHCR, 'Standard-setting Processes at UNHCR' in International Council on Human Rights Policy and the International Commission of Jurists Workshop: International Human Rights Standard-setting Processes, *Workshop Paper* (Geneva, 2005).

First, the subject matter of the Conclusions for the year is identified through discussions undertaken in 'Informal Consultative Meetings'. These meetings involve both UNHCR and members of the Executive Committee and allow for discussion of the topics of the Conclusions, before a draft of the Conclusion has actually been formulated. The results of these meetings are adopted in Work Plans, which list the proposed Conclusions and other related matters. Since 2002, the choice of themes for the Conclusions has been guided by UNHCR's Agenda for Protection based on protection concerns raised during the Global Consultations.[95] Following the selection of the subject of a Conclusion, UNHCR undertakes research on the relevant subject matter. The results of this research are normally presented to the Standing Committee in the form of a 'Conference Room Discussion Paper'. States are then able to present their views to the Standing Committee on the concepts and positions elaborated in the Discussion Paper.

The next step involves the preparation of a draft Conclusion. This is generally prepared by UNHCR and based on the debate on the Discussion Paper. While UNHCR takes into account the views of States, it is also cautious to ensure that drafts preserve existing standards and develop them further to address gaps in protection law and principles. On its completion, UNHCR presents a Secretariat Draft of the Conclusion for the consideration of Committee members. The draft text is then negotiated between States in a series of informal consultations in which they present their views. Through this process, consensus is reached on a final text, which is then presented to the Executive Committee for adoption at its annual Plenary Session.[96]

Loescher has argued that the meetings do not provide an adequate structure for dealing with the numerous and complex issues that are assigned to them.[97] Despite progressive improvements in the working methods of the Executive Committee, limitations remain in the process's ability to represent the views and priorities of the international community. These limitations have been succinctly outlined by UNHCR in a *Note on Review of the Process for Drafting Executive Committee Conclusions on International Protection* and are discussed below.

To begin with, there is presently limited substantive discussion regarding the issues to be covered in the Conclusions, as the majority of debate is focused on the language in the text.[98] The themes or issues are first presented in the Conference Room Papers to either the March or June Standing Committee, where only limited debate takes place. The first draft text of the Conclusions is then presented shortly after to start the negotiation process. To a large extent therefore, the focus is on contesting the language to be included in the document. Given the intensity of the debate and the limited time to reach a consensus, little time remains for more constructive dialogue on the issues. Furthermore, the merger of issues of protection with matters of an administrative and financial character has diluted the Committee's protection focus.[99]

95 *Note on Review of the Process for Drafting*, above n43 at [10].
96 *Standard-Setting Processes at UNHCR,* above n94 at [8].
97 Gil Loescher, above n75 at 376.
98 *Note on Review of the Process for Drafting*, above n43 at [13(b)].
99 Id at [4].

Furthermore, the practicalities of participating in the many negotiation sessions leading up to the annual plenary session may be difficult for smaller missions which do not have the capacity to sufficiently prepare themselves for the rounds of negotiations. Consequently, they may find they are unable to adequately defend their proposals or challenge those of other members. The process does not effectively cater for broad consensus, which calls into question the quality of participation of all member States. This also gives the process a protracted nature. The lack of manoeuvrability on the part of many delegates, who have to refer to capitals for instructions, as well as the reopening of texts at a late stage by States which have not been able to participate earlier, present a challenge to the progressive development of the text of a Conclusion.[100]

The fact that Conclusions are adopted by consensus also contributes to the intensity of debate. It is possible that one State could block the adoption of a Conclusion, putting at risk carefully negotiated texts. This happened once in 1985 and caused the deferral of a Conclusion on irregular movement.[101] It also means that there is potential for standards to be watered down, if key provisions of a Conclusion are lost in political compromise.

The alternative approach would be to vote on the adoption of the Conclusions. However, it is likely that overall this would weaken the value of the Conclusions as soft law, given that the voting pattern of individual Conclusions would introduce another variable to be considered when evaluating their status.[102] Reaching agreement on the text of a Conclusion through consensus does add weight to the Conclusions as an expression of international consensus and the watering down of standards can be minimised by ensuring that procedures exist for constructive negotiation.

C. The Contents of the Conclusions

The general acceptability of the content of the Conclusions is clearly an important factor contributing to their persuasive value. Although a comprehensive textual analysis of the Conclusions is beyond the scope of this paper, some general comments do provide insight into variations in the regulatory intent of the Conclusions, as well as some general trends in the issues covered in them. It is important to remember, as Sztucki points out, that the Conclusions are 'hardly susceptible of a strict and objective classification; not only do various paragraphs of the same Conclusion differ between themselves as to their character, but often one and the same paragraph contains different elements, or is of an "intermediate" character'.[103]

(i) The Regulatory Intent of the Conclusions

As noted in the *Note on Review of the Process for Drafting*, the Executive Committee Conclusions can be categorised into four general groups.[104] By looking at these groups, it is clear that not all of them are intended to address States directly. What can be seen is

100 Id at [13].

101 Id at [6].

102 Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed) (1997) at 22.

103 Jerzy Sztucki, above n37 at 298.

104 *Note on Review of the Process for Drafting*, above n43 at [8].

a differentiation between Conclusions that have no regulatory intent and those that have a normative objective. Those without regulatory intent include Conclusions focused on UNHCR organisational matters, which although binding on UNHCR, are not directed at State practice. Statements that record a certain point of view of the Committee on a specific protection phenomenon, without intending to influence future behaviour, also fall within this category.[105] Paragraphs with such statements would normally be prefaced by terms such as 'notes', 'welcomes', 'condemns' and similar terms. A majority of the content of the General Conclusions can be categorised in such a way.[106]

Of the Conclusions that do possess more legal relevance in terms of their content, the various types of statements can be roughly categorised into three groups. Firstly, there are statements interpreting refugee protection principles, including comments on issues such as *non-refoulement*, detention, expulsion, the extraterritorial effect of determination of refugee status, safeguarding asylum and family unity.[107] Depending on the particular issue, these would normally be prefaced by 'affirms', 'underlines', 'recalls', or if a stronger approach is necessary, by terms such as 'recommends' or 'recognises'.[108]

Secondly, there are statements that represent progressive development of international refugee law, in that they aim to develop more detailed rules for the application of the *Convention*.[109] These include provisions on determination of refugee status, protection of asylum-seekers in situations of large-scale influx, the problem of manifestly unfounded or abusive applications for refugee status, those relating to protection of refugee children and women, burden and responsibility sharing, protection of asylum-seekers at sea and safeguards for interception.[110] Such statements may be prefaced by terminology such as 'recognises', 'acknowledges', or 'emphasises'.[111]

Thirdly, there are statements which directly attempt to guide States' actions. Such provisions are framed in the form of recommendations 'recommends' or encouragement 'encourages' or simply calling upon the High Commissioner or States to pursue certain courses of action.[112] This category may include Conclusions relating to internally displaced persons and statelessness, as well as those that concern the pursuit of durable solutions.[113]

Clearly the stronger and more direct the language contained in the Conclusions is, the stronger their persuasive value. However, UNHCR has identified a trend towards hedging paragraphs with conditionalities and qualifiers, including those paragraphs that deal with basic protection principles.[114] For example, Conclusion No. 80 (XLVII) —

105 Ibid.

106 Jerzy Sztucki, above n37 at 299.

107 *Note on Review of the Process for Drafting,* above n43 at [8].

108 See for example: Conclusion No. 88 (L) – 1999 – Conclusion on the Protection of the Refugee's Family at [a]-[b]; Conclusion No. 79 (XLVII) – 1996 – General at [j]: paragraph concerns issue of expulsion.

109 Jerzy Sztucki, above n37 at 301.

110 *Note on Review of the Process for Drafting*, above n43 at [8].

111 See for example: Conclusion No. 84 (XLVIII) – 1997 – Conclusion on Refugee Children and Adolescents; Conclusion No. 100 (LV) – 2004 – General at [d]: paragraph on refugee women's special protection needs).

112 See for example: Conclusion No. 101 (LV) – 2004 – General at [m]: paragraph on statelessness.

113 *Note on Review of the Process for Drafting*, above n43 at [8].

1996 encourages States, in coordination and cooperation with each other, and with international organisations, *if applicable*, to *consider* the adoption of protection-based comprehensive approaches to particular problems of displacement.[115] The effect of this may be to deprive the provision of any meaningful content against which State action can be compared.

(ii) Issues Addressed in the Conclusions

Hathaway has argued that the dominance of Western States has meant that in developing refugee law, the focus has been on the containment of Third World refugee problems.[116] Evidence of such a trend can broadly be seen in the issues covered by the Conclusions, particularly since the mid 1990s. While the Conclusions are creating an increasingly expanded role for UNHCR, they also allow for increasingly restrictive asylum practice. This changing focus in refugee law can be attributed to the fact that, as identified by UNHCR, more and more State interests have underpinned the Executive Committee's discussions, rather than the collective objective of furthering refugee protection principles.[117]

The dominant influence of developed States can also be seen by tracking issues through the thematic compilation of the Conclusions produced by UNHCR.[118] For example, looking at the development of the institution of asylum, which has been a dominated the international agenda for a number of decades, demonstrates States' continued unwillingness to accept the existence of a right to be granted asylum. Interestingly, the last Conclusion to look explicitly at the topic of 'restrictive asylum practices' was in 1984.[119]

Another example is the return of persons not in need of international protection, which has been considered by the Committee on a number of occasions. While earlier Conclusions focused on preventing the *refoulement* of those who may require protection, whether or not they fall within the *Convention* definition of a refugee,[120] in more recent Conclusions the focus moves towards facilitating the efficient and expeditious return of

---

114 Id at [13(a)].

115 Conclusion no. 80 (XLVII) – 1996 Comprehensive and Regional Approaches within a Protection Framework at [e] (emphasis added).

116 James Hathaway, above n16 at 161.

117 *Note on Review of the Process for Drafting*, above n43 at [5].

118 UNHCR, *A thematic compilation of Executive Committee Conclusions* (2005) <www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf> accessed 31 August 2007.

119 Id at 27; Conclusion No. 33 (XXXV) – 1984 – General, [d] notes with deep regret 'that restrictive practices were being followed with respect to the granting of asylum, the determination of refugee status and the treatment of asylum seekers and refugees.'

120 See for example: Conclusion No. 6 (XXVIII) – 1977 – General at [c] which *reaffirms* the fundamental importance of the observance of the principle of non-refoulement of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees; or Conclusion No. 74 (XLV) – 1994 – General at [1] which *recognizes* that, while persons who are unable to return in safety to their countries of origin may not be considered refugees within the terms of the 1951 Convention and 1967 Protocol, they nonetheless are often in need of international protection and humanitarian assistance.

those not needing protection.[121] The desire to contain refugee problems can also be seen in the consistency with which the Conclusions call for UNHCR to be facilitating the conditions necessary for the repatriation of refugees.[122]

D. State Practice

As discussed in the preceding part, the Conclusions may play a role in the formation of customary norms of international law. The existence of customary laws can be deduced from the practice and behaviour of States which, according to article 38 of the *Statute of the International Court of Justice*, requires 'evidence of a general practice accepted as law'. The two basic elements of the court's requirement are the material fact of State behaviour and *opinio juris,* a subjective belief that such behaviour is 'law'.[123] The resolutions of an international organisation can be regarded as evidence of *opinio juris.*[124] However, to show the existence of a customary norm, it is still necessary to demonstrate evidence of state behaviour consistent with those resolutions.[125]

Accordingly, if the Conclusions are to be taken as indicative of general customary law, it is necessary to demonstrate evidence of State practice in line with substance of the Conclusions. As McNamara describes, the Conclusions can be viewed as 'an invaluable barometer of the political support on which UNHCR so critically depends'.[126] However, in the area of international refugee protection, demonstrating the requisite general practice to evidence the existence of a customary norm may be somewhat problematic given the wide ranging examples of State practice that do not reflect the norms espoused in the Conclusions.

An analysis of the implementation of particular Conclusions by specific States is, again, beyond the scope of this article. However, at a general level, this can be seen in post Cold War asylum trends, which have seen increasing numbers coming from the developing world and more complex refugee flows that have blurred the line between refugees and migrants.[127] The response of developed States has been the adoption of restrictive asylum policies without consultation within the international framework.[128] Furthermore, since the 11 September 2001 attacks in the United States, State security

121 See for example: Conclusion No. 96 (LIV) – 2003 –the Return of Persons Found Not to Be in Need of International Protection; or Conclusion No. 97 (LIV) – 2003 – General at [viii[which states that intercepted persons who do not seek or who are determined not to be in need of international protection should be returned swiftly to their respective countries of origin and States are encouraged to cooperate in facilitating this process.

122 See for example: Conclusion No. 68 (XLIII) – 1992 – General at [s]; Conclusion No. 74 (XLV) – 1994 – General at [u]; Conclusion No. 95 (LIV) – 2003 – General at [i]; Conclusion No. 101 (LV) – 2004 – General at [a].

123 Malcolm Shaw, *International law* (5th ed) (2003) at 69–70.

124 Grigory Tunkin, above n59 at 13.

125 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 4 at 42–44.

126 Dennis McNamara, above n65 at 232.

127 Laura Barnett, above n7 at 247.

128 B.S Chimni, 'Reforming the International Refugee Regime: A Dialogic Model' (2001) 14(2) *Journal of Refugee Studies* 151 at 151.

concerns have dominated the migration debate, with governments increasingly revisiting their asylum systems from a security angle. Many States have broadened grounds for detention; now focus more strongly on detecting potential security risks when reviewing asylum claims; and extended the scope of the exclusionary provisions in the *Convention*, allowing for refugees to be denied access to status determination procedures; and in other cases, refugees have been subject to expulsion.[129] Although these actions may be consistent with the letter of the *Convention*, applying increasingly restrictive interpretations is contrary to its intent and do generally not reflect the standards contained in the Executive Committee's Conclusions.

3. Enhancing the Legal Significance of the Conclusions

Overall, it must be said that the Conclusions of the Executive Committee fall relatively low on the scale in terms of their value as non-binding instruments.[130] What can be concluded from this discussion is that there are certain weaknesses in the Conclusions process that contribute to this relatively low status. In particular, the fact that there is no follow-up of Conclusions,[131] or any regularised mechanism for assessing State compliance with the Conventions, has meant that their actual implementation is not comprehensively monitored and their ability to influence State practice is therefore significantly weakened.

Recognising the relatively low status of the Conclusions, it is necessary to consider the means by which their weight as non-binding instruments could be increased. This part addresses potential reforms in both the structure and working methods of the Executive Committee as a means of doing so. Specifically, it draws on some of the criticisms of UN human rights bodies that have come out in recent reform documents and looks at whether any are applicable by analogy to the Executive Committee. Although there is no single model used in the human rights bodies that can be replicated exactly for the refugee protection framework, there are a number of lessons that can be learned from the reform discussions in the area of human rights.

A. Formalising the Committee's Legal Mandate

The Executive Committee has stressed the need for due regard to be paid to its Conclusions.[132] However, as discussed in Part 1, the Committee's authority to address States stems from an informal acceptance by States, rather than from a formally mandated power. While the cooperation obligation under article 35 of the *Convention* was reaffirmed in 2001 by the *Declaration of States Parties*, which also urged all States to consider ways to ensure *closer* cooperation between themselves and UNHCR to more effectively facilitate UNHCR's duty supervise the *Convention*,[133] the connection between

129 UNHCR, *The State of the World's Refugees 2006: Human displacement in the new millennium* (2006) <www.unhcr.org> accessed 2 July 2006.

130 Jerzy Sztucki, above n37 at 308.

131 Although Conclusions may make textual reference to past Conclusions on the same issue, this does not amount to effective follow-up: Jerzy Sztucki, above n37 at 310.

132 Conclusion No. 81 (XLVIII) – 1997 – General at [g].

the Conclusions and the duty in article 35 is not explicit. Therefore, a stronger legal basis for addressing States in the Conclusions would greatly enhance their normative value. This could be done by granting the Committee express authority to make recommendations or resolutions directed to States through ECOSOC or the General Assembly.[134] Similar authority was given to the new Human Rights Council, which has the power to 'make recommendations with regard to the promotion and protection of human rights'.[135]

B. *Improving Working Methods*

In order for the Executive Committee to play a meaningful standard setting role, it is essential that the process by which Conclusions are adopted allows for serious deliberation amongst key actors on questions of protection. However, as Loescher points out, currently the meetings do not provide an adequate forum for dealing with the complex and numerous issues assigned to them.[136] Shortcomings in this process have also been recognised by the Executive Committee itself, which has held informal consultative meetings to review the drafting process. The first of such meetings occurred in November 2005 and the issues outlined were discussed extensively in Part 2. A supplement to this review,[137] conducted in February 2006, identified some possible ways forward to address these issues, which are discussed below.

To begin with, the Note emphasised that more in-depth debate and conceptual agreement on the issues being discussed were needed prior to the preparatory consultations on the Conclusions. It recommended increasing the period of time between the presentation of the thematic papers and the start of the formal drafting process to allow for this.[138] In terms of the adoption process, the Note also looked at the consensus based approach, recommending that this be maintained.[139] By reaching international consensus on a particular issue addressed in the Conclusions their authority is significantly enhanced. Maintaining this methodology is therefore appropriate, provided that the process is guided by a 'collective objective to foster progressive development', rather than becoming a forum for the contest of State interests.[140]

The content of the Conclusions was also addressed; particularly the process of selecting themes for the Conclusions, which currently has no clear formula. The Note suggested that a particular thematic issue should only be selected if there is value in engaging in further debate about that issue. In other words, themes should relate to areas

133 *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (2002) at [8]-[9] (emphasis added).

134 As EXCOM is based on art 4 of the UNCHR Statute and forms part of the institutional framework created by the Statute no amendments to the Convention would be needed: Walter Kälin, above n21 at 34.

135 *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, UN Doc A/RES/60/251 (2006) at [5(i)].

136 Gil Loescher, above n75 at 376.

137 UNHCR Executive Committee, Informal Consultative Meeting, *Second note on review of the process for drafting Executive Committee Conclusions on International Protection* (2006) ('*Second note on drafting process*').

138 Id at [8].

139 Id at [9].

140 *Note on Review of the Process for Drafting*, above n43 at [5].

where there are 'gaps' in the protection framework, or in the application of such framework.[141] In relation to the selection of themes, the need for a General Conclusion was also questioned. As general guidance, it was suggested that the General Conclusions be kept shorter and focused on a few key issues that are sufficiently significant to require the Committee's attention.[142]

The involvement of non-members in the Executive Committee also remains an important issue. This is because, as Goodwin-Gill points out, the international protection of refugees brings together a unique combination of States, international organisations, non-government organisations and refugees themselves in the pursuit of common ends.[143] The Note from the second informal consultative meeting demonstrates an acknowledgement amongst Committee members of the useful role that NGOs can play in the drafting process. It recommends a review of the possible role that they could play in the Informal Preparatory Consultations.[144] As discussed in Part 2, NGOs can offer valuable expertise to the process. However, as NGOs lack any international legal personality or a source of formal accountability,[145] it is important that such involvement be regulated appropriately.

Overall, these recommendations present a promising development in improving the efficiency of the process and have the potential to improve the quality of the Conclusions that are adopted by the Committee. However, by themselves they do not go far enough in terms of enhancing the status of Conclusions as a source of soft law.

C. Restructuring the Committee

Loescher argues that both the Executive Committee and its Standing Committee have become overly large and cumbersome bodies that cannot effectively shape UNCHR policy.[146] Furthermore, he asserts that the committees' effectiveness is hindered by the divergent interests of their members, which include donor governments, host governments and those who are themselves the cause of refugee outflows.[147] These challenges to both the size and composition of the Committees mirror critiques of the UN Human Rights Commission, which was replaced by the Human Rights Council in 2006. For this reason, it is valuable to consider some of these critiques and their possible applicability to the Executive Committee.

In his report *In Larger Freedom,* UN Secretary General Kofi Annan argued that the Human Rights Commission's capacity to perform its tasks had been increasingly undermined by declining credibility and professionalism. This decline was due to the fact that some States had sought membership on the Commission with the objective of

141 *Second note on drafting process*, above n137 at [12]-[13].
142 Id at [17]-[18].
143 Guy Goodwin-Gill, above n1 at 221.
144 *Second note on drafting process*, above n135 at [10]-[11].
145 Robert Blitt, 'Who will watch the watchdogs? Human Rights Non-governmental organisations and the case for regulation' (2004) 10 *Buffalo Human Rights Law Review* 261 at 262.
146 Gil Loescher, above n75 at 376.
147 Ibid.

shielding themselves from criticism, rather than contributing to the advancement of human rights.[148] In response, the General Assembly adopted Resolution 60/251, creating the new Human Rights Council. Membership on the Council has been reduced from 53 to 47 members, elected directly by the General Assembly and reflecting an equitable geographic spread.[149] When electing States to the Council, the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto are to be taken into account.[150]

There would be clear benefits to adopting a similar approach to the Executive Committee. To begin with, direct election would mean that the criteria for membership to the Committee could be more rigorously assessed. In addition, smaller numbers would make debate on the Conclusions more efficient. Finally, a more formalised geographic spread would help to ensure that discussions were not dominated by the interests of developed States. However, without more stable funding arrangements, it is difficult to overcome the influence that donor status may have on power relations within the Committee.

On the other hand, the fewer the number of States represented on the Executive Committee, the less reflective the Conclusions are of the consensus of the international community. This could be addressed either by ensuring endorsement of the Conclusions by the General Assembly, or by maintaining the size of the Executive Committee and reinstating a smaller Sub-Committee. Conclusions introduced by the Sub-Committee could then be endorsed at the plenary session. If a smaller Committee or Sub-Committee was created, consideration should also be given to whether permanent membership is appropriate, or whether States should serve for a fixed term only.

There is also strong merit in the argument that by excluding States you may reduce the capacity to constructively influence their behaviour from within the system. Therefore, an alternative approach would be to maintain the size of the Executive Committee, but adjust its structure, to apply what Chimni calls an 'inter-regional' approach to dialogue.[151] This focus on regional development differentiates the refugee regime from other human rights approaches. However, there is strong support for the proposition that UNHCR should be encouraging more States to develop regional refugee protection regimes.[152] Chimni is right in pointing out that regional regimes need to be shaped in dialogue with other regions. He suggests that the Executive Committee may provide a forum where such dialogue can take place.[153] On a practical level this could be implemented with the introduction of regional sub-committees.

148 Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General,* UN GAOR, 59th sess, UN Doc A/59/2005 (2005), at [182].

149 The distributed is as follows: Group of African States, 13; Group of Asian States, 13; Group of Eastern European States, 6; Group of Latin American and Caribbean States, 8; and Group of Western European and other States, 7: GA Res 60/251, above n135 at [7].

150 Id at [8].

151 B.S Chimni, above n128 at 156.

152 See for example: Anonymous, 'The Note on International Protection you won't see' (1997) 9(2) *International Journal of Refugee Law* 267 at 270.

153 B.S Chimni, above n128 at 156–157.

D. Monitoring Implementation of the Conclusions

As discussed in Part 1, the Conclusions may be declaratory of a customary norm or evidence of an emerging principle. For this to be the case, it is necessary to demonstrate evidence of State practice in line with the substance of the Conclusions. On these grounds, effectiveness of the Conclusions process must be assessed against the extent to which the recommendations contained in them are implemented. However, at present it would be extremely difficult to demonstrate that implementation evidences the existence of customary norms. The absence of a body to examine the legality of State conduct and hold States accountable for the implementation of their Convention obligations has significantly hindered the impact of the Conclusions of the Executive Committee and a discussion of possible monitoring mechanisms is therefore warranted.

(i) Possible Monitoring Mechanisms

There is a variety of monitoring mechanisms present in international human rights organisations that evaluate the performance of their member States. These include supervision based on State reporting, advisory opinions, or individual complaints instruments. The possible applicability of these mechanisms to the international refugee regime is evaluated below.

The form of monitoring that has received the widest support is State reporting, which currently exists for the seven principal human rights treaties. Its objective is to give individual States the opportunity to conduct comprehensive reviews of the measures they have taken to bring their national laws and policies into line with the provisions of the treaties to which they have voluntarily signed.[154] States already have a reporting obligation under article 35(2) of the *Convention*, which requires them to provide UNHCR with information concerning the condition of refugees, their implementation of the Convention and national laws relating to refugees, to enable them to make reports to the competent organs of the United Nations. However, at present the application of this provision has not been regularised.[155] As a result, there is no forum within which States are required to engage in a 'kind of dialogue of justification', which has become standard practice in human rights instruments.[156] The role of article 35 in monitoring the refugee regime was considered at the Cambridge Expert Roundtable in July 2001, as part of the second track meetings of UNHCR's Global Consultations. In a background paper prepared for the meeting, Professor Kälin made two monitoring proposals. The first would establish a permanent Sub-Committee within the framework of the Executive Committee, responsible for Review and Monitoring. It would include those Committee members that are parties to the *1951 Convention* or the *1967 Protocol*. The Sub-Committee would be responsible for carrying out reviews of specific situations of refugee flows or of particular countries, which would be identified on the basis of transparent and

154 *Concept Paper on the High Commissioner's Proposal for a unified standing treaty body – report by the Secretariat*, UN Doc HRI/MC/2006/CRP.1 (2006) at [8].

155 Walter Kälin, above n21 at 625.

156 James Hathaway, *The Rights of Refugees under International Law* (2005) at 993.

objective criteria. These Refugee Protection Reviews would combine independent fact-finding and expertise with elements of peer review (discussion of reports by other States Parties).[157]

The second proposal would introduce a thematic Rapporteur that would be handled by the Executive Committee's Standing Committee. Kälin argues that the June Standing Committee, which is usually dedicated to protection issues, would be an appropriate forum for the discussion of reports by Special Rapporteurs. The Rapporteur would be appointed by the Committee when needed, to address specific issues such as women and children, access to asylum and so on. Their reports, together with observations from the Standing Committee, could be disseminated with unrestricted circulation. The outcomes of such discussions could then be reflected in Executive Committee Conclusions on protection.[158]

The Summary Conclusions of the Roundtable Meeting recommend establishing a Sub-Committee of the Executive Committee, to which the High Commissioner might submit problems with implementation of the *Convention*. This would operate in a similar manner as the former Sub-Committee of the Whole on International Protection and would ensure a more focused debate on international protection generally and improve the quality of Conclusions.[159]

A similar proposal, published in the *International Journal of Refugee Law,*[160] gives UNHCR responsibility for documenting violations of refugees' rights in countries of asylum. These might then be presented at inter-sessional meetings of the Standing Committee and could be made public in Executive Committee sessional documents if the report is ignored by the State concerned. This proposal goes further, recommending that member States of the Executive Committee should be sanctioned by measures such as suspension or expulsion from the Committee, if they are responsible for violations of refugees' rights.[161]

An alternative, or complementary, reform would be the introduction of a judicial body to encourage consistent interpretations of the provisions in the *Convention* and the standards in the Conclusions. One such proposal comes from Australian Federal Court Judge, Justice Tony North, who recommends the introduction of an 'International Judicial Commission on Refugees'.[162] Under this proposal, the Commission would be created under UNHCR's power to supervise the *Convention* contained in article 8, but would be independent of UNHCR. It would be a nine-member independent body of judicial experts, providing advisory legal opinions pertaining to questions of

157 Walter Kälin, above n21 at 657–658.

158 Id at 659.

159 'Summary Conclusions: Supervisory Responsibility' UNHCR & Lauterpacht Research Centre for International Law, *Expert Roundtable* (Cambridge, 2001) at [10(b)] <www.unhcr.org/cgibin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419dc1114> accessed 28 February 2006.

160 Anonymous, above n152.

161 Id at 269.

162 Tony North, 'A Proposal for the Establishment of an International Judicial Commission on Refugees', *Paper presented at 'Moving on: forced migration and Human Rights' Conference* (Sydney, 2005) <www.apo.org.au/linkboard/list.chtml?topic=Immigration%20and%20refugees> accessed 9 May 2006.

interpretation of the *Convention*. The members of the Commission would select these questions, although UNHCR would have a special power to seek opinions from the Commission.

However, it might be difficult to garner support for this proposal from amongst States. The possibility of requesting advisory opinions has been considered by the Sub-Committee of the Whole on International Protection, and was met with generally low levels of support.[163] It is therefore likely that the greatest role such mechanism could play would be as a supplement to some other monitoring mechanism.

Another option for monitoring the *Convention* would be to allow individuals to petition a judicial or quasi-judicial body regarding alleged violations of their rights. This is often regarded as the most effective form of monitoring and currently five human rights treaties have such provisions for individual complaints. Although the views they provide are not binding, they have received a relatively high degree of compliance.[164] However, in the context of the refugee regime, an individual complaints mechanism would face some major problems. Firstly, it would require the introduction of an optional protocol to the *Convention* and it is unlikely that this would receive wide ratification. Secondly, it is highly unlikely that such a mechanism would be able to cope with what would inevitably be an extremely large workload. Thirdly, such mechanisms inevitably take a long period of time to process claims.

(ii) Responsibility for Monitoring

Of the three mechanisms discussed, it seems that the reporting process could most appropriately be applied in the refugee context. There are, however, challenges to the effectiveness of any reporting system, given that it is still heavily reliant on voluntary compliance of States.[165] Additionally, in the context of human rights treaties, the quality of reports often varies significantly.[166] Overcoming these challenges will depend to a large extent on how the reporting is conducted and there are various options for how such a mechanism may operate. A particular difference amongst the options is in regards to *who* should be responsible for overseeing State compliance and this issue is discussed further below.

The summary Conclusions of the Roundtable Meeting suggest that responsibility should remain within the Executive Committee, but they emphasised the need to avoid the politicisation of debate, as demonstrated by the experience of the Human Rights Commission.[167] However, it is unclear how such politicisation might be avoided. Goodwin-Gill has suggested that the Executive Committee itself is 'not suited' to overseeing State actions or determining UNHCR's accountability under its mandate.[168]

---

163 Walter Kälin, above n21 at 655.

164 Id at 650–651.

165 Concept Paper on the High Commissioner's Proposal for a unified standing treaty body – report by the Secretariat, UN Doc HRI/MC/2006/CRP.1 (2006) ('*Treaty Body Concept Paper*') at [16].

166 Id at [24].

167 *Summary Conclusions: Supervisory Responsibility,* above n159 at [10(b)].

168 See for example: Guy Goodwin-Gill, above n1 at 247–248.

Helton proposes that UNHCR be responsible for documenting violations of refugees' rights in countries of asylum. However, there are difficulties with this too, which Hathaway articulates. He argues that it is simply too easy for States to avoid meaningful accountability between and among themselves, because they presently take little, if any, individual responsibility for ensuring that their fellow States live up to international refugee law obligations. The dynamic of 'persuading, cajoling, and indeed shaming of partner States', which has been critical in the success in the area of human rights, is generally absent in refugee law and it is simply too easy to leave the task to UNHCR.[169] Furthermore, because UNHCR is an operational agency, working closely with host countries, the political tension that may result from UNHCR taking on this additional supervisory role may in fact hamper its protection efforts.[170]

The alternative model of supervision that Hathaway proposes extends beyond the current framework of the Executive Committee and the supervisory function under article 35 of the *Convention*. He argues that responsibility for the implementation of the *Convention*, as an international treaty, lies with the States that signed it. Accordingly, there is nothing in article 35 which precludes States, which are both the 'objects and the trustees of the refugee protection system, from establishing an 'arms-length' mechanism to provide general guidance on, and oversight of, the *1951 Convention*.[171] While an independent body could avoid potential politicisation, such an option would again have difficulty garnering support from States.

Conclusion

Significant changes in the global refugee situation have presented a challenge to the international protection regime which was established more than 50 years ago. Of particular concern is the continuing gap between the responsibilities entrusted to UNHCR and the obligations undertaken by States. This gap has allowed for increasingly restrictive interpretations of the *1951 Convention* and has led to what has been described as a 'crisis' in the asylum system.[172] The lack of advancement in international refugee law at a treaty level means that less formal mechanisms that complement the provisions in the *Convention* are required to fill these gaps in the protection regime.

Within the provisions of the *Convention*, States do have an obligation to cooperate with UNHCR in the exercise of its functions, an obligation that extends beyond the terms of the *UNHCR Statute* to include UNHCR's broader role. On the basis of this obligation, this article argued that States are required to take into account the Conclusions of the UNHCR Executive Committee. Accordingly, the Conclusions can play a role in addressing the ongoing ambiguities in the international protection regime, despite the fact that this is a role which falls outside the original mandate of the Committee.

169 James Hathaway, above n156 at 996.

170 Ibid.

171 James Hathaway, 'Taking Oversight of Refugee Law Seriously' in International Council of Voluntary Agencies, *Speech delivered at the Global Consultation on International Protection* (Geneva, 2001).

172 Gil Loescher, above n75 at 15.

However, because the Committee does not have the capacity to form rules that are legally binding on member States, the normative significance of the conclusions as a form of soft law rests largely on States' acceptance of their content, which in turn rests on factors such as the composition of the Committee, the method of adoption and the actual implementation of their principles in State practice. As the analysis of these factors in Part 2 revealed, a number of weaknesses exist. As a result of these shortcomings, the Committee has at times been overly influenced by State interests, rather than by the collective objective of furthering refugee protection principles.[173] In some areas, this has resulted in a weakening of the protection standards afforded to refugees. This has hindered the ability of the Conclusions to positively influence State practice, a trend that is apparent when considering the increasingly restrictive asylum procedures that are being applied by developed States. For this reason, the weaknesses identified in this article need to be effectively addressed, in order to enhance the normative influence of the Conclusions.

Drawing on the experience of other human rights bodies, potential means to address these shortfalls were identified in Part 3. These included formalising the legal mandate of the Committee to address Member States, improving the Committee's working methods to ensure a more open dialogue on protection issues, and restructuring the Committee to provide more equitable regional distribution and more rigorous assessments of States' commitment to addressing the refugee problem. All of these reform options would help to increase the effectiveness of the Conclusions process. However, the biggest problem remains the fact that without any mechanism for monitoring how their recommendations are implemented, the Committee's ability to influence State practice remains limited. The discussion referred to a number of possible monitoring mechanisms that exist in international law. The most applicable within the refugee context being a reporting system that could be developed under article 35(2) of the *Convention*. Ideally, this would be undertaken by an independent body, to avoid potential politicisation. However, it could also possibility operate within the context of the Executive Committee. Ensuring more consistent application of the principles contained in the Conclusions is vital to increasing their standard-setting role and enhancing the development of refuge protection on an international level and development in this area is therefore essential.

173 Id at 376.