Article 35 of the 1951 Convention/Article II of the 1967 Protocol

Co-operation of the National Authorities with the United Nations = Coopération des Autorités Nationales avec les Nations Unies

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Article 35 of the 1951 Convention/ Article II of the 1967 Protocol

Article 35 (Co-operation of the National Authorities with the United Nations/ Coopération des Autorités Nationales avec les Nations Unies)

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

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,
(b) the implementation of this Convention, and
(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

1. Les États Contractants s'engagent à coopérer avec le Haut Commissariat des Nations Unies pour les réfugiés, ou toute autre institution des Nations Unies qui lui succéderait, dans l'exercice de ses fonctions et en particulier à faciliter sa tâche de surveillance de l'application des dispositions de cette Convention.

2. Afin de permettre au Haut Commissariat ou à toute autre institution des Nations Unies qui lui succéderait de présenter des rapports aux organes compétents des Nations Unies, les États Contractants s'engagent à leur fournir dans la forme appropriée les informations et les données statistiques demandées relatives:

a) au statut des réfugiés,
b) à la mise en oeuvre de cette Convention, et
c) aux lois, règlements et décrets, qui sont ou entreront en vigueur en ce qui concerne les réfugiés.

Article II (Co-operation of the National Authorities with the United Nations/ Coopération des Autorités Nationales avec les Nations Unies)

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

1. Les États parties au présent Protocole s'engagent à coopérer avec le Haut Commissariat des Nations Unies pour les réfugiés, ou toute autre institution des Nations Unies qui lui succéderait, dans l'exercice de ses fonctions et, en particulier, à faciliter sa tâche de surveillance de l'application des dispositions du présent Protocole.

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2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees,
(b) The implementation of the present Protocol;
(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

2. Afin de permettre au Haut Commissariat ou à toute autre institution des Nations Unies qui lui succéderait de présenter des rapports aux organes compétents des Nations Unies, les États parties au présent Protocole s'engagent à leur fournir, dans la forme appropriée, les informations et les statistiques demandées relatives:

a) Au statut des réfugiés,
b) A la mise en oeuvre du présent Protocole;
c) Aux lois, règlements et décrets qui sont ou entreront en vigueur en ce qui concerne les réfugiés.

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A. Function of Article 35 and Article II

Article 35 forms part of Chapter VI of the 1951 Convention which comprises 'Executory and Transitory Provisions', namely Art. 35 (Co-operation of the National Authorities with the United Nations), Art. 36 (Information on National Legislation), and Art. 37 (Relation to Previous Conventions). Article 35 is clearly of 'executory' nature. It serves to secure the co-operation and ongoing liaison between States parties and UNHCR as well as to connect the responsibilities of States as laid down in the 1951 Convention with those of UNHCR, pursuant to the way the protective regime as created in the wake of the Second World War was devised. States were to provide protection to refugees on the basis of the 1951 Convention 1

and UNHCR to provide a complementary form of international protection that explicitly includes supervising the application of international conventions for the protection of refugees, including the 1951 Convention.

2 More specifically, Art. 35 requires States parties to the 1951 Convention to cooperate with UNHCR in order to enable UNHCR to exercise its functions, in particular that of supervising the application of the provisions of the 1951 Convention. Article 35 obliges States not only to recognize the supervisory function of UNHCR but also to facilitate it. Although the second paragraph, which requires States to furnish UNHCR with relevant information and data, relates *stricto sensu* to another task of UNHCR—reporting to the competent organs of the UN—the fact that States have to supply information concerning the implementation of the 1951 Convention contributes to and substantially reinforces UNHCR's supervisory function.

3 The same applies, *mutatis mutandis*, to Art. II of the 1967 Protocol.[1] The structure of the 1967 Protocol, however, differs from that of the 1951 Convention: it is not divided into Chapters, consequently the categorization of Art. II as belonging to the category of executory provisions is lacking. Article I, para. 1 incorporates into the 1967 Protocol the substantive provisions of the 1951 Convention laid down in its Arts. 2 to 34 inclusive. The remaining provisions of the 1951 Convention have been given separate articles in the 1967 Protocol in accordance with the decision to position the Protocol as an independent instrument, adherence to which would not be limited to States parties to the Convention but also open to other States.[2]

4 The function of Art. 35 of the 1951 Convention and Art. II of the 1967 Protocol is identical. The drafting history of Art. 35, however, differs of necessity from that of Art. II and that may, in theory, affect the interpretation of Art. II in the sense that the *travaux préparatoires* of the 1951 Convention are *stricto sensu* not available as supplementary means of interpretation with respect to the 1967 Protocol,[3] with the exception of the substantive articles of the 1951 Convention which are incorporated by reference in the 1967 Protocol. In view of the fact that the 1967 Protocol, even while explicitly drafted to constitute an independent instrument, only aimed to extend the temporally limited personal scope of the 1951 Convention, such a strict view seems overly legalistic.[4] Moreover, it is hardly sustainable in view of the fact that the *travaux préparatoires* pertaining to Art. II in essence consist of the observation that Art. II reproduces, *mutatis mutandis*, Art. 35 of the 1951 Convention.[5] The *travaux préparatoires* of Art. 35 are consequently indispensable to Art. II. Unless indicated otherwise, the following analysis proceeds therefore throughout from the identical function, purport, and meaning of Art. 35 of the 1951 Convention and Art. II of the 1967 Protocol.

[1] *Cf.* UN Doc. A/AC.96/346 (1966), para. 14.
[2] *Cf. inter alia* UN Doc. A/AC.96/INF.40 (1965), para. 5 (a); UN Doc. A/AC.96/346 (1966), para. 12.
[3] *Cf.* Art. 32 Vienna Convention on the Law of Treaties (VCLT).
[4] It is in addition a rather academic view, since most States are both party to the 1951 Convention and the 1967 Protocol.
[5] UN Doc. A/AC.96/346 (1966), para. 14, and Annex II, pp. 1–2; UN Doc. A/AC.96/SR.141–152 (1966), pp. 69, 70. Art. II was, however, discussed in the context of Art. VII, para. 1 of the 1967 Protocol on reservations, *cf. infra*, MN 18.

B. Historical Development

I. Instruments Prior to the 1951 Convention

From a historical point of view, Art. 35 is an innovative provision which does not have pre- **5**
cursors in earlier treaties concerning refugees.[6] The 1951 Convention is not, however, the first human rights instrument that comprises a form of external supervision: the International Labour Organization (ILO) already, and long before 1951, entrusted supervision of conventions and recommendations in 1926 to a Committee of Experts on the Application of Conventions and Recommendations.[7]

II. Drafting History of Articles 35 and II

A preliminary draft of the Convention (prepared in consultation with the International Refugee **6**
Organization (IRO)) that was submitted by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems with a view to facilitating its work,[8] comprised a chapter entitled 'Co-Operation with the High Commissioner for Refugees'.[9] This chapter comprised two articles (26 and 27) with comments. The first one provided that the 'High Contracting Parties' undertake to facilitate the work of UNHCR and to maintain constant relations with him as long as his office exists.[10] The accompanying comment explained that it is essential that there should be close and constant cooperation and trust between UNHCR and governments by means of continuous relations.[11] The second article provided that the Contracting States undertake to designate a national authority to compile and communicate to the High Commissioner statistics concerning refugees, and the laws and regulations concerning their status, and all information regarding their condition, and the application of the present Convention.[12] The comment on this draft article explained that the national authority referred to would be responsible for liaison with the High Commissioner.

France also submitted a proposal for a draft convention. The quite elaborate Preamble of **7**
this draft explains that the provisions of the convention intended to confer on refugees the indispensable minimum. The High Commissioner should therefore, it was added, bear in mind that his duty is to see not only that each State party effectively applies the present provisions but that they are given a wider scope by means of private agreements, amendments to the present convention, or the establishment of a new one.[13] The body of the proposed

[6] Weis observes that under Art. 35 cooperation with UNHCR or its successor in the exercise of its functions, in particular the facilitation of its duty of supervising the application of the provisions of the 1951 Convention, 'becomes, for the first time, a contractual obligation of the Contracting States', Weis, *Refugee*, p. 362.

[7] This committee, which consists of independent experts, examines the information and reports submitted by States members of the ILO under Arts. 19, 22, and 35 Constitution of the ILO on the measures taken with regard to conventions to which they are party and communicated recommendations.

[8] This Committee had been established pursuant to E/Res/248(IX) (1949) to consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons, and if considered desirable, draft such a convention.

[9] UN Doc. E/AC.32/2 Annex (1950), p. 49.

[10] *Ibid.* (draft Art. 26).

[11] *Ibid.*

[12] *Ibid.* (draft Art. 27).

[13] UN Doc. E/AC.32/L.3 (1950), p. 2.

draft convention comprised two articles on cooperation with UNHCR. In the first one, the Contracting States undertake to facilitate the work of UNHCR, and in order to enable UNHCR to report annually to the UN, provide it with data and information concerning the condition of refugees and the implementation of the convention. The second draft article focused on designating a national authority.[14] Since both draft texts covered the same ground with respect to cooperation with UNHCR, the draft articles of the Secretary-General and France were examined jointly.[15]

8 The first discussion focused on the terms of reference and powers of UNHCR. The representative of Israel observed that providing information on the implementation of the 1951 Convention as provided in the French draft ascribed to UNHCR greater powers than so far granted by the General Assembly.[16] It was countered by the representative of the IRO who pointed to the annex to the relevant General Assembly resolution that already authorized the High Commissioner to supervise the provisions of conventions providing for the protection of refugees.[17] The Chairman felt the Committee could freely adopt the text since the General Assembly would review the draft convention anyway. The second issue that was addressed pertained to the life span of UNHCR. In view of the expectation that the 1951 Convention would outlive the Office of the UNHCR, it was suggested to redraft the relevant provisions and refer to UN agencies to secure their substance even if the Office were to be terminated.[18] This proposal was accepted, and the two French draft articles were combined into a single article,[19] and moved to a chapter of the draft 1951 Convention that was entitled 'Implementation and Transitory Provisions'.

9 At the suggestion of the Chairman, the first paragraph of the single article, then draft Art. 30, was revised in order to emphasize the need for contact between States and the agencies charged by the UN with the international protection of refugees.[20] The resultant text of draft Art. 30 on cooperation of the national authorities with UNHCR ran as follows:

1. The Contracting States shall maintain contact with the agencies charged by the United Nations with the international protection of refugees such as the United Nations High Commissioner for Refugees and shall facilitate their work.
2. In order to enable such agencies to make reports to the competent organs of the United Nations, the Contracting States shall provide them in the form prescribed with data, statistics and information concerning:
   (a) The condition of refugees,
   (b) The implementation of this Convention, and
   (c) All regulations, laws, decrees etc., made by them concerning refugees.[21]

10 The United States considered the wording of the first paragraph too hesitant to bind States to cooperation with UNHCR: since the ECOSOC had recognized the important link between

[14] *Ibid.,* p. 10.
[15] UN Doc. E/AC.32/SR.21 (1950), para. 37.
[16] *Ibid.,* para. 39, referring to the terms of reference comprised in GA Res. 319 A(IV) of 3 December 1949.
[17] *Ibid.,* para. 40.
[18] *Ibid.,* para. 42 (representative of Denmark).
[19] *Ibid.*, paras. 44, 47.
[20] UN Doc. E/AC.32/SR.25 (1950), para. 54.
[21] UN Doc. E/1618-E/AC.32/5 (1950), p. 25.

the provisions of the 1951 Convention and the functions of UNHCR,[22] there was no reason for this hesitancy.[23] In order to remove the hesitant tone, the United States proposed to revise paragraph 1 as follows:[24]

> The Contracting States undertake to cooperate with the United Nations High Commissioner's Office for Refugees, or any successor agency charged by the United Nations with the international protection of refugees, in the function of supervising the application of the provisions of this Convention.

In response to the suggestion that it would be inappropriate to refer to a successor to a functionary who was on the point of taking office,[25] he proposed, in addition, to replace the words 'or any successor agency' by the words 'or any other agency'.[26]

11 At this stage the first paragraph focused exclusively on the supervisory function of UNHCR and not on any other function of the agency. The representative of Belgium regarded the pertinent provision as being somewhat infelicitous and sought to insert a more general reference to undertaking to facilitate the work of UNHCR.[27] Another change was suggested by the representative of France, who wanted to substitute the phrase 'in the form prescribed' in Art. 30, para. 2 for the words 'in the requisite form' in order to avoid the suggestion that UNHCR had some powers *vis-à-vis* States, whereas the intention was merely to ensure that States would submit the information supplied in a manner sufficiently uniform to facilitate the work of UNHCR.[28] The suggestions and changes that were made during this phase of the drafting are illustrative of the fact that the drafters explicitly took account of the (draft) Statute of UNHCR;[29] the terms of reference of UNHCR remained guiding in the drafting process.[30]

12 The suggested changes were processed by the Drafting Committee, and the resultant text of draft Art. 30 read as follows:[31]

> 1. The Contracting States undertake to co-operate with the United Nations High Commissioner's Office for Refugees, or other agency charged by the United Nations with the international protection of refugees, in the exercise of its functions, and shall

[22] The US representative referred in particular to the following preambular phrase that had been approved by the Council: 'Considering that the High Commissioner for Refugees will be called upon to supervise the application of this Convention, and that the effective implementation of this Convention depends on the full cooperation of States with the High Commissioner and on a wide measure of international co-operation', UN Doc. E/AC.32/SR.40 (1950), pp. 34–35. *Cf. infra,* MN 17.

[23] UN Doc. E/AC.32/SR.40 (1950), pp. 34–35.

[24] UN Doc. E/AC.32/L.40 (1950), p. 59.

[25] A point made by the UK representative in the Social Committee of the ECOSOC, UN Doc. E/AC.7/SR.170 (1950), pp. 8–9.

[26] UN Doc. E/AC.32/SR.40 (1950), p. 35; and to replace the words 'or any successor agency' in the second paragraph by 'or any other appropriate agency', *ibid.*

[27] UN Doc. E/AC.32/SR.40 (1950), p. 36.

[28] *Ibid.*

[29] UN Doc. E/1850-E/AC.32/8 (1950), p. 13.

[30] *Cf.* the Statement made by the representative of France in the Conference of Plenipotentiaries: 'the text of the Convention as a whole was to be viewed in the light of the decisions taken by the United Nations, particularly in connexion with the Statute of the Office of the High Commissioner for Refugees', UN Doc. A/CONF.2/SR.31 (1951), p. 9.

[31] UN Doc. E/AC.32/L.42/Add.2 (1950), pp. 4–5.

in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the High Commissioner's Office or other appropriate agency of the United Nations to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the form requested with any data, statistics, and information requested concerning
   (a) the condition of refugees,
   (b) the implementation of this Convention, and
   (c) all regulations, laws, decrees, etc., made by them concerning refugees.[32]

13 Draft Art. 30 was subsequently considered by the Conference of Plenipotentiaries.[33] The discussion focused on the reference to an agency other than UNHCR in both paragraphs of draft Art. 30. The representative of Yugoslavia, for instance, suggested deleting this reference in Art. 30, para. 1 since he questioned the desirability of imposing on Contracting States the obligation of cooperating with some unknown agency of the UN that might be established in the future.[34] As to the concerns expressed by Yugoslavia, the French representative explained that Art. 30 as it stood had been drafted so as to take into account the temporary character of the High Commissioner's Office. The Belgium representative observed that unlike the English version, the French version of the draft referred to any other agency that might *succeed* UNHCR, and proposed to adjust the English version accordingly.[35] The President summarized the ensuing discussion by presenting three possible options: cooperation with UNHCR, cooperation with the agency that might succeed it, and cooperation with other agencies which might, under the terms of different agreements or arrangements, be empowered to supervise the implementation of the present Convention.[36] In short, the point at issue was whether the Conference should impose the obligation on governments to cooperate with any agency charged with the international protection of refugees other than UNHCR.[37] The representative of the United States opined that: 'it must be made perfectly clear that the supervision of the present Convention must devolve upon the United Nations High Commissioner's Office or the agency which succeeded it'.[38] Thereupon the Belgian suggestion, now an amendment, to insert, 'or any agency of the United Nations which may succeed it' in Art. 30, para. 1 was adopted.[39]

14 As a result of the Belgian amendment, the bearer of the supervisory task was clarified, supervision itself not yet. The envisaged supervision was considered to be an innovation

[32] This text was adopted, UN Doc. E/AC.32/SR.41 (1950), p. 24; and slightly adjusted: the words 'in the form requested' were exchanged for 'in the appropriate form', see Report of the Ad Hoc Committee, UN Doc. E/1850-E/AC.32/8 (1950), p. 13.

[33] For the text of the draft Convention, see UN Doc. A/CONF.2/1 (1951).

[34] UN Doc. A/CONF.2/SR.25 (1951), p. 11 (subsequently withdrawn, *ibid.,* p. 13); for the text of the proposed amendment, see UN Doc. A/CONF.2/31 (1951), p. 3.

[35] UN Doc. A/CONF.2/SR.25 (1951), pp. 11, 13. Actually, it should not have been part of the French text since the relevant phrase had been deleted in favour of a reference to UN agencies generally, *ibid.,* p. 14, and see *supra,* MN 8.

[36] UN Doc. A/CONF.2/SR.25 (1951), p. 15.

[37] *Ibid*., p. 17 (President).

[38] *Ibid.*, p. 18.

[39] *Ibid.*, p. 21. The amendment was interpreted by the President as also covering the wording of para. 2, *ibid.*, p. 22. In the second reading, the words 'any agency' in para. 1, and 'any appropriate agency' in para. 2 were adjusted to read 'any other agency', UN Doc. A/CONF.2/SR.35 (1951), p. 25.

by comparison with the provisions of earlier conventions which had operated without any representative of an international organization to supervise its implementation,[40] but how supervision of the application of the provisions of the 1951 Convention would be carried out was not clear: 'Was it the intention that refugees should appeal to the High Commissioner against alleged contraventions of the Convention and that he should hear such appeals?'[41] The question was left unanswered.[42]

The envisaged cooperation with UNHCR was not clear either: the idea of cooperation called for clarification.[43] However, that clarification was not forthcoming: the representative of Egypt indicated that the term 'co-operate' did not imply direct action.[44] The representative of France pointed out that there was a certain difference between an instrument inviting States members of the UN to cooperate with an agency—somewhat beside the point since the relevant 'invitation' would be part of a treaty obligation, and in any case, not be confined to States members of the UN—and the actual exercise of such cooperation.[45] Moreover, any such cooperation could only be effected through special charters or agreements concluded between the States concerned and the agency in question.[46] This position had been conveyed earlier by the representative of Italy who did not consider itself in any way bound by the substance of Art. 30. Its position should not be taken to mean it declined to collaborate with UNHCR, but that before assuming any obligations towards the Office of the High Commissioner, an agreement with UNHCR would be necessary.[47] **15**

The question of whether or not States would be entitled to enter a reservation to Art. 35 elicited further insights as to the meaning and purport of the envisaged cooperation. The representative of France had indicated earlier that Art. 35 was one of those articles to which France might be obliged to enter a reservation;[48] when the draft provision on reservations to the 1951 Convention was discussed, France accordingly proposed an amendment that would allow reservations to Art. 35.[49] The representative of Belgium observed that the French amendment would, if adopted, in effect leave States free not to cooperate with UNHCR: **16**

> The Belgian Government keenly desired the High Commissioner's collaboration in the execution of the Convention. In its opinion there was, in the present instance, no question of an international organization interfering in the exercise by Contracting States of their prerogatives, but only of a guarantee afforded to the refugees covered by the Convention. Although the need for such a guarantee might not often be felt, it was none the less true…that the authorities of the country of reception would be at the same time both judge and party in every appeal submitted by a refugee and in every request concerning

[40] UN Doc. A/CONF.2/SR.25 (1951), p. 12 (France).
[41] *Ibid.*, p. 13 (Australia).
[42] The omission was regretted by the French delegate, *ibid*., p. 18.
[43] UN Doc. A/CONF.2/SR.25 (1951), pp. 19–20 (France).
[44] *Ibid.*, p. 19.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*, p. 13; UN Doc. A/CONF.2/SR.27 (1951), p. 12: the Italian position was due to the fact that it was not a member of the UN at the time, and had not taken part in the election of the High Commissioner or in the drafting of the Statute of UNHCR.
[48] UN Doc. A/CONF.2/SR.25 (1951), p. 12.
[49] UN Doc. A/CONF.2/SR.27 (1951), p. 11 (the records do not comprise a document with the text of the amendment).

the exercise of a right by a refugee. Article 30 gave refugees moral satisfaction in that it amounted to the setting up of the 'refugees government' to which they had long aspired.[50]

17 The representative of France explained that his position was one of principle, and did not signify a refusal to cooperate with UNHCR. However, he added, '[t]he cooperation referred to in article 30 did not necessarily form part and parcel of the application of the Convention',[51] and in addition, 'the High Commissioner's Office and the Convention were two entirely separate matters; the fact of their coming together was an historical event, but not an absolute necessity'.[52] Perhaps so, but it was France which had earlier submitted an amendment to insert a provision on cooperation with UNHCR in the Preamble to the 1951 Convention and had thus provided 'the necessary link between the Convention and the work of the High Commissioner's Office'.[53] France also pointed to the fact that States who were not members of the UN might have difficulty signing the Convention in view of the fact they had not taken part in the establishment of UNHCR or in drafting its Statute, and hence might object to intervention by UNHCR unless it was subject to a working procedure specified in an agreement between UNHCR and the Government concerned.[54] In view of the fact that the number of States represented at the Conference of Plenipotentiaries which had voted for the UNHCR Statute was small, and the number of States that would adhere to the 1951 Convention unknown, France wondered how a State could commit itself *vis-à-vis* a body which was at present a completely unknown quantity, which might turn out to have been set up by majority of States devoid of any knowledge of the problem, and which might impose unacceptable arrangements on the other Contracting States.[55] The French amendment was adopted.[56]

18 However, the question of a reservation to the obligation to cooperate with UNHCR resurfaced when the extension of the personal scope of the 1951 Convention by means of a protocol was drafted. The initial draft of what became the 1967 Protocol did not comprise Arts. II and III.[57] When those articles were added, draft Art. VII, para. 1 allowed reservations to Art. II of the 1967 Protocol.[58] It was, once again, the representative of France who was the most outspoken. France considered it inappropriate to provide for reservations in respect of Art. II since such would imply that the States concerned did not wish to undertake to cooperate with UNHCR or provide the Office with the information specified in Art. II, para. 2: 'Very few states would surely consider it necessary to make such a reservation. The reference to article II might, therefore, be deleted.'[59] UNHCR explained that it had not felt at liberty to make any change in the relevant provisions of the 1951 Convention, which were reproduced with the substitution of the word 'Protocol' for 'Convention' in Arts. II and III

[50] *Ibid.*
[51] *Ibid.,* p. 13.
[52] *Ibid.*
[53] UN Doc. E/AC.7/SR.160 (1950), p. 26. For the text of the amendment, see UN Doc. E/L.81 (1950), based, according to the French representative, 'on a decision of principle', UN Doc. E/AC.7/SR.166 (1950), p. 15.
[54] UN Doc. A/CONF.2/SR.27 (1951), p. 14.
[55] *Ibid.*, p. 15. France also implied that UNHCR would have 'compulsory powers of jurisdiction', *ibid.,* p. 14.
[56] *Ibid.,* p. 16.
[57] UN Doc. A/AC.96/INF.40 (1965), Annex II; *cf.* also Annex III which comprises a draft article on reservations that would allow reservations to Art. 35 of the 1951 Convention.
[58] UN Docs. A/AC.96/346 (1966), Annex II, p. 3; A/AC.96/346/Corr.2. (1966).
[59] UN Doc. A/AC.96/SR.141–152 (1966), p. 66.

of the draft 1967 Protocol and which were subject to reservation.[60] In view of the possibility that 'a layman would draw the unwarranted conclusion that States need not co-operate with UNHCR', France persisted that reservations should not be permitted with respect to Art. II.[61] The Executive Committee of UNHCR so decided, and the text of the Protocol was adjusted accordingly and submitted as an addendum to the annual report of UNHCR through the ECOSOC to the GA.[62] The ECOSOC merely took note of the draft Protocol and transmitted the text of the 1967 Protocol to the GA:[63] neither the Third Committee nor the GA at large touched upon reservations or any other point of substance, and the 1967 Protocol was adopted on 16 December 1966.[64]

C. Declarations and Reservations Made with Regard to Article 35 of the 1951 Convention and Article II of the 1967 Protocol Respectively

Article 42 of the 1951 Convention permits reservations to Art. 35. Robinson nonetheless **19**
argues that UN member States may not enter a reservation to this article.[65] He does not explain his position but the argument is presumably that UN member States are legally bound to cooperate with the UN by virtue of the Charter of the United Nations.[66] In view of the fact that UNHCR is a subsidiary organ of the GA, hence an integral part of the organization, a reservation to Art. 35 made by a UN member State would boil down to unilaterally diminishing the scope of the obligations incurred by UN member States and would consequently contravene the UN Charter. Should UNHCR be replaced by another agency, UN member States would, on the strength of the same reasoning, still be barred from entering a reservation since the succeeding agency will be a UN agency. The question is whether this argument is tenable when the cooperation that is called for extends to functions that are not obviously part of what the UN Charter requires on the part of member States and would consequently need their consent. External supervision, however rudimentary prescribed in Art. 35, arguably requires this consent:[67] consent that can be withheld by means of a reservation to that effect. In practice, no reservations have been made to Art. 35.[68]

[60] *Ibid.*, p. 69 (this is not correct: Art. 42, para. 1 of the 1951 Convention does not allow reservations to Art. 36); see also p. 70.

[61] *Ibid.*, p. 70 (typographical errors omitted).

[62] *Ibid.*, p. 92; for the text of the Protocol, see UN Doc. A/6311/Rev.1/Add.1, and Corr.1 (1966).

[63] E/Res/1186 (XLI) of 18 November 1966; *cf.* UN ECOSOCOR, 41st Sess., SR 1453 (1966), paras. 1–6.

[64] *Cf.* GA Third Committee, UN GAOR, 21st Sess., SR 1447 (1966); GA Third Committee, UN GAOR, 21st Sess., SR 1448 (1966); GA Third Committee, UN GAOR, 21st Sess., SR 1449 (1966); GA Third Committee, UN GAOR, 21st Sess., SR 1450 (1966) (for a summary, see UN Doc. A/6586 (1966); GA, UN GAOR, 21st Sess., SR. 1495 (1966), para. 92. See also GA Res. 2198 (XXI) of 16 December 1966.

[65] Robinson, *Commentary*, p. 168 (only non-members).

[66] Art. 2, para. 5 UN Charter; see also *infra,* MN 28.

[67] *Cf. infra*, MN 48.

[68] *Cf.* UNTC. At the time of drafting Art. 35, Venezuela stated that it would make a reservation with respect to the phrase 'and shall in particular facilitate' in para. 1, but it never did, Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.35 (1951), p. 25. Neither did France which, as mentioned earlier, had indicated too that Art. 35 (numbered 30 at the time) was one of those to which it might be obliged to enter a reservation despite the fact that it had also stated, rather incongruously, that para. 1 was in effect only a recommendation yet had introduced the amendment that made reservations to Art. 35 possible, UN Docs. A/CONF.2/SR.25, p. 16 and SR.27, p. 11.

20 By virtue of Art. VII of the 1967 Protocol, no reservations can be made to Art. II of the 1967 Protocol.[69] Upon accession to the 1967 Protocol in 1983, Peru made a declaration with respect to Art. II of the 1967 Protocol to the effect that it 'shall endeavour in all cases to co-operate as far as possible with the Office of the United Nations High Commissioner for Refugees'.[70] In view of the wording of Art. II, para. 1 of the 1967 Protocol it seems that the Peruvian declaration is in effect a reservation, since it converts the unqualified undertaking to cooperate into an endeavour that is subject to feasibility. When Peru acceded to the 1951 Convention, it had not issued a comparable declaration, and the quoted declaration, which is of a later date, consequently affects its obligation to cooperate with UNHCR as of 1983 when it acceded to the 1967 Protocol. The safeguard comprised in Art. VII, para. 1 of the 1967 Protocol to the effect that reservations shall, in the case of a State party to the 1951 Convention, not extend to refugees to whom the 1951 Convention applies offers little if any legal solace with respect to this particular diminution.

D. Interrelationship of Articles 35 and II with Other Provisions

21 Article 35 is an elaboration of the sixth paragraph of the Preamble to the 1951 Convention:

> *Noting* that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective coordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

The phrasing of this particular provision is somewhat unfortunate, since it implies that the problem that requires cooperation is that of supervising international conventions rather than the protection of refugees or what is usually referred to as 'the problem of refugees', which is clearly what is meant in view of the preceding paragraph in the Preamble. This part of the Preamble to the 1951 Convention was inserted when the text of the UNHCR Statute was drafted, and it guided the drafting of Art. 35.[71]

22 Article 35 is included in Chapter VI of the 1951 Convention which is entitled 'Executory and Transitory Provisions'. This chapter includes, besides Art. 35, Art. 36 (Information on National Legislation) and Art. 37 (Relation to Previous Conventions). In terms of substance, Arts. 35 and 36 are the executory provisions of Chapter VI, and Art. 37 clearly constitutes the transitory part.[72]

23 There is an overlap between Art. 35, para. 2 and Art. 36, and likewise between Art. II, para. 2 and Art. III. The first overlap relates to Art. 35, para. 2 (b): both provisions require information with respect to implementation of the 1951 Convention in the domestic legal

[69] *Cf. infra*, MN 26.
[70] *Cf.* UNTC.
[71] *Cf. supra*, MN 11.
[72] *Cf. supra*, MN 1 and 3. For further details on the relation between Art. 35, para. 2 and Art. 36 and Art. II, para. 2 and Art. III respectively *cf. infra*, MN 23, and Zieck on Art. 36/Art. III, MN 15.

order.[73] Whereas Art. 35, para. 2 (b) merely requires 'information' about implementation of the 1951 Convention, Art. 36 requires submission of the relevant laws and regulations. A second overlap pertains to Art. 35, para. 2 (c) and Art. 36.[74] By virtue of Art. 35, States parties have to provide information about laws, regulations, and decrees which are, or may hereafter be, in force relating to refugees, and by virtue of Art. 36, laws and regulations States may adopt to ensure the application of the 1951 Convention need to be communicated. Although the former provision focuses on positive law and the latter on future laws and regulations, this distinction is arguably substantively irrelevant, and so is the fact that Art. 36 requires that laws and regulations should be submitted to the Secretary-General rather than to UNHCR.[75] The provisions nonetheless differ in scope in view of the fact that Art. 35, para. 2 (c) refers to any rules and regulations pertaining to refugees, whilst Art. 36 rather focuses on the means that ensure implementation of the 1951 Convention as such in the domestic legal order.[76] Another difference between Art. 35, para. 2—both (b) and (c)—and Art. 36, and likewise in the corresponding provisions in the 1967 Protocol, is that the relevant instruments are to be submitted on request in the case of Art. 35, para. 2, whilst Art. 36 constitutes a standing request.

Article 35 is also related to Art. 38 of the 1951 Convention on Settlement of Disputes that **24**
provides that any dispute between States parties relating to the interpretation or application of the 1951 Convention, which cannot be settled by other means, may be referred to the ICJ at the request of any one of the parties to the dispute, and the same applies to the corresponding articles in the 1967 Protocol, Arts. II and IV. Although Arts. 35 and II do not mention 'interpretation', UNHCR is charged with supervising the application of the provisions of the 1951 Convention and the 1967 Protocol, which presupposes interpretation of those provisions to enable supervision.[77] Any disputes concerning interpretation are nonetheless disputes among States parties in the system of the 1951 Convention and the 1967 Protocol. The representative of Mexico envisaged a role for UNHCR preceding recourse to the dispute settlement procedure of the 1951 Convention: 'From the very beginning, the High Commissioner would certainly be called on to deal with differences arising between countries before the provision in Art. 33 [*i.e.* Art. 38] for reference of such disputes to the International Court of Justice could be applied.'[78] Articles 38 and IV do not provide UNHCR the possibility of requesting an advisory opinion from the ICJ despite its being charged with supervising the Convention. However, since the GA, the parent organ of UNHCR, is entitled to do so, and may also authorize UNHCR to request an advisory opinion on legal questions arising within the scope of its activities,[79] this omission is not problematic *per se*.

[73] The overlap was noted in the drafting process and the suggestion was made to revise Art. 35, para. 2 (b) in the light of Art. 36 (Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.26 (1951), p. 6) but this revision did not take place.

[74] A comparable overlap exists between Art. II, para. 2 (c) and Art. III of the 1967 Protocol.

[75] *Cf.* Zieck on Art. 36/Art. III, MN 20.

[76] *Cf. infra*, MN 77–78.

[77] *Cf. infra*, MN 56 *et seq.*

[78] ECOSOC Social Committee, UN Doc. E/AC.7/SR.166 (1950), p. 20.

[79] Art. 96 UN Charter. The representative of Belgium had submitted a draft recommendation for insertion in the Final Act of the Conference concerning the grant of authority by the GA to the High Commissioner for Refugees to seek advisory opinions from the ICJ but withdrew it when he received no instructions from his government, Conference of Plenipotentiaries, UN Doc. A/CONF.2/101 (1951); UN Doc. A/CONF.2/SR.32 (1951), p. 4.

25 Article 35, para. 2 is also related to Art. 41 (c) of the 1951 Convention.[80] Article 41 is the federal clause of the 1951 Convention, and at the request of another State party to the 1951 Convention, a federal State party shall supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the 1951 Convention showing the extent to which effect has been given to that provision by legislative or other action. This information is similar to the information UNHCR may request from States on the basis of Art. 35, para. 2 (b) and (c). Article 35, para. 2, however, refers to 'Contracting States' and does not differentiate between unitary or federal or non-unitary States. Considering the purport of the relevant provisions, it would seem that the obligation comprised in Art. 35, para. 2 applies regardless of the internal make-up of the contracting State. Therefore it requires submission of information concerning the implementation of the 1951 Convention as well as laws and regulations relating to refugees both at federal and component State, province, or canton level taking into consideration that Art. 41 (b) indicates that there may be issues that come within the legislative jurisdiction of constituent States, provinces, or cantons and regarding which they are not, under the constitutional system of the federation, bound to take legislative action. Apart from the fact that Art. 41 also requires, unlike Art. 35, para. 2, a statement of practice, the difference between the two provisions is that the requisite information has to be submitted to UNHCR in the case of Art. 35, para. 2 and to other States parties in case of Art. 41 (c).[81] The same applies to Arts. II and VI of the 1967 Protocol; the sole difference being that Art. VI takes the purport of the 1967 Protocol into consideration with reference to Art. I, para. 1.

26 Article 35 is also related to Art. 42, para. 1 of the 1951 Convention, since Art. 35 is subject to reservations. Beyond reservations that concern Art. 35 directly, the possibility of making reservations at large touches upon the scope of the obligations a State party incurs under the 1951 Convention, obligations which are subject to supervision on the basis of Art. 35, para. 1. The reverse, withdrawing reservations—regulated in Art. 42, para. 2—is equally relevant to Art. 35. Similar considerations apply to the possibility of geographically limiting the scope of the definition and relinquishing this particular limitation.[82] The possibility of making reservations is addressed in Art. VII of the 1967 Protocol and does not include Art. II. Article VII, para. 2, however, provides that reservations made by States parties to the 1951 Convention in accordance with Art. 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the 1967 Protocol. This means that a reservation made to Art. 35 upon ratification of, or accession to, the 1951 Convention may affect Art. II when retained upon accession despite the fact that Art. II is excluded from the possibility of making reservations.

E. Other Relevant Norms of International Law

27 Numerous instruments, both universal and regional, comprise norms that are relevant to Arts. 35, and II. The majority of the relevant norms are confined to recalling the obligation

[80] It is also related to Art. 36 and Art. III, *cf.* Zieck on Art. 36/Art. III, MN 15, *passim*.
[81] *Cf.* Zieck on Art. 36/Art. III, MN 16.
[82] *Cf.* Art. 46 lit. a.

to cooperate with UNHCR at large; explicit references to UNHCR's supervisory task are much less frequent.

I. Universal Instruments: Treaties

28 A number of provisions in the UN Charter require the cooperation of the member States with the organization of which UNHCR is an integral part.[83] The most generally phrased obligation is comprised in Art. 2, para. 5 UN Charter, and a more specific one in Art. 56 UN Charter, in which all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set out in Art. 55 UN Charter (the promotion, on the part of the UN of, *inter alia*, universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion). With reference to the resolution of the GA in which the GA expressed its satisfaction at the conclusion of the 1951 Convention and called upon States to become parties to it,[84] Grahl-Madsen observed that '[t]here can be no doubt that the Convention falls within the scope of Art. 55':[85]

> It seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter. This brings the observance of the material provisions of the present Convention within the orbit of the vested interests of the United Nations…[86]

29 The Preamble to the Agreement Relating to Refugee Seamen refers to cooperation with UNHCR and explicitly mentions Art. 35:

> Desirous of making further progress towards a solution of the problem of refugee seamen in the spirit of Art. 11 and of maintaining co-operation with the United Nations High Commissioner for Refugees in the fulfilment of his functions, especially having regard to Art. 35 of the above-mentioned Convention.[87]

II. Universal Instruments: Resolutions and Declarations

30 The GA adopted the Statute of UNHCR in 1950,[88] calling on States to cooperate with the High Commissioner in the performance of his functions concerning refugees falling under the competence of his office, especially by becoming parties to international conventions providing for the protection of refugees and taking the necessary steps of implementation under such conventions, and by providing UNHCR with information concerning the

[83] UNHCR is a subsidiary organ of the GA, *cf.* Art. 22 UN Charter.
[84] GA Res. 538 (VI) of 2 February 1952.
[85] Grahl-Madsen, *Commentary*, Art. 35, para. 2.
[86] *Ibid.*
[87] The reference is to the 1951 Convention. Art. 11 provides that: 'The Contracting Party in the territory of which a refugee seaman is lawfully staying … shall admit him to its territory if so requested by the Contracting Party in whose territory that seaman finds himself.'
[88] Annex to GA Res. 428 (V) of 14 December 1950.

number and condition of refugees, and laws and regulations concerning them.[89] This resolution was also transmitted to States not members of the UN with a view to obtaining their cooperation in its implementation.[90] The Statute itself assigns to UNHCR the task of promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application, and proposing amendments thereto.[91] As indicated earlier, the Preamble to the 1951 Convention notes that UNHCR is charged with this supervisory task, and Art. 35, para. 1 obliges States to cooperate with UNHCR in the exercise of its functions, and in particular to facilitate its duty of supervising the application of the provisions of the Convention.

31 UNHCR's Executive Committee has adopted various conclusions,[92] which recall the obligation of States parties to the 1951 Convention and/or 1967 Protocol to cooperate with UNHCR,[93] to facilitate its supervisory task, and provide detailed information on the implementation of the 1951 Convention and 1967 Protocol.[94]

32 On the occasion of the 50th anniversary of the 1951 Convention, States parties to the 1951 Convention or its 1967 Protocol issued a declaration,[95] in which they recalled their obligations as States parties to cooperate with UNHCR in the exercise of its functions, and in addition, urged all States

> to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or the 1967 Protocol and to ensure closer cooperation between States parties and UNHCR to facilitate UNHCR's duty of supervising the application of the provisions of these instruments.[96]

This particular obligation—or the call that was made—was not addressed or revisited by the Heads of State and Government and High Representatives in what became known as the 2016 New York Declaration for Refugees and Migrants,[97] nor in the attached Comprehensive Refugee Response Framework (CRRF). The CRRF became an integral part of the Global Compact on Refugees that was adopted in 2018, along with a Programme of Action:[98] the Global Compact on Refugees does not address this particular duty either,

[89] This call was recalled in the Final Act of the International Conference on Human Rights in 1968, UN Doc. A/CONF.32/41 (1968), Ch. XIII.

[90] This call on States not members of the UN to cooperate with UNHCR and support its efforts was repeated until 1956, *cf.* UN Doc. A/Res/728 (VIII) (1953), para. 2; UN Doc. A/Res/832 (IX) (1954), para. 7; UN Doc. A/Res/925 (X) (1955), para. 3. The call to cooperate with UNHCR is nowadays simply addressed to States, *cf.* UN Doc. A/Res/75/163 (2020), para. 6.

[91] Prov. 8 (a), Statute (comparable to the supervisory task given to the High Commissioner for Refugees under the Protection of the League of Nations who had been charged with superintending the entry into force and the application of the conventions for the legal status of refugees).

[92] UNHCR's Executive Committee was established by the ECOSOC in 1958 (Res. 672 (XXV) pursuant to Prov. 4, Statute UNHCR). It is charged with advising UNHCR. It currently has 106 members (2020).

[93] *Cf.* UNHCR ExCom, Conclusions No. 22 (1981), para. III; No. 52 (1988), (l); No. 68 (1992), (a); No. 71 (1993), (e); No. 72 (1993), (e); No. 81 (1997), (e); No. 85 (1998), (d); No. 90 (2001), (c); No. 108 (2008), (d).

[94] *Cf.* UNHCR ExCom, Conclusions No. 57 (1990), Preamble; No. 74 (1994), (c); No. 77 (1995), (e); No. 79 (1996), (f) (ExCom reaffirming the competence of UNHCR to supervise the application of international instruments for the protection of refugees); No. 93 (2002), (c). ExCom Conclusions No. 77 (1995) and No. 79 (1996) recall the supervisory function of UNHCR in the context of a questionnaire that was sent to States, *cf. infra*, MN 72.

[95] UNHCR Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09 (2002).

[96] *Ibid.*, p. 3, paras. 8 and 9.

[97] GA Res. 71/1 of 3 October 2016.

[98] UN Doc. A/73/12 (Part II) Global Compact on Refugees (2018).

and that extends to consideration of ways to strengthen the implementation of the 1951 Convention and/or 1967 Protocol.

33 The Security Council (SC) has adopted several resolutions in which reference is made to cooperation with UNHCR but invariably in the context of specific operations and never with a reference to a pre-existing obligation of States to cooperate with UNHCR. For instance, it called on the parties involved to collaborate with UNHCR in the implementation of confidence-building measures in the context of the unresolved dispute over Western Sahara.[99] Other resolutions pertain to peacekeeping operations and are confined to calling on peacekeeping forces to cooperate with UNHCR, for instance by monitoring the voluntary and safe return of refugees and displaced persons to their home of origin in cooperation with UNHCR.[100] Most calls, however, are calls to those forces to provide assistance such as logistical support to UNHCR.[101]

III. Regional Instruments

1. Africa

34 The 1969 Convention Governing Specific Aspects of Refugee Problems in Africa contains two provisions on cooperation with UNHCR: one pertains to the OAU, now AU, and the other one is addressed to States parties to the Convention. In the Preamble, it is observed that the efficiency of the measures listed in the Convention to solve the problem of refugees in Africa necessitates the close and continuous collaboration between the AU and UNHCR. Article 8, para. 1 provides that '[m]ember States [of the AU] shall co-operate with the Office of the United Nations High Commissioner for Refugees'.

2. Americas

35 The Cartagena Declaration on Refugees of 1984 includes the commitment '[t]o support the work performed by the United Nations High Commissioner for Refugees (UNHCR) in Central America and to establish direct co-ordination machinery to facilitate the fulfilment of his mandate'.[102] On the occasion of the twentieth anniversary of the Cartagena Declaration, the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America were adopted in November 2004: they underscore the importance of strengthening cooperation between the organs of the Inter-American human rights system and UNHCR aimed at more effective protection of refugees and others in need of protection, and urge UNHCR to request of States, in the exercise of its supervisory responsibility, periodic reports on the situation of refugees in the Latin American countries and the status of the implementation by States parties to the 1951 Convention and the 1967 Protocol in Latin America.

[99] SC Res. 1429 (2002), para. 3; *cf.* also SC Res. 1494 (2003), para. 5. Most other calls, however, are appeals to States to undertake certain commitments in consultation or cooperation with UNHCR, see *e.g.* SC Res. 1494 (2003), para. 14; SC Res. 1524 (2004), para. 14; SC Res. 1554 (2004), para. 13; SC Res. 1582 (2005), para. 15; SC Res. 1615 (2005), para. 16.

[100] SC Res. 1037 (1996) (UNTAES), para. 10.

[101] See *e.g.* SC Res. 1029 (1995) (UNAMIR), para. 2; SC Res. 1778 (2007) (MINURCAT), para. 2 (c); SC Res. 1861 (2009) (MINURCAT), para. 6 (c).

[102] Para. II (e) Cartagena Declaration.

3. Asia

36 The Principles on Status and Treatment of Refugees ('Bangkok Principles'), which were adopted by the Asian-African Legal Consultative Committee (AALCO) in 1966, provide in Art. XIII that '[s]tates shall co-operate with the Office of the United Nations High Commissioner for Refugees'.

4. Europe

37 Several European instruments repeat the obligation to cooperate with UNHCR. States parties to the 1990 Convention Implementing the Schengen Agreement of 14 June 1985 between the States of the Benelux Economic Union, Germany, and France on the Gradual Abolition of Checks at their Common Borders reaffirm their obligations under the 1951 Convention and the 1967 Protocol and their commitment to cooperate with UNHCR in the implementation of these instruments.[103] A comparable reaffirmation was included in the 1990 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the Community (Dublin Convention),[104] but not repeated in either the Dublin II Regulation that replaced this Convention in 2003,[105] or in the Dublin III Regulation of 2013.[106] Reference should also be made to Declaration No. 17, annex to the Final Act to the Treaty of Amsterdam, on Art. 63 (former Art. 73k) of the Treaty Establishing the European Community, which provides that: 'Consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy.' It clearly acknowledges UNHCR's competence but there is no reference to the treaty obligation to cooperate with UNHCR all the Member States incurred. The same Declaration is also referred to in the Temporary Protection Directive that, as well as calling for respect for the mandate of UNHCR regarding refugees and other persons in need of international protection, indicates that effect should be given to this particular Declaration.[107] The Qualification Directive merely pays lip service to UNHCR by including a non-committal preambular consideration that consultations with UNHCR may provide valuable guidance for Member States when determining refugee status according to Art. 1 of the Geneva Convention.[108] The Asylum Procedures Directive provides, on the role of UNHCR, that EU Member States shall allow UNHCR to present its views, in the exercise

[103] Art. 28 Schengen Implementation Convention. (Art. 28 is part of Ch. 7 on the Responsibility for Processing Applications for Asylum.)

[104] Art. 2 Dublin Convention.

[105] EC Regulation 343/2003 of 18 February 2003, OJ 2003 L 50, 1. In a Statement issued in the context of a reference for a preliminary ruling by the Court of Justice of the European Union (ECJ), UNHCR opined that EU treaties and secondary legislation, which create an obligation to comply with the 1951 Convention, impose an obligation on Member States to cooperate with UNHCR in the exercise of its supervisory responsibility, including within the context of proceedings under the Dublin II Regulation, and therefore oblige Member States to provide UNHCR with an opportunity to present its views to any competent authority regarding individual applications, and to take UNHCR's views duly into account, *UNHCR Public Statement in Relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees Pending Before the ECJ, August 2012, C-528/11*, p. 20. The Court pointed to the exclusion of Dublin II from that obligation in Recital 29 in the Preamble to Directive 2005/85/EC (retained in recital 53 to the Preamble to Directive 2013/32/EU), Judgment of the Court of 30 May 2013, ECLI:EU:C:2013:342.

[106] Regulation EU No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[107] Recital 11 of the Preamble to EC Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 07 August 2001, pp. 12–23.

[108] Recital 22, Preamble to EC Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of

of its supervisory responsibilities under Art. 35 of the 1951 Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.[109] The European Asylum Support Office (EASO), lastly, is bound to cooperate with UNHCR.[110]

Two specialized European conventions that were adopted by the Council of Europe also prescribe cooperation with UNHCR. The 1967 Protocol to the European Convention on Consular Functions Concerning the Protection of Refugees provides that the consular officer of the State where a refugee habitually resides is entitled to protect that refugee and defend his rights under the 1967 Convention on Consular Relations,[111] in consultation, wherever possible, with UNHCR.[112] The 2006 Convention on the Avoidance of Statelessness in Relation to State Succession provides that States parties shall cooperate with UNHCR with respect to adopting appropriate measures to avoid statelessness arising from State succession.[113] **38**

F. Analysis

I. General Questions

1. The Title of Articles 35 and II

Even though the titles of chapters and articles of the 1951 Convention have been included for practical purposes and do not constitute an element of interpretation,[114] the references to the UN and to 'National Authorities' in the title of Art. 35 are nonetheless briefly discussed also in view of the fact that a similar *caveat* regarding interpretation does not exist with respect to Art. II of the 1967 Protocol, which retained the title of Art. 35. **39**

a) '… United Nations'

The first two draft proposals of what became Art. 35 were entitled 'Co-operation with the [United Nations] High Commissioner for Refugees'.[115] When the two proposals were joined, the title was changed to 'Co-operation of the national authorities with the United Nations'. The change from UNHCR to the more generic reference 'United Nations' is illustrative for the awareness that UNHCR was expected to function for a relatively short time. This awareness led to debate regarding the phrasing to accommodate the contingency of **40**

international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, pp. 9–26.

[109] Art. 29(c) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) , OJ L 180, 29 June 2013, pp. 60 -95 (Procedures Directive).

[110] See Arts. 2(5), 50, Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. EASO will be renamed EU Agency for Asylum; the draft Regulation repeats the modes of cooperation with UNHCR, see the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, Brussels, 4.5.2016 COM (2016) 271 final, 2016/0131 (COD) (also part of the New Pact on Migration and Asylum of 2020).

[111] European Treaty Series – No. 61.

[112] Art. 2, para. 2 of the Protocol (European Treaty Series – No. 61A).

[113] Art. 14, para. 2 (European Treaty Series – No. 200).

[114] UN Doc. A/CONF.2/108 (1951), Final Act, p. 7; *cf.* UN Doc. A/CONF.2/SR.27 (1951), p. 10; UN Doc. A/CONF.2/SR.35 (1951), pp. 39–40.

[115] UN Docs. E/AC.32/2 Annex (1950), p. 49 (Art. 26), and E/AC.32/L.3 (1950), p. 10 (Art. 21); *cf. supra,* MN 6 and 7.

a temporary office, which resulted in the current wording that refers to 'any other agency of the United Nations which may succeed it'.[116] The reference to the 'United Nations' in the title of Art. 35 should, consequently, be taken to cover this eventuality. In view of the fact that the mandate of UNHCR has meanwhile, in 2003,[117] in essence been extended indefinitely by the GA, with hindsight it could be said that the original title could have been retained.[118]

b) '…National Authorities…'

41 The reference to 'national authorities' no longer features in Art. 35 itself, which only refers to the Contracting States. It did appear in the first drafts as part of the provision (now para. 2), which provided that 'a national authority' would be responsible for compiling and communicating to UNHCR the relevant statistics and other information regarding the condition of refugees and the application of the Convention.[119] In a comment it was observed that:

> …in the absence of an international authority there should be, in every country of asylum, a national authority responsible for refugees, and maintaining contact with the various national services dealing with refugees. This authority would be responsible for liaison with the High Commissioner.[120]

If recourse is taken to past practice,[121] representatives of the High Commissioner for refugees were responsible for rendering particular services to refugees in the territory of countries of asylum. In the 1933 Convention Relating to the International Status of Refugees, 'in the absence of an international body', the creation of national ('central') committees was foreseen to render such services.[122] Since UNHCR was created as a non-operational agency, it made sense to (once more) refer to a national authority.[123] However, the reference to a national authority disappeared, and the tasks that were foreseen for the national authority were assigned to the High Contracting States. The reference to 'national authorities' in the title of Art. 35 should therefore be taken as equivalent to the 'Contracting State', leaving to the competence of that State how it will actually implement Art. 35, para. 2 at the domestic level. The same applies *mutatis mutandis* to Art. II of the 1967 Protocol.

[116] See *supra*, MN 10 and 13.

[117] UN Doc. A/Res/58/153 (2003) ('to continue the Office until the refugee problem is solved', at the request of the High Commissioner who qualified the temporal limitation anachronistic, UN Doc. A/C.3/58/SR.30 (2003), para. 2.

[118] When the question of an institutional follow-up to the IRO was discussed in the Third Committee of the GA, the representative of India considered it hardly necessary to create a new international body 'which, it was to be feared, would in all probability become a permanent, or at least, a semi-permanent organization', GA Third Committee, UN GAOR, 5th Sess., SR 263 (1949), para. 57. Prophetic words.

[119] UN Doc. E/AC.32/2 Annex (1950), p. 49, Art. 26; UN Doc. E/AC.32/L.3 (1950), p. 10, Art. 21.

[120] UN Doc. E/AC.32/2 Annex (1950), p. 49, Art. 26. The comment referred to similar observations made with respect to draft Art. 23 (Administrative assistance), which too stipulated the need for a national authority in the absence of an international authority, see *infra*.

[121] See in particular Art. 1 of the Arrangement Relating to the Legal Status of Russian and Armenian Refugees and Agreement of 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005.

[122] *Cf.* Art. 15 on the creation of central committee(s) for refugees charged with practical matters such as coordinating the work of the organs for finding employment for refugees if need be, the powers enumerated in Art. 1 of the Arrangement and Agreement of 30 June 1928 (insofar not exercised by representatives of the Secretary-General of the League of Nations).

[123] *Cf.* UN Doc. E/AC.32/2 (1950) at 43 on Art. 23 (Administrative Assistance) that confirms this assumption.

2. References Common to Both Paragraphs of Article 35 and Article II Respectively

a) 'The Contracting States…'

'Contracting States' refers to States parties to the 1951 Convention,[124] and Art. 35 only binds States parties to the 1951 Convention; Art. II of the 1967 Protocol does not refer to 'Contracting States' but simply to 'States Parties to the present Protocol'. However, States not parties to the 1951 Convention or 1967 Protocol may be considered bound to cooperate with UNHCR by virtue of the UN Charter.[125] When UNHCR was established, States not members of the UN were called upon by the GA to cooperate with UNHCR.[126] The requisite cooperation is alternatively secured by means of host state agreements ('cooperation agreements') UNHCR concludes with States regardless of whether they are parties to the 1951 Convention and/or the 1967 Protocol.[127] **42**

b) '…the Office of the United Nations High Commissioner for Refugees…'

The idea of creating the Office of the UNHCR originated in the GA, which had envisaged it 'as the means of making the Convention a dynamic and living reality'.[128] UNHCR was established in 1950 as a subsidiary organ of the GA.[129] Its mandate is laid down in its Statute,[130] which provides that the tasks of the agency are providing international protection to refugees who fall within the scope of the Statute and seeking permanent solutions for the problem of refugees.[131] One of the means by which UNHCR 'shall provide for the protection of refugees falling under the competence of his Office' consists of promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application, and proposing amendments thereto.[132] **43**

As to refugees 'falling under the competence of his Office', UNHCR's mandate *ratione personae* has developed from those defined as refugees in its Statute into the very broad notion of 'persons of concern to UNHCR', which comprises, besides refugees and asylum seekers, internally displaced persons protected/assisted by UNHCR, stateless persons, returnees, returned internally displaced persons, and 'other groups or people of concern'.[133] The latter category denotes individuals who do not necessarily fall directly into any of the enumerated **44**

[124] The Assistant Secretary-General (in charge of the Department of Legal Affairs) had observed that the reference to 'Contracting States' in the draft article on reservations might lead to difficulties 'since the traditional notion that the Contracting States were the negotiating States had now been modified to mean States bound by a convention or treaty' and suggested the reference should be to 'any State', UN Doc. A/CONF.2/SR.27 (1951), p. 16. This suggestion was adopted by the Style Committee in Art. 42 but many other articles retained the reference to 'Contracting States'.

[125] See *supra*, MN 19.

[126] See *supra*, MN 30.

[127] Those agreements contain a provision on cooperation with UNHCR (that, in case the host State is a party to the 1951 Convention and/or 1967 Protocol, also refers to the obligation to cooperate laid down in those instruments). For the text of UNHCR's Model Cooperation Agreement, see <https://www.refworld.org/docid/3ae6b31b27.html>, accessed on 6 July 2021.

[128] Recalled by the representative of France, UN Doc. A/CONF.2/SR.27 (1951), p. 22.

[129] GA Res. 428 (V) of 14 December 1950.

[130] *Ibid.*, Annex.

[131] Prov. 1 UNHCR Statute.

[132] Prov. 8 lit. a UNHCR Statute.

[133] Zieck, *UNHCR's Parallel Universe: Marking the Contours of a Problem* (2019), pp. 8–9; *cf.* UNHCR's website (Who We Help), <https://www.unhcr.org/who-we-help.htmlb>, accessed on 6 July 2021.

categories but to whom UNHCR has extended its protection and/or assistance services, based on humanitarian or other special grounds.[134]

c) '. . . or any other agency of the United Nations which may succeed it . . .'

45 The original lifespan of the Office of UNHCR was three years, and Art. 35 was drafted to take the temporary character of UNHCR's Office into account.[135] In order to ensure continuity yet remove any doubts as to the role of future agencies in particular with respect to supervising the 1951 Convention, the present wording sought to ensure that the task of supervision would devolve solely on UNHCR or its successor.[136] The reference to a successor has become moot since 2003, when the existence of the Office was extended indefinitely.[137]

II. Article 35, para. 1 and Article II, para. 1

1. '. . . co-operate with the Office of the United Nations High Commissioner for Refugees . . .'

a) Meaning and Implications of 'Cooperation'

46 Article 35, para. 1 of the 1951 Convention and Art. II, para. 1 of the 1967 Protocol require States parties to cooperate with UNHCR in the exercise of its functions: providing international protection and seeking durable solutions.[138] What 'cooperation' should be taken to mean and entail for States parties was, however, not clear to the drafters, indeed the very idea called for clarification.[139] The representative of France indicated, moreover, that cooperation could only be effected through agreements between States and UNHCR, and the representative of Italy likewise subjected cooperation to the conclusion of an agreement with UNHCR.[140] France and Italy were the first States that concluded an agreement with UNHCR,[141] agreements that were much later categorized as 'cooperation agreements'.[142] The question is, however, whether cooperation on the basis of Art. 35, para. 1 of the 1951 Convention and Art. II, para. 1 of the 1967 Protocol requires the conclusion of agreements.

47 Arguably not when the (original) *modus operandi* of UNHCR is taken into consideration. Taking the Statute of UNHCR as point of departure, it is obvious that UNHCR had to

[134] UNHCR, *Statistical Yearbook 2007*, pp. 7, 16–17.
[135] UN Doc. A/CONF.2/SR.25, p. 12 (France).
[136] *Cf. supra*, MN 13, the representative of the US in particular pressed for unequivocality in this respect.
[137] *Cf. supra*, MN 40.
[138] Prov. 1 UNHCR Statute.
[139] UN Doc. A/CONF.2/SR.25 (1951), pp. 19–20 (France). Although the representative of Egypt observed that the verb 'cooperate' did not imply direct action, *supra,* MN 15, Grahl-Madsen infers 'a more active participation in the functions of the United Nations Agency' from the fact that the verb cooperate is used rather than facilitate which was used in the draft text of the Secretary-General, Grahl-Madsen, *Commentary*, Art. 35, para. 2.
[140] UN Doc. A/CONF.2/SR.25 (1951), pp. 19 and 13 respectively; *cf. supra,* MN 46.
[141] *Accord entre le Gouvernement Italien et le Haut Commissaire des Nations Unies pour les Réfugiés*, 2 April 1952; *Accord entre le Gouvernement Français et le Haut Commissaire des Nations Unies pour les Réfugiés, en Vue de l'Installation et du Fonctionnement en France de la Délégation du Haut-Commissaire,* 18 February 1953 (the agreement extended beyond metropolitan France to Algeria and the French overseas territories in general, the so-called '*Départements d'Outre-Mer*').
[142] This designation is the official one since 1989; earlier they were referred to as 'branch office agreements' and 'field office agreements', UNHCR, *Memorandum: Designation of UNHCR Field Offices* (1988); UNHCR, *Inter-Office Memorandum No. 79/89*; UNHCR, *Field Office Memorandum No. 67/89: Model UNHCR Co-operation Agreement* (1989).

exercise its functions indirectly. First of all, the Statute provided that the work of UNHCR would relate to groups and categories of refugees,[143] a provision that 'was aimed at insuring that the UNHCR would not become another IRO ministering directly to the individual needs of a multitude of refugees but would instead remain a small office dealing mainly with general refugee matters'.[144] Secondly, other provisions in the Statute similarly served to emphasize the non-operational character of UNHCR. The Statute confines the task of seeking durable solutions to assisting governments and private organizations to facilitate the voluntary repatriation of refugees, or their assimilation within new national communities.[145] A wording that 'reflects the fact that the drafters of the Statute agreed that UNHCR should be, in contrast to the IRO, a "non-operational" agency'.[146] 'Even in regard to international protection, the predominant role of the UNHCR was seen as being to stimulate and encourage action by governments to achieve more favourable treatment of refugees rather than to perform direct services for individual refugees or groups of refugees.'[147] The role given to UNHCR was characterized by the drafters as one complementary to that of States—themselves charged with the responsibility to protect the refugees on their territory—and it meant that the functions of UNHCR would in essence consist of higher direction, liaison, control, and supervision and not also comprise executive services.[148] The office was accordingly set up with a very small staff and a modest budget.[149] The cooperation required by States would of necessity correspond with the envisaged *modus operandi,* and it is hard to see why this would require the conclusion of an agreement: an agreement would only be required when States would replace the envisaged division of responsibilities between themselves and UNHCR by an alternative one. Illustrative of this is the first cooperation agreement, the one concluded with Italy, which transferred the national responsibility for protecting and assisting refugees in Italy to UNHCR who was to exercise this responsibility by means of a physical presence in the country.[150]

Article 35, para. 1 was drafted when the decision had been made to create a non-operational successor to the IRO and the corresponding *modus operandi* of UNHCR simply did not require a physical foothold in the territory of States parties. The cooperation called for in Art. 35, para. 1 cannot, therefore, be taken to imply and entail such a foothold, and the same applies to Art. II of the 1967 Protocol.[151] This means that the cooperation States parties are to undertake on the basis of Art. 35, para. 1 of the 1951 Convention and/or Art. II of the 1967 Protocol does not comprise consent to a physical presence of UNHCR in their territory: a physical (operational) presence consequently requires the explicit consent of States **48**

[143] Prov. 2 UNHCR Statute.

[144] Holborn, *Refugees, vol I*, p. 90.

[145] Prov. 1 UNHCR Statute.

[146] Holborn, *Refugees, vol I*, p. 88. The first High Commissioner accordingly concluded that the function of his office was 'essentially an indirect one', best defined as 'to encourage, to assist, to promote, to co-ordinate and to co-operate', GA Third Committee, UN GAOR, 6th Sess., SR 380 (1952), para. 6.

[147] Holborn, *Refugees, vol I*, p. 88 (with reference to Prov. 8 UNHCR Statute).

[148] GA Third Committee, UN Doc. A/C.3/529 (1949), pp. 3–5; GA Third Committee, UN Doc. A/C.3/L.26 (1949), Annex; GA Third Committee, UN GAOR, 4th Sess., SR 256 (1949), paras. 14–15, 19, 39; *cf.* also the statement of the representative of France who emphasized that the High Commissioner's Office was intended to be an authority, not an administration, UN Doc. A/CONF.2/SR.3 (1951), p. 11.

[149] GA Fifth Committee, UN Doc. A/C.5/357 (1949), para. 4; *cf.* also Zieck, *UNHCR's Presence*, pp. 29–31.

[150] Zieck, *UNHCR's Presence*, p. 254. *Cf.* Prov. 16 UNHCR Statute, the legal basis of such agreements, and its reference to 'need' on the part of States.

[151] In that respect it is worth adding that the 1967 Protocol was meant to remedy a limitation in the definition of refugee in the 1951 Convention rather than anything else, *cf. supra*, MN 4.

parties.[152] Although this consent need not be given in the form of an agreement, in practice this will generally be the case.

49 The nature of UNHCR and corresponding *modus operandi* has, however, changed dramatically: UNHCR has developed into a fully-fledged operational agency.[153] This transformation was induced by the consideration, already expressed by the first High Commissioner, that 'it would be unrealistic to envisage merely a central organ in Geneva from which the international protection of refugees could be undertaken'.[154] The High Commissioner argued that UNHCR's work could not be effective without field offices: refugees could not be protected effectively by means of a single central office whose only means of action were the exchange of letters and the submission of reports.[155] To underline the point made, he referred to the practical problems refugees encounter on a daily basis, such as discrimination and the lack of necessary papers, and observed that it was accepted practice for States to maintain permanent representatives with one another and that refugees are simply a people without a government.[156] Half a century later, the High Commissioner observed in the same vein that 'UNHCR needs to assure its own proximity and access to refugees and other persons of concern, so that it can provide for their effective protection, monitor their situation and address their needs'.[157]

50 The presence of UNHCR in the territory of States can nonetheless not invariably be characterized as an operational presence, and the functions it discharges in particular States accordingly vary considerably. Of necessity, the meaning of 'cooperation' and what it entails on the part of States parties to the 1951 Convention and/or 1967 Protocol varies along with the nature and purpose of the presence of UNHCR in the territory of States parties.

b) Obligation to Cooperate Ratione Personae

51 States parties to the Convention and/or Protocol have to cooperate with UNHCR in the exercise of its functions. This obligation entails that the cooperation extends to those who fall within the mandate *ratione personae* of UNHCR.[158] As a result of numerous extensions of UNHCR's mandate by the GA, UNHCR's competence *ratione personae* differs considerably from that of States parties under the 1951 Convention and the 1967 Protocol whose obligations are predicated on a categorically smaller group of beneficiaries.[159] Despite the fact that

[152] *Cf.* Goodrich/Hambro/Simmons, *Charter of the United Nations: Commentary and Documents* (3rd edn., 1969), p. 190; Dutheil de la Rochère, 'Art. 22', in *La Charte des Nations Unies: Commentaire Article par Article* (Cot/Pellet, eds., 1985), pp. 425, 430; Khan, 'Article 22', in *The Charter of the United Nations: A Commentary, vol. I* (Simma, ed., 3rd edn., 2012), pp. 719, 734; Maynard, 'The Legal Competence of the United Nations High Commissioner for Refugees', *ICLQ* 31 (1982), pp. 415, 416; GA Third Committee, UN Docs. A/C.3/527 and A/C.3/527/Corr.1 (1949), p. 35, fn. 1.

[153] Illustrative of which are the following figures: as of 31 May 2020, UNHCR employs 17,324 people, of whom nearly 90 per cent are based in the field. UNHCR has a presence in 135 countries, website UNHCR (figures at a glance, available at: <https://www.unhcr.org/about-unhcr/who-we-are/figures-glance>). Another indicator is UNHCR's budget, $8.615.8 million for 2021, UN Doc. A/AC.96/1191/Add.1 (2019), para. 10.

[154] UN Doc. E/2036 (1951), para. 26.

[155] GA Third Committee, UN GAOR, 6th Sess., SR 373 (1952), para. 14; *cf.* also GA Third Committee, UN GAOR, 6th Sess., SR 380 (1952), para. 11.

[156] GA Third Committee, UN GAOR, 6th Sess., SR 373 (1952), para. 25; *cf. supra*, MN 16 for the characterization of Art. 35—then draft Art. 30—by the Belgian representative at the Conference of Plenipotentiaries.

[157] UN Doc. A/AC.96/980 (2003), p. 5, para. 11.

[158] *Cf.* Türk, 'The Role of UNHCR in the Development of International Refugee Law', in *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Nicholson/Twomey, eds., 1999), p. 156.

[159] *Cf. supra*, MN 44.

their obligation to cooperate with UNHCR is included in the Convention and Protocol, this does not mean that the States parties to those instruments have to apply them to all those of UNHCR's concern.[160]

c) Obligation to Cooperate Ratione Materiae

Article 35, para. 1 of the 1951 Convention obliges States parties to cooperate with UNHCR in the exercise of its functions. That should be taken to mean: 'in any and all of the functions of the High Commissioner's Office, irrespective of their legal basis'.[161] Article 35, para. 1—and the same applies to Art. II, para. 1 of the 1967 Protocol—is in that respect a blanket norm in that it may comprise anything UNHCR sets out to do. Art. 35, para. 1 may therefore be characterized as the legal equivalent of the Bermuda Triangle, a vanishing point,[162] which may cause a dilution of the (original) division of responsibilities between States and UNHCR.[163] This, in turn, raises the question of whether there are any limits to the obligation of States parties to the 1951 Convention and 1967 Protocol to cooperate with UNHCR in the exercise of its functions. The most obvious limits are the (other) obligations States parties have under the 1951 Convention and/or the 1967 Protocol, and, more generally, the original allocation of responsibilities with respect to refugees between States, as normatively substantiated by the 1951 Convention and the 1967 Protocol, on the one hand, and UNHCR, in the form of the specific functions laid down in its Statute, on the other. **52**

d) Obligation to Cooperate Ratione Loci

The role of UNHCR was initially confined to countries of refuge, illustrative of which is the fact that Prov. 16 UNHCR Statute, which allows for the possibility of a presence of UNHCR in the territory of a State subject to the consent of that State, explicitly refers to 'countries of residence of refugees'. UNHCR's operational scope has been expanded and comprises countries of origin of refugees. Initially this expansion resulted from UNHCR's concern with returnees,[164] but has gradually evolved to include internally displaced persons and the more elusive and dubious task of prevention.[165] **53**

2. UNHCR's Functions

UNHCR's functions are set out in its Statute: providing international protection and seeking permanent solutions for the problem of refugees.[166] The qualification 'permanent' is no longer in use; it has been changed to 'durable'. The solutions are respectively voluntary repatriation of refugees and assimilation within new national communities.[167] The designation 'assimilation' is no longer in use either and the relevant **54**

[160] See Zieck, *supra*, fn. 133.
[161] Grahl-Madsen, *Commentary*, Art. 35, para. 4.
[162] Zieck, 'Vanishing Points of the Refugee Law Regime', *Ohio State JDR* 20 (2005), pp. 217, 238–241.
[163] *Ibid*. On this dilution in terms of 'institutional overreaching', *cf*. Hathaway, 'The Right of States to Repatriate Former Refugees', *Ohio State JDR* 20 (2005), pp. 175, 198 *et seq*. 'Original' is placed in brackets for the basic division—also in terms of responsibility—still proceeds from the primary responsibility of States to protect refugees within their jurisdiction, *cf*. UN Doc. A/AC.96/830 (1994), para. 13.
[164] *Cf*. UNHCR ExCom, Conclusion No. 18 (1980), (h), which is almost apologetic in terms of this particular expansion.
[165] *Cf*. Hathaway, 'New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection', *JRS* 8 (1995), pp. 288–294, *passim*.
[166] Prov. 1 UNHCR Statute.
[167] *Ibid*.

solution is usually described as integration in the country of refuge or local integration respectively resettlement in a third country. The function of providing international protection is elaborated in Prov. 8 UNHCR Statute, and includes supervising the application of international conventions for the protection of refugees, and obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them. As indicated earlier, UNHCR, and the wording of the forms of protection included in Prov. 8 is illustrative of that, was to accomplish its tasks in an indirect manner.[168] The contemporary description of providing international protection stands in stark contrast to this: 'Protection is first and foremost about direct protection delivery in the field.'[169] A field presence has become a *conditio sine qua non* in UNHCR's current understanding of its protection mandate; in the terminology of UNHCR: a 'tool of international protection'.[170] A physical presence of UNHCR in the territory of States has developed into such a common feature that many tasks UNHCR is nowadays assigned to perform, actually presuppose, or proceed from a physical presence of UNHCR in the field, for instance arranging basic food rations, clean water, the removal of armed elements from refugee camps, counselling for individual refugees, and the prevention of attacks, intimidation, and harassment of refugees and returnees.[171] With reference to those responsibilities, which are also assumed in the territory of States parties to the 1951 Convention and/or 1967 Protocol, 'it can be argued, [that] UNHCR has been transformed from a humanitarian organisation to one that shares certain features of a state'.[172]

3. UNHCR's Supervisory Duty

a) '…facilitate…'

55 States parties have to cooperate with UNHCR in the exercise of its functions and in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention and/or the 1967 Protocol. The question is what 'facilitating' should be taken to mean. At the least it would mean that no obstacles are placed in way of this particular task in the sense that UNHCR should be capable of actually exercising its supervisory task, but the verb 'facilitate' requires more from States: 'To render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process).'[173] What this, in turn, entails for the States parties to the 1951 Convention and/or 1967 Protocol depends on understanding UNHCR's supervisory duty (and how it is exercised).

[168] See *supra,* MN 47.

[169] Feller/Klug, 'Refugees—United Nations High Commissioner for (UNHCR)', in *MPEPIL*, para. 72.

[170] UN Doc. A/AC.96/830 (1994), para. 14.

[171] *Ibid.*, paras. 14 and 18. By way of illustration, *cf.* UNHCR ExCom, Conclusions No. 1 (1975), (g); No. 47 (1988), (r) (on surveying individual cases with a view to identifying major protection problems); No. 8 (1977), (d); No. 28 (1982), (e); No. 68 (1992), (g) (on participation in status determination procedures); No. 18 (1980), (j) (on monitoring the situation of returning refugees with particular regard to any guarantees provided by the country of origin, making appropriate arrangements for the reception of returnees and/or to establish projects for their integration in their countries of origin); No. 22 (1981), para. III; No. 48 (1988), para. 4 (d); No. 72 (1993), (b) (on supervising the well-being of persons entering reception or other refugee centres, camps, or other refugee settlements), and (e) (on monitoring the personal security of refugees and asylum seekers).

[172] Slaughter/Crisp, 'A Surrogate State? The Role of UNHCR in *Protracted Refugee Situations*', *UNHCR Research Paper No. 168* (2009), p. 2; *cf.* Türk, in *UNHCR and Supervision*—UNHCR's Director of International Protection at the time—simply refers to operational contexts where UNHCR takes on 'a state-substitution role', p. 49.

[173] Simpson/Weiner (eds.), *Oxford English Dictionary* (2nd edn., 1989), 'facilitate, *v.*'.

b) '… its duty of supervising…'

The drafters did not have a clear understanding of what supervision on the part of UNHCR would signify and entail: the drafting process raised questions rather than answering them.[174] An early commentator on the 1951 Convention merely observed that UNHCR supervises the application of the provisions of the 1951 Convention from its headquarters in Geneva and its branch offices in the various countries.[175] **56**

With a view to identifying the meaning and purport of UNHCR's supervisory task, recourse should therefore be had to the practice of UNHCR, and corresponding State practice. This recourse will proceed from the understanding that 'supervision' can be taken as the equivalent of monitoring or overseeing rule compliance, with a view to enhancing compliance,[176] and the corresponding presumptions that supervision presupposes a clear understanding of the meaning of the various provisions of the 1951 Convention and 1967 Protocol,[177] and knowledge about actual application on the part of States parties.[178] In this respect it is remarkable that the information regarding implementation of the 1951 Convention has been included in Art. 35, para. 2, and regarding implementation of the 1967 Protocol in Art. II, para. 2, which stipulate that this information should be provided by States parties on request with a view to UNHCR's making reports to the competent organs of the UN, rather than enabling the Office to exercise its supervisory function. In addition, as is set out below, UNHCR has made little use of the possibility of actively soliciting information in the manner provided for in the Convention and Protocol. **57**

As far as the first presumption is concerned, UNHCR has arguably been the most active: seeking to promote a common—and consequently consistent—approach to the application of the 1951 Convention and the 1967 Protocol. In 1979, at the request of its ExCom,[179] and hence of States, to provide guidance to governments in applying the terms of the 1951 Convention and the 1967 Protocol, UNHCR published a *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. It was based on the knowledge accumulated by the Office over the years since its creation, taking State practice and doctrine into account.[180] A second edition of the Handbook was published in 1992, a third in 2011, and a fourth in February 2019.[181] Since 2002, the Handbook has been complemented by a series of Guidelines on International Protection, once again, at the request of States.[182] These **58**

[174] *Cf. supra*, MN 14.

[175] Weis, *Refugee*, pp. 362–363.

[176] Schmalenbach, 'International Organisations or Institutions, Supervision and Sanctions', in *MPEPIL* (2013), paras. 1, 4, 6.

[177] *Cf.* UNHCR's stated aim of its supervisory responsibility: to ensure consistency with international refugee law and standards, UN Doc. A/AC.96/930 (Note on International Protection) (2000), para. 20, which is not tantamount to *ensuring* compliance as UNHCR argued in a public Statement before the ECJ, *UNHCR Public Statement in Relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees Pending Before the Court of Justice of the European Union, August 2012, C-528/11*, para. 3.1.4.

[178] The second assumption is addressed in relation to Arts. 35, para. 2 and 36 of the 1951 Convention, and Art. II, para. 2 and Art. III of the 1967 Protocol.

[179] UNHCR ExCom, Conclusion No. 8 (1977), (g).

[180] Preface, UNHCR, *Handbook on Procedures*.

[181] UNHCR, *Handbook on Procedures*.

[182] *Cf.* UN Doc. A/AC.96/965/Add.1 (2002), pp. 7–8 (Goal 1, Objective 6). Reference should also be made to the numerous background notes, position papers, (key) legal considerations, and (eligibility and other) guidelines UNHCR publishes (see *e.g.*, UNHCR, International Protection Considerations with regard to People Fleeing the Syrian Arab Republic, Update V, 3 November 2017), available at UNHCR's web site (<http://www.unhcr.org>).

Guidelines, all of which explicitly refer to UNHCR's mandate in conjunction with Art. 35 of the 1951 Convention and Art. II of the 1967 Protocol, are 'intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field'.[183] None of the guidelines, however, address the subject of reservations, which is a remarkable omission since they affect the extent of the obligations States parties have incurred.[184] In that respect it is worth recalling the argument of the Human Rights Committee that did address this subject with respect to the CCPR: the operation of the classic rules on reservations are inadequate for human rights treaties since they are not a web of interstate exchanges of mutual obligations as a result of which States have often not seen any legal interest in or need to object to reservations, and therefore it necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the CCPR.[185]

59 States parties have the obligation to implement and apply the 1951 Convention and/or 1967 Protocol—their accountability is strictly a function of compliance with their formal treaty obligations[186]—and that of necessity entails interpreting those obligations,[187] even whilst one of them prescribes facilitating the supervisory function of UNHCR which includes interpretation of the same treaty obligations, *i.e.* identification of the yardstick it will apply when supervising the application of the provisions of the 1951 Convention and 1967 Protocol by States parties. The circularity involved may explain the reticence of States parties to recognize the *Handbook on Procedures* as a legally binding interpretation, and to instead consider it in terms of significant guidance in construing the 1951 Convention and the 1967 Protocol.[188] The circularity involved may be problematic, and compounded by a lack of binding interpretations, when imprecision of the 1951 Convention and the 1967 Protocol gives rise to differences of interpretation and application.[189]

[183] The quoted phrase is repeated in the preface to each of the enumerated Guidelines on International Protection: the 13 Guidelines are included in UNHCR's Handbook on Procedures. *Cf.* Türk, 'Introductory Note to UNHCR Guidelines on International Protection', *IJRL* 15 (2003), pp. 303–304. For a critical analysis of the guidelines, and more generally, UNHCR's interpretative practice *cf.* Hathaway, *Rights*, pp. 63–66; see also O'Byrne, 'Is there a Need for Better Supervision of the Refugee Convention?', 26 *Journal of Refugee Studies* (2013), pp. 340–341 examining inconsistencies in the Handbook, contradictions between the Handbook and 1951 Convention, and Guidelines conflicting with the Handbook and ExCom conclusions.

[184] *Cf. supra,* MN 26.

[185] See CCPR, CCPR/C/21/Rev.1/Add.6, paras. 17, 18.

[186] Art. 38 of the 1951 Convention is indicative of the prerogative of States in this respect: it concerns disputes relating to interpretation or application of the 1951 Convention between States parties to the 1951 Convention.

[187] *Cf.* UNHCR ExCom, Conclusion No. 39 (1986), (k): '*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 Art. 1 A (2) of the 1951 United Nations Refugee Convention'.

[188] The US Supreme Court explicitly stated that it did not consider the *Handbook on Procedures* legally binding on US officials, *cf. Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 US 421, 439, fn. 22, where it is added that the *Handbook on Procedures* itself disclaims force of law (reference is made to the observation in the handbook that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol … is incumbent upon the Contracting State in whose territory the refugee finds himself'). More in general *cf.* Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond', in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Feller/Türk/Nicholson, eds., 2003), pp. 613, 627; Juss, 'The UNHCR Handbook and the Interface between "Soft Law" and "Hard Law" in International Refugee Law', in *Contemporary Issues in International Refugee Law* (Juss/Harvey, eds., 2013), pp. 31–67.

[189] *Cf.* by way of illustration UN Doc. EC/1992/SC.2/CRP.10 (1992), paras. 16–22.

Until 2018, the UNHCR ExCom annually adopted conclusions,[190] some of which interpreted the 1951 Convention and the 1967 Protocol.[191] It has been argued that these conclusions constitute subsequent agreements in the sense of the 1969 Vienna Convention on the Law of Treaties: agreements between the parties to the 1951 Convention and/or 1967 Protocol 'regarding the interpretation of the treaty or the application of its provisions', to take into account when interpreting the 1951 Convention and/or 1967 Protocol pursuant to Art. 31, para. 3 (a) VCLT.[192] However, there are a several arguments that militate against qualifying the conclusions as subsequent agreements. First of all, they are adopted by a subsidiary organ of the ECOSOC that was created to advise UNHCR, not States:[193] accordingly, most of the conclusions consist of advice addressed to UNHCR. Secondly, the conclusions are not legally binding, and are therefore not 'agreements'.[194] Thirdly, the Executive Committee does not consist of all States parties to the 1951 Convention and/or the 1967 Protocol.[195] Lastly, many conclusions address general issues such as the protection of UNHCR staff, accession to international instruments and their implementation, promotion and dissemination of refugee law, UNHCR's pursuit of durable solutions, and issues that are not addressed in Convention and Protocol such as family reunion. The conclusions as such do not intend to interpret the 1951 Convention and/or 1967 Protocol, they only do so occasionally,[196] and haphazardly. The value of the conclusions seems rather to consist of their addressing general issues and highlighting specific problems beyond the scope of the 1951 Convention and/or 1967 Protocol such as protection from sexual abuse and exploitation, reduction of statelessness, sharing responsibility for refugees, and protracted refugee situations.[197] **60**

Another means to secure a uniform interpretation of 'international conventions for the protection of refugees' consists of third party interventions in judicial proceedings. In 1999, the European Court of Human Rights (ECtHR) invited UNHCR to submit a written **61**

[190] Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion No. 1-114), UN Doc. HCR/IP/3/Eng/REV.2017. It is not clear why this practice ended in 2017.

[191] *Cf. inter alia* UNHCR ExCom, Conclusions No. 6 (1977), (c); No. 7 (1977), (a) and (c); No. 12 (1978), (d) and (f); No. 15 (1979), (b); No. 17 (1980), (g); No. 69 (1992); No. 73 (1993), (d); No. 94 (2002), (c); No. 95 (LIV), (f); No. 103 (LVI), (b).

[192] Hathaway, *Rights*, pp. 145, 62 (describing the conclusions as UNHCR's views on the substance of refugee law which are 'formally codified through the authoritative process of Executive Committee decision-making').

[193] See Barutciski, 'The Limits to the UNHCR's Supervisory Role', in *The UNHCR and the Supervision of International Refugee Law* (Simeon, ed., 2013), suggesting that ExCom (encouraged by UNHCR protection specialists) acts *ultra vires* when addressing States rather than UNHCR, p. 71.

[194] Perhaps they could therefore have been considered in terms of 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' (Art. 31, para. 3 lit. b VCLT), but see the next footnote on the composition of ExCom.

[195] As at January 2021, 100 of the 106 current members of the ExCom are parties to the 1951 Convention and/or 1967 Protocol (the other six States are not party to either one of them), which means that 68.49 per cent of all the States parties to those instruments are ExCom members, and 31.51 per cent are not.

[196] Subtracting repetitions, probably less than 10 per cent of the conclusions concern interpretation. See also North/Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees', in *The UNHCR and the Supervision of International Refugee Law* (Simeon, ed., 2013), pp. 214–256 denying their capacity to provide the kind of ongoing, context-specific jurisprudential reasoning that would be of particular use to the interpreters of the 1951 Convention, p. 228; and Barutciski, *supra*, fn. 193, who contends that 'the conclusion process' was never meant to be an example of UNHCR's supervisory role, and points to the Excom's inability to encourage effective follow-up procedures for the protection conclusions it has adopted, p. 72.

[197] Conclusions No. 98 (LIV), No. 106 (LVII)), No. 100 (LV)), No. 109 (LX).

intervention in a case concerning a refugee who feared indirect *refoulement*.[198] More invitations would follow, and in addition, UNHCR sought leave to intervene in a number of cases.[199] In its submissions UNHCR invariably explains its Statutory responsibility to supervise the application of international conventions for the protection of refugees, and points to the corresponding treaty obligation of States to facilitate its duty of supervising the application of the provisions of the 1951 Convention. In addition, it adds that its submissions (accordingly) do not address or comment on the facts or merits of the case but seek to clarify 'questions of refugee law'.[200] With respect to 'questions of refugee law', the 1951 Convention and/or 1967 Protocol are, of course, outside the scope of the jurisdiction of the Court which is confined to the European Convention and its Protocols, and UNHCR's supervisory power is confined to 'international conventions for the protection of refugees'. Illustrative of the way those restrictions are transcended are the following considerations, made by UNHCR in its first intervention, and repeated in later ones:

> In this statement, UNHCR focuses on a number of fundamental principles concerning mainly the 1951 Convention in the context of international refugee law. In doing so, UNHCR is not directly addressing the relationship between the 1951 Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). However, some of the legal principles outlined in regard to the 1951 Convention may have relevance to comparable protection issues under the ECHR.[201]

Nonetheless, the scope of UNHCR's supervisory responsibility, perhaps unavoidable when intervening in cases before the ECtHR, appears to extend beyond 'international conventions for the protection of refugees' to international human rights law.[202] For instance, it has addressed the question whether, and in what circumstances, the detention of asylum seekers during the asylum procedure 'is compatible with international refugee and human rights law'.[203] Another example is UNHCR's interpretation of the relevant principles of 'international refugee and human rights law' regarding the extraterritorial scope of the *non-refoulement* obligation.[204] A third example concerns UNHCR's submission regarding the non-admission or 'push-back' of

[198] UNHCR, *UNHCR Intervention before the ECtHR in the case of T.I. v. The United Kingdom, Appl. No. 43844/98, 4 February 2000*.

[199] On the basis of Art. 36 ECHR, and Art. 44 of the Rules of the Court. For an overview of interventions, dated 29 October 2020, see UNHCR Interventions before the ECtHR, <https://www.unhcr.org/protection/operations/5f9ab8794/unhcr-interventions-european-court-human-rights.html>, accessed on 20 July 2021.

[200] See *e.g.* UNHCR, *UNHCR Intervention before the ECtHR in the case of Mir Isfahani v. The Netherlands, Appl. No. 31252/03, May 2005*, paras. 2, 3.

[201] UNHCR, *UNHCR Intervention before the ECtHR in the case of T.I. v. The United Kingdom, Appl. No. 43844/98, 4 February 2000*, which could be taken as an oblique reference to Art. 5 of the 1951 Convention ('Nothing in the Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention').

[202] UNHCR points to the complementary and mutually reinforcing nature of international human rights law and international refugee law, *UNHCR Intervention before the ECtHR in the case of Hirsi and Others v. Italy, Appl. No. 27765/09, March 2010*, para. 4.2.1. For an example of a case that clearly falls within the scope of UNHCR's supervisory responsibility in the sense indicated, see UNHCR, *UNHCR Intervention before the ECtHR in the case of Said v. Hungary, Appl. No. 13457/11, 30 March 2012*, regarding the interpretation and application of Arts. 31, 32, and 33 of the 1951 Convention.

[203] UNHCR, *UNHCR Intervention before the ECtHR in the case of Saadi v. The United Kingdom, Appl. No. 13229/03, 30 March 2007*; see also UNHCR, *Submission by UNHCR before the ECtHR in the case of H.A. and Others v. Greece, Appl. No. 19951/16, 30 March 2017* (interpretation of the relevant principles of international refugee and human rights law governing the detention of unaccompanied and separated children).

[204] UNHCR, *Submission by UNHCR before the ECtHR in the case of S.S. and Others. v. Italy, Appl. No. 21660/18, 14 November 2019*.

persons at the border in the Melilla enclave and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law governing such situations.[205] In addition, UNHCR addresses issues that are not included in 'international instruments for the protection of refugees' such as 'the concept of statelessness as a worldwide phenomenon, as well as the international and regional legal frameworks established to address statelessness',[206] and family reunification.[207] Leaving the issue of statelessness aside, since UNHCR's competence regarding statelessness is based on its extended mandate,[208] it is clear that UNHCR extends its supervisory power *ratione materiae* in its submissions before the Court beyond international conventions for the protection of refugees, and even beyond (the wider notion of) international refugee law, to the protection of refugees under international (human rights) law in accordance with its observation that the treatment of refugees is governed not only by instruments that address refugees specifically, but also by broader human rights treaties.[209]

Another regional court where UNHCR intervenes is the Court of Justice of the European Union (CJEU).[210] The common European Asylum system must be based on the full and inclusive application of the 1951 Convention, which means, in turn, that UNHCR's interventions touch upon the 1951 Convention and/or the 1967 Protocol indirectly.[211] For instance, UNHCR had to address cessation of refugee status in the Qualification Directive,[212] and the pertinent provision is based on Art. 1C (5) of the 1951 Convention, and consequently UNHCR could clarify for the CJEU the application of a provision of the 1951 Convention in the framework of the EU asylum *acquis*.[213] **62**

[205] UNHCR, *Submission by UNHCR before the ECtHR in the cases of N.D. and N.T. v. Spain, Appl. Nos. 8675/15 and 8697/15, 15 November 2015*.

[206] UNHCR, *Submission by UNHCR before the ECtHR in the case of Bedri Hoti v. Croatia, Appl. No.63311/14, 3 July 2015* concerning the so-called 'erasure process' in Croatia that deprived those affected of their permanent residency status and hence prevented them from accessing procedures for the acquisition of citizenship.

[207] See UNHCR, *Submission by UNHCR before the ECtHR in the case of J. K. v. Switzerland, Appl. No. 15500/18, 28 May 2019*, and UNHCR, *Submission by UNHCR before the ECtHR in the case of M.A. v. Denmark, Appl. No. 6697/18, 21 January 2019*.

[208] *Cf.* UN Docs. A/Res/3274 (XXIX) (1974); 49/169 (1995); 50/152 (1996).

[209] UNHCR, *UNHCR Intervention before the ECtHR in the case of T.I. v. The United Kingdom, Appl. No. 43844/98, 4 February 2000*, para. 8. In another intervention, UNHCR recalls that the rights included in the 1951 Convention constitute the minimum protection, the implementation of which requires taking into consideration the preambular concern to assure refugees the widest possible exercise of fundamental rights and freedoms, *UNHCR Intervention before the ECtHR in the case of Saadi v. The United Kingdom, Appl. No. 13229/0330, 30 March 2007*, para. 8. UNHCR could, in that respect, have referred to Art. 5 of the 1951 Convention (for the text, see *supra,* fn. 201), that requires, in short, 'that refugees receive the benefits of the cognate rights set by international human rights law', Hathaway, *Rights*, p. 52, fn. 173.

[210] For an overview, see UNHCR's 15 interventions before the ECJ (Court of Justice of the EU until 2009), 29 October 2020, <https://www.unhcr.org/protection/operations/5f9ab7d44/unhcr-interventions-court-justice-eu.html>, accessed on 20 July 2021.

[211] So far, UNHCR only intervened once *(UNHCR Intervention Before the ECJ in the Cases of Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/12, C-201/12), 28 September 2012 joined as a party to the case by the Dutch Council of State*); in all the other cases (see *supra,* fn. 210), it submitted statements.

[212] EC Directive 2004/83 of 29 April 2004, OJ L 304, 12, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[213] UNHCR, *UNHCR Public Statement in relation to Salahadin Abdulla and Others v. Bundesrepublik Deutschland pending before the ECJ (C-175/08; C-176/08; C-178/08 & C-179/08), August 2008*, pp. 1, 2. The second case in which UNHCR could clarify a provision of the 1951 Convention in the framework of the EU asylum *acquis* concerned Art. 1D, *UNHCR Revised Statement on Article 1D of the 1951 Convention in relation to Bolbol v. Bevándorlási és Állampolgársági Hivatal Pending Before the ECJ, October 2009*; the third, Art. 1F, *UNHCR Public Statement in relation to cases Bundesrepublik Deutschland v. B and D pending before the ECJ, July 2009*. A more recent example concerned Art. 1D, *UNHCR Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive Issued in the Context of the Preliminary Ruling*

63 Another regional court is the Inter-American Court of Human Rights (IACtHR). UNHCR appears to intervene in proceedings before this court too, but it is not clear how frequently.[214] Unlike the European Convention, the American Convention on Human Rights includes a right to seek and be granted asylum (albeit confined to political offenses or related common crimes),[215] so UNHCR can address the protection of refugees—including the relevant norms of the 1951 Convention and/or 1967 Protocol—more directly than it does before the ECtHR.[216] An example of this is UNHCR's expert witness testimony in the case of *Pacheo Tineo v. Bolivia* in which UNHCR explained how the rights to due process and judicial protection are to be respected in refugee status determination procedures.[217]

64 UNHCR also tries to secure a correct and uniform interpretation of the 1951 Convention and 1967 Protocol at the national level by means of giving its views—*amicus curiae* briefs—before the highest appellate courts in refugee status determination procedures and other procedures regarding refugees.[218] It does so predominantly in States whose jurisdictions belong to the common law system that, unlike the civil law and other law traditions,[219] includes the *amicus curiae* figure.[220] The written views invariably refer to UNHCR's supervisory task as recognized in Art. 35 of the 1951 Convention, and Art. II of the 1967 Protocol, and express UNHCR's 'clear interest in ensuring the correct and consistent interpretation of the 1951 Convention by States party',[221] taking into account that court decisions may influence the manner in which the authorities of other countries apply the 1951 Convention and the 1967 Protocol. The desire to reduce the possibility of conflict between decisions made by different States, between decisions made by a State and UNHCR, or both is also mentioned.[222] UNHCR's interventions are consequently not geared to individual refugees, but to 'the interpretation and application of the Convention as a matter of law and principle…'[223] In its *amicus curiae* submissions, UNHCR 'only seeks to address issues of legal principle arising from the concerned case, in an effort to support consistent interpretation of refugee law in line with international standards'.[224]

Reference to the ECJ from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019—Federal Republic of Germany v. XT (C-507/19), 18 August 2020.

[214] UNHCR's web site (including Reflaw) does not include an overview.

[215] Art. 22, para. 7.

[216] See *supra,* MN 61.

[217] UNHCR, *UNHCR's Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of Pacheco Tineo vs. Bolivia (Case 12.474), 19 March 2013*, see in particular also para. 23 where UNHCR argues that the interrelation between the scope and content of the right to asylum and the international protection of refugees rests in Art. 22(7) of the American Convention; a link recognized by the Inter-American Court, see *ibid*., para. 25.

[218] See also *infra,* MN 79 on UNHCR's commenting on (draft) national legislation.

[219] UNHCR nonetheless submitted briefs in a number of Scandinavian countries, see *e.g. Amicus curiae* of UNHCR in case number 19-028135ASD-BORG/01 against the State/the Norwegian Appeals Board before the Borgarting Court of Appeal (Borgarting *Lagmannsrett*) on the interpretation of the 1951 Convention Relating to the Status of Refugees, 10 April 2020.

[220] In addition, most interventions take place in Australia, Canada, the US, and the UK.

[221] UNHCR, *Skeleton Argument in the Case Amer Mohammed El-Ali v. Secretary of State for the Home Department*, 26 June 2002, para. 4.

[222] *Cf. e.g.* Brief *Amicus Curiae* of the Office of the UNHCR in Support of Petitioner in the case of *Daniel Girmai Negusie, Petitioner, v. Michael Mukasey, United States Attorney General, Respondent,* 23 June 2008, pp. 3–4.

[223] UNHCR, Intervention, *K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent),* (2006) UKHL 46, United Kingdom: House of Lords (Judicial Committee), *IJRL* 19 (2007), p. 339, para. 2.

[224] UNHCR, *UNHCR Intervention before the Swedish Migration Court of Appeal in case number UM 8384-16*, 21 April 2017.

An advisory or consultative role of UNHCR in (individual) national refugee status determination procedures is a step further. However, UNHCR does not consider this role in terms of supervision but in terms of cooperation in the sense of Art. 35, para. 1 of the 1951 Convention and Art. II, para. 1 of the 1967 Protocol.[225] This role should be distinguished from status determination procedures that UNHCR undertakes to determine the eligibility of refugees in terms of its own mandate as well as those which UNHCR undertakes on behalf of States.[226] **65**

Any dispute between States parties relating to interpretation or application of the 1951 Convention shall, in case it cannot be settled by other means, be referred to the ICJ at the request of any one of the parties to the dispute.[227] Despite the fact that UNHCR has been charged with supervision—which comprises both interpretation and application—of the 1951 Convention and 1967 Protocol, Art. 38 of the 1951 Convention and Art. IV of the 1967 Protocol do not give UNHCR *locus standi*.[228] UNHCR observed that although 'it may not be able to claim the breach of Convention obligations owed to itself, or to invoke the dispute settlement provisions of the Convention and the Protocol, which are reserved to States parties', it 'looks to States parties to the Convention, not only to fulfil their own undertakings, but also to use their legal standing under the Convention to ensure compliance among the other parties'.[229] **66**

The supervisory power of UNHCR does not include the power to enforce compliance in case of contraventions or violations of the 1951 Convention and 1967 Protocol.[230] However, UNHCR claims it includes 'the legal authority to intervene with a State party which is perceived to be failing in its implementation of the Convention'.[231] This authority is confined to making formal and informal representations to governments,[232] and has, therefore, not without reason been qualified in terms of 'soft enforcement'.[233] UNHCR's extensive presence in the field enables it actively to monitor the protection, rights, and well-being of refugees at country level, which contributes to ensuring that States take the necessary action to identify and protect those deemed to be in need of international protection,[234] and hence to **67**

[225] UNHCR, *Handbook on Procedures*, p. 1.

[226] UNHCR conducts status determination procedures under its mandate in some 50–60 countries, by default, *i.e.* when a State is not a party to the 1951 Refugee Convention and/or does not have a fair and efficient national asylum procedure in place, and in approximately 20 countries, UNHCR conducts refugee status determination jointly with the Government pending the State assuming full responsibility for refugee status determination, <https://www.unhcr.org/refugee-status-determination.html#:~:text=States%20have%20the%20primary%20responsibility,national%20asylum%20procedure%20in%20place>, accessed on 20 July 2021; and see UNHCR, *Providing for Protection: Assisting States with the Assumption of Responsibility for Refugee Status Determination—A Preliminary Review*, March 2014. *Cf.* however, ECtHR, *D. et Autres c. Turquie*, Appl. No. 56125/10, 4 June 2013, in which the Court held Turkiye responsible for a status determination made by UNHCR on which Turkiye had relied.

[227] Art. 38 of the 1951 Convention; Art. IV of the 1967 Protocol.

[228] *Cf. supra*, MN 24.

[229] UNHCR, 'The Queen (Al-Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another (United Nations High Commissioner for Refugees intervening)', *IJRL* 20 (2008), pp. 675, 697, paras. 91, 97; see also para. 43.

[230] Türk, *UNHCR and Supervision*, p. 42; *cf.* Schmalenbach, *supra*, fn. 176, paras. 3, 20: supervision serves to uncover non-compliance, whilst sanctions (a response to defiant conduct, rarely judicial) aim to end it; they are two different concepts.

[231] UNHCR, *supra*, fn. 229, pp. 675, 697, para. 90.

[232] UNHCR ExCom, Conclusion No. 1 (1975), (g); UN Doc. A/AC.96/930 (2000), para. 13.

[233] Türk, 'UNHCR's Supervisory Responsibility', *RQDI* 14 (2001), pp. 135, 149.

[234] UNHCR, UN Doc. EPAU/2004/06 (2004), Ch. 4, para. 3. This active monitoring may include special monitoring arrangements at the frontier of a State, UN Doc. A/AC.96/930 (2000), para. 10.

compliance with the applicable norms. Its effectiveness in this respect is, however, incidentally hampered by funding constraints that affect staff deployment,[235] and structurally so by the fact that it is dependent on States in various ways: it requires their ongoing consent to a presence in their territory, and is dependent on their funding of its programmes.[236]

c) '… application of the provisions of this Convention'/'… of the present Protocol'

68 Supervision focuses on the application of the provisions of the 1951 Convention and the 1967 Protocol, or how those provisions are brought to bear on the beneficiaries of both instruments in practice. Consequently, it is not, at least not by virtue of Art. 35, para. 1 of the 1951 Convention and Art. II, para. 1 of the 1967 Protocol, so much geared to verification of whether or not States parties have actually given effect to the 1951 Convention and the 1967 Protocol in the domestic legal order. That question is addressed elsewhere: in Art. 35, para. 2 and Art. 36 of the 1951 Convention and in Art. II, para. 2 and Art. III of the 1967 Protocol. 'Application' should consequently be distinguished from 'implementation' in the sense that application presupposes implementation of the 1951 Convention and 1967 Protocol, *i.e.* the adoption of legislation or other measures to give effect to the provisions of those two instruments. States parties are legally bound to make the necessary legal adjustments in the domestic legal order when ratifying or acceding to the 1951 Convention and 1967 Protocol,[237] to ensure these instruments can be applied.

III. Article 35, para. 2 and Article II, para. 2

1. Providing Information on Request to Enable UNHCR to Report to the Competent Organs of the United Nations

a) '… the competent organs of the United Nations'

69 On the basis of its Statute,[238] UNHCR has to report annually to the GA—its parent organ—through the ECOSOC, and the reference to 'the competent organs' should therefore be taken to refer to the GA, and the ECOSOC.

b) '… requested …'

70 States parties are not obliged to submit information and statistical data to UNHCR at set intervals but only at its request. UNHCR has only made sparing use of this possibility.[239] On an *ad hoc* basis, specific information has been requested on particular articles.[240] UNHCR

[235] UN Doc. A/AC.96/930 (2000), para. 12; van Roemburg, *UNHCR*, pp. 115, 139.

[236] UNHCR operates on the basis of voluntary contributions. Only a limited part of its administrative expenses is borne by the UN.

[237] *Cf.* also Zieck on Art. 36/Art. III, *passim*.

[238] Prov. 11 UNHCR Statute.

[239] UNHCR has an alternative source of information at its disposal: the Annual Protection Reports UNHCR country offices have to submit to Headquarters. Those (confidential) reports are intended to assist UNHCR to 'obtain a comprehensive and global picture as to developments and practices of States and of UNHCR in respect of the international protection of refugees with a view to enabling those situations to be monitored, analysed and if necessary, addressed appropriately', UNHCR, UN Doc. EPAU/2004/06 (2004), para. 100. In addition UNHCR, albeit rarely, conducts research into implementation, *e.g.* UNHCR, *Asylum in the European Union, A Study of the Implementation of the Qualification Directive*, November 2007 (in which specific reference is made to UNHCR's duty to supervise the provisions of the 1951 Convention).

[240] UN Doc. EC/SCP/54 (1989), para. 7.

has made a more comprehensive request for information on only two occasions by means of questionnaires.

The first questionnaire was induced by the fact of an increasing number of States parties to the 1951 Convention and the 1967 Protocol, and the need to have more information about the legislation and administrative practices relating to refugees in these countries. This need prompted UNHCR's ExCom 'to introduce a reporting and supervision procedure in accordance with Art. 35 of the Convention', and Art. II of the 1967 Protocol,[241] pursuant to Arts. 35 and 36 of the 1951 Convention, and Arts. II and III of the 1967 Protocol.[242] The questionnaire that was drafted closely followed the pattern of the forms the ILO had adopted for the purpose of supervising the application of the provisions of its numerous conventions:[243] **71**

> …the information required relates to the legislative and administrative measures and current practices, which are either specifically aimed at giving effect to the main provisions of the Convention, or, in fact, so framed as to have a bearing on the provisions of the Convention and Protocol.[244]

However, 'in order to save the governments both time and effort', the questionnaire was not 'exhaustive but has been so framed as to confine the information we seek to only the more important articles of the Convention'.[245] In view of the ILO's experience that the response of governments is not always readily forthcoming, the questionnaire was not sent directly to the then 63 States parties to the 1951 Convention and/or the 1967 Protocol but rather presented to the governments by UNHCR representatives and correspondents (between October 1969 and February 1970). Even so, the requested information was not provided quickly: over the period 1969 to 1980 only some 40 governments provided the requested information.[246] It was then proposed to send the questionnaire also to those States who had since acceded to the 1951 Convention and/or the 1967 Protocol and—once more—to those States who had not yet answered but had meanwhile acceded to the 1967 Protocol in order to ensure that they took the necessary steps to implement the Protocol.[247] With respect to States that had replied in a timely manner, it was necessary to update the information already collected.[248]

[241] UN Doc. A/AC.96/403 (1968), para. 62 (e); UNHCR, *Interoffice Memorandum No. 21/Branch Office Memorandum No. 22: 'Supervision of the Application of the Provisions of the Convention Relating to the Status of Refugees'*, 1969.

[242] UN Doc. A/AC.96/508/Add.2 (1974), para. 2; *cf.* also UN Doc. A/6711/Add. 1 (1968), para. 47.

[243] The questionnaire was actually drawn up in cooperation with the ILO, UN Docs. A/AC.96/508/Add.2 (1974); A/7211/Add.1 (1968), para. 51. For the text of the questionnaire (and replies), see UN Doc. A/AC.96/508/Add.2 (1974).

[244] UNHCR, *Interoffice Memorandum No. 21/Branch Office Memorandum No. 22: 'Supervision of the Application of the Provisions of the Convention Relating to the Status of Refugees'* (1969); *cf.* also UN Doc. EC/SCP/54 (1989), para. 7.

[245] UNHCR, *Interoffice Memorandum No. 21/Branch Office Memorandum No. 22: 'Supervision of the Application of the Provisions of the Convention Relating to the Status of Refugees'* (1969).

[246] UNHCR (internal document), *Questionnaire—Reports on the Implementation of the 1951 Convention and the 1967 Protocol* (1981).

[247] UNHCR, *Note for the File: 'Plan of Action for Follow-up on the Questionnaire—Report on the Implementation of the 1951 Convention and the 1967 Protocol'* (1981). Meanwhile UNHCR re-examined the contents of the questionnaire and the procedure for collecting information under the questionnaire in order to better ensure the effectiveness of the supervisory role of UNHCR, but it seems the questionnaire was not changed, UNHCR (internal document), *'Questionnaire—Reports on the Implementation of the 1951 Convention and the 1967 Protocol'* (1981).

[248] 'The States replied to the questionnaire as far back as seven to eleven years ago and there have been, in the meanwhile, further developments concerning the implementation of the Convention, Protocol. The Branch

72 The second time UNHCR requested information on implementation of the 1951 Convention and the 1967 Protocol, once more at the request of ExCom,[249] was in 1990, again in the form of a questionnaire that was submitted to States on 9 May 1990.[250] The explanatory remarks in the questionnaire[251] do not merely refer to Art. 35 of the 1951 Convention and Art. II of the 1967 Protocol, but also to Art. 36 and Art. III, which 'provide for certain reporting obligations of States Parties to the Convention and the Protocol'.[252] The questionnaire requested both general and specific information in relation to selected articles of the 1951 Convention.[253] Part of the requested information was to be sent in at intervals but the final date for submission of the entire questionnaire was 31 January 1991. At the relevant time, only 23 States had replied,[254] and a report was prepared on the basis of these replies, qualified as 'preliminary' on account of the absence of a more extensive response, and on that account lacking an extensive analysis and definitive conclusions.[255] UNHCR indicated that it would welcome possible future action to regularize the system of reporting on implementation and suggested that States reflect upon the desirability of periodic assessment on a more structured basis—for instance at two, three, or five-year intervals; follow-up mechanisms on problems encountered; and appropriate mechanisms to resolve differences of interpretation or disputed notions including the possibility of 'requesting an advisory opinion [*sic*] of the International Court of Justice as envisaged in Art. 38 of the 1951 Convention'.[256]

73 Even though ExCom acknowledged the value of reporting by States parties to the 1951 Convention and the 1967 Protocol, and requested UNHCR to accord public access to the replies of States to the questionnaire, subject to the consent of the States concerned,[257] no more questionnaires on the implementation of the 1951 Convention and the 1967 Protocol were sent to States parties. Yet the issue of monitoring implementation of the 1951 Convention resurfaced regularly,[258] without, however, resulting in anything tangible: UNHCR was encouraged to use the existing legal framework and its own discretion to enhance its supervisory responsibility through dialogue with States, for instance, and/or in terms of reporting to ExCom or the GA through ECOSOC.[259] However, one of the objectives of

Offices may be requested to fill this gap, in co-operation with the governments concerned', UNHCR, *Note for the File: 'Plan of Action for Follow-up on the Questionnaire—Report on the Implementation of the 1951 Convention and the 1967 Protocol'* (1981).

[249] A request that was induced by an outline of the problems identified as impeding full and effective implementation of the 1951 Convention and the 1967 Protocol, UN Doc. EC/SCP/54 (1989); UN Doc. A/45/12 (1990), paras. 15, 30; UNHCR ExCom, Conclusion No. 57 (1990).

[250] UNHCR, *Inter-Office Memorandum No. 73/90, Field Office Memorandum No. 61/90: Questionnaire on Implementation, 1990*; UNHCR ExCom, Conclusions No. 61 (1990) (i); No. 65 (1991) (l).

[251] UNHCR, *The Convention of 28 July 1951 Relating to the Status of Refugees and Its Protocol of 31 January 1967: Questionnaire on Implementation Prepared by UNHCR* (1990).

[252] *Ibid*. The relevant Conclusion of the UNHCR ExCom—No. 57 (1990)—merely refers to Art. 35.

[253] Arts. 1–4, 8, 9, 12–28, 29–34.

[254] States were reminded to respond in 1992, *cf.* UNHCR ExCom, Conclusion No. 68 (1992), (c); in 1995, *cf.* UNHCR ExCom, Conclusion No. 77 (1995), (e); and again, in 1996, *cf.* UNHCR ExCom, Conclusion No. 79 (1996), (f). The UNCmHR joined the call for response that year, with reference to Art. 35, UNCmHR Res. 96/51 of 19 April 1996, para. 15 and again the next year in UNCmHR Res. 1997/75 of 18 April 1997, para. 16. Ultimately, 28 States reportedly replied to the questionnaire, UN Doc. EC/1992/SC.2/CRP.10 (1992), para. 6.

[255] UN Doc. EC/SCP/66 (1991), para. 4; for the report see the Annex to *ibid.*

[256] UN Doc. EC/SCP/66 (1991), para. 10.

[257] UNHCR ExCom, Conclusion No. 65 (1991), (m).

[258] UN Doc. EC/1992/SC.2/CRP.10 (1992), para. 7; EC/SCP/76 (1992), paras. 7–15; UN Doc. EC/46/SC/CRP.34 (1996), para. 14; UN Doc. EC/47/SC/CRP.27 (1997), paras. 7–9.

[259] UN Doc. EC/47/SC/CRP.27 (1997), para. 9.

UNHCR's Agenda for Protection, which resulted from the so-called 'Global Consultations on International Protection' and the Ministerial Conference that took place in 2001, is closer cooperation in the supervision of implementation of the 1951 Convention and the 1967 Protocol.[260] States and UNHCR were to identify and work on practical modalities to ensure better cooperation between UNHCR and States parties in strengthening implementation of the 1951 Convention and the 1967 Protocol, and in facilitating UNHCR's duty to supervise international refugee instruments.[261] To assess progress made in the implementation of the Agenda for Protection at the national level, a questionnaire—'Matrix'[262]—was sent to States.[263] A preliminary report on feedback by (42) States on their implementation of the Agenda for Protection was issued on 1 October 2008,[264] and a further update in 2009.[265] Neither resulted in concrete suggestions or plans regarding supervision.[266]

c) '…in the appropriate form…'

74 The requested information needs to be submitted in the 'appropriate form'. Different concerns guided the drafters in this respect. First, they sought to delimit the powers of UNHCR, *i.e.* avoid the suggestion that UNHCR would have powers *vis-à-vis* States, and merely ensure that States would submit the information supplied in a manner sufficiently uniform to facilitate the work of UNHCR.[267] A second concern was 'the growing burden of supplying documentation requested by a large number of international organisations'.[268] This concern did not affect the form in which information should be provided but induced the suggestion that the request should be confined to 'necessary' rather than 'any' data.[269] Conceding the possibility that it would be UNHCR rather than States parties that would decide what data would be necessary, the suggestion was dropped in view of the fact that the desired limitation was already provided by the enumeration in para. 2: anything beyond it could be regarded as unnecessary.[270]

2. Contents of the Requisite Information

a) 'The condition of refugees'

75 Refugees are mentioned twice in Art. 35, para. 2 of the 1951 Convention and Art. II, para. 2 of the 1967 Protocol. The question is whether the references are to identical designees. Arguably not. It would seem that information regarding the condition of refugees is not necessarily a reference to those who are refugees in the sense of the 1951 Convention and/or 1967 Protocol definition. In this respect, Recommendation E of the Final Act of the Conference of Plenipotentiaries is worth mentioning.[271] The Conference of

[260] UN Doc. A/AC.96/965/Add.1 (2002), p. 7 (Goal 1, Objective 5: Closer cooperation in the supervision of implementation of the 1951 Convention and the 1967 Protocol).
[261] *Ibid.*
[262] *Cf.* UN Doc. EC/59/SC/CRP.12 (2008), para. 7.
[263] *Ibid.*, para. 5.
[264] UNHCR observed that the reports 'have tended to be mainly descriptive rather than analytical', UNHCR, *Preliminary Summary Report on Feedback*, 1 October 2008, p. 11.
[265] UN Doc. EC/60/SC/INF.1 (2009).
[266] See also *supra,* MN 32.
[267] UN Doc. E/AC.32/SR.40 (1950), p. 35 (representative of France).
[268] UN Doc. E/AC.32/SR.25 (1950), p. 11 (representative of Australia).
[269] *Ibid.*
[270] UN Doc. E/AC.32/SR.25 (1950), p. 12 (representative of Israel); *cf.* also pp. 13, 20–21, 22.
[271] UN Doc. A/CONF.2/108 (1951), pp. 9–10. Recommendation E does not apply, however, to States parties to (only) the 1967 Protocol.

Plenipotentiaries expressed the hope that the 1951 Convention will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the 1951 Convention the treatment for which it provides. A second argument to interpret the reference to refugees in this broad sense can be derived from the purpose of Art. 35, para. 2: UNHCR needs this information 'to make reports to the competent organs of the United Nations'. The interest of the UN, and UNHCR in particular, is not confined to those who qualify under the relatively narrow eligibility criteria of the 1951 Convention or those who qualify under the definition as expanded by the 1967 Protocol.[272] The second time reference is made to refugees in Art. 35, para. 2 is in the context of laws, regulations, and decrees which are in force relating to refugees. Here it would make sense to limit the designation to refugees in the sense of the 1951 Convention, as the purpose of the required information is to establish whether and how the 1951 Convention is implemented by the States parties, and the same applies, *mutatis mutandis*, to the 1967 Protocol.

76 The information should not just relate to 'refugees' but focus on their condition. It is submitted that 'condition' should be taken to refer to the legal status and entitlements of refugees in a State party, *i.e.* access to asylum procedures, protection from *refoulement,* and access to the rights included in the 1951 Convention and/or 1967 Protocol and other fundamental human rights.[273] Grahl-Madsen explains that the expression 'the condition of refugees' should be taken to refer to groups and categories of refugees in general, and that UNHCR would not, therefore, be entitled to request information on individual cases on the basis of Art. 35, para. 2.[274] The suggested limitation recalls the Statutory provision that UNHCR's work shall relate, as a rule, to groups and categories of refugees.[275] Although the sheer number of refugees is likely to cause UNHCR to focus on groups, the provision itself was inserted to emphasize that UNHCR would not become another IRO ministering to the needs of individual refugees.[276] It is a moot point whether this Statutory limitation would constitute a bar with respect to Art. 35, para. 2 of the 1951 Convention, or Art. II, para. 2 of the 1967 Protocol: it is the purpose of those provisions—enabling the High Commissioner to make reports to the competent organs of the UN—rather than anything else that compels to fairly general descriptions of the condition of refugees in a particular State party.

b) 'The implementation of this Convention'/'. . . the present Protocol'

77 'Implementation' should be distinguished from 'application' as used in Art. 35, para. 1 of the 1951 Convention and Art. II, para. 1 of the 1967 Protocol: supervision is explicitly geared to 'application' of the provisions of the 1951 Convention and the 1967 Protocol, and presupposes or proceeds from implementation of those instruments in the domestic legal order. Art. 35, para. 2 and Art. II, para. 2 seek information about the implementation of the 1951

[272] See *supra,* MN 51.

[273] *Cf.* UNHCR, Mission Statement (UNHCR describing its primary purpose as safeguarding the rights and well-being of refugees), <https://www.unhcr.org/4565a5742.pdf>, accessed on 6 July 2021; UNHCR, UN Doc. EPAU/2004/06 (2004), Ch. 2, pp. 3–4.

[274] Grahl-Madsen, *Commentary*, Art. 35, para. 8 with the exception of extreme cases. However, should UNHCR desire such information for the purpose of Art. 35, para. 1, this limitation would not apply, *ibid.*, Art. 35, para. 8, fn. h.

[275] Prov. 2 UNHCR Statute.

[276] *Cf. supra*, MN 47.

Convention and the 1967 Protocol in that order.[277] The questionnaire of 1968 confirms this distinction;[278] by way of illustration, question 2 from the general questions section of the questionnaire:

> Please supply available information concerning the practice, legislative provisions and regulations and any other measures the effect of which is to ensure the application of the following articles of the Convention and Protocol. If in your country, ratification of the Convention and Protocol gives the force of national law to its provisions please indicate … any measure which may have been taken to give effect to those provisions of the Convention and Protocol which may require the interventions of the national authorities to ensure their application.

Comparable questions were asked in the second questionnaire of 1990:

a) Describe briefly the general legal framework … within which, at the national level, refugees are protected and their rights are guaranteed.
b) What is the status of the 1951 Convention and/or the 1967 Protocol under domestic law? Please specify, in particular, whether they can be invoked before and directly enforced by the courts, other tribunals or administrative authorities, or whether they must be enacted as internal laws or administrative regulations to be directly enforced. If such enactment is necessary, but has not yet been carried out, please indicate what measures you intend to take in this regard.[279]

The information requested pertaining to specific articles of the 1951 Convention prescribes that the answers to all questions should specify major judicial decisions and legislative, judicial and administrative or other measures in force to implement a particular right or obligation at issue.[280]

c) 'Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees'

Besides the laws, regulations, and decrees that relate to implementation in the sense indicated, States parties have to provide UNHCR with information about any other laws, regulations, and decrees that concern refugees on their territory. The sole criterion is whether or not a particular rule affects the status and welfare of refugees.[281] **78**

3. Relationship between Article 35, paras. 1 and 2 and Article II, paras. 1 and 2 Respectively

Article 35 serves different purposes that originate in different draft articles that were joined in the drafting process without simultaneously substantively connecting the previously distinct provisions. Paragraph 1 is about cooperation with UNHCR in the exercise of all its functions in general and its supervisory function in particular. The second paragraph is about enabling **79**

[277] In that sense it is virtually identical to Art. 36 of the 1951 Convention and Art. III of the 1967 Protocol, *cf.* Zieck on Art. 36/Art. III, *passim*.
[278] UN Doc. A/AC.96/508/Add.2 (1974). Please note that this particular questionnaire meant to elicit information on the basis of both Arts. 35 and 36 of the 1951 Convention and Arts. II and III of the 1967 Protocol, *cf. supra*, MN 71.
[279] UNHCR, *The Convention of 28 July 1951 Relating to the Status of Refugees and Its Protocol of 31 January 1967: Questionnaire on Implementation Prepared by UNHCR* (1990), p. 3.
[280] *Ibid.*, p. 4.
[281] *Cf.* Grahl-Madsen, *Commentary*, Art. 35, para. 9.

UNHCR to compile the annual reports it is due to submit to its parent organ. This reporting obligation is not linked to its supervisory function. Obviously, the information States have to provide on request may support UNHCR's supervisory function. Even if reporting would for that reason be considered to be an integral part of UNHCR's functions,[282] in practice UNHCR does not rely on the power it has under Art. 35, para. 2, and Art. II, para. 2 of the 1967 Protocol to strengthen its supervisory function but, to the contrary, seems to neglect this particular power,[283] despite the fact that it simultaneously considers commenting on national legislation (an important) part of its supervisory function.[284]

G. Evaluation

80 The general obligation to cooperate with UNHCR appears, first of all, to be firmly entrenched in that many instruments besides the 1951 Convention and the 1967 Protocol insert or recall, and consequently reinforce this particular obligation. The 'cooperation' called for does not have a fixed meaning since it is related to the exercise of UNHCR's varying functions, a fluidity which is counterbalanced by the fact that it is predicated on a clear division of responsibilities between States, who bear the primary responsibility for protecting refugees on their territory, on the one hand, and UNHCR, charged with a supplementary protection function, on the other. This division is, however, no longer clear-cut.

81 Organizational practice has transformed UNHCR from 'a trustee or guardian of refugee rights as implemented by states to an agency that is now primarily focused on direct service delivery',[285] assuming tasks that are properly those of States to an extent that triggered the designation of UNHCR as a 'surrogate state'.[286] This obfuscation of responsibilities affects the standing of UNHCR to supervise the application by States of the provisions of the 1951 Convention and 1967 Protocol.[287] UNHCR's standing derived its strength from the original division of responsibilities, and supervision ceases to be the natural and exclusive preserve of UNHCR when it assumes responsibilities that are properly those of States and actually require supervision themselves.[288] UNHCR's standing as supervisor is, in addition,

[282] *Ibid*., para. 6.

[283] *Cf*. also Zieck on Art. 36/Art. III, *passim*. At a conference that addressed supervision, UNHCR's Director of Protection raised the question 'do we need to revisit reporting?' to stimulate the discussion, Türk, *UNHCR and Supervision*, p. 57.

[284] *Cf*. UNHCR, *Inter-Office Memorandum No. 015/2009 Field Office Memorandum No. 015/2009 on Guidelines for Reviewing and Commenting on National Legislation, 18 March 2009 (with references to Art. 35 para. 2, and Art. 36 in para. 5)*; van Roemburg, *UNHCR*, p. 173.

[285] James Hathaway, 'Who should watch over refugee law?', *FMR* 14 (2002), pp. 23, 24.

[286] *Cf*. *supra,* fn. 172.

[287] However, with reference to UNHCR's supervisory role which is 'facilitated through UNHCR's very operational character', the Assistant High Commissioner observed that 'UNHCR is both an overseer of what is delivered, and a deliverer in its own right. These are two distinct but mutually reinforcing aspects of our mandate, which have important implications for the authority and expertise we bring to what we do', Statement by Ms. Erika Feller, Assistant High Commissioner—Protection, at the Fifty-ninth Session of the Executive Committee of the High Commissioner's Programme: 'Protection Makes a Difference. It Can Mean *the* Difference' (2008), para. 69.

[288] Hathaway, 'Taking Oversight of Refugee Law Seriously', speech delivered at the Global Consultation on International Protection convened by ICVA, Geneva (2001), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294191#PaperDownload>, accessed on 6 July 2021; Hathaway, *FMR* 14 (2002), pp. 23, 24–25; Zieck, *UNHCR's Presence*, pp. 324–325 (similar conclusion based on an analysis of the consequences of the cooperation agreements UNHCR concludes); 'The agency, and its partners, act in many instances as quasi-state entities and

structurally affected, *i.e.* weakened, by the fact that UNHCR is dependent on States to finance its programmes, and the need to secure its ongoing presence in the territory of States which, of necessity, may lead to subdued responses in case of contraventions of the 1951 Convention and the 1967 Protocol.[289]

Whilst innovative at the time, the supervisory role of UNHCR appears to suffer the drawbacks of being one of the first external supervisory mechanisms in that it is of a rather rudimentary nature when compared to the contemporary sophisticated supervisory mechanisms of human rights treaties that comprise periodic reporting, assessment of performance by an independent body, (individual and States) complaints procedures, and other enforcement mechanisms. The question is whether UNHCR has done enough to remedy those drawbacks. The recognition that implementation of the 1951 Convention and the 1967 Protocol is fraught with problems, including a lack of uniformity in the actual application of its provisions, led to the decision to include UNHCR's supervisory function among the issues to be addressed in the Global Consultations on International Protection that took place in 2001. The discussions focused on ways to enhance the effective implementation of the 1951 Convention and the 1967 Protocol: **82**

> Generally, there was agreement that the identification of appropriate mechanisms should seek to preserve, even strengthen, the pre-eminence and authority of the voice of the High Commissioner. Anything that could undermine UNHCR's current Article 35 supervisory authority should be avoided.[290]

States parties confirmed this central role of UNHCR: 'many delegates stressed that any measures taken should not undermine the role of UNHCR'.[291] However, the expectation that the discussion would be continued following its inclusion in the 'Agenda for Protection'[292] did not materialize: supervision is no longer on the agenda,[293] despite the obvious need for it,[294] and the many suggestions that have been made by scholars to improve it.[295]

should not be left without some form of supervision', International Council of Voluntary Agencies, Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond, Comments on Prof. Kaelin's Paper (2001), para. 12; *cf.* also WARIPNET/RADDHO (Senegal)/Africa Legal Aid (Ghana)/Lawyers for Human Rights (South Africa), 'African Perspectives on Art. 35 Supervision of the 1951 Convention and Complementary Monitoring Mechanisms', submitted to the Global Consultations (2001), p. 2; see also p. 3.

[289] Factors that 'impact on what the Office may say publicly, and how it reports its concerns', Feller/Klug, *supra*, fn. 169, para. 86.

[290] Expert Roundtable, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Feller/Türk/Nicholson, eds., 2003), pp. 668, 669.

[291] UNHCR Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, Chairperson's Report on Roundtable 1, p. 2; *cf.* Türk, *UNHCR and Supervision*—at the time UNHCR's Director of International Protection—also emphasizes that any new proposals must not weaken UNHCR's 'legal authority stemming from its supervisory role', p. 57.

[292] *Cf. supra,* fn. 260.

[293] Key documents such as the New York Declaration for Refugees and Migrants (UN Doc. A/Res/71/1 (2016)), and the Global Compact on Refugees of 2018 (UN Doc. A/73/12 (Part II)) do not even mention supervision. On the claim that the Global Compact in effect sidelines UNHCR's supervisory mandate, see Kinchin, 'A "Supportive and Catalytic" Supervisor? UNHCR's Role in the Global Compact for Refugees', *RSQ* 40 (2021), pp. 30–57.

[294] *Cf.* O'Byrne, *supra*, fn. 183, pp. 349–354.

[295] *E.g.* the establishment of a Sub-Committee on Review and Monitoring within the framework of ExCom (Kälin, *supra*, fn. 188); an International Judicial Commission for Refugees (North/Chia, *supra*, fn. 196); a bipartite model consisting of a Supervisory Working Group and a Special Committee of Experts (Blackham, 'A Proposal for an Enhanced Supervision of the Refugee Convention', *JRS* 26 (2013), pp. 392–415), supplementing UNHCR's supervisory role by means of engaging with the human rights treaty bodies (Edwards, 'Peter Pan's Fairies and Genie Bottles: UNHCR, the UN Human Rights Treaty Bodies and "Complementary Supervision"', in *The UNHCR*

83 If and when it will be resumed again, the question is whether the fact that UNHCR has been given the task of supervision should indeed be decisive when considering ways to enhance the effective implementation of the 1951 Convention and the 1967 Protocol. It has been observed that Art. 35, para. 1 'does not create a monopoly on treaty oversight in favour of UNHCR'.[296] To the extent that this observation is solely meant to recall that States parties have and retain a distinct responsibility to ensure that other States parties live up to their obligations under the 1951 Convention,[297] and the same applies to the 1967 Protocol, this is true. If meant to challenge the position of UNHCR with respect to supervising the 1951 Convention, it is not: the *travaux préparatoires* demonstrate very clearly that UNHCR was meant to have an exclusive competence in this respect.[298] Any strengthening of supervisory mechanisms should consequently proceed from both the distinct responsibility of States parties in the sense indicated, and UNHCR's competence to supervise the 1951 Convention and the 1967 Protocol. These premises are part and parcel of the 1951 Convention (Art. 35 in conjunction with Art. 38) and the 1967 Protocol (Art. II in conjunction with Art. IV). However, retaining them, despite the impediments that structurally affect the exercise of UNHCR's supervisory function—its political and financial dependency on States on the one hand, and the highly operational nature of its work that dilutes the original clear division of responsibilities between itself and States hosting refugees on the other—is bound to perpetuate the current inadequacies. The factors that constrain the development of a more effective supervisory mechanism to safeguard the rights of refugees under the 1951 Convention and the 1967 Protocol should therefore be acknowledged and taken seriously, even if that would mean sacrificing the current 'pre-eminence and authority' of UNHCR with respect to supervising the application of the provisions of the 1951 Convention and the 1967 Protocol.

MARJOLEINE ZIECK*

and the Supervision of International Refugee Law (Simeon, ed., 2013), pp. 159–181), and scaling down humanitarian assistance in favour of international protection coupled to a more public scrutiny of States' compliance (van Roemburg, *UNHCR*), etc.

[296] Hathaway, *FMR* 14 (2002), p. 23.
[297] *Ibid*.
[298] *Cf. supra*, MN 13, 45.

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