



UvA-DARE (Digital Academic Repository)

The effectiveness of UNHCR's supervision

Assessing the UN refugee agency's supervisory task regarding states' compliance with the 1951 Refugee Convention and the 1967 Protocol

van Roemburg, E.T.W.

Publication date

2021

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

van Roemburg, E. T. W. (2021). *The effectiveness of UNHCR's supervision: Assessing the UN refugee agency's supervisory task regarding states' compliance with the 1951 Refugee Convention and the 1967 Protocol*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Chapter 1

Introduction

1.1 Setting the problem

UNHCR, the UN refugee agency, announced in the summer of 2020 that at the end of the preceding year, more than 79.5 million people were displaced by violence and persecution.¹ To a majority of them, UNHCR is known for its role of providing humanitarian aid and ensuring protection.² This includes short-term emergency assistance in the form of clean water, sanitation and shelter, as well as refugee status determination and long-term aid such as healthcare, provision of household goods, transportation, education for children, and building skills and knowledge to achieve self-reliance for both displaced persons and their host communities.³ However, when the refugee agency was set up in 1950, providing direct material and development aid to refugees was specifically excluded from being its task.⁴ Instead, the UN General Assembly (GA) entrusted the refugee agency with tasks that signified an agency at arm's length from such humanitarian aid work.⁵ These tasks consist of providing international protection and finding

1 UNHCR, 'Global Trends: Forced Displacement in 2019' (2020). This record high in global forced displacement is to a large extent the result of a series of emergencies around the world, in countries such as Syria, Yemen, Iraq, South Sudan, Central African Republic, Nigeria, Mali, and Ukraine, as well as longstanding conflicts in Afghanistan, Myanmar, Somalia, Eritrea and Sudan that have, at the same time, made it impossible for refugees to return to their countries of origin.

2 Worldwide, there are 26 million refugees, of which 20.4 million refugees fall under UNHCR's mandate. The global figure also includes 45.7 million internally displaced persons (IDPs). *ibid* 2 and 6.

3 See <<http://www.unhcr.org/what-we-do.html>> last assessed 1 July 2020.

4 Gil Loescher, Alexander Betts and James HS Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection Into the 21st Century* (Routledge 2008) 13; Louise Wilhelmine Holborn, 'The Problem of Refugees' (1960) 38 *Current History* 342, 344.

5 David Kennedy, 'International Refugee Protection' (1986) 8 *Hum. Rts. Q.* 1, 5.

durable solutions for refugees.⁶ Part of providing international protection is the supervision of states' application of international conventions for the protection of refugees⁷, including the cornerstone of the international refugee regime: the 1951 Convention Relating to the Status of Refugees.⁸

When UNHCR was founded, it was only the second international body ever to be charged with some form of supervision of states' compliance with international law.⁹ During the drafting of the 1950 Statute, it was not explicated how the agency's supervisory task was supposed to take shape or to be executed,

6 Statute of the Office of the High Commissioner for Refugees, adopted by the General Assembly as an annex to Resolution 428(V) (14 December 1950) Art. 1. The text of UNHCR's Statute states 'shall assume the function of [...] seeking permanent solutions for the problem of refugees by assisting Governments and, subject to approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities'. The term 'permanent solutions' is no longer in use; it has been changed to 'durable solutions'. Marjoleine Zieck, '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' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press 2011) 1493.

7 Art. 8(a) of the Statute states that UNHCR shall provide for the protection of refugees by 'promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'. The 1950 Statute Art. 8(a).

8 Convention Relating to the Status of Refugees (adopted 28 July 1951, entry into force 22 April 1954] 189 UNTS 137 [the 1951 Convention]. See also the Protocol Relating to the Status of Refugees (adopted 31 January 1967, entry into force 4 October 1967) 606 UNTS 267 [1967 Protocol] (which is an independent instrument and not one that 'amends' the 1951 Convention, as is often stated). The 1967 Protocol removed the date restriction of the 1951 Convention, no longer limiting the term refugee to those who fled as a result of events occurring before 1 January 1951. There are, however, still a few States that maintain the geographical limitation of the 1951 Convention ('events occurring in Europe'): Congo, Madagascar, Monaco and Turkey (see the United Nations Treaty Collection, which is updated frequently). For sake of brevity, the terms '1951 Convention' or 'Convention' will be used when describing both the 1951 Convention and the 1967 Protocol, unless otherwise expressly stated.

9 The Committee of Experts on the Application of Conventions and Recommendations was the first international body, established in 1926, and in charge of supervising the conventions and recommendations of the International Labour Organization (ILO). Eric Gravel and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamic and Impact* (International Labour Organization 2003) 1–7.

nor were any explicit monitoring or enforcement powers assigned to the agency.¹⁰ And although the drafters of the 1951 Convention made sure that states parties to this Convention had a corresponding obligation to cooperate with UNHCR in the exercise of its supervisory task¹¹, they neither elaborated on the meaning of supervision nor on the manner in which this cooperation would take place.¹² Neither the UNGA and the Economic and Social Council (ECOSOC), which both can give policy directions to UNHCR¹³, nor the Executive Committee (ExCom), the agency's governing body¹⁴, have in more than six decades given any guidance on the meaning and implementation of the agency's supervisory task.¹⁵ Supervision as commonly understood is having oversight (from the Latin 'super': over and 'videre': to see) with the purpose of making certain that those who are overseen adhere to certain rules or procedures.¹⁶ On the international plane, this often translates into institutions that, through supervision, promote the

10 In international agreements relating to protection of (categories of) refugees from the interbellum period, no clauses on authorizing a person or (international) body to supervise their application were included either. Paul Weis, 'The International Protection of Refugees' (1954) 48 *American Journal of International Law* 193, 212.

11 Art. 35(I) of the 1951 Convention: "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." (emphasis added). Art. II(I) of the 1967 Protocol contains a similar phrase. See also the sixth paragraph of the Preamble of the 1951 Convention, stating: "Noting that the United Nations High Commissioner for Refugees is charged with the tasks of supervising international conventions providing for the protection of refugees {...}".

12 Zieck, 'Article 35 of the 1951 Convention' (n 6) 1472–1473.

13 The 1950 Statute Arts. 1 and 3.

14 ECOSOC Resolution E/RES/672 (30 April 1958) para 2(a)-(c).

15 See for an overview of all resolutions by the General Assembly and ECOSOC: UNHCR, 'Thematic Compilation of General Assembly & Economic and Social Council Resolutions (5th Edition)' (2015). Since 2015, no resolutions clarifying UNHCR's supervisory task have been adopted by the UNGA or ECOSOC either. See <<http://www.un.org/en/sections/documents/general-assembly-resolutions/>> assessed 1 July 2020 and <<https://www.un.org/ecosoc/en/documents/resolutions>> assessed 1 July 2020.

16 According to the Cambridge Dictionary, supervision is 'the act of watching a person or activity and making certain that everything is done correctly'.

observance of states with international rules.¹⁷ In other words, the aim of supervision is compliant behaviour of states.¹⁸

Whereas UNHCR, in 1950, was one of two international supervisory bodies, the past few decades have seen the rise of a multitude of monitoring, quasi-judicial and judicial bodies in charge of overseeing states' compliance with their treaty obligations, both at the international and the regional level.¹⁹ Supervisory mechanisms that are at their disposal include commenting on (regular) reports submitted by states²⁰, considering inter-state and individual complaints²¹, carrying out country visits²², appointing experts or rapporteurs to monitor specific topical

17 Niels M Blokker and A Sam Muller, *Towards More Effective Supervision by International Organizations*, vol 1 (Martinus Nijhoff Publishers 1994) 280–289; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity Within Diversity* (6th edn, Martinus Nijhoff Publishers 2018) 913; Marcel Merle, 'Le Contrôle Exercé Par Les Organisations Internationales Sur Les Activités Des États Membres' (1959) 5 *Annuaire français de droit international* 411, 412–413; Oran R Young, *Compliance & Public Authority: A Theory with International Applications* (Routledge 2013) 5, who defines supervision as '[...] any institution or set of institutions (formal or informal) established by a public authority [...] for the purpose of encouraging compliance with one or more behavioral prescriptions of a compliance system'.

18 Blokker and Muller (n 17) 280–289; Schermers and Blokker (n 17) 913; Merle (n 17) 412–413; Young (n 17) 5, who defines supervision as '[...] any institution or set of institutions (formal or informal) established by a public authority [...] for the purpose of encouraging compliance with one or more behavioral prescriptions of a compliance system'.

19 These include amongst others bodies that monitor treaties in the field of environmental protection, arms control, human rights, labour conditions, trade and financial markets. See in particular Blokker and Muller (n 17); James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in Philip Alston and James Crawford, *The future of UN human rights treaty monitoring* (Cambridge University Press 2000) 1–3; Henry G Schermers, 'Acceptance of International Supervision of Human Rights' (1999) 12 *Leiden Journal of International Law* 821.

20 See for example International Covenant on Civil and Political Rights 1966 (999 UNTS 172) Art. 40; Constitution of the International Labour Organisation (ILO) 1919 Art. 22; Arab Charter on Human Rights 2004 Art. 48.

21 See for example Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (1465 UNTS 85) Art. 21 and 22; Optional Protocol to the International Covenant on Civil, Economic and Social Rights 2008 (A/RES/63/117) Art. 10 and 2.

22 See for example, for the country monitoring through visits of the Council of Europe's Commissioner for Human Rights: <<https://www.coe.int/en/web/commissioner/country-monitoring>> assessed 1 July 2020, and for country visits during so-called Article IV consultations under the International Monetary Fund's Articles of Agreement: <<https://www.imf.org/external/about/econsurv.htm>> assessed 1 July 2020.

themes²³, adjudicating cases²⁴ or providing advisory opinions on the interpretation of the law.²⁵ Increasingly, some of these bodies, such as the European Court of Human Rights (ECtHR)²⁶ and the Commission Against Torture (CAT)²⁷, have been called upon to deal with the rights of refugees as well, by monitoring states' compliance with international and European human rights law.

At the same time, UNHCR has expanded the manner in which it supervises the 1951 Convention, establishing an unparalleled 'practice [...] of constructive, broad engagement with the executive, judicial and legislative branches of the state'.²⁸ The agency employs a broad range of activities or output in the exercise

23 See for example, for the thematic rapporteurships of the Inter-American Commission for Human Rights: <<http://www.oas.org/en/iachr/mandate/rapporteurships.asp>> assessed 1 July 2020, and for special rapporteurs of the African Commission on Human and Peoples' Rights: <<https://www.achpr.org/specialmechanisms>> assessed 1 July 2020.

24 See, for example Statute of the Inter-American Court of Human Rights 1979 Art. 2(1) in conjunction with; American Convention on Human Rights, 'Pact of San Jose' 1969 Arts. 61-63; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 Arts. 31, 33 and 44.

25 See for example Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms 2013, which allows the highest courts and tribunals of a state party of the European Convention on Human Rights to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. See also Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998 Art. 3.

26 See for example the case of *Hirsi Jamaa and Others v. Italy*, in which the Court ruled that returning Somali and Eritrean asylum seekers traveling from Libya back to Libya without examining their case exposed them to a risk of ill-treatment, which is incompatible with Article 3 of the European Convention on Human Rights. This practice is also in violation of Article 33(1) of the 1951 Convention. *Hirsi Jamaa and Others v Italy* [2012] Council of Europe: European Court of Human Rights Application no. 27765/09.

27 See for example the report of the CAT on Australia's fourth and fifth periodic reports under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which the Committee expresses its concerns about 'policies and practices currently applied in relation to persons who, irregularly, attempt to arrive or arrive in [Australia], in particular the policy of intercepting and turning back boats, without due consideration of [Australia's] obligations under article 3 of the Convention [on non-refoulement]'. Committee Against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*' (2014) CAT/C/AUS/CO/4-5 5 ff.

28 Volker Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (Keynote Address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967

of its supervisory task²⁹: from providing interpretative guidance on the 1951 Convention³⁰ to advising on national refugee status determination (RSD) procedures³¹, from intervening in court cases through *amicus curiae* briefs³² to issuing public statements on states' violations of their treaty obligations³³, and from having direct access to asylum applicants and refugees³⁴ to providing comments and technical input on draft refugee legislation.³⁵ Concurrently, UNHCR has taken on tasks that are inherently the responsibility of states, such as managing camps, registering newly arriving asylum seekers, and overseeing the implementation of education, health and livelihood services. Some scholars have even described the agency as a 'surrogate state'.³⁶ This physical and often

Protocol and Other International Instruments, York University, Toronto, Canada, 17 May 2010).

29 During the second track of the Global Consultations on International Protection, UNHCR's supervisory responsibility was discussed. The summary conclusions of this discussion listed (while not exhaustively) the current supervisory practices of UNHCR. Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 668–669. See also Türk (n 28) 12–15.

30 See, for example, UNHCR, 'Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees' (2017) HCR/GIP/16/12.

31 See, for example, this evaluation of how UNHCR assists countries in initiating or supporting national RSD systems: Wilbert Van Hövell and others, 'Providing for Protection, Assisting States with the Assumption of Responsibility for Refugee Status Determination, A Preliminary Review' (2014) PDES/2014/01.

32 See, for example, *UNHCR intervention before the United States Court of Appeals for the First Circuit in the case of Dimbil Noor Hassan v Jefferson B Sessions, III, Attorney General* (NO 17-1894 (A209-760-181) [2017]).

33 See, for example, 'UNHCR Appeals to Israel over Forced Relocations Policy' (*UNHCR*, 9 January 2018) <<http://www.unhcr.org/news/briefing/2018/1/5a548e064/unhcr-appeals-israel-forced-relocations-policy.html>> accessed 1 July 2020.

34 See, for example, UNHCR, 'UNHCR in Italy Factsheet' (2019) <<https://reliefweb.int/sites/reliefweb.int/files/resources/73119.pdf>> accessed 1 July 2020.

35 See, for example, UNHCR, 'Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal Amending the Aliens Act and Related Laws of the Republic of Finland' (2016).

36 Amy Slaughter & Jeff Crisp coined this phrase first, referring to the fact that UNHCR has in many operations taken over the governments' task of providing protection to refugees. Amy Slaughter and Jeff Crisp, 'A Surrogate State? The Role of UNHCR in Protracted Refugee Situations' in Gil Loescher and others (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press 2005); see also Michael Kagan, 'We Live in a Country of UNHCR: The UN Surrogate State and

operational presence in states parties to the 1951 Convention,³⁷ as well as its exceptional involvement in national procedures as part of its supervisory responsibility, have set UNHCR apart from other monitoring bodies, particularly the human rights treaty bodies.³⁸

The manner in which UNHCR was set up and how it executes its supervisory task have not gone unnoticed by the academic community.³⁹ For example, scholars have expressed concern or even criticism on the alleged dichotomy between UNHCR's humanitarian work and its task of supervising states' compliance with the 1951 Convention.⁴⁰ They claim that the agency is no longer at a remote distance from the implementation of the international law on refugee protection that it is mandated to supervise.⁴¹ Being the principal provider of protection to millions of refugees - both legal protection through its status determination and physical protection in refugee camps it administers - one might wonder who is supervising the work of the agency itself? This question has indeed

Refugee Policy in the Middle East' [2011] The UN Refugee Agency: Policy Development & Evaluation Service Research Paper; Türk (n 28).

37 But UNHCR's presence is not limited to states parties of the 1951 Convention; the agency also has a strong presence in, for example, Lebanon, Pakistan and Thailand, none of which have ratified the 1951 Convention nor the 1967 Protocol. See the United Nations Treaty Collection.

38 Türk (n 28) 15.

39 One example is the 2010 York International Conference on "Forced Displacement, Protection Standards, and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments", hosted at the Centre of Refugee Studies at York University, Canada, on May 17-20 2010. It culminated in an edited edition by James Simeon on UNHCR and the supervision of international refugee law. This book differs from this thesis in that it does not provide for one overarching framework against which the supervisory task of UNHCR is analysed. James C Simeon, *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013). The Refugee Studies Centre at the University of Oxford has also, between 2008-2012, undertaken a program of research on the challenges faced by UNHCR in 'balancing the political and strategic interests of states and the rights of refugees'. See <<https://www.rsc.ox.ac.uk/completed-projects/unhcr-international-cooperation>> assessed 1 July 2020.

40 Most notably by James Hathaway. See, for example, Caroline De Gruyter, "Vroeger distribueerden we vluchtelingen per cruiseschip" *NRC Handelsblad* (16 August 2016) 14; James C Hathaway, Anthony M North and Jason Pobjoy, 'Supervising the Refugee Convention - Introduction' (2013) 26 *Journal of Refugee Studies* 323.

41 De Gruyter (n 40); Hathaway, North and Pobjoy (n 40).

been asked by several academics and organisations⁴², but has not been satisfactory answered yet.

Scholars have also raised concerns on the dependency of UNHCR on states for its financing.⁴³ As only one per cent of UNHCR's budget comes from the United Nations, the rest of its budget has to be made up of voluntary contributions, of which 86 per cent is currently coming from governments and the European Union.⁴⁴ Arguably, this financial arrangement leads to 'the power of the purse'⁴⁵, with a fairly small number of developed states that has the *de facto* financial control. As a result of these power relations, UNHCR may be tempted to develop its protection policy in line with the demands of developed states.⁴⁶

42 James C Hathaway, 'Taking Oversight of Refugee Law Seriously' (Global Consultation on International Protection convened by the International Council of Voluntary Agencies (ICVA) in Geneva on December 11, 2001, on the occasion of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol, Geneva, Switzerland, 12 December 2001); James C Hathaway, 'Who Should Watch over Refugee Law?' (2002) 14 *Forced Migration Review* 23, 24–25; Zieck, 'Article 35 of the 1951 Convention' (n 6); Marjoleine Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal Publishers 2006) 324–325; International Council of Voluntary Agencies, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond, Comments on Prof. Kälin's Paper' (2001) in; Marjoleine Zieck, 'Treaties as Boundaries of Policy: Revisiting the Policies That Informed the 1951 Convention Relating to the Status of Refugees.' (Amsterdam Law School, University of Amsterdam) n 36.

43 James C Hathaway, 'Reconsideration of the Underlying Premise of Refugee Law, A' (1990) 31 *Harv. Int'l. LJ* 129, 161; Hathaway, 'Who Should Watch over Refugee Law?' (n 42) 25; Guy S Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospect' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 244; Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' (2006) 25 *Aust. YBIL* 105, 128; Zieck, 'Article 35 of the 1951 Convention' (n 6) 1508; Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 634; Alex Cunliffe and Michael Pugh, 'UNHCR as Leader in Humanitarian Assistance: A Triumph of Politics over Law?' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 183–186.

44 The top ten donors are the United States of America, Germany, Japan, Sweden, the European Union, Denmark, the Netherlands, the United Kingdom, Norway and Canada. See <<http://www.unhcr.org/figures-at-a-glance.html>> assessed 1 July 2020, and UNHCR, Funding Update 2020 - Global Overview (15 May 2020).

45 Hathaway, 'Reconsideration of the Underlying Premise of Refugee Law, A' (n 43) 161.

46 Cunliffe and Pugh (n 43) 184.

The agency may even remain silent in the case of a state's violation of its obligations under the 1951 Convention, because of its dependency on the monetary goodwill of this state.⁴⁷ The fact that the (voluntary) contributions by states are often earmarked, makes UNHCR possibly even more prone to the priorities of donor countries.⁴⁸

In addition, UNHCR is also dependent on states for securing its ongoing presence in the territory of states in order to successfully provide international protection and in particular humanitarian assistance to refugees. This dependency can potentially be detrimental to the task of supervising states, especially in the case of breaches of the 1951 Convention, as the professional distance that is needed to safeguard the fulfillment of the supervisory task may be affected.⁴⁹ The criticism by scholars is that UNHCR may rather remain quiet than endanger its operations on the ground.⁵⁰ Another issue that has concerned scholars is that UNHCR, unlike the human rights treaty bodies, does not have an institutionalized and regular reporting mechanism.⁵¹ This may impede the agency's ability to provide at any point in time an up-to-date overview and analysis of state practice in relation to the implementation and application of the 1951 Convention in domestic law.⁵²

47 James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113, 115; BS Chimni, 'The Changing World Order, the Structural Role of Humanitarian NGOs, and the Protection of Displaced Persons and Migrants' (2003); Jeff Crisp, 'Mobilizing Political Will for Refugee Protection and Solutions. A Framework for Analysis.' [2018] *World Refugee Council Research Paper* 3, 9.

48 Saul Takahashi, 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention' (2002) 20 *Neth. Q. Hum. Rts.* 53, 59. See also Chapter 4, section 4.5.2 for a detailed account of UNHCR's finances.

49 Goodwin-Gill (n 43) 235; see also Jeff Crisp, 'As the World Abandons Refugees, UNHCR's Constraints Are Exposed' (*Refugees Deeply*, 13 September 2018) <<https://www.newsdeeply.com/refugees/community/2018/09/13/as-the-world-abandons-refugees-unhcrs-constraints-are-exposed>> accessed 1 July 2020.

50 Amnesty International, 'Amnesty International Report 1999' (1999) 46–48; Michael Barutciski, 'The Limits to the UNHCR's Supervisory Role' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 67; Zieck, 'Article 35 of the 1951 Convention' (n 6) 1508; Kälin (n 43) 628; Crisp (n 47) 3, 9; North and Chia (n 43) 128.

51 States that are parties to the various human rights treaties have an obligation under these treaties to submit initial and periodic reports on "the measures that they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights". See, for example, ICCPR Art. 40. Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' in Rüdiger Wolfrum (ed), *MPEPIL* (2013) para 85.

52 Volker Türk, 'UNHCR's Supervisory Responsibility' (2002) 14 *Revue Quebécoise de droit international* 135, 147.

The lack of guidance by the GA, ECOSOC and ExCom, and the scholarly criticism on and concerns about UNHCR's supervision, make up a list of potential inadequacies, constraints and weaknesses that may influence the effectiveness of UNHCR's supervisory task. Ineffective supervision of in particular the 1951 Convention, and, as a consequence, prolongation of inadequate or even a wrong interpretation, implementation or application of its provisions, is detrimental to all parties involved: refugees and asylum seekers, states parties, and UNHCR itself. First, refugees and asylum seekers suffer when they do not have access to the rights that are lawfully theirs.⁵³ Second, states parties are bound to observe their obligations *vis-à-vis* each other; therefore, when a state party violates its obligations under the 1951 Convention, it commits an internationally wrongful act towards the other states parties of the Convention.⁵⁴ In addition, disregard for the rights of refugees by one state party may cause secondary movements to and thus a greater influx of refugees in states that fully observe their obligations under the 1951 Convention, which may in turn induce the implementation of a more restrictive refugee policy across the board.⁵⁵ This race to the bottom is detrimental to states as well as refugees. As for UNHCR, ineffective supervision decreases its legitimacy and authority, and affects its moral reputation⁵⁶, as a result of which its standing as the mandated supervisor of the 1951 Convention will be weakened even more.

In light of these considerations, this thesis aims to analyse the merits of the scholarly concerns and criticism by asking the question: how should UNHCR's supervisory mandate and its supervisory activities regarding the 1951 Convention be assessed in terms of effectiveness?

53 See Executive Committee Conclusion 108 (LIX, 2008): "Deeply preoccupied by current and persistent protection problems of persons of concern, including the rejection of refugees and asylum-seekers at frontiers without examination of claims for asylum or safeguards to prevent refoulement, long-term detention, continuing sexual and gender-based violence and exploitation, and manifestations of xenophobia, racism and related intolerance."

54 According to the Vienna Convention on the Law of Treaties, states are bound by the treaties that they are states parties to (see. Art. 26). Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331). See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 [Supplement No. 10 (A/56/10), chp.IV.E.1]. See also Art. 38 of the 1951 Convention, which entitles every state party to the Convention to refer a dispute regarding the interpretation or application of the Convention to the International Court of Justice. The 1951 Convention; Kälín (n 43) 632.

55 Kälín (n 43) 632.

56 Crisp (n 47) 3.

1.2 A theory of effective supervision

In international institutional law, effectiveness of institutions is not a thoroughly studied subject.⁵⁷ For example, functionalism, as the dominating theory in the law of international organizations⁵⁸, does not take note of elements or factors required for an organization to function effectively. Instead, functionalism adheres to the basic insight that ‘international organizations are functional entities, set up to perform specific tasks for the greater good of mankind’.⁵⁹ As such, the theory is especially concerned with the organization’s legal entity, its privileges and immunities, and its rules on membership.⁶⁰ Functionalism also mostly pertains to the relationship between the member states (the principal) and the organization (the agent)⁶¹, which means that other stakeholders, such as donors or individuals, who have both influence on the organization’s acts or omissions and are affected by them, are not accounted for. Global administrative law (GAL), on the other hand, has developed as a factor in international legal scholarship particularly because of the lack by other legal theories of recognizing this accountability deficit.⁶² Although GAL theory sets forward various factors that can ensure or improve accountability⁶³, effectiveness of the institution as such is not its main concern.

In social science literature on the other hand, more in particular the sub-field of organizational studies, there seem to be as many theories on what constitutes

57 In all its 1327 pages, Schermers and Blokker’s seminal book on international institutional law does not once mention effective or effectiveness. Schermers and Blokker (n 17). In Amerasinghe’s textbook, which is ‘probably the best general study of the law of international organizations’ (*dixit* Klabbers, *An Introduction to International Institutional Law*, 2002, p. 35), effectiveness is only mentioned in the context of ‘effective interpretation’. Cf Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005).

58 Jan Klabbers, ‘The Transformation of International Organizations Law’ (*EJIL: Talk!*, 18 August 2015) <<https://www.ejiltalk.org/the-transformation-of-international-organizations-law/>> accessed 1 July 2020.

59 Jan Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’ (2015) 26 *European Journal of International Law* 9, 11.

60 *ibid* 10.

61 *I.e.* functionalism is essentially a principal-agent theory. *ibid* 10–11.

62 ‘Global administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration, [...]’ Benedict Kingsbury, Nico Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, 16, 28.

63 Since accountability in this study is considered a factor in effectiveness, these factors will be elaborated upon in Chapter 2.

effectiveness as there are types of organisations.⁶⁴ Traditionally, the effectiveness of an (international) institution is measured by the degree to which the institution attains its goals or aims - the goal model.⁶⁵ This approach has been criticized for focusing only on goals set by external stakeholders, instead of the organization itself⁶⁶, but for this thesis this focus is an advantage. International organizations are set up by member states for a particular purpose, and in this thesis compliant behaviour by states is that purpose, which should be pursued through effective supervision. The goal model is thus inherently normative, as it contains the implicit statement about the manner in which organizations should conduct their tasks in order to fulfil their purpose, namely, through meeting their goals and fulfilling their mandate.⁶⁷ Competing theories, such as the ‘open system model’ and the ‘system resource approach’, lack this normative approach.⁶⁸ The open system model is particularly focused on evaluating the impact of organizations, asking what organizations do, without asking what they should do.⁶⁹ The system resource model looks at the degree of success in attaining resources and at ‘surviving’ in a competitive environment as an expression of the organization’s overall effectiveness.⁷⁰ Longevity in itself is however not a means to an end for international organizations, although it could suggest that key stakeholders

64 Robert D Herman and David O Renz, ‘Multiple Constituencies and the Social Construction of Nonprofit Organization Effectiveness’ (1997) 26 *Nonprofit And Voluntary Sector Quarterly* 185; in: A Balduck and M Buelens, ‘A Two-Level Competing Values Approach to Measure Nonprofit Organizational Effectiveness’ (Ghent University, Faculty of Economics and Business Administration 2008) 08/510 4.

65 Richard L Daft, *Organizational Theory and Design* (9th edn, Thompson Higher Education 2006) 71; Amitai Etzioni, *Modern Organizations* (Prentice-Hall 1964); Jeffrey Pfeffer, *Organizations and Organization Theory* (Pitman 1982) 41; James L Price, ‘The Study of Organizational Effectiveness’ (1972) 13 *The Sociological Quarterly* 3, 3–7; in: Yuval Shany, *Assessing the Effectiveness of International Courts* (International Courts and Tribunals Series 2014) 13–14. See also Bedjaoui, who links the effectiveness of an international organization to the degree in which this organization attains its goals: Mohammed Bedjaoui, ‘On the Efficacy of International Organizations: Some Variations on an Inexhaustible Theme...’ in Niels M Blokker and A Sam Muller (eds), *Towards More Effective Supervision by International Organizations*, vol 1 (Martinus Nijhoff Publishers 1994) 10–11; Ann McKittrick, ‘UNHCR as an Autonomous Organisation: Complex Operations and the Case of Kosovo’ (2008) 9.

66 Ephraim Yuchtman and Stanley E Seashore, ‘A System Resource Approach to Organizational Effectiveness’ (1967) 32 *American Sociological Review* 891.

67 Shany, *Assessing the Effectiveness of International Courts* (n 65) 14.

68 W Warner Burke, *Organization Change: Theory and Practice* (SAGE Publications 2017) 54–55.

69 Shany, *Assessing the Effectiveness of International Courts* (n 65) 15.

70 Ephraim Yuchtman and Stanley E Seashore, ‘A System Resource Approach to Organizational Effectiveness’ (1967) 32 *American Sociological Review* 891; Shany, *Assessing the Effectiveness of International Courts* (n 65) 15.

perceive the organization to be useful if they continue to support it. The goal-based approach, on the other hand, provides a proper yardstick to measure the success or failure of the organization.

However, measuring the actual attainment of a goal on the international plane does pose methodological challenges for three reasons: first, it is nearly impossible to ascertain a causal effect between two set of circumstances (such as a public statement from an international organization on the non-compliant behaviour of a state, and that state changing its behaviour) as there are generally too many factors that should be taken into account; second, there is no possibility of having a control group; and third, a *ceteris paribus* assumption can generally not be made. Translating that to the object of this study - UNHCR's supervision - it is thus fairly difficult to directly observe whether its supervision has been effective in the sense that it has influenced the conduct of states, even when a change in behaviour (from non-compliance to compliant behaviour) can be detected.⁷¹

This methodological challenge and the difficulty of establishing a causality chain in supervisory mechanisms will be illustrated with the following example: the Consultation Meeting of Latin America and the Caribbean as a Regional Contribution to the Global Compact on Refugees, and the adoption of the document 'The 100 Points of Brasilia: Input from Latin America and the Caribbean to the Global Compact on Refugees'.⁷² At the meeting, states in Latin America and the Caribbean renewed their commitment to strengthen their protection of refugees under, amongst others, the 1951 Convention (*e.g.*, by applying the Convention in a non-discriminatory manner under Article 3 and by enforcing the principle of non-refoulement under Article 33(1)), and adopted a document with good practices and initiatives that could serve as proposals for the

71 Catharina E Koops, 'Contemplating Compliance. European Compliance Mechanisms in International Perspective' (2014) 60.

72 Ministry of Foreign Affairs, 'Consultation Meeting of Latin America and the Caribbean as a Regional Contribution to the Global Compact on Refugees' <<http://www.itamaraty.gov.br/en/sem-categoria/18200-latin-american-and-caribbean-regional-consultation-meeting-on-the-global-compact-on-refugees>> accessed 1 July 2020; 'The 100 Points of Brasilia: Input from Latin America and the Caribbean to the Global Compact on Refugees' <http://www.itamaraty.gov.br/images/banners/ReuniaoPactoGlobalRefugiados/The_100_Points_of_Brasilia.pdf> accessed 1 July 2020; Ministério das Relacoes Exteriores, 'Program' (2018) <http://www.itamaraty.gov.br/images/banners/ReuniaoPactoGlobalRefugiados/PROGRAMA_ING_SITE.pdf>.

The Global Compact on Refugees is new international framework, proposed by the UN Secretary General, to ensure more effective responsibility-sharing in response to significant refugee movements. Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28 *International Journal of Refugee Law* 656.

Global Compact on Refugees negotiations.⁷³ UNHCR, as one of the organizers of this meeting and as a facilitator of strengthened refugee protection in light of these negotiations⁷⁴, ‘welcomed’ the commitment of the states that were present and ‘hailed’ the region’s initiatives.⁷⁵ It is tempting to attribute some causal link between UNHCR as a vehement supporter and facilitator of this meeting and its outcomes, namely the adoption of the ‘100 points’ document. However, there have been numerous other actors (such as government officials, representatives from international organizations and civil society as well as observer countries) which have also been pushing for increased refugee protection by states in Latin America and the Caribbean⁷⁶, and which individually or in conjunction may have influenced the outcome of the meeting as well. In addition, representatives of the states at the meeting might have been influenced by national developments in their respective states. It is therefore fairly difficult to identify which actors and circumstances contributed to the positive outcome of this meeting, and, consequently, it is also not possible to state - by merely looking at the outcome - that the supervision of UNHCR in this respect was effective.⁷⁷

1.3 Circumventing the theoretical challenges

Considering these methodological challenges in assessing the success or failure of an institution, this study will not attempt to analyse how effective UNHCR’s supervision of the 1951 Convention is through a quantitative undertaking that

73 ‘The 100 Points of Brasilia: Input from Latin America and the Caribbean to the Global Compact on Refugees’ (n 72).

74 Which is part of the agency’s supervisory task. Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28 *International Journal of Refugee Law* 656; Jane McAdam, ‘The Enduring Relevance of the 1951 Refugee Convention’ (2017) 29 *International Journal of Refugee Law* 1.

75 UNHCR, ‘UNHCR Welcomes Renewed Commitment to Protect Refugees by Latin American and Caribbean States at Key Meeting’ <<http://www.unhcr.org/news/press/2018/2/5a8e8e954/unhcr-welcomes-renewed-commitment-protect-refugees-latin-american-caribbean.html>> accessed 1 July 2020.

76 See for example this report by 30+ civil society organizations and NGOs to promote the implementation of refugee protection in Latin America and the Caribbean. Regional Working Group for the Brazil Plan of Action, ‘Our Story / Objectives and Activities / Where Are We Now?’ <<http://www.asylumaccess.org/wp-content/uploads/2016/05/GARPAB.-OurStory.-ObjectivesActivities.-Whereare.pdf>> accessed 1 July 2020.

77 Unless by directly asking all those involved in the decision making on the outcomes of the meeting, and then hoping that they would be forthcoming (and unanimous) in their answer.

provides for a binary answer.⁷⁸ Rather, the research in this study will likely find that some aspects of UNHCR's supervisory task will be more conducive to achieving the goal of compliant behaviour by states than others. The aim of this study is thus to identify which aspects indeed contribute to the agency's effective supervision. In order to do so, and to assess effectiveness, this study will look at the structures put in place for UNHCR to function effectively, meaning the manner in which those having control over UNHCR have set up the agency so it can execute its supervisory task, and the processes or procedures that UNHCR implements to carry out this task.

To measure structure and procedures, the technique of 'reverse reasoning'⁷⁹ will be used: although it will not be possible to conclude with a definite certainty whether UNHCR's structure and procedures will lead to goal attainment (compliant behaviour by states), it is more likely that UNHCR is effective in realizing its goal when it has been equipped with regard to its supervisory task with an adequate structure and has implemented procedures of a high quality. In other words, the conditions under which supervision takes place that are necessary as a prerequisite for the attainment of compliant behaviour will be examined and scrutinized; when these conditions are indeed in place, it is submitted that the likelihood of UNHCR playing a factor in contributing to compliant behaviour by states will increase.

This methodology is relatively straightforward, but not without constraints. Even if UNHCR is set up in the most effective manner, and capable of implementing its supervisory task effectively in the sense indicated, it is still possible that the goal, *i.e.* compliant behaviour by states parties to the 1951 Convention, is not (fully) achieved. It is unrealistic to think that UNHCR - or any other international non-state actor - has that much power over states. They can influence, or have an effect, on state behaviour, but they cannot determine the outcome and certainly not the impact of their work, as it is ultimately the responsibility of (sovereign) states to act in a certain matter. It is important to acknowledge this limitation of any research into the behaviour of states. Nonetheless, the methodology used in this study assumes that the degree of UNHCR's influence on this behaviour can increase if the agency is equipped with adequate structures and if the agency is itself implementing processes of a high quality. What 'adequate' and 'high quality' is, is determined by a set of indicators such as control, finances and expertise; all these indicators will be explicated in Chapter 2.

78 Because, indeed, also in the case of UNHCR's supervision, 'the problem is that the impact is hard to measure'. Interview with UNHCR official #5a (9 September 2014).

79 Shany calls this 'reverse engineering'. Shany, *Assessing the Effectiveness of International Courts* (n 65) 51.

Accordingly, this research is substituting an outcome or impact assessment, or empirical analysis, with the evaluation of structure and procedures as proxies for outcome or impact.⁸⁰ This approach is based on a Theory of Change (ToC) model.⁸¹ A ToC is a well-placed tool for ‘reverse reasoning’, as the process for developing a ToC usually starts with the question: ‘what is the ultimate goal?’⁸² Once that goal has been established - in this study: compliant behaviour by states through effective supervision - the preconditions that are necessary for contributing to the achievement of that goal will be identified through backward mapping. Since UNHCR is the focus of this study, these preconditions are related to the functioning of UNHCR: either the manner in which the agency is set up, or the manner in which the supervisory task is executed. Both aspects are in the ‘sphere of control’ of respectively those who have authority over UNHCR (those who can change UNHCR’s mandate) and the agency itself, meaning that they have “unilateral change authority”, *i.e.* control to change on their own.⁸³

Outside their sphere of control is whether those who are supervised – states – value the agency’s supervisory output. It is important to distinguish between UNHCR’s output, which are the ‘products’ of the agency’s supervisory mandate (such as the submission of an *amicus curiae* brief or the issuing of Guidelines on International Protection, but also a conversation behind closed doors with state officials) and the outcomes or impacts, which are the effects of these outputs in the external world. The output, which is within the sphere of control of UNHCR, is predominantly a means for attaining the outcomes as identified in the ToC: that states value what UNHCR has to say.⁸⁴ It is submitted that if the quality of the output is high, states are more likely to value it. Hence, whether states value UNHCR’s work is within the agency’s ‘sphere of influence’.⁸⁵ The ultimate goal that UNHCR through its supervision aspires to achieve, in other words, the goal in which the agency is interested, namely compliance of states, is a logical result from the output (its supervisory activities) and the outcome (states valuing these activities), and is within the ‘sphere of interest’ of UNHCR. Diagram 1 schematically presents the ToC for this study.

80 *ibid.*

81 Implicitly, Shany is also using elements of the ToC model.

82 In a ToC, the ultimate goal is often presented as ‘impact’, but to stay in line with the approach followed in this thesis, reference will be made to ‘goal’.

83 H William Dettmer, *The Logical Thinking Process: A Systems Approach to Complex Problem Solving* (2nd edn, ASQ Quality Press 2007) 70.

84 Yuval Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’ (2012) 106 *American Journal of International Law* 225, 248–249.

85 Dettmer (n 83) 70.

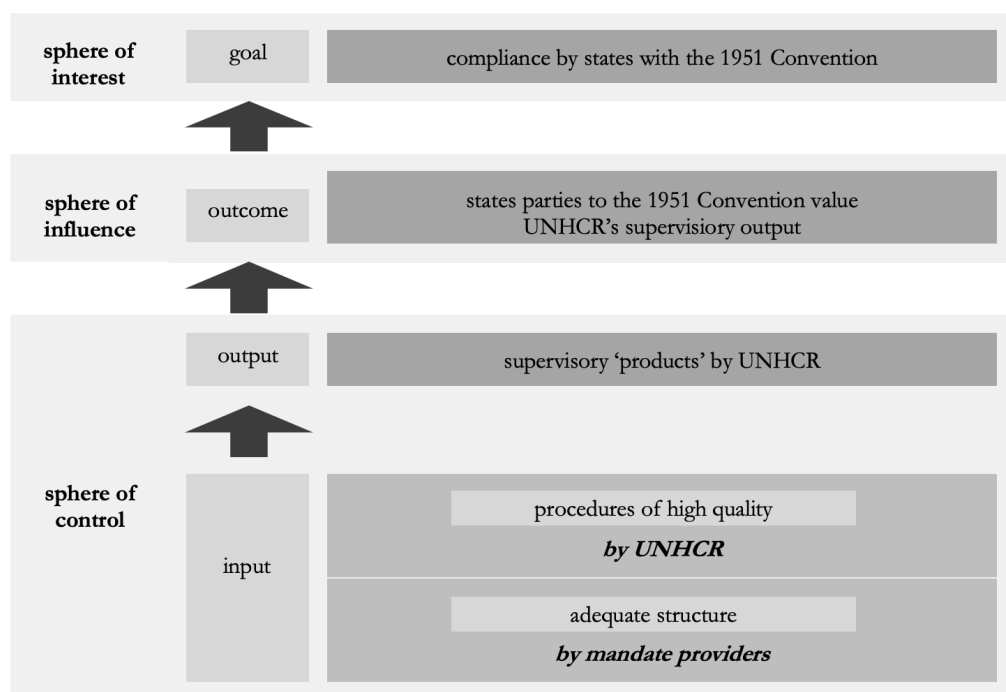


Diagram 1 - Theory of Change

Although not explicitly mentioning the ToC model, Yuval Shany has used a similar approach to evaluate the effectiveness of both international courts and the Human Rights Committee, and as such has inspired this thesis' methodology.⁸⁶ In both instances, Shany identifies first the mandate providers of both institutions and the goal(s) as set by the mandate providers.⁸⁷ He then goes on to identify structural and process indicators to evaluate effectiveness.⁸⁸ In the case of international courts, he enumerates seven structural indicators: legal powers, personnel capacity, resources, structural independence, usage potential, reputation, and relations with other institutions; and three process indicators:

86 Shany, *Assessing the Effectiveness of International Courts* (n 65); Shany, 'Assessing the Effectiveness of International Courts' (n 84); Yuval Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' in Marten Breuer and others (eds), *Der Staat im Recht: Festschrift für Eckart Klein zum 70. Geburtstag* (Duncker & Humblot 2013).

87 Shany, *Assessing the Effectiveness of International Courts* (n 65) 31–48; Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' (n 86) 5–11.

88 Shany, *Assessing the Effectiveness of International Courts* (n 65) 58–61.

procedural justice, interpersonal justice, and informational justice.⁸⁹ In the case of the HRC, he lists six structural indicators: budget of operations, quantity and quality of support staff, meeting facilities, allocation of meeting time, quality of experts on the Committee, and legal powers, and only one procedural indicator: constructive dialogue with state-parties.⁹⁰ No detailed justification is given as to the choice of these particular indicators.

In this study, Shany's approach will be further explored in light of a ToC model by describing an ideal type of effective supervision as carried out by international organizations, identifying various structural and procedural indicators, some of which overlap with the ones selected by Shany, and others which are taken from legal theories such as Global Administrative Law.⁹¹ Chapter 2 will be devoted to refining the theory and substantiating the choices made. It is, in this respect, important to underscore that UNHCR is not an international organization as such, but a subsidiary organ of the GA. In this capacity, it operates on the international plane with extensive autonomy, but the agency still remains a body within the legal framework of the United Nations.⁹² The framework as used in this study is, nevertheless, relevant, as it paints the picture of the ideal type of effective supervision on the international plane. The probability that there is no international organization that fulfils all the criteria of effective supervision does not make the ideal type less relevant.

Combining a ToC model, goal attainment and reverse reasoning to assess the effectiveness of UNHCR's supervisory task circumvents to a large extent the methodological challenges that are posed by measuring hard-to-quantify goods that are created by a public institution.⁹³ Analysing whether the structure of UNHCR and the procedures it employs in exercising its supervisory task are well-gearred to be instrumental in achieving compliant behaviour by states makes it also more straightforward to diagnose which parts of UNHCR's structure and procedures are adequate and which are not, and thus whether structural or procedural reforms are justified. In other words, the methodology as used in this research is particularly appropriate for answering the 'how' in the research question. Furthermore, the classification of structure on the one hand and procedures on the other hand, both within the sphere of control, makes it easier to pinpoint who exactly should make the adjustment: whether the GA should

89 Shany, 'Assessing the Effectiveness of International Courts' (n 84) 251–254.

90 Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' (n 86) 12–14.

91 This particularly refers to the use of indicators for what constitutes accountability.

92 Gilbert Jaeger, 'Status and International Protection of Refugees' (International Institute of Human Rights 1978) 33.

93 Shany, *Assessing the Effectiveness of International Courts* (n 65) 50–51. In contrast to private institutions that have the tendency to generate quantifiable profits or losses.

fine-tune or change the supervisory structure of the 1951 Convention, whether UNHCR itself should modify its procedures, or both. If no inadequacies are found, then that would lead to the conclusion that ‘better’ supervision is not the panacea to more compliant behaviour, and that recourse must be made to other factors that influence the behaviour of states. The theory used is not able to give an answer to which other factors. At the same time, even when inadequacies are found, these other factors might also still be relevant.

1.4 Demarcations

Before going into the specifics of how the data for this research is collected, first an account for this study’s focus on the 1951 Convention will be given. The ‘international refugee regime’ is made up of the legal norms and institutions that have as their primary objective the (international) protection of refugees, and defines who qualifies as a ‘refugee’ as well as what the obligations of states are towards such an individual.⁹⁴ The 1951 Convention and the 1967 Protocol are the core universal treaties in this regime, which is why this research focuses on these specifically.⁹⁵ Other aspects of the international refugee regime, in particular the significant developments that have occurred in regional instruments concerning refugee protection, such as the expansion of the definition of refugee in many African states through the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁹⁶ and the regulation of binding norms governing the status determination process through the EU Directive on Common Procedures for Granting and Withdrawing International Protection (recast)⁹⁷, will thus mostly be ignored. UNHCR has a formal task of supervising these regional instruments too⁹⁸, but this research’s focus on the 1951 Convention

94 Martin Jones, ‘The Governance Question – The UNHCR, the Refugee Convention and the International Refugee Regime’ in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 85.

95 See note 8, above (where the reason for only referring to the 1951 Convention for sake of brevity is explained).

96 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa [1969 African Refugee Convention] 1969 (1001 UNTS 45).

97 Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [L 180/60-95 of 26 June 2013 December 2005], which is part of the Common European Asylum System (CEAS) consisting of a number of legislative measures to harmonise minimum standards for asylum.

98 Such as the 1969 African Refugee Convention through Article VIII of that Convention, the 1984 Cartagena Declaration on Refugees through Recommendation II(e) (Declaration

is considered illustrative of the agency's supervisory task in general, including the supervision of regional instruments, as the task of UNHCR regarding all these instruments is arguably more or less interchangeable. Therefore, it is submitted that a study that focuses on the 1951 Convention will encompass all the particularities of UNHCR's supervisory task.

For this research, the ultimate goal that needs to be achieved (compliant behaviour due to effective supervision by an international organization) is not questioned itself. Therefore, assessing to what extent UNHCR carries out its supervisory task effectively is predominantly an analytical and descriptive effort. However, normative considerations are implicitly incorporated in three ways: first, that supervision is a necessary component in attaining compliant behaviour by states (which will be discussed further in Chapter 2); second, that UNHCR, in order to attain effective supervision, should follow the structures and procedures as defined in this thesis (Chapter 4 and Chapter 5); and third, that researching the supervisory task of UNHCR might suggest that it is desirable that this task is, indeed, carried out by UNHCR - although, of course, it is not normative that UNHCR has been given this task through its Statute and the Convention.⁹⁹ This desire is shared by UNHCR, its mandate providers, states and scholars alike, although not by all scholars.¹⁰⁰ Despite numerous proposals in the past three

on Refugees, adopted at a Colloquium entitled 'Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios', held at Cartagena, Colombia, 19-22 November 1984, and the EU Council Directive 2004/83/EC of 29 April 2004 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 [OJ L 304/12 of 30.09.2004] through Recital 15 which states that "Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention". Recital 22 of the updated Qualification Directive 2009 has the same wording.

99 See, for a similar justification, on the research into the effectiveness of international courts: Shany, 'Assessing the Effectiveness of International Courts' (n 84) 230–231 and note 34.

100 Which also became apparent during the 2010 York International Conference on Forced Displacement, Protection Standards and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments, held on May 17-20 2010. Simeon (n 39) 26; see also Feller, Türk and Nicholson (n 29). See also the declaration adopted unanimously by states parties of the 1951 Convention during the Global Consultations process in 2002, that affirmed, inter alia, the need for closer cooperation between the states parties and UNHCR to facilitate UNHCR's duty of supervising the application of this convention. Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, 'Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees,

decades for establishing a meaningful oversight mechanism of the 1951 Convention outside UNHCR's institutional settings¹⁰¹ (these proposals will be discussed in Chapter 6), no such mechanism has been created yet.

Measuring goal attainment and the effectiveness of an organization is not similar to examining whether the organization carries out its tasks efficiently. Although effectiveness and efficiency are related issues in organizational studies¹⁰², there is an important difference: efficiency generally refers to cost-effectiveness.¹⁰³ In other words, how the organization copes with the (limited) resources that it has at its disposal. And, often more important for those financing the organization, whether it is possible to fulfil the goals of the organization with fewer finances and staff.¹⁰⁴ Supervision is thus considered to be efficient when optimal output is achieved with minimum input and at minimum costs.¹⁰⁵ Although these questions are not the main focus in this study, the efficiency of UNHCR in this sense will be touched upon in both the examination of the structural elements (when analysing whether UNHCR has sufficient resources to carry out its supervisory task) and the procedural elements (when exploring how UNHCR makes use of the financial and personal capacity that it has at its disposal).

Finally, although the idea of UNHCR as the sole supervisor of the 1951 Convention is challenged by some scholars,¹⁰⁶ this study will not evaluate the significance of other actors for the correct interpretation, implementation and application of the 1951 Convention. This has already been done by others. For example, the contribution of (domestic and EU) judiciary to the protection of refugees under the 1951 Convention has been discussed by three different authors

HCR/MMSP/2001/09' (2002). Finally, the General Assembly reaffirms yearly that international protection (which encompasses supervision) is 'at the core of the mandate' of UNHCR. 'Thematic Compilation of General Assembly & Economic and Social Council Resolutions (4th Edition)' (2014) 308–309.

101 Leanne MacMillan and Lars Olsson, 'Rights and Accountability' (2001) 10 *Forced Migration Review*; BS Chimni, 'Reforming the International Refugee Regime: A Dialogic Model' (2001) 14 *Journal of Refugee Studies* 151; Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013).

102 'Efficiency is doing things right whereas effectiveness is doing the right things.' Peter Drucker, *Managing the Non-Profit Organization* (Routledge 2012) 155 in: ; Shany, *Assessing the Effectiveness of International Courts* (n 65) note 66.

103 Shany, *Assessing the Effectiveness of International Courts* (n 65) 27–29.

104 *ibid* 51–52.

105 Koops (n 71) 58.

106 Hathaway, 'Who Should Watch over Refugee Law?' (n 42); Zieck, 'Article 35 of the 1951 Convention' (n 6) 1509–1510.

in the edited book by Simeon.¹⁰⁷ Similarly, the role of other human rights treaty monitoring bodies and NGOs has also been analysed elsewhere.¹⁰⁸ Accordingly, only when these other actors are relevant for UNHCR's supervisory task will they be discussed; *i.e.* the manner in which the agency relates to these actors in the exercise of its supervisory task. In addition, in Chapter 6, when discussing proposals made by scholars to make the supervision of the 1951 Convention more effective, some reference to external stakeholders will be made in as far as scholars propose these stakeholders as alternatives.

1.5 Data gathering

The data-gathering methodology for this study is based on three forms of qualitative and inter-disciplinary research. First, it is based on an examination of primary and secondary legal sources on UNHCR's supervisory mandate and work. This includes, *e.g.*, various international (human rights and refugee law) treaties, UN resolutions, decisions of courts, and guidelines and recommendations by UNHCR. Second, it is founded in an analysis of literature that specifically deals with UNHCR and its supervisory task, and of social science literature on supervision, mainly rooted in international relations, law and social studies. Incorporating other disciplines than law enriches the understanding of the meaning of effectiveness in international law, and, for the underlying study, also of UNHCR.¹⁰⁹ Third, interviews with UNHCR officials at UNHCR Headquarters in Geneva and in the field were conducted.¹¹⁰

Interviews are often used in social science for empirical reasons. In this study of the law, interviews merely serve to clarify the practices of UNHCR. The reason

107 Nicholas Blake, 'The Contribution of the Judiciary to the Protection of Asylum Seekers in the UK and the EU' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013); Russel W Zinn and Benjamin N Perryman, 'The Impact of International Law and Domestic Human Rights Law on Canada's Judicial Supervision of the 1951 Refugee Convention' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013); Harald Dörig, 'Judicial Experience with the Geneva Convention in Germany and Europe' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013).

108 Alice Edwards, 'Peter Pan's Fairies and Genie Bottles: UNHCR, the UN Human Rights Treaty Bodies and "Complementary Supervision"' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013); *ibid.*

109 Shany, *Assessing the Effectiveness of International Courts* (n 65) 5.

110 'In the field' is a term used to describe the location where certain personnel is working; in this study, it refers to all those UNHCR employees who do not work at headquarters in Geneva.

for interviewing UNHCR staff members is twofold: first, the aforementioned criticism on UNHCR provides a significant number of ‘external’ views on how UNHCR is executing its supervisory task. This research will add an internal perspective to these external views; a perspective that has been lacking in the research on this topic so far. Second, UNHCR staff members, both in Geneva and in the field, are in general quite critical on both their own performances and on the performances of UNHCR as a supervisor. These interviews will thus give meaningful insight in the practices and (perceived) performance of UNHCR’s supervisory task.

The respondents were contacted through email for an interview appointment - most of the respondents were introduced by their colleagues on the basis of their particular expertise. All interviewees in field offices were (senior) protection officers, legal officers or heads of office. The interviewees at UNHCR headquarters in Geneva worked either for the Department of International Protection (DIP) or for Communications and Public Information Services. All in all, 25 in-depth interviews were conducted: 8 at UNHCR’s headquarters, 16 with UNHCR officials working in country or regional offices, and 1 with a former High Commissioner for Refugees. All interviews lasted between 45 minutes and 1,5 hour.

All of the interviews (which were either conducted face-to-face, by telephone or through Skype) were digitally recorded with the consent of the interviewees. All the respondents were anonymised and numbered. The interviews were semi-structured: they were all based on the same questionnaire, but they had a relatively open framework which permitted focused, conversational, two-way communication. Given the fact that not all questions were formulated in advance, there was some flexibility for both the interviewer and the interviewees to probe for details or explore issues that came up during the interview.¹¹¹ The only exception to this is interview #15 which was conducted with former High Commissioner Ruud Lubbers (who consented to being named in the research); this interview followed a different questionnaire that allowed for exploring the particular experiences of Lubbers during his years in office. Annex 1 to this study provides an overview of the interviews and the geographical spread of interviewees; the questionnaire is included in this research as Annex 2. The interviews took place over the course of 4 years (2013-2017). Although there is some time between the last interview and the publication of this study, there have been no significant changes in UNHCR’s structure and processes in the past few years (this statement will be substantiated in Chapter 4 and 5) - meaning that the illustrations that these interviews gave to the study remain relevant.

111 Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* (SAGE 2001) 4–5.

1.6 Structure of the study

This study consists of seven chapters. Each chapter will be instrumental in answering elements of the main research question.

Chapter 2 presents the conceptual framework of this study. The first step in evaluating effectiveness under a goal-based approach is to ascertain and expound the goal that is researched, which in this study is compliance with the 1951 Convention through supervision by UNHCR. The aim of this chapter is to describe the central theoretical concept of this study, *i.e.* supervision. The importance of supervision as a task of international organizations will be explored and its function in international law analysed. Most importantly, the conditions that are essential as a prerequisite for the attainment of effective supervision, the structural and procedural elements, will be explicated in this chapter. Although the existing literature does contain directions as to how the effectiveness of international organizations must be assessed, there is not an existing framework that can be used to systematically analyze the structure and procedures that induce compliance of states with their international obligations. Therefore, this chapter will review the literature on, amongst others, organizational effectiveness and GAL, and propose a conceptual framework through which UNHCR's supervisory task can be assessed.¹¹²

Chapter 3 will then provide a short historical overview of the development UNHCR has gone through in more than six decades: the agency's origins, the manner in which its High Commissioners have struggled to obtain a position for their agency, and, most importantly, how this struggle has affected UNHCR's supervisory task.

After this overview, the findings of Chapter 2 will be applied to the protagonist of this study, UNHCR, to understand how the agency is currently carrying out its supervision regarding the 1951 Convention. The objective of Chapter 4 is to provide an analysis of the first condition for effective supervision: structural elements. First, UNHCR's mandate provider(s) will be described and analysed. Then, an overview will be given, and an analysis will be made of the manner in which states have set up UNHCR's supervisory task. The legal basis of UNHCR's supervisory task in both the Statute and the 1951 Convention (including subsequent resolutions of the GA and ECOSOC and conclusions of ExCom) will be discussed. Both Article 35 (Co-operation of the national authorities with the

112 This study does not focus on organizations in the broadest sense of the meaning, although the goal-based approach might be useful for various forms of institutions. Instead, the organization that is the center of attention in this chapter is the international kind, more specifically the international organization that has been mandated to supervise the compliance of states with their international (human rights) norms.

United Nations) and Article 36 (Information on National Legislation) of the 1951 Convention will be examined, as well as Article 8 of UNHCR's Statute and, additionally, the interpretation of the term 'international protection' (which includes supervision). The manner in which UNHCR is resourced in the exercise of its supervisory function is a structural element as well, as is the level of legal and financial independence. Both will be analysed in this chapter. Finally, this chapter will also include an examination of the manner in which the mandate providers are overseeing the supervisory task of UNHCR.

The second condition of effective supervision, the manner in which UNHCR executes its supervisory task within the structure that is set up by its mandate providers, is the subject of Chapter 5. The set of principles that was explicated in Chapter 2 will be set against UNHCR's own supervisory procedures. Accordingly, this chapter will focus on how UNHCR gives shape to its legitimacy, its accountability and whether it is operationally capable of carrying out its supervisory task. Both Chapter 4 and Chapter 5 will also include an in-depth discussion of the scholarly criticism and concern as pointed out in this chapter.

After analysing whether the current structure of UNHCR supervisory task and the procedures it employs are adequate to achieve effective supervision, and highlighting the weaknesses in both structure and procedure, the possible manners in which these weaknesses may be addressed will be explored in Chapter 6. This will be done by revisiting the various proposals and suggestions that scholars have made over time on how the effectiveness of UNHCR's supervisory task can be improved, and by considering them in light of current developments within and outside of UNHCR. These proposals are categorized as follows: first, the proposals that try to reinforce UNHCR's supervisory task will be discussed; second, the proposals that broaden or deepen the supervision of the 1951 Convention, but that still include a role for UNHCR, will be examined; and third, proposals will be discussed that suggest supervisory mechanisms outside of UNHCR's institutional settings. This enumeration will be followed by an evaluation of the (dis)advantages of these proposals and how they are contributing to achieving effective supervision, using the theoretical framework of this study as a yardstick. The objective of this chapter is to find out whether scholars already have a clear-cut answer to the problems that were identified in this study, or whether additional proposals and suggestions are needed.

Chapter 7 concludes the study.