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**REVIEW OF THE USE OF UNHCR EXECUTIVE COMMITTEE
CONCLUSIONS ON INTERNATIONAL PROTECTION**

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ACRONYMS and ABBREVIATIONS

| | |
|---------|---|
| AC | Appeals Cases |
| ACMRO | Australian Catholic Migrant and Refugee Office |
| ALJR | Australian Law Journal Reports |
| CLR | Commonwealth Law Reports |
| HAP | Humanitarian Accountability Project |
| HCA | High Court of Australia |
| HRW | Human Rights Watch, USA |
| IARLJ | International Association of Refugee Law Judges |
| ICMC | The International Catholic Migration Commission, Headquarters Switzerland |
| ICVA | International Council of Voluntary Agencies |
| IRC | International Rescue Committee |
| JRS/SA | Jesuit Refugee Service, Southern Africa |
| JRS/C | Jesuit Refugee Service, Cambodia |
| NZLR | New Zealand Law Reports |
| QUNO | Quaker UN Office |
| RCUSA | Refugee Council, USA |
| RCHR | Refugee Center for Human Rights |
| RCA | Refugee Council of Australia |
| RCUSA | Refugee Council, USA |
| RCK | Refugee Consortium of Kenya |
| REFINTL | Refugees International, USA |
| SOLO | Sudan Open Learning Organization |
| UKHL | United Kingdom House of Lords |
| USCRI | U.S. Committee for Refugees and Immigrants, USA |
| WCRWC | Women's Commission for Refugee Women and Children, USA |
| WVI | World Vision International, Geneva, Switzerland |

EXECUTIVE SUMMARY

1. This Review of the Conclusions of the Executive Committee (ExCom) of the United Nations High Commissioner's Programme (UNHCR) has focused, in accordance with its Terms of Reference (TORs) (Annex 1) on the *use* being made by the various stakeholders of these Conclusions. It thus complements the work being done by the Executive Committee in reviewing the *process* whereby these Conclusions are proposed as regards to their subject matter, their text negotiated, and then adopted. While these two aspects of the study of the Conclusions are distinct, they are nevertheless related. Use, to a large extent, will be influenced by aspects of the process, especially as to how the theme of a given Conclusion was chosen: a theme that is perceived as responding to a recognized gap in the refugee protection regime will obviously be used effectively by one or more stakeholders.

2. In Part I of this Review (paragraphs 1-40), the focus is on the preliminary issues evoked by the first key question posed by the Terms of Reference for this study: *To what extent are ExCom Conclusions known, understood and appreciated by states, UNHCR, NGOs and other stakeholders?* After a preliminary consideration of the relationship of use and process (para. 2) and methodology (paras. 3-4), the basic issues of knowledge, awareness and accessibility of the Conclusions are dealt with (paras. 5-16). This part of the study shows that more can be done by the various stakeholders, especially UNHCR, in this regard. Six Recommendations are made on ways to enhance the knowledge by all stakeholders of the Conclusions.

3. By far the most important part of the introductory considerations of this Review relates to the observations as to how the Conclusions are understood (paras. 17-22). This understanding affects one's appreciation of them which, in turn, influences their use. The appreciation of ExCom Conclusions (paras. 23-26) was most notable where there was an understanding of how they related to the international refugee protection regime. Where Conclusions were considered in themselves as merely the fruit of some negotiating process, and at times a somewhat torturous one, then there was much less appreciation as to their value, and hence the inevitable question: *Are they really worth it?*

4. UNHCR needs to do more to spell out the relationship of Conclusions to the broader international refugee protection regime (Recommendation 7). Moreover, the ExCom's parallel consideration of issues of process may need to look at ways to allow for a more substantive consideration of issues that might be proposed as subjects of Conclusions (paras. 27-28). This is another possible way in which the *process* that elaborates quality Conclusions that are responsive to perceived needs in the protection architecture could ensure their better *use*.

5. Anticipating somewhat Part II of this Review, the Report in Part I looked briefly at patterns of use as an indication of the *usefulness* of Conclusions. Here the use of paragraphs of General Conclusions by various stakeholders was somewhat of a surprise (paras. 29-34; Part B of Annex 3). Ultimately, the use of particular Conclusions or paragraphs of General Conclusions would appear to be dictated by operational considerations.

6. It is important that a focus on *use* does not distract one from the more import questions of the *impact of the use* of Conclusions. (paras 35-36). This is a more difficult question to resolve as the ExCom Conclusions are often not seen as having a direct impact, but rather their influence is more in a *mediated* fashion by shaping such things as the Global Strategic Objectives

of UNHCR and the policies of other stakeholders; furthermore, their impact is also mediated through the key role they play in various protection handbooks and guidelines and through training.

7. Part I concludes with a consideration of the current refugee protection environment and the potential that Conclusions could play in making the exercise of international protection principled and relevant (paras. 37-40). As recognized in the Declaration of the States Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol issued on 13 December 2001, and which reaffirmed the central place of the 1951 Convention, the evolving environment in which refugee protection has to be provided is complex and requires that the international protection regime should be developed further, as appropriate, in a way that complements and strengthens the 1951 Convention and its Protocol. One obvious avenue whereby this regime might be developed is through Conclusions on International Protection elaborated and adopted by the Executive Committee of the UNHCR Programme.

8. The core of the Review is found in Part II (paras. 41-104) which looks at the way and the extent to which the ExCom Conclusions are being used by a range of stakeholders. This Part attempts to answer the second key question in the TORs: *To what extent have the different types of Excom Conclusion been used by various stakeholders (a) in the formulation of policy, official positions and legal guidance (b) in the drafting of national, regional and international legislation (c) as a input to judicial and asylum proceedings, (d) as an advocacy tool, and (e) in any other ways?*

9. In one sense, the primary stakeholder, not expressly mentioned in the TORs, should be the refugees themselves. The other obvious stakeholders are: UNHCR; States, including their independent statutory bodies such as refugee appeals tribunals, their judiciary, and parliamentarians; and the non-governmental organizations. Among these stakeholders, one was able to note different attitudes to the Conclusions; for example the attitude of a State Party to the Convention and /or its Protocol is understandably different to a State that has not acceded; or, the interest of an NGO whose orientation is mainly towards human rights and/or advocacy will be different to that of an NGO whose primary orientation may be humanitarian assistance. Each of the stakeholders has a varying degree of interest in the ExCom Conclusions and tends to use them somewhat differently; furthermore, the degree of use of them differs significantly. In some instances, one stakeholder may use a Conclusion(s) as a standard of reference or accountability to measure or challenge the behaviour of another stakeholder. Thus, it comes as no surprise that the task of negotiating them may, at times, be difficult.

10. The question of how ExCom Conclusions impact on the lives of refugees does not lend itself to a simple answer (paras. 42-48) The ExCom Conclusions touch the lives of refugees mainly in a *mediated, indirect manner*, through the people who, working alongside them, and through programmes developed in consultation with them. Hence the importance of guidelines, handbooks, and training modules based on the ExCom Conclusions, and which seek to inform the approach of those working with refugees and others of concern to UNHCR. Equally important, is the necessity for effective frameworks of accountability, such as UNHCR's Age, Gender and Diversity Mainstreaming Accountability Framework (AGDM). Through such mechanisms the refugees have an opportunity to have their say on the quality of their protection (indirectly related to ExCom Conclusions, guidelines, etc.). The findings of these

assessments are fed into Participatory Planning exercises involving host governments, implementing partners and the refugees themselves. Out of these exercises are derived the various UNHCR Country Operations Plans whose results and impact are able to be monitored. In addition, UNHCR has in place today an overall accountability framework which, *inter alia*, follows up progress on recommendations of Audit Reports, the Inspector-General's reports and evaluation findings. Part of this overarching framework are a number of other specific accountability frameworks e.g. for the AGDM. Another significant development that is affecting the lives of refugees has been the progress in UNHCR in relation to results-based management, especially the development of the related software called *Focus*. It is through results-based management that one is able to measure, to varying degrees, the mediated impact of ExCom Conclusions on the quality of protection enjoyed by refugees.

11. Of the various stakeholders, UNHCR (paras. 49-77) has obviously a strong interest in the ExCom Conclusions, be it in their elaboration or in their use. By their extensive use in a range of ways, UNHCR contributes not only to the perception of their relevance, but shows their real usefulness in the discharge of its international protection mandate. Through its operational experience, UNHCR is able to see the need for, and the value of, additional Conclusions to address particular new challenges, and to support its supervisory responsibilities. UNHCR is able to exercise considerable influence over the genesis and direction of Conclusions in the way it structures the ExCom agenda, particularly by foreshadowing the direction of the Plenary Debate by sharing, in advance, points from the High Commissioner's statement, or by choosing the themes for the various informal consultations, such as the High Commissioner's Dialogue on Protection Challenges. The preparation of related background papers of sound quality can be vital in showing the importance of an issue that might, in time be worthy of a Conclusion. There is, however, a perception in some circles that for UNHCR the drafting of Conclusions has become an end in itself, a certain "cult of conclusions".

12. From the some 60 responses to the 95 questionnaires sent to UNHCR Offices in the Field (see Annex 3), one was able to gain some insight into how UNHCR uses the Conclusions, and to see if there was any pattern of use of such Conclusions, influenced by factors such as the type of Conclusion, its length etc. This did not appear to be the case. Rather, the primary consideration seemed to be operational relevance. The same could be said for the NGOs, although the level of response to their questionnaire (28 responses to some 155 questionnaires sent out) was somewhat weaker.

13. On the basis of these two sets of questionnaires, one was able to note the Conclusions most used (with 10 or more listed users). These were: Conclusion 44 (1986): *Detention of Refugees and Asylum-Seekers* (23 users); Conclusion No. 105 (2006): *Women at Risk* (17 users); Conclusion 91 (2001): *Registration of Refugees and Asylum-Seekers* (16 users); Conclusion 106 (2006): *Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* (14 users); Conclusion 8 (1977): *Determination of Refugee Status* (13 users); Conclusion 93 (2002): *Reception of Asylum-Seekers in the Context of Individual Asylum Seekers* (12 users); Conclusion 107 (2007): *Children at Risk* (12 users); Conclusion 69 (1992): *Cessation of Status* (10 users); Conclusion 58 (1989): *Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection* (10 users). According to the Questionnaires, the use of Conclusions adopted in the period 2002-2007 showed 121 users of one or more of 15

Conclusions (both General or Thematic); the period 1996-2001: 47 users of 12 Conclusions; for the period 1990-1995: 49 users of 12 Conclusions; for the period 1984-1989: 82 users of 20 Conclusions; for the period 1976-1983: 78 users of 15 Conclusions.

14. One key way in which UNHCR uses Conclusions is in the discharge of its supervisory responsibility (paras. 56-67). The Statute of the Office (paragraph 8), annexed to General Assembly Resolution 428 (V) of 14 December 1950, specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among other things, 'Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...' States have recognized and accepted this supervisory responsibility of the UNHCR in Article 35 of the 1951 Convention. The Review looked at specific examples of how UNHCR used Conclusions for this purpose in several different contexts: commenting on draft legislation and directives, intervening in court cases and providing written advisory opinions. The worth of the ExCom Conclusions in relation to UNHCR's supervisory functions vis-à-vis signatory States has been pointed out by Courts; for example, the Canadian Federal Court of Appeal noted: "Accordingly, considerable weight should be given to the recommendation of the Executive committee of the High Commissioner's Program on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself. (*Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002), per. Evans JA).

15. As regards the use by Member States of Conclusions (paras. 78-97), the Review has found it almost impossible to come up with some broad findings that are empirically based that will answer the general question as to how States are using ExCom Conclusions. One simply has impressions based on research of relevant literature, as well as input from a limited number of Member States, as well as UNHCR Annual Protection Reports that are the most comprehensive sources of information on State practice in general, and on attitudes to, or use of, ExCom Conclusions in particular.

16. UNHCR sees parliamentarians (paras. 83-87) as a key category in supporting the international refugee protection regime and as a key partner in influencing national legislation on refugee-related matters. This is why, together with the International Parliamentary Union, it has produced the Handbook, *Refugee Protection: A Guide to International Refugee Law*. Throughout the Guide Conclusions are used to explain the role of both States and UNHCR, to elaborate the rights of refugees and asylum seekers, to offer procedural guidance and minimum standards for the treatment of refugees in various contexts and to set out a range of challenges and needs in relation to international protection. It should be noted that the *Handbook on International Refugee Law for Parliamentarians* first published in English and French in December 2001, now exists also in Arabic, Chinese, Portuguese, Spanish and Russian.

17. One way in which ExCom Conclusions have contributed to the functioning of the international refugee protection regime has been in the way they have helped influence State practice on refugee status determination (paras. 88-91). One important and influential example of this is that of the Canadian Immigration and Refugee Board (IRB). Its Guidelines, called Chairperson's Guidelines, have addressed matters that have been raised in ExCom Conclusions;

some of these Chairperson's Guidelines, especially that on *Women Refugee Claimants Fearing Gender-Related Persecution* (September 1996) have had an influence on similar Guidelines developed by other Review Boards. These Guidelines were the first of their kind in the world, and are now being used as a model elsewhere, including the United States, Australia, the United Kingdom and Sweden.

18. A further example of use by States of Conclusions may be found in judicial pronouncements (paras. 92-97; Annex 4). The Executive Committee Conclusions are seen as representing collective international expertise on refugee matters, including legal expertise. As such, courts and tribunals in a range of jurisdictions use ExCom Conclusions, as soft law instruments, as persuasive and even authoritative sources on matters of policy, legal practice or interpretation. Annex 4 sets out in summary form some of the recent cases in which Conclusions have been used both by the parties before the court and the judiciary in its reasoning. They have been drawn from a range of judicial bodies such as international treaty bodies, regional courts and commissions and national courts. Some national jurisdictions (e.g. New Zealand) seem more willing to use the Conclusions than others (e.g. Japan). Some judgments differentiate between the weight of Conclusions and UNHCR Guidelines, whereas others consider the use of non-binding UNHCR materials more generally.

19. The Review found very little by way of reporting on what has been done by the various stakeholders, including NGOs, in giving effect to the various ExCom Conclusions. One exception in this regard has been what has been achieved by The Centre for Refugee Research of the University of New South Wales Australia in relation to the Conclusion 105 on *Women and Girls at Risk*. While the Centre recognized the achievements of the Women at Risk (WaR) programme introduced in 1989, it was able to document also the problems in its implementation, and the shortcomings in its approach. The result was a proposal to introduce a Conclusion on the topic: *The Case for a UNHCR Conclusion on "Refugee Women at Risk"* (2005). The Centre has now set up an International Working Group on the Protection of Refugee Women and Children to advocate for the implementation of commitments made in the Conclusion and to monitor progress on its implementation. It will report on progress at each of the Annual NGO Consultations.

20. Part III of the Report (paras. 105-111) focused on the remaining key questions posed in the Terms of Reference. Question 3 asked: *What are the key variables (e.g. subject matter, timing, specificity, length, dissemination) that determine whether an ExCom Conclusion is actively used by States and other stakeholders?* As was noted above in discussing the responses to questionnaires sent to UNHCR Field Offices and NGOs, it would be difficult to point to any of these elements as influencing the use of a given Conclusion by any of the stakeholders.

21. The other issue discussed in Part III related to possible preferences for Conclusions developed at different times: *Is there any evidence to suggest that recent Excom Conclusions have been used to a greater or to a lesser extent than in earlier periods, and if so, what accounts for the trend?* As noted above, on the basis of the patterns of use by UNHCR Field Offices and NGOs, there is some evidence to suggest that recent Conclusions i.e. those elaborated in the last 6 years, have been perhaps used more. But then one has to remember that the bulk of these were drafted precisely because the Global Consultations recognized some key gaps in the current protection

architecture, and in relation to which the Agenda for Protection foreshadowed the need for such Conclusions. There is an important message here: Conclusions that are seen to address protection gaps will be perceived to be of value, and their subsequent use assured. The same can be said of the more recent Conclusions on *Women at Risk* and *Children at Risk*.

22. The remaining question posed in the TORs related to effective/ineffective practice in using the Conclusions: *Can specific examples of effective and ineffective practice be identified in relation to the use of Excom Conclusions?* This is basically a strategic consideration. Use is effective when there is relevant analysis of the operational context, and a decision made on what “protection toll” might be most appropriate. Conclusions are only but one, albeit an important tool, in the “protection tool box”. Effective use of Conclusions might, at times, be non-use.

23. One truly impressive example of effective practice is the way the Canadian Immigration and Refugee Board, through its Chairperson’s Guidelines, has been able to influence practice in other countries, on a range of issues dealt with in ExCom Conclusions. This is effective use of Conclusions: not the fact that they are cited, but rather that the issues addressed in Conclusions are taken further by States and reflected in national practice. The other example is that of the work of The Centre for Refugee Research of the University of New South Wales, Australia in the follow-up to Conclusion 105 on *Women and Girls at Risk*.

24. At the end of this review exercise, the dominant impression for the Evaluation Team was that Executive Committee Conclusions were playing a useful role in regard to the international refugee protection regime, and that they should continue to play such a role in today’s challenging environment in which forced human displacement continues to be a constant dimension of broader discussions relating to globalization, human rights, human security and migration.

PART I. INTRODUCTORY OBSERVATIONS

1. This Report focuses on the *use* being made, by a range of actors,¹ of the Conclusions on International Protection² elaborated and adopted³ by the Executive Committee of the Programme of the High Commissioner for Refugees (ExCom).

A. Use and Process

2. It was noted in the Terms of Reference, however, that “while the review will not focus specifically on the process employed for the preparation of ExCom Conclusions, it is recognized that this issue may arise in the course of interviews undertaken by the evaluation team. The Evaluation Team will consequently be invited to provide a summary of key findings in relation to this matter”. Certain aspects of the *process* whereby Conclusions are generated have a close relationship to their subsequent *use*. For example, where the chosen theme for a Conclusion is perceived by the range of stakeholders mentioned in the TORs, or some of them, as answering a real perceived need, this would suggest that such a Conclusion might subsequently be more extensively used. Similarly, the active involvement of Member States who are not parties to the 1951 Convention and/or its Protocol in the negotiating process is more a question relating to process; however, from the point of view of *use*, strong arguments were encountered, especially in interviews with UNHCR Representatives, for their involvement, as this gave to UNHCR some leverage in advocating the issues covered by the Conclusions in their dealings with these States. Other aspects of the ExCom Conclusion drafting *process* have an impact on *use*, as will be noted in the course of the Report.

B. Point of Departure

3. The structure of this Review and its methodology were determined primarily by the Terms of Reference.⁴ These TOR posed five questions:

1. To what extent are ExCom Conclusions known, understood and appreciated by states, UNHCR, NGOs and other stakeholders?
2. To what extent have the different types of ExCom Conclusion been used by various stakeholders (a) in the formulation of policy, official positions and legal guidance (b) in

¹ The Terms of Reference refers to “stakeholders” in the following terms: “key stakeholders, including states, UNHCR, other international and regional organizations, NGOs and legal practitioners”. It does not mention refugees as stakeholders, a fact commented on by some interlocutors.

² A chronological compilation of Conclusions may be found in *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, UNHCR, Geneva, 2007; the Conclusions may be readily accessed at: <http://www.unhcr.org/excom/3bb1cb676.html>

³ The outcomes of the Executive Committee’s deliberations on protection matters are expressed in terms of “conclusions”, as distinct from “decisions” or “resolutions”. On the background to the use of this terminology, see J. Sztucki, “The Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme”, *International Journal of Refugee Law*, vol. 1, no. 3, pp. 286-318, 295-298.

⁴ See Annex 1.

the drafting of national, regional and international legislation (c) as a input to judicial and asylum proceedings, (d) as an advocacy tool, and (e) in any other ways?

3. What are the key variables (e.g. subject matter, timing, specificity, length, dissemination) that determine whether an Excom conclusion is actively used by states and other stakeholders?

4. Is there any evidence to suggest that recent ExCom Conclusions have been used to a greater or to a lesser extent than in earlier periods, and if so, what accounts for the trend?

5. Can specific examples of effective and ineffective practice be identified in relation to the use of ExCom Conclusions?

Of these five questions, the most important are questions 1 and 2. Question 2 deals with use by stakeholders of the Conclusions, while question 1 looks at those issues influencing use. Part I of this Report deals with the various aspects of question 1. Part II of this Report focuses on question 2. On the basis of what emerges in Part II on patterns of use by the stakeholders, one is able to answer questions 3, 4, and 5 in Part III of this study.

4. Obviously, any consideration of use of the ExCom Conclusions by any one stakeholder is based firstly on knowledge of them. An understanding and appreciation of what they represent will determine the extent of their use. The Report found that this knowledge varied considerably among the various stakeholders, as did their appreciation. This appreciation, in turn, largely depended on an understanding of what the Conclusions represented, and where they “fitted” in the overall scheme of things. Finally, when one talks of use, it is necessary to distinguish between use, usefulness and impact of use. Effective use normally implies that such a use has had a useful impact. Measuring that impact is another more challenging issue. The following paragraphs will briefly touch on these points. These observations will be based, where possible, on the responses to the Questionnaires sent to UNHCR Field Offices⁵ and NGOs⁶, and related interviews with a range of stakeholders⁷. The number of responses, to 90 questionnaires and some 70 interviews, provide a limited, but representative basis, for a range of impressions on the key issues; one thus has to be conscious of the limitations in the empirical basis of the Report’s findings.

C. Knowledge of Conclusions

5. The level of knowledge of Conclusions obviously varies between and within the various categories of stakeholders. Understandably, knowledge of the Conclusions in UNHCR is good,

⁵ The questionnaire was sent to some 95 Field Offices on 11 March 2008. As at 30 April, some 60 responses had been received.

⁶ This was sent out through the ICVA network and by UNHCR’s NGO Liaison Unit on 25 March 2008 to some 155 agencies; at the end of April, some 30 responses had been received.

⁷ For a listing see Annex 2.

but could be better. Until recently (2005), a Memo (IOM/FOM)⁸ had been sent by the Director of the Division of International Protection Services (DIPS) to all Representatives and Senior Staff at Headquarters, after an ExCom Session, drawing attention to Conclusions recently adopted and providing an analysis of their content and some background information on the drafting exercise that had led to the adopted text. DIPS should reconsider the reintroduction of this very useful analysis.

6. The Conclusions exist in printed form and in various electronic formats. The UNHCR website, although it has three sets of the Conclusions in different formats on the one page, only one set gives the most recent Conclusions. The thematic compilation only covers Conclusions up to 2004 as does the more prominent chronological compilation.

7. In relation to accessibility, the Conclusions are available in the report of the ExCom meetings in the official UN languages, and are accessible on many of UNHCR's national websites. UNHCR Field Offices that do not belong to the UN official language group are translating the Conclusions into other national languages (e.g. German, Portuguese) to enhance UNHCR's protection work. There may be a role for DIPS to facilitate and coordinate the translation of other major linguistic groupings e.g. Portuguese, and make them publicly available.

Recommendation 1: UNHCR/DIPS should consider resuming the practice of circulating newly adopted Conclusions, together with a background commentary/analysis, to the Field and Units at Headquarters.

Recommendation 2: UNHCR/DIPS should systematically ensure that the main UNHCR Website has up-to-date listings, both chronological and thematic, of the Conclusions.

Recommendation 3: UNHCR/DIPs could explore the possibility of Facilitating and coordinating the translation of Conclusions in those languages common to a number of countries, and which are not part of the UN official language group.

8. As regards States, knowledge of the Conclusions is understandably limited to particular ministries and departments. But it would appear that even in the relevant Ministries, knowledge is not that extensive. UNHCR has a perception that States could make Conclusions better known. As pointed out by the Assistant High Commissioner (Protection) in relaying the observations from the meeting of the UNHCR Field Reference Group on Protection Policies:⁹ "One issue that Field colleagues did ask to be highlighted is that governments themselves could do more to make the conclusions a living tool. The drafters are not always the implementers of these conclusions and our colleagues have noted that in some instances there seems to be a real communications breakdown, with one sector of government not being aware of what has been

⁸ IOM (Inter-Office Memorandum); FOM (Field Office Memorandum); see IOM/79/2005-FOM/78/2005.

⁹ Memorandum from Assistant High Commissioner for Protection, 25 Sept. 2006.

agreed elsewhere by another sector. For UNHCR; this is certainly a handicap to full implementation".¹⁰

9. This perception would appear to find confirmation in some responses to the Questionnaires sent to the UNHCR Field Offices. For instance, there is the observation from one UNHCR Field Office (Ireland): "Knowledge of EXCOM functions and work is restricted to a few higher officials who are part of the inner circle of the [Justice] Department's Secretary-General as well as to a larger number of our counterparts in the Department of Foreign Affairs/Irish Aid." These comments were made in the context of UNHCR providing advice on writing new asylum legislation. Another comparable comment relates to the Nordic countries: "I [a Protection Assistant] also believe (as mentioned explicitly in Red Cross report on changes in Swedish RSD and Aliens Act), that ExCom Conclusions are not very well known in the Nordics and they have little impact".

10. In talking with Representatives of some States, there was an acknowledgement by those who were justly satisfied with their coordinated input into the ExCom negotiating process, whereby the views of all relevant Ministries, including those of NGOs, were reflected on a text being negotiated, that the follow up after their adoption in making them known at the operational level was a challenge. Some Permanent Missions (Canada, Australia) were able to refer to the use of Conclusions in various operational manuals, but this was not extensive. As will be seen below, however, other stakeholders in different countries e.g. independent refugee review boards and the judiciary, etc. were quite knowledgeable about the Conclusions.

Recommendation 4: The "lead" ministry/department in a government responsible for dealing with policy issues in UNHCR should explore ways to ensure that ExCom Conclusions are brought to the attention of other relevant ministries/departments/agencies dealing with refugee matters.

11. Knowledge of Conclusions among NGOs, especially those engaged in advocacy, human rights and policy issues, was quite extensive. Academics¹¹ and individual experts/consultants working in the areas of migration, forced displacement, and human rights, as one would expect, were well informed.

12. Promoting a better knowledge of ExCom Conclusions is incumbent on a range of stakeholders. The prime actor, with obviously the most interest in the issue, should be UNHCR. The new instructions for UNHCR's Annual Protection Reports (IOM/002/2008-FOM/004/2008 of 30 Jan. 2008), the principal internal document that summarizes UNHCR's protection work at the country level, seeks to build reporting, inter-alia, around the Conclusions; for example, in section 1.1 on International and regional instruments, Offices are specifically asked to '[b]riefly outline how the Office has been able to make use of EXCOM

¹⁰ Statement by Ms. Erika Feller, AHC (Protection) to the Fifty-eighth session of the Executive Committee of the High Commissioner's Programme. Agenda Item 5 (a).

¹¹ Two research institutes made submissions to the evaluation: Centre for Refugee Research, University of New South Wales, Australia; Human Rights Centre, School of Law, University of Nottingham, UK.

conclusions to support its work".¹² The same Reports for 2007 give a range of examples of how these Conclusions are being made known by UNHCR to governments in a range of concrete ways.

13. The need for more promotional activity of ExCom Conclusions by UNHCR, however, is further illustrated in the responses to questionnaires sent both to UNHCR and NGOs. In both questionnaires, there is a similar question:

Since the last ExCom has there been a discussion with NGOs of Conclusion 107 on Children at Risk? (UNHCR Questionnaire)

Since the last ExCom has there been a discussion with UNHCR of Conclusion 107 on Children at Risk? (NGO Questionnaire)

Of the 90 responses received (UNHCR 60; NGOs: 30), only 17 UNHCR Offices responded positively: Afghanistan, Angola, Australia, Bangladesh, Belgium, Burundi, Canada, Croatia, DRC, Kazakhstan, Liberia, Montenegro, Nepal, Tanzania, Turkmenistan, The former Yugoslav Republic of Macedonia, Washington; six NGOs also responded positively: Women's Commission for Refugee Women and Children, USA; Refugee Center for Human Rights, Egypt; Refugee Council of Australia; Sudan Open Learning Organization; Jesuit Refugee Service, Cambodia; World Vision International, Geneva.

Recommendation 5: UNHCR/DIPS should consider the possibility of issuing an FOM directing Branch Offices to be more proactive in disseminating the ExCom Conclusions to relevant ministries/departments in governments, to operational and implementing partners and civil society organizations.

14. One way of bringing greater sensitivity to this need for better dissemination of ExCom Conclusions might be for the UNHCR Inspector-General to monitor this issue in his inspections. The *Inspection Checklist* (June 2005) for UNHCR inspections undertaken by its Inspector General, poses a number of questions related to ExCom Conclusions, including the following in relation to protection: *Is the Office providing guidance to States through advice and dissemination of relevant ExCom Conclusions?* A similar question in relation to progress in establishing formal structures with NGOs for consultation and cooperation in working for the protection of refugees (FOM/059/2004), also exists: *Is the Office making use of partners to identify protection concerns, including a functioning coordination mechanism in place between the Office and partners?* A similar sub-question to that asked in relation to States and the dissemination of ExCom Conclusions, could profitably be asked in relation to NGOs.

Recommendation 6: The Inspector-General of UNHCR should explore ways of monitoring a better and more systematic dissemination of ExCom Conclusions among States and operational and implementing partners.

15. Training sessions of government officials, organized by government departments with the assistance of UNHCR, or by UNHCR itself, was one recurring theme in the responses to the

¹² Op. cit., p. 5.

UNHCR Field Questionnaire as to how UNHCR is using the ExCom Conclusions. Obviously more can be done in this area. But this requires the allocation of appropriate resources by UNHCR. The 2008-2009 UNHCR Programme Budget (Table II. 10, p. 126) shows a considerable increase in the initial budget allocations for 2008 and 2009 for Protection Training, but perhaps the true picture is best seen in the diminishing expenditure in 2006 over 2005. Often training is one of the earliest budget lines to be “capped” in an environment of pressure on resources. UNHCR Inspection Reports have drawn attention to this problem. Some balance needs to be found between resources allocated for operational activities considered of a higher priority and those for training, if the Office is to engage in a meaningful partnership with governments and NGOs in the discharge of its protection mandate.

16. Knowledge of ExCom Conclusions, as was seen above, was only one element in determining their use by the different actors. Another key factor is how they understood them. This is basic to any appreciation of them.

D. What do Conclusions Represent?

17. The Review soon discovered that the use of Conclusions was not unrelated to the way people viewed them. Conclusions may be considered simply as “stand alone” results of a negotiating process, or they may be seen as well in a broader context, namely that of the international refugee protection regime. This regime can be summarily described¹³ as being constituted by an intricate web of international practice and precepts drawn from refugee law, human rights law and general principles of international law, of which the 1951 Convention and its 1967 Protocol are the cornerstone of this system; UNHCR through its international protection mandate and its supervisory role in relation to international refugee instruments, is the central institution of this regime. An appreciation of ExCom Conclusions as part of this broader context varied notably between and within the various categories of stakeholders who were interviewed.

18. The Executive Committee of the High Commissioner’s Programme was established in 1958 and functions as a subsidiary organ of the General Assembly and has both executive and advisory responsibilities. Its terms of reference as reflected in the United Nations General Assembly (UNGA) Resolution 1166(XII), mainly focuses on budgetary and financial issues, but includes the following provision: “To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office” (para. b). This provision has been interpreted, especially by UNHCR, as giving the ExCom an advisory role, as distinct from an executive function, in relation to protection policy; others also link ExCom Conclusions, or at least some of them, to it. It is in this context that ExCom Conclusions are often described as a privileged form of advice to the High Commissioner. Quite recently, however, one has seen the Executive Committee (or at least Informal Consultations of the same) somewhat unwilling

¹³ V. Türk, “Freedom from Fear: Refugees, the Broader Forced Displacement Context and the Underlying International Protection Regime” in *Globalization, Migration and Human Rights: International Law under Review*, vol. II, Collection of the Geneva Academy of International Humanitarian Law and Human Rights under the direction of V. Chetail, Brussels, 2007, pp. 475-522, p. 479.

to respond positively to requests of the High Commissioner, mediated through the UNHCR Secretariat, for guidance, in the form of Conclusions, on a range of issues. This way of looking at Conclusions, plus the practice beginning in 1972 whereby the Committee also addressed its Conclusions directly to States, leads one to situate Conclusions in a broader context.

19. It has been noted that the primary role envisaged for the Executive Committee under its Terms of Reference was a programmatic, administrative and financial one. In 1962, the Executive Committee for the first time formally put the question of protection on its agenda.¹⁴ Since 1963, with the exception of 1964, the Committee has presented the results of its deliberations on protection as formal texts termed "Conclusions", except in 1963, 1970 and 1971, when they were termed "Decisions". In passing it might be noted that the current numbering of Conclusions¹⁵ begins with the establishment of the Sub-Committee of the Whole on International Protection in 1975. Some would claim¹⁶ that the ten Conclusions adopted by the Executive Committee in the preceding 11 years do not differ in substance or character from the subsequent General Conclusions adopted after 1975.

20. Against this background that briefly sketches the evolution of the Executive Committee's involvement in protection issues and the related development of its Conclusions, one is better able to answer the question as to what they represent.

21. The Conclusions, adopted by consensus, are recognized as particularly important for a range of reasons,¹⁷ including the following:

- they have a standard-setting role, being an indication of State practice in key areas;
- they serve to interpret and develop principles and provisions of international refugee law;
- they provide evidence of an already established rule of customary international law, or lead to law creation;
- they contribute, albeit as soft law, to judicial pronouncements as sources of authority on matters of policy, legal practice or interpretation.

22. Where one encountered this broader understanding, there was generally an appreciation of the importance of the Conclusions. Where the perspective was more focused on national issues e.g. the more immediate relevance of EC Directives, then the significance of Conclusions waned commensurately.

¹⁴ The following analysis is based on J. Sztucki, op. cit., pp. 293-295.

¹⁵ See *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme*, UNHCR, Geneva, 2007.

¹⁶ J. Sztucki, op. cit., p. 295.

¹⁷ The following listing draws on a contribution from Erika Feller and Anja Klug to a forthcoming publication of the Max Planck Institute for Comparative Public Law and International Law, Munich, namely the *Max Planck Encyclopedia of Public International Law*, being prepared under the auspices of Prof. Dr. Rüdiger Wolfram.

E. Attitudes to Conclusions

23. The Evaluation Team found a range of attitudes vis-à-vis the Conclusions. Among those Permanent Missions and/or capitals that provided input, the following viewpoints of the various interlocutors might be noted:

- Attitudes ranged from strong commitment to the ExCom Conclusion process, to polite statements of appreciation of the value of ExCom Conclusions, through to expressions of pragmatic acceptance of their existence and of their possible value (on which one yet needed to be convinced), all the way through to their dismissal as to their relevance in a national context, especially for those countries belonging to the EU.
- These attitudes seemed largely influenced by feelings about the way the texts were negotiated, rather than by a first-hand knowledge as to their use, even by entities within one's own government e.g. by another ministry/department, or a review board etc. Part of this negativity related to the way UNHCR handled the negotiating process, its openness to views of States, issues of trust, etc.
- The exercise of negotiating Conclusions was felt by some to have degenerated into an end in itself: Conclusions for the sake of Conclusions; some thought that it was time to stand back and ask some basic questions as to why and for what purpose one was elaborating more of the same.
- The current disaffection with the negotiating process was attributed by one interlocutor to the excessive time that delegations had given themselves to drafting the Conclusions; others felt that not enough time was being given to the substantive consideration of the issues under discussion (this is distinct from time given to negotiating the text *per se*).
- Some States felt that their cautiousness in not signing off on something they could not deliver on, and for which they may be held accountable, was interpreted by UNHCR as restrictiveness vis-à-vis their obligations as Parties to the Convention; it was felt that there needed to be a better appreciation of the interests of all involved, including States.
- Refugee-hosting countries felt that their interests were being ignored; not enough attention was being paid to real issues of solidarity and burden-sharing and protracted refugee situations.
- Some expressed concern about UNHCR's apparent unwillingness to accept guidance in the negotiating process, and show an openness to Delegation's views; rather UNHCR obstinately held to its own position especially in relation to whether there should be a Conclusion on a particular topic or not.

24 In regard to UNHCR, the level of appreciation of the Conclusions was generally high. In this context, it might be noted that more recent Handbooks, e.g. UNHCR Handbook for the Protection of Women and Girls (January 2008), and the Self-Study Modules e.g. No. 5 on Human Rights and Refugee Protection, 2 vols. (December 2006) are to be commended for promoting an understanding of ExCom Conclusions within the broader international and regional legal framework. On the other hand, some interlocutors in Branch Offices, in particular operational contexts, were not reluctant in pointing to the lack of immediate relevance of the Conclusions to their daily work.

25. Among the NGOs, the attitude of interlocutors was broadly comparable to that of their UNHCR colleagues, although an appreciation of where the Conclusions “fitted” in relation to the broader international and regional legal framework was somewhat uneven.

Recommendation 7: UNHCR should further emphasize in its training activities the relevance of ExCom Conclusions to the international refugee protection regime.

26. While it would be too strong a word to talk of a “crisis” in relation to the ExCom Conclusion process, the fact that there is a review of the use of the Conclusions shows that the current evaluation is not exactly a disinterested exercise. Rather, it is as though some are saying: *Prove to us that the use of these Conclusions makes this whole exercise of negotiating them worth it.*

27. Quality Conclusions require substantive, informed deliberations, not just time spent in negotiating a drafted text. Where there had been such deliberations, e.g. in relation to the Conclusion on *Women and Girls at Risk*, such Conclusions have been found to be used extensively. At the risk of venturing into the subject of process, it might be noted in this context the feeling expressed by some Member States that currently there is not a substantive, informed, in-depth discussion of protection issues. The very structure of the ExCom calendar does not facilitate this; there is always the risk that the growing, diverse agenda of the June Standing Committee Meeting, intended to focus on protection issues, will squeeze out such in-depth consideration. It may be time to rethink, in the light of experience since 1995, whether there might not be a need to have a return to something comparable to the Sub-Committee of the Whole on International Protection whose deliberations would allow the study in more detail of the more technical aspects of the protection of refugees” (Excom Conclusion 1 (XXVI) 1975). Moreover, “word-smithing” on a draft Conclusion, rather than substantive consideration of subject matter seems to characterize much of the current ExCom Conclusion process.

28. Assured use implies that a Conclusion is a response to a perceived real need; this real need is most likely not going to be a “soft” topic, and so would require substantive reflection which might not bear fruit in a given year. These topics might best be served by commissioned papers by experts, supported by a commentary by UNHCR, reflecting its supervisory responsibilities. This might require a longer cycle of deliberation comparable to the biennial cycle for programme and budgetary issues. Discussions on use of Conclusions have revealed a climate of dissatisfaction and, rather disappointingly, some distrust. Something radical is required if we are to have in the future Conclusions to use.

F. Use and Usefulness

29. The question of how Conclusions are used is distinct from, but related to, questions of their usefulness. Use normally implies a perception that something is useful, and flows from that appreciation.

30. Here might be the appropriate moment to differentiate between General Conclusions and specific Conclusions that focus on a particular subject e.g. Statelessness, and their respective uses. One might also note a certain number of the General Conclusions¹⁸ that have a “hybrid character” whereby, through the use of sub-headings, a number of operational paragraphs in a General Conclusion are dedicated to the consideration of a certain subject, thereby resembling a “mini-thematic Conclusion” sheltering under the protective wings of a General Conclusion. While one might have assumed that specific Conclusions would be, by far, the most used, it was surprising to note in the course of the current Review, the number of times that certain paragraphs of General Conclusions were cited by respondents to the UNHCR Field Questionnaire as being among those Conclusions regularly used.

31. One could note that as UNHCR promotes a more holistic notion of protection as reflected in the new format of the Annual Protection Reports,¹⁹ and touches on issues relating to HIV/AIDS, nutrition etc., that in the past, these topics would normally have been dealt with in ExCom Decisions (reflecting the bureaucratic structure of UNHCR and the fact that these topics were considered more as “assistance “ topics and dealt with by staff who were in the Division of Operational Services); hence the few references to these issues in General Conclusions become all the more precious.²⁰ The preceding excursus is simply by way of introduction to a brief consideration of the respective use and usefulness of General and thematic Conclusions respectively. While one may make a statement about the value of Conclusions in general, and thereby as to their usefulness as a genre or category, it is only in relation to specific Conclusions or particular paragraphs of General Conclusions that one can accurately talk of use, and the extent of use.

G. Conclusions as a Category and Use of Specific Conclusions

32. The clearest articulation of the value of ExCom Conclusions as a category (and therefore an argument for their use) is found in paragraph (g) of General Conclusion 81 (XLVIII), 1997²¹:

The Executive Committee,

Stresses the importance of the role played by this Committee in providing guidance and forging consensus on vital protection policies and practices, and, in this connection, emphasizes the need for due regard to be paid to the Conclusions of the Executive Committee.

33. In the case of the present study, however, it was the use of particular Conclusions or paragraphs in General Conclusions by a range of different actors that stood out. In the case of

¹⁸ Conclusion 85 (xlix), 87 (l), 89 (lii), 95 (liv). For example *Conclusion 95 (LIV)-General* (2003) has two distinct sub sections dealing with the “Agenda for Protection” and “Statelessness”.

¹⁹ IOM/002/2008-FOM/004/2008 of 30 Jan. 2008.

²⁰ See the reference to HIV and AIDS in General Conclusion 102 (LVI) 2005, para. (w).

²¹ Not surprisingly, this statement as to the value of the Conclusions and of the work of the Executive Committee that elaborates them was made at a time when the viability and value of Conclusions was in question.

UNHCR, operational context largely determined the use, if any, of a range of particular types of Conclusions, depending on whether the UNHCR Office was in a country hosting large influxes of refugees or in developed, industrialized countries that were the preferred destination of asylum-seekers. Similarly in the case of NGOs, the primary focus of the organization determined which Conclusions were of most relevance; for example, for those NGOs who described themselves as focused on human rights and/or on advocacy, the ExCom Conclusions seen to be of most relevance or use to their work tended to be different to other NGOs who described their focus as humanitarian activities and for whom operational considerations largely influenced use. Similarly for States, (and for UNHCR Offices working in States which were the destination of asylum seekers), issues of sovereignty, border control, asylum procedures were more centre stage, with refugee-hosting countries also interested in issues related to solidarity and burden sharing, as well as durable solutions. In the case of statutory bodies tasked with refugee status determination, or related appeals, as well as for the judiciary and other legal practitioners, use was mainly made of those Conclusions related to refugee status determination, family unity, and those dealing with gender and age. These general observations will be dealt with more fully below.

H. Criteria of Usefulness

34. As noted, use of something is normally associated with an appreciation of its value and usefulness. Value judgments are by nature subjective. This is also the case with the range of users of the Conclusions. Ultimately, however, the value of Conclusions and their usefulness must be judged on the degree to which they contribute to the nurturing and ongoing development of the international refugee protection regime and through it to the effective and/or enhanced quality of protection for the intended beneficiaries of the 1951 Convention and 1967 Protocol; more particularly, usefulness will be judged in relation to how a given Conclusion is helpful in responding to a particular operational challenge.

I. Use and Impact of Use

35. Use of something and the impact of that use are also different things. Judging the impact of Conclusions, however, is obviously difficult. Firstly, the impact of Conclusions is rarely direct; this is largely mediated through their contribution, *inter alia*, to the formulation of UNHCR's Global Strategic Objectives (GSO) and related Performance Targets (PT), and the policies of other stakeholders; in addition, they are form an important point of reference in protection tools such as handbooks and guidelines, and in processes such as training. Any familiarity with results-based management processes confirms the difficulty of measuring the impact of activities directed towards the pursuit of a strategic objective in the area of refugee protection etc. While such objectives can be traced back to certain Conclusions on International Protection, the link is largely rather tenuous. One thus ends up judging the impact of Conclusions by the way they are related to activities undertaken in the pursuit of an objective, and related performance targets.

36. These few, brief preliminary remarks are made simply to highlight the limitations of a study that purely concentrates on the use of the Conclusions. On the other hand there is value in seeing how they are used and how they could be better used by all relevant parties.

J. Context

37. The present situation confronting UNHCR and its Executive Committee in relation to Conclusions can be attributed to a range of factors, some of which can be sourced to the complex environment that characterizes any current multi-lateral consideration of migration and asylum issues, others that deal with aspects of process, and the remaining ones that are less tangible, but none the less real, just as trust. All these issues need to be addressed and some confidence restored in the ExCom Conclusion. Eventually it will be the demonstrated usefulness of the Conclusions as shown in Part II of this study and in Annexes 3 and 4 that, hopefully, will influence the current situation. But first it should be noted that it is precisely because of today's complex world, and the obvious gaps in the current protection architecture, that new Conclusions may be called for and which, if properly elaborated, and subsequently used will contribute to the overall protection regime and the quality of protection for those countless millions that need it.

38. In the Declaration of the States Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol issued on 13 December 2001, and which reaffirmed the central place of the 1951 Convention, as amended by the 1967 Protocol, in the international refugee protection regime,²² there is found a summary description of the "complex features of the evolving environment in which refugee protection has to be provided".²³ These factors were listed as follows:

"the nature of armed conflict, ongoing violations of human rights and international humanitarian law, current patterns of displacement, mixed population flows, the high costs of hosting large numbers of refugees and asylum-seekers and of maintaining asylum systems, the growth of associated trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding and returning those not entitled to or in need of international protection, as well as the lack of resolution of long-standing refugee situations."²⁴

This list largely mirrored, with some obvious and understandable differences that found in the UNHCR internal memorandum (IOM/FOM) of 17 August 2000 that foreshadowed the launch of the Global Consultations to revitalize the Protection Regime.

39. Subsequent events have confirmed the wisdom of launching the Global Consultations. At the time of launching them, their success was not automatically assured. This success was due, in no small part, to the recognition expressed in the UNHCR memorandum just cited of the serious dilemmas confronting governments²⁵ in the face of contemporary population movements, and of the need to examine how innovative approaches and standards to address

²² Preambular paragraph 7.

²³ Preambular paragraph 6.

²⁴ Ibidem.

²⁵ Op. cit., para. 3.

important protection gaps in the existing framework could be developed in a manner sensitive to the interests and concerns of all concerned, including States.²⁶

40. The same States Parties in their Declaration not only reaffirmed the centrality of the 1951 Convention and its Protocol to international protection regime, but were of the belief also “that this regime should be developed further, as appropriate, in a way that complements and strengthens the 1951 Convention and its Protocol”.²⁷ One obvious avenue whereby this regime might be developed is through Conclusions on International Protection elaborated and adopted by the Executive Committee of the UNHCR Programme.²⁸ To play such a role, Conclusions, both General and those dedicated to a particular theme, will need to be grounded in the reality of contemporary protection challenges, innovative in what they propose, sensitive to the interests of all parties, including those of States, but especially of those in need of protection, and be used in ways by all relevant parties such that they concretely contribute to the quality of protection enjoyed by refugees and to the strengthening of the international refugee protection regime.

PART II. KEY STAKEHOLDERS

41. This part of the Report looks at how key stakeholders make use of the Executive Committee Conclusions, or in the case of refugees, how ExCom Conclusions may impact on their lives. The most obvious stakeholders are: UNHCR; States, including independent statutory bodies such as refugee appeals tribunals, their judiciary, parliamentarians; non-governmental organizations, etc. Within some of these categories, one can also discern different attitudes to the Conclusions; for example the attitude of a State Party to the Convention and /or its Protocol is understandably different to a State that has not acceded; or, the interest of an NGO whose orientation is towards human rights will be different to that of an NGO whose primary orientation may be development. Thus each of the stakeholders has a varying degree of interest in the ExCom Conclusions. Each stakeholder uses them or benefits from them differently. In some instances, one stakeholder may use a Conclusion(s) as a standard of reference or accountability to measure or challenge the behaviour of another stakeholder. It is little wonder that the task of drafting them is not without its difficulties, and the degree of use of them differs so significantly.

A. Refugees

42. In the early days of this Evaluation, a non-governmental organization²⁹ pointed out that its Terms of Reference failed to mention a key stakeholder, namely the refugees. This is a valid point. However, the very focus of the Review with its emphasis on use, particularly use of the

²⁶ IOM/FOM No. 58/2000, paragraph 6.

²⁷ Preambular paragraph 7.

²⁸ See *Agenda for Protection*, Goal 1.7 *Further standard-setting* notes: “Consistent with the recognition in the Declaration of States Parties that the international refugee protection regime should be developed further, as appropriate, UNHCR to explore areas that would benefit from further standard-setting, such as ExCom Conclusions or other instruments to be identified at a later stage”, 3rd. ed., UNHCR, Geneva, October 2003, p. 36.

²⁹ HAP International, Geneva, Switzerland; see www.hapinternational.org

Conclusions in the Field by a range of actors, showed an appreciation of the fact that the ultimate purpose of Conclusions was to ensure international protection for those who need it and to improve its quality.

43. The question of how ExCom Conclusions impact the lives of refugees is not susceptible to a simple answer. The ExCom Conclusions touch the lives of refugees mainly in a *mediated, indirect manner*, through the people who, working alongside them, are helping to rebuild their lives, and through the programmes developed in consultation with them. Hence the importance of Guidelines and Handbooks, based on the ExCom Conclusions, which inform the approach of those who seek to be of assistance to refugees. Equally important, is the necessity for effective frameworks of accountability, such as the UNHCR **Age, Gender and Diversity Mainstreaming Accountability Framework (AGDM)**, the SCHR³⁰ Peer Reviews, the HAP Standard for Humanitarian Accountability and Quality Management³¹, etc.

44. Through *The UNHCR Tool for Participatory Assessments in Operations*³², the refugees have an opportunity to have their say on the quality of their protection (indirectly related to ExCom Conclusions and Guidelines). The findings of these assessments are fed into Participatory Planning exercises which contribute to UNHCR's Country Operations Plan and related budget in the light of UNHCR's Strategic Global Objectives and related regional priorities.

45. One tool of particular importance aimed at ascertaining gaps in international protection at the national level and building a plan of action to address them, and which involves the refugees also in a participatory manner, is the **Strengthening Protection Capacity Project (SPCP)**. Based on a gap analysis and a consensus among refugees, host States and UNHCR, the Project proceeds to design and develop concrete interventions to improve protection capacity. A key tool for this gap analysis is the publication, *Protection Gaps. Framework for Analysis. Enhancing Protection of Refugees*,³³ which draws on a range of sources, and gives in an Annex a selection of authoritative sources, including relevant ExCom Conclusions, UNHCR handbooks and guidelines.

46. Then there is the essential planning tool for UNHCR operations, the *Practical Guide to the Systematic Use of Standards & Indicators in UNHCR Operations* (2nd ed. February 2006); it is through this tool that ExCom Conclusions, alongside other handbooks and guidelines have their most tangible impact.

47. Evaluation exercises, however, provide refugees with a structured and concrete mechanism whereby they can hold UNHCR accountable for the standards reflected in ExCom Conclusions, and expect results. A good example of this is evaluation undertaken in 2002 by the Women's Commission for Refugee Women and Children, with the support of UNHCR and

³⁰ <http://www.humanitarianinfo.org/iasc/content/about/schr.asp>

³¹ *The Guide to the HAP Standard. Humanitarian Accountability and Quality Management*, Oxfam Publishing, HAP. Geneva, 2008.

³² UNHCR, Geneva, 1st ed., May 2006.

³³ Edited by Ninette Kelley, and published by UNHCR and the European Commission, Geneva, 2006.

two of its principal donors, of the extent to which UNHCR had successfully implemented the principles contained in the related Guidelines on refugee women and girls.

48. Most significantly, UNHCR has in place today an overall accountability framework which, inter alia, follows up progress on recommendations of Audit Reports, the Inspector-General's reports and evaluation findings. Part of this overarching framework are a number of other specific accountability frameworks e.g. for the AGDM. Another significant development that is affecting the lives of refugees has been the progress in UNHCR in relation to results-based management, especially the development of the related software called *Focus*. As was noted above, it is through results-based management that a range of initiatives find their cohesiveness and complementarities in ways that will be able to measure, to varying degrees, their impact on the quality of protection enjoyed by refugees.

B. UNHCR

49. UNHCR has obviously a strong interest in the ExCom Conclusions, be it in their elaboration or in their use. By their extensive use in a range of ways, UNHCR contributes not only to the perception of their relevance, but shows their real usefulness in the discharge of its international protection mandate. Through its operational experience, UNHCR is able to see the need for, and the value of, additional Conclusions to address particular new challenges, and support its supervisory responsibilities.

50. UNHCR is able to exercise considerable influence over the genesis and direction of Conclusions in the way it structures the ExCom agenda, particularly by foreshadowing the direction of the Plenary Debate by sharing in advance points from the High Commissioner's statement, or by choosing the themes for the various informal consultations, such as the High Commissioner's Dialogue on Protection Challenges. The preparation of related background papers of sound quality can be vital in showing the importance of an issue that might, in time be worthy of a Conclusion. A shared conviction about such usefulness, which may have to be nurtured over time, is a key ingredient for ensuring its future use. As succinctly put in a communication of an NGO to the Review Team: "In my view with regard to UNHCR – when they really know what they want and why, the Conclusions tend to be useful".

51. There is a perception in some circles that for UNHCR the drafting of Conclusions has become an end in itself; that there has to be a Conclusion every year, come what may. Reference has been made in this context by another interlocutor to the "cult of conclusions" whereby they are generated for their own sake, hopefully with a request to produce related guidelines on the subject of the Conclusion. On the other hand, this observation could be countered with the observation that, if in the course of the meetings of the Executive Committee in a given year there had been substantive discussion on a protection topic, then it would be natural to expect that this would find expression in a Conclusion.

1. Patterns of Use by UNHCR

52. From the some 60 responses from UNHCR Offices in the Field to a Questionnaire, one is able to gain some insight into how UNHCR uses the Conclusions. To control and elaborate on the information in these responses, some 28 Offices were interviewed by phone, including 6 Offices that had not answered the written Questionnaire.

53. It might be noted that the Terms of Reference for the Review speak of an "earlier survey on this topic undertaken by UNHCR's Division of International Protection Services (DIPS)". In fact, this was more of a sampling by DIPS of UNHCR Offices known to be working, in various ways, with ExCom Conclusions. It is somewhat of an overstatement to say that a "survey" was undertaken. The results of this sampling were referred to in the paper submitted to an ICM on 10 February 2006 entitled "Second Note on Review of the Process for drafting Executive Committee Conclusions on International Protection", Section B headed "Outcome of a minor survey on value of ExCom Conclusions".

54. Set out below is a summary of the answers received to the Questionnaire from sixty UNHCR Offices. Annex 3 relates this information to the various Conclusions. Against an overall positive and impressive response that indicates that ExCom Conclusions are being used, a note of caution needs to be sounded. Several Representatives (Chad, DRC, Italy) in phone interviews or in notes to their response to the Questionnaire, noted that they while they recognized the importance of the ExCom Conclusions, that in their day-to-day work they did not figure largely. On the other hand, the phone interviews revealed, in most instances, are more encouraging picture, with interlocutors able to quite readily talk of the use of the Conclusions and the positive impact, citing correspondence from the government counterparts. The response from UNHCR Branch Offices can be summarized as follows as to use (but not necessarily implying effectiveness in all instances).

Interventions on specific protection issues: Angola; Argentina; Armenia; Australia; Belarus; Botswana; Burundi; Cambodia; Canada; China; Djibouti; DRC; Germany; Georgia; Ghana; Indonesia; Jordan; Kazakhstan; Kenya; Korea, Rep. of; Liberia; Malawi; Malaysia; Mexico; Morocco; Mozambique; Nepal; Pakistan; Romania; Russian Federation; Sarajevo; Serbia; Sri Lanka; Tajikistan; Tanzania; Turkmenistan; Turkey; USA.

Input into legislation: Albania; Angola; Argentina; Armenia; Australia; Belarus; Belgium; Botswana; Bulgaria; Burundi; Canada; China; Djibouti; Georgia; Germany; Ireland; Kazakhstan; Kenya; Korea, Rep. of; Liberia; Mexico; Macedonia, The former Yugoslav Republic of; Montenegro; Morocco; Namibia; Nepal; Poland; Russian Federation; Sarajevo; Serbia; South Africa; Sri Lanka; Sweden; Tanzania; Turkmenistan; USA

Training and Capacity Building: Angola; Argentina; Belarus; Belgium; Bulgaria; Canada; China; Kenya; Korea, Rep. of; Liberia; Macedonia, The former Yugoslav Republic of; Malaysia; Mexico; Montenegro; Morocco; Nepal; Sweden; Turkey; Turkmenistan; Uganda; USA; Zimbabwe

Advocacy: Australia; Belgium; Djibouti; Germany; Jordan; Mexico; Namibia; Serbia; South Africa; Sri Lanka; Uganda; USA

55. To help in the analysis of the above responses, it should be noted that UNHCR discharges its protection function in a variety of ways, and using a range of “tools”.³⁴ For the purposes of this review which is focused on ExCom Conclusions and how UNHCR uses them, for ease of presentation the uses of ExCom Conclusions by UNHCR will be grouped into two broad categories: one which reflects and supports its supervisory responsibility flowing from the Statute; the other which might be described as the Office’s efforts to “operationalize”³⁵ its international protection mandate through activities such as the development of Guidelines and Handbooks, training, mainstreaming of protection concerns into operations etc. These two categories, with related activities, will be considered separately below. Obviously, the ExCom Conclusions are one protection tool among a number of such tools. Although they fit more the image of a “legal and political protection” tool, they have been used to develop operational tools such as guidelines and handbooks; in addition they themselves have undergone, at times, a transformation of late by becoming more operational and “field-friendly”. As the primary responsibility for safeguarding the rights of refugees rests with States, UNHCR’s statutory role is to assist States discharge this obligation; hence the tools of protection developed by UNHCR may be used by States and others to assist in ensuring the effective protection of refugees.

(a) UNHCR’s Supervisory Role

56. The Office of the United Nations High Commissioner for Refugees has been entrusted by the United Nations General Assembly with the responsibility of providing international protection to refugees within its mandate and of seeking permanent solutions to the problem of refugees. The Statute of the Office (paragraph 8), annexed to General Assembly Resolution 428 (V) of 14 December 1950, specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among other things, ‘Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...’

57. States have recognized and accepted this supervisory responsibility of the UNHCR in Article 35 of the 1951 Convention: ‘The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention...’

58. Regional refugee law instruments also contain similar provisions to cooperate with UNHCR in the exercise of its supervisory responsibility.³⁶ In the case of countries that have not acceded to any international refugee instrument, the legal basis for UNHCR’s supervisory role is its Statute and those norms and principles of international law applicable to refugees that apply to all States, regardless of accession to international instruments.³⁷

³⁴ See A/AC.96/830, Note on International Protection, 7 September 1994, para. 14 ff.

³⁵ A/AC.96/930, Note on International Protection, 7 July 2000, para. 9 ff.

³⁶ For example, the 1984 Cartagena Declaration, Recommendation II (e); Directive 2005/85/EC of 23 October 2000 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJL326/13, Art. 21.

³⁷ V. Türk, *UNHCR’s Supervisory Responsibility*, pp. 8-9

59. Executive Committee Conclusions are used by UNHCR in exercising its supervisory responsibility. The following sections provide specific examples of such use in several different contexts: commenting on draft legislation and Directives, intervening in court cases and providing written advisory opinions. The worth of the ExCom Conclusions in relation to UNHCR's supervisory functions vis-à-vis signatory States has been pointed out by the Canadian Federal Court of Appeal:

[I]n Article 35 of the [Refugee] Convention the signatory states undertake to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to the recommendation of the Executive committee of the High Commissioner's Program on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself.³⁸

60. As the noted legal scholar Hathaway points out,³⁹ these Conclusions, while not matters of law, represent standards that have strong political authority as consensus resolutions of a formal body of government representatives expressly responsible for "providing guidance and forging consensus on vital protection policies and practices" (ExCom Conclusion, No. 81 (1997)).

(b) UNHCR's Comments on Draft Legislation and Directives

61. As part of its supervisory function, UNHCR often submits comments on both regional and national legislation. In relation to regional legislation, UNHCR actively contributes to the EU harmonization process by providing detailed policy and legal comments on its draft texts.⁴⁰ For example, in 2005 UNHCR provided comments on a 2004 Proposal for a Council Directive on Minimum Standards for Procedures in Member States for Granting and Withdrawing Refugee Status, which made extensive references to ExCom Conclusions in expressing UNHCR's concerns.⁴¹ However, a 2006 information note from the European Council on Refugees and Exiles made clear that UNHCR's recommendations were not taken into account.⁴² More recently, UNHCR made reference to several ExCom Conclusions in its Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007.

³⁸ *Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002), per. Evans JA, cited in James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, CUP, 2005, pp. 113-114.

³⁹ Op. cit. p. 113

⁴⁰ For a range of comments, see: <http://www.unhcr.org/protect/43672f0a2.html>

⁴¹ UNHCR, Provisional Comments on the Proposal for a Council Directive on Minimum Standards for granting and withdrawing refugee status (Council Document 14203/04, Aisle 64, of November 2004), 10 February 2005.

⁴² European Council on Refugees and Exiles, *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, October 2006.

62. In regard to national legislation, UNHCR is often involved in both drafting new legislation and commenting on proposed amendments to existing legislation. For example, in 2007 UNHCR in Bosnia and Herzegovina disseminated and effectively used ExCom Conclusions in the drafting and negotiating of a new draft Law on Movement and Stay of Aliens and Asylum Seekers. A non-exhaustive list of other examples of such use by UNHCR in 2007 includes: reference to ExCom Conclusion No. 44 in comments on proposed amendments to South Africa's Refugee Act of 1998; use of ExCom Conclusions Nos 8 and 44 in comments on legislation in Korea; extensive referencing of ExCom Conclusions in comments on draft provisions of a new asylum law in Slovenia; and references to ExCom Conclusions in recommendations on legislative reforms in Panama and draft legislation in Croatia.

(c) *Amicus Curiae* Briefs

63. In light of its supervisory responsibilities and mandate to provide international protection, UNHCR makes submissions to both national and regional courts to ensure the proper interpretation and application of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. In the course of making these oral and/or written submissions (referred to as *amicus curiae* briefs, submissions or cases for the intervener) UNHCR sometimes makes reference to ExCom Conclusions. For example, ExCom Conclusions have been referred to in relation to the detention of asylum seekers⁴³, complementary forms of protection⁴⁴, combatants and international protection⁴⁵, *non-refoulement*⁴⁶, women as a particular social group⁴⁷, gender-related persecution⁴⁸, the willful destruction of passports by asylum seekers⁴⁹, cessation under the 1951 Convention⁵⁰ and the large-scale influx of refugees and asylum seekers⁵¹.

⁴³ *Saadi v United Kingdom* 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008 in relation to ExCom Conclusion No. 44.

⁴⁴ UNHCR's statement on Subsidiary Protection under the EC Qualification Directive for People threatened by indiscriminate violence in the European Court of Justice, January 2008, pages 4 and 5, in relation to ExCom Conclusion No. 103 of 2005.

⁴⁵ UNHCR's statement on Subsidiary Protection under the EC Qualification Directive for People threatened by indiscriminate violence in the European Court of Justice, January 2008, page 7, in relation to ExCom Conclusion No. 94 of 2002.

⁴⁶ Case for the Intervener, *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and Others (FC) (Respondents)*. [2007] UKHL 49, footnote to para 3.5, in relation to ExCom Conclusion No. 92 of 2002; Written Case on Behalf of the Intervener, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55 at page 18, in relation to ExCom Conclusion No. 6 of 1977; Factum of the Intervener, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC , page 5 para 16 in relation to ExCom Conclusions No. 79 of 1996, No. 8 of 1997 and No. 82 of 1997.

⁴⁷ Case for the Intervener, *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)* [2006] UKHL 46, page 7, in relation to ExCom Conclusion No. 39 of 1985

⁴⁸ Case for the Intervener, *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)* [2006] UKHL 46, page 8, in relation to ExCom Conclusions No. 77 of 1995 at (g), No. 79 of 1996 at (o), No. 81 of 1997 at (t) and No. 87 of 1999 at (n).

64. The extent to which courts take these submissions into account – and especially the references to ExCom Conclusions therein – can be difficult to assess. In a 2006 House of Lords case, Lord Bingham commented that ‘the House derived great help from the submission of counsel [on behalf of UNHCR]’.⁵² Also in 2006, Lithuania reported in its Annual Protection Report that UNHCR effectively used *amicus curiae* briefs in individual precedent setting cases.⁵³ In some cases, judges make specific reference to ExCom Conclusions in their judgments,⁵⁴ and sometimes comment on their use.⁵⁵ For example, the dissenting judge in a 2006 High Court of Australia case adopted a holistic approach to treaty interpretation and commented, making reference to earlier Australian cases⁵⁶, that ‘due weight should therefore be given to the guidance provided by relevant UNHCR publications, including the UNHCR Handbook and the Guidelines. This does not mean that such sources are binding on this or any other court. But it does mean that, like other final courts, this Court will often derive great assistance by having access to such materials⁵⁷.’

65. However, in some cases courts make no reference to UNHCR’s submission and/or its use of ExCom Conclusions. In others, courts do not agree with UNHCR’s submissions: for example, in 2008 the European Court of Human Rights considered that a narrow interpretation of Article 5 (f) of the Convention for the Protection of Human Rights and Fundamental Freedoms whereby detention would only be permitted where a person is shown to be trying to evade entry restrictions, would be inconsistent with ExCom Conclusion No. 44 relating to the detention of asylum seekers. This use of Excom Conclusion No. 44 was not consistent with UNHCR’s written submission.

⁴⁹ UNHCR written submission in the case of *Messaoud Bennacer v Minister for Justice*, in the High Court of Appeal on appeal from the Seoul Administrative Court, 2005, page 7 para 19(b)(a).

⁵⁰ UNHCR brief as *amicus curiae*, *MIMA v QAAH of 2004 & Anor* [2006] HCA 53, in relation to ExCom Conclusions No. 65 of 1991 and No. 69 of 1992.

⁵¹ Written Case on Behalf of the Intervener, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, page 9 para 53, in relation to ExCom Conclusion No. 22.

⁵² *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)* [2006] UKHL 46, page 5, para 9.

⁵³ Pilot Format for 2006 Annual Protection Assessment, Lithuania, Reporting Year: 2006, submitted 2 March 2007.

⁵⁴ See *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)* [2006] UKHL 46 at para 84 per Baroness Hale of Richmond who refers to the 1985 Conclusions on refugee women; *MIMA v QAAH of 2004 & Anor* [2006] HCA 53 at para 118 per Justice Kirby in dissent who quotes ExCom Conclusions No. 65 and 69; *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55 at page 24 per Lord Bingham of Cornhill, who quotes from ExCom Conclusions No 6 of 1977 and No. 22 of 1981.

⁵⁵ Examples of this are provided in the section on case law.

⁵⁶ *Immigration and Naturalization Service v Cardozo Fonseca* 480 US 421 at 439 n 22 (1987); *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477 at 500 per Lord Woolf MR, 519-520 per Lord Steyn.

⁵⁷ *MIMA v QAAH of 2004 & Anor* [2006] HCA 53 at para 76.

(d) Written Advisory Opinions

66. In a similar exercise of its supervisory role and responsibility to provide international protection to refugees, UNHCR also provides written advisory opinions on the interpretation and application of 1951 Convention and 1967 Protocol Relating to the Status of Refugees. This form of advice – which often draws on ExCom Conclusions as guidance – is requested by various actors including advocacy centres,⁵⁸ human rights commissions,⁵⁹ bar associations⁶⁰ and legal practitioners.⁶¹

2. Operational Protection Tools

67. UNHCR uses a range of operational protection tools to discharge its international protection mandate; all of them rely heavily on the ExCom Conclusions.

(a) Handbooks

68. Of all of UNHCR's Handbooks, considerable importance attaches to the *Handbook on Procedures and Criteria for Determining Refugee Status*.⁶² This Handbook grew out of a request of the Executive Committee.⁶³ Various courts⁶⁴ have attached considerable importance to it as providing significant guidance on the interpretation of refugee law, including the basic requirements of the determination of refugee status as set out in ExCom Conclusion 8 (XXVIII) 1977.

69. Another key UNHCR Handbook is that covering emergencies.⁶⁵ This *Handbook for Emergencies* states that “the moral strength and standard setting value of the conclusions on international protection of UNHCR's Executive Committee (ExCom) is not limited to states

⁵⁸ See, for example the following advice to the Florida Immigrant Advocacy Centre: Advisory Opinion from the Office of the High Commissioner for Refugees (UNHCR) on Certain Aspects of the Current Practice of Detention of Asylum Seekers by the Immigration and Naturalization Service (INS), 15 April 2002.

⁵⁹ See, for example Submission to the Human Rights and Equal Opportunity Commission Inquiry into Children in Immigration Detention, Australia, 14 May 2002.

⁶⁰ See, for example Advisory Opinion by UNHCR to the Tokyo Bar Association on the Causal Linkage Between a 1951 Convention Ground and the Risk of Being Persecuted, 1 March 2006.

⁶¹ See, for example Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees, 6 January 2006; Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers, 12 September 2005; Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on Cessation and Cancellation of refugee Status, 28 February 2003.

⁶² *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, Geneva, 1979, reedited 1992.

⁶³ ExCom Conclusion 8 (XXVIII) 1977, para. (g).

⁶⁴ See Hathaway, *op. cit.*, pp. 114-116.

⁶⁵ *Handbook for Emergencies*, 3rd. ed., UNHCR, February 2007.

which are members of the Executive Committee..."⁶⁶ In the course of the Handbook, a range of ExCom Conclusions are referred to.⁶⁷

70. Resettlement is the subject of another recently revised Handbook.⁶⁸ Conclusions on Resettlement are included as annexes; Nos. 99, 100, 95, 85, 87, 90, 79, 77, 67, 61, 55, 47, 38, 34, 24, 23 and 22. Reference is made to many of these Conclusions throughout the Handbook either in the text, footnotes, as references, or in lists for essential reading.

71. The important topic of Operational Protection in Camps and Settlements is the subject of another UNHCR Handbook produced in 2006.⁶⁹ This Handbook looks at a range of issues such as administration of justice, camp security and the maintenance of the civilian character of asylum, freedom of movement, registration, sexual and gender-based violence, unaccompanied and separated children; all of these topics are extensively referenced by the use of relevant ExCom Conclusions.

72. In 1991 UNHCR published *Guidelines on the Protection of Refugee Women*. More recently (January 2008) UNHCR published a new version, *Handbook for the Protection of Women and Girls at Risk* which takes ExCom Conclusion No. 105 on Women and Girls at Risk (2006) as its framework. This Handbook makes reference to some 29 Conclusions: Nos. 9, 22, 24, 35, 39, 44, 47, 54, 64, 73, 74, 77, 78, 84, 85, 87, 88, 91, 92, 94, 98, 99, 101, 102, 104, 105, 106, and 107.

(b) Guidelines

73. In 1987, UNHCR Executive Committee Conclusion No. 47 requested a set of guidelines on refugee Children, and the 1988 'Guidelines on Refugee Children' were produced. Following the introduction of the UNHCR Policy on Refugee Children in 1993, the Guidelines were revised, see 'Refugee Children: Guidelines on Protection and Care' 1994. These remain the most up to date guidelines and are still used today.

74. Conclusions are not referred to extensively throughout the 1994 Guidelines. Reference is made to: Conclusion No. 44 in relation to proper justifications for detention; Executive Committee Conclusions and Decisions 31 (d) 1992, in relation to the basic primary education needs of refugee children; and Conclusion No. 24 in relation to family reunification for unaccompanied minors.

(c) Training Modules

75. The basic and essential UNHCR training tool is the computer-based course, *UNHCR and International Protection: A Protection Induction Programme* which was launched on 1 June 2006. It

⁶⁶ Op. cit., p. 19.

⁶⁷ For example: Conclusion 94 (LIII) 2002 on the *Civilian and Humanitarian Character of Asylum*; Conclusion No. 91 (LII) 2001 on *Registration of Refugees and Asylum-Seekers*; Conclusion No. 105 (LVII) 2006 on *Women and Girls at Risk*.

⁶⁸ *Resettlement Handbook*, Rev. ed., September 2007.

⁶⁹ *Operational Protection in Camps and Settlements. A reference guide of good practices in the protection of refugees and other persons of concern*, UNHCR, 2006.

was developed for the staff of UNHCR, NGOs, other UN organizations and governments working with UNHCR in the discharge of its protection mandate. It is obligatory for UNHCR staff, including those on Temporary Assignment, UNVs, JPOs, consultants, interns, and staff of other organizations working with UNHCR under various deployment schemes. It is available in Arabic, English, French, Russian, Serbian and Spanish. Each of its seven chapters is complemented by “Further Reading” which makes copious references to ExCom Conclusions.

76. The centre pieces of UNHCR’s training programmes are its Core Learning Programmes, one of which is its Protection Learning Programme. In addition, UNHCR has a range of self-study programmes dedicated especially to protection learning. Among these, one may point to the following:

Self-Study Module 1: An Introduction to International Protection: Protecting Persons of Concern to UNHCR, 1 August 2005.

Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee, 1 September 2005.

These Self-Study Modules which focus on some of the core concepts on which UNHCR’s work is built also give us a clue as to some of the key ExCom Conclusions which are cited throughout the Modules.

77. A further Self-Study Module looks at human rights and refugee protection:

Self-study Module 5: Human Rights and Refugee Protection, Volumes I & II (15 December 2006).

This Module takes as its premise the acknowledgement that international refugee law, international human rights law, and international humanitarian law should be applied in concert to best protect refugees and other persons of concern to UNHCR. Both volumes include numerous references to ExCom Conclusions.

C. STATES AS STAKEHOLDERS

78. Since sovereign States have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction,⁷⁰ the Government of the country of asylum is responsible for ensuring the effective protection of refugees on their territory, irrespective of whether they have acceded to the international protection instruments. UNHCR’s role in providing *international* protection requires it to ensure that States honour this obligation, as well as the principle of *non refoulement* of those persons seeking admission at their borders who may be refugees. The discharge of the High Commissioner’s international protection mandate requires the active cooperation and support of the governments concerned, as well as support in a spirit of burden sharing by other countries of the international community. This support is particularly incumbent on the

⁷⁰ See International Covenant on Civil and Political Rights, Article 2 (i)

Members of the Executive Committee who have “a demonstrated interest in, and devotion to, the solution of the refugee problem.”⁷¹

79. The Executive Committee is the only global inter-governmental forum involved in the development of international protection standards. It is in relation to these standards as expressed in Conclusions, and their use by Member States, that the current review has sought to bring some clarity. How, and to what extent, are Member States using the Conclusions? The answer would appear to be complicated by the difference among Member States between those who have acceded to the Convention and/or its Protocol and those who have not; moreover, even within a given State there is a range of actors (i.e. ministries/departments and independent national appeals tribunals) as reflected in the composition of the delegations to the Executive Committee, dealing with refugee issues. In addition, State practice vis-à-vis Conclusions is further influenced by whether a country belongs to a regional grouping that seeks to harmonize policy and practice in the area of asylum as, for example, the future Common European Asylum System (CEAS) that will encompass 27 countries. Since 1970, more and more ExCom Conclusions are addressed to States, irrespective of whether they are Members of the Executive Committee. A not insignificant number of ExCom Conclusions have been subsumed into General Assembly resolutions.

80. The Review has found it almost impossible to come up with some broad findings that are empirically based that will answer the general question as to how States are using ExCom Conclusions. One simply has impressions based on research of relevant literature, as well as input from a limited number of Member States,⁷² as well as UNHCR Annual Protection Reports that are the most comprehensive sources of information on State practice in general, and on attitudes to, or use of, ExCom Conclusions in particular.

81.. Among those Permanent Missions that provided input on the question of use, the following observations might be noted:

- Some States were open to being convinced of the Conclusions’ usefulness, if it could be shown that they were being used effectively in the Field by UNHCR and NGOs.
- There was recognition on the part of some that there were still gaps in the current protection architecture; it is these topics that should be identified as possible themes for Conclusions; in this way, such Conclusions would thus be seen as responding to a real need, thereby assuring their subsequent use.
- Rarely was there any reporting on the use and impact of a given Conclusion; some expressed interest in exploring ways to follow up on the implementation of Conclusions.

82. With the exception of 3 or 4 States who were able to give a detailed account of use and follow up, little was said by other States on use except the statement of some that they would be gladly convinced of Conclusions’ usefulness, if this could be demonstrated by what is being

⁷¹ General Assembly Resolution 1166 (XII), 5.

⁷² All Member States were informed through a communication from UNHCR on 11 March of the current Review and invited to contribute to it; the response has not been exactly overwhelming. Input has been received from only 13 States: Australia, Bangladesh, Canada, Costa Rica, Netherlands, New Zealand, Pakistan, Sweden, Switzerland, Tanzania, United Kingdom, USA,

done in the Field. Herein lays the challenge for UNHCR – but also for States. States need to share with the other Members of the Executive Committee what they are doing in regard to those Conclusions, including those taken up in General Assembly Resolutions that are addressed *inter alia* to them.

1. Parliamentarians

83. UNHCR sees parliamentarians as a key category in supporting the international refugee protection regime and as a key partner in influencing national legislation on refugee-related matters.⁷³ This is why, together with the International Parliamentary Union, it has produced the Handbook, *Refugee Protection: A Guide to International Refugee Law*.⁷⁴

84. The *Refugee Protection: A Guide to International Refugee Law*, 2001 has a twofold purpose: to inform parliamentarians about the founding principles and challenges of international refugee law and also to mobilize them, as policy makers, in the implementation of the law for securing adequate protection of refugees. ExCom Conclusions are referred to throughout the Handbook in the pursuit of both purposes. UNHCR has encouraged its staff to use the Handbook as a lobbying tool and to translate the Handbook into local languages.⁷⁵

(a) Executive Committee Conclusions

85. In the Handbook, ExCom Conclusions are described as forming part of the framework of the international refugee protection regime.⁷⁶ They are used throughout the Guide to explain the role of both States and UNHCR, to elaborate the rights of refugees and asylum seekers, to offer procedural guidance and minimum standards for the treatment of refugees in various contexts and to set out a range of challenges and needs in relation to international protection.

86. Moreover, in explaining what Parliaments and their members can do in the context of the International Refugee Protection System, the Guide states that “inspiration can be drawn from a significant body of international standards - including the Conclusions adopted by UNHCR’s Executive Committee and guidelines, produced by UNHCR, on a range of refugee-related issues - in devising national systems of refugee protection. UNHCR offices can assist parliamentarians by providing information on these standards and commenting on proposed legislation”.⁷⁷

87. It should be noted that the *Handbook on International Refugee Law for Parliamentarians* first published in English and French in December 2001, now exists also in Arabic, Chinese, Portuguese, Spanish and Russian.

⁷³ See below the paragraphs on Promotion and Dissemination.

⁷⁴ *Refugee Protection: A Guide to International Refugee Law*, Handbook for Parliamentarians No. 2, IPU-UNHCR, Geneva, 2001.

⁷⁵ Announcement published on HRC-Net, 7 December 2001; IOM/10/2003-FOM/10/2003, 30 January 2003; IOM/23/2005-FOM/23/2005, 11 March 2005.

⁷⁶ Op. cit., p. 16.

⁷⁷ Op. cit., p. 20.

2. Asylum Regime

88. One way in which ExCom Conclusions have contributed to the functioning of the international refugee protection regime has been in the way they have helped influence State practice on refugee status determination. One important and influential example of this is that of the Canadian Immigration and Refugee Board (IRB). Its Guidelines, called Chairperson's Guidelines, have addressed matters that have been raised in ExCom Conclusions; some of these Chairperson's Guidelines, especially that on *Women Refugee Claimants Fearing Gender-Related Persecution* (September 1996) have had an influence on similar Guidelines developed by other Review Boards.

Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (9 Mar. 1993; updated 25 Nov. 1996): The IRB's Guideline on Women Refugee Claimants recognizes the imperative of a gender-sensitive interpretation of the Convention. This approach to the interpretation of the Convention is consistent with the Conclusion 39 (XXXVI) 1985 dealing with refugee women. As an illustration of the consideration given to ExCom Conclusions in this particular guideline, the text makes several references to the ExCom Conclusions as well as other UNHCR ExCom policy instruments, such as the *Guidelines on the Protection of Refugee Women* and the *Note on Refugee Women and International Protection*.

- o *e.g. Women*: two sections of Guideline 4, titled "Gender-defined particular social group," and "Application of the statutory ground" draw on Conclusion No.39 (XXXVI) 1985. In the paragraph dealing with the gender-defined particular social group, paragraph K of Conclusion No.39 is quoted in full: "Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."

89. These Guidelines⁷⁸ were the first of their kind in the world, and are now being used as a model elsewhere, including the United States⁷⁹, Australia⁸⁰, the United Kingdom⁸¹ and Sweden.⁸²

⁷⁸ Nicole LaViolette, "Gender-Related Refugee Claims : Expanding the Scope of Canadian Guidelines", *IJRL*, Vol. 19 No.2, pp. 169-192.

⁷⁹ The US directives explicitly acknowledge the influence of the Canadian Guidelines: Immigration and Naturalization Service, *Gender Guidelines - Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, 7 *IJRL* 700 (1995), at 702. New rules relating to, among other things, spousal abuse were proposed in the United States: US, *Asylum and Withholding Definitions*, 65 Fed. Reg. 76588 (2000) (to be codified at 8 C.F.R. § 208); cited in article by N. LaViolette.

⁸⁰ Australia, Commonwealth Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants - Guidelines on Gender Issues for Decision-Makers* (July 1996), Special Issue *IJRL* (1997) 195; cited in article by N. LaViolette.

Other Chairperson's Guidelines that draw on ExCom Conclusions include *Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues* (30 September 1996). This Guideline also had influence on the US Guidelines, *Guidelines for Children's Asylum Claims* developed by the US Department of Justice, Immigration and Naturalization Service, 1998.⁸³ ExCom Conclusions 47 and 59 are listed in the US Guidelines, with explanations, in a Section on international guidance.

90. A third Guideline which shows the influence of the ExCom Conclusions is *Guideline 8 - Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada* (December 2006).

91. It is no surprise then, that in the light of the above the UNHCR Assistant High Commissioner, Ms. E. Feller in an address to the Canadian Immigration and Refugee Board, Refugee Protection Division National Training Seminar, Toronto, January 28 2008 should say: "[T]he Canadian system is one of the few UNHCR holds out as a model for other States to examine when they are establishing procedures [for determining refugee status]. Canada is also viewed world wide as a leader in the area of refugee status adjudication".

3. Judicial Pronouncements⁸⁴

92. The Executive Committee Conclusions are seen as representing 'collective international expertise on refugee matters including legal expertise'⁸⁵. As such, courts and tribunals in a range of jurisdictions use ExCom Conclusions, as soft law instruments, as persuasive and even authoritative sources on matters of policy, legal practice or interpretation.⁸⁶

⁸¹ Nathalia Berkowitz & Catriona Jarvis, *Asylum Gender Guidelines* (United Kingdom: Immigration Appellate Authority, 2000) [Asylum Gender Guidelines]. In Mar. 2004, the Home Office elaborated policy guidelines on gender issues for its caseworkers: Immigration and Nationality Directorate, *Asylum policy Instructions: Gender Issues in the Asylum Claim*. (Home Office: London, Mar. 2004), online: Home Office 'Asylum Policy Instructions - Gender Issues in the Asylum Claim' [Home Office Guidelines]; see N. LaViolette, op. cit.

⁸² Migrationsverket, Legal Practice Division, *Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection* (28 March 2001). The Guidelines note, at page 4: "Experience has shown that the asylum process and the determination of the right to asylum have often, in practice, been based on a male perspective. There is a need for guidelines that more specifically focus on women. Certain countries, including Canada, the United States and Australia have therefore produced special guidelines relating to female applicants for asylum. Recently, guidelines have also been adopted in the United Kingdom, and have been applied for some time by the UNHCR. The creation of these documents regarding female applicants for asylum is also in conformity with the recommendations issued by the UNHCR Executive Committee (No. 73, 1993), as well as the conclusions reached by the UN Fourth World Conference on Women (1995) and the report of the UN Special Rapporteur on Violence against Women (1998)".

⁸³ <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=3f8ec0574>

⁸⁴ The analysis of the case law in this section is the work of Rebecca Dowd; for reasons of space this is a much edited version of her work. The fuller text is available to those who may wish to use it.

⁸⁵ *Re R, Refugee Appeal No 59/91*, RSAA, 19 May 1992, at 20; see further 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*, pp. 285, 308.

⁸⁶ The introductory comments, as well as those in the subsequent paragraph are mainly drawn from a draft Note entitled "The Use of EXCOM Conclusions in the Judicial Process" prepared for UNHCR by Michael Fordham

93. UNHCR places great value on the work of the judiciary in the area of international refugee protection. “The value of the judiciary in asylum procedures is not only linked to its independence – but also to its role of setting precedent, interpreting the definition, deciding individual cases and establishing procedural standards”.⁸⁷

94. Annex 4 sets out in summary form some of the recent cases in which Conclusions have been used both by the parties before the court and the judiciary in its reasoning. They have been drawn from a range of judicial bodies such as international treaty bodies, regional courts and commissions and national courts. Note that the apparent focus on Anglo-Saxon jurisdictions was largely unavoidable due to the availability and accessibility of judgments from common law systems (as opposed to civil law systems).

95. One of the sections of Annex 4 considers the use of ExCom Conclusions in the interpretation of the 1951 Refugee Convention. There is a good argument that ExCom Conclusions are to be viewed as ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions⁸⁸, pursuant to Article 31(3)(a) Vienna Convention on the Law of Treaties⁸⁹, making allowance for the distinction between Conclusions expressed in aspirational terms and those expressed as obligations. This argument may encounter the objection that not all State Parties to the Convention are members of ExCom, nor vice versa. But, as Hathaway – who adopts a strict positivist approach to the CSR – observes, ‘the overwhelming majority of the ... states represented on the Executive Committee are parties to the Convention or Protocol, and all state parties are invited to observe and to comment upon draft proposals under consideration by the Executive Committee. While this process is no doubt imperfect, it is difficult to imagine in practical terms how subsequent agreement among 145 state parties to the Refugee Convention could more fairly be generated.’⁹⁰

96. Some national jurisdictions (e.g. New Zealand) seem more willing to use the Conclusions than others (e.g. Japan). Some judgments differentiate between the weight of Conclusions and UNHCR Guidelines, whereas others consider the use of non-binding UNHCR materials more generally. The UNHCR *Handbook on Determining Refugee Status* has already been mentioned above. Lord Steyn, in a House of Lords case in 2000, commented that ‘Contracting states are obliged to co-operate with UNHCR. It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on

QC (Blackstone Chambers), Raza Husain (Matrix Chambers) and Nina Patel (Blackstone Chambers), version of 10 March 2008).

⁸⁷ Statement of E. Feller to the IARLJ Conference in Stockholm, Sweden, 21 April, 2005: <https://www.hcrnet.ch/policies/protection/SPEECH/2005/spe02.htm>

⁸⁸ *The Rights of Refugees under International Law*, CUP, 2005, p. 54.

⁸⁹ The Vienna Convention does not have retrospective effect (see Article 4) and therefore does not technically apply to the Convention on the Status of Refugees, but the contents of Articles 31-32 represent pre-existing customary international law, and therefore do in fact apply to the interpretation of the CSR: see e.g. *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, 282D per Lord Diplock: Articles 31 and 32 do “no more than codify already existing public international law”.

⁹⁰ *The Rights of Refugees under International Law*, p. 55.

by domestic courts and tribunals.⁹¹ Whilst the summary in Annex 4 focuses primarily on direct references to ExCom Conclusions, use of the Handbook is also relevant as it was produced at the request of ExCom in Conclusion No. 8 of 1977.

97. For some of the stakeholders in the current review of Executive Committee Conclusions this growing role of the judiciary in refugee and asylum might be seen as a double-edged sword. It certainly explains the caution of some States in drafting these Conclusions. Ultimately, however, the primary stakeholders in this review, namely those in need of international protection, have everything to gain from judicial supervision and the upholding of the rule of law. While recognizing the legitimacy of State interests and pragmatic efforts to address them, “[t]here is therefore a need, also in the forced displacement area, to reinvigorate the rule of law dimension, and in particular its international foundations”.⁹²

D. NON GOVERNMENTAL ORGANIZATIONS

98. Reference has already been made to the directive of the High Commissioner in 2004 (IOM/057/2004-FOM/059/2004) entitled: “Partnerships for Protection – the Importance of Regular Dialogue and Cooperation with our NGO Partners”. This IOM/FOM took as its point of departure the fact that protecting refugees is a shared responsibility and that NGOs have a key role to play in assuring refugee protection. The discussions with NGOs and their responses to the Questionnaire⁹³ have revealed a range of concerns about the use of ExCom Conclusions.

99. Like a number of UNHCR Representatives in the Field, one major NGO, the International Rescue Committee, said: “The short answer from us is we don’t actually use the Conclusions much in the field”, but noted that IRC already incorporates a lot of the Conclusions’ recommendations in its activities. Other types of NGOs, especially those involved in advocacy, human rights and policy development, were more explicit in their use of the ExCom Conclusions; this is evident from Annex 3 which shows the use of the Conclusions by NGOs.

100. UNHCR finds in NGOs natural allies in advocating refugees’ needs with governments; but NGOs are not backward in using the ExCom Conclusions to hold both States and UNHCR accountable. This is a healthy sign. As was pointed out by one interlocutor (IRC), the UN system can be notoriously slow in incorporating ExCom Conclusions into its policy and practices, despite offering lip-service to them. The consultants have been challenged by some NGOs to find benchmarks by which to identify progress by key stakeholders in integrating the Conclusions into their policy development and operational activities.

101. The Review understandably has found very little by way of reporting on what has been done by the various stakeholders, including NGOs, in giving effect to the various ExCom Conclusions. Rather than reporting on implementation of the Conclusions *per se*, the focus

⁹¹ *R. (on the application of Adan (Lul Omar)) v Secretary of State for the Home Department, R. v Secretary of State for the Home Department Ex p. Subaskaran, R. (on the application of Aitseguer) v Secretary of State for the Home Department (No.2)* [2000] UKHL 67 [2001] 2 AC 477, p. 520.

⁹² V. Türk, “Freedom from Fear...”, p. 478.

⁹³ The Questionnaire was sent to some 150 NGOs; 30 responses were received.

should be on progress on the issues covered by the Conclusions. An impressive example in this regard has been what has been achieved by The Centre for Refugee Research of the University of New South Wales Australia in relation to the Conclusion 105 on *Women and Girls at Risk*. While the Centre recognized the achievements of the Women at Risk (WaR) programme introduced in 1989, it was able to document also the problems in its implementation, and the shortcomings in its approach. The result was a proposal written by E. Pittaway and L. Bartolomei to introduce a Conclusion on the topic: *The Case for a UNHCR Conclusion on "Refugee Women at Risk"* (2005). Having had the satisfaction of seeing the adoption of a Conclusion on the subject, and further continued financial support from the Australian Government (Australian Research Council), the Centre has now set up an International Working Group on the Protection of Refugee Women and Children to advocate for the implementation of commitments made in the Conclusion and to monitor progress on its implementation. It will report on progress at the Annual NGO Consultations. This is a demonstration of all the elements of a successful Conclusion: a clear articulation of the reasons for a Conclusion; a consideration of the topic in the Standing Committee (EC/57/SC/CRP.7 of 17 February 2006); further study of the issue in an Informal Consultative Meeting (4 May 2006); and the establishment of an implementation and reporting mechanism. This key issue of follow-up and reporting will be addressed below.

102. An issue that needs to be addressed by the broader review of ExCom Conclusions is how to give a more meaningful role to NGOs in the process of their elaboration.

E. OTHER UN AND INTER-GOVERNMENTAL ORGANIZATIONS

103. Reference has been made to UNHCR's work with the Inter-Parliamentary Union (IPU) in the production of the Handbook for Parliamentarians on *Refugee Protection: A Guide to International Refugee Law*. Consultations with other organizations (UNICEF, IOM) revealed only perfunctory consultations, if any, in the elaboration of Conclusions in which they have a legitimate interest.

104. With the exception of the recent reference to the Conclusion on the *Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* (No. 106 (LVII) 2006) in Resolution 7/10 of the Human Rights Council (HRC) on *Human rights and arbitrary deprivation of nationality* adopted during its Seventh Session (March 2008), and the instances of references to Conclusions in international treaty bodies⁹⁴, there is little indication of use by other bodies of ExCom Conclusions.

PART III. GENERAL OBSERVATIONS

105. By way on conclusion, one is now in a better position to answer some of the key questions posed in the Terms of Reference.

What are the key variables (e.g. subject matter, timing, specificity, length, dissemination) that determine whether an ExCom Conclusion is actively used by States and other stakeholders?

⁹⁴ e.g. *Elif Pelit v Azerbaijan*, CAT/C/38/D/281/2005, UN Committee Against Torture, 29 May 2007; *A. v. Australia*. CCPR/C/59/D/560/1993. UN Human Rights Committee (HRC). 30 April 1997.

On the basis of what this Review has studied, it would be difficult to point to any of these elements as influencing the use of a given Conclusion by any of the Stakeholders. Invariably operational considerations determine use of particular Conclusions, irrespective of the variables indicated. This is borne out by the diverse and varied listings given by UNHCR Field Offices and NGOs in response to the Questionnaires listed in Annex 3. There is nothing to suggest that normative or interpretative Conclusions e.g. No. 8 on *Refugee Status Determination* are generally more used than an operational Conclusion e.g. No. 105 on *Women and Girls at Risk*; certainly for some stakeholders, namely the judiciary, there is an understandable exclusive interest in the interpretative Conclusions, and there is the recognition by all that these are basic to UNHCR's core work.

106. In relation to operational Conclusions such as No. 107 on *Children at Risk*, one could ask whether it is in UNHCR's interest to be inviting such detailed involvement and micro-management from the Executive Committee. While some would argue that such detail should be left to guidelines, others, for example the Washington Office of UNHCR, expressed appreciation of certain detailed points in this Conclusion as an aid to advocacy. Perhaps the answer lies, as suggested by the Australian Government submission and the Quaker UN Office, in being more strategic in deciding what one really wants out of a Conclusion, in terms of issues that had to be covered, so as to move an issue ahead and to have the impact required at the Field level.

107. The next issue relates to possible preferences for Conclusions developed at different times:

Is there any evidence to suggest that recent Excom Conclusions have been used to a greater or to a lesser extent than in earlier periods, and if so, what accounts for the trend?

There is evidence to suggest, at least on the basis of responses to the Questionnaires that recent Conclusions i.e. those elaborated in the last 6 years, have been perhaps used more.⁹⁵ But then one has to remember that the bulk of these were drafted precisely because the Global Consultations recognized some key gaps in the current protection architecture, and in relation to which the Agenda for Protection foreshadowed the need for such Conclusions. There is an important message here: Conclusions that are seen to address protection gaps will be perceived to be of value, and their subsequent use assured. The same can be said of the more recent Conclusions on *Women at Risk* and *Children at Risk*. This having been said, the analysis of the responses to the Questionnaires, and a review of Handbooks and Guidelines still showed

⁹⁵ According to the Questionnaires, the period 2002-2007 showed 121 users of one or more of 15 Conclusions (both General or Thematic); the period 1996-2001: 47 users of 12 Conclusions; for the period 1990-1995: 49 users of 12 Conclusions; for the period 1984-1989: 82 users of 20 Conclusions; for the period 1976-1983: 78 users of 15 Conclusions. The Conclusions most referred to (with 10 or more listed users) were: 44 (*Detention of Refugees and Asylum-Seekers*: 23 users); Nos. 105 (*Women at Risk*: 17 users); 91 (*Registration of Refugees and Asylum-Seekers*: 16 users); 106 (*Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*: 14 users); 8 (*Determination of Refugee Status*: 13 users); 93 (*Reception of Asylum-Seekers in the Context of Individual Asylum Seekers*: 12 users); 107 (*Children at Risk*: 12 users); 69 (*Cessation of Status*: 10 users); 58 (*Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection*: 10 users); see Annex 3.

significant dependence on use of the earlier, classic normative Conclusions. What was interesting was the recurring use of General Conclusions.

108. Then there is the issue of effective/ineffective practice in using the Conclusions:

Can specific examples of effective and ineffective practice be identified in relation to the use of Excom Conclusions?

This is basically a strategic consideration. Use is effective when there is relevant analysis of the operational context, and a decision made on what “protection toll” might be most appropriate. Conclusions are only but one, albeit an important tool, in the “protection tool box”. Effective use of Conclusions might, at times, be non-use. The same might be said of the overall process of drafting Conclusions and their subsequent use. This is not an end in itself, but an artful exercise that calls for analysis and discernment, and willingness to honour one’s various responsibilities to refugees and those countries that support them. And this is best done when one can answer in the affirmative the question: *Will the drafting of a Conclusion on this topic respond to a real need and thereby contribute to the development of the international refugee protection regime?* Such an answer would normally assure its use which, in turn, would contribute to the strengthening of that regime.

109. One truly impressive example of effective practice is the way the Canadian Immigration and Refugee Board, through its Chairperson’s Guidelines, has been able to influence practice in other countries, on a range of issues dealt with in ExCom Conclusions. This is effective use of Conclusions: not the fact that they are cited, but rather that the issues addressed in Conclusions are taken further by States and reflected in national practice. The other example is that elaborated on above where the work of The Centre for Refugee Research of the University of New South Wales, Australia in the follow-up to Conclusion 105 on *Women and Girls at Risk*.

110. At the end of this review exercise, the dominant impression for the Evaluation Team is that Executive Committee Conclusions are playing a useful role in regard to the international refugee protection regime, and that they should continue to play such a role in today’s challenging environment in which forced human displacement continues to be a constant dimension of broader discussions relating to globalization, human rights, human security and migration.

111. The Conclusions are one way in which the international refugee protection regime, with the 1951 Convention and its Protocol at its heart, continues to be nurtured and developed and made relevant in the face of contemporary challenges to human dignity and security. There is need for all stakeholders to share how they are using the ExCom Conclusions. Provision might be able to be found for such reporting either at the June Meeting of the Standing Committee, or at the Executive Committee as a sub item under the Agenda Item 5 (a) entitled: *Reports on recent Protection Initiatives*. This could be an opportunity for States and other stakeholders to share best practices and experiences on their use of ExCom Conclusions; this would underline the ultimate purpose of Conclusions, namely as a means to provide relevant, quality protection in a constantly evolving protection environment.

Recommendation 8: The Executive Committee should consider encouraging the introduction of some form of oral reporting by States, UNHCR and other organizations on progress in responding to Executive Committee Conclusions adopted at the previous session; this could be part of statements made at the Executive Committee under the item of the agenda dealing with “General Debate”, or under the item “Consideration of Reports of the Work of the Standing Committee”.

Recommendation 9: The Executive Committee should ensure that Conclusions on specific themes contain some provision for reporting on progress on implementation of the matters covered in the Conclusion.

PART IV. CONCLUSION

112. To conclude this Review of the use of Conclusions, the opening words of a submission to the Review from a university human rights law centre are apposite: “There are a number of reasons why EXCOM Conclusions are particularly important and must be maintained. Any suggestion that they should be abolished is driven by either a lack of understanding as to their function and usefulness, or must be questioned as to motive in removing one of the key sources of law and policy in the refugee and forced migration field”.⁹⁶

⁹⁶ Submission from Alice Edwards, Lecturer in Law and Head, Forced Migration and Human Rights Unit, Human Rights Law Centre, School of Law, University of Nottingham.

ANNEX 1

REVIEW OF THE USE OF UNHCR EXECUTIVE COMMITTEE CONCLUSIONS ON INTERNATIONAL PROTECTION

Terms of reference

These Terms of Reference were drafted by UNHCR's Policy and Development and Evaluation Service (PDES), which has been designated to commission a review of the use of UNHCR Executive Committee Conclusions on International Protection. The Terms of Reference have been agreed by the Steering Committee that has been established to oversee this project.

Background to the review

UNHCR's Executive Committee (Excom) is currently engaged in an effort to improve the process whereby the Conclusions on International Protection are identified, prepared, drafted and finalized. In this regard, Excom Decision No. 1 of October 2007 "requests the Bureau, in consultation with the Office, to establish the parameters and timelines of a review or an evaluation on the use of Executive Committee Conclusions."

Pursuant to the decision, the Rapporteur of Excom undertook consultations with a cross-section of Excom members and subsequently prepared a discussion paper which was considered at an informal consultative meeting on 21 November 2007. The summary terms of reference presented below derive from these initiatives.

Aim and scope of the review

The primary aim of this review is to ascertain how key stakeholders, including states, UNHCR, other international and regional organizations, NGOs and legal practitioners, are making use of the Conclusions in their efforts to strengthen the protection of refugees and other persons of concern to the Office.

The methodology of the review will be determined by PDES and the consultant(s) engaged to undertake the project. This may include:

- structured exchanges with key stakeholders, by means of face-to-face interviews in Geneva as well as by telephone calls and e-mail exchanges to individuals in other locations;
- an examination of existing literature and information on Excom Conclusions, including an earlier survey on this topic undertaken by UNHCR's Division of International Protection Services (DIPS); and,
- a review of the format, content and subject matter of the Conclusions themselves, focusing primarily but not exclusively on the more recent Conclusions and including a mixture of normative, standard-setting, operational and thematic Conclusions.

A comprehensive list of the key stakeholders to be involved in the review will be established by PDES, the evaluation team and the Steering Committee that will be established to oversee the project.

Management of the review

PDES will manage the project and will engage a team of two or three people to complete the review, selected for their knowledge of the Excom process, the Conclusions, international refugee law and refugee protection issues.

The project will be overseen by a Steering Committee comprising the Excom Bureau, PDES, DIPS and a selected NGO. The Steering Committee will:

- advise on the Terms of Reference for the review;
- approve the selection of the review team;
- meet the team in the course of their work and monitor the progress of the project;
- review and comment on the team's draft report; and,
- ensure that the findings and recommendations of the evaluation are effectively disseminated and utilised.

The project will be undertaken in strict accordance with UNHCR's evaluation policy and will be completed by the end of April 2008.

The principal output of the review will be a report of not more than 30 pages which will be placed in the public domain.

Key questions

The review will be focused on the following key questions:

1. To what extent are Excom Conclusions known, understood and appreciated by states, UNHCR, NGOs and other stakeholders?
2. To what extent have the different types of Excom Conclusion been used by various stakeholders (a) in the formulation of policy, official positions and legal guidance (b) in the drafting of national, regional and international legislation (c) as a input to judicial and asylum proceedings, (d) as an advocacy tool, and (e) in any other ways?
3. What are the key variables (e.g. subject matter, timing, specificity, length, dissemination) that determine whether an Excom conclusion is actively used by states and other stakeholders?
4. Is there any evidence to suggest that recent Excom Conclusions have been used to a greater or to a lesser extent than in earlier periods, and if so, what accounts for the trend?
5. Can specific examples of effective and ineffective practice be identified in relation to the use of Excom Conclusions?

While the review will not focus specifically on the process employed for the preparation of Excom Conclusions, it is recognized that this issue may arise in the course of interviews undertaken by the evaluation team. The team will consequently be invited to provide a summary of key findings in relation to this matter.

**ANNEX 2:
LIST OF THOSE CONSULTED**

MEMBER STATES

Australia
Jane Duke, Counsellor (Migration)

Bangladesh
Muhamed Enayet Mowla, Counsellor

Canada
Emina Tudakovic, First Secretary

Costa Rica
Alexandra Segura Hernandez, Minister Counsellor

Egypt
Mohamed Fakhry, Counsellor

Netherlands
Yvonne Ruijters, First Secretary

New Zealand
Mary-Ann Crompton. Counsellor

Pakistan
Ahmar Ismail, First Secretary

Sweden
Ann Blomberg, First Secretary
Lisa Hallstedt Björklund, Ministry of Justice, Stockholm

Switzerland
Philippe Kaeser, First Secretary

Tanzania
Deusdedit B. Kaganda, First Secretary

United Kingdom
Corinne Kitsell, First Secretary

United States of America
Katherine Perkins, Attaché
Nicole Gaeertner Programme Officer, PRM, State Department, Washington

UNHCR FIELD RESPONSE (List as at 30 April 2008; of 90 Field Offices sent Questionnaire, 60 responded or were interviewed by phone)

| | Country | Questionnaire sent via email | Questionnaire response received | Phone interview |
|---|----------------|-------------------------------------|--|------------------------|
| 1 | Afghanistan | Yes | Yes | |
| 2 | Albania | Yes | Yes | Yes |
| 3 | Angola | Yes | Yes | |
| 4 | Argentina | Yes | | Yes |

| | | | | |
|----|---------------------------------------|--|-----|-----|
| 5 | Armenia | Yes | Yes | |
| 6 | Australia | Yes | Yes | |
| 7 | Bangladesh | Yes | Yes | |
| 8 | Belarus | Yes | Yes | Yes |
| 9 | Belgium | No (spoke before questionnaire sent out) | | Yes |
| 10 | Bosnia and Herzegovina | Yes | Yes | |
| 11 | Botswana | Yes | Yes | |
| 12 | Bulgaria | Yes | Yes | Yes |
| 13 | Burundi | Yes | Yes | |
| 14 | Cambodia | Yes | Yes | |
| 15 | Canada | Yes | Yes | |
| 16 | Chad | Yes | Yes | Yes |
| 17 | China | Yes | Yes | |
| 18 | Croatia | Yes | Yes | |
| 19 | Demcratic Republic of the Congo (DRC) | Yes | Yes | |
| 20 | Djibouti | Yes | Yes | |
| 21 | Strasbourg/Eur. Inst. | Yes | Yes | |
| 22 | Georgia | Yes | Yes | Yes |
| 23 | Germany | Yes | Yes | Yes |
| 24 | Ghana | Yes | Yes | Yes |
| 25 | Indonesia | Yes | Yes | Yes |
| 26 | Iran | Yes | Yes | |
| 27 | Ireland | Yes | Yes | |
| 28 | Italy | Yes | | Yes |
| 29 | Jordan | Yes | Yes | Yes |

| | | | | |
|----|--|-----|-----|-----|
| 30 | Kazakhstan | Yes | Yes | |
| 31 | Kenya | Yes | Yes | Yes |
| 32 | Korea, Rep. of | Yes | Yes | Yes |
| 33 | Liberia | Yes | Yes | Yes |
| 34 | Macedonia, the former Yugoslav Rep. of | Yes | Yes | |
| 35 | Malawi | Yes | Yes | |
| 36 | Malaysia | Yes | Yes | Yes |
| 37 | Mexico | Yes | | Yes |
| 38 | Montenegro | Yes | Yes | Yes |
| 39 | Morocco | Yes | Yes | Yes |
| 40 | Mozambique | Yes | Yes | |
| 41 | Myanmar | Yes | Yes | |
| 42 | Namibia | Yes | Yes | |
| 43 | Nepal | Yes | Yes | |
| 44 | New York Liaison Office | Yes | | Yes |
| 45 | Poland | Yes | Yes | Yes |
| 46 | Pakistan | Yes | Yes | |
| 47 | Romania | Yes | Yes | |
| 48 | Russia | Yes | Yes | Yes |
| 49 | Serbia | Yes | Yes | Yes |
| 50 | South Africa | Yes | Yes | Yes |
| 51 | Sri Lanka | Yes | Yes | |
| 52 | Sweden | Yes | Yes | Yes |
| 53 | Tajikistan | Yes | Yes | Yes |
| 54 | Tanzania | Yes | Yes | |
| 55 | Turkey | Yes | | Yes |

| | | | | |
|----|--------------|-----|-----|-----|
| 56 | Turkmenistan | Yes | Yes | |
| 57 | Uganda | Yes | Yes | |
| 58 | USA | Yes | | Yes |
| 59 | Zambia | Yes | Yes | |
| 60 | Zimbabwe | Yes | Yes | |

NON GOVERNMENTAL ORGANIZATIONS

ActionAid International in Bangladesh

Amnesty International (Geneva)

Anatolian Development, Turkey

Australian Catholic Migrant and Refugee Office (ACMRO)

CARD, Malawi

CEPAD, Nicaragua

HAP (Humanitarian Accountability Project)

Refugee Council, USA (RCUSA)

VIDES, Italy

Handicap International, France

ICVA

The International Catholic Migration Commission, Headquarters Switzerland (ICMC)

International Rescue Committee (IRC)

Jesuit Refugee Service, Southern Africa (JRS/SA)

Jesuit Refugee Service, Cambodia (JRS/C)

The Lutheran World Federation, DWS, Nepal

U.S. Committee for Refugees and Immigrants, USA (USCRI)

Quaker UN Office (QUNO)

Reach Out to Asia, Qatar

Refugee Center for Human Rights (RCHR)

Sudan Open Learning Organization (SOLO)

Human Rights Watch, USA (HRW)

Refugee Council of Australia (RCA)

Refugee Council, USA

Refugee Consortium of Kenya (RCK)

Refugees International, USA (REFINTL)

Women's Commission for Refugee Women and Children, USA (WCRWC)

World Vision International, Geneva, Switzerland (WVI)

UNIVERSITY INSTITUTES (Submissions)

Centre for Refugee Research, University of New South Wales, Australia (CRR)

Alice Edwards, Human Rights Centre, School of Law, University of Nottingham, UK

United Nations/Other Inter-Governmental Organizations

UNICEF (K. Landgren, Chief, Child Protection Section, NY)

IOM (M. Klein Solomon, Director, Division of Migration Policy, Research and Communications)

UN Secretariat, DESA (B. Hovy)

IPU (Kareen Jabre; Valeria Sistek)

OHCHR (Shahrazad Tadjbakah, Chief of Staff)

UNHCR Headquarters

Erika Feller Assistant High Commissioner (Protection)

George Okoth-Obo, Director, DIPS

Cathy Walker, Acting Secretary Executive Committee

Raymond Hall, Former Secretary Executive Committee

Pirkko Kourula, Former Secretary Executive Committee

Catherine Walker, Secretary Executive Committee

Jeff Crisp, Head, Policy Development and Evaluation Service (PDES)

Jose Riera, Senior Policy Adviser, PDES

Philippe Leclercq, former Chief, Stateless Unit, DIPS

Wei-Meng Lim-Kabaa, Chief, Protection Operations and Legal Advice Section (POLAS) DIPS

Mathijs Le Rutte, Snr. Legal Officer, POLAS

Karolina Lindholm-Billing, Research Officer, POLAS

Frances Nicholson, Research Officer, POLAS

Anja Klug, Research Officer, POLAS

Richard Stainsby, Chief, Status Determination & Protection Information Section

Jerome Sabety, Senior Information Officer

Naoko Obi, Chief, Community Development, Gender Equality and Children Section (CDGECS),

Terry Morel, Former Chief, CDGECS

Ron Pouwels Senior Adviser, CDGECS

Volker Türk, former Representative Malaysia, former Chief of POLAS

Larry Bottnick, Senior Legal Advisor. Americas Bureau

Ivor Jackson, former UNHCR staff member and Deputy Director, DIPS

Individual Researchers (Submissions, Interviews, Comments, etc)

Rosa Da Costa, Independent Consultant

Eve Lester Independent Consultant

Jane Mc Adam, University of New South Wales

Maria-Teresa Gil-Bazo, Newcastle University, UK

**ANNEX 3:
USE OF EXECUTIVE COMMITTEE CONCLUSIONS**

(Note: This table deals with UNHCR Field use as stated in Questionnaire replies, as well as use by NGOs as indicated in response to their own Questionnaire; the countries refer to the location of the UNHCR Field Offices; for the NGO/other acronyms, see Annex 2)

A: Thematic Conclusions

| | | |
|------------|------|---|
| 2(XXVII) | 1976 | <i>Functioning of the Sub-Committee and General;</i> Pakistan; NGO: RCHR. |
| 6 (XXVII) | 1976 | <i>Non Refoulement;</i> UNHCR: Albania; Bosnia and Herzegovina; Kazakhstan; Kenya; The former Yugoslav Republic of Macedonia. NGOs: HRW |
| 7 (XXVIII) | 1977 | <i>Expulsion;</i> UNHCR: Bulgaria; The former Yugoslav Republic of Macedonia |
| 8 (XXVIII) | 1977 | <i>Determination of Refugee Status:</i> UNHCR: Armenia; Burundi; Bosnia and Herzegovina; Croatia; Georgia; Korea, Rep. of; Liberia; Malawi; Morocco; Montenegro; Strasbourg/Eur. Instit.; Pakistan; The former Yugoslav Republic of Macedonia |
| 9 (XXVIII) | 1977 | <i>Family Reunion:</i> UNHCR; Bosnia and Herzegovina; Morocco; Uganda. NGOs: ICMC |
| 12 (XXIX) | 1978 | <i>Extraterritorial Effect of the Determination of Refugee Status;</i> UNHCR: Angola; Belarus; Georgia; Germany; Mexico; Morocco |
| 13 (XXIX) | 1978 | <i>Travel Documents for Refugees;</i> UNHCR: Georgia |
| 15 (XXX) | 1979 | <i>Refugees without an Asylum Country;</i> UNHCR: Belarus; Georgia; Korea, Rep. of; Mexico; Morocco; The former Yugoslav Republic of Macedonia. NGOs: HRW |
| 17 (XXXI) | 1980 | <i>Problems of Extradition Affecting Refugees;</i> UNHCR: Bulgaria; Germany; Kazakhstan |
| 18 (XXXI) | 1980 | <i>Voluntary Repatriation;</i> UNHCR: Afghanistan; Albania; Burundi; Djibouti; Romania; Pakistan; Tanzania; Zambia |
| 22 (XXXII) | 1981 | <i>Protection of Asylum-Seekers in Situations of Large-Scale Influx;</i> UNHCR: Bosnia and Herzegovina; Burundi; Strasbourg/Eur. Instit.; The former Yugoslav Republic of Macedonia. |

NGOs: HRW

- 24 (XXXII) 1981 *Family Reunification*; UNHCR: Albania; Belarus; Bosnia and Herzegovina; Georgia; Mexico; Morocco; Montenegro.
NGOs: ICMC
- 28 (XXXIII) 1982 *Follow-Up on the Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, inter alia, with Reference to the role of UNHCR in National Refugee Status Determination Procedures*: UNHCR: Jordan; Malawi; Morocco; Montenegro.
- 30 (XXXIV) 1983 *Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*; UNHCR: Belarus; Bosnia and Herzegovina; Croatia; Korea, Rep. of; Malawi; Morocco; Montenegro ; Strasbourg/Eur. Instit.
NGO : ICMC
- 35 (XXXV) 1984 *Identity Documents for Refugees*; UNHCR: Albania; Mexico; Nepal; Russian Federation.
NGOs: ICMC
- 39 (XXXVI) 1985 *Refugee Women and International Protection*; UNHCR: Bosnia and Herzegovina; Ghana; Turkmenistan.
NGO: CRR; ICMC;
- 40 (XXXVI) 1985 *Voluntary Repatriation*; UNHCR: Albania; Burundi; DRC Liberia; Romania; Tanzania; Zambia.
NGO: ICMC
- 44 (XXXVII) 1986 *Detention of Refugees and Asylum-Seekers*; UNHCR: Angola; Armenia; Australia; Bosnia and Herzegovina; Botswana; Bulgaria; Croatia; Georgia; Indonesia; Korea, Rep. of; Liberia; Malaysia; Mexico; Montenegro; Morocco; Nepal; Poland; Russian Federation; Strasbourg/Eur. Instit.; Tajikistan; Turkmenistan
NGOs: HRW; JRS/C
- 45 (XXXVII) 1986 *Military and Armed Attacks on Refugee Camps and Settlements*; UNHCR: Kazakhstan
- 47 (XXXVIII) 1987 *Refugee Children*; UNHCR: Australia; Liberia; Turkmenistan
NGO: QUNO

| | | |
|--------------|------|---|
| 48 (XXXVIII) | 1987 | <i>Military or Armed Attacks on Refugee Camps and Settlements</i> ; UNHCR: Nepal |
| 49 (XXXVIII) | 1987 | <i>Travel documents for Refugees</i> ; UNHCR: Albania; Liberia. |
| 51(XXXIX) | 1988 | <i>Promotion and Dissemination of Refugee Law</i> : NGO: RCHR |
| 53 (XXXIX) | 1988 | <i>Stowaway Asylum-Seekers</i> ; UNHCR: Korea, Rep. of; |
| 54 (XXXIX) | 1988 | <i>Refugee Women</i> ; UNHCR: Bosnia and Herzegovina; Ghana; Liberia; Uganda. NGO: CRR |
| 56 (XL) | 1989 | <i>Durable Solutions and Refugee Protection</i> ; UNHCR: Albania |
| 57 (XL) | 1989 | <i>Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees</i> ; UNHCR: Kazakhstan |
| 58 (XL) | 1989 | <i>Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection</i> : UNHCR: Albania; DRC; Angola; Belarus; Indonesia; Libya; Romania; Serbia; Tanzania; Zambia |
| 59 (XL) | 1989 | <i>Refugee Children</i> ; UNHCR: Jordan; Turkmenistan. NGO: RCHR |
| 60 (XL) | 1989 | <i>Refugee Women</i> : UNHCR: Bosnia and Herzegovina; Ghana. NGO: CRR; RCHR |
| 64 (XLI) | 1990 | <i>Refugee Women and International Protection</i> : UNHCR: Ghana; Korea, Rep. of; Turkmenistan. |
| 67 (XLII) | 1991 | <i>Resettlement as an Instrument of Protection</i> ; UNHCR: Libya; Romania |
| 69 (XLIII) | 1992 | <i>Cessation of Status</i> ; UNHCR: Angola; Croatia; Georgia; Germany; Ghana; Kazakhstan; Korea, Rep. of; Liberia; Libya; Serbia |
| 73 (XLIV) | 1993 | <i>Refugee Protection and Sexual Violence</i> ; UNHCR: Albania; DRC; Germany; Ghana; Zambia NGO: CRR |
| 75 (XLV) | 1994 | <i>Internally Displaced Persons</i> ; UNHCR: Afghanistan; Georgia; Pakistan; Sri Lanka. NGO: SOLO |

| | | |
|-------------|------|--|
| 78 (XLVI) | 1995 | <i>Prevention and Reduction of Stateless Persons</i> ; UNHCR: Bangladesh; Mexico; The former Yugoslav Republic of Macedonia; Sri Lanka; Turkmenistan; Zambia |
| 82 (XLVIII) | 1997 | <i>Safeguarding Asylum</i> ; UNHCR: Angola; Australia; Burundi; Ghana; The former Yugoslav Republic of Macedonia; Zambia |
| 84 (XLVIII) | 1997 | <i>Refugee Children and Adolescents</i> ; UNHCR: Turkmenistan; Uganda |
| 88 (L) | 1999 | <i>The Protection of the Refugee's Family</i> ; UNHCR: Belarus; Georgia; Korea, Rep. of; NGO: CRR; ICMC |
| 91 (LII) | 2001 | <i>Registration of Refugees and Asylum-Seekers</i> ; UNHCR: Armenia; Bangladesh; Botswana; Bosnia and Herzegovina; Djibouti; Kazakhstan; Kenya; Korea, Rep. of; Mozambique; Namibia; Serbia; South Africa; Sri Lanka; Zambia. NGO: CRR |
| 93 (LIII) | 2002 | <i>Reception of Asylum-Seekers in the Context Of Individual Asylum Seekers</i> ; UNHCR: Australia; Burundi; China; Croatia; Georgia; Indonesia; Kazakhstan; Korea, Rep. of; Mozambique; Poland; The former Yugoslav Republic of Macedonia; Zambia. |
| 94 (LIII) | 2002 | <i>Civilian and Humanitarian Character of Asylum</i> ; UNHCR: German; Jordan; Kenya; Liberia; The former Yugoslav Republic of Macedonia. NGO: CRR; QUNO |
| 96 (LIV) | 2003 | <i>Return of Persons found not to be in Need of International Protection</i> ; UNHCR: Australia; Cambodia; Korea, Rep. of; Romania; Sweden; The former Yugoslav Republic of Macedonia South Africa; Sweden |
| 97 (LIV) | 2003 | <i>Protection Safeguards in Interception Measures</i> ; UNHCR: Australia; Canada; Indonesia; NGO: RCA |
| 98 (LIV) | 2003 | <i>Protection from Sexual Abuse and Exploitation</i> ; UNHCR: Bangladesh; Bosnia and Herzegovina; Cambodia; Mozambique; Poland; Turkmenistan; Zambia; NGOs: WCRWC |

| | | |
|-------------|------|--|
| 100 (LV) | 2004 | <i>International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations</i> ; UNHCR: Bangladesh. NGO: SOLO |
| 101 (LV) | 2004 | <i>Legal Safety Issues in the Context of Voluntary Repatriation of Refugees</i> ; UNHCR: Afghanistan; Bangladesh; Burundi; China; Korea, Rep. of; Sweden; Turkmenistan. NGO: ICMC |
| 103 (LVI) | 2005 | <i>Provision of International Protection including through Complementary Forms of Protection</i> ; UNHCR: Australia; Canada; Germany; Indonesia; Korea, Rep. of; NGOs: ACMRO; HRW |
| 104 (LVI) | 2005 | <i>Local integration</i> ; UNHCR: Kazakhstan The former Yugoslav Republic of Macedonia; Mozambique; Namibia; Serbia; Sweden; NGO: RCK; USCRI |
| 105 (LVII) | 2006 | <i>Women and Girls at Risk</i> ; UNHCR: Australia; Georgia; Ghana; Malaysia; Namibia; Sri Lanka The former Yugoslav Republic of Macedonia; Turkmenistan; NGOs: CRR; ICMC; IRC; RCA; RCK; REFINTL; USCRI; WCRWC; WVI |
| 106 (LVII) | 2006 | <i>Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons</i> ; UNHCR: Australia Bosnia and Herzegovina: Canada; Georgia; Korea, Rep. of; Malaysia; Nepal; The former Yugoslav Republic of Macedonia; Turkmenistan; NGOs: ICMC; QUNO; REFINTL; IRC; JRS/C; |
| 107 (LVIII) | 2007 | <i>Children at Risk</i> ; UNHCR: Canada; China/Hong Kong; Liberia; Sri Lanka; The former Yugoslav Republic of Macedonia; NGOs: ACMRO; IRC; JRC/SA; QUNO; RCA; WCRWC; WVI; |

B: General Conclusions: Use by UNHCR (Countries listed refer to UNHCR Field Offices) and NGOs (see Annex 2 for abbreviations of NGOs)

| | | | |
|------------|--------------|------|--|
| Conclusion | 25 (XXXIII) | 1982 | NGOs: HRW |
| | 33 (XXXV) | 1984 | UNHCR: Nepal; Russian Federation |
| | 46 (XXXVIII) | 1987 | UNHCR: Australia |
| | 50 (XXXIX) | 1988 | UNHCR: Australia; Mexico; NGO: USCRI |
| | 55 (XL) | 1989 | UNHCR: Australia |
| | 61 (XLI) | 1990 | UNHCR: Jordan |
| | 65 (XLII) | 1991 | UNHCR: Australia; Serbia. NGO: USCRI |
| | 68 (XLIII) | 1992 | UNHCR: Australia; NGO: CRR |
| | 71 (XLIV) | 1993 | UNHCR: Australia; Kazakhstan; Korea, Rep. of; Tajikistan; Russian Federation. |
| | 74 (XLV) | 1994 | UNHCR: Kazakhstan; Romania; South Africa; Tajikistan. NGO: CRR |
| | 77 (XLVI) | 1995 | UNHCR: Kenya |
| | 79 (XLVII) | 1996 | UNHCR: Mexico; NGOs: CRR; HRW |
| | 81 (XLVIII) | 1997 | UNHCR: Australia; Jordan; Russian Federation; NGOs: HRW; RCHR |
| | 85 (XLIX) | 1998 | UNHCR: Australia; Bosnia and Herzegovina; Korea, Rep. of; NGOs: HRW |
| | 87 (L) | 1999 | UNHCR: Russian Federation. NGO: CRR; JRC/SA |
| | 89 (LI) | 2000 | UNHCR: Australia |
| | 90 (LII) | 2001 | UNHCR: Bosnia and Herzegovina; China; Nepal |
| | 95 (LIV) | 2003 | UNHCR: Angola. NGO: HCHR; VIDES |
| | 99 (LV) | 2004 | UNHCR: Angola; Cambodia; Georgia; Korea, Rep. of; NGOs: HRW; JRC/SA; RCK; QUNO |
| | 102 (LVI) | 2005 | NGO: ACMRO; SOLO; USCRI |

ANNEX 4: JUDICIAL PRONOUNCEMENTS

Set out below in summary form are some of the recent cases in which Conclusions have been used both by the parties before the court and the judiciary in its reasoning. They have been drawn from a range of judicial bodies such as international treaty bodies, regional courts and commissions and national courts. They are grouped into 4 categories:

(a) Conclusions used in the interpretation of domestic, regional and international legislation:

- Complaint Filed by B of W v. Administrative Decision No. 221.553/0-V/13/01 Issued on 22 May 2001 by the Independent Federal Asylum Review Board concerning Articles 7 and 8 of the 1997 Asylum Act (Additional Party: Federal Minister of Interior). 2001/01/0402-10. Austria: Higher Administrative Court (Verwaltungsgerichtshof), 3 December 2003. The Court used ExCom Conclusion No 64 in interpreting Article 27 of Austria's Asylum Act. This Conclusion was expressly referred to in the explanatory notes on Article 27 (accompanying government bill, 686, appendix to National Council record 20, 27th legislative period) (p. 6).
- Z. v. The Minister for Justice, Equality and Law Reform, James Nicholson Sitting as the Appeals Authority, Ireland and the Attorney General. IESC 14. Ireland: Supreme Court. 1 March 2002. The Court considered ExCom Conclusion No 44 in assessing how the appellant's claim for refugee status was dealt with, considering that the Refugee Act was not applicable.
- Decision Number: U-I-200/00-6. U-I-200/00-6. Slovenia: Constitutional Court. 28 September 2000. Slovenia's Ministry of Interior referred to its use of ExCom Conclusions in response to constitutional complaints about domestic legislation: it followed ExCom recommendations by offering citizens of Bosnia and Herzegovina de facto protection, and also when drafting the Regulation (page 2).

The Court also noted that '[w]hen considering a large-scale refugee situation, the republic of Slovenia acted in accordance with the recommendations of the UNHCR Executive Committee concerning the actions of states when a large-scale influx of aliens occurs,' making specific reference to Conclusions 19 and 22.

- Advisory Opinion on Juridical Condition and Human Rights of the Child. OC-17/02. Inter-American Court of Human Rights (IACrtHR). 28 August 2002. In giving its advisory opinion, the Court made specific reference to ExCom Conclusion No. 44 to assist in the interpretation of the American Convention on Human Rights. It set out the four situations in which detainment of an individual might be considered necessary, as identified in this Conclusion, and then adapted them for the situation of minors in the American context.
- Saadi v. United Kingdom. 13229/03. Council of Europe: European Court of Human Rights, 29 January 2008. The Court included the text of ExCom Conclusion No. 44 in its judgment when considering the 1951 Convention. The Court commented (para. 34) that this Conclusion "was expressly approved by the General Assembly on 4 December 1986 (Resolution 41/124)." The Court used this Conclusion in the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms.

(b) Conclusions used in the interpretation of the 1951 Refugee Convention (and States' obligations thereunder)

- *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (NZ CA, Apr 16, 2003). ExCom Conclusion No 44 was used as a guide for the Court to assess New Zealand's obligations under the Refugee Convention, as incorporated into domestic legislation. The court agreed unanimously (para. 4) that the judicial discretion in s128 (13B) of the Immigration Act recognizes the opinion expressed by the Executive Committee in ExCom Conclusion No. 44. Two judges agreed (para. 8) that '[i]t is appropriate when assessing the obligations under the Refugee Convention to have regard to ExCom Conclusion No. 44 and it is also appropriate to have regard to the UNHCR "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers" (February 1999) and to the UNHCR "Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice" (Standing Committee, 15th Meeting, 4 June 1999, EC/49/SC/CRP13) (see paras. [100], [111] & [271]).'

One judge, McGrath J stated that '[t]here is a helpful and authoritative elaboration of the content of that very generally expressed duty [Article 31.2 of Refugee Convention] in the 1986 statement of the Executive Committee of the United Nations High Commissioner for Refugees Programme. Its value derives in part from the fact that the Executive Committee is itself an assembly of states which has debated the issue and settled on a formal statement concerning it' (para. 100). ExCom Conclusion No 44 was attached to McGrath's judgment as a schedule.

- *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*. [2006] UKHL 46. *United Kingdom: House of Lords, 18 October 2006*. In considering gender-related persecution and membership of a particular social group, the House of Lords placed strong reliance on both ExCom Conclusions and UNHCR Guidelines.
- *Attorney-General v E Court of Appeal, Wellington CA282/99; [2000] 3 NZLR 257*. An issue in this case was whether the UNHCR Guidelines on Detention of Asylum-Seekers and related documents were relevant material for District Court Judge to consider under Immigration Act 1987. The majority answered this in the affirmative, and reinforced the role of ExCom Conclusions in interpretation of the 1951 Convention: 'the guidelines do not appear to have the status of documents such as the conclusions of the Executive Committee for the United Nations High Commissioner for Refugees which purport to interpret provisions of the Convention' (para. 38).

The dissenting judge commented that ExCom Conclusion No. 44 'was designed to address the ambiguity in Article 31(2)' (para. 95), noting that 'explicit endorsement by the General Assembly' vests it with 'considerable weight' (para. 96). He included text from the Conclusion in his judgment, and set out the four grounds on which detention can be considered necessary.

Importantly, this case has been referred to subsequently by the High Court of New Zealand as recognition of the authority of the Executive Committee: *Refugee Council New Zealand Inc, The Human Rights Foundation of Aotearoa New Zealand Inc and "D" v. Attorney General (Interim Judgment)*. M1881-AS01. New Zealand: High Court. 31 May 2002, para. 47.

- Hassan Ch v. Office for Repatriation and Aliens. BMU-III-211/93. Poland: Department of Refugee and Asylum Proceedings. 10 September 2002. The Court used ExCom Conclusion No. 69 in interpreting the cessation clauses in Article 1 of the Geneva Convention.
- MIMA v QAAH of 2004 & Anor [2006] HCA 53 (15 November 2006) (Australia). Whilst only the dissenting judge in this case made reference to ExCom Conclusions, his comments about the use of non-binding UNHCR materials, especially considering his extensive citations of earlier authorities, are most useful. He commented that 'This Court has frequently resorted to the UNHCR Guidelines and the Handbook in construing and applying the Convention.⁹⁷ This has been done because of the expertise of the UNHCR in the application of the Convention' (para. 76).

Whilst acknowledging the non-binding nature of UNHCR publications, he commented that 'this Court will often derive great assistance by having access to such materials⁹⁸' (para. 76). 'In effect, in deciding cases such as the present, national courts are exercising a species of international jurisdiction⁹⁹. The more assistance courts can receive from the relevant international agencies, in discharging such international functions, the better' (para. 78).

- Myanmar v. Japan (Minister of Justice). Heisei 14 (2002) Gyo-U (Administrative Case) No. 19. Japan: District Courts. 15 September 2003. The Court commented that 'interpretation of a treaty means clarifying the meaning and scope of the provisions of the treaty in a way consistent with the Contracting Parties' will. The Executive Committee of the UNHCR is nothing more than an independent body, not established under the Convention, whose views cannot have binding forces on the Contracting Parties outside their agreement.' (page 25)

The court considered ExCom Conclusion No 15, as invoked by the plaintiff, stating that 'it is no more than guidelines to the effect that states should use their best endeavors to grant asylum to refugees without an asylum country' (page 6). It also considered Conclusion No 30 which provides that 'states can establish special arrangements to deal with manifestly unfounded applications speedily. Thus the establishment of limitations on periods for applications is not prohibited by the Executive Committee, let alone by international customary law.'

(c) Conclusions used as evidence of customary law/consensus amongst States

- Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent). [2006] UKHL 46. United Kingdom: House of Lords. 18 October 2006. ExCom Conclusion No 39 was referred to as recognition by the world community of the special problems of refugee women.

⁹⁷ See, e.g., *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at 20 [61]; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at 545 [21]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1008-1009 [80]-[82]; 207 ALR 12 at 35-36; *Re Woolley*; *Ex parte Applicant M276/2003* (by their next friend GS) (2004) 79 ALJR 43 at 67 [107]; 210 ALR 369 at 399.

⁹⁸ *Immigration and Naturalization Service v Cardozo Fonseca* 480 US 421 at 439 n 22 (1987); *R v Secretary of State for the Home Department*; *Ex parte Adan* [2001] 2 AC 477 at 500 per Lord Woolf MR, 519-520 per Lord Steyn.

⁹⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622 [168], citing Brownlie, *Principles of Public International Law*, 5th ed (1998) at 584.

- A. v. Australia. CCPR/C/59/D/560/1993. UN Human Rights Committee (HRC). 30 April 1997. ExCom Conclusion No 44 was used by counsel for the author of the communication, to support an argument that ‘international treaty law and customary international law require that detention of asylum-seekers be avoided as a general rule. Where such detention may become necessary, it should be strictly limited’ (para. 3.1). The State Party responded that the instruments and practice invoked by counsel (including ExCom Conclusion No. 44) fall far short of proving the existence of a rule of customary international law (para. 7.7). Whilst the Committee found violations of the Convention by Australia, it did not find any support for the contention that there is a rule of customary international law that would render all detention of individuals requesting asylum arbitrary.

(d) Conclusions used to assess the role of decision-makers

- Bugdaycay v. Secretary of State for the Home Department; NelidowSantis v. Secretary of State for the Home Department; Norman v. Secretary of State for the Home Department; In re Musisi. [1987] 1 AC 514, United Kingdom: House of Lords, 19 February 1987. The court stated that the Secretary of State is not under an obligation to have regard to the recommendations made by the UNHCR Executive Committee where this would override express terms of domestic legislation, commenting that such a situation would be ‘plainly untenable.’

30 April 2008