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
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Chapter 4
The structural elements of UNHCR’s supervision

4.1 Introduction

To determine whether UNHCR is effective in achieving its task of supervising the 1951 Convention, this chapter will look at the manner in which the agency has been set up. The structural elements of effective supervision as identified in Chapter 2 will be applied to UNHCR. This will be done by examining four factors: UNHCR’s mandate and competences, its resources, its structural independence, and its internal oversight mechanisms. The manner in which the agency was created in 1950 as well as any modifications and adjustments of these factors by its mandate providers will be part of this analysis. In order to understand these factors, this chapter will first identify the mandate providers who created UNHCR and have the power to adjust UNHCR’s mandate.

4.2 The mandate providers

Since UNHCR was not created as an international organization, the agency does not have any member states, which are usually the mandate providers of international organizations. Rather, UNHCR is a subsidiary organ of the General Assembly, established by the GA on the basis of Article 22 of the UN Charter, similar to other UN agencies such as UNDP and UNICEF. As such, the

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1 Sometimes, international organizations are themselves a member of another international organization. This is in particular the case with the European Union, which is a member of a number of international organizations such as the WTO and the FAO. Christine Kaddous (ed), The European Union in International Organisations and Global Governance: Recent Developments (Hart Publishing 2015).

agency acts under the authority of the General Assembly, which is, together with ECOSOC pursuant to Article 3 of the UNHCR Statute, the mandate provider of UNHCR. So, the agency derives the justification for the exercise of its authority from the fact that national governments have deliberately attributed tasks to the UN (and the UN, in turn, to specialized agencies such as UNHCR).  

The High Commissioner is elected by the General Assembly on the nomination of the UN Secretary-General (UNSG) and needs to report annually on the results of the agency’s work to the GA through ECOSOC. The General Assembly and ECOSOC can both give policy directives to the High Commissioner, which he is required to follow. These policy directives take the form of resolutions. Some of these resolutions have expanded UNHCR’s mandate and authority; therefore, these resolutions must be read together with the Statute to understand the full scope of UNHCR’s responsibilities. The resolutions that authorized UNHCR to ‘use its good offices’ to assist refugees who do not come within its Statutory competence are a good example of this expansion of the agency’s mandate.

The UNSG is not mentioned amongst the agency’s mandate providers alongside the GA and ECOSOC in Article 3. During the drafting of the Statute, the French delegate was quite passionate about why the High Commissioner should not be receiving instructions from the UNSG, as that would make him an ‘ordinary official of the Secretariat’ and a ‘mere subordinate of the Secretary-General’ whereas the work of the agency required a more independent status.

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5 ibid Art. 3.


7 The first resolution that refers to this ‘good offices’ of UNHCR was GA Res. 1388 (XIV) of 20 November 1959, in relation to Chinese refugees in Hong Kong. The use of the ‘good offices’ resolutions were already anticipated during the drafting of UNHCR’s Statute, when the delegate from Australia said: “With regard to the terms of reference to be given to the Office of the High Commissioner, he considered that for the time being the High Commissioner should be granted limited powers, subject to later extension”. UN General Assembly, Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success [A/C.3/SR.262] para 35.

8 UN General Assembly, Provisional Summary Record of the Two Hundred and Sixty-First Meeting Held at Lake Success [A/C.3/SR.261] 55; UN General Assembly Provisional
As a consequence, the High Commissioner should also not be appointed by the Secretary General. The delegate from the United States, on the other hand, feared that if the UNSG would not appoint the High Commissioner, the UNSG’s sense of responsibility for the work of the agency would be weakened, and UNHCR might also fail to integrate its work with the other services of the UN. Eventually, a compromise was reached, proposed by the delegate from Lebanon: nomination by the UNSG, but elected by the General Assembly. Aside from that, the Statute gives a rather limited role to the UNSG in the agency’s work. As such, the UNSG cannot be considered a mandate provider of the agency - even though he has considerable political authority and influence within the United Nations family as chief administrator. That the UNSG is using this influence vis-à-vis UNHCR regardless of its formal role and the drafting history of the Statute, will be discussed later in this chapter.

Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) para 13. The Lebanese delegate added that appointment by the UNSG would not give the High Commissioner the required authority and prestige necessary to perform its tasks, which is why the GA would have to elect the High Commissioner. ibid, para. 31. The Dutch delegate felt the same, saying that this would ‘give the High Commissioner greater independence’. UN General Assembly, Provisional Summary Record of the Two Hundred and Sixty-Third Meeting Held at Lake Success [A/C.3/SR.263] para 24.

9 UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-First Meeting Held at Lake Success (n 8) para 41.
10 UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) para 31; UN General Assembly, Provisional Summary Record of the Two Hundred and Sixty-Fourth Meeting Held at Lake Success [A/C.3/SR.264] para 51.
11 The Statute does mention that “the High Commissioner and the UNSG shall make appropriate arrangements for liaison and consultation on matters of mutual interest” and that “the UNSG shall provide the High Commissioner with all necessary facilities within budgetary limitations”. The 1950 Statute Arts. 18 and 19; Niamh Kinchin, ‘UNHCR and the Complexity of Accountability in the Global Space’ in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), UNHCR and the struggle for accountability: Technology, law and result-based management (Routledge Humanitarian Studies 2016) 31.
12 See Katja Göcke and Hubertus von Mohr, ‘United Nations, Secretary-General’, Max Planck Encyclopedias of International Law (2013) paras 1, 6. The legal basis for the UNSG’s role lies in Arts. 7 and 97-101 of the UN Charter, naming him the chief administrator of the whole organization (i.e. going beyond being the head of the UN Secretariat) and, more importantly, giving him an independent political role with regard to any matter that ‘in his opinion may threaten the maintenance of international peace and security’. Charter of the United Nations 1945 (1 UNTS XVI) Arts. 7, 97-101; Ian Johnstone, ‘The Role of the UN Secretary-General: The Power of Persuasion Based on Law’ (2003) 9 Global Governance 441, 442.
13 See §4.5.1.
Besides the GA and ECOSOC, UNHCR’s Executive Committee (ExCom) is also a mandate provider. ExCom was established in 1958 by ECOSOC and functions as a subsidiary organ of the General Assembly. ExCom was instituted to take the place of the Executive Committee of UNREF and is the executive body of UNHCR, responsible for determining general policies, advising the High Commissioner in the exercise of his functions and reviewing and approving UNHCR’s budget and programs. Although UNHCR’s Statute merely requires of the High Commissioner that he “requests the opinion” of ExCom, the General Assembly has instructed the High Commissioner to abide by the policy and mandate directions of ExCom. Currently, ExCom consists of 106 members, including states that are not states parties to any international treaty on the protection of refugees, such as Pakistan and Lebanon. Since ExCom can give policy directions to UNHCR, which are more than just recommendations, and, more importantly, since it approves UNHCR’s budget, this ‘governing body’ of the agency can be qualified to be one of its mandate providers.

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14 ECOSOC Resolution E/RES/672 (30 April 1958).
15 As such, its reports are submitted for consideration in the Third Committee of the General Assembly.
16 See §3.3.
17 ECOSOC Resolution E/RES/672 (30 April 1958) (n 14) para 2(a)-(c).
19 The General Assembly has requested the High Commissioner to ‘abide by directions which that [Executive] Committee might give him in regard to situations concerning refugees’. See, for example, UN General Assembly Resolution A/RES/1673 (XVI) (18 December 1961). See also Marjoleine Zieck, UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis (Martinus Nijhoff Publishers 1997) 70.
20 UNHCR, ‘Executive Committee’s Membership by Year of Admission of Members’ <http://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html> accessed 1 July 2020.
21 The criteria for membership of ExCom are stipulated in the General Assembly Resolution that requested the ECOSOC to establish ExCom. Members should be elected ‘on the widest possible geographical basis from those states with a demonstrated interest in, and devotion to, the solution of the refugee problem [emphasis added]’. UN General Assembly Resolution A/RES/1166 (XII) (26 November 1957) para 5.
22 Scholars are not univocal on whether the conclusions of ExCom are legally binding on UNHCR. Holborn and Takahashi state that ExCom can only give advice to UNHCR, Sztucki has the opposite view in light of the General Assembly Resolutions that implore UNHCR to abide by ExCom’s Conclusions. Holborn (n 6) 92; Saul Takahashi, ‘Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention’ (2002) 20 Neth. Q. Hum. Rts. 53, 55, note 7; Jerzy Sztucki, ‘The Conclusions on the International
Consequently, the three mandate providers of UNHCR are the General Assembly, ECOSOC and ExCom. If there are reforms necessary in UNHCR’s structure, i.e. the manner in which the agency has been set up to carry out its supervisory task, only the General Assembly and ECOSOC and ExCom will be in the position to amend UNHCR’s mandate. It is important to have identified these mandate providers, as they are jointly responsible for formulating and revising the mandate of UNHCR, and as such its goals and functions. Conversely, UNHCR may experience repercussions from these mandate providers if it deviates too far from achieving its goals as prescribed by its mandate providers.

In addition to its mandate providers, states are also important stakeholders for UNHCR. They are members of the UN and the GA, states parties to the 1951 Convention, individual members of ExCom, financial donors of UNHCR’s work, host states, and partners in the implementation of cooperation or host state agreements, as well as those with jurisdiction over the territories in which UNHCR operates. States may have different expectations of how UNHCR should interpret and execute its supervisory task than the mandate providers, depending on the role the state assumes (e.g., donor, partner, UNHCR hosting state). Although this study focuses on the expectations of UNHCR’s mandate providers, the role individual states play with regard to the agency’s supervisory task will be part of the analysis as well, for example when there is a divergence between their (alleged) expectations and those of the mandate providers. In addition, the General Assembly, ECOSOC and ExCom may even expect that UNHCR adheres to the expectations of other important stakeholders.

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23 Shany also identified this need in relation to international courts and their mandate providers. Yuval Shany, Assessing the Effectiveness of International Courts (International Courts and Tribunals Series 2014) 32.

24 ibid 33.

25 A ‘cooperation agreement’ is the formal agreement between UNHCR and a host state that describes the conditions under which UNHCR will co-operate with and/or open and/or maintain an office in that host state, and under which conditions it will carry out its international protection and humanitarian assistance function in that host state. See UNHCR, ‘Model UNHCR Co-Operation Agreement between the United Nations High Commissioner for Refugees and the Government of Country X, 2009, Rev. MNW 24/10/01’ Art. 2 <http://www.refworld.org/docid/3ae6b31b27.html> accessed 1 July 2020. See also Marjoleine Zieck, UNHCR’s Worldwide Presence in the Field: A Legal Analysis of UNHCR’s Cooperation Agreements (Wolf Legal Publishers 2006).

26 Shany states that the ability of an organization to satisfy the goals as set by the mandate provider may be jeopardized if other stakeholders become disappointed by the organization. Shany (n 23) 35–36.
Individual refugees, refugee communities, NGOs, other international organizations, academic institutions, and the general public are some of these stakeholders. Therefore, the manner in which UNHCR engages with other stakeholders, most notably states outside the formal frameworks of the GA and ExCom, will be part of the analysis as well.

4.3 A clear and substantial legal mandate

In Chapter 3, the historical and political developments of UNHCR’s supervisory task were outlined. It demonstrated that the operations in the field became a significant part of UNHCR’s work, while at times the supervisory task seemed to have taken a backseat. However, this supervisory task still remains part and parcel of UNHCR’s mandate, which was decided upon by states in 1950 and has been upheld ever since. One of the sub questions that needs to be answered now is whether this supervisory task has been articulated in a clear and substantial mandate. This questions thus refers to the manner in which the mandate providers have formulated and subsequently set up the supervisory mandate of the international organization, or, in this thesis, UNHCR. ‘Clear’, in this regard, indicates that the mandate is formulated in precise and unambiguous terms, whereas ‘substantial’ refers to meaningful powers attributed to the organization by its mandate providers in all three phases of supervision (interpretation, monitoring and enforcement). The presumption is, as explained in Chapter 2, that the more clear and substantial the mandate is, the better and more effective UNHCR can perform its supervisory task, making it more likely that the ultimate

27 For example, with regard to the general public, ExCom has acknowledged the “importance of promoting a favourable climate of public opinion in order to facilitate the exercise of the High Commissioner’s international protection function” (ExCom Conclusion 41 (XXXVII, 1986), para (o)), and with regard to other entities: “calls upon the High Commissioner to strengthen the Office’s refugee law promotion work, with the active support of States and through increased cooperation with non-governmental organizations, academic institutions and other organizations” (ExCom Conclusion 81 (XLVIII, 1997), para. (u)).

28 In §2.2.2, it was asserted that an interpretation method that follows the rules of the Vienna Convention would be a right process. The 1951 Convention, however, predates the Vienna Convention, which strictly makes the latter non-applicable (see Art. 4 of the Vienna Convention). However, the norms for interpreting treaty obligations as contained in the Vienna Convention are customary public international law, and are therefore applicable on the 1951 Convention as well. Anthony Aust, ‘Vienna Convention on the Law of Treaties (1969)’, Max Planck Encyclopedia of Public International Law (2006) paras 14–17; Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) Arts. 4, 31-32.
goal - compliant behaviour by states - can be achieved. Therefore, the legal parameters from which UNHCR derives its supervisory task will be analysed and examined to find out whether they indeed consist of a clear and substantial legal mandate. These parameters are formed by the 1950 Statute, the 1951 Convention, subsequent resolutions by the General Assembly and ECOSOC, and conclusions by ExCom.

4.3.1 UNHCR’s Statute

UNHCR was established by the General Assembly “to provide international protection” and “to seek permanent solutions for the problem of refugees”. The first function, international protection, is considered to be the raison d’être for the creation of UNHCR, and is formulated in Article 8 of the 1950 Statute: “The High Commissioner shall provide for the protection of refugees falling under the competence of his Office […].” The protection function is framed in mandatory language (‘shall’); a positive duty is therefore imposed on the High Commissioner. There was, however, little discussion during the drafting phase as to what ‘international protection’ meant, and it does not become clear from the wording of the Statute what this protection requires either.

Commonly understood, ‘international protection’ of refugees encompasses all the activities that aim to ensure the rights of these uprooted persons, which begins with securing admission to a country of asylum and ends with the attainment of a durable solution. States have the primary responsibility to provide international protection to refugees, but UNHCR also has a mandate to provide international protection to refugees and other persons of concern. The term was introduced for the first time during debates in the ECOSOC meetings in 1949, but without providing any explanation or a definition of the term. The term replaced the phrase ‘legal and political protection’, which was used for the description of the work done by the refugee agencies under the League of Nations and the work of the International Refugee Organization. Both Holborn and Vernant argue that

29 The 1950 Statute Art. 1: “The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities. […]”.


31 Holborn (n 6) 62.

32 ibid 99 and note 9.

33 ibid 99.
the term ‘international protection’ differs significantly from this earlier phrase, as is characterized by the non-exhaustive list of nine activities in Article 8 of the Statute in which no reference is made to any political or quasi-consular activities, nor to any activities on behalf of individual refugees. These political activities have indeed been ruled out specifically by the Statute. According to Vernant, the drafter of the Statute “seem to have been guided by a desire to restrict the scope of the HC’s Office to functions of a higher [legal] order related to the protection of refugees at the international level”. However, this presumed desire has been cast aside by subsequent High Commissioners. Van Heuven Goedhart, the first High Commissioner, stated already in 1953 that a restriction to only providing legal (international) protection would cripple his agency, and that the protection for which UNHCR was responsible was even wider than the legal and political protection with which the IRO was charged. Van Heuven Goedhart was determined to extend his services to include material assistance to refugees. However, the fact that he could make such a statement and that later High Commissioners could successfully act upon

34 Jacques Vernant, The Refugee in the Post-War World: Preliminary Report of a Survey of the Refugee Problem (United Nations 1951) 42; in: Holborn (n 6) 99–100. However, according to Weis, the various international agencies who were responsible for (categories of) refugees in the interbellum and after WWII gave effect to this responsibility in a ‘remarkably uniform’ manner. Paul Weis, ‘The International Protection of Refugees’ (1954) 48 American Journal of International Law 193, 211.

35 The 1950 Statute Art. 2 reads: “The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.”

36 Vernant (n 34) 42; Holborn (n 6) 99–100. However, not all drafter agreed with this approach. The delegate from India, Kirpalani, actually said that she could not vote in favor of establishing UNHCR, ‘an elaborate international organization whose sole responsibility would be to give refugees legal protection [emphasis added]’. She wanted, instead, an organization that would also be providing humanitarian aid - particularly as India was hosting a large number of displaced persons who ‘were dying of starvation’. UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) para 61. The delegate from Pakistan had similar concerns. UN General Assembly, Provisional Summary Record of the Two Hundred and Sixtieth Meeting Held at Lake Success [A/C.3/SR.260] para 36.

37 Gerrit Jan van Heuven Goedhart, ‘Statement by the United Nations High Commissioner for Refugees, at the Meeting of the Third Committee of the United Nations General Assembly, 13 October 1953’ (13 October 1953); Holborn (n 6) 100 and note 12. But see the Constitution of the IRO, in which this material assistance was already listed through supervising the ‘care and maintenance’ of refugees and displaced persons. Constitution of the International Refugee Organization 1946 Art. 2(2)(d).
it\textsuperscript{38}, made clear that the articles of the Statute could be broadly interpreted, especially with Article 8 being not limitative.\textsuperscript{39}

In 1963, the then-High Commissioner Félix Schnyder focused predominantly on the agency’s task of providing international protection, stating that the purpose of international protection was the safeguarding of refugees’ rights and interest.\textsuperscript{40} In its 1965 Annual Report to the GA, the High Commissioner mentioned that, since the situation in Europe seemed to be stabilizing again, “protection is once again assuming the primary place that was originally assigned to it”.\textsuperscript{41} However, under the leadership of his successor Prince Sadruddin Aga Khan, it was acknowledged that although the original mandate was indeed, as Schnyder had said, “the safeguarding of [refugees’] legitimate rights and interests”\textsuperscript{42}, the need of refugees for assistance in the field by UNHCR was “more far reaching and more lasting than was originally believed when the Statute was adopted”.\textsuperscript{43}

\textsuperscript{38} Something which became clear when - as discussed in Chapter 1 - UNHCR successfully broadened its mandate to include refugees from Hungary and, later, used its ‘good office’ to assist refugees seeking refuge in Hong Kong. See Ingo Venzke, \textit{How Interpretation Makes International Law: On Semantic Change and Normative Twists} (Oxford University Press 2012) 98–100.

\textsuperscript{39} There is some support in the drafting history of the Statute for this as well. For example, Wilson, the delegate from Canada, already mentioned that ‘although the primary function of the High commissioner’s Office would be to provide legal protection for the refugees, it was also quite probable that a certain amount of material assistance would still have to be provided. [...] Some representatives seemed reluctant to envisage the need for material assistance, but that problem would continue to exist and there was no escaping from it.’ UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) para 30. In the same meeting, the delegate from Brazil made a similar comment: ‘[...] it would be unthinkable to tell the refugees that the organization [UNHCR] would provide them with papers but not with food’. para. 18.


\textsuperscript{43} \textit{ibid} 92.
UNHCR has claimed that international protection encompasses the “ensuring [of] the basic rights of refugees, and increasingly their physical safety and security” which is a broad understanding of the activities as mentioned in Article 8 of UNHCR’s Statute. The agency has thus adopted an interpretation of the term ‘international protection’ that is much more comprehensive than was envisaged by states, giving UNHCR the possibility to perform many different types of activities, including providing material assistance to refugees.

The Statute makes clear that the supervisory task is part of the agency’s international protection mandate. This task is formulated as one of the undertakings mentioned in Article 8(a): “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [emphasis added]”. It is clear from the wording of the Statute that the supervisory task extends to all treaties dealing with the protection of refugees, thus not only the 1951 Convention. States who are not parties to any instrument regarding the protection of refugees also have a duty to cooperate with UNHCR in the exercise of its functions, including its supervisory task – the legal basis for this is the UN Charter in conjunction with Article 8(a) of the UNHCR Statute. This reading is confirmed by UNHCR.

44 As is shown by numerous UN General Assembly resolutions that have expanded UNHCR’s protection mandate, the list of activities as enumerated in Article 8 is non-exhaustive. UNHCR, Note on International Protection, UN doc. A/AC.96/830 (7 September 1994), para. 12 and UNHCR, Note on International Protection, UN doc. A/AC.96/930 (7 July 2000), para. 2 in: 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) 620, and note 27.

45 UNHCR in some of its documents states that ‘the phrase international protection covers the gamut of activities through which refugees’ rights are protected’. See also Michael Barnett and Martha Finnemore, Rules for the World: International Organizations in Global Politics (Cornell University Press 2004) 82.

46 See Articles 1(3), 2(2) and (5), 22, 55 and 56 of the UN Charter. Volker Türk, ‘The UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ in James C Simeon (ed), The UNHCR and the Supervision of International Refugee Law (Cambridge University Press 2013) 42. In addition, GA Resolution 428(V) 1950 also called upon states which were not members of the UN to co-operate with UNHCR. At the time, this statement was quite important as many states were not (yet) members of the UN, including states with a large number of refugees on its territory (e.g. Austria and the Federal Republic of Germany). Jaeger (n 18) 36.

47 “UNHCR is also able to rely on its Statute [for the content of its protection role], the humanitarian principles underlying the Convention and those deriving from other branches of general humanitarian law. State consensus on particular principles, as evidenced by State practice or set out, for example, in conclusions of the Executive
and by the Executive Committee, with the latter calling upon all states several times to cooperate fully with UNHCR in the exercise of its international protection function.  

The effectiveness of international refugee law is, however, only ensured when states are bound by international conventions and when, subsequently, UNHCR can exercise its task of supervising the application of these conventions. For this reason, UNHCR is, pursuant to Article 8(a) of its Statute, mandated to promote the ratification of such conventions. The General Assembly resolution to which UNHCR’s Statute was annexed indeed appeals to states to become parties to international conventions for the protection of refugees, as part of their cooperation with UNHCR. More recent resolutions by the General Assembly, and conclusions by the Executive Committee, have restated the significance of UNHCR’s responsibility in this area.  

However, ratification alone is in most states not sufficient for guaranteeing protection: treaties must be implemented as well for them to become effective in the domestic legal order. If the obligations for those states under the 1951 Convention are not part of their domestic law, then the protection of refugees’ rights within that state cannot be guaranteed. The Statute, however, does not contain a specific provision on UNHCR’s role in the implementation process of conventions that provide for the protection of refugees. While the drafters of the Statute did consider a proposal by the Secretary-General to include a more active role for UNHCR in this area, it was eventually decided that the actual

Committee, also provide guidance.” See UNHCR, ‘Note on International Solidarity and Refugee Protection’ (n 30).
48 See for example ExCom Conclusions 57 (XL, 1989); 81 (XLVIII, 1997), para. (c); and 108 (LIX), para. (d).
49 UN General Assembly Res. 428(V) of December 14, 1950, 2(a).
50 Between 1950 and 2016, the General Assembly has appealed 59 times to States to consider acceding to the 1951 Convention and / or the 1967 Protocol. The language of the appeal differs slightly between resolutions, but oftentimes contains the reaffirmation of the need for states to co-operate with UNHCR in facilitating international protection by acceding to the relevant international instruments. See UNHCR, ‘Thematic Compilation of General Assembly & Economic and Social Council Resolutions (4th Edition)’ (2014). Concerning ExCom conclusions, see for example ExCom Conclusions 87 (L, 1999), para. (c); 90 (LII, 2001), para. (b).
51 Although some states have as a national rule the automatic incorporation of the provisions of international conventions in the national legal order without the adoption of a national law (such as the Netherlands - when the treaty has a ‘direct effect’ - and Germany). Malcolm N Shaw, International Law (Cambridge University Press 2003) 138–179.
implementation was the responsibility for states. An obligation on the part of states to implement the 1951 Convention in their domestic legal order was rejected as well during the drafting of the Convention: it was presumed that such discretionary steps would be taken by states within a reasonable time. Eventually, it was decided that UNHCR could monitor states’ implementation through the obtaining of information regarding the laws and regulations concerning refugees, as is provided for in Article 8(f) of the Statute.

The Statute mentions specifically that UNHCR has a task in “supervising the application [of international conventions for the protection of refugees]”, but in what manner this supervision must be carried out does not become clear, neither from the wording of the Statute nor from its drafting history. In international agreements relating to protection of (categories of) refugees from the interbellum period, no clauses on authorizing anyone to supervise their application were included either. A discussion in 1949 amongst the drafters suggests, however, that they aimed for a limited scope of UNHCR’s supervisory mandate. The discussion centred around the question whether the provisions of the Constitution of the International Refugee Organization, in particular under its Annex I, should be reused. The delegates of France and the United Kingdom were not in favour of this. The new High Commissioner was mainly responsible for negotiating with governments in order to persuade them to grant legal protection in the sense of Arts. 3-34 of the 1951 Convention to refugees in their territories,

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54 ibid.
55 Art. 8(f) reads: “obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them.” Lewis (n 52) 40–42. See also The 1950 Statute Art. 11: ‘the High Commissioner shall report annually to the General Assembly through the Economic and Social Council […]’. The content of these reports is, however, not specified.
56 Weis (n 34) 212.
57 UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) at 10-12.
58 Annex I of the IRO Constitution provided for definitions of the organization’s general principles, who would constitute a refugee and a displaced person, when and under which circumstances a person would become the organization’s concern, when this person would cease to be the concern of the organization, and which persons are not the concern of the organization. Constitution of the International Refugee Organization.
59 UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) at 10-12.
60 ibid.
so he would merely need a “just text” as the basis for his appeals.\footnote{ibid at 12.} The “long and complex provisions of the IRO Constitution”, on the other hand, would necessitate the establishment of an elaborate and expensive administrative or even semi-judicial machinery, which would be inconsistent with the view that the High Commissioner’s functions should be advisory and that he should carry out his work with a minimum of staff, and not conduct status determination.\footnote{ibid at 36. Although these discussions were mainly focused on not establishing another operational agency, the comments were also insightful in light of the agency’s supervisory role.} The same remarks on UNHCR’s tasks had been made in previous meetings of the drafters.\footnote{UN General Assembly, Provisional Summary Record of the Two Hundred and Fifty-seventh Meeting Held at Lake Success [A/C.3/SR.257] at 32.}

From these remarks, it becomes clear that at least some of the drafters sought for a supervisory mandate that would include advisory tasks, but no one mentioned, for example, specific monitoring or enforcement powers. Rather the contrary, as the French delegate in particular was quite outspoken about the limited scope of the agency’s powers: “if a government ill-treated the refugees whom it was supposed to protect, the High Commissioner would not be empowered to take action himself”.\footnote{Rochefort (France) at the UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Third Meeting Held at Lake Success (n 8) para 11.} His duty would be to investigate and then call upon that government to remember its ‘international responsibility’ - which is where the involvement of UNHCR would end. If the ill-treatment persisted, the case would be considered further by the General Assembly, which could ‘invite’ the government to do its duty.\footnote{Rochefort (France) at the ibid.}

It is thus not surprising that enforcement of compliance of states’ obligations is not part of UNHCR’s Statute. This is mostly due to the Zeitgeist in which the Statute was drafted: “compliance and enforcement were on the margins of UN concern; […] comfort was taken in the pious hope that governments which acknowledged their legal obligations would carry them out”.\footnote{Oscar Schachter and Christopher C Joyner, ‘The UN Legal Order: An Overview’ in Oscar Schachter and Christopher C Joyner (eds), United Nations Legal Order (Cambridge University Press 1995) 15.} In addition, there were not many supervisory mechanisms of international treaties that could be taken as an example.\footnote{Only the International Labour Organization (ILO) had been entrusted in the 1920s with the supervision of conventions and recommendations. Marjolaine Zieck, ‘Article 35 of the 1951 Convention / Article II of the 1967 Protocol: Co-Operation of the National
supervisory mandate, they did not provide in the Statute for a system to monitor or sanction non-compliance.

4.3.2 \textit{UNHCR’s supervisory role under Article 35 and 36 of the 1951 Convention}

The Statute contains the legal parameters for UNHCR’s supervision of any international convention for the protection of refugees. The 1951 Convention also explicitly refers to the supervisory task of UNHCR, obliging states parties to this Convention to cooperate with UNHCR in the exercise of its functions, and ‘in particular facilitate its duty of supervising the application’ of the Convention.

UNHCR’s Statute and the 1951 Convention were drafted approximately at the same time, and are the two sides of the same coin: the protection regime for refugees comprised of states on the one hand, who were to provide (physical and legal) protection to refugees preferably on the basis of the 1951 Convention, and UNHCR on the other hand, whose purpose it is - on the basis of its Statute - to provide a complementary form of international protection, including the supervision of the application of the 1951 Convention. Article 8(a) of the Statute secures UNHCR to this task; Article 35 (Co-operation of the National Authorities with the United Nations) of the 1951 Convention assures that states cooperate with UNHCR in order for the agency to perform - in particular - its supervisory tasks:

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 implementations of this Convention, and
   (c) laws, regulations and decrees which are, or may hereafter be, in force

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relating to refugees.  

The article requires of states parties to cooperate with UNHCR in order to enable UNHCR to perform its duties; thus, not merely facilitate the work of UNHCR, but actively participate in the functioning of the agency. In addition, Article 36 (Information on National Legislation) may also be instrumental for the supervisory task of UNHCR:

The Contracting States shall communicate to the Secretary General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Although UNHCR is not mentioned as such in the article, in practice these communications are intended for UNHCR as a subsidiary organ of the General Assembly and the main body within the United Nations system that is responsible for refugee matters. There is a significant overlap between Article 35 and Article 36: both provisions require information with regard to the implementation of the 1951 Convention in the domestic legal order of states parties. However, there are some differences in the wording and thus the meaning of both provisions. While Article 35 requires merely ‘information’ concerning the implementation of the Convention, Article 36 demands the submission of the actual laws and regulations. In addition, Article 35 is directed at law that is already in force, while Article 36 refers to laws that still may be adopted. These distinctions seem irrelevant though.

68 Article II of the 1967 Protocol is identical in wording. Although the travaux préparatoires of Article II obviously differs from that of Article 35, the 1967 Protocol was drafted to merely remedy just one specific limitation of the 1951 Convention (extending the personal scope of the 1951 Convention), and the travaux of Article II is simply the statement that Article II reproduces Article 35. Therefore, and since the function of Article II is similar to that of Article 35, the following legal analysis of Article 35 can be read as the analysis of Article II as well (unless indicated otherwise). See also ibid 1469.

69 The wording and function of Article III of the 1967 Protocol is identical. This kind of article was not the first in its kind; Conventions that preceeded the 1951 Convention already had similar provisions (see for example the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entry into force 9 March 1927) 60 LNTS 253 [the Slavery Convention] Art. 7).

70 Türk, ‘The UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 46) 44.

The first proposals of what eventually would become Article 35 provided that “[c]ontracting States shall maintain contact with the agencies charged by the UN with the international protection of refugees, such as the UN High commissioner for Refugees, and shall facilitate their work [emphasis added]”, but the United States’ delegate thought that this was not firm enough on states’ cooperation with UNHCR: since the Economic and Social Council had already recognized the link between the 1951 Convention and the tasks of UNHCR, there was no cause for such hesitancy. It was therefore suggested to change the wording into more decisive language, in which states parties to the 1951 Convention were to undertake to cooperate with UNHCR in the exercise of its supervisory task. The Belgium delegate commented that a reference to only the supervisory task was inappropriate, after which a more general reference to facilitate all the work of UNHCR was considered. However, neither in this stage of the drafting nor during the Conference of Plenipotentiaries was it exactly explicated how supervision by UNHCR should be carried out and, as a consequence, it was unclear what the duty of states would be in this respect. Although during the drafting of the Statute it was affirmed that the supervisory work of UNHCR would include advisory work, nothing of such guidance was given during the drafting of the Convention. Nevertheless, it was explicated that “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 connection with the Statute of the High Commissioner for Refugees”. There were no objections raised against this

72 Ad Hoc Committee on Refugees and Stateless Persons, ‘UN Doc. E/AC.32/SR.40 (1950)’.
73 In particular, reference was made to the preamble of a draft of the 1951 Convention, which has already been approved by the ECOSOC: “Considering that the High Commissioner 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 cooperation.” Ad Hoc Committee on Refugees and Stateless Persons, ‘UN Doc. E/AC.32/8 (ECOSOC, UN. Doc. E/1818)’.
75 Ad Hoc Committee on Refugees and Stateless Persons, ‘UN Doc. E/AC.32/SR.40 (1950)’ (n 72).
76 UN General Assembly Provisional Summary Record of the Two Hundred and Sixty-Second Meeting Held at Lake Success (n 7) at 36.
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statement, so it is reasonable to assume that the remarks made during the drafting of the Statute, especially with regard to the supervisory task, are valid for the 1951 Convention as well.

Not much direction was given either by the drafters on how UNHCR was to be supported by states in the exercise of its supervisory task - “apart from Art. 35(2) and Art. 36, there is no proper procedure implementing UNHCR’s supervisory responsibility”.\(^\text{78}\) This wording, on how the information and statistical data should be provided to UNHCR, caused some discussion.\(^\text{79}\) The phrase “in the appropriate form” (in an earlier draft “in the requisite form”) was included to avoid any suggestion that UNHCR had some powers \textit{vis-à-vis} states.\(^\text{80}\) The intention of the drafters was just to certify that states would submit their information in a manner that was adequately uniform for UNHCR to facilitate its work.\(^\text{81}\)

During the meeting of Plenipotentiaries, the French delegate, Rochefort, drew attention to the fact that Article 35\(^\text{82}\) was “an innovation by comparison with the provisions of earlier conventions […] which had operated without any representative of an international organization to supervise its implementation”.\(^\text{83}\) The lack of such a provision had not resulted in bad results though, according to Rochefort.\(^\text{84}\) Nevertheless, specific monitoring or enforcement mechanisms were not considered by the delegates; the highly relevant question by the Australian delegation, “how supervision of the application of the provisions of the Convention […] would be carried out” \(^\text{85}\), remained unanswered. He even inquired whether refugees could directly appeal to the High Commissioner in case of a breach by a state party\(^\text{86}\), but other delegates did not seem to share (or care for) his uncertainty as to the extent of the work of the new High Commissioner. Only the French delegate later expressed his disappointed that no

\(^{78}\) Volker Türk, ‘UNHCR’s Supervisory Responsibility’ (2002) 14 Revue Québécoise de droit international 135, 141.

\(^{79}\) Zieck, ‘Article 35 of the 1951 Convention’ (n 67) 1471.

\(^{80}\) \textit{ibid}.

\(^{81}\) \textit{ibid}.

\(^{82}\) During that meeting, it was still Article 30 (during the editing phase by the drafting committee, it would turn into Article 35).

\(^{83}\) Statement by Rochefort (France) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (1951) 12.

\(^{84}\) Statement by Rochefort (France) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (n 83).

\(^{85}\) Statement by Shaw (Australia) at the \textit{ibid}.

\(^{86}\) Statement by Shaw (Australia) at the \textit{ibid}.
clear answers were given to these questions, although he did not provide for an answer himself either.\textsuperscript{87}

As UNHCR was at the time scheduled to be terminated after 3 years, some time was spent on the question of succession of the agency; a discussion that now seems a bit irrelevant in light of the fact that UNHCR is - after almost seventy years - still in existence. However, there was considerable discussion on what was understood with the phrase that states would cooperate with UNHCR, “or other agencies charged by the United Nations with the international protection of refugees”.\textsuperscript{88} There was particular concern that states would be bound to cooperate with some future unknown agencies\textsuperscript{89} as well as uncertainty as to how other agencies would be empowered to supervise the implementation of the Convention.\textsuperscript{90} After some back and forth in which delegates did not seem to come eye to eye on this matter, it was the American delegate who pointed out quite forcibly 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”,\textsuperscript{91} \textit{i.e.} not on any other agency simultaneously, otherwise doubts would arise as to the number of agencies entitled to supervise Convention. A Belgian amendment that would indeed refer to ‘UNHCR or any agency which may succeed it’ was then voted upon and adopted by 17 in favour, 2 against and 3 abstentions.\textsuperscript{92}

In the course of the discussion on succession of the agency, the question of what signified ‘cooperation’ with UNHCR by states was raised, also touching upon cooperation in light of the agency’s supervisory task.\textsuperscript{93} It was pointed out by the delegate from Belgium, Hermant, that it should be mandatory for states parties to comply with requests from the Office of the High Commissioner, as is provided for in paragraph 2 of Article 35.\textsuperscript{94} Rochefort used considerable less strong wording: “an appeal to Contracting States to co-operate with

\textsuperscript{87} Statement by Rochefort (France) at the \textit{ibid} 17–18.
\textsuperscript{88} Ad Hoc Committee on Refugees and Stateless Persons, ‘UN Doc. E/AC.32/L.32’ (1950) 4–5.
\textsuperscript{89} Statements by Makiedo (Yugoslavia) and Trutzschler (Federal Republic of Germany) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (n 83) 15, 17.
\textsuperscript{90} Statement by the President at the \textit{ibid} 17.
\textsuperscript{91} Statements by Warren (United States) at the \textit{ibid} 18.
\textsuperscript{92} \textit{ibid} 21. A couple days later, the text would be amended to ‘any other agency’ (para. 1) and ‘any appropriate agency’ (para. 2). Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.35 (1951)’ (1951) 25.
\textsuperscript{93} Statement by Hermant (Belgium) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (n 83), Statement by Hermant (Belgium) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (n 470).
\textsuperscript{94} \textit{ibid}.
[UNHCR], further stating that Article 35 merely ‘invited’ states parties to cooperate. In addition, he stated that actual cooperation could only be effected through specific agreements signed between the states parties and UNHCR. In the opinion of the Egyptian delegate, the verb ‘to cooperate’ did not imply any direct action on the part of states. Although the president of the meeting tried to settle the discussion by summarizing that there was in fact an obligation on the part of states to cooperate with UNHCR, it seemed that his view was not supported by the direction the discussion took in the meeting.

The debate on the meaning of cooperation re-emerged later again when the provision in the Convention on reservations was discussed, in which the French delegation submitted an amendment enabling governments to make a reservation regarding Article 35. This was a position of principle by the French delegation, and did not signify per se their refusal to cooperate with UNHCR. However, the cooperation referred to in Article 35, Rochefort stated, “did not necessarily form part and parcel of the application of the Convention”. In addition, he considered UNHCR and the Convention as two entirely separate matters; “the fact of their coming together was an historical event, but not an absolute necessity”. However, it was Rochefort who had proposed the amendment on cooperation with UNHCR in the Preamble of the Convention in the first place, thereby providing “the necessary link between the Convention and the work of the High Commissioner’s Office”. The sixth preambular paragraph of the Convention indeed mentions UNHCR, noting “[…] the effective co-ordination of measures taken to deal with [the protection of refugees] will depend upon the co-operation of States with the High Commissioner”. The ‘reservation amendment’ touched a sore point, as the Belgium delegate remarked with regret that the French amendment would, in effect, leave states free not to cooperate

95 Statement by Rochefort (France) at the ibid.
96 Statement by Rochefort (France) and by Del Drago (Italy) at the ibid 19, 13. However, the Italian position was apparently induced by the fact that Italy at that point in time was not a member of the United Nations, nor had it participated in the drafting of UNHCR’s Statute. See: Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.27 (1951)’ (1951) 12.
97 Statement by Maher (Egypt) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.25 (1951)’ (n 83) 19.
99 Statement by Rochefort (France) at the ibid.
100 Statement by Rochefort (France) at the ibid.
101 Statement by Rochefort (France) at the ibid.
with UNHCR.\textsuperscript{103} Rochefort nevertheless persisted, stating that he could not allow burdening his state or others not present at the Conference to possibly cooperate with agencies not yet in existence.\textsuperscript{104} In addition, he saw the new refugee agency to be “a judge, possessing compulsory powers of jurisdiction, for questions affecting the interests of some of the Contracting States”.\textsuperscript{105} In the end, the French amendment was adopted, but only with 10 votes in favour, and 15 delegates abstaining.\textsuperscript{106}

Notwithstanding the sometimes-heated debate on the issue, no state has ever made a reservation to Article 35.\textsuperscript{107} In addition, despite some of the above-mentioned remarks made during the drafting, Article 35 does contain, according to Weis and Türk, an obligation for states parties to cooperate with UNHCR, not merely a recommendation.\textsuperscript{108} And, although the duty to cooperate falls only on states parties to the 1951 Convention (and not on UNHCR, as was mentioned by the US delegate, who referred to ‘the duty of supervision’ of the High Commissioner\textsuperscript{109}), this cooperation is not limited to the Convention, but refers to all the functions and tasks of UNHCR, irrespective of their legal basis.\textsuperscript{110} This is indeed supported by the wording of the text: to co-operate with UNHCR “in the exercise of its functions”, with ‘functions’ being plural. As UNHCR’s responsibilities have grown over the past six decades, with its mandate and thus its functions being broadened by the GA\textsuperscript{111}, this also means that the obligations of states have broadened in the sense that the cooperation encompasses now more than it did in 1951.\textsuperscript{112} States, when acceding to the Convention, are (or should be)

\begin{itemize}
\item \textsuperscript{103} Statement by Herbert (Belgium) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.27 (1951)’ (n 96) 11.
\item \textsuperscript{104} As UNHCR was scheduled to terminate its activities in three years, and Article 35 mentioned “any other agency of the United Nations which may succeed [UNHCR]”.
\item \textsuperscript{105} Statement by Rochefort (France) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.27 (1951)’ (n 96) 14.
\item \textsuperscript{106} ibid.
\item \textsuperscript{107} See for all reservations made to the 1951 Convention: the United Nations Treaty Collection (UNTC) at <https://treaties.un.org> assessed 30 October 2018.
\item \textsuperscript{108} Paul Weis, \textit{The Refugees Convention, 1951: The Travaux Preparatoires Analysed with a Commentary by Dr. Paul Weis} (Cambridge University Press 1995) 259; Türk, ‘UNHCR’s Supervisory Responsibility’ (n 78) 142.
\item \textsuperscript{109} Statement by Warren (United States of America) at the Conference of Plenipotentiaries, ‘UN Doc. A/CONF.2/SR.27 (1951)’ (n 96).
\item \textsuperscript{110} Grah-Madsen (n 53) 254.
\item \textsuperscript{111} See, for example, UN General Assembly Resolution 1388 XIV (20 November 1959) (“authorizing the High Commissioner, in respect of refugees who do not come within the competence of the United Nations, to use his good offices in the transmission of contributions designed to provide assistance to these refugees.”).
\item \textsuperscript{112} Türk, ‘UNHCR’s Supervisory Responsibility’ (n 78) 142–143.
\end{itemize}
aware of this ‘dynamic character’ of the obligation under Article 35 - especially since UNHCR’s Statute refers to the possibility of broadening the agency’s scope in Article 3 and Article 9.113

The Convention does only impose rights and obligations on contracting parties, i.e. states. Accordingly, states parties have a standing vis-à-vis each other regarding the compliance of this provision. Any dispute related to the interpretation or application of a provision in the Convention may give cause to a state party to bring the matter before the International Court of Justice.114 Since Article 35 creates an obligation only between states, UNHCR - although alluded to in this article - does not have a standing against states if they do not observe their treaty obligations. According to Grahl-Madsen, the cooperation as provided for in Article 35 nevertheless also implies a right of UNHCR to request a state party to intervene with another state, whose application of a particular provision of the Convention leaves much to be desired.115 This reading of Article 35 is unsupported, both by the wording of the article and by its drafting history. In the unlikely event that a state party would ever initiate the proceedings under Article 38, UNHCR is of course in the position to make its views known to the ICJ, either through a submission on its own initiative, or upon a request by the ICJ under Arts. 34 and 66(2) of the ICJ Statute.116

UNHCR can, however, enter into agreements with governments with regard to their own cooperation with the office; agreements that are designated as ‘cooperation agreements’.117 The preamble of these agreements refers to Article 16 of UNHCR’s Statute, in which the appointment of a representative in the countries of residence of refugees is mentioned.118 Article 2 of these agreements contains a reference to Article 35, namely that “co-operation between the

113 Article 3 states ‘The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council.’ Article 9 states ‘The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.’ The 1950 Statute; Türk, ‘UNHCR’s Supervisory Responsibility’ (n 78) 142–143.
115 Grahl-Madsen (n 53) 150.
117 See, in general on this topic: Zieck, UNHCR’s Worldwide Presence in the Field (n 25).
Government and UNHCR in the field of international protection [...] shall be carried out on the basis of the Statute of UNHCR [...] and of Article 35”.

The supervisory task of UNHCR, as contained in Article 35, does not per se require an implementing agreement, especially because the originally envisioned modus operandi of UNHCR’s supervisory task does not necessitate the physical foothold of UNHCR in a state’s territory. Indeed, the non-operational nature of UNHCR’s work was also acknowledged and desired by the drafters. Accordingly, an extensive physical presence of UNHCR was not envisaged during the drafting of Article 35. However, already in 1951 - before the Meeting of Plenipotentiaries - UNHCR had established branch offices in a number of states in order to maintain direct contact with the governments concerned. Weis, who was present during the drafting of the 1951 Convention on behalf of UNHCR, indeed commented that UNHCR’s supervisory task was to be executed from its headquarters in Geneva and, “in particular, through [its] branch offices in the various countries”. The idea of a physical presence for executing the supervisory task was therefore not unconventional.

Going back to the wording of Article 35, the manner in which states shall facilitate the work of UNHCR, particularly its supervisory task, may be carried out in a number of ways. The submission of information and statistical data regarding the condition of refugees, the implementation of the Convention, and the laws and regulations relating to refugees, as is mentioned in the second paragraph of Article 35 and in Article 36, is one of the avenues to this end. UNHCR, and especially its regional and branch offices, indeed are quite proactive and regularly request for specific information on particular articles or issues relating to the conditions of refugees. In addition, each UNHCR country office must submit a (confidential) Annual Protection Report to the headquarters in Geneva, which is intended to help UNHCR obtain a comprehensive and global picture of the worldwide developments in refugee protection by states in order to “enabling those situations to be monitored, analysed and if necessary,

119 ibid Art. 2.
122 Weis (n 108) 259.
123 For example, one of the branch offices in Europe requested the government of its host state for statistical data on the asylum requests by and admissions of LGBTQ asylum seekers. This information could, however, not be provided to UNHCR, with the justification by the government that such information was not registered. Interview with UNHCR official #4 (17 June 2014).
addressed appropriately”. In order to be able to draft such reports, it must be assumed that UNHCR has gathered and requested information from relevant sources.

To get a more global overview of the implementation and application of the Convention, UNHCR, at the request of the Executive Committee, drafted in 1969 a standard questionnaire relating to the most important provisions of the 1951 Convention. This questionnaire was supposed to be completed by states, giving meaning to their duty under Article 35(2) and 36 of the 1951 Convention, and sent to UNHCR, enabling the agency to fulfil its supervisory task under the Statute. The questionnaire was presented to the governments of the, at that time, 63 states parties to the 1951 Convention. A second request, also on the initiative of the Executive Committee, was sent in 1990. Both attempts were not very successful: the first questionnaire was filled out by 40 governments, but within a time frame of no less than eleven years; the second questionnaire was only filled out by 23 governments within the given time frame. As part of the Agenda for Protection, which was the outcome of the Global Consultations in 2001, states parties were also required to report on their implementation of the issues discussed in the Agenda. In response to a request by UNHCR to “systematise the process of state reporting”, only 42 states (some non-signatory states of the 1951 Convention) responded with an overview of their activities. ExCom has called upon states several times to respond to the questionnaire, but has not urged for another reporting procedure after 1992.

In a discussion note of 1992, UNHCR remarked in restrained diplomatic language that the mere restatement of the commitment by states to facilitate

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126 ibid.
127 UNHCR Note on International Protection, A/AC.96/413 (n 125).
130 UNHCR, ‘Agenda for Protection (Third Edition)’ (UNHCR 2003). See also §3.6.
133 Erika Feller. ‘Protection Makes a Difference: It Can Mean the Difference’ (59th session of the Executive Committee of the High Commissioner’s Programme, Geneva, Switzerland, 6 October 2008) 5 Although the low response rate was disappointing, some responses led to national consultations around protection issues, even in a non-signatory state such as Yemen.
134 See ExCom Conclusions 57 (XL, 1989), para. (d), 61 (XLII, 1990), para. (i), 65 (XLII, 1991), para. (l) & (m), and 68 (XLIII, 1992), para. (c).
UNHCR in its supervisory task does not serve much purpose if those statements are not accompanied by an actual strengthening of UNHCR’s monitoring responsibilities, for example, through a regularized reporting system on implementation (meaning a system in which states submit reports on a regular basis, instead on the basis of a request by UNHCR).\(^\text{135}\) Neither states nor the GA or ExCom have ever bothered to implement such reporting system, nor any other mechanisms to strengthen the supervisory power of UNHCR.\(^\text{136}\) It is, in addition, questionable whether such a regularized reporting system would change the poor response rate by states, given the discouraging experiences hitherto as described above.

In regional instruments regarding the protection of refugees, UNHCR is mentioned as an agency to cooperate with\(^\text{137}\), but these instruments usually not explicate what this cooperation - and thus supervision - with UNHCR means. The 1969 OAU Refugee Convention only contains an obligation on states parties to cooperate with UNHCR, but what this obligation entails is not elaborated in the Convention.\(^\text{138}\) Similarly, the Cartagena Declaration on Refugees\(^\text{139}\), which is a non-binding agreement on the protection of refugees in Latin America, contains a recommendation on the cooperation with UNHCR; the meaning or method of realization of this cooperation is not elaborated upon.\(^\text{140}\) In Asia, the non-binding Bangkok Principles contain a provision that is equivalent to the previous two instruments.\(^\text{141}\) In Europe, there are several instruments that mention cooperation between UNHCR and the EU member states.\(^\text{142}\) One of these instruments, the


\(^{137}\) See, for example, Convention Governing the Specific Aspects of Refugee Problems in Africa [OAU Refugee Convention] 1969 (1001 UNTS 45) Art. 8.

\(^{138}\) ibid.

\(^{139}\) Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama 1984.

\(^{140}\) ibid II(e).


Procedures Directive\textsuperscript{143}, provides that UNHCR should be allowed to “present it views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure”.\textsuperscript{144} This is the only instrument that explains, albeit rather minimally, one aspect of what this cooperation and, more in particular, the supervisory task of UNHCR entails.

4.3.3 General Assembly and ECOSOC resolutions and ExCom conclusions
The vertical relationship between the GA and UNHCR as its subsidiary organ has been acknowledged in UNHCR’s Statute. Article 3 stipulates that the High Commissioner is required to follow policy directives given to him by the GA or ECOSOC, and Article 9 that the GA may determine additional activities in which UNHCR can engage; Article 11 requires of UNHCR that an annual report is submitted to the GA through ECOSOC.\textsuperscript{145} As for Articles 3 and 9, it is not specified when policy directions are given, and when a resolution contains the determination of additional activities. However, ‘policy directives’ is believed to refer to a refinement of the already mandated activities, whereas Article 9 refers to the broadening of said mandate.\textsuperscript{146} The latter has been done frequently, which makes analysing the legal mandate of UNHCR - initially established in its Statute - a laborious exercise because there is no up-to-date and coherent constituent document, but rather a set of resolutions mentioning or referring to UNHCR’s task. This has resulted in a Statute that no longer encompasses the entire mandate of UNHCR and an seemingly ever expanding range of individuals and groups falling within the competence of UNHCR’s supervisory task.\textsuperscript{147} However, despite

\begin{footnotesize}
\begin{enumerate}
\item Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (n 142).
\item \textit{ibid} Art. 29(c).
\item The 1950 Statute: Art. 3: “The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council.” Art. 9: “The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.” Art. 11: ‘[...] The High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly’; UNHCR submits these reports now directly to the General Assembly, making the relationship with ECOSOC less significant. Lewis (n 52) 13.
\item Lewis (n 52) 52.
\item Türk, ‘The UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 46) 46–47.
\end{enumerate}
\end{footnotesize}
the many resolutions broadening the agency’s mandate in the past sixty years,148 not one resolution has clarified the meaning of UNHCR’s supervision, nor has any resolution specifically defined what kind of activities may be employed by UNHCR in the exercise of this task.

On the other hand, the broad interpretation of the term ‘international protection’, including material assistance in this term, has been acknowledged in various GA and ECOSOC Resolutions.149 In 2001, the GA recognized that ‘international protection’ is a “dynamic and action-oriented function”150, the word ‘dynamic’ suggesting that this protection caters to a wide range of future circumstances. This particular interpretation has been reiterated annually.151 More importantly, as of 2003, the GA has acknowledged that the delivery of such international protection is a staff-intensive service that demands requisite staff in the field with the appropriate expertise.152 It is unclear though whether this refers to supervision or other aspects of the international protection task. None of the recent resolutions (nor the older ones for that matter) state what kind of (supervisory) activities or actions can be undertaken by UNHCR to fulfil this task.153 The same is true for the Conclusions of ExCom: many conclusions mention the importance of UNHCR’s international protection function, but none of these conclusions elaborate on this function nor do they describe what supervision on behalf of UNHCR exactly entails.154

150 UN General Assembly Resolution A/RES/55/74 (12 February 2001) par. 8.
152 UN General Assembly Resolution A/RES/58/151 (22 December 2003) par. 6, reiterated annually as well.
154 See, in general: UNHCR, ‘Thematic Compilation of Executive Committee Conclusions (7th Edition)’ (n 136) 293–298. See also ExCom Conclusion 29 (XXXIV, 1983) para. (b), which states that UNHCR’s work related to ‘the development [...] of basic standards for the treatment of refugees’ is part of UNHCR’s international protection function’ in: Lewis (n 52) 75.
4.3.4 Reflection

Giving UNHCR the mandate to supervise the application of the 1951 Convention has been a deliberate act by the agency’s mandate providers: the 1950 Statute and the 1951 Convention, including the many resolutions by the General Assembly and ECOSOC and the conclusions of ExCom, explicitly attributed supervisory powers to UNHCR. However, concluding from the description and analysis in the previous paragraphs, this mandate is neither clear nor very substantial.

Reiterating the definition as used in Chapter 2, a clear mandate is one that is formulated precisely and in unambiguous terms.\(^{155}\) It has been explicated in the previous section that the debate by the drafters on the supervisory task was rather ambiguous: they did not have a clear understanding of what constituted ‘supervision’ and how UNHCR was supposed to carry out this task. Nor did they appreciate that the ‘non-political character’ of the agency’s work as stipulated by Article 2 of the Statute would be at odds with the quite political nature of supervising state’s behaviour. Supervising is, by nature, not a politically neutral act, even though UNHCR’s primary role is treaty based and legal: reporting on violations of human rights is “likely to be regarded as a political act in errant states”.\(^{156}\) In addition, the protection of refugees takes place in a particularly politically-charged context.\(^{157}\) The agency’s supervisory work, through which it aims to influence states to protect refugees and adhere to their treaty obligations – in other words, in which it tries to advance a preferred public policy – is therefore a political act.\(^{158}\)

UNHCR’s mandate providers have, however, not given any guidance as to how this supervisory task needs to be executed either, politically or not. It was submitted in Chapter 2 that a vague or unclear mandate might give an organization more room to operate and to interpret its tasks in a broader manner than possibly envisioned originally by its mandate providers, but that, in the long run, such a broadening would likely endanger the legitimacy of the agency and would thus not strengthen the effectiveness of the supervision unless this process of broadening is actively and outspokenly supported by the mandate providers. The next chapter will analyse whether this is indeed the case.

A substantial mandate means that the powers that have been granted to the supervisory body are broad enough to give it meaningful control mechanisms vis-\(\text{-}\)
à-vis states necessary for all three phases of supervision: interpretation, monitoring and enforcement. Regarding the first phase, Türk has argued that interpreting the law is an obligation for UNHCR.159 According to Zieck, supervision of the application of the relevant provisions of the 1951 Convention presupposes a clear understanding of these provisions.160 This understanding is provided for by a key reference document, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees161, and a series of Guidelines on International Protection.162


160 Zieck, Article 35 of the 1951 Convention” (n 67) 1495.


Chapter 4 The structural elements of UNHCR’s supervision

The Handbook was issued at the request of the Executive Committee and refers explicitly to UNHCR’s supervisory mandate in conjunction with Article 35 of the 1951 Convention.163 The Handbook is “one of the most important doctrinal documents ever created by UNHCR”164, interpreting every clause of the refugee definition165 and providing for procedures for the determination of refugee status. The Guidelines on International Protection – of which a total of 13 have been published - are meant to complement the Handbook and are “intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary […]”.166

The fact that the Handbook was issued on the request of one of UNHCR’s mandate providers gives this document, and the subsequent Guidelines, substantial support. Zieck, on the other hand, finds it remarkable that the Handbook ‘appear[s] to be drafted at the request of states rather than at the initiative of UNHCR itself’, despite the fact that Van Heuven Goedhart was already quite aware that a uniform application of the 1951 Convention, and UNHCR’s role in this process, was secured in Article 35.167 However, this chain of events was probably part of a “diplomatic game”168 in which it is better for UNHCR to be invited by the mandate provider to draft such guidelines - which states then have to respect - than to impose such guidelines. By asking UNHCR to draft these guidelines, ExCom has given the agency a meaningful control mechanism for this first phase of supervision.

163 See, for example, ExCom Conclusion 8 (XXVIII, 1977), para. (g): “[…] consider the possibility of issuing - for the guidance of governments - a handbook relating to procedures and criteria for determining refugee status”.
164 Lewis (n 52) 66.
165 The Handbook only interprets Art. 1 of the 1951 Convention.
166 See for example UNHCR, ‘The Guidelines No. 5’ (n 162) 1. This phrase is similar to all Guidelines.
167 Zieck, ‘Article 35 of the 1951 Convention’ (n 67) 1508 and note 287.
168 Interview with UNHCR official #5a (9 September 2014).
In addition, ExCom has issued conclusions that can be regarded as the basis for other means of interpretative guidance by UNHCR as well. These means include the annual Notes on International Protection as submitted by the High Commissioner, which are directed towards ExCom and which provide for a basis on which the members of ExCom and its Standing Committee discuss certain topics and subsequently formulate conclusions. These conclusions are an exemplary means for UNHCR to have its positions supported by one of its mandate providers.

Another method of interpretative guidance is provided by interventions in judicial proceedings through, amongst others, amicus curiae briefs. The number of court interventions has increased significantly since the start of the new millennium, with a record number of interventions in 2010 - see below, Chart 1. This development is mostly due to the fact that “asylum policies are becoming more restrictive, which called for our involvement with other partners and branches [of government], like the judicial branch”. Court interventions are more prevalent in states with a common law tradition due to the role of the judge: judges in common-law systems function more as arbiters between parties.

169 These conclusions urge UNHCR, for example, to continue the ‘development and elaboration of refugee law in response to the new and changing humanitarian and other problems of refugees and asylum-seekers’ (ExCom Conclusion 25 [XXXIII, 1982] para. [i]), or note ‘with satisfaction UNHCR’s activities with regard to the promotion and dissemination of refugee law’ (ExCom Conclusion 71 [XLIV, 1993] para. [aa]). See also Lewis (n 52) 74.
170 These Conclusions do have the binding force of law, but they are representing the views of the international community and, as such, have compelling authority. Guy S Goodwin-Gill and Jane McAdam, The Refugee in International Law (3rd edn, Oxford University Press 2007) 217. The annual Notes on International Protection are, on the other hand, rather vague and hazy.
171 Lewis (n 52) 67.
172 An amicus curiae is intended to help the court by providing information or expertise on issues of the law that might be unclear. Volker Türk, ‘Summary of Introductory Remarks’ (2013) 2 Int’lJ. Refugee L. 394, 395.
173 See Chart 1, p. 107. Interview with UNHCR official #9 (10 September 2014); Interview with UNHCR official #12 (6 November 2014); Interview with UNHCR official #13 (12 November 2014). However, the number of court interventions is nothing compared to the number of courts worldwide deciding on refugee (case) law on a daily basis.
174 Interview with UNHCR official #9 (n 173); another UNHCR official confirmed that court procedures are more likely to be undertaken when the quality of the decision-making in refugee status determination procedures is less than desirable: Interview with UNHCR official #12 (n 173).
who put forward their own arguments.\textsuperscript{175} This system creates opportunities for third parties interventions through \textit{amicus curiae} briefs.\textsuperscript{176}

\begin{center}
\textbf{Chart 1 - Number of court interventions by UNHCR (1986-2019)}\textsuperscript{177}
\end{center}

\begin{figure}[h]
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\includegraphics[width=\textwidth]{chart1.png}
\end{figure}

\textsuperscript{175} Accordingly, UNHCR has intervened mostly in cases before various US Courts of Appeals and the US Supreme Court, before the Court of Appeals of England and Wales and the UK Supreme Court, and before the Court of Justice of the European Union and the European Court of Human Rights. With regard to the latter, High Commissioner Guterres remarked in 2011 that “it is also a source of great encouragement to us in the exercise of our supervisory role […] that the Court gives due weight to our views.” António Guterres, ‘Remarks at the Opening of the Judicial Year of the European Court of Human Rights Strasbourg’ (28 January 2011).


\textsuperscript{177} The numbers in this chart are taken from Refworld’s overview of UNHCR’s court interventions. See <http://www.refworld.org/type,AMICUS,UNHCR,,,,0.html#SRTop21> assessed 1 July 2020.
According to UNHCR, *amicus curiae* briefs “before the highest appellate courts of a country [are] an appropriate and effective means of better ensuring the correct interpretation and application of the Convention’s provisions.”

UNHCR’s court interventions stipulate that they are not geared to individuals, but are concerned as a matter of law and principle with the interpretation and application of the Convention. In addition, *amicus curiae* develop legal standards, enhance the consistency in the interpretation and application of these standards and assure adherence to the rights of refugees, and as such, they are part of UNHCR’s broader protection strategy. The legal standing for these interventions is the recognition by states of their obligation under Article 35 of the 1951 Convention (and subsequent resolutions by the General Assembly) to co-operate with the agency, and, more importantly, the resolution to set up UNHCR. Accordingly, UNHCR can intervene with a state party when this state is considered to be failing in its correct implementation and application of the Convention. It is increasingly doing so, as the number of asylum related cases before particularly the ECtHR has increased as well.

Even though the agency’s interpretations have not always been endorsed, several of the highest courts have acknowledged UNHCR’s legal and authoritative standing. In some cases, courts have referred to UNHCR’s analysis even without the submission of an *amicus curiae*. This type of engagement with branches of government in states parties is highly exceptional.

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178 ibid 3.
179 Türk, ‘Summary of Introductory Remarks’ (n 172) 396.
181 Goodwin-Gill (n 179) 697.
182 Türk, ‘Summary of Introductory Remarks’ (n 172) 397.
183 See Kälin, who lists a number of courts that have referred to the authoritative (albeit non-binding) status of UNHCR’s guidance. Kälin (n 44) 625–627 For a more recent judgement, see, for example, the European Court of Human Rights in M.S.S. v. Belgium and Greece (2011), in which the Court refers extensively to viewpoints and statements of UNHCR. For a case in which the court did not agree with UNHCR’s expert analysis, see Febles v Canada (Citizenship and Immigration), 2014 SCC 68 (30 October 2014).
184 See JN v Staatssecretaris voor Veiligheid en Justitie, Case C-601/15 PPU, CJEU (Grand Chamber) (15 February 2016), para. 63, in which the Court refers to UNHCR’s Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. See also Case of Sufi and Elmi v the United Kingdom [2011] Council of Europe: European Court of Human Rights Application no. 8319/07 and 11449/07, which cites the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia of 5 May 2010.
for international monitoring bodies; UNHCR seems to be the only international supervising agency that is so closely working with courts and civil servants. The means and methods for interpreting the 1951 Convention are thus rather extensive.185

UNHCR’s powers regarding the monitoring phase are less developed and supported by its mandate providers. UNHCR does have the possibility to request states parties to the 1951 Convention for information and statistical data with regard to the condition of refugees, the implementation of the Convention, and any laws, regulations and decrees that are or will be in force relating to refugees (as is laid down in Article 35(2)). A manifestation of this monitoring capacity are the requests for information by UNHCR field offices to states in order to draft its (confidential) Annual Protection Reports that are submitted to UNHCR Headquarters in Geneva.186 Another monitoring manifestation, the process of sending questionnaires to states - which was attempted a few times - was not very successful, as already discussed in the previous section: both the number of replies and the timeframe in which states replied were unsatisfactory. UNHCR’s mandate providers also have not strengthened the agency’s monitoring and reporting capacities, despite requests from the agency.187 Instead, ExCom has merely encouraged UNHCR to use the existing monitoring framework for the enhancement of its supervisory task.188 UNHCR has indeed implemented or developed different ways and means to monitor the 1951 Convention; these will be discussed in the next chapter.

Although the agency’s powers with regard to the monitoring phase leave much to be desired, these powers at least correspond with the obligations of states parties under the 1951 Convention. On the other hand, neither the 1951 Convention nor UNHCR’s Statute contain any provision on the possibility to enforce compliance in the case of a breach of the 1951 Convention except for Article 38 which has never been invoked by a state party to the Convention. In that sense, international human rights law has developed in a different direction, with various formal ways for enforcement through the monitoring bodies or even judicial mechanisms, such as the ECtHR, whose judgments are binding and enforceable.189 UNHCR, on the other hand, does make many formal and informal representations and advocates with states’ authorities at all levels, but

185 Simeon (n 159) 24.
189 Türk, ‘UNHCR’s Supervisory Responsibility’ (n 78) 148.
this is difficult to quantify and is not without reason qualified as ‘soft enforcement’. 190

Concluding, although UNHCR has substantial power in the area of interpretation, provided through various ExCom conclusions, its monitoring powers are rather insignificant, whereas it is lacking any formal enforcement powers. This is problematic, because, as was pointed out in Chapter 2, a mandate that is not substantial makes it easier for states to set the supervision of an organization aside, rendering it less effectively. It is furthermore problematic because having strong monitoring and enforcement powers is important for states who are motivated to comply with international law for reputational concerns or the fear for the consequences of non-compliance. 191 It is not surprising that UNHCR does not have broad supervisory control powers, considering it was one of the first international agencies that was charged with the supervision of the international obligations of states. However, the developments that have taken place with regard to other international human rights treaties and their monitoring bodies have not inspired the General Assembly, ECOSOC or ExCom to likewise broaden the supervisory powers of UNHCR, despite proposals by UNHCR to this effect. 192 Although UNHCR is involved with the work of some of these monitoring bodies regarding the rights of refugees 193, a broadening of its own powers would be much more conductive to making UNHCR’s supervisory task effective.

4.4 Sufficient resources

The fact that the operations in the field have become a significant part of UNHCR’s work has been considered by some scholars as a strain on the agency’s ability to supervise the compliance of states parties with their obligations under


193 See, for example: B Gorlick, ‘The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees’ (1999) 11 International Journal of Refugee Law 479. This topic will be discussed in more detail in §6.4.2.
Chapter 4 The structural elements of UNHCR’s supervision

the 1951 Convention effectively. In Chapter 2, it was stated that an organization needs to have, as a structural element, sufficient resources at its disposal to perform its supervisory tasks effectively. These resources include both financial means and information resources. Therefore, this section will explore whether indeed sufficient resources are being transferred to UNHCR for the exercise of its supervisory task. With regard to the financial means, it is important to distinguish between the size of UNHCR’s budget for its supervisory task on the one hand, and the manner in which UNHCR is financed on the other hand. The latter refers to its dependence on donors and will be analysed in the section on independence. The manner in which UNHCR prioritizes between international protection, including supervision, and its material assistance task, is a procedural element of effective supervision, because allocation of resources is within the power of the agency itself. Therefore, this issue will be discussed in Chapter 5. In this section, first financial resources for the supervisory task will be analysed, after which the information resources will be discussed.

4.4.1 Financial means

In this Chapter’s section on UNHCR’s legal mandate, it was pointed out that UNHCR’s Statute has been interpreted broadly by the agency, especially with regard to the phrase ‘international protection’. Article 8 specifies nine activities that the High Commissioner can undertake to provide for the protection of refugees, but both UNHCR’s and scholars’ consistent interpretation has been that this list is not intended to be exhaustive. Accordingly, the international protection function has become the framework for the more operational aspects of UNHCR’s work as well. Whereas the functions of UNHCR in its early days were confined to international protection interpreted as an indirect, non-executorial task and the seeking of durable solutions, material assistance has now become either part of that international protection function or has acquired an independent position as one of three principal tasks of UNHCR. The GA has

194 See §1.1.
195 See §5.3.1.
196 Holborn (n 6) 98; Lewis (n 52) 20; Türk, Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR) (n 40) 148; Feller, Türk and Nicholson (n 131) n 620; UNHCR, Division of International Protection (n 148).
197 UNHCR seems to be a proponent of the first view. See, for example: UNHCR, Note on International Protection, A/AC.96/930 [ExCom Reports, 7 July 2000] 24 in which it states that ‘UNHCR’s protection function covers a whole spectrum of activities [...]’ and that ‘the strong operational focus of UNHCR’s international protection activities [...] has made UNHCR’s mandate distinct, even unique, within the international system’. The GA has had, in its resolutions on international protection, a focus on UNHCR’s presence in
been silent on the issue, but ExCom has ‘welcomed’ the 2003 Note on International Protection, which indeed describes the operational and humanitarian aspects of UNHCR’s task as falling under its international protection mandate. Therefore, in this study, international protection is considered to encompass both supervision and material assistance aspects of UNHCR’s task. With the latter, UNHCR is now sometimes taking on the responsibilities that lie primarily with states, acting as a substitute for these states in providing direct assistance instead of “pursuing international protection [by ensuring] that states are aware of, and act on, their obligations to protect refugees”.

This development is exemplified by the progressive development in UNHCR’s budget. Whereas the agency started out with an initial budget of 300,000 US dollars, the annual budget of 2020 reached an all-time high of 8,636 million US dollar. Chart 2 shows the growth of UNHCR’s budget from 1994 until 2019. The chart may be misleading though: the rapid increase in the agency’s requirements since 2009/2010 is the result of a new methodology used for planning and budgeting; before 2010, a resource-based methodology was used, whereas since 2010 a needs-based methodology is in place. Within the new methodology, UNHCR’s annual budget refers to the funds it has requested in order to fulfil all its tasks and duties. It is clear that there is a difference between UNHCR’s budget on the one hand and the funds that are actually being allocated to the agency on the other hand. The funding gap in 2019 was 45 per cent, making the funds that were available (through contributions, adjustments and carry over from 2018) 4,782 million dollar. Although the needs-based approach

the field and has been very staff oriented, which suggests that the GA also considers material assistance to be part of international protection. ; Türk seems to take the view that material assistance is a separate category: Türk, Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR) (n 40) 138.

198 ExCom Conclusion No. 95 (LIV; 2003), para. (a); UNHCR, Note on International Protection, A/AC.96/975 [ExCom Reports, 2 July 2003].


202 UNHCR, ‘Update on Budgets and Funding (2019, 2020-2021) (as Prepared for the 77th Meeting of the Standing Committee of ExCom)’ (n 200).
has shown a large funding gap, a lack of sufficient and timely financial resources has been a problematic issue for decades.

A GA Resolution in 1965 already took ‘note of the difficulties encountered by the High Commissioner in obtaining funds required to finance his programmes, [and considered] that a greater effort could and should be made by the international community to provide the High Commissioner with the financial means required by the tasks incumbent upon him.’ UN General Assembly Resolution A/RES/2039 (XX) (7 December 1965). In its report to the GA of 1978, ExCom notes “the low level of funds available on 1 January every year”. UNHCR’s Executive Committee, Addendum to the Report of the United Nations High Commissioner for Refugees’ (1978) Supplement No. 12A (A/33/12/Add.1) 29; See also more recent concerns of the GA about the gap in funding: UN General Assembly Resolution A/RES/73/151 (10 January 2019) paras 63–64.

The numbers in this chart are taken from the annual updates on programme budgets and funding, that are submitted by UNHCR to the Standing Committee of the Executive Committee and can be found on UNHCR’s website, and from the annual reports of the Executive Committee to the General Assembly, that are submitted as supplements to the agenda of the General Assembly and can be found through the United Nations Bibliographic Information System. It was, however, difficult to obtain the numbers of UNHCR’s annual budget from the period 1951-1990, as the reports by the Executive Committee to the General Assembly in this period most of the time only contain the
This remark is indicative of another issue regarding UNHCR’s funding: the fact that almost its entire budget is made up of voluntary contributions by states and other partners. Only one per cent of its annual budget is provided by the United Nations Regular Budget. The voluntary character of the contributions has a number of implications for the agency. First, it is very difficult for UNHCR to make a multi-year planning, as the agency does not know what the contributions of its donors will be in the long run. This leads to “a frequent state of crisis” in which re-prioritization of objectives, cutbacks and programme closures towards the end of the year are not uncommon. Second, the need to continuously secure its funding, which is predominantly but not exclusively carried out at the Annual Pledging Conference, necessitates a great investment of time and effort, neither of which can be dedicated to UNHCR’s core task of providing international protection and the seeking of durable solutions. Additional or unforeseen needs that arise throughout the year require special appeals for funding. And despite the efforts that are devoted by UNHCR to fully finance its tasks and operations, the funding gap remains an obstacle. UNHCR thus does not have sufficient financial resources at its disposal to carry out the tasks that states expect it to carry out.

Some of these implications also relate to UNHCR’s independence, which will be discussed in the next section.

Loescher, Betts and Milner (n 204) 92.

ibid.

See, for example, the contributions pledged to UNHCR for 2018 at the pledging conference in Geneva, December 2017. UNHCR, ‘Ad Hoc Committee of the General Assembly for the Announcement of Voluntary Contributions to the Programme of the United Nations High Commissioner for Refugees (UNHCR Pledging Conference)’.

Additional and supplementary appeals can be found on UNHCR’s reporting website: <http://reporting.unhcr.org> assessed 1 July 2020. In 2019, UNHCR launched an additional appeal for crisis emergency responses in Cameroon and Venezuela. UNHCR, ‘Update on Budgets and Funding (2019, 2020-2021) (as Prepared for the 77th Meeting of the Standing Committee of ExCom)’ (n 200) 10.

The funding of UNHCR’s programs is troubled with more problems, says Whitaker. One, for example, is the so-called ‘sin of omission’ by the media, meaning that (one-sided) media attention is often given to crises not based on the extent and depth of real humanitarian needs, but on the extent of mediagenic shots, making simmering long-term
It must be noted, however, that since 2009, UNHCR has significantly increased its requested budget: in 2008, the requested budget was 1,850 million US dollar, whereas in 2020, the budget had risen to 8,668 million US dollar.\footnote{UNHCR, *Update on Programme Budgets and Funding for 2008 and Projections for 2009* (as Prepared for the 44th Meeting of the Standing Committee of ExCom) (2009) EC/60/SC/CRP6 2; UNHCR, *Update on Budgets and Funding (2019, 2020-2021)* (as Prepared for the 77th Meeting of the Standing Committee of ExCom) (n 200) 1.} The funding of UNHCR’s programs has risen as well (from 1,754 million US dollar in 2008 to 4,782 million US dollar in 2019)\footnote{See above, chart 2.}, but has not kept pace with the budget requests by UNHCR. In other words, whereas UNHCR’s requested budget has more than quadrupled in the past seven years, its donors have more than doubled their contributions to the agency. Whether or not the budget requests of UNHCR can be considered reasonable, is not within the scope of this study. Nevertheless, the agency submits its programs and accompanying budget to ExCom every year, which subsequently approves this budget based on discussions held in the Standing Committee.\footnote{See all documentation of Standing Committee meetings: <http://www.unhcr.org/standing-committee-meetings.html> assessed 1 July 2020.} If UNHCR’s budget requests were wholly unreasonable, ExCom would most likely not approve them.\footnote{This happened once, in 1989, when during a financial scandal involving High Commissioner Hocke and alleged misuse of funds, ExCom refused the annual budget as submitted by UNHCR. Loescher (n 2) 263.} In addition, UNHCR’s population of concern has increased significantly over the past decades as well, as is shown in Chart 3, justifying a larger budget. It seems reasonable to conclude therefore, that the agency is not given sufficient resources for the tasks it is supposed to carry out.

or difficult to explain crises and the post-violence phase of wars to receive less media attention and, as a consequence, fewer funds from governments. Geopolitical interests of major donors may also play a role regarding this issue. Since this problem is mainly related to UNHCR’s work in the field, it shall not be discussed further in this thesis. Raimo Väyrynen, ‘Funding Dilemmas in Refugee Assistance: Political Interests and Institutional Reforms in UNHCR’ (2001) 35 International Migration Review 143, 147–148.
4.4.2 Information resources

The second aspect of having sufficient resources is whether UNHCR can easily access information about states’ compliance with their obligations under the 1951 Convention. It was already pointed out that states have not responded adequately to the few requests by UNHCR for relevant information and statistical data about the conditions of refugees, the implementation of the 1951 Convention, and laws, regulations and decrees relating to the protection of refugees, despite this being a treaty obligation for states under Arts. 35(2) and 36 of the 1951 Convention. Neither the Convention nor the Statute institutionalize other mechanisms to retrieve information. Whether or not UNHCR has independent - non-statutory, that is, not prescribed in its Statute - means of access to information is a subject that will be discussed in Chapter 5.

216 See also the analysis about UNHCR’s legal mandate in this Chapter and the three attempts by the agency to request for information through Art. 35(2) and 36 in §4.3.2.
4.4.3 Reflection
It becomes clear from the analysis in the previous section on resources that there are some serious concerns regarding the second structural element of effective supervision. These concerns have, in the past, been shared by ExCom, which has linked the effectiveness of the agency’s protection activities to the necessity of sufficient financial resources.217 The financial resources in particular are not adequate, despite the fact that ExCom has reiterated that “the delivery of international protection is a staff-intensive service at the core of UNHCR’s mandate which requires the agency to have adequate protection staff with the appropriate expertise”.218 However, because international protection encompasses both supervision and material assistance, this particular sentence could also refer to the material assistance task of UNHCR; ExCom has not specified to what aspect of the agency’s international protection task it refers.

The manner in which UNHCR is funded causes some particular serious issues. The dependency on voluntary contributions makes UNHCR tasks, protection as well as material assistance, unreliable and unsustainable for the carrying out of existing and new programs. Moreover, the permanent effort of the agency to secure funding is an effort that is not invested in the agency’s core tasks. The fact that there is no institutionalized and structural reporting mechanism makes the gathering of information also difficult. In the next Chapter, it will be analysed whether the agency has solved this by implementing ‘independent’ reporting mechanisms.

4.5 Independence
As the mandated supervisor of the 1951 Convention, UNHCR needs as much independence as possible from its mandate providers and from states parties to this Convention. Its supervision will suffer from perceived or real interference of third parties with the agency’s supervisory task. Accordingly, in Chapter 2 it was submitted that independence is one of the structural elements of effective supervision. Therefore, in this section, the extent of independence will be analysed on two levels. First, the level of legal independence as an agency that can operate autonomously on the international plane will be studied. Second, the need for financial independency from its donors, and the degree to which UNHCR succeeds in this need, will be assessed. One of the five categories of

217 ExCom Conclusion 108 (LIX, 2008), para. (c).
218 ExCom Conclusion 95 (LIV, 2003), para. (c); see also Conclusion 99 (LV, 2004), para. (o).
criticism, specified in Chapter 1, will thus be addressed in this section: the constraints that are inherent in the way UNHCR is financed.

4.5.1 UNHCR’s legal independence

One of the elements that constitutes an international organization is that it is instituted by an international agreement, which establishes a separate legal personality for the organization. A subsidiary organ of the United Nations, like UNHCR, is not created through such an agreement and, as a consequence, formally does not have a separate legal personality from its parent organization. ECOSOC is charged with the task to coordinate the policies and activities of the agency, under the final responsibility of the GA. However, in the ‘UN family’, the emphasis is on the autonomy of the constituent parts. Accordingly, in practice, a certain extent of independence is provided when a subsidiary organ is created, or such independence is gradually acquired by these organs. In the case of UNHCR, this independency or autonomy was indeed discussed during the drafting of its Statute. It was considered that the agency needed some independence to act when necessary, instead of having to wait for approval every time a decision was necessary. In addition, it was argued that the protection of refugees would have a political dimension; some autonomy by UNHCR would prevent a strong implication of the United Nations or the UNSG. Furthermore, states that were not (yet) members of the United Nations would associate more with an autonomous agency than a service in the Secretariat of the Secretary-General. Indeed, it was the intention of the GA to ensure that the High

219 Schermers and Blokker (n 191) 44–45.
220 The United Nations Office of Legal Affairs [the Office] has addressed this issue with regard to the World Food Programme, which is also a subsidiary organ of the UN (and the Food and Agriculture Organization). The Office stated that the fact that an entity could perform legal acts, such as enter into contracts and international agreements, does not necessarily mean that it also enjoys an independent juridical personality. See: The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities, Supplementary study prepared by the Secretariat, Yearbook of the ILC, 1985, Vol. II, Part One, 152, in: Zieck, UNHCR’s Worldwide Presence in the Field (n 25) 97.
221 Niels M Blokker, ‘Proliferation of International Organizations’ in Niels M Blokker and Henry G Schermers, Proliferation of International Organizations - Legal Issues (Kluwer Law International 2001) 37. See also UN Charter, Arts. 60, 63 and 64.
222 ibid 38.
223 Schermers and Blokker (n 191) 44–47.
224 Zieck, UNHCR’s Worldwide Presence in the Field (n 25) 22.
225 ibid 22 and note 19. It was also an argument to counterpose the proposal by the United States to include this service in the Secretariat.
226 ibid 22 and note 20.
Commissioner, supported by his Office, “would enjoy a special status within the UN … possess[ing] the degree of independence and prestige which would seem to be required for the effective performance of his functions [emphasis added]”.227

However, although the GA intended the office of UNHCR to have a degree of independence, it has not specifically opted for changing the agency’s legal status to that of an independent international organization; an option that has been chosen for other subsidiary organs. For example, the United Nations Industrial Development Organization, which was created as a subsidiary organ, was later transformed into an international organization to increase and further expand its autonomy and powers.228 Perhaps such a conversion was not deemed necessary for UNHCR to fully operate as an autonomous body within the United Nations framework; the agency already seemed to be conceived and function as one.229 The continuous expansion of the agency’s autonomy can also be inferred from the termination of the need to seek prolongation of its temporal mandate. Initially, UNHCR was established for a period of three years, which later extended to every five years.230 Although the possibility of terminating the agency was never really a principled discussion, the temporal scope of its mandate made UNHCR dependent of the GA every time it neared its alleged discontinuation. In 2003, after “considerable persuasion”231 from then-High Commissioner Ruud Lubbers, the GA decided to remove the temporal limitation and extend the lifespan of UNHCR “until the refugee problem is solved”.232 As such, UNHCR was given an infinite mandate by its mandate provider, which made the agency relatively more independent and autonomous.

It has already been established that the UNSG is not a mandate provider of UNHCR, so as to make sure that the agency could function independently from the political environment in which the UNSG operates.233 Nevertheless, there have been instances in which the UNSG has interfered significantly with the work of the agency. The most notable234, and unprecedented, example happened in

227 Report of the Secretary-General, A/C.3/527 (26 October 1949), para. 11.
228 Schermers and Blokker (n 191) 45–46.
229 Jaeger (n 18) 33; Zieck, UNHCR’s Worldwide Presence in the Field (n 25) 100–103.
231 McKittrick (n 2) n 26.
233 See §4.2.
234 Other examples are the way in which the UNSG may have played an important role in the resignation of two High Commissioners: Jean-Pierre Hocké in 1989, for financial mismanagement, and Ruud Lubbers in 2005, for accusations of sexual harassment. Lubbers was actually quite outspoken about the pressure put on him by then-UNSG Kofi Annan to ‘voluntary’ resign. “The authority inherent in the ability of the Secretary-
1993, when then-UNSG Boutros Boutros-Ghali publicly overturned the decision by the High Commissioner at the time, Sadako Ogata, to cease the delivery of aid to various parts of Bosnia during the Yugoslav Wars. Ogata’s decision came as a surprise for senior UN officials, including the commander of the UN military force that was deployed to escort the aid convoys, who said that his mission remained the same, as long as the UNSG did not change it. Apparently angered, Boutros-Ghali immediately overturned the decision, ordering UNHCR to resume its humanitarian assistance in Bosnia immediately. Aside from the very overt political conflict at the highest levels of the UN, this example is also striking because the UNSG has no official authority to give such directions to UNHCR; that authority lies with the agency’s mandate providers, notably the GA and ECOSOC. Although the public and polarized clash between Ogata and Boutros-Ghali has not been repeated in later years by other UNSGs and High Commissioners, it nevertheless gives an insight in how UNHCR, despite the clear wording in its Statute, does not operate completely autonomous or independently from the UN’s chief administrator.

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General to influence the resignation of a High Commissioner [...] suggests that UNHCR is more subordinate to the Secretary-General than it would initially appear.” Kinchin (n 11) 31.

235 Ogata made this decision because militants were hindering the delivery of aid. *ibid*. See also Ogata’s own narrative on this whole history. ‘No decision that I took in my ten years as high commissioner caused as much havoc.’ Sadako Ogata, *The Turbulent Decade: Confronting the Refugee Crises of the 1990s* (W W Norton & Company 2005) 83, 81–86.


238 Ogata said ‘my governing board, the Executive Committee, convened a special session and expressed its strong support for my action’. Ogata (n 235) 85.

4.5.2 UNHCR’s financial independence

In the late 1980s, UNHCR found itself in a crisis. High Commissioner Jean-Pierre Hocké had adopted a new strategy of de-prioritizing the agency’s protection function ‘at a distance’ and focusing mainly on material assistance programs, which naturally caused a significant increase in UNHCR’s financial needs.\(^{240}\) At the end of the decade, UNHCR faced a serious deficit, as well as some financial scandals, that eventually led to the forced resignation of Hocké and the refusal of ExCom to approve the agency’s budget.\(^{241}\) The crisis exposed what is called UNHCR’s “most significant institutional weakness”: its dependency on its donors. As was explained in Chapter 1, some scholars have identified this financial reliance on the goodwill of mainly industrialized states as the main reason for its silence regarding the lack of sufficient implementation and application of states’ obligations under the 1951 Convention.\(^{242}\)

The current figures indeed indicate that UNHCR’s donor base is rather narrow: more than four fifth of its budget is provided for by its top fifteen government donors and the European Union.\(^{244}\) The United States, with 1.7 billion US dollar, made the largest contribution to UNHCR in 2019, which accounts for 40 per cent of the funds made available to UNHCR. This substantially exceeds the contributions by the next top five donors together: the European Union (473 million US dollar), Germany (390 million US dollar), Sweden (143 million US dollar), Japan (126 million US dollar) and the United Kingdom (122 million US dollar). Chart 4 shows the top-15 contributions by governments (and the European Union) to UNHCR in 2019 as percentage of the total amount of contributions.

It is in this context important to emphasize that although UNHCR is largely financed by industrialized countries, neighbouring states of areas of conflict - such as Pakistan, South Sudan, Uganda, Chad, Niger and Lebanon, which are not significant donors of UNHCR - have nevertheless been hosting large numbers of refugees on their territories for decades. In terms of financial responsibilities, these countries have contributed hugely by providing refuge to hundreds of thousands of displaced persons.

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240 Loescher (n 2) 249.
241 Loescher, Betts and Milner (n 204) 46; Loescher (n 2) 262–264.
242 Loescher, Betts and Milner (n 204) 46.
244 UNHCR, ‘Contributions to UNHCR for Budget Year 2017 (as at 14 February 2018)’.

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Looking at the size of the economies of some of these states, measured by their gross national product, their dues are even more impressive: the number of refugees per 1 million US dollar GDP was 90 in South Sudan, 39 in Chad, 36 in Uganda and 22 in Niger (compared to Germany, the largest refugee hosting state in Europe, the number is 0.22). This policy is not only financially burdensome


246 ‘Comparing the overall size of a host country’s economy to the size of the refugee population indicates the economic resources that may be available to meet the needs of the refugee population.’ UNHCR, ‘Global Trends: Forced Displacement in 2016’ (2017) 21. UNHCR did not calculate this number anymore in the Global Trends report in 2017, which is why these slightly outdated numbers are used - they are nevertheless still relevant and reflect also the current state of affairs. For the number of refugees per 1 million US dollar GDP in Germany, two separate source were used. Source for economy size: International Monetary Fund, World Economic Outlook Database, April 2017 <https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/index.aspx> assessed 1 July 2020. Source for number of refugees: the German Federal Statistics Office
for these states, but has also had an impact on socio-economic, religious, ethnic and political structures. So, the contributions to UNHCR’s budget by mainly industrialized countries as depicted in Chart 4, does certainly not paint the entire picture.

Going back to those countries that contribute financially, UNHCR has acknowledged that the small donor base is not well balanced; the agency has, therefore, put a lot of effort in developing relationships with new donors, including the private sector and individual donors.\textsuperscript{247} Nevertheless, despite these efforts and the growing number of contributions, these donors currently account for just ten per cent of the total budget, making (rich) governments still the most important financial supporters of UNHCR. That is problematic for two reasons: first, it might be difficult for UNHCR to independently and critically supervise the compliance of states with their obligations under the 1951 Convention when the agency is, at the same time, dependent on these same states for the continuation of its programs. This is specifically the case when all donations are voluntarily. In the previous section on sufficient resources, it was already pointed out that such voluntary contributions are undesirable because they prevent the possibility to make multi-year planning, and the appeals for funding take up a lot of time.\textsuperscript{248} Voluntary contributions are moreover problematic because, as was submitted in Chapter 2, the withholding of funding or the threat to do so can be used by donors to influence UNHCR’s policies and programmes.\textsuperscript{249}

With regard to the first issue, the statement that UNHCR is too financially dependent to challenge the wishes and demands of its major donors and, as a consequence, mostly acts as an instrument of these donors, can be qualified as a statist perspective, which is still the most dominant paradigm in international relations.\textsuperscript{250} This perspective states that international organizations are dependent on donor states for funding its programs (and on host states for permission to

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\begin{footnotes}
\footnotetext{247} UNHCR, ‘Global Appeal 2018-2019’ (2017) 11. But see also this report of 2003, in which the High Commissioner explains to the General Assembly that it is problematic that the agency’s budget is almost fully paid for by a small number of donors. The High Commissioner subsequently proposes to, amongst others, diversify its donor base, but this proposal has not taken much root. UNHCR, ‘Report by the High Commissioner to the General Assembly on Strengthening the Capacity of the Office of the High Commissioner for Refugees to Carry out Its Mandate’ (Executive Committee, 54th session 2003) A/AC.96/980 paras 53–61.

\footnotetext{248} See §4.4.1.

\footnotetext{249} See §2.3.3.

\footnotetext{250} Barnett and Finnemore (n 45) 10.
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operate and provide protection on its territory, which will be discussed in the next chapter under ‘political independency’). This might lead to what is called “the power of the purse”: mainly industrialized states using their (earmarked) contribution to press for particular policies or for changes in the operation of the international organization, for example to prevent the admission of large numbers of refugees themselves. As such, donor finance leads to state capture.252

However, international organizations are also autonomous actors in their own right, with an independent agenda of their own. 253 This view is supported by empirical research254 and leans heavily on Max Weber’s theory on bureaucracies.255 He states that the autonomy and independence of bureaucracies flow from two sources: first, the legitimacy of the rational-legal authority it embodies, and second, the control over technical expertise and information by a civil staff.256 In Weber’s work, the rational-legal authority refers to norms and regulations on which the organization is based; norms and regulations that have originated rationally, instead, for example, an authority based on a charismatic

251 Hathaway (n 243) 161.
254 Within the EU, there is evidence of an independent role for civil staff; studies have shown that there is an independent culture and agenda within the World Bank; and other studies of UN peacekeeping operations show that there are ‘UN agendas’ that are frequently at odds with member (and donor) states. ibid 705–706. Venzke also acknowledges that, with due regard to methodological challenges, emperical research has challenged the notion that international organizations are merely serving the interests of their member states and donors. See Venzke (n 38) 77.
255 HH Gerth and C Wright Mills, From Max Weber: Essays in Sociology (Oxford University Press 1946) 196–244. See also Venzke, who argues that although UNHCR is not an international organization (but a subsidiary organ of the United Nations), the sociological understanding of UNHCR as a bureaucracy in the sense of Weber’s theory holds true: Venzke (n 38) 76–87.
256 Barnett and Finnemore (n 253) 708–709.
person or on tradition.\textsuperscript{257} As was indicated in this Chapter’s section on UNHCR’s mandate, the agency’s rational-legal authority finds its basis in its Statute and subsequent General Assembly resolutions. In addition, as will be demonstrated in the next Chapter on resources and personnel, the agency has control over a vast amount of technical expertise and information due to its presence in many countries. This argument will be elaborated in Chapter 5.

The second issue regarding the manner in which UNHCR is financed, is that the earmarks attached to donor contributions exposes the agency to the risk of particular policy and political priorities, \textit{i.e.} the power of the purse. Some scholars have indeed stated that the use of earmarks underlines the presumption that states donate larger sums of money because of their own domestic or foreign policy priorities instead of altruistic humanitarian reasons.\textsuperscript{258} UNHCR itself prefers unrestricted donor support,\textsuperscript{259} albeit for seemingly other reasons: in order to “allow operations to start up and continue without interruption [...]”, especially at times when new emergencies tend to divert resources from less visible operations” and “greatly facilitates UNHCR being able to kick-start an emergency response, bolster forgotten or under-resourced crises, and enable the fullest possible implementation of programmes”.\textsuperscript{261} As is shown in Chart 5, the amount of tightly earmarked contributions has almost doubled from 37 per cent in 2001 to 70 per cent in 2019. As a result of this structure, UNHCR is particularly vulnerable to alterations in the quantity of donor contributions.\textsuperscript{262}

However, despite these tight earmarks and the possibility that donors exert power through these earmarked contributions, UNHCR can still take the lead in shaping its own funding patterns. The agency can formulate regional and program priorities and establish budgets accordingly, only after which the budget is presented to donors in the form of an appeal. Donor states can thus choose to fund an operation or to earmark their contribution for a particular programme, but their choices are constrained by the manner in which UNHCR presents the information to them in its budget appeals.\textsuperscript{263} So, although unrestricted contributions would certainly give UNHCR more freedom, UNHCR still has a somewhat independent and autonomous impact on the budgeting process through its internal policy considerations.

\begin{itemize}
\item \textsuperscript{257}Gerth and Wright Mills (n 255) 245–255.
\item \textsuperscript{258}Roper and Barria (n 252) 633; Takahashi (n 22) 59.
\item \textsuperscript{259}UNHCR, ‘Report on Use of Flexible Funding in 2018’ (2019).
\item \textsuperscript{261}UNHCR, ‘Report on Use of Flexible Funding in 2018’ (n 259) 12.
\item \textsuperscript{262}Whitaker (n 252) 243.
\item \textsuperscript{263}\textit{ibid}.
\end{itemize}
Whether donor states use their contributions to UNHCR to avoid the responsibility of protecting refugees themselves and burden other states, notably poor refugee hosting states, with material assistance for refugees, is a difficult question to answer. Research has indicated that states contribute more funds to crises that are closer to their borders than to emergencies that are further away, possibly because these crises could have effects on the domestic level (for example, through a refugee influx). In the case of the United States, the largest donor of UNHCR, this theory would result in relatively more earmarked donations for crises in South and Central America instead of, for example, crises in Africa or

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266 Although it remains to be seen whether this will continue to be the case under the Trump administration.
Asia. This is, however, not *per se* the case. The United States has been earmarking its entire contribution to UNHCR (1,707 million US dollar in 2019). UNHCR data shows that the USA in that year earmarked ‘just’ 69.3 million US dollar to UNHCR programs in Latin and Central America. Although these figures do not show how other donors earmark their contributions to UNHCR, they are indicative of the submission that donors are not merely led by domestic or foreign policy interests, but also by other (possibly humanitarian) concerns.

This reasoning is supported by an empirical study that had UNHCR as its lead subject. It demonstrated that states with a better record on political rights and civil liberties and with full democratic institutions are more likely to donate to the agency and provide assistance to promoting human rights and the rule of law than states that do not have such a record. However, there are at the same time examples of how considerable injections of earmarked funding in crisis close to home of UNHCR’s biggest donors resulted in the scaling down of assistance in other, less politically sensitive crises. All in all, in light of the above, it is submitted that states that donate to UNHCR are driven by both (realist) interests and altruistic norms.

4.5.3 Reflection
From the aforementioned analysis of UNHCR’s independence, it becomes clear that this element of effective supervision is hard to quantify. This is mainly due to

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268 *ibid*.
269 This study showed that there is no correlation between UNHCR’s field priorities and the United States’ foreign policy interests. However, this study is a bit dated, as it has been conducted between 1963 and 1981. New research is necessary to see whether the results of this study would still hold up. Shelly Pitterman, *Determinants of Policy in a Functional International Agency: A Comparative Study of United Nations High Commissioner for Refugees (UNHCR) Assistance in Africa, 1963-1981* (Northwestern University 1984); in: Kevin Hartigan, ‘Matching Humanitarian Norms with Cold, Hard Interests: The Making of Refugee Policies in Mexico and Honduras, 1980–89’ (1992) 46 International Organization 709, 711–712.
270 According to Freedom House, the US, the states of the European Union, the United Kingdom, Japan, Germany, Sweden and the Netherlands (all of which belong to the top 10 donors of UNHCR) all scored high in the 2014 Freedom in the World Survey. Freedom House, ‘Freedom in the World 2014’.
271 Roper and Barria (n 252) 626; Freedom House (n 270).
272 One quarter of its staff and one third of its total resources was allocated for providing protection and assistance in the former Yugoslavia. Loescher (n 2) 296; Marjoleine Zieck, ‘Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited’ (2009) 21 International Journal of Refugee Law 387, 416.
273 Loescher, Betts and Milner (n 204) 94.
the fact that UNHCR is a subsidiary organ of the United Nations without a regular budget, which is at odds with the concept of independence as was formulated in Chapter 2. However, things are not as bleak as they seem to be on first sight.

First, with respect to its legal independence, it is submitted that within the structure in which UNHCR is operating, i.e. as part of the larger ‘UN family’, and potentially also because of this structure, the agency has acquired quite some independence and autonomy. Although it is not an international organization, the autonomy and legal personality that are dominant factors for constituting such an organization are just as well applicable to UNHCR. In addition, as was indicated in Chapter 3, UNHCR’s mandate has slowly but steadily been broadened, mostly at the initiative of the agency itself (so-called “self-directed mandate expansion”\textsuperscript{274}), which was then later, retroactively, formalized by the GA. This process indicates that UNHCR has a certain independency with regard to its legal mandate as well.

The extent of UNHCR’s financial independence is, however, less convincing. The agency is not only confronted with a lack of sufficient resources, but its financial resources are also almost all coming from a few major donor states. Moreover, more than two-third of the contributions is earmarked. This makes for unreliable multi-year planning, instable budgets, and a tendency to receive funding for those mediagenic crises that receive one-sided media attention but are not \textit{per se} the crises that need funding the most. Although this is a problem that relates to the material assistance task of UNHCR, and the choices that need to be made with regard to the various emergencies the agency is involved in, this method of financing also has consequences for its supervisory task. For states, it is much more rewarding (in terms of public opinion and their perceived human rights’ track record) to earmark their contribution for visible operations than for rather invisible supervision of more or less functioning asylum systems. Supervision is difficult to sell with pictures.\textsuperscript{275}

However, the persistent criticism that UNHCR is kept on a leash by its major donor states and cannot, as a consequence, faithfully exercise its supervisory task, is not convincingly supported by either theory or practice. UNHCR is not merely passive, waiting for policy directions given by its major donor states. Its apparent policy shifts form part of the agency’s internal strategy, made in relative isolation


\textsuperscript{275} Interview with UNHCR official #5a (n 168).
from external factors. These shifts take place regardless of any constraints by donor states on UNHCR’s programs that do exist. An example is the change in attitude towards repatriation, both within and outside UNHCR. Since the 80s, donor states increasingly press for repatriation, instead of local integration or resettlement, as the most preferred durable solution, as repatriation does not place the burden of providing protection for these refugees on themselves. However, within UNHCR, there has also been a development in its stance regarding repatriation: namely, that repatriation and reintegration would be far better for refugees than to stay in overcrowded refugee camps with no possibility of any development or sustainable future. Therefore, since the late 1980s, UNHCR has started to emphasize the preferability of repatriation, even though the situation to which the refugees would return to was sometimes unstable at best. This is a typical chicken-or-egg dilemma, in which it is hard to detect what came first: the donor state pressure for this particular durable solution, or UNHCR’s own progressed thinking on the matter. Even if there is correlation between the wishes of donor states and the actions of UNHCR, it does not necessarily mean there is causality as well.

UNHCR and the donor states could

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277 Venzke (n 38) 106.


279 The number of refugees that is put forward by the agency for resettlement is less than 1 per cent of the total number of refugees of concern to UNHCR. See <http://www.unhcr.org/resettlement-data.html> assessed 1 July 2020. Only a few states take part in UNHCR resettlement program. UNHCR, ‘UNHCR Resettlement Handbook and Country Chapters’ (2011) rev. ed. As a consequence, almost two third of all refugees find themselves in ‘protracted refugee situations’ (situations in which refugees have lived in exile for five years or more, with no likelihood of resolving their situation in the near future). The lack of a sufficient number of resettlement places offered by states has been criticized heavily by NGOs. See for example: Evelien van Roemburg, Alexandra Saieh and Daniel Gorevan, ‘Where There’s a Will, There’s a Way: Safe Havens Needed for Refugees from Syria’ (Oxfam 2016); Amnesty International, “I Want a Safe Place” Refugee Women from Syria Uprooted and Unprotected in Lebanon’ (2016); ECRE, ‘Global Resettlement Needs on the Rise, While Opportunities Decline’ ECRE Weekly Bulletin (29 June 2018) <https://www.ecre.org/global-resettlement-needs-on-the-rise-while-opportunities-declines/> accessed 1 July 2020.

280 Loescher (n 278) 47; Zieck, UNHCR and Voluntary Repatriation of Refugees (n 19) 438–443.

281 There was certainly no causality in the case of the Rohingyan refugees who had fled from Burma to Bangladesh and were repatriated by UNHCR in 1978-1979 to unstable
have come to the same conclusion based on different grounds, or UNHCR could have set the agenda and convinced states to adopt it.282 UNHCR is not merely following the wishes and commands of its financial contributors, but acts autonomously and independently as well.283

The question remains whether, in general, UNHCR is able to act independently from its mandate providers and its major donors. To answer that question, a distinction must be made between two terms that were used alongside each other in this section: autonomy and independence. Autonomy refers to the capability of “having some leeway within a delegated relationship to interpret state preferences”284, whereas independence is, in this study, understood as “the ability to make decisions and exert influence outside of a principal-agent relationship with states”.285 This principal-agent theory is being used to describe the relationship between an actor (the principal) who delegates some authority to an institution (the agent) for the carrying out of specific tasks.286 Within a relationship that is based merely on the autonomy of the agent, the latter cannot take decisions solely on its own account, i.e. outside the policy priorities of the principal (states) that have instituted the agent and endowed it with the power to manage, supervise and coordinate action. For these activities, a certain degree of autonomy is necessary, but the extent to which these activities can be realized is predetermined by the principal. Independence, on the other hand, indicates that the organization can act outside the boundaries as established by states, deviating from the standard model in which states set up international organizations after which these organizations abide by the wished of these states; instead,

conditions, even though there was no financial or political pressure by donor or hosting states to do so. See Barnett and Finnemore (n 45) 11, 105–118; Loescher (n 2) 224–225; Venzke (n 38) 106.

282 Barnett and Finnemore (n 45) 11.

283 See for more information on how the position of UNHCR changed with regard to repatriation: ibid 93–120.

284 Betts (n 274) 129. Not all scholars use the same definition of ‘autonomy’. Carpenter, for example, who is a much cited author on the subject, describes ‘bureaucratic autonomy’ as one that (1) is politically differentiated from the actors who seek to control them, (2) requires the development of unique organizational capacities, and (3) requires political legitimacy embedded in an independent power base. So, according to Carpenter, autonomy and independence are two sides of the same coin. Daniel P Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928 (Princeton University Press 2001) 14.

285 Betts (n 274) 129.

286 Bob Reinalda and Bertjan Verbeek, ‘The Issue of Decision Making within International Organizations’ in Bob Reinalda and Bertjan Verbeek (eds), Decision Making within International Organisations (Routledge 2004); in: McKittrick (n 2) 9.
organisations become actors with wills on their own account.\footnote{Joel E Oestreich, Power and Principle: Human Rights Programming in International Organizations (Georgetown University Press 2007) 1.} Although the line between autonomy and independence is thin, the difference can be illustrated by turning to UNHCR for an example.

The agency has several times taken a different direction than was the initial intention of its mandate providers, and, more importantly\footnote{This is more important for this thesis, because the criticism on UNHCR’s (perceived) lack of independence always refers to its dependency on funding and political support by its major donor states, not on its dependency on the General Assembly, ECOSOC or ExCom.} it has even contradicted the wishes and interests of some of the most important powerful (donor) states.\footnote{Betts (n 274) 119, 130–131.} The transition to a field-based agency that provides material assistance to persons of concern is the most dominant case in point: in the case of West Berlin and Hungary, UNHCR explicitly acted against the (initial) wishes of the United States\footnote{In 1956, the United States was the highest contributing donor to the United Nations Refugee Fund (UNREF), which was UNHCR’s first material assistance program. The US contributed 1.5 million dollars, out of a total of 3.3 million in contributions. The next nine biggest donors (Australia, Belgium, Canada, France, Netherlands, New Zealand, Sweden, Switzerland and the UK) contributed a combined total of 1.4 million dollars. UNHCR, ‘Annual Report of the United Nations High Commissioner for Refugees to the General Assembly’ (A/3585/Rev1 1958) A/3585/Rev.1 para 123.} and the expansion of its mandate beyond Europe to Hong Kong and Algeria did not fall well with both the Soviet Union and France.\footnote{Betts (n 274) 130; Loescher (n 2) 97–101.} This decision-making happened in the first decade of UNHCR’s existence, but more recently UNHCR has acted independently from its main stakeholders as well. The decision to play a role in the protection of Internally Displaced Persons (IDPs), which signified a major policy shift in the work of the agency, was made only after UNHCR had internally decided that this role would indeed fit the agenda of the agency.\footnote{UNHCR declined the request of the United States to take on this role in 2000, but later - when it suited the agency’s agenda - it decided to take on this responsibility nevertheless. Betts (n 274) 130. However, the Secretary General had also played a role in this, calling upon UNHCR numerous time to undertake humanitarian assistance and protection activities on behalf of the internally displaced: UNHCR, ‘Information Note: UNHCR’s Role with Internally Displaced Persons’ paras 5–7.} It thus seems that UNHCR is not merely an autonomous actor that is flexible in interpreting and implementing the wishes of its principal donors, but that the agency has considerable independence in how it defines its
position in the international refugee regime.\textsuperscript{293} There is no reason to assume that this is different for the agency’s supervisory task.

4.6 Adequate oversight

The last structural element of effective supervision is how the mandate providers have set up the institutional checks and balances in order to give formal directions with regard to the supervisory task. In Chapter 2, it was submitted that a clear legal mandate would benefit the adequacy of the oversight mechanism: without such a mandate, it is difficult for mandate providers to oversee its application.\textsuperscript{294} This chapter has already pointed out that UNHCR’s mandate is all but clear. This chapter has also already analysed UNHCR’s independence, which must be set apart from adequate oversight. An organization can operate independently from its mandate providers (or from important stakeholders), but at the same time observe formal directions given with regard to its mandate. In order for these two structural elements not to conflict with each, oversight mechanisms must ideally be secured in the constituent document of the organization. So, in this section, the oversight mechanisms of UNHCR with regard to its supervisory task will be determined and analysed.

4.6.1 The General Assembly and ECOSOC

It was pointed out before that UNHCR, according to its Statute, needs to follow policy directives given by the GA and ECOSOC.\textsuperscript{295} With regard to the supervisory task, these policy directives are non-existent: none of the GA Resolutions, nor any ECOSOC Resolutions, have ever explicitly mentioned the supervisory task.\textsuperscript{296} International protection, on the other hand, has been the subject of some of these resolutions, as has been stated before, especially that this protection is “a dynamic and action-oriented function”, which is a staff-intensive service that necessitates a field presence with knowledgeable staff.\textsuperscript{297} The only direction that UNHCR has received thus refers to the fact that international

\textsuperscript{293} Betts (n 274) 137; Oestreich (n 287) 3.
\textsuperscript{294} See §2.3.1.
\textsuperscript{295} The 1950 Statute Art. 3. See also §4.2.
\textsuperscript{297} See, for example, UN General Assembly Resolution A/RES/55/74 (12 February 2001) (n 150) para 8; UN General Assembly Resolution A/RES/58/151 (22 December 2003) (n 152) para 6. This definition and explanation of international protection has been restated annually.

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protection, whether that includes material assistance or not, requires field-based staff members with expertise on the subject matter.298

4.6.2 The Executive Committee

The Statute of UNHCR also directs the High Commissioner to seek the opinion of “the advisory committee on refugees” in the exercise of his function, in particular when difficulties arise.299 This Advisory Committee of initially 15 states was established in 1951300, but was replaced by the United Nations Refugee Fund (UNREF) Executive Committee in 1955301, which in turn was replaced two years later by the Executive Committee when UNHCR started to engage in material assistance programs.302 The UNREF Executive Committee in particular was entrusted with the task of giving guidance and “exercising general supervision”; ExCom was mainly concerned with the material assistance task of UNHCR as well, but also retained the general advisory function.303 However, as was explicated in this chapter’s section on UNHCR’s mandate, ExCom nor its Standing Committee304 has not quite overseen the manner in which UNHCR has given shape to its supervisory task, although the instruction to send questionnaires states seemed to be a positive exception.305 Rather to the contrary: UNHCR has played a considerable role in setting the agenda of the ExCom meetings, and in drafting the preliminary conclusions of ExCom. Indeed, unlike any other UN bodies, the agency plays a formal role in the process of negotiating the conclusions.306 “Only on the face of it does ExCom resemble an intergovernmental body where state delegates are in charge. [In practise], it usually acts upon the initiative and with strong guidance of the High

298 Jaeger (n 18) 34.
299 The 1950 Statute Art. 1.
300 ECOSOC Resolution E/RES/393B (XIII) (10 September 1951).
302 ECOSOC Resolution E/RES/1166 (XII) (26 November 1957); Jaeger (n 18) 36.
303 Jaeger (n 18) 36–37.
304 The Standing Committee meets three and sometimes four times each year to examine thematic issues, review UNHCR’s activities and programmes, adopt appropriate decisions and conclusions on issues, and discusses other issues that it deems of concern. See <https://www.unhcr.org/standing-committee-meetings.html> assessed 1 July 2020. Chapter 6 will go deeper into discussing alternatives for this Standing Committee, see §6.4.3.
305 See §4.3.
306 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 Protocol and Other International Instruments, York University, Toronto, Canada, 17 May 2010) 3. The last Conclusion was issued in 2020.
This mechanism, in which UNHCR sets the agenda of ExCom instead of the other way around, is still in place.

4.6.3 Reflection
The previous exploration clearly indicates that there is hardly an internal mechanism for adequate oversight by UNHCR’s mandate providers of its supervisory task. It is telling that none of the GA or ECOSOC Resolutions even mention this task. On the other hand, the fact that the GA has defined the international protection task of UNHCR as one that is ‘action-oriented’ and ‘staff-intensive’, may indicate that the importance of the agency’s material assistance task (which, by definition, is action-oriented and staff-intensive) has been acknowledged by its mandate providers.

ExCom has not been overseeing the supervisory task of UNHCR either. Although many ExCom conclusions mention the crucial importance of the international protection function, none of these elaborate on this function. So the mandate providers that are entrusted with overseeing UNHCR’s compliance with its statutory mandate of providing international protection (including supervision of the 1951 Convention) are shortcoming. There is thus no meaningful internal supervision of the agency’s work by its mandate providers, which both adds to and explains the criticism by scholars that UNHCR is unaccountable for its supervisory actions. The question ‘quis custodiet ipsos custodes’ is thus ‘nemo’ (nobody). The only policy directives and guidance that the agency has received by the GA, ECOSOC and ExCom, seem to be related to the material assistance task and thus only emphasize the importance of this particular task, perhaps at the expense of UNHCR’s supervisory task.

307 Venzke (n 38) 80.
308 Interview with UNHCR official #5a (n 168).