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Thematic session on the “Governance of Refugee Law: Suggestions and Perspectives”

The preoccupation over the “governance of refugee law” is entirely understandable from the perspective of the two inter-related drivers of this concern. On the one hand, on the global level, what often appears as almost a state of impunity in transgressing the obligations of that regime – denial of admission; detention; very parlous conditions of treatment; etc - inevitably brings into question the system that should assure compliance.

On the other hand, the system of oversight and compliance established within the 1951 Convention and its 1967 Protocol thus comes to be seen as at best only a patchy one, both in its own terms and when contrasted with the more conventional approaches for global oversight of human rights or other treaty obligations, namely:

- By other States (through the ICJ; Inter-State Complaints to Treaty Bodies; or Assessments)
- By or on behalf of the Organization or Treaty Body (through State Reports; Supervision based on Fact Finding (by Special Rapporteurs, Policy Reviews, Review Conferences or Inspection Reports); or Supervision based on a request for an Advisory Opinion (Article 65 of the ICJ). (Likewise regional judicial tribunals such as the Inter-American Court of Human Rights and the European Court of Justice)
- Supervision based on an Individual Complaints Procedure.

The system of monitoring compliance of the 1951 Convention is visited upon UNHCR first through its Statute (Article 8) and, as far as the Convention itself is concerned, Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

States are obliged to co-operate with UNHCR in respect of this role and, particularly, to provide it the relevant information. Articles 38 of the Convention and IV of the Protocol envisage that an advisory opinion could be sought from the ICJ on a matter concerning the application of those instruments.

The criticisms are legion:

- The supervisory role of UNHCR is not defined.
- It is not elaborated at all in terms of actual activities.
- It does not come with any established procedure.
- It comes unaccompanied with any enforcement mechanism or authority.
- As also an operational agency for protection delivery, UNHCR can neither effectively nor critically discharge a real supervisory, let alone public monitoring and an action forcing, role.
- UNHCR has to balance the consequences of such a robust role with the necessity to maintain good relations with Governments so as to be able to operate.

- Thus the reports it draws up on State practice are only confidential to it and are not available for public scrutiny.
- Moreover, delimited under both the Office's Statute and the Convention to only refugees, UNHCR's supervisory role does not thus cater for the much wider responsibilities with respect to the other persons with which it works.

Several proposals have therefore been made to improve the system of "governance" of the conventional refugee system, including, most notably, as part of the Global Consultations which considered proposals, on one hand, by NGOs for the establishment of an Advisory Group for the High Commissioner, and another by the current Special Representative for the Human Rights of Internally Displaced Persons, Professor Walter Kaelin, who proposed a kind of peer review mechanism imbedded within the Executive Committee of the High Commissioner's Programme. Styled a "Sub Committee on Review and Monitoring" it would be comprised of member States and work principally through reports that would be prepared on countries selected by UNHCR.

In respect of these calls for reform, I would like to put some seven reflections on the table for our discussions today.

- First of all, although we have heard again today an echo of the perceived problems with the oversight system as it stands now, what exactly is being proposed in terms of change now? If those proposals would mirror any of the conventional prototypes listed earlier, does the experience thus far under those mechanisms offer moving inspiration or confidence that, applied in the refugee context, they would dramatically, materially and robustly mitigate rogue, derelictual or fortuitous transgressions by States of the rights and obligations owed to asylum-seekers and refugees?
- Secondly, already in 1992 within the EXCOM context and later under the Global Consultations, there were attempts at generating dialogue on improving the system. Both these efforts resulted principally in only very tepid momentum. It could be drawn from this experience that a further initiative of reform would at best take a considerable amount of time and effort even before showing any real results one way or the other, never mind the ones that would be sought. Should we therefore leave this room today with, first, a sense that it is only in the reform of enforcement or governance mechanisms at the global level that the ultimate solutions lie? Does that mean that, until those reforms are achieved, nothing can be done already now to bring about significant results on this question?
- In this respect, my third observation is that there are theatres which are already at play today, right now, which are just as critical, even more immediately and profoundly relevant, to the question of governance, or, more particularly, performance on obligations to protect asylum-seekers and refugees. Those theatres may thus be even the more urgent ones to look at for purposes of the changes we must engineer on the issue of compliance. They may, in fact, be more amenable to both pressures for the achievement of results. Thus, even as we might move forward with the reform agenda on the global level, it seems imperative to look even more closely and immediately at these more apt arenas.

- My point number four concerns the first of these theatres, namely a focus on the national levels. With due respect to legal, policy and operational developments at the global level, it is ultimately in the manner in which those developments get or do not get expression at national levels that will often have by far the most important effects for asylum-seekers and refugees. This is especially the case with respect to the development and implementation of national legislation, policies, and institutional and operational structures and arrangements. The way in which judicial structures contribute to the enforcement of or realization of standards is another crucial dimension of the point being made here. There is therefore urgency to ensure that the right types of action – critical advocacy, capacity-building, pressure, etc- to positively influence legislative, policy, institutional and operational developments and accountability on all these questions. Effort should be made to leverage a rights-friendly role by players, including NGOs, in national courts (through amicus briefs, rule of law related initiatives or legal counseling) and otherwise to project refugee concerns and needs in a proper light and create space for asylum. These efforts merit to be mobilized and taken at EVERY national level, irrespective of the status quo at the international level.
- My fifth point relates to the regional level of what I have just mentioned. There is no question that in some regions at least, by far the most telling and impactful legal, policy, institutional and operational developments for asylum-seekers and refugees that can be broadly clustered under the notion of “governance” have and continue to take place not at the global, but principally at the regional level. Moreover, these developments are taking place in real time and at high and furious pace. It is likewise at those levels that we need to ensure that efforts of the type that I have urged are also driven forward.
- For my sixth and seventh points, I will return to the global level. For point number six, let me focus, first, on the development of international law broadly and norms and standards that affect asylum-seekers and refugees. On the global plane, and even if only at the “soft law level” these developments are taking place critically within the context of the Executive Committee of UNHCR, and, particularly, through the Conclusions process. This is therefore a likewise critical touch stone of where refugee law governance is taking place today. From the point of view of the questions that NGOs would be concerned about, for instance the issue of participation and inclusivity in the development of these legal norms, this is a vital arena that should command interest and attention in relation to the issue of refugee law governance.
- For my seventh and final point, let me return to the question framed for our discussion today, namely reform of the governance system for the global refugee regime. My point is the following: What is the outcome sought to emanate from this discussion? I have, today, appeared here to speak to this question as a point of interest framed by NGOs. But what do the NGOs wish to result from this dialogue, and what is the reaction or even action expected of UNHCR? If the question relates to whether UNHCR would support efforts to engineer a more effective system of monitoring and assuring compliance and accountability for State obligations to refugees, that is an objective that the Office has broadly supported as I have indicated already. I am sure that the Office would do likewise still now, but I would add two important riders:

- ✓ The first one is that the broad question of monitoring and enforcement should not be taken as one and the same thing as UNHCR's supervisory role, which, it would be the Organizations position, should be strongly preserved.
- ✓ Secondly, at this stage of the process, it would be important to agree on the principles according to which the template for a new system would be established. In 2002, UNHCR agreed with those proposed by Professor Kaelin, which I will mention here briefly without elaboration, namely: (i) independence and expertise; (ii) objectivity and transparency; (iii) inclusiveness (including NGO stakeholders of course); (iv) operationality; and (v) complementarity. These are the same working principles the Office would support now.

Thank you very much for listening to me.

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