



UvA-DARE (Digital Academic Repository)

The effectiveness of UNHCR's supervision

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

van Roenburg, E.T.W.

Publication date

2021

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

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

General rights

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

Disclaimer/Complaints regulations

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

Chapter 5

The procedural elements of UNHCR's supervision

5.1 Introduction

The previous chapter considered the manner in which UNHCR's mandate providers have structured the agency in order to enable it to carry out its supervisory task effectively. This chapter will analyse the manner in which UNHCR implements its Statutory responsibility within that given structure by looking at the procedural elements of effective supervision. These elements were identified in Chapter 2.¹ Through these elements, the development of procedures and principles adapted by UNHCR to supervise the compliance of states with their international obligations can be assessed. Three elements are used for evaluating the quality of this effort: legitimacy, accountability and operationality. Legitimacy refers to the acceptance and recognition of UNHCR's authority by those that are the subject of its supervision: states. This authority is recognized and accepted when UNHCR adheres to three core factors: expertise, consistency and mandate abidance. Accountability is the duty to answer for the exercise of authority that is vested in the agency. This duty is realized when three factors are incorporated in the execution of the supervisory task: political independence, participation and transparency. Operationality, finally, deals with the question whether UNHCR can actually function in the real world, which is determined by analysing UNHCR's access to information, its punctuality and its capacity.

As was indicated in the previous chapter, the structural elements of UNHCR's supervision are not all adequate, which hampers its ability to perform its supervisory task effectively. Within the agency's structure as set up by the mandate providers, UNHCR's procedures can nonetheless be satisfactory despite these structural obstructions. Even when the structure is not in conformity with the requirements for effective supervision, the procedures can be. So, the parameters of an imperfect structure are the point of departure for this chapter, but the procedures will be evaluated on their own merits.

¹ See §2.4.

5.2 Legitimacy

It is important to examine whether UNHCR's supervision can be considered legitimate, because "to say that an institution is legitimate [...] is to assert that it has *the right to rule*"². This includes promoting certain rules and attempting to secure compliance with these rules; in other words, supervision. So, legitimacy, which in this study is defined as the acceptance and recognition of UNHCR's authority by states, is a precondition for effective supervision. UNHCR derives its authority and thus its legitimacy to supervise from two different sources. First, from its legal mandate, which is contained in its Statute and in subsequent GA and ECOSOC resolutions and ExCom conclusions. This first source is a structural element, discussed in the previous chapter.³ However, focusing on the legal mandate alone, *i.e.* on the legitimacy of its origin, is tantamount to driving a car while looking in the rear-view mirror. Instead, attention should also be given to the road ahead; in other words, how UNHCR gives effect to its supervisory task within the parameters of its legal mandate.

The second source of legitimacy is, therefore, derived from the manner in which UNHCR carries out its supervisory task: the legitimacy of its exercise.⁴ This is a procedural element. Since legitimacy is the recognition and acceptance of authority, this section will assess and evaluate three factors that are instrumental in the recognition and acceptance of the agency's legitimacy: first, the conformity with its legal mandate in the exercise of its supervisory task; second, the expertise of UNHCR's staff that carries out the supervisory task; and third, the consistency in its supervisory output, *e.g.*, its Handbook, *amicus curiae* briefs, and press releases.

5.2.1 Mandate abidance

Most international organizations are only tested briefly regarding the legitimacy of their origin; namely when states ratify the constitutional treaty of the organization.⁵ UNHCR differs from these organizations in that its mandate has been broadened through subsequent GA and ECOSOC resolutions. This broadening indicates that the agency's legitimacy of origin has been

2 Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & international affairs* 405, 405 (emphasis added). See also Allan Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010).

3 See §4.3.

4 Jean d'Aspremont and Eric De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 *Fordham Int'l LJ* 190, 190.

5 *ibid* 215.

acknowledged at various points in the past seven decades. However, UNHCR also needs to ensure that it utilizes its authority in a manner that matches its legal mandate and the functions assigned to it.⁶ This acting in conformity with legal obligations is especially important for institutions such as UNHCR acting on the international plane, as there are no elections or other democratic means to secure their legitimacy, and their authority is therefore “on loan” from those who have delegated it.⁷

So, in the case of UNHCR, the question is whether the agency acts in conformity with its legal mandate and the directions given with regard to this mandate by the GA, ECOSOC and ExCom. Analysing this conformity is nevertheless difficult, because UNHCR's mandate is not formulated in a clear and precise manner nor have its mandate providers given useful guidance as to how the agency should carry out its supervisory task.⁸ This structural deficiency seems to harm the implementation of a procedural element: it is hardly possible to abide by a mandate that does not give much direction. Instead, UNHCR has been given quite some latitude to interpret the meaning of and methods to shape its mandate. A case in point is UNHCR's interpretation of the meaning of the terms ‘refugee’ and ‘international protection’, which have gone through a significant semantic change in the past 60 years. International protection, says Kälin, “has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection by their country of origin into a broader concept that includes protection not only of rights provided for by the 1951 Convention and the 1967 Protocol but also of refugees ‘human rights in general’.”⁹ The historical developments in Chapter 3 and the explanation of UNHCR's mandate in Chapter 4 already showed that UNHCR had indeed significantly broadened its mandate, all with the acceptance of its mandate

6 *ibid*; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity Within Diversity* (6th edn, Martinus Nijhoff Publishers 2018) 800.

7 Buchanan and Keohane (n 2) 406–407; Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 22. UNHCR does send every year its Annual Report to the GA, which then discusses this report in its Third Committee and votes on it.

8 See §4.3.4.

9 Although consular and diplomatic protection was already redundant when UNHCR was created. 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) 619–620. See also Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 88, stating that ‘international protection, for example, is no longer the restricted functioning of the agency of a higher direction, liaison and control service.’

providers.¹⁰

More importantly, UNHCR has used the latitude it was given by its mandate providers also with regard to establishing an exceptional practice of supervisory activities.¹¹ Lewis indeed concludes that the lack of direction on the part of the GA, ECOSOC and ExCom with regard to the content of the supervisory mandate has allowed UNHCR to have a considerable amount of flexibility in determining how it should carry out its supervisory work.¹² The lack of precision and direction on the part of its mandate providers has been taken as an advantage: as long as its task is not prescribed in a narrow manner, UNHCR can permit itself to construe this task as it deems fit.¹³ The agency is now actively (and eagerly) engaged in national procedures and mechanisms; an engagement that is unparalleled compared to other international agencies, including other UN organs.¹⁴ For example, according to Volker Türk, the former Assistant High Commissioner for Protection (and, before that, the Director of the DIP), UNHCR is expected to “provide comments on and technical input into draft legislation and related administrative decrees”.¹⁵ In order for this involvement to

10 Whereas UNHCR’s original mission ‘focused only on refugees, its activities were primarily about offering legal advice to states, and it worked exclusively in Europe’. Alexander Betts, ‘UNHCR, Autonomy, and Mandate Change’ in Joel E Oestreich (ed), *International Organizations as Self-directed Actors: A Framework for Analysis* (Routledge 2012) 118.

11 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).

12 Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 43.

13 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) 53.

14 Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 11).

15 Türk, ‘The UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 13) 52. See, for example UNHCR, ‘UNHCR Comments on the Draft Law of the Republic of Armenia on Making Amendments and Supplements to the Law of the Republic of Armenia on Refugees and Asylum’ (2018) <<http://www.refworld.org/docid/5bd81b954.html>> accessed 1 July 2020; UNHCR, ‘UNHCR-Analyse Des Entwurfs Für Das Fremdenrechtsänderungsgesetz 2018’ (UNHCR 2018) <<http://www.refworld.org/docid/5afae4a64.html>> accessed 1 July 2020; UNHCR, ‘UNHCR’s Comments on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea’ (2013) <<http://www.refworld.org/docid/54100f8f4.html>> accessed 1 July 2020.

succeed, UNHCR needs to have a “constructive dialogue”¹⁶ with the legislative branch and the civil servants who draft the legislation, and to have its eyes and ears in the field. In addition, UNHCR has direct access to persons of concern¹⁷, and submits regular advice on national legal procedures.¹⁸ This is supervision on a microlevel, which goes far beyond what the drafters could have envisioned; not only because this type of supervision was non-existent in the 1950s, but also because governments would carry out their treaty obligations without outside interference.¹⁹

The agency has thus organically increased its engagement with all kinds of national procedures as part of its supervisory task. This engagement has been a reaction to states' demands for UNHCR's assistance and has been directed or at least supported by its mandate providers.²⁰ The latter is important, because organizations that act *ultra vires* or, more subtly, bend and twist their mandate to include powers and procedures that the mandate providers did not approve of, may anticipate criticism.²¹ Such criticism (and the accompanying lack of cooperation) will undermine the legitimacy of the organization and thus its ability to effectively supervise states' compliance with their treaty obligations. UNHCR should ensure that the engagement in national procedures and mechanisms, and the other ways in which it currently carries out its supervisory task, are continuously and preferably candidly supported by its mandate providers. This support seems to be there: not only has the GA propagated in its annual Resolutions on international protection that UNHCR should have its eyes and

16 Volker Türk, ‘UNHCR’s Supervisory Responsibility’ (2002) 14 *Revue Quebécoise de droit international* 135, 148.

17 UNHCR, ‘UNHCR Serbia Update 3-16 Sep 2018’ (2018) Situation Report <<https://data2.unhcr.org/en/documents/details/65782>> accessed 1 July 2020; ‘UN Agency Supporting French Authorities in Transferring Refugees from Calais “Jungle”’ *UN News* (25 October 2016) <<https://news.un.org/en/story/2016/10/543692-un-agency-supporting-french-authorities-transferring-refugees-calais-jungle>> accessed 1 July 2020. Or access through partners: UNHCR, ‘Japan Factsheet 2016’ (2016) <<http://www.unhcr.org/protection/operations/5000196c13/japan-fact-sheet.html>> accessed 1 July 2020.

18 Wilbert Van Hövell and others, ‘Providing for Protection, Assisting States with the Assumption of Responsibility for Refugee Status Determination, A Preliminary Review’ (2014) PDES/2014/01.

19 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.

20 Paul Szasz, ‘The Complexification of the United Nations System’ (1999) 3 *Max Planck Yearbook of United Nations Law* 1, 6, note 13.

21 See §2.3.1.

ears in the field²², but the close engagement with national governments (many of which are members of ExCom and all of which are members of the GA) would also not be possible if these governments would at the same time reject this increased engagement.

5.2.2 Expertise

The benefit of establishing international institutions lies often, at least partly, in the fact that specific expertise or knowledge is lacking on the national level.²³ This is also true in the case of UNHCR: its supervisory task requires extensive knowledge on the content and meaning of the 1951 Convention and conformity with this convention by states parties. It is nearly impossible for every state party to be well informed about the compliance of other states parties at any given time, which is why it is rational that an international agency is charged with this task.²⁴ There are two aspects that are important in this matter: the amount of knowledge and the degree of knowledge. The amount of knowledge has been discussed in the previous chapter as the structural element of ‘sufficient resources’: it was submitted that UNHCR does not have a sufficient number of staff members to carry out its supervisory task, but that the agency’s access to information is considerably facilitated by its presence in field offices in states parties to the 1951 Convention.²⁵

On the other hand, the expertise of this staff (the degree of knowledge) is a procedural element, as it is in UNHCR’s own hands to recruit and maintain a highly technical and knowledgeable staff. The agency never misses an opportunity to emphasize that its supervision is based on extended legal knowledge of the implementation and application of the 1951 Convention. One of the agency’s *amicus curiae* briefs specifically stated that “UNHCR has [...] unique expertise to present its views to this Court [the High Court of Ireland]”²⁶,

22 See, for example: UN General Assembly Resolution A/RES/58/151 (22 December 2003) para 6; UN General Assembly Resolution A/RES/64/127 (18 December 2009) para 19; UN General Assembly Resolution A/RES/68/141 (18 December 2013) para 24.

23 Ingo Venzke, ‘International Bureaucracies from a Political Science Perspective—Agency, Authority and International Institutional Law’ in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009) 1405–1406; Kenneth W Abbott and Duncan Snidal, ‘Why States Act through Formal International Organizations’ (1998) 42 *Journal of conflict resolution* 3, 9–16. Of course, another important reason for the establishment of international institutions is for topics or activities that transcend the national domain.

24 Although the drafting history of both the Statute and the 1951 Convention do not specify the reason for assigning this task to UNHCR. See §4.3.1. and §4.3.2.

25 See §4.4.

26 UNHCR, *Amicus curiae* of UNHCR in the case of B.D.(Bhutan and Nepal) -v- The Minister for Justice and Equality & ors 2018 [2010/1188 JR] para 6.

and “UNHCR has special knowledge and expertise in relation to [a state’s international obligations regarding asylum seekers and refugees], stemming in particular from its over 60 years of history supervising the implementation of States parties of the 1951 Convention”.²⁷ Indeed, expertise is considered a crucial aspect in pursuing compliant behaviour: “[w]e need to convince authorities by high level expertise and quality research that they cannot avoid dealing with us”.²⁸

UNHCR is not the only one who is in awe of its expertise. Courts around the world have resonated the agency’s claim to expertise. For example, the Supreme Court of Canada stated that “the UNHCR Handbook has been formed from [UNHCR’s] cumulative knowledge available concerning the refugee admission procedures and criteria of signatory states”.²⁹ The High Court of Australia stated that “[t]his Court has frequently resorted to the UNHCR Guidelines and the Handbook in construing and applying the Convention. This has been done because of the expertise of the UNHCR in the application of the Convention.”³⁰ The Supreme Court of the United Kingdom mentioned that the agency has “unique and unrivalled expertise” on particular legal issues.³¹

27 UNHCR, UNHCR Submissions in the High Court of Australia in the case of *CPCF v Minister for Immigration and Border Protection and the Commonwealth of Australia* 2014 [NO S169 OF 2014] para 5. See also UNHCR, UNHCR’s Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of *Pacheco Tineo vs. Bolivia* 2013 [Case 12.474] 1, stating that ‘the views UNHCR would like to present to this Court in these proceedings are informed by more than 60 years of experience supervising international refugee law instruments’.

28 Interview with UNHCR official #12 (6 November 2014).

29 *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, para. 46. See also *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000; *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987. In two seminal cases before the European Court of Human Rights, the Court referred extensively to the position and opinion of UNHCR: in *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, and in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 (“the Court [...] attached weight to the fact that [...] UNHCR believed that the prevalent situation in Greece called into question whether ‘Dublin’ returnees would have access to an effective remedy as foreseen by Article 13 of the Convention.”).

30 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*, High Court of Australia, 15 November 2006, [2006] HCA 53, J Kirby, paras 76–78, in: Venzke (n 9) 118.

31 *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2014] United Kingdom: Supreme Court UKSC 12 [72].

UNHCR's mandate providers have also been instrumental in appreciating the specific knowledge and expertise of the agency, thereby reinforcing the authority and legitimacy of UNHCR. ExCom, for example, has on several occasions acknowledged the expertise of UNHCR in the field of international refugee law.³² The agency's governing body has in particular praised UNHCR's efforts in providing training courses for government officials and others working directly with refugees.³³ Furthermore, ExCom has often called upon UNHCR to use its expertise and knowledge for the promotion and dissemination of refugee law³⁴, and has acknowledged that its task of providing international protection (which includes supervision of the 1951 Convention) requires a staff with appropriate expertise.³⁵ The GA has, similarly, appreciated the fact that UNHCR shares its knowledge and expertise with others³⁶, and has, since 2003, reiterated annually that international protection requires skilled staff, especially in the field.³⁷ In addition, UNHCR's expertise and knowledge has also been recognized by scholars.³⁸ In all, there is no doubt that UNHCR has extensive expertise on the subject matter it is expected to supervise.

5.2.3 Consistency

Institutions that are charged with supervision of an international treaty need to be consistent in two different ways. First, states need to rely on the fact that interpretation of treaty provisions is carried out uniformly; in other words, that there is no divergence in how the treaty is interpreted. This is especially important

32 See, for example, ExCom Conclusions 14 (XXX, 1979), para. (h); 21 (XXXII, 1981), para. (j); 25 (XXXIII, 1982), para. (i) & (j); 29 (XXXIV, 1983), para. (k); 33 (XXXV, 1984), para. (j).

33 See, for example, EcCom Conclusions 46 (XXXVIII, 1987), para. (o); 55 (XL, 1989), para. (n); 81 (XLVIII, 1997), para. (u); 98 (LIV, 2003), preamble.

34 See ExCom Conclusion 51 (XXXIX, 1988), para. (1)-(5).

35 Although it is unclear whether ExCom has UNHCR's supervisory task in mind when making this statement. See Excom Conclusion 95 (LIV, 2003), para. (c).

36 It has, for example, appealed to UNHCR to intensify its support to African Governments through capacity building activities, which includes the training of officials, the dissemination of information about refugees, and the providing of technical and advisory services. UN General Assembly Resolution A/RES/68/143 (18 December 2013) para 20.

37 UNHCR, 'Thematic Compilation of General Assembly & Economic and Social Council Resolutions (4th Edition)' (2014) 308–309.

38 Venzke (n 9) 88; Barnett and Finnemore (n 7) 25–26; Gil Loescher, 'The UNHCR and World Politics: State Interests vs. Institutional Autonomy' (2001) 35 *International Migration Review* 33, 40; Niklaus Steiner, Mark Gibney and Gil Loescher, *Problems of Protection: The UNHCR, Refugees, and Human Rights* (Routledge 2012) 5; Türk, 'UNHCR's Supervisory Responsibility' (n 16) 149 (NB at the time Türk was the Chief of the Protection Policy and Legal Advice Section at UNHCR Headquarters in Geneva).

as inconsistent interpretation may lead to non-uniform application of a treaty. For UNHCR, this necessitates a constant and uniform interpretation throughout all its interpretative practices, *e.g.*, its Handbook & Guidelines, its *amicus curiae* briefs and its submissions in domestic legislation processes (the latter are often in the form of letters, *note verbales* or 'non-papers', which are not published³⁹). Second, the manner in which UNHCR responds to states, both in the monitoring and in the enforcement phase, needs to be consistent as well. In other words, similar non-compliant behaviour of various states should warrant a similar response by UNHCR.⁴⁰ The criteria that are used for evaluating the implementation and application of states' treaty obligations must be "based on recognized norms and standards".⁴¹ Both manners of consistency strengthen UNHCR's legitimacy: consistent interpretation of the norms and a consistent response to states reinforces the presumption of non-arbitrariness, which in turn strengthens the acceptance of the agency's authority and, consequently, its legitimacy.

With regard to the first manner of consistency, UNHCR has acknowledged that consistent application of the law and policies governing refugee matters is important.⁴² For example, the agency has stated that the consistency of asylum decisions is a key concern.⁴³ This concern is, however, directed at the consistent application by states, not a consistent interpretation by UNHCR. It nevertheless demonstrates that the agency values consistency. UNHCR sees it, furthermore, as its duty to carry out its mandate of securing the "consistent and coherent interpretation of international refugee law".⁴⁴ One UNHCR official stated that "[c]ountries compare among themselves, especially in the EU, so if you want to be sound and solid in your supervisory function, you need to ensure governments that you have a consistent approach".⁴⁵ In addition, scholars have also indicated

39 Türk, 'UNHCR's Supervisory Responsibility' (n 16) 149.

40 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American political science review* 29, 39–40.

41 Kälin (n 9) 352.

42 UNHCR, 'Measuring Protection by Numbers (2005)' (2006) 9, 19.

43 UNHCR, 'Global Appeal 2010-2011' (2011) 45, 47; UNHCR, 'Global Appeals 2014-2015' (2014) 57.

44 UNHCR UNHCR's Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of Pacheco Tineo vs. Bolivia (n 27) 1.

45 Interview with UNHCR official #16 (7 April 2015). It is rather interesting that European countries are comparing amongst each other, given the wide disparity in recognition rates across Europe. For example, for Iraqi asylum seekers, the recognition rate in Italy was 94.2% in 2018, whereas it was 69.4% in Greece, 31.2% in Belgium and merely 12% in Bulgaria. For Afghani nationals, it was 98.4% in Italy, 77.7% in Slovenia, 52.2% in Germany and just 33% in Sweden. See ECRE, 'Asylum Statistics 2018: Changing Arrivals, Same Concerns' (25 January 2019) <<https://www.asylumineurope.org/news/>

that one of the values of UNHCR's supervisory task is that the agency establishes uniformity and standardisation of laws and policies regarding refugee protection.⁴⁶

However, the manner in which UNHCR is hierarchically set up has an unfavourable influence on the consistency of its supervision. The agency's administrative structure is fragmented: it includes field offices, branch offices, regional offices, five Bureaus (for Europe, Africa, the Americas, Asia and the Pacific, and the Middle East and North Africa), and the Division for International Protection (DIP) at the agency's headquarters in Geneva. This geographical spreading of its offices and staff members charged with supervision makes consistency in the interpretation of the 1951 Convention challenging. This issue has been recognized within UNHCR, resulting in internal guidelines for supervisory activities.⁴⁷ *Amicus curiae* briefs, for example, are the subject of an extensive (confidential) guideline that is drafted by the DIP and that provides for a clear and uniform practice in the use of court interventions.⁴⁸ The rationale for this document was the divergence in approaches by the more than 150 court interventions since 1986; the guideline therefore aims to "harmonize UNHCR's court intervention work, to bring the various ways and means of intervening in court within the scope of the process described herein [*i.e.* these internal guidelines], and to provide clear guidance to UNHCR staff on when and how to

25-01-2019/asylum-statistics-2018-changing-arrivals-same-concerns> accessed 1 July 2020.

46 Osamu Arakaki, 'Non-State Actors and UNHCR's Supervisory Role in International Relations' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 290; Türk, 'UNHCR's Supervisory Responsibility' (n 16) 144, 147.

47 UNHCR, Division of International Protection, 'Instructions, Procedures and Associated Guidance on Court Interventions' (2014) UNHCR/AI/2014/3. These internal guidelines were also mentioned by Interview with UNHCR official #4 (17 June 2014); Interview with UNHCR official #9 (10 September 2014). In the 1960s, under the legal advice direction of Paul Weiss, UNHCR already issued a series of confidential internal eligibility guidelines and legal bulletins, to assist UNHCR staff in their efforts with a consistent interpretation of the 1951 Convention. Guy S Goodwin-Gill, 'UNHCR's Protection Guidelines: What Role for External Voices?' (Trinity Term 2015 Public Seminar Series (20 May 2015), Refugee Studies Centre (University of Oxford), 21 May 2015).

48 UNHCR, Division of International Protection (n 47). This guideline, specifically focusing on court interventions, succeeds two earlier memoranda on court interventions, the first dating back to 2002. The guideline is for internal use by UNHCR staff only. The author of this study received these guidelines from UNHCR staff in Geneva with regard to this study.

intervene".⁴⁹ The guideline is not only instrumental for procedural consistency, but also includes rules and regulations to ensure substantive consistency. For example, to ensure the consistency in UNHCR's doctrinal position, clearance by the DIP is necessary for all court interventions; the memo that needs to be submitted to request permission is, furthermore, quite extensive.⁵⁰

Review and comments on national legislation, which form a considerable part of UNHCR's supervisory task, are the subject of another internal guideline.⁵¹ The guideline includes an extensive checklist the purpose of which is to offer guidance to UNHCR staff on issues that should be taken into consideration when reviewing draft legislation. It notes that draft comments should always be forwarded to the regional bureau for review, "to ensure consistency with international refugee law standards and with positions taken in other contexts".⁵² Clearance at the DIP-level is needed when comments depart from UNHCR's previous position on a particular subject, when no position is yet taken or when the legislation transcends more than one country (for example, EU legislation).⁵³

Despite the existence of elaborate guidelines, UNHCR's guidance on the substance of the 1951 Convention has not always been internally consistent. A case in point are the subtle but important dissimilarities between the Handbook and the Guidelines on International Protection regarding the exclusion clauses of Article 1F of the 1951 Convention.⁵⁴ These clauses exclude a person from refugee status on account of suspected criminal behaviour.⁵⁵ With regard to assessing whether the exclusion clauses are relevant in a particular case, UNHCR is an advocate of considering 'inclusion' (*i.e.* determining whether a person adheres to

49 *ibid* 4.

50 *ibid* 11–13.

51 UNHCR, Division of International Protection, 'Guidelines for Reviewing and Commenting on National Legislation' (2009) Inter-Office Memorandum No. 015/2009.

The author of this study received these guidelines from UNHCR staff in Geneva with regard to this study. The guidelines may have been updated since 2014.

52 *ibid* 8–9.

53 *ibid* 9.

54 UNHCR, 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' (2003) HCR/GIP/03/05.

55 Article 1F of the Convention excludes an individual from refugee status and thus from acquiring the rights under the Convention if there are serious reasons to believe that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. Convention Relating to the Status of Refugees [the 1951 Convention] 1951 (189 UNTS 137).

the criteria under Article 1(A)(2) of the 1951 Convention) before ‘exclusion’ due to the severe consequences of excluding a person from refugee status.⁵⁶ The agency’s Handbook is quite clear: it emphasizes that an application for refugee status must be examined from the standpoint of the inclusion clauses and that only when this has been determined, the question of exclusion may arise.⁵⁷ However, the Guidelines are less absolute in this regard, stating that the inclusion clauses should generally be considered before exclusion, but “[t]here is no rigid formula”.⁵⁸ This vague language seems to imply a departure from the rather unconditional ‘inclusion before exclusion’ position as provided for in the Handbook.⁵⁹ There is no obvious hierarchy⁶⁰ in the degree of authority between the Handbook and the Guidelines, and UNHCR has not made clear that the Guidelines outdate the Handbook or that the position in the Guidelines are the result of some enhanced wisdom, the position and guidance of UNHCR on this particular issue are inconsistent.⁶¹

In addition, it is impossible for all staff members who are concerned with the supervisory task to discuss everything with other offices that are hierarchically involved due to “the huge [...] amount of information”⁶². One of the interviewees indicated that there is little exchange between the field offices in various countries (for example, between the field offices in Western Europe), while other UNHCR officials stated that, depending on the issues, there is some coordination with other offices.⁶³ These exchanges also seem to be dependent on the composition of the various offices and (personal) relations between staff members.⁶⁴ There is a serious attempt to coordinate the various supervisory mechanisms and interventions in order to achieve overall consistency, especially with regard to

56 UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (2011) HCR/1P/4/ENG/REV. 3 paras 176–177.

57 *ibid.*

58 UNHCR, ‘The Guidelines No. 5’ (n 54) para 31.

59 David Kosar, ‘Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say’ (2013) 25 *International Journal of Refugee Law* 87, 94–95.

60 Even though the Guidelines are more recent and more detailed, this does not automatically mean that they would precede the Handbook.

61 In the last decade, states have increasingly opted for the ‘exclusion before inclusion’ approach. Although it is not possible to establish a causal link between the inconsistent position of UNHCR and this state practice, a firm and consistent stand of the agency on the issue could have persuaded states to reconsider this approach. Kosar (n 59) 95–101.

62 Interview with UNHCR official #12 (n 28).

63 *ibid.*; Interview with UNHCR official #13 (12 November 2014); Interview with UNHCR official #14 (10 November 2014); Interview with UNHCR official #21 (23 March 2016).

64 Interview with UNHCR official #12 (n 28).

court interventions and comments on draft legislation,⁶⁵ but this consistency is not always realized. In the particular case of the Handbook and the Guidelines, inconsistencies can easily be avoided, as both documents were drafted by the DIP.

The second way of consistency relates to the manner in which UNHCR responds to states in the monitoring and enforcement phase of its supervisory task. This is methodologically a difficult element to analyse, because the agency's supervision is at least partly carried out behind closed doors. Türk describes that UNHCR's interventions comprise of political, diplomatic and legal actions, carried out through dialogues with the relevant (governmental) counterparts, making formal and informal statements, or submitting UNHCR's position in a suitable, *i.e.* public or confidential, manner.⁶⁶ Informal or diplomatic interventions could be effective in the sense that they trigger compliant behaviour, but it is also important for the acceptance of the agency's authority, and thus its legitimacy, when states are publicly supervised in a similar manner and thus at least perceived to be treated equally. This is particularly important as the agency is scrutinized for being too dependent on its large donors, as was already discussed in Chapter 4⁶⁷; not only may these donors press for particular policies and programmes that suit their (national) interests, the agency's financial dependence on these states may also lead to UNHCR turning a blind eye if these states are not acting in accordance with their obligations under the 1951 Convention. This is not a theoretical discussion: Loescher and others have documented several cases in which donors who were criticized threatened to cut their funding, leading to the agency becoming subservient to these donors' policies.⁶⁸ In addition, it is unclear for states, the general public, the media, and academics, why non-compliant behaviour by Australia with its obligations under the 1951 Convention

65 Multiple interviewees indicated that their court interventions are indeed subject of extensive consultation with the DIP. Interview with UNHCR official #4 (n 47); Interview with UNHCR official #12 (n 28); Interview with UNHCR official #13 (n 63); Interview with UNHCR official #14 (n 63); Interview with UNHCR official #20 (16 March 2016); Interview with UNHCR official #24 (14 June 2017).

66 Türk, 'UNHCR's Supervisory Responsibility' (n 16) 148–149.

67 See §4.5.2.

68 Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993) 137–138; Steiner, Gibney and Loescher (n 38) 58. See also James C Hathaway, "A Terrible Signal That International Law Can Be Flaunted without Consequence" (Interview) (*Verfassungsblog*, 31 January 2017) <<https://verfassungsblog.de/a-terrible-signal-that-international-law-can-be-flaunted-without-consequence/>> accessed 1 July 2020.

gave rise to several concerned (public) announcements and press releases by UNHCR, but similar behaviour by Israel did not until 2017.⁶⁹

5.2.4 Reflection

The three determining factors of legitimacy as discussed above are interrelated: because UNHCR's mandate is not formulated in a clear manner, and, as a consequence, UNHCR needs to interpret and explore its legal parameters itself in a consistent manner, the amount of expertise within the agency with regard to this task is pivotal. The authority to supervise the compliance of states parties' obligations has been delegated to UNHCR precisely because states are in no position to fully execute this task effectively themselves, as they lack the expertise and knowledge to do so. UNHCR was instituted at the same time as the international framework it is expected to interpret and monitor, with little to no knowledge or expertise by other institutions on how to perform its supervisory task.⁷⁰

Although the circumstances are different now, with many international organizations and NGOs that are specifically dealing with refugee law and migration, UNHCR is in the unique position of supervising the compliance of states parties, while concomitantly being physically present in countries around the world. Within UNHCR, this combination is seen as a golden ticket: Erika Feller, as the then-head of the DIP, stated in 2008 that being both an overseer of what is delivered and a deliverer itself provides UNHCR with the authority and expertise that is needed to reinforce and strengthen its protection mandate,

69 See for example this news story on UNHCR's website, which voices 'deep concern' over an agreement between Australia and Cambodia under which Australia can relocate refugees to Cambodia, from which these refugees can be send back to persecution in China or Vietnam. UNHCR, 'UNHCR Warns Australia-Cambodia Agreement on Refugee Relocation Could Set Worrying Precedent - News Stories'. UNHCR has also tweeted about this issue a considerable number of times. However, a similar policy has been in the making in Israel since 2014, deporting Eritrean and Sudanese refugees to Rwanda and Uganda. This policy only gave rise to one public statement by UNHCR in 2017. UNHCR, 'UNHCR Concerned over Israel's Refugee Relocation Proposals' (17 November 2017) <<http://www.unhcr.org/news/press/2017/11/5a0f27484/unhcr-concerned-israels-refugee-relocation-proposals.html>> accessed 1 July 2020; Ilan Lior, 'Israel Will Deport Eritrean, Sudanese Refugees to Africa under New Policy - National *Haaretz* (Tel Aviv, 31 March 2015). One can only wonder why this is the case - whether Israel had any kind of leverage over UNHCR, or whether the United States had something to do with this.

70 Barnett and Finnemore (n 7) 25–26.

including its supervisory task.⁷¹ Volker Türk, who succeeded Feller as head of the DIP and was the Assistant High Commissioner for Protection between February 2015 and July 2019, thought that this “unparalleled character” of UNHCR, focusing on its material assistance work in the field on the one hand and its supervisory responsibilities on the other hand, are intrinsically linked and intertwined.⁷² It is indeed true that the multitude of tasks that UNHCR is carrying out increases the agency's acquired expertise on all issues related to refugee protection, which in turn enhances its authority and legitimacy.

With regard to the degree to which UNHCR abides by its legal mandate, the agency's mandate providers have given UNHCR significant room to manoeuvre, which the agency has taken maximum advantage of by continuously broadening its mandate. On first glance, this broadening seems only relevant for UNHCR's material assistance task, as UNHCR has evolved from a non-operational, understaffed bureau in Geneva to a highly active humanitarian institution with offices in 134 countries.⁷³ However, the expanded definition of refugee, which now seem to encompass “every person in need of UNHCR's international protection”, as is argued by Venzke⁷⁴, and the broader interpretation of the term ‘international protection’ are also significant for UNHCR's supervisory task. After all, UNHCR provides international protection to “refugees who fall within the scope of the present Statute”⁷⁵; one of the means of providing for this protection is through its supervisory task. However, the agency's supervision is also and predominantly tied to the international instruments that see to the protection of refugees. The wording of the 1951 Convention (*i.e.* focusing on protection of refugees, and not of the many other categories of persons of concern to UNHCR, such as IDPs, stateless persons and persons affected by natural disaster) is therefore still leading.

Although the meaning of the agency's mandate is currently a far cry from what the drafters of this document had envisaged, the agency's interpretation of its legal mandate has not weakened its legitimacy. The continuous broadening of the interpretation of its mandate has mostly had the support of the agency's

71 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) 6.

72 Türk, ‘UNHCR's Supervisory Responsibility’ (n 16) 138.

73 UNHCR, ‘Global Appeal 2020-2021’ (2019) 4–5.

74 Venzke states that ‘it is not the definition spelled out in the Statute which tells who is a refugee, but the need of assistance which does so’. Venzke (n 9) 101–108.

75 Statute of the Office of the High Commissioner for Refugees, adopted by the General Assembly as an annex to Resolution 428(V) (14 December 1950) Art. 1.

mandate providers.⁷⁶ This in itself constitutes a significant manifestation of their acceptance of UNHCR's authority. However, some states, on the other hand, have either only supported this broader mandate because it suited their self-interests or have actually criticized UNHCR for acting upon its extended mandate *ratione personae*.⁷⁷ Nevertheless, the agency's authority, its interpreting of the mandate and the acceptance of this interpreting by its mandate providers reinforce each other, as is also claimed by Venzke: "[UNHCR] has thrown its authority into struggles about what its Statute allows it to do".⁷⁸

The legitimacy of the agency is, however, possibly undermined by the lack of (perceived) consistency in its responses to non-compliant behaviour by states parties to the 1951 Convention. In Chapter 4, it was explicated that UNHCR does not have enforcement mechanisms that are comparable with other monitoring bodies, but that the various activities which the agency can employ, such as the publication of (critical) press releases or public statements, can amount to 'soft' enforcement.⁷⁹ According to its Statute, UNHCR shall provide for international protection, of which the supervisory task is but one aspect.⁸⁰ Although this task is mentioned first in the enumeration of the Statute's Article 8, there is no indication, neither in the drafting history nor in subsequent resolutions by the GA and ECOSOC or conclusions of ExCom, that the tasks that comprise international protection are hierarchically arranged.⁸¹ In other words, when the duty of providing international protection can be achieved more effectively by "promoting the admission of refugees [...] to the territories of states" (Article 8(d) of UNHCR's Statute) than by supervising the application of the 1951 Convention

76 Marjoleine Zieck, *UNHCR's Parallel Universe: Marking the Contours of a Problem* (Amsterdam University Press 2010) 15–16.

77 Venzke (n 9) 99; Zieck (n 76) 14.

78 Venzke (n 9) 87. See also Betts (n 10) 118.

79 See §4.3.4. See also Türk, 'UNHCR's Supervisory Responsibility' (n 16) 148–149; Marjoleine Zieck, 'Article 35 of the 1951 Convention / Article II of the 1967 Protocol: Co-Operation of the National Authorities with the United Nations = Coopération Des Autorités Nationales Avec Les Nations Unies' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press 2011) 1499–1500.

80 The 1950 Statute Art. 8.

81 Lewis does not agree with this position. She states that the significance of UNHCR's role in contributing to the development of international refugee law is emphasized by the fact that this role is placed in the first sub-paragraph of Article 8. C Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution' (2005) 17 *International Journal of Refugee Law* 67, 71.

(Article 8(a) of UNHCR's Statute), the supervisory task may give way to one of the other tasks of the agency.⁸²

This analysis is not purely theoretical: the internal guideline on court interventions makes explicit that those who are responsible for deciding whether or not to intervene in court procedures, need to weigh the various responsibilities of the agency, keeping in mind possible consequences for UNHCR's reputation, its operations, and the security and safety of its staff.⁸³ In the next section, the issuing (or not) of Eligibility Guidelines will make clear that this balancing exercise sometimes tips in favour of the operational aspects of UNHCR's international protection work.⁸⁴ It is not possible to determine with certainty that a disproportionate focus exists on the material assistance work of UNHCR, because the examples brought forward in this study are merely anecdotal. However, awareness of the fact that regularly prioritising the operational aspects of its international protection task weakens UNHCR's legitimacy regarding its supervisory task is important, for example when this prioritization results in inconsistent responses to non-compliant behaviour by states parties. In addition, although UNHCR's mandate does not accord priority to supervision when a balancing of the agency's multiple responsibilities takes place, the question arises as to who will supervise states' compliance in the case the agency chooses to give priority to its material assistance task.

As to UNHCR's consistency in responses to non-compliance behaviour by its major donors as opposed to other states who do not contribute significantly to the agency's budget, there are indeed some real and valid concerns. Powerful donors have, in fact, threatened to cut funding to UNHCR if the agency was too critical, which would undermine the operability of all of UNHCR's work significantly.⁸⁵ Most recently, the Trump administration has threatened to cut funding to a number of UN institutions, and has actually followed through on that threat with regard to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the World Health Organization (WHO).⁸⁶ Despite the significant funding at stake, UNHCR

82 One of the interviewees articulated this position quite clearly. 'You want the maximum benefit for refugees. If we would be strong on supervision, and we would [as a consequence] need to abandon a camp, stop certain assistance programmes, then what? Would that be better?' Interview with UNHCR official #5a (9 September 2014).

83 UNHCR, Division of International Protection (n 47) 7.

84 See §5.3.1.

85 Loescher, *Beyond Charity* (n 68) 137–138; Steiner, Gibney and Loescher (n 38) 58.

86 Edward Wong, 'U.S. to End Funding to U.N. Agency That Helps Palestinian Refugees' *New York Times* (31 August 2018) <<https://www.nytimes.com/2018/08/31/us/politics/trump-unrwa-palestinians.html>> accessed 1 July 2020; 'Coronavirus Updates:

nevertheless continues to express its concerns about and condemnation of recent detrimental American policies and practices regarding refugees and asylum seekers, even though some have said that the agency's response has not been strong enough.⁸⁷ That the United States seems to largely ignore these protests, as has others states done as well⁸⁸, does not change the fact that UNHCR is, in fact, protesting and speaking out against its donors. Whether or not that is done in a consistent manner is more difficult to ascertain.

5.3 Accountability

Independence, defined as the ability to make decisions outside a principal-agent relationship with states, is one of the structural elements for effective supervision.⁸⁹ There is a certain tension between independence and the requirement of accountability, a procedural element for effective supervision, because accountability is, in this study, understood as the necessity to scrutinize the performance of the international organization.⁹⁰ For UNHCR, accountability is an important issue: "Accountability is talked about frequently and is one of the

Trump Halts U.S. Funding of World Health Organization' New York Times (14 April 2020) <<https://www.nytimes.com/2020/04/14/us/coronavirus-updates.html#link-73ae6f28>> accessed 1 July 2020.

87 See, for the responses, amongst others: UNHCR, 'UNHCR Alarmed at Impact of U.S. Refugee Program Suspension' (*NHCR Press releases*, 30 January 2017) <<https://www.unhcr.org/news/press/2017/1/588f78ee4/unhcr-alarmed-impact-refugee-program-suspension.html>> accessed 1 July 2020; UNHCR, 'UNHCR Statement on New US Regulation on Asylum' (*UNHCR Press releases*, 9 November 2018) <<https://www.unhcr.org/news/press/2018/11/5be5bfac4/unhcr-statement-new-regulation-asylum.html>> accessed 1 July 2020; UNHCR, 'Statement on New U.S. Asylum Policy' (*UNHCR Press releases*, 19 November 2019) <<https://www.unhcr.org/5dd426824?fbclid=IwAR2kbGZrz3E7zCpf9ji2-08GFHfqAIq1xWr6UPFr5jE03Wga7nyYzeABDPM>> accessed 1 July 2020. See here for some criticism on these responses: Hathaway, "A Terrible Signal That International Law Can Be Flaunted without Consequence" (Interview) (n 68); Teresa Welsh, 'UNHCR Balances Interests in Response to Trump Asylum Policy' (*DevEx*, 16 November 2018) <https://www.devex.com/news/unhcr-balances-interests-in-response-to-trump-asylum-policy-93849?mc_cid=6f41bf63f8&mc_eid=d161162a8f> accessed 1 July 2020.

88 'In the 1990s, the United States and West European governments have continued to override UNHCR protests [...] of their forcibly repatriation of thousands of Haitians and Albanians.' Loescher, *Beyond Charity* (n 68) 138.

89 See §2.3.3.

90 Parliamentary Assembly of the Council of Europe, 'Accountability of International Organisations for Human Rights Violations' (Committee on Legal Affairs and Human Rights 2013) Doc. 13370 6.

greatest concerns of UNHCR staff at all levels".⁹¹ One of these concerns is a general lack of accountability for the agency's operational task and for the task of seeking durable solutions; a concern that materialized when in 2001, the United Nations Office of Internal Oversight Services found that the UNHCR Branch Office in Nairobi, Kenya, was involved in widespread fraud during the resettlement process.⁹² RSD Watch, an online platform, has criticized the manner in which UNHCR conducts refugee status determination and the lack of fairness and accountability in this process since 2005 (until the side become dormant in 2016).⁹³ However, although there might be (serious) issues relating to processes and practices of the agency's RSD⁹⁴, accountability in this study refers to the manner in which UNHCR accounts for the exercise of its supervisory task.

But first the question as to who should be able to hold UNHCR accountable needs to be answered. The 'participation' model of accountability claims that the agency needs to answer to those who are directly affected by its supervisory task

91 Barb Wigley, 'The State of UNHCR's Organization Culture: What Now?' (UNHCR Evaluation and Policy Analysis Unit 2006) EPAU/2006/01 6.

92 The report stated that a number of staff members at the office were demanding bribes up to 5,000 US dollars to ensure resettlement. Although a lack of accountability had led to this fraud, the investigation led to the replacement of the entire protection and resettlement staff at this Branch Office and the issuance of several indictments. Report of the Secretary-General on the activities of the Office of Internal Oversight Services, 'Investigation into Allegations of Refugee Smuggling at the Nairobi Branch Office of the Office of the United Nations High Commissioner for Refugees' (Office of Internal Oversight Services 2001) GA/A/56/733.

93 See <rsdwatch.wordpress.com> assessed 1 July 2020.

94 Kagan has written extensively on this issue, but there are also others scholars who have pointed out deficiencies. Michael Kagan, 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002'; Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1; Michael Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt' (2006) 19 *Journal of refugee studies* 45; Michael Kagan, 'We Live in a Country of UNHCR: The UN Surrogate State and Refugee Policy in the Middle East' [2011] *The UN Refugee Agency: Policy Development & Evaluation Service Research Paper*; Amy Slaughter and Jeff Crisp, 'A Surrogate State? The Role of UNHCR in Protracted Refugee Situations' in Gil Loescher and others (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press 2005); Martin Jones, 'The Governance Question – The UNHCR, the Refugee Convention and the International Refugee Regime' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 96; Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' (2008) 9 *German Law Journal* 1779; Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2004) 37 *NYUJ Int'l. L. & Pol.* 869.

(*i.e.* states parties to the 1951 Convention).⁹⁵ On the other hand, according to the ‘delegation’ model of accountability, those who have entrusted UNHCR with the supervisory task (*i.e.* its mandate providers) are the primary source of reference for UNHCR.⁹⁶ This model, which seems to be the most prevalent in the literature, is derived from John Locke’s Second Treatise of Government, in which he asserted that he who is in power (the legislative) is accountable to those who have entrusted him with this power (the people).⁹⁷ UNHCR has been granted the task of supervising states parties’ obligations under the 1951 Convention by states assembled in the GA. Therefore, the agency is primarily accountable to these mandate providers.⁹⁸ That does not mean that there is no accountability towards those who are the object of supervision (*i.e.* states), but this comes back in the element ‘participation’, as described below.

In Chapter 2, it was submitted that the success of securing accountability - the duty to account for the exercise of authority - depends on the development and adoption of three factors: political independence, participation, and transparency. Political independence are safeguards built in the system by the agency to account for how policy choices are made, namely in relative isolation from the political wishes of stakeholders. The criticism that UNHCR is too dependent on the cooperation of states, which may affect its policy decisions, will thus be addressed in this part. Political independence also refers to the absence of any influence by persons who are holding positions that are not reconcilable with an independent and impartial performance of the supervisory task, such as persons holding political functions. Participation is the manner in which UNHCR engages with those who are the object of its supervision. These objects are, in the first place, states parties to the 1951 Convention, but other important stakeholders are refugees and NGOs. Both factors can only be adhered to correctly, and UNHCR can only be held accountable, if the mandate providers are informed of the manner in which UNHCR carries out its supervisory task. Therefore, the third factor of accountability is transparency: it increases the chance of the oversight mechanism (which was discussed as a structural element

95 Pallis (n 94) 870; Grant and Keohane (n 40) 30–33.

96 Pallis (n 94) 870.

97 See, especially, the following quote: ‘[f]or all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.’ John Locke, Second Treatise of Government (Crawford B MacPherson ed, Hackett Publishing 1980) para 149.

98 Volker Türk and Elizabeth Eyster, ‘Strengthening Accountability in UNHCR’ (2010) 22 International Journal of Refugee Law 159, 163–164.

in Chapter 4) to be successful, it enhances political independence and participation, and it, thus, facilitates the overall accountability of the agency.

5.3.1 (*Political*) independence

The failure of states to protect their own citizens, because they are unable or unwilling to do so, as a result of which these citizens are forced to flee the territory of the state, is always rooted in political dynamics. UNHCR's work, as provider of international protection for these refugees, is thus necessarily linked with politics: with the tensions between national and international interests, between sovereignty and international assistance, between providing assistance on the territory of states and supervising these states at the same time.

The drafters of the UNHCR's Statute indicated very clearly that the agency's work "shall be of an entirely non-political character".⁹⁹ In the 90s, UNHCR expanded its activities on the territory of states by assisting (internally) displaced persons and concerned itself more with conflict resolution by facilitating negotiations. This led the agency into political areas that were previously the concern of the more political bodies within the UN.¹⁰⁰ These activities create a tension between politics and humanitarianism, which is mostly felt when UNHCR is "forced to choose between its humanitarian [non-political] mandate to protect refugees [by providing international assistance] and political dynamics on the ground".¹⁰¹

One aspect of UNHCR's work in which this tension is tangible is in the issuing of its eligibility guidelines. These guidelines are tools for governments and UNHCR staff in assessing the international protection need of asylum seekers from a given country, and are issued pursuant to UNHCR's supervisory task.¹⁰² However, draft guidelines of particular countries sometimes do not see the light of day due to political tensions and security concerns.¹⁰³ There are three main

99 The 1950 Statute Art. 2.

100 Claire Palley, 'Legal Issues Arising from Conflicts between UN Humanitarianism and Political Mandates - A Survey' in Vera Gowlland Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff Publishers 1996) 146–147.

101 Beth Elise Whitaker, 'Funding the International Refugee Regime: Implications for Protection' (2008) 14 *Global Governance: A Review of Multilateralism and International Organizations* 241, 243.

102 See, for an elaboration on how the eligibility guidelines come about, this statement by the then-Deputy Head of the DIP: AMM, MW, ZF, FM, AF and Secretary of State for the Home Department: Statement of Janice Lyn Marshall [2011] UK Upper Tribunal 6 June 2011.

103 Interview with UNHCR official #6 (9 September 2014); Interview with UNHCR official #8 (9 September 2014).

issues that may block the publishing of such guidelines, which are all connected to either UNHCR's presence in the field or to more general political motives. First, the publishing of a guideline could give rise to staff safety concerns: "When we finished the guidelines, which was a document of more than 300 pages, suddenly the director of the Regional Bureau woke up and said 'we will not publish this, because that would be a security risk for our colleagues in [country X]'"¹⁰⁴ The concern (at the management level within UNHCR) is that critical guidelines may cause the government or influential extremists groups within a country to target local UNHCR staff.¹⁰⁵ The second issue is that the guidelines could have a negative impact on the operating protection environment. "We wanted to remain friends with [country Y], as it had become a large refugee hosting state and we wanted to be there [in the field]. So our colleagues in [country Y] said: 'We do not want to upset the government, so it might not be a good idea to publish these guidelines.'"¹⁰⁶ Third, there could be general political concerns about states that are quite influential on the international plane, rubbing them the wrong way with critical guidelines.¹⁰⁷ For example, there are no eligibility guidelines for the Russian Federation or China, despite the fact that these are refugee-producing states.

In this example, UNHCR's operational work, for which the agency needs to have access to its persons of concern in the territories of states, and for which UNHCR needs to gain the confidence of various local and national actors, undermined the agency's supervisory task.¹⁰⁸ As for the issuing of guidance for eligibility criteria, this is highly problematic, because the eligibility guidelines are both important guidance for a uniform application of the 1951 Convention as well as an important protection tool for asylum seekers, which is recognized in

104 The country about which this statement was made is known to the author. Interview with UNHCR official #6 (n 103).

105 This is also acknowledged in the literature. Nicholas Morris, 'Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR' (1997) 9 Int'l J. Refugee L. 492.

106 The country about which this statement was made is known to the author. The lack of eligibility guidelines for this country has, according to Amnesty International, caused protection concerns for a particular ethnic group that is targeted by the government of this country. Interview with UNHCR official #6 (n 103).

107 *ibid*; Interview with UNHCR official #8 (n 103).

108 Loescher, 'The UNHCR and World Politics' (n 38) 49; Ralph Wilde, 'Quis Custodiet Ipsos Custodes: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law' (1998) 1 Yale Hum. Rts. & Dev. LJ 107, 119.

those same guidelines.¹⁰⁹ Some even consider the guidelines to be “the most important source for knowing whether someone’s claim can be credible”.¹¹⁰ According to one of UNHCR’s former Principal Policy and Evaluation Advisor to the High Commissioner, “country of origin information is the most important source for knowing whether someone’s claim can be credible”.¹¹¹ The guidelines are also often the basis for UNHCR’s court interventions through *amicus curiae*.¹¹² If operational motives, no matter how legitimate, prevent UNHCR from publishing these guidelines, this compromises part of its supervisory task.

However, concerns on whether or not to publish Eligibility Guidelines were raised within the agency, not by others. States do not have a say in whether such guidelines are published, and they do not get to comment on draft guidelines.¹¹³ The reluctance to publish the guidelines therefore seem to be the result of a self-inflicted gag order, anticipating possible negative responses from the states concerned.¹¹⁴ This tension between UNHCR’s material assistance in the field and its supervisory task is presumably a friction that is brought about by the agency’s different organizational divisions, for example between the DIP and the Division of Programme Support and Management (DPSM), which is mainly responsible for the support of field operations.¹¹⁵ That does not make the concern about this

109 All Eligibility Guidelines begin with a statement that, amongst other, indicates that ‘it is expected that the positions and guidance contained in the Guidelines should be weighed heavily by the relevant decision-making authorities in reaching a decision on the asylum applications concerned’. See, for example, UNHCR, ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea’ (2009).

110 Interview with UNHCR official #16 (7 April 2015).

111 Machiel Salomons, ‘Key Challenges in RSD Transition: The Case of Kenya’ (Guest lecture in the course International Refugee Law, University of Amsterdam, Amsterdam (the Netherlands), 22 May 2015).

112 Volker Türk, ‘Summary of Introductory Remarks’ (2013) 2 Int’l J. Refugee L. 394, 396.

113 Interview with UNHCR official #8 (n 103).

114 There is a telling anecdote in which the fear for what a major donor states would do when being criticized by the agency led to an impressive silencing operation: in 1988, when the agency’s magazine ‘Refugees’ had printed an article that criticized (then) West Germany’s refugee asylum commitment, then High Commissioner Poul Hocke ordered the burning of all 138,000 copies because West Germany was a major donor of the agency. William Branigin, ‘Agency Heads Draw Criticism’ *The Washington Post* (Rome, 22 September 1992)
<<https://www.washingtonpost.com/archive/politics/1992/09/22/agency-heads-draw-criticism/75e66bcd-0937-4e7e-b2c3-3a2bbefdb252/>> accessed 1 July 2020.

115 It is perhaps indicative of the growing role of the operational aspect of UNHCR’s work that the function of Assistant High Commissioner for Protection, who forms the senior management of the agency together with the High Commissioner, the Deputy High Commissioner and the Assistant High Commissioner for Operations, was not filled for

issue less relevant, particularly because in light of consistency and a uniform application by states it would be appropriate to have Eligibility Guidelines for each refugee producing country.

States have, however, interfered with the agency's supervision of the 1951 Convention. There are two anecdotal yet telling examples in which the humanitarian aspect of UNHCR's work was balanced against its supervisory task after such interference. In one example, states tried to pressure UNHCR into submission but failed, whereas in the other the balance tipped the other way. The first example was presented by Sadako Ogata, a former High Commissioner in her book "The Turbulent Decade, Confronting the Refugee Crises of the 1990s".¹¹⁶ She describes how refugees fleeing Kosovo in 1999 were stuck at the border with Macedonia, as the Macedonian government was reluctant to grant asylum to a large group of ethnic Albanians that could tilt an already delicate ethnopolitical balance of the country's population.¹¹⁷ According to Ogata, "UNHCR staff made clear statements against the government's reluctance to grant asylum"¹¹⁸, but the agency, which was running a large humanitarian program in the region, was criticized by US officials and other important UNHCR donor states for doing so. These donors' primary concern was about maintaining NATO presence in Macedonia. Ogata, candidly, said that "I found myself trapped between the government position, supported by key governments, such as the United States and United Kingdom, not to protest the improper handling of refugees, and the pressure from the media and NGOs to raise the very same points critically".¹¹⁹ In this case, Ogata stood her ground, not giving way to the pressure that important donor states put on her: she kept appealing to the Macedonian government to keep the border open, emphasizing the need to treat all refugees with the rights that they have under the 1951 Convention.¹²⁰

more than a year after the retirement of Erica Feller, the previous Assistant HC for Protection, on 30 April 2013. The director of the DIP, Volker Türk, has been the temporarily replacement for this vacancy, but he did not have the same seniority as the Assistant High Commissioner for Operations. As of 12 February 2015, Türk has been officially appointed by the UN Secretary-General as the new Assistant High Commissioner for Protection. UNHCR, 'George Okoth-Obbo and Volker Turk Appointed as New Assistant High Commissioners for Refugees' (2015) Briefing Notes.

116 Sadako Ogata, *The Turbulent Decade: Confronting the Refugee Crises of the 1990s* (WW Norton & Company 2005).

117 *ibid* 146–147, 151.

118 *ibid* 147.

119 *ibid* 151.

120 Sadako Ogata, 'Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the Humanitarian Issues Working Group of the Peace Implementation Council' (Geneva, 6 April 1999).

The second example was presented by Harrell-Bond during a 2011 speech.¹²¹ She recounts of a situation in Uganda, where on 14 July 2010, Ugandan and Rwandan police and military - under a false pretext and at gunpoint - rounded up hundreds of Rwandese refugees and asylum seekers, who had fled to Uganda and stayed in camps, and forcibly returned them to Rwanda.¹²² Harrell-Bond learned about these events the same day and informed UNHCR in Geneva, which immediately issued a statement condemning the 'brutal nature of this operation' and the trickery employed to gather the Rwandans for *refoulement*.¹²³ However, in the words of Harrell-Bond, "to avoid being thrown out of Uganda", the UNHCR representative in Uganda was forced by the Ugandan government to take back the claims that trickery was used and to apologize for the agency's statement.¹²⁴ Clearly, UNHCR's involvement as a humanitarian actor in the country¹²⁵ was more important than overseeing and condemning a violation by the Ugandan authorities of the prohibition of *refoulement*.

The principle of *non-refoulement* is considered by UNHCR itself as the cornerstone of the 1951 Convention.¹²⁶ If the agency itself is not persistent in calling out governments in their failure to uphold this principle, it will not only undermine the agency's stance in other cases of *refoulement*, but it will also send a message to states that they can get away with violations of the 1951 Convention as long as they have leverage over UNHCR - as is the case with granting access to a state's territory. Although states gain from this presence as well, there is a delicate mutual dependency in which the balance can tip easily to the side of states.

Political independence also refers to the fact that UNHCR should, in the exercise of its supervisory task, refrain from employing persons who hold positions that are not reconcilable with the independent tasks of the agency. Employing impartial expertise has been a serious problem for monitoring bodies of other

121 Barbara Harrell-Bond, 'Cessation Clause Uganda Style. Keynote Speech Delivered at the Northwestern University Conference on Human Rights' (2011) 11 Center for Forced Migration Studies Working Paper Series.

122 *ibid.*

123 *ibid.*

124 *ibid.*

125 In 2010, UNHCR's population of concern in Uganda comprised of 585,450 persons, of which a staggering 428,600 (returned) IDPs. UNHCR, 'UNHCR Global Report 2010' (2011) 104.

126 UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' <<http://www.refworld.org/docid/438c6d972.html>> accessed 1 July 2020.

human rights treaties¹²⁷, but UNHCR - with a vast work force that is seemingly committed to the agency's mandate¹²⁸ - does not suffer from this deficiency. Another case in point is the general rule within UNHCR to refrain from hiring a consultant who is politically active in his or her country of origin. Furthermore, although a 2005 report on UNHCR's organizational culture stated that there are disparities in authority between international and national staff (with the former having more - assumed - authority than the latter), the report did not (nor the report that superseded the first one) mention a lack of independence or impartiality of the staff as a concern.¹²⁹ The expertise of UNHCR's staff, in the previous section mentioned as a factor to determine legitimacy, similarly enhances the agency's accountability as "expert authority also enables [UNHCR] to be powerful by creating the appearance of depoliticization".¹³⁰ Accordingly, the more UNHCR can rely on its expertise, the less the agency is receptive to pressure through political means.

There seems to be, nevertheless, a difference in approach between UNHCR's headquarters in Geneva and the regional bureaus and field offices who carry out the supervisory task; Geneva is considered to be more legalistic towards the compliance of states with their obligations under the 1951 Convention, whereas the offices that are dealing directly with governments are more receptive to political pressure applied by states, also in relation to the operational task of the agency.¹³¹ This might be caused by the fact that UNHCR officials working in Geneva are more removed from the daily practices in capitals, and are therefore less confronted with the need to be sensitive to the diplomatic game played in-

127 States have on numerous occasions put forward candidates that were neither independent nor had much expertise on the subject matter of the monitoring body. See Amnesty International, 'United Nations: Proposals to Strengthen the Human Rights Treaty Bodies' (2003) 14.

128 Barb Wigley, 'The State of UNHCR's Organization Culture' (UNHCR Evaluation and Policy Analysis Unit 2005) EPAU/2005/08 25.

129 This has been different in the past. During the tenure of High Commissioner Poul Hartling of Denmark, a group of fellow Danes were established in high positions, which led to insiders calling them 'the Danish mafia'. Branigin (n 114). Currently, the 'group' within UNHCR that appears to have the most power is one that fulfills at least two of the following criteria: white, male, Anglophone or fluent in English. Wigley (n 128) 60-64.

130 Barnett and Finnemore (n 7) 24. Kälin also acknowledges that expertise is one of the necessary requirements for reducing the danger of politicization. Kälin (n 9) 652.

131 Michael Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 *International organization* 699, 725.

country. In the interviews with UNHCR officials, this sensitivity is indeed recognized.¹³²

5.3.2 Participation

Organizations in general, and UNHCR as an international agency as well, will be more effective - because more accountable - if stakeholders perceive themselves as working towards the same goal or result.¹³³ This working together is framed as participation, referring to the manner in which UNHCR engages with those who are the object of its supervision. These subjects are, first and foremost, states parties to the 1951 Convention. UNHCR will be more effective in carrying out its supervisory task if these states are encouraged to participate in the agency's activities.¹³⁴ Participation is also important because UNHCR lacks strong enforcement mechanisms; engagement and dialogues with states parties are then all the more necessary for convincing states to take a certain course of action resulting in compliant behaviour.¹³⁵ As UNHCR's supervisory task has a universal character, this participation should include all states parties, not only major donor states or common-law states.¹³⁶

The cooperation of states parties to the 1951 Convention with UNHCR has been encouraged by numerous GA and ECOSOC resolutions¹³⁷, for example by emphasizing that states need to grant access to asylum seekers and refugees so UNHCR can carry out its protection function¹³⁸, facilitate durable solutions¹³⁹ and provide financial contributions to UNHCR's programmes.¹⁴⁰ The GA has also emphasized that full and effective cooperation of states is required to enable UNHCR to fulfil its mandated functions (amongst which the supervisory task).¹⁴¹

132 Interview with UNHCR official #13 (n 63); Interview with UNHCR official #14 (n 63); Interview with UNHCR official #19 (15 March 2016); Interview with UNHCR official #21 (n 63); Interview with UNHCR official #24 (n 65).

133 Türk and Eyster (n 98) 161.

134 Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 *International Journal of Refugee Law* 651, 658; Goodwin-Gill (n 47).

135 Arakaki (n 46) 291.

136 Cecilia M Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within UNHCR Guidelines on International Protection' (2015) 29 *Emory International Law Review* 2059, 2080.

137 See, in general, UNHCR, 'Thematic Compilation of General Assembly & Economic and Social Council Resolutions (5th Edition)' (2015) 114–120; UNHCR, 'Thematic Compilation of Executive Committee Conclusions (7th Edition)' (2014) 147–148.

138 See ExCom Conclusion 108 (LIX, 2008), para. (d).

139 See ExCom Conclusion 107 (LVIII, 2007), preamble.

140 See UN General Assembly Resolution A/RES/1499 (XV) (5 December 1960); UN General Assembly Resolution A/RES/55/74 (12 February 2001) para 25.

141 UN General Assembly Resolution A/RES/57/187 (6 February 2003) para 8.

Similarly, ExCom has called upon states frequently to cooperate with UNHCR, for example to actively support the protection functions of the agency in order “to safeguard the right to seek and enjoy asylum from persecution and to ensure full respect for the principle of *non-refoulement*”.¹⁴²

However, these requests are all directed at (and by) states, whereas the factor ‘participation’ refers to the manner in which UNHCR engages with states; in other words, what actions the agency undertakes in order for states to be involved in the exercise of the supervisory task. A major effort of UNHCR to be involved with as much states as possible around the issue of international protection were the Global Consultations on International Protection in late 2000. The goal of these Consultations was to “engage states and other partners in a broad-ranging dialogue on refugee protection”.¹⁴³ It combined in-depth research, an extensive analysis of case law, a conference of states parties, a meeting of experts which had drafted background papers, and a publication of all the relevant documents in a comprehensive book.¹⁴⁴ UNHCR had firm control over the content of the meetings, as the agency decided who wrote the background notes and who was invited to the round table discussions.¹⁴⁵ The outcome of the Global Consultations was, amongst others, the Agenda for Protection, adopted jointly by UNHCR and states, which was endorsed by ExCom and welcomed by the GA.¹⁴⁶

Following the adoption of this Agenda for Protection, UNHCR started to publish its Guidelines on International Protection.¹⁴⁷ In Chapter 4, it was explained that the guidelines are an important tool for UNHCR, especially with regard to the interpretation phase of its supervisory task.¹⁴⁸ These guidelines used to be mostly a result of in-house drafting, without any formal input by states parties or other stakeholders.¹⁴⁹ However, perhaps as a result of some criticism¹⁵⁰, UNHCR started “to consider how external input could be usefully and effectively

142 See Excom Conclusion 52 (XXXIX, 1988), para. (5).

143 UNHCR, ‘Agenda for Protection (Third Edition)’ (UNHCR 2003) 5.

144 Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003).

145 Goodwin-Gill (n 47).

146 See ExCom Conclusion 92 (III, 2002) and UN General Assembly Resolution A/RES/57/183 (18 December 2002) para 7.

147 On the first page of all Guidelines, UNHCR states that ‘these Guidelines complement the UNHCR Handbook’. See, for example, UNHCR, ‘Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (2002) HCR/GIP/02/01 1.

148 See §4.3.4.

149 Goodwin-Gill (n 47).

150 Bailliet (n 136); Goodwin-Gill (n 134) 657–661.

managed, for example, through the circulation of drafts for comment".¹⁵¹ One of the manners in which this external input is acquired is by organizing round table events for government officials, lawyers, academics and NGOs on particular subjects.¹⁵² According to UNHCR, this process of including as many voices as possible gives these guidelines an authoritative status.¹⁵³ However, a review of all the Guidelines and Background Notes shows a considerable bias in favour of citing common law cases over civil law cases, and there are no references at all to case law from the developing world.¹⁵⁴ Overall, the processes of producing the guidelines have neither been very inclusive nor participatory: most were issued without an expert meeting or background paper, whereas UNHCR called for the participation of stakeholders on the Guidelines on Sexual Orientation and Gender only after the publication of these Guidelines.¹⁵⁵

In late 2014, however, UNHCR started with a trial to seek public comments on proposed guidelines and asked specifically for comments by all relevant stakeholders, because as the agency stated, "UNHCR is committed to a broad consultation process in the issuance of its Guidelines on International Protection".¹⁵⁶ The request also went out through email to experts in the field of

151 Goodwin-Gill (n 47).

152 The author of this thesis was invited for one of these round table events on 14 June 2012 by the Director of UNHCR The Netherlands. One of UNHCR officials from the DIP in Geneva, who was working on an updated version of the Guidelines on International Protection regarding the Application of the Exclusion Clauses, came to this round table to discuss developments in the Dutch (case) law with regard to these exclusion clauses in order to get input for an updated Guideline (yet to be published).

153 Bailliet (n 136) 2061.

154 *ibid* 2064; UNHCR is not the only one that has a bias towards European or Western jurisdictions. Chimni argues that 'the agenda of evolving Refugee Studies is set in the North'. BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' [2009] *Journal of Refugee Studies* 51, 16.

155 Bailliet (n 136) 2063; UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (2012) HCR/GIP/12/09.

156 'UNHCR Guidelines on International Protection – Consultation Process' (*UNHCR*) <<http://www.unhcr.org/544f59896.html>> accessed 1 July 2020. The first call was in October 2014 and concerned prima facie recognition of refugee status. These Guidelines were published in June 2015. UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (2015) HCR/GIP/15/11. The second call came in December 2014, UNHCR was then seeking comments on two new proposed guidelines, one on Article 1D and its application to Palestinian refugees, and one on the definition of 'former country of habitual residence'. The Guidelines on Article 1D were published in December 2017. UNHCR, 'Guidelines on International Protection No. 13:

international refugee law.¹⁵⁷ One of the later Guidelines, re-issued in November 2014, on refugee claims regarding military service, explicitly mentions (for the first time) that it is “the result of broad consultations”.¹⁵⁸ Since this development to actively seek the participation of states and others in an important aspect of its supervisory task is rather new, it remains to be seen how this process plays out, but the effort should be applauded nonetheless.

In 2016, UNHCR took the lead in the process of drafting the Global Compact on Refugees (GCR),¹⁵⁹ about which it advertises on its website that it has embarked on extensive consultations with (mainly) states, but also with civil society, refugees, and refugee organizations.¹⁶⁰ These consultations consisted of thematic discussions, formal meetings, stocktaking at the High Commissioner’s Dialogue on Protection Challenges¹⁶¹, as well as through many more informal consultations and more than 500 written contributions.¹⁶² However, its level of consultations has been criticized, with scholars condemning UNHCR’s ‘internal process’ with hardly any room for intergovernmental and formal consultations.¹⁶³

Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees’ (2017) HCR/GIP/17/13. The ones on habitual residence have not been published (yet). The third call came in January 2016, and concerned claims to refugee status related to situations of armed violence and conflict. These Guidelines were published in December 2016. UNHCR, ‘Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ (2016) HCR/GIP/16/12; Michael Kagan, ‘Notice and Comment Comes to the UN: UNHCR Seeks Public Comments on Draft Guidelines on Prima Facie Refugee Recognition’ (*RSDwatch*) <<https://rsdwatch.wordpress.com/2014/10/28/notice-and-comment-comes-to-the-un-unhcr-seeks-public-comments-on-draft-guidelines-on-prima-facie-refugee-recognition/>> accessed 1 July 2020.

157 Goodwin-Gill (n 47).

158 UNHCR, ‘Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service within the Context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees’ (2014) HCR/GIP/13/10/Corr. 1.

159 UN General Assembly Resolution A/RES/71/1 (3 October 2016) Annex 1.

160 See UNHCR, ‘The Global Compact on Refugees’ <<http://www.unhcr.org/towards-a-global-compact-on-refugees.html>> accessed 1 July 2020.

161 UNHCR, ‘High Commissioner’s Dialogue on Protection Challenges 2017: “Towards a Global Compact on Refugees” 12/13 December 2017’ (2018) Summary report.

162 UNHCR, ‘The Global Compact on Refugees’ (n 160).

163 Alexander Betts, ‘U.N. Refugee Agency Must Change Course or Risk Obsolescence’ (*Refugees*, 6 April 2017) <<https://www.newsdeeply.com/refugees/community/2017/04/06/u-n-refugee-agency-must-change-course-or-risk-obsolence>> accessed 1

The formal consultations were indeed only started after the release of the first or 'zero' draft of the GCR in February 2018, 17 months after the GA adopted the 'New York Declaration for Refugees and Migrants' that called for the GCR.¹⁶⁴ In the late summer of 2018, UNHCR finalized the drafting of the Global Compact and presented it as part of its 2018 Annual Report to the GA.¹⁶⁵

Although states parties to the 1951 Convention are the prime stakeholders to which UNHCR needs to relate, other stakeholders are also important: refugees as the recipients of the protection under the 1951 Convention, NGOs as advocacy partners of UNHCR, and academics as critical sparring partners. The agency has drafted a number of documents that see to its engagement with refugees and refugee communities.¹⁶⁶ However, these documents mainly seek for participation of refugees and refugee communities in the material assistance work of UNHCR. But the agency is also being criticised for not bringing a legitimate range of voices, especially those of refugees, into the supervisory process.¹⁶⁷ In one of its reports, the Policy Development and Evaluation Service (PDES) of UNHCR sought the inclusion of feedback from refugees on their knowledge of the Refugee Status Determination process as it is conducted in Kenya.¹⁶⁸ It is perhaps exemplary for the lack of UNHCR's participation with refugees and refugee communities in the exercise of its supervisory task that this survey of refugees' opinions was regarded within the agency as "highly exceptional".¹⁶⁹ Even at the 2019 Global Refugee Forum¹⁷⁰, which was initiated by UNHCR to give effect to the Global Compact on Refugees, there were only 70 refugees out

July 2020; James C Hathaway, 'A Really, Really Bad Month for Refugees' (*Verfassungsblog*, 2 October 2016) <<http://verfassungsblog.de/a-really-really-bad-month-for-refugees/>> accessed 1 July 2020.

164 UN General Assembly Resolution A/RES/71/1 (3 October 2016) (n 159) See also §3.6.

165 UNHCR, 'The Global Compact on Refugees FINAL DRAFT (as at 26 June 2018)'.

166 UNHCR, 'The UNHCR Tool for Participatory Assessment in Operations' (2006); UNHCR, 'Reinforcing a Community Development Approach' (2001) EC/51/SC/CRP.6; UNHCR, 'Community-Based Approach in UNHCR Operation' (2008), in: Robert Lloyd, Shana Warren and Michael Hammer, '2008 Global Accountability Report' (One World Trust 2008) 45.

167 James C Hathaway, 'Who Should Watch over Refugee Law?' (2002) 14 *Forced Migration Review* 23, 24; BS Chimni, 'Reforming the International Refugee Regime: A Dialogic Model' (2001) 14 *Journal of Refugee Studies* 151, 152–153.

168 Madeline Garlick and others, 'Building on the Foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya' (UNHCR Policy Development and Evaluation Service 2015) PDES/2015/01 78–87.

169 Salomons (n 111).

170 See <<https://www.unhcr.org/programme-and-practical-information.html>> assessed 1 July 2020.

of the 3,000 participants - a fact that has been criticized by refugee-led organizations.¹⁷¹

NGOs are especially relevant to be actively involved in the monitoring phase, because information about (non-)compliance of states with their treaty obligations will generally not be submitted by states themselves or by other states.¹⁷² Instead, UNHCR needs other critical voices that call attention to the behaviour of states. Therefore, it can be beneficial for UNHCR to engage with these NGOs and to join forces in order to enhance the agency's supervisory task. The agency has indeed acknowledged that partnerships, especially with NGOs, is a key concept.¹⁷³ NGOs can, for example, apply for observer status with ExCom, which allows them to attend its sessions. Nevertheless, whether or not these partnerships with NGOs are considered valuable throughout the organization is questionable. A UNHCR official at Headquarters, who is tasked with supervision, stated: "UNHCR is really bad in communicating with its counterparts; perhaps less so with governments, but all the more so with civil society. There is more effort put in place now to ameliorate this process, but advocacy NGOs still remain a blind spot for UNHCR. They are mainly seen as being 'difficult'."¹⁷⁴ This reflection is mirrored by Okoth-Obbo, UNHCR's Assistant High Commissioner for Operations, who said that "[q]uite a lot of the energy we spend is on duelling with each other. I feel that sometimes there is not sufficient transparency [with NGOs], and I am sure some of the NGOs will say that the same is true for UNHCR. [We are in] a fundamental battle between NGOs and UNHCR. And I can be very honest and say that what this then creates in-house is a dynamic of feeling

171 Rebecca Root, 'Where Were the Refugees at the Global Refugee Forum?' (20 December 2019) <<https://www.devex.com/news/where-were-the-refugees-at-the-global-refugee-forum-96266>> accessed 1 July 2020; 'Oxfam's Response to Global Refugee Forum: World Leaders Need to Do More to Deliver Real Change for Refugees' (Oxfam International, 19 December 2019) <<https://www.oxfam.org/en/press-releases/oxfams-response-global-refugee-forum-world-leaders-need-do-more-deliver-real-change>> accessed 1 July 2020.

172 Kälin (n 9) 652; Ronald B Mitchell, 'Sources of Transparency: Information Systems in International Regimes' (1998) 42 *International Studies Quarterly* 109, 116. According to Hathaway, this reluctance by states parties is due to the fact that UNHCR exists in the first place: Hathaway, 'Who Should Watch over Refugee Law?' (n 167) 25.

173 Feller (n 71) 8. In addition, UNHCR has established the 'Partnership in Action', which is a framework for cooperation between UNHCR and the many NGOs the agency works with around the world, primarily with regard to its operational and humanitarian work. Since 2000, UNHCR also organised the Annual Consultations with NGOs, which has turned in "three days of dialogue on a wide variety of subjects" <<http://www.unhcr.org/pages/49f9b49f6.html>> accessed 1 July 2020.

174 Interview with UNHCR official #8 (n 103).

defensive, which is wasting energy.”¹⁷⁵ Most UNHCR officials working in field offices, on the other hand, are quite appreciating of their partnerships with NGOs.¹⁷⁶

In the late '90s, UNHCR set up an Academic Advisory Committee “as a vehicle for increasing interaction with external researchers” on various issues.¹⁷⁷ However, according to Loescher, this Committee neither met frequently nor were they scheduled on regular intervals. In addition, “too often, the meetings were occasions for the UNHCR to make presentations about policy developments rather than opportunities for the Office to listen to and learn from external researchers”.¹⁷⁸ UNHCR's online information tool, Refworld, does not contain any information regarding the work of this Committee nor the members that make up the Committee, which might be indicative of its operationality. The apparent reluctance within the agency's headquarters to engage specifically with the academic field is not *per se* shared with the offices in states. Most UNHCR's officials who were interviewed for this study indicated that they did have some involvement with academic institutions, although this involvement mainly focused on trainings given to academics “to ensure that these professors understood the international standards”.¹⁷⁹ On the other hand, academics and researchers are invited for the High Commissioner's Dialogue on Protection Challenges, an annual forum for “free and open exchange of views” between various stakeholders.¹⁸⁰

175 Okoth-Obbo referred both to NGOs working ‘in the field’ and to NGOs who work on advocacy. IRIN, *FULL INTERVIEW In Conversation With: George Okoth-Obbo, Head of Operations at the UN Refugee Agency* (2018) <<https://www.youtube.com/watch?v=5ivRpdimrlo>> accessed 1 July 2020.

176 Interview with UNHCR official #12 (n 28); Interview with UNHCR official #13 (n 63); Interview with UNHCR official #16 (n 45); Interview with UNHCR official #14 (n 63).

177 Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 381, note 14.

178 *ibid.*

179 Interview with UNHCR official #20 (n 65); Interview with UNHCR official #11 (10 September 2014); Interview with UNHCR official #12 (n 28); Interview with UNHCR official #21 (n 63), stating that ‘our networking efforts are to get them interested, but also to establish a cooperation agreement to do research activities with them’.

180 This forum, instituted in 2007 by then High Commissioner António Guterres, is a multiple day event in which states, non-governmental and international organizations, academics, researchers and other stakeholders exchange ideas in an (more or less) informal setting. The Dialogue does not provide formal or agreed outcomes; rather, the High Commissioner delivers a summary of the discussions and points out elements to follow up in the next year. <<http://www.unhcr.org/high-commissioners-dialogue.html>> Accessed 1 July 2020.

5.3.3 Transparency

The third factor of accountability, transparency, is a facilitator: political independence, participation and public oversight are all easier to achieve if the organization acts transparently. In Chapter 4, it was assessed that the public oversight mechanism of mandate providers is not functioning properly. This makes it all the more necessary that states parties to the 1951 Convention (and others) are enabled by the agency to publicly scrutinize how UNHCR uses its supervisory mechanisms. Transparency also decreases the chance that a state puts pressure on UNHCR to carry out its supervisory task in particular manner.

UNHCR is quite committed to providing information on its website through Refworld, an online tool containing, amongst others, country information, policy documents, position papers, documents relating to international and national legal frameworks, and interventions or statements by UNHCR. Not all information that the agency produces is, however, available on Refworld, which is made clear in the Access Policy regarding the agency's archives, that applies to materials that are more than twenty years old.¹⁸¹ The Access Policy states that there are documents in the archives that are subject to restrictions imposed by either UNHCR or "by donors of personal papers and other historical materials".¹⁸² Although most restrictions are based on the fact that it contains information on decision-making in individual cases, materials that contain "confidential business and financial information"¹⁸³ are also restricted from access. There is no similar publicly available documentation that describes the transparency and disclosure policy for more recent materials.¹⁸⁴ As has been mentioned earlier in this chapter, the manner in which some of the Guidelines have come about also lacks transparency.

Not everyone agrees with this need for transparency. "In our area, [transparency] is sometimes extremely difficult. In Turkey, there is now an asylum law; not because of us, but because of the EU. However, we pushed and pushed, we were not irrelevant. [...] And nobody knew, but that [working behind

181 UNHCR, 'Annex 3: Guidelines on Access to UNHCR Archives' (2017) UNHCR/HCP/2017/4.

182 *ibid* 1.

183 *ibid* 2.

184 As a result, UNHCR scored relatively low on the transparency rating (29 per cent out of 100 per cent) by One World Trust in 2008, an independent charitable organization that does research on accountability and global governance. Unfortunately, this was also the last year that One World Trust did this research. Robert Lloyd, Shana Warren and Michael Hammer, '2008 Global Accountability Report - Accountability Profile UNHCR' (One World Trust 2008).

the scenes] was part of the condition.”¹⁸⁵ This personal account of a UNHCR official working in Geneva suggests that some states only allow UNHCR to be closely involved in the drafting of new legislation and the implementation of states' obligations under the 1951 Convention if this is done under strict confidentiality. Although there might be a truth in this argument, executing the supervisory task in such a non-public manner makes the agency vulnerable for pressure by powerful (donor) states, because exerting influence is easier done behind closed doors than in full daylight. Since UNHCR has a mandated task in supervising the implementation and application of international refugee law, it should be able to stand firm towards governments in allowing it to fulfil this task publicly.

Another way in which UNHCR provides for transparency and thus accountability for its work, is through its Evaluation Service. This Service was established in 2016 through the Policy on Evaluation document [the Policy], superseding the PDES.¹⁸⁶ The Policy “confirms UNHCR's commitment to the importance of evaluation and its role in supporting organizational accountability, learning and the continual improvement of UNHCR's performance in addressing the protection, assistance and solutions needs of refugees, stateless persons and other persons of concern”.¹⁸⁷ All evaluation reports are published for the sake of transparency on the dedicated evaluation page of UNHCR's website, ranging from an evaluation of UNHCR's engagement with the private sector to agency's livelihood programs in various countries.¹⁸⁸ The Evaluation Service also conducts research and writes reports. At the time of writing, it is not yet clear whether these reports are as critical as some of the reports commissioner and published by the former PDES.¹⁸⁹

185 Interview with UNHCR official #5a (n 82), meaning that UNHCR could only be involved in commenting on the draft law if that was done behind closed doors. .

186 UNHCR, ‘UNHCR Policy on Evaluation’ (2016) UNHCR/HCP/2016/2. The previous policy dated from 2010: UNHCR, ‘UNHCR's Evaluation Policy’ (2010).

187 UNHCR, ‘UNHCR Policy on Evaluation’ (n 186) 3.

188 See <<https://www.unhcr.org/evaluation-and-research.html>> assessed 1 July 2020. This was also common practice under PDES: ‘All PDES evaluation reports are placed in the public domain.’ See UNHCR, ‘UNHCR's Evaluation Policy’ (n 186).

189 See, for two rather critical reports: Katy Long, ‘No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx’ (UNHCR Policy Development and Evaluation Service 2010) PDES/2010/07; Anna Marie Gallagher, José Riera and Maria Riiskjaer, ‘Refugee Protection and International Migration: A Review of UNHCR's Role in the Canary Islands, Spain’ (UNHCR Policy Development and Evaluation Service 2009) PDES/2009/01.

5.3.4 Reflection

Accountability is an important element of effective supervision, because “its absence means that those in power have the capacity to act without regard for those who authorise their actions and for those whose lives are affected by those actions”.¹⁹⁰ Accountability is a manner in which the autonomy of an institution can be constrained in order to avoid possible abuse of power.¹⁹¹ The great extent of autonomy and independence that UNHCR enjoys - as was examined in Chapter 4 - needs to be matched by a thorough justification of how the agency accounts for the exercise of this autonomy.

According to the delegation model, elaborated on in the introduction of this section, UNHCR is accountable to those who have entrusted the agency with the supervisory task. This means that UNHCR is not directly accountable for the exercise of this task to those who finance the agency.¹⁹² It does not mean that UNHCR should therefore refrain from engaging with its stakeholders, including states, NGOs, refugee and refugee communities, in the exercise of its supervisory task, as it is important to work together towards the same objective; in this case, full and correct implementation and application of the 1951 Convention. Although UNHCR has made efforts to increase the participation of its stakeholders, for example in the issuing of its Guidelines on International Protection, there is still much to be done to fully engage with those who are the object of its supervision. These engagements also need to have a continuous character, instead of being based on *ad hoc* process such as the Global Consultations or the GCR process.¹⁹³

As has been pointed out in Chapter 3 on the rise of UNHCR as the world’s leading refugee agency, UNHCR has become a wilful actor in its own right with independent concerns and capabilities. UNHCR’s practices and procedures are shaped by the agency acting as an independent agent, but also by the interests of states, who have their own agenda.¹⁹⁴ UNHCR can, nevertheless, in some instances be qualified as a ‘policy leader’, setting the agenda and subsequently persuading states to adopt this agenda.¹⁹⁵ The agency has used this technique to

190 Barnett and Finnemore (n 7) 141; in: Ann McKittrick, ‘UNHCR as an Autonomous Organisation: Complex Operations and the Case of Kosovo’ (2008) 9.

191 Grant and Keohane (n 40) 29.

192 Although some form of accountability towards governments providing (voluntary) contributions should be part of the agency’s financial reporting mechanism. Türk and Eyster (n 98) 163.

193 Chimni, ‘Reforming the International Refugee Regime’ (n 167) 152.

194 Bhupinder Singh Chimni, ‘The Meaning of Words and the Role of UNHCR in Voluntary Repatriation’ (1993) 5 International Journal of Refugee Law 442, 447.

195 Barnett and Finnemore (n 7) 11.

not only persuade states, but even its mandate providers.¹⁹⁶ This has particularly affected the institutional checks and balances, as UNHCR now commonly sets the agenda of ExCom and drafts its preliminary conclusions.¹⁹⁷

The more or less independent position of the agency has not been without constraints. UNHCR has been significantly proactive in shaping its own path, but this has taken place against the need to remain receptive to the interests of states and to respond to matters such as competition for funding and taking leadership positions.¹⁹⁸ As one of the interviewees states about material assistance: “If we are not willing to be involved, then we are out of business, and then [country X] will be doing business with other organizations. It is a competitive world.”¹⁹⁹ A case in point of this competition is the aid response in Bangladesh during the Rohingya crisis. As the government of Bangladesh had closer relations with the International Organization for Migration (IOM), UNHCR was refused to lead the aid response.²⁰⁰ What is worse is that the rivalry between the two UN agencies has hampered the relief efforts to and protection of the Rohingya, as acknowledged in an exceptional frank interview with George Okoth-Obbo, UNHCR's former Assistant High Commissioner for Operations.²⁰¹

In this regard, it is submitted that UNHCR has internalized the need to prioritize its material assistance task, which seems now more relevant for the agency in order to position itself on the international plane than the agency's protection and supervisory task. The issues mentioned in this chapter regarding the Eligibility Guidelines exposes this need of UNHCR; consequently, in this particular case, the agency has compromised one task in order to be able to perform the other. The example of the expulsion of the Rwandese refugees and asylum seekers to Uganda, and the agency's deference to wishes of the state on whose territory it was running a large humanitarian programme, is nevertheless illustrative of external pressure. It is not possible to conclude whether this example illustrates a one-time occurrence or whether it is evidence of a more common practice. Nevertheless, from the previous analysis does not follow that UNHCR is solely dependent on the political goodwill of its mandate providers or its important stakeholders; the choices made by the agency are more the outcome

196 See §3.3, §3.5 and §5.2.1.

197 That is, when these conclusions were still drafted at all. See §4.6.2.

198 Betts (n 10) 136; Wigley (n 128) 19.

199 Interview with UNHCR official #6 (n 103).

200 Ben Parker, ‘Bangladesh Resists Greater UNHCR Role in Rohingya Crisis’ (IRIN, 23 October 2017) <<https://www.irinnews.org/news/2017/10/23/bangladesh-resists-greater-unhcr-role-rohingya-crisis>> accessed 1 July 2020.

201 IRIN (n 175). In addition, Okoth-Obbo also said: ‘[If] we are perceived as being in competition with each other [...] that will magnify the opportunity for one to be played off against the other.’

of a navigation between internal and external factors, constraints and opportunities.

5.4 Operationality

The last procedural element, operationality, answers the question: can the agency perform its supervisory task in the real world? This question relates to practicalities that are important for the proper functioning of the agency. First, it deals with the amount of information that the agency has access to through its own sources. This differs from the information that it receives through institutionalized mechanisms, such as state reporting or complaints procedures, which was examined as a structural element in Chapter 4. The second element of operationality is punctuality, referring to the pace at which UNHCR goes through the different stages of supervision. Thirdly, operationality deals with capacity and the workload of the agency, which can, for example, be affected by the number of states that need to be supervised or the other tasks the agency need to perform.

5.4.1 Access to information

A prerequisite for effective supervision is the availability of sufficient information about norm compliance by states parties. This is especially important in the monitoring phase, because a supervisory body cannot oversee compliant behaviour if there is a lack of information about this behaviour. As was explained in Chapter 4, UNHCR does not have a functioning institutionalized mechanism for collecting information; there is no state reporting under the 1951 Convention nor is there a state or individual complaints mechanism. States have neither fully adhered to their treaty obligations under Arts. 35(2) and 36 of the 1951 Convention to provide UNHCR with 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 requests by the agency to do so.²⁰²

UNHCR has, however, dealt with this structural handicap. The gathering of information is considerably facilitated by UNHCR's permanent presence in the territory of states.²⁰³ This presence ensures that there are short lines of

202 See the analysis about UNHCR's legal mandate in Chapter 4 and the three attempts by the agency to request for information through Art. 35(2) and 36, in §4.3.2 and §4.4.2.

203 Türk, 'UNHCR's Supervisory Responsibility' (n 16) 147. One of the interviewees also considered the permanent presence in states as one of the strengths of UNHCR. Interview with UNHCR official #5a (n 82).

communication with relevant authorities; at least much shorter than if UNHCR would have operated from its headquarters in Geneva only. UNHCR is, for example, involved with legislative procedures and the drafting of new legislation. The most effective time to influence the legislative branch is indeed before the legislation is sent to parliament for confirmation.²⁰⁴ UNHCR therefore tries to “front load”, because “an early investment in draft legislation could make it easier later in the process [of supervising]”.²⁰⁵ This early involvement is beneficial because it gives UNHCR inside information and the possibility to exert its influence before the legislation has been confirmed in parliament. The agency can, for example, discuss with other UNHCR offices or the DIP in Geneva to prepare its position well in advance. Almost all the interviewees stated that regularly commenting on national legislation is an important, if not the most important, element of their (supervisory) work.²⁰⁶ In addition, as almost all discussions on new legislation take place behind closed doors on the civil servant level²⁰⁷, it is critical for the success of UNHCR's intervention to have a good working relationship with these actors and to be informed in time of a revision of the law, of a policy change or when a new law is being drafted. “That's the moment to influence. We still have the whole official game, of issuing comments and letting the government publicly know what we think. But it's too late if that's the only thing that we do.”²⁰⁸

UNHCR in its supervisory task works closely with other organizations, notably NGOs, to gather and assess the multitude of information. As one of the interviewees pointed out: “[With regard to the monitoring phase], the starting point is that we have to rely on NGOs which will inform us on the latest developments. The courts issue 15,000 decisions a year, so it is impossible to monitor everything.”²⁰⁹ Another staff member noted that improving the relationship with NGOs in a particular country was key to having a bigger impact

204 A UNHCR official stated that ‘Once a law is in parliament, it is very difficult to influence’ and, later in the interview: ‘Changing something in parliament is not possible’. Interview with UNHCR official #13 (n 63). Another official stated that ‘it is really important to provide input in an early state’. Interview with UNHCR official #18 (16 January 2016).

205 Interview with UNHCR official #17 (16 January 2016); Interview with UNHCR official #23 (14 April 2016).

206 Interview with UNHCR official #4 (n 47); Interview with UNHCR official #12 (n 28); Interview with UNHCR official #13 (n 63); Interview with UNHCR official #16 (n 45); Interview with UNHCR official #14 (n 63); Interview with UNHCR official #17 (n 205); Interview with UNHCR official #18 (n 204).

207 Which is acknowledged by several UNHCR officials who work in national offices: Interview with UNHCR official #12 (n 28); Interview with UNHCR official #13 (n 63); Interview with UNHCR official #16 (n 45).

208 Interview with UNHCR official #5a (n 82).

209 Interview with UNHCR official #13 (n 63).

on draft legislation, because NGOs were normally invited to hearings of parliamentary committees (whereas UNHCR was not).²¹⁰ In the Conclusions of the Global Consultations in 2001 it has been recognized that NGOs should have a proper role in the process of supervision.²¹¹ ExCom has confirmed this as well.²¹² It is unclear though whether this exchange between national NGOs and the agency has been structuralized. In addition, none of the interviewees pointed out that they exchanged or relied on information from academic institutions or experts.

5.4.2 *Punctuality*

The supervisory process is divided in three phases: interpretation, monitoring and enforcement. Interpretation of the norms, in this case the 1951 Convention, is a rather autonomous process: there is no clear deadline of when the interpretation of a specific norm needs to be 'ready'. However, punctuality - meaning that each individual phase is carried out within a time frame that ensures that the supervision remains relevant - is also important for the interpretation phase: UNHCR needs to keep pace with developments that exist in the states parties of the 1951 Convention. It is submitted that if states continue to develop certain principles of law, incorporating broader or more narrow interpretations of the law, and UNHCR does not lead, anticipate or shape these developments, that this will be detrimental to the agency's interpretative guidance.

In the drafting of its guidelines, UNHCR indeed takes into account the developments that occur in states and in academia.²¹³ Its Handbook is, amongst others, based on the accumulated views of state practice, academic literature and judicial decisions at national, regional and international levels.²¹⁴ The release of new guidelines and the updating of existing guidelines is, however, a very time-consuming process. A case in point is the updating by the DIP of its Guidelines on the Application of the Exclusion Clauses since, at least, 2012. The DIP confirmed in 2014 that the process was slowed down for various reasons, but that the department was still hopeful that these guidelines would be published soon.²¹⁵ However, the updated version has so far not been released, whereas the developments in state practice, case law and academic analysis with regard to the

210 Interview with UNHCR official #5a (n 82).

211 Feller, Türk and Nicholson (n 144) 669.

212 See, for example, ExCom Conclusions 29 (XXXIV, 1983), para. (j); 41 (XXXVII, 1986), para. (n); 46 (XXXVIII, 1987), para. (r).

213 UNHCR, 'The Handbook' (n 56) 3.

214 *ibid.*

215 Interview with UNHCR official #6 (n 103) (follow up by email on 4 September 2014).

application of the exclusion clauses have not stood still.²¹⁶ UNHCR, as a 'policy leader', could have shaped these developments with a new Guideline in line with the 1951 Convention, instead of merely awaiting what comes out of state practice. The lack of punctuality reduces the relevance of UNHCR's guidance on this particular aspect of the 1951 Convention.

With regard to monitoring and enforcing compliant behaviour, punctuality is also important. As was asserted in Chapter 2, when too much time lapses between the moment of non-compliant behaviour or the moment that states report on their behaviour (be it complying or non-complying behaviour) and the organization's response to that behaviour, the effectiveness of that statement diminishes.²¹⁷ The fact that UNHCR does not have an institutionalized reporting mechanism can be an advantage: the agency keeps a close eye on the implementation and application of the 1951 Convention through its field presence in (almost) all states parties, and does not need to go through the lengthy process of responding to extensive reports on norm compliance. When questions regarding implementation or application arise, or when states have difficulties complying with their obligations under the 1951 Convention, UNHCR is – theoretically – in the position to address these issues at once.²¹⁸

Nevertheless, the punctuality of UNHCR's supervisory task is impaired by the legislative activities that are currently undertaken in, especially, Europe.²¹⁹ One

216 See, for example, the analysis of state practice in the Netherlands, drawing attention, amongst others, to the necessity to have a more uniform practice in the post-exclusion phase (which is not mentioned in UNHCR's guidelines): Maarten P Bolhuis and Joris Van Wijk, 'Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F (b) of the Refugee Convention in the Netherlands' (2016) 29 *Journal of Refugee Studies* 1. See also the analysis of ICC witnesses and acquitted suspects who sought asylum in the Netherlands: a side-effect of hosting the ICC that has not been foreseen (neither by the Netherlands nor by UNHCR) and that raises questions with regard to the application of, amongst others, Article 1F of the 1951 Convention. Tom de Boer and Marjoleine Zieck, 'ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State' (2015) 27 *International Journal of Refugee Law* 573; Lastly, the Colloquium on Challenges in International Refugee Law, organised by Michigan Law School, producing guidelines on 'cutting-edge problems in refugee protection', has published guidelines with regard to the exclusion clauses. James C Hathaway, 'The Michigan Guidelines on the Exclusion of International Criminals' (2013) 35 *Michigan Journal of International Law* 1.

217 See §2.4.3.

218 Interview with UNHCR official #4 (n 47); Interview with UNHCR official #8 (n 103).

219 Between December 2014 and February 2016, for example, the governments of Germany, France, Italy, Denmark, Poland, Hungary, Belgium, Croatia, Austria and

of the interviewees summarized this trend eloquently: “There are now constantly new law proposals, and we only have a week or two to analyse these very comprehensive law proposals that exist within [a] very difficult legal framework. This makes it difficult to exercise our supervisory task.”²²⁰ In addition: “We don’t have pre-existing positions on everything, so we have to analyse case law, study doctrine, look at our past guidance, compare with other countries. We want to be as thorough as possible, but it can be really challenging.”²²¹ UNHCR officials working in other offices concurred with this view: the amount of legislation and court cases is “quite staggering”²²², making it difficult to, first, respond to all the legislative and judicial output, and, second, to be punctual in this response. An institutionalized reporting mechanism would not solve this problem; it would merely create a bottleneck.

Another reason why UNHCR’s punctuality may be compromised is the need for clearance within the organization by either the regional office, one of the Bureaus or the DIP. As was discussed in the paragraph on legitimacy, UNHCR has published internal guidelines on the drafting of court interventions and comments on national legislation.²²³ Both guidelines consist of rules to ensure procedural and substantive consistency: it is mandatory to submit an extensive memo on a court intervention for clearance to the DIP, and draft comments on (new) legislation always requires review by the regional bureau and, in case of a departure of previously held positions or new (doctrinal) issues, clearance at the DIP-level.²²⁴ Although this policy of internal review is beneficial for maintaining consistency (which increases the agency’s legitimacy), it is detrimental for its punctuality if it is not matched with sufficient capacity at the DIP-level. Since the DIP does not have much personnel that is involved with the supervisory task²²⁵, and it deals with the clearance of worldwide comments and court interventions, it is not surprising that a backlog is the rule rather than the exception.²²⁶ All in all, UNHCR’s punctuality arguably benefits from its presence in the territories of

Switzerland have all proposed or implemented several legislative reforms with regard to asylum, mostly taken against the backdrop of the a record number of arrivals of asylum seekers in that period of time. See AIDA, the Asylum Information Database <<http://www.asylumineurope.org>> accessed 1 July 2020.

220 Interview with UNHCR official #18 (n 204).

221 *ibid.*

222 Interview with UNHCR official #14 (n 63).

223 See §5.2.3.

224 UNHCR, Division of International Protection (n 47); UNHCR, Division of International Protection (n 51) 8–9.

225 Interview with UNHCR official #5a (n 82); Interview with UNHCR official #8 (n 103).

226 Interview with UNHCR official #5b (10 September 2014); Interview with UNHCR official #9 (n 47).

states parties, but states' substantial activities in the field of refugee law and the agency's internal clearance procedures are nonetheless the cause of serious backlogs.

5.4.3 *Capacity*

The last element of operationality, capacity, refers to the manner in which the resources that are available to the organization are used. Two aspects are particularly relevant: how are the available resources allocated within the organization, and how heavy is the supervisory workload?²²⁷ In Chapter 4, it was indicated that UNHCR has a lack of financial resources for its overall programmes, resulting in a funding gap of 45 per cent in 2019.²²⁸ How UNHCR differentiates or prioritizes between international protection, including supervision, and its material assistance task is a procedural question that cannot be answered easily.

For example, a staff member in the UNHCR Branch Office in Ankara may be involved in providing (material) assistance to non-European refugees residing in Turkey, but the same person may also be involved in extending support and expertise to the Turkish authorities in advancing its legal framework for the protection of refugees, notably the 2013 Law on Foreigners and International Protection (the national legislation in force that implements parts of the 1951 Convention and deals with the processing of individual asylum claims in Turkey).²²⁹ It is, therefore, not possible to point out exactly which part of UNHCR's budget is intended for the supervisory task and which for the agency's other activities.

Closely connected to the issue of sufficient (allocation of) financial resources is whether UNHCR has equipped itself with adequate numbers of staff with relevant expertise. Supervision is staff-intensive; therefore, a lack of financial

227 See §2.4.3.

228 See §4.4.1.

229 UNHCR, 'UNHCR Welcomes Turkey's New Law on Asylum'; UNHCR Washington, 'Fact Sheet - Questions and Answers on Resettlement of Refugees from Turkey'. UNHCR was involved in the process of drafting this law. According to a UNHCR official, UNHCR "was not irrelevant [in the drafting process]. When they [the Turkish government] did take the decision to design this law, we were extremely close in advising the government how to draft it. We pushed and pushed and pushed. The reason why it did not end as a completely bad law is certainly to a good extent due to our good relations with the government." Interview with UNHCR official #5a (n 82). Another example of this overlap between the two workflows, is when the author of this thesis worked as an intern at UNHCR's Branch Office in Nairobi, Kenya, in 2008, her colleagues from the Protection Delivery Unit provided humanitarian assistance and legal guidance directly to refugees as well as assisted the government of Kenya in drafting a new Refugee Bill.

resources will likely influence the number of personnel that is engaged with supervisory tasks. At the UNHCR Headquarters in Geneva, where roughly 1000 staff members work, it is the DIP that is primarily concerned with the supervisory task. At this department, a handful of staff members are lawyers who are actually involved with the supervisory task of agency.²³⁰ Their work covers the responsibility for the world-wide coordination of the supervisory task through legal and protection policy papers, judicial and legislative engagement, drafting Country of Origin information, organizing expert meetings, and assisting field offices with their supervisory tasks. It is difficult to deny that such a small number of staff members at Headquarters for one of UNHCR's core tasks is rather meagre. For comparison: the Human Rights Committee has 18 members who meet for about ten weeks each year²³¹, 3 special rapporteurs, and a number of civil servants working at the secretariat in Geneva.²³² On the other hand, the Committee Against Torture has 10 independent experts that monitor the implementation of the Convention Against Torture, with 5 civil servants (4 Professionals and 1 General Service Assistance) working at the secretariat in Geneva.²³³

With regard to the field offices, especially those in states with a more or less established refugee protection system (where the majority of the supervisory work is conducted²³⁴), it is, again, difficult to establish what percentage of the total work is directed towards the supervisory task. However, it is acknowledged at headquarters that there is a general lack of sufficient numbers of staff members. "We are everywhere completely understaffed. It's just accepted, and even

230 Bailliet (n 136) 2081.

231 These experts perform their roles on a voluntary basis. Yuval Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' in Marten Breuer and others (eds), *Der Staat im Recht: Festschrift für Eckart Klein zum 70. Geburtstag* (Duncker & Humblot 2013) 12.

232 However, the Human Rights Committee (as well as other monitoring bodies of UN Human Rights treaties) has just undergone budget cuts that would have 'disproportionately serious consequences on the implementation of international human rights law'. See Nick Cumming-Bruce, 'Budget Cuts May Undercut the U.N.'s Human Rights Committees' *New York Times* (24 May 2019) <<https://www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>> accessed 1 July 2020. See also OHCHR, 'UN Budget Shortfalls Seriously Undermine the Work of the Human Rights Treaty Bodies' (17 May 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24621&LangID=E>> accessed 1 July 2020.

233 CAT Secretariat, 'Re: Inquiry for Research - Number of Personnel Working at the Secretariat' (2 November 2018) (response to an email sent on 2 November).

234 Interview with UNHCR official #5a (n 82); Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 11) 11.

[among] ourselves we don't say it openly."²³⁵ Within the field offices itself, one of the challenges that has been identified is, indeed, the lack of personnel resources. At least three interviewees pointed out that their offices have difficulty in keeping up with the amount of work that requires supervision, such as new pieces of legislation and the follow-up of court interventions and judicial outcomes.²³⁶

5.4.4 Reflection

UNHCR has acquired a position for itself that is unlike any other international monitoring body; a position that is very instrumental in carrying out the agency's supervisory task. The presence of UNHCR field offices in the vast majority of states parties to the 1951 Convention and its involvement in domestic procedures is an enormous advantage that the agency has when compared with other monitoring bodies.²³⁷ As such, the agency has been very successful in gathering the information necessary for an effective exercise of its supervisory task; which perhaps is also the reason why UNHCR has not put in a great deal of effort to go through the formal process of obtaining information via Articles 35(2) and 36. Going back to Weber's theory on bureaucratic power, it is not just the control over information, but also the fact that UNHCR can transform this information into knowledge, *i.e.* to give meaning to this information through interpretation and comparison, that is at the heart of the agency's power.²³⁸ The close cooperation between UNHCR and numerous NGOs in respect of this task is another means of ensuring that the agency can access the information it needs and turn it into knowledge.

However, despite these advantages, the lack of an institutionalized reporting mechanism still had consequences for the effectiveness of the agency's supervisory task. Staff members are now responsible for gathering information about the implementation and application of states' obligations under the 1951 Convention. The number of staff members who are conducting the supervisory task is, however, relatively low, as has been pointed out above. It is thus quite burdensome and overwhelming for these staff members to collect and analyse the enormous amount of information that is available and stay abreast of

235 Interview with UNHCR official #5a (n 82).

236 Interview with UNHCR official #12 (n 28): "It is a real challenge to keep up with the speed of legal developments [...]"; Interview with UNHCR official #13 (n 63): "We are only a small office, and there's a lot that we could do but we just can't."; Interview with UNHCR official #14 (n 63): "We sometimes try to follow up, but it's resource intensive, so we don't do it as much as we want to. We do it to a certain extent but we would like to do more."

237 Türk, 'UNHCR's Supervisory Responsibility' (n 16) 153.

238 HH Gerth and C Wright Mills, *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 232–235, in; Barnett and Finnemore (n 7) 29.

developments, as is also pointed out by several interviews by UNHCR officials.²³⁹ This is a handicap that also affects the punctuality of the supervisory work. In addition, since there is no structured information gathering mechanism, the process may differ in the various offices, depending on the capacity and expertise of staff members, the priorities of the office or the relationship with civil servants.

Moreover, despite the high expertise of the agency's staff (discussed under 'legitimacy'), UNHCR is hampered in carrying out its supervisory task due to the lack of resources and staff members. Because of the scarcity of financial resources, the supervisory task has to compete for funding with the material assistance work of UNHCR. In addition, one of the interviewees stated that it is not always clear for outsiders (especially donors, but also the general public) why it is necessary to spend resources on the supervision of already more or less adequate refugee protection systems in industrialized countries when at the same time children are dying in refugee camps in Syria and Sudan.²⁴⁰

However, material assistance can also induce state compliance with treaty obligations under the 1951 Convention. One article that analysed a case study in Tanzania suggested that the decline in funding for the humanitarian protection programme in Tanzania, which was both a result of waning interests by donor government and decisions made in UNHCR's Headquarters, led to a deterioration of the Tanzanian government's willingness to comply with its obligations to protect refugees.²⁴¹ Spending resources on the material assistance task and thus achieving goodwill can thus also be an effective manner in achieving compliance. Unfortunately, this has been the only example in scholarly articles on this subject.

239 Interview with UNHCR official #5b (n 226); Interview with UNHCR official #12 (n 28); Interview with UNHCR official #13 (n 63); Interview with UNHCR official #14 (n 63).

240 'Our work is downplayed. And then comes the killer argument: we should spend the money on some poor children who are about to die.' (n 82).

241 Whitaker (n 101).