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The effectiveness of UNHCR's supervision

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

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Publication date

2021

Document Version

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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].

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Chapter 6

Proposals for alternative structures and procedures

6.1 Introduction

The previous chapters have addressed the structural and procedural challenges that hamper UNHCR in carrying out its supervisory task effectively. As was mentioned in Chapter 1, these challenges have not gone unnoticed by the academic community and others (such as states). Increasingly since the late 80s, scholars have been identifying several issues with the supervisory task, but many of them have gone beyond merely criticizing the agency. A large number of proposals have been put forward to remedy these issues as well. As it is not this study's aim to reinvent the wheel, these proposals could be a good starting point for addressing the weaknesses in structure and procedure as identified in the previous two chapters. This chapter will therefore explore many of such proposals, in particular the ones that are either very elaborative in their analysis (signifying that a lot of effort has been put in developing them) or that have been mentioned by several scholars on different occasions. The advantages and drawbacks of all proposals will be discussed. Reference will be made to the general framework as discussed in Chapter 2 and the obstacles that currently interfere with the effective supervision of states compliance with the 1951 Convention.

Therefore, this chapter will start with an overview of what framework gaps need to be attended to, looking at the structural and procedural challenges that UNHCR is facing. It then continues with a scrutiny of the proposals, some of which are quite modest, addressing improvements within UNHCR's institutional framework, whereas others are more ambitious, proposing to set up new mechanisms of supervision. The discussion of these proposals is structured as follows: first, proposals that reinforce and improve the supervisory structure and procedures of UNHCR that are already in place will be discussed. Second, proposals that broaden or deepen the supervision of the 1951 Convention but that still attribute a significant role to UNHCR will be examined. Third, the proposals that discuss supervisory mechanisms outside UNHCR's institutional settings by establishing new mechanisms, instruments or bodies, will be analysed. All proposals will be set against the framework and the structural and procedural

challenges as identified in the previous chapters so as to assess whether they indeed are capable of remedying the problems identified in this thesis.

6.2 Filling the gaps

In Chapter 2, a framework for effective supervision was developed; a framework through which international organizations can authoritatively interpret norms, monitor state behaviour and enforce compliance with the norms.¹ These three phases of supervision are the output that ultimately should trigger states to comply with the international norms they pledged to uphold. They speak to the different motives (or changing motives over time) for states to comply with their obligations and should therefore preferably all be used by the supervisory body to increase compliant behaviour of states. This output is the direct result of various activities (the input): structural and procedural elements that were subdivided in elements that are under the sphere of control of mandate providers - four structural elements - and those that are under the sphere of control of the organization itself - three procedural elements. Together, they would ideally lead to states parties to the 1951 Convention valuing UNHCR's output (the three phases of supervision), and ultimately to compliant behaviour.²

From the analysis in Chapter 4, it became apparent that UNHCR's structure does not meet the threshold of any of the four structural elements that are identified as preconditions for effective supervision. Especially the insignificant legal basis and powers for UNHCR to monitor states' compliance and to enforce the norms states have signed up for and the lack of sufficient financial resources impede the effective supervision by the agency. UNHCR officials also acknowledge that one of the biggest challenges that UNHCR is facing with regard to the execution of the supervisory task is both 'the lack of proper enforcement mechanisms' and 'financial constraints'.³

The insufficient manner in which the mandate providers have set up UNHCR, *i.e.* the agency's structural deficiencies, negatively impact on two of the three phases of supervision: monitoring and enforcement. Monitoring and

1 See §2.5.

2 See Diagram 2 on p. 57.

3 Interview with UNHCR official #3 (oktober 2013); Interview with UNHCR official #11 (10 September 2014); Interview with UNHCR official #12 (6 November 2014); Interview with UNHCR official #13 (12 November 2014); Interview with UNHCR official #14 (10 November 2014); Interview with UNHCR official #16 (7 April 2015); Interview with UNHCR official #17 (16 January 2016); Interview with UNHCR official #18 (16 January 2016); Interview with UNHCR official #21 (23 March 2016); Interview with UNHCR official #22 (23 March 2016).

enforcing are particularly important to induce compliance of states that are motivated by external stimuli for complying with their international obligations; *i.e.* states that adhere to the instrumentalist or realist approach. On the other hand, interpretation, the first phase of supervision, that in particular caters to states that comply with international norms because it is the morally right thing to do (besides that complying with the norms is a legal obligation), is an output in which UNHCR seems to be quite successful. The agency has been given sufficient power by its mandate providers, in particular ExCom, to interpret the 1951 Convention and provide authoritative guidance through, amongst others, its Handbook and Guidelines on International Protection. States, the most important stakeholders of UNHCR, have valued this output as well; in particular the judicial branches of government.⁴ The agency also has the possibility to request states parties to the 1951 Convention for information and statistical data with regard to the condition of refugees, the implementation of the Convention, and any legal rules relating to refugees. As set out earlier, this monitoring power is rather weak.⁵

Within a structure that is not adequate to enable effective supervision, it is not surprising that many procedural elements of UNHCR's supervisory task are not adequate either. This, however, is not only due to the structural inadequacies, but is also closely connected to the agency's work as a direct provider of refugees' protection. This operational, humanitarian work has become part and parcel of UNHCR's international protection function; a function that also encompasses the supervisory task. The two tasks often go hand in hand and even reinforce each other, but sometimes also compete. For example, UNHCR has been able to attain a great deal of expertise and access to information, precisely because the agency has a presence on the ground.⁶ However, in Chapter 5 it was submitted that UNHCR sometimes prioritizes the operational aspects of its work over its supervisory task, resulting in, amongst others, inconsistent responses to non-compliant behaviour by states (or no responses at all) and a lack of political

4 See, in particular, the statements of the Supreme Court of Canada and the High Court of Australia in Chapter 5, in §5.2.2.

5 See §4.3.4.

6 The much-used phrase 'in the field' refers to the work UN agencies and (I)NGOs perform in countries in the Global South, irrespective of the actual place (rural areas, villages, cities) where the work is conducted. The phrase is harmful though, a way to 'other' the people who live in these places. In this study, the phrase is avoided as much as possible, and replaced by 'on the ground'. See also 'Secret Aid Worker: "the Field" Is Not a Lab Where You Can Experiment without Consequence' *The Guardian* (12 July 2016) <<https://www.theguardian.com/global-development-professionals-network/2016/jul/12/secret-aid-worker-field-fieldwork-neocolonial-vocabulary>> accessed 1 July 2020.

independence. In addition, UNHCR has not been very successful in implementing the factors participation and transparency in its international protection work, nor has it allocated enough capacity to fulfil its supervisory task.

The framework as formulated in Chapter 2 described an ‘ideal’ situation against which effective supervision can be evaluated. When juxtaposing UNHCR’s current structure and procedures against this framework, it became clear what is currently in accordance with that framework, and which parts of its structure and procedures are manifestly inadequate. Based on this framework, it subsequently also became clear where reforms are needed. This means that proposals that try to improve the supervision of the 1951 Convention have to specifically increase the monitoring and enforcement of states’ compliance, which is the main concern coming out of Chapter 4. They should also improve the procedural aspects as mentioned in Chapter 5, enhancing the political independence, consistency, participation, transparency and capacity of UNHCR’s supervision.

6.3 Reinforcement

The various proposals that have been made regarding reinforcement of the current supervisory processes are all quite straightforward, in the sense that they challenge UNHCR to do more of what the agency is already doing. Illustrative for this is the call for reinforcement by the delegates at the Ministerial Meeting of States Parties to the 1951 Convention, a meeting that was part of the Global Consultations in 2001, by enhancing the current supervisory mechanisms of UNHCR rather than creating new ones.⁷ However, as will be evident from and substantiated in the following sections, scholars have not spent a lot of time on proposals that enhance UNHCR’s current supervisory task; most have instead submitted more elaborate proposals, broadening the agency’s supervisory task or suggesting alternatives outside of UNHCR’s institutional setting. There are therefore only a few proposals to reinforce the agency’s supervisory task that will be highlighted in this ‘do it more and do it better’ section: to issue more Guidelines on the international refugee law regime, to increase the participation of persons of concern in the supervisory task, and to speak out more publicly on violations of treaty obligations.

⁷ So, this was a proposal not put forward by scholars, but by states themselves. Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, ‘Chairperson’s Report on Roundtable 1: “1951 Convention and 1967 Protocol Framework: Strengthening Implementation”’ (2001).

6.3.1 *More General Comments*

UNHCR has already borrowed various supervisory elements that are employed by the human rights treaty bodies. One of these elements is the issuing of Guidelines on International Protection, supplementing UNHCR's Handbook. These Guidelines are similar to the 'general comments' or 'general recommendations' made by each of the treaty bodies, through which they provide their interpretation of the provisions of their respective human rights treaties.⁸ UNHCR has since 2002 issued thirteen of these guidelines. The guidelines, like the general comments, are an authoritative source for governments, legal practitioners and decision-makers. It has been argued that the guidelines are "one of the most influential means for UNHCR to further the development of refugee law principles and standards".⁹ It has therefore been proposed that UNHCR should issue more of them, which would allow the agency to contribute even more to the development of refugee law principles and standards, as well as reconcile issues of interpretation on disputed concepts.¹⁰

The idea of increasing UNHCR's interpretative output through its Guidelines on International Protection is appealing. Like the general comments of treaty bodies, they are an important source for interpreting specific provisions of the 1951 Convention, and they contribute to the progressive development in human rights law.¹¹ It has to be noted, however, that (more) guidelines should not replace the ongoing dialogue that UNHCR has with states (both at the national level and with the different branches of government) - which might be a consequence if existing capacity is directed towards developing guidelines instead of this dialogue. As the guidelines are rather abstract, a dialogue provides for much more

8 Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 22.

9 C Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution' (2005) 17 *International Journal of Refugee Law* 67, 81.

10 *ibid* 89; Volker Türk, 'UNHCR's Supervisory Responsibility' (2002) 14 *Revue Quebecoise de droit international* 135, 155; 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) 15. In comparison to the 13 Guidelines UNHCR has published: the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have both issued 35 general comments (since 1981 and 1972 respectively), the Committee on the Elimination of Discrimination against Women has issued 29 general comments since 1986, and the Committee on Economic, Social and Cultural Rights has issued 23 general comments since 1989..

11 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).

technical and specific advice tailored to the need and specific circumstances of implementation by individual states; of course based on the guidance the agency has given in its guidelines. These dialogues that the agency has with governments, or more in particular with the civil servants that are transposing, interpreting and applying refugee and asylum law, have been qualified as an effective means of guiding states in their compliant behaviour.

In addition, general comments are not very timely - the Committee Against Torture produces one every 2.5 years. The same is true for UNHCR's Guidelines. Although anecdotal, the Guidelines on the Application of the Exclusion Clauses were first published in 2003 and have been in the process of being updated to accommodate the developments in state practice, case law and academic analysis since 2011 - which means that these Guidelines have been not up to date since 2011. At this moment, new developments through case law or scholarly contributions, or progressive thinking on certain legal issues by UNHCR itself, will find its way to states parties to the 1951 Convention quicker through the regular dialogues the agency has than through updated or new Guidelines. That being said, publicising UNHCR's interpretation of the 1951 Convention and its clauses in a public form is more transparent, which is one of the procedural factors of effective supervision that indeed needs to be addressed. In addition, the issuing of more guidelines is helpful to ensure that states interpret the 1951 Convention in a uniform manner - something that might be lost when UNHCR only resorts to dialogue with individual states. All in all, UNHCR is already quite well-endowed with interpretational powers (the first phase of supervision), and it would not hurt if these powers are used more extensively by publishing more Guidelines, but they are not the panacea for the main challenges regarding the agency's supervisory task.

6.3.2 More involvement and participation

The most important stakeholders for UNHCR are its mandate providers and the states parties to the 1951 Convention. Through trial and error, the agency is actively seeking the participation of states in, for example, the issuing of new guidelines, or through high level processes such as the Global Consultations and the Global Compact on Refugees. There are no scholars that propose that the involvement and participation of states need to be increased. However, some scholars have argued that greater involvement and participation of persons of concern and their organizations would increase UNHCR's accountability, as they are the ones who are most affected by a correct interpretation,

implementation and application of the 1951 Convention.¹² Apparently, this involvement would go beyond the agency's humanitarian operations, where indeed more participation needs to be stimulated.¹³ It would include "listening and responding to refugees; informing them about their rights and the activities undertaken on their behalf and for them; reporting to them on the outcome of these activities; and handling individual complaints or concerns".¹⁴

The importance of participation by so-called affected communities is increasingly being recognized in the humanitarian sector. The New York Declaration for Refugees and Migrants and its Annex 1¹⁵ make explicit reference to the participation of refugees and their organizations in the process of developing the Global Compact on Refugees. As key stakeholders, refugees' participation in developing and operationalizing refugee policies is essential to ensure that what is being intended for refugees is not planned and implemented without them.¹⁶ Indeed, one of the recommendations of UNHCR's Annual Consultations with NGOs in 2017, that focused on the Global Compact, was to give refugees and their organizations a role in planning new refugee policies, including by defining protection strategies with refugees.¹⁷ UNHCR agrees that refugees are key stakeholders, and that their voices should be heard and their views taken into account; especially in the process of revitalising the refugee protection regime through the Global Consultations.¹⁸ However, how precisely the participation of refugees and refugee organizations with regard to the supervision of the 1951 Convention (rather than with regard to the agency's humanitarian responses) needs to be implemented or structuralized does not

12 See in particular Ferris, 'The Role of Non-Governmental Organizations in the International Refugee Regime' in Niklaus Steiner, Mark Gibney and Gil Loescher (eds), *Problems of Protection: The UNHCR, Refugees, and Human Rights* (Routledge 2012) 136–137. But see also Hathaway, who said: 'There has not really been a genuinely inclusive range of voices, including those of refugees themselves, brought into the supervisory process.' James C Hathaway, 'Who Should Watch over Refugee Law?' (2002) 14 *Forced Migration Review* 23, 24.

13 Based on the adage 'nothing about us, without us'. See also Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 10) 17–18.

14 Deirdre Clancy, 'Reflections on Accountability and Refugee Protection' (2001) 3 *Talk Back - The Newsletter of ICVA* 16, 18.

15 UNGA, 'New York Declaration for Refugees and Migrants' (2016) A/71/L.1.

16 Discussion paper, 'Refugee Voices in the Global Compact' (2017).

17 'NGO Reflection Paper on the Global Compact on Refugees' (2017) 2 <<http://www.unhcr.org/events/conferences/595fc1427/ngo-reflection-paper-global-compact-refugees.html>> accessed 1 July 2020.

18 UNHCR, 'Global Consultations: Listening to Refugee Voices' <<http://www.unhcr.org/3c0b819c3.pdf>>.

become clear from these sources nor from scholars' suggestions.¹⁹ As this study has not identified that the lack of refugee voices in UNHCR's supervision is hampering the agency in its work, or that it has a negative effect on its effectiveness, this will not be further considered.

NGOs, as implementing partners of UNHCR but, for this thesis more relevant, as advocates for people of concern to the agency, are other important stakeholders. Sometimes, these NGOs have more leverage over governments than UNHCR, which is an important reason to work more closely together.²⁰ Scholars have suggested that a strengthened partnership of UNHCR with NGOs could be achieved through the appointment of experts (see under 6.3.1), by giving NGOs a role in identifying specific issues, situations or countries to be reviewed by UNHCR, by developing a method for coming together in a non-confrontational setting to share information on protection concerns, or by the submission of views during systematic monitoring systems and possibly even country visits of UNHCR.²¹ The need for a close relationship with NGOs has been acknowledged within UNHCR²², resulting in many large-scale meetings in Geneva, most importantly the annual UNHCR-NGO consultations, but also the High Commissioner's Dialogue on Protection Challenges and the joint statements, facilitated by the International Council of Voluntary Agencies, at

19 Hathaway, 'Who Should Watch over Refugee Law?' (n 12) 24.

20 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. Okoth-Obbo mentioned the specific example of BRAC (a development organization) that has more voice and power to influence the government of Bangladesh on the issue of protection for Rohingya refugees than UNHCR.

21 Deirdre Clancy, 'Some Options for Supervising the 1951 Convention' (2001) 3 *Talk Back - The Newsletter of ICVA* 14, 15; Ferris (n 12) 136; *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection Into the 21st Century* (Routledge 2008) 90–91; Türk, 'UNHCR's Supervisory Responsibility' (n 10) 156.

22 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) 8. See also the following frank statement from Okoth-Obbo, UNHCR's Assistant High Commissioner for Operations: "On advocacy NGOs: how do we optimise this power of voice so that most of the energy is spend in the right direction? Because quite a lot of the energy we spend 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. But we need to be joined in an enterprise together, writing research and positions. It may come out as 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 defensive, which is wasting energy. So, if there is a way, we must maximize our collective voice, our collective energies, towards common action." IRIN (n 20).

ExCom meetings. However, besides these formal interactions, there is also a need for (more) smaller scale off-the-record meetings in which UNHCR and the NGO community can “grapple together with the difficulties in increasing refugee protection in concrete cases”.²³ For this to happen, the relation between UNHCR and NGOs need to be fortified. Now, UNHCR sometimes deems NGOs too one-sided and provocative, and as not being appreciative of the often political, financial and diplomatic restrictions under which UNHCR has to carry out its tasks, including supervision.²⁴ NGOs on the other hand perceive UNHCR sometimes as being too unassertive with governments that violate their obligations under the 1951 Convention.²⁵ For an increased interaction between UNHCR and NGOs to succeed, it is important to improve trust between the two.²⁶

6.3.3 *More public reporting*

One of the first proposals ever made by a scholar on the topic of enhancing UNHCR’s supervisory task, was introducing the concept of state reporting on a regular basis, with the reports being made public. It was proposed by Lentini in 1985, more than 30 years ago, who submitted that a rigorous reporting mechanism, including the publication of these reports for discussion in the General Assembly, would fortify ‘fair, consistent and impartial’ actions under the 1951 Convention.²⁷ Lentini drew inspiration from the International Labour Organization and Amnesty International for using similar procedures to persuade states in complying with their treaty obligation.²⁸ Similarly, other scholars have looked at the treaty body reporting mechanism for ways of communicating with states in a public forum on their protection arrangements for asylum seekers and refugees.²⁹ This public nature is an important part of the accountability for human rights compliance by states. It also shows what the human rights monitoring bodies are actually doing. In other words, the public (or

23 Ferris (n 12) 136; SeaWatch et al, ‘Open Letter to UNHCR’ (July 2018) <<http://no-racism.net/upload/389022904.pdf>> accessed 1 July 2020.

24 Ferris (n 12) 135; Interview with UNHCR official #7 (9 September 2014); Interview with UNHCR official #24 (14 June 2017); IRIN (n 20).

25 Ferris (n 12) 136; SeaWatch et al (n 23).

26 Okoth-Obbo has suggested that UNHCR and NGOs need to find a way to ‘maximize our collective voice, our collective energies, towards common action.’ He did not offer any concrete steps that should be taken in order to maximise the collective efforts though. IRIN (n 20).

27 Elizabeth J Lentini, ‘The Definition of Refugee in International Law: Proposals for the Future’ (1985) 5 Boston College Third World Law Journal 183, 196.

28 *ibid.*

29 Türk, ‘UNHCR’s Supervisory Responsibility’ (n 10) 156–157.

transparent, as mentioned in Chapter 5) nature of reporting increases accountability for all actors involved.

Within UNHCR, the importance of conducting supervision more publicly is acknowledged and proposed as well³⁰, although emphasis lies on creating an obligation for state parties: “more formal and annual reporting to UNHCR would be a step towards improved public accountability”.³¹ Scholars, who criticize UNHCR for remaining silent in the case of non-compliance by a state party to the 1951 Convention because of its dependency on the monetary goodwill of these states, argue that the burden lies on the agency to speak out more forcefully, including publicly, on violations of treaty obligations.³² One way to follow up on this proposal is by investing in and formalizing the agency’s annual protection reports, which field offices put together and currently submit confidentially to Geneva, and which are being used to monitor and report on protection standards.³³

The idea of a more formal reporting procedure was discussed with scholars and government officials under the lead of the DIP in 1997.³⁴ According to the report of the meeting, the officials thought it would be feasible to consider the annual protection reports as the basis for an institutionalised dialogue.³⁵ It is encouraging that states suggested this alternative of a state-based reporting procedure; an alternative that can easily be implemented as these protection

30 Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 10) 18.

31 Alice Edwards, ‘Peter Pan’s Fairies and Genie Bottles: UNHCR, the UN Human Rights Treaty Bodies and “Complementary Supervision”’ in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 171.

32 James C Hathaway, ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 *Journal of Refugee Studies* 113, 115; BS Chimni, ‘The Changing World Order, the Structural Role of Humanitarian NGOs, and the Protection of Displaced Persons and Migrants’ (2003).

33 ‘The annual APRs are comprehensive, country-specific reports describing the protection environment and implementation of activities, allowing the Office to monitor protection developments in all operations, including as regards the implementation and impact of UNHCR protection activities.’ in: UNHCR, ‘Measuring Protection by Numbers (2005)’ (2006). See also Saul Takahashi, ‘Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention’ (2002) 20 *Neth. Q. Hum. Rts.* 53, 74; Türk, ‘UNHCR’s Supervisory Responsibility’ (n 10) 157.

34 Karen Landgren, ‘New Issues in Refugee Research, Working Paper No. 10: Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests’ 63.

35 UNHCR, ‘Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It’ (Standing Committee 1997) EC/47/SC/CRP.27 para 9.

reports are drafted yearly. “This type of reporting would not place on governments the initial onus of preparing written material.”³⁶ This is important as states are likely not very keen on taking on an another reporting obligation; illustrative of which is the experience with the reluctance of states to fill in the questionnaires sent by UNHCR in 1969, 1990 and 2008. A more formal reporting procedure would likely also professionalize the standard of review, compel UNHCR to systematically evaluate all articles of the 1951 Convention and encourage the agency to have a position on non-compliant behaviour of all states parties.³⁷ Periodic (public) meetings based on these reports would, however, “undesirably politicize the process” according to most government participants.³⁸

An even better step “towards ensuring openness and accountability” would be to publicize these the annual protection reports.³⁹ Although currently the process of writing these reports does not provide an opportunity for NGOs or other stakeholders to influence and discuss the outcomes with UNHCR, focusing on the annual protection reports would enhance the monitoring and possibly the enforcement phase of supervision and make these phases more public and transparent. In addition, UNHCR could consider to invite NGOs and other stakeholders to participate in the process by means of making a submission, as well as to get a broader overview of protection issues that might be overlooked by the agency.⁴⁰ As explained earlier, publicly calling out states that fail to uphold their obligations under the 1951 Convention sends a strong message not only to these states, but also to other states that they cannot silently get away with violating their treaty obligations.⁴¹ This kind of supervision, which could be harmful for a state’s reputation, is most likely to trigger those states that are persuaded by external stimuli and self-interest to comply with their international obligations. As UNHCR’s output aimed at this kind of states is still underdeveloped, public reporting could be a way to strengthen this output.

6.4 Expansion

This section will discuss the proposals of scholars to broaden or deepen the supervision of the 1951 Convention by creating new tasks for UNHCR or by seeking to adopt new supervisory mechanisms while still attributing an important

36 Landgren (n 34) 64.

37 *ibid.*

38 UNHCR, ‘Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It’ (n 35) para 9.

39 Landgren (n 34) 64; Takahashi (n 33) 74.

40 Türk, ‘UNHCR’s Supervisory Responsibility’ (n 10) 156.

41 See §2.2.2 and §4.3.4.

role to the agency. The following three proposals have been the most prominent in scholarly discussions: establishing a Special Committee of Experts to the High Commissioner⁴², linking up to other human rights treaty monitoring bodies⁴³ and establishing a Special Committee of ExCom.⁴⁴

6.4.1 Special Committee of Experts to the High Commissioner

On several occasions, UNHCR made use of the knowledge that exists outside the agency on international and national refugee law and policy. For example, in drafting new Guidelines on International Protection, UNHCR now regularly asks for external input. Additionally, staff members of the DIP often participate in academic conferences and other fora to consider and discuss ways to enhance refugee protection.⁴⁵ Many scholars, however, would like to see this intellectual exchange to be institutionalised. They recommend that the High Commissioner should have available to him a group or Committee of eminent advisors, experts in the field of refugee and asylum law, who would report to him on a multitude of issues. Some say these experts should submit regular reports “on the implementation of international instruments on a country, regional or thematic basis”.⁴⁶ Others argue that such a Committee should be able to issue advisory opinions on interpretation and application of the 1951 Convention, not only at the request of the High Commissioner, but also on its own initiative or when national courts appeal to it.⁴⁷ There should, at the minimum, be a mechanism in place that allows for constant consultation between this group of experts and the

42 Editorial, ‘An Independent Advisory Group to Supervise the Convention?’ (2001) 3 Talk Back - The Newsletter of ICVA 20, 20; James C Hathaway, Anthony M North and Jason Pobjoy, ‘Supervising the Refugee Convention - Introduction’ (2013) 26 *Journal of Refugee Studies* 323, 325; Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 10); James C Simeon, *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 25.

43 Edwards (n 31); Takahashi (n 33).

44 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); Simeon (n 42) 26–27; 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).

45 See, for example, UNHCR’s attendance and participation at the conferences of the International Association of Refugee and Migration Judges (see, for the agendas of these meetings: <<https://www.iarlj.org/events>> assessed 1 July 2020).

46 Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 10) 19.

47 Editorial (n 42) 20; Hathaway, North and Pobjoy (n 42) 325.

High Commissioner.⁴⁸ Recommendations this group of experts could draft would not only be about the law, but also on responsibility sharing or on more comprehensive actions; issues that are not regulated in the 1951 Convention but are important for refugee protection.⁴⁹ The proposal to institute such a Committee of Experts would link “UNHCR’s institutional expertise with insights and understandings derived from the application and interpretation of the Convention in relation to the hard facts of real cases from around the world.”⁵⁰

The idea to institute a Committee of Experts is comparable with the suggestion of appointing Special Rapporteurs for fact-finding missions.⁵¹ These Rapporteurs could write a report on a specific country or on specific themes, including on protection issues in countries that are not states parties to the 1951 Convention.⁵² These reports could then either publicly be discussed in ExCom or dealt with privately by the High Commissioner, depending on the subject matter.

These ideas, especially the ones establishing a Committee of Experts, have been around for quite some time, and do not come out of the blue. Most international human rights treaties have a similar Committee, to monitor the implementation of the treaty provisions and to advise states on how to fulfil their treaty obligations. One of the most comprehensive suggestions to fit such a Committee within UNHCR’s institutional framework was submitted in 2001 in an editorial in *Talk Back*, the newsletter of the International Council for Voluntary Agencies (ICVA), and thus guided mainly by the desire to include civil society organisations in the process.⁵³ Summarizing the argument of the authors, the work of a Committee should be guided by two principles: openness and independency. The authors argued that the High Commissioner should appoint the persons serving in the Committee, but that NGOs and civil society should have a formal role in suggesting suitable candidates as well. Persons that qualify for the Committee should not have any political aspirations; they could be former judges that served at the ICJ or on national Supreme Courts.⁵⁴ The Committee would work closely with the High Commissioner and have full access to all the agency’s information, but it should also be independent, with its own secretariat and funded by donations of private and public institutions.⁵⁵ In addition, any question directed at the Committee should be considered in public, so that civil

48 Hathaway, North and Pobjoy (n 42) 326.

49 Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 10) 19.

50 Hathaway, North and Pobjoy (n 42) 326.

51 Kälin (n 44) 643–645; Landgren (n 34).

52 Kälin (n 44) 643–645.

53 Editorial (n 42) 20–21.

54 *ibid* 20.

55 *ibid*.

society organizations could inform the process. The outcome of the consideration should also be made public and sent to the High Commissioner, who can forward it to the state concerned (in case the consideration relates to an act or omission in breach of its obligations under the 1951 Convention) or to ExCom.⁵⁶ Other scholars have suggested that the way the Committee operates should be an inclusive consultation process that would allow states parties to the 1951 Convention to voice their ideas.⁵⁷

At a 2010 York Conference⁵⁸, establishing of a Committee of Experts was discussed, and most people attending were sympathetic of the idea. One advantage of the proposal is that it taps into the expertise that exists outside the agency. Another advantage is that the establishment of a Special Committee (or appointing Rapporteurs) does not require an additional protocol or an amendment of the 1951 Convention: there are no mandate-related bars to prevent the High Commissioner (or ExCom) from establishing a Committee or appointing Rapporteurs.⁵⁹ However, some scholars did envision that an optional or additional protocol would need to be created if the Committee would have the responsibility for authoritatively determining how the Convention is to be interpreted.⁶⁰ These scholars did not explicitly state that this should be done by or under the direction of UNHCR, so this proposal will be further discussed in the next section. Two other advantages of the proposal are that they would contribute to making the supervisory regime of the 1951 Convention more transparent and participatory, especially if the suggestions of the ICVA as mentioned above are taken on board.

The suggestions made by scholars on establishing a Committee of Experts or appointing Rapporteurs suffers from some drawbacks and have received some particular fierce criticism.⁶¹ First, the question is whether this Committee would add anything to the current supervisory output of UNHCR, whose expertise is already one of its stronger features. For example, the agency focuses already on delivering high quality guidance to national courts through its *amicus curiae* briefs.

56 *ibid* 21.

57 Simeon (n 42) 25.

58 Centre for Refugee Studies, York University, York 2010 International Conference: Forced Displacement, Protection Standards and the Supervision of the 1951 Convention and its 1967 Protocol and other International Instruments 2010.

59 Landgren (n 34) 65.

60 Leanne MacMillan and Lars Olsson, 'Rights and Accountability' (2001) 10 *Forced Migration Review* 41.

61 'A layer of "experts" at the top of the "pyramide" seems to me to be the least desirable initiative and a poor use of resources.' Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 *International Journal of Refugee Law* 651, 656–657.

UNHCR submits these briefs solicited and unsolicited. Although these briefs do not have legal authority, some states have recognized, pursuant to Article 35 of the 1951 Convention, that UNHCR can intervene when a state party is considered to be failing in its correct implementation and application of the Convention.⁶² No matter how good the output of a Committee of Experts would be, it would lack this link with Article 35 - especially if the Committee would work independently and at arm's length from the High Commissioner and the DIP. Accordingly, its output would be less authoritative than anything coming directly from the High Commissioner's office.

Secondly, differences in the Committee's interpretation of the law with that of UNHCR might cause confusion or, in the worst-case scenario, a race to the bottom by states who would cherry-pick which interpretation best suits their national interests rather than the interests of those seeking international protection. In that regard, Türk's concern that the work would overlap with or even take on that of the DIP or that it would weaken the authority of the High Commissioner is not unfounded.⁶³ As inconsistent responses are already undermining the current supervisory regime, adding another possibility for differences in interpretation is a risk that should not be taken lightly.

Third, it remains unclear whether the reports that would be drawn up by this Committee would trigger any action from state parties. Simeon points out that similar reports in other treaty monitoring mechanisms are often dismissed or even ignored, making it questionable whether they would have any impact on state compliance.⁶⁴ Fourth and last, former judges from the ICJ or national Supreme Courts who are selected to take a seat in the Committee, enjoy a high esteem, but they do not necessarily possess particular expertise on or experience with refugee law. They are also not *per se* experts on 'the hard facts of real cases from around the world', as is necessary according to Hathaway and others⁶⁵; rather, they would be far removed from the real issues faced by people in need of international protection.⁶⁶ Therefore, if such a Committee would be established (despite the objections on the output of such Committee raised here), it would be better served with eminent scholars and practitioners in the field of refugee law and policy, and

62 This is presumably mostly the case in common law countries. Guy S Goodwin-Gill, 'The Queen (Al-Rawi and Others) v Secretary of State for Foreign and Commonwealth Affairs and Another (United Nations High Commissioner for Refugees Intervening)' (2008) 20 *International Journal of Refugee Law* 675, 697.

63 Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 10) 16.

64 Simeon (n 42) 25.

65 Hathaway, North and Pobjoy (n 42) 326.

66 Goodwin-Gill, 'The Dynamic of International Refugee Law' (n 61) 657.

with those who are part of the grass-root advocates that have done so much for refugee protection.⁶⁷

6.4.2 More connectedness between UNHCR and other human rights treaty bodies

The monitoring bodies of the human rights treaties also review information retrieved from states' reports and others, mostly NGOs, on their compliance with treaty obligations, discuss this information with state officials, and draw up recommendations for state parties on how to improve the implementation of their treaty obligations. In addition, these bodies adopt General Comments, as discussed above in section 5.2.1. Instead of establishing a Committee of Experts to the High Commissioner with limited powers (as any legal powers require an additional Protocol to be drafted), some scholars argue that UNHCR can instead establish a closer relationship with these already existing committees, benefitting from the possibilities that they offer.⁶⁸ These possibilities include the state reporting mechanisms, in which UNHCR could play a more prominent role through the submission of information and statistics or through reviews of draft reports⁶⁹, through the publication of General Comments, for which UNHCR could provide input, or through the Special Rapporteurs and special procedures of the Human Rights Council, in which UNHCR can be considered as one of the experts that is relied on for information.⁷⁰

UNHCR's involvement with the treaty monitoring body of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) provides a glimpse of how such relationship would look like. UNHCR has been working with the CEDAW Committee for a number of years.⁷¹ According to Edwards, this collaboration has very likely contributed to the highlighting of refugee and asylum issues in the CEDAW Committee's reports.⁷² For example, in 2009, a seminar was organized that discussed the ways in which UNHCR and the CEDAW Committee could strengthen their cooperation, "in order to increase the capacity of women of concern to UNHCR around the world to enjoy

67 *ibid* 656–657.

68 Edwards (n 31); Takahashi (n 33).

69 Andrew Clapham, 'UN Human Rights Reporting Procedures: An NGO Perspective' in Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 176.

70 Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201.

71 Edwards (n 31) 169.

72 *ibid*.

and exercise the rights to which they are entitled under the CEDAW”.⁷³ One of the issues raised was the practice of UNHCR to provide confidential comments on acts or omissions of states parties for consideration of the CEDAW Committee, and the use of Concluding Observations on states parties’ compliance by UNHCR field offices in advocacy and capacity-building activities.⁷⁴ In addition, the issuance of a General Recommendation on women affected by forced displacement was discussed.⁷⁵ In 2014, the CEDAW Committee indeed published General Recommendation No. 32 on gender-related dimensions of refugee status, asylum, nationality and statelessness of women, which was welcomed by UNHCR.⁷⁶ Establishing a definite causal link between the agency’s advocacy and the publishing of the recommendations by CEDAW is not easy, but it is not too far-fetched to argue that there is a strong likelihood that the seminar and further collaboration with UNHCR has had a positive influence on the issuing of these recommendations.

The advantages of upscaling the use of the human rights treaty bodies by UNHCR is that, again, this proposal would not require an additional protocol. On the contrary: some of the human rights treaties refer specifically to ‘competent bodies’ that can submit reports on the implementation of the conventions ‘in areas falling within the scope of their activities’.⁷⁷ It would be relatively easy to incorporate this work in the DIP, where the Human Rights Liaison Unit is to some extent already collaborating with these bodies.⁷⁸ In addition, it would create an opportunity to discuss publicly some of the obligations states have regarding refugees: under the human rights treaty monitoring mechanisms, states parties

73 Joint seminar of CEDAW Committee and UNHCR, ‘Examining the Particular Relevance of the Convention on the Elimination of All Forms of Discrimination Against Women to the Protection of Women of Concert to UNHCR’, Summary of proceedings (2009) 4. See also the background note that was prepared for this meeting: Alice Edwards, ‘Displacement, Statelessness and Questions of Gender Equality under the Convention No the Elimination of All Forms of Discrimination against Women’ (UNHCR 2009) PPLAS/2009/02.

74 Joint seminar of CEDAW Committee and UNHCR (n 73) 20–22.

75 *ibid* 17–18.

76 CEDAW Committee, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women 2014 CEDAW/C/GC/32.

77 Convention on the Rights of the Child 1989 (1577 UNTS 3) Art. 45. See also Convention on the Elimination of All Forms of Discrimination against Women 1979 (1249 UNTS 13) Art. 22, but this is only referring to ‘specialized agencies’ (whereas UNHCR is a program). Also referring to ‘specialized agencies’ is International Covenant on Civil and Political Rights 1966 (999 UNTS 172) Art. 40(3).

78 Geoff Gilbert, ‘*Amicus Curiae... Sed Curia Amica Est?* UNHCR and Courts’ (2016) 28 International Journal of Refugee Law 623, 630.

already have an obligation to submit regular reports to the relevant monitoring body on how they are implementing the treaties' provisions. This obligation guarantees a discussion with the treaty body on the manner in which the state has given effect to the treaty provisions, including the difficulties or challenges it experienced. As such, a formal review of states' compliance with their international obligations is provided for, as is the participation of civil society and other stakeholders that are often also engaged in this review. Such a public review is not part of the current monitoring mechanism under the 1951 Convention.

In addition, the human rights treaty bodies do not experience the same lack of political independence that UNHCR has due to its need for access to the sovereign territories of states for carrying out its humanitarian assistance. The human rights treaty bodies are in addition solely monitoring bodies, without any operational task, so they do not have to strike a balance between various mandated tasks. That does not necessarily mean that these bodies have unlimited access to states' territories or are otherwise immune to political interference. The Human Rights Council has a system of Special Procedures, described by former UN Secretary-General Kofi Annan as 'the crown jewel' of the UN human rights system⁷⁹, that are in essence fact-finding missions under which field visits can be undertaken. The most significant weakness here is that states must consent to such visits, which they are not always willing to do: the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for example had at some point in the past ten years thirty-one pending requests for field visits.⁸⁰ So even though the monitoring bodies may be more politically independent than UNHCR and could thus potentially speak out on issues that UNHCR cannot (or will not), they still experience the constraints that come with deferring to state sovereignty.

There are also disadvantages to the proposal. First and foremost, the human rights treaty monitoring bodies have received quite some criticism on its processes and procedures.⁸¹ They suffer from serious backlogs and delays in the processing of the reports of and communications with states due to, amongst others, a lack

79 United Nations, 'Annan Calls on Human Rights Council to Strive for Unity, Avoid Familiar Fault Lines' *Press release* (29 November 2006) <<https://news.un.org/en/story/2006/11/201202-annan-calls-human-rights-council-strive-unity-avoid-familiar-fault-lines>> accessed 1 July 2020 in: ; Subedi (n 70) 203 and note 8.

80 Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 300.

81 See, in general: Alston and Crawford (n 8); but also Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, 2008; Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Oxford University Press 2015).

of financial resources available to them to support their monitoring work.⁸² The cooperation of UNHCR with the treaty bodies will not be immune to these challenges and weaknesses. Second, the monitoring bodies only have competence to review states' reports and issue statements on the human rights treaty for which they were established. Although some of these treaties might be relevant for refugees and other persons of concern to UNHCR, they do not contain a specific and coherent refugee protection regime as the one under the 1951 Convention. Therefore, although more and more rights are considered under the monitoring bodies, some important provisions such as the cessation clauses of Article 1C and the exclusion clauses of Article 1F cannot.

Third, the reporting periodicities under the treaties is every four or five years (disregarding the serious backlogs as discussed above). UNHCR, on the other hand, can speak out about infractions of states' obligations on a more continuous basis, addressing a violation of a provision under the 1951 Convention within a relevant time frame. For example, UNHCR was quite outspoken about the pushbacks at the Hungarian-Serbian border in 2016 and the treatment of asylum seekers in Hungary: the agency considered the Hungarian asylum policy to be violating the provisions of the 1951 Convention and EU law.⁸³ These violations, including the infringement of the right to liberty, are also possibly in breach of other international human rights treaties, notably the ICCPR.⁸⁴ Under the Human Rights Committee (HRC), the monitoring body of the ICCPR, Hungary has been reviewed in 2010 and again in 2018 - in the latter, the detention of asylum seekers is indeed mentioned as possibly in violation of Hungary's obligations under the ICCPR.⁸⁵ In its own sixth periodic to the HRC, Hungary

82 Alston and Crawford (n 8) 4–6, 461–479; Amnesty International, 'United Nations: Proposals to Strengthen the Human Rights Treaty Bodies' (2003). See also the report of the former UN High Commissioner for Human Rights, which highlights a list of weaknesses and challenges of the treaty bodies: Navanethem Pillay, 'Strengthening the United Nations Human Rights System' (2012) UN Doc. A/66/860.

83 UNHCR issued a press release and a report on Hungary as a Country of Asylum: Zsolt Balla, 'UNHCR Concerned Hungary Pushing Asylum Seekers Back to Serbia' (UNHCR, 15 July 2016) <<http://www.unhcr.org/news/latest/2016/7/5788c85a4/unhcr-concerned-hungary-pushing-asylum-seekers-serbia.html>> accessed 1 July 2020; UNHCR, 'Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016' (2016).

84 In particular Arts. 9 and 10 ICCPR.

85 'The State party should bring its legislation and practices relating to the treatment of migrants and asylum seekers into compliance with the Covenant, taking into account, inter alia, the Committee's general comment No. 35 (2014) on liberty and security of person.' Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Hungary' (Human Rights Committee 2018) CCPR/C/HUN/CO/6 8–9.

does not mention the pushbacks.⁸⁶ It is important that the HRC has addressed the pushbacks and the infringement on the right to liberty in its concluding observations on Hungary, but this review has been neither timely nor very relevant for those affected in 2016. Punctuality is one of the factors of the procedural element operationality; this factor is not being satisfied with the fact that the periodic reviews of the human rights monitoring bodies are always, at least somewhat and sometimes considerably, *post facto*.

All in all, the criticism on the monitoring mechanism of other human rights treaties makes it necessary to critically review whether more connectedness between UNHCR and the treaty bodies would benefit and increase effective supervision of states' treaty obligations regarding refugees, or that it would rather amplify the already existing weaknesses of these treaty bodies.⁸⁷ Taking into account that, other than the human rights treaty bodies, UNHCR has numerous ways of communicating its views to states (and others) through speeches of the High Commissioner, verbal representations of UNHCR officials to government officials, *amicus curiae* briefs to the judicial branch, Notes on International Protection, discussion notes and preparation of conclusions for the Executive Committee, to name a few, and that it has a physical presence in many states parties to the 1951 Convention, it becomes clear that UNHCR has quite some advantages over these more 'traditional' monitoring mechanisms.⁸⁸ Evidently, UNHCR can do more and better, as was pointed out in earlier sections; but recourse to the human rights treaty bodies will likely not be the key to this.

6.4.3 *Special Committee of ExCom*

The Executive Committee of UNHCR, established in 1958, has in the past been assisted in its work by two Sub-Committees: the Sub-Committee of the Whole on International Protection (SCIP) and the Sub-Committee on Administrative and Financial Matters (SCAF), established in 1975 and 1980 respectively. These committees were replaced by one Standing Committee in 1995.⁸⁹ However, some scholars now argue that within ExCom, a new or renewed Special Committee

86 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure - Sixth Periodic Reports of States Parties Due in 2016 (Hungary)' (Human Rights Committee 2017) CCPR/C/HUN/6.

87 RKM Smith, 'The United Nations Human Rights System' in MA Baderin and M Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 226; in: Edwards (n 31) 167.

88 Lewis (n 9) 80–81.

89 United Nations High Commissioner for Executive Committee, 'Report of the Forty-Sixth Session of the Executive Committee of the High Commissioner's Programme' (1995) A/AC.96/860 para 32(a).

should be established that focuses solely on international protection issues.⁹⁰ States have been receptive to this proposal: the idea to reconstitute a reformed SCIP drew considerable support at a Ministerial Meeting in 2001.⁹¹ It would “provide a forum to bring together the parties most interested in protection issues to address them in a systematic, detailed and yet dynamic way”.⁹² According to Türk, a Special Committee would allow for better monitoring of state’s compliance with their international obligations under the 1951 Convention.⁹³

Kälin has merged the proposal of involving experts (see previous section) and a Special Committee of ExCom. He argues that a ‘Sub-Committee on Review and Monitoring’ would be responsible for carrying out ‘Refugee Protection Reviews’, considering particular refugee situations or particular states with a view to monitoring implementation of the 1951 Convention, identifying impediments to full implementation and drawing lessons from actual experiences.⁹⁴ These reviews would be carried out by a team of experts who are nominated by states parties and then selected and appointed by the Special Committee. States that are the subject of a review should prepare a paper on the issue under investigation, after which a team of experts would need access to study the situation on the ground and talk freely with everyone involved: civil servants, government officials, refugees, NGOs, etc. Subsequently, a report would be drafted and submitted to the Special Committee, after which it would be discussed in a public session where civil society would be able to participate as well.⁹⁵ It is clear that this proposal mirrors many aspects of the Special Procedures of the Human Rights Council.⁹⁶

There are advantages of what in essence would be a reinstatement of a Sub-Committee on International Protection. It would force discussions during sessions of ExCom to focus on protection issues. Especially when concrete reports on particular refugee situations or particular states can be openly discussed in these sessions, as proposed by Kälin, reputational concerns may induce states to comply with their obligations under the 1951 Convention.⁹⁷ As was analysed in Chapter

90 Kälin (n 44); Simeon (n 42) 26–27; Türk, ‘The UNHCR’s Role in Supervising International Protection Standards in the Context of Its Mandate’ (n 44).

91 Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the status of refugees (n 7).

92 *ibid* 2.

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

94 Kälin (n 44) 657.

95 *ibid* 664–666.

96 Subedi (n 70).

97 In Chapter 2, concern for reputational damage was discussed as one of the reasons for compliant behavior by states. See §2.2.1.

4, UNHCR's current supervisory mechanism does not speak much to states that are motivated to comply with their international obligations because of extrinsic or realist motives.⁹⁸ Adding such a public, reputational component to the supervisory arsenal of the agency would thus be useful. In addition, renewed attention to protection issues would also increase the likelihood of the publication of more conclusions on international protection that can guide states on matters of interpretation of the 1951 Convention.⁹⁹ Considering that the past few years have not seen (many) meaningful conclusions on international protection, a restored focus on drafting and publishing such conclusions could be helpful.¹⁰⁰

However, a PDES study showed that although the knowledge and use of conclusions amongst NGOs and academics is quite extensive, the same cannot be said for relevant ministries and states' departments.¹⁰¹ That begs the question as to whether more conclusions would have a substantial impact on states' behaviour. The significantly reduced number of conclusions on international protection in the past few years may also be an indication of the difficulty to reach consensus on protection issues, especially in an ExCom that has seen a considerable expansion of its members (in 2020, ExCom membership stood at 106 states¹⁰²). This has arguably made it more difficult to navigate and manage the executive body, not in the least because with a growing number of members, more national interests and points of view now inform the decision-making process. In addition, not all members of ExCom are states party to the 1951 Convention.¹⁰³ If the new committee would also have members that are not signatories to the 1951 Convention, its authoritative guidance on the correct interpretation, implementation and application of the 1951 Convention might be weakened from the start.

98 See §4.3.4.

99 Brendan Joyce, 'The Case for a Conclusion' [2010] *Forced Migration Review* 44; Bryan Deschamp and Rebecca Dowd, 'Review of the Use of UNHCR Executive Committee Conclusions on International Protection' (UNHCR Policy Development and Evaluation Service 2008) PDES/2008/03 4.

100 Between 1975 and 2010, the Executive Committee published 110 Conclusions on International Protection. There were one and often many more Conclusions in every year. Then, there were suddenly no Conclusions in 2011 and 2012, and again no Conclusions in 2014 and 2015. The Conclusion in 2017 was about 'Machine-readable travel documents for Refugees and Stateless Persons'. UNHCR, 'Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)' (HCR/IP/3/Eng/REV 2017) HCR/IP/3/Eng/REV. 2017. See also Simeon (n 42) 26–27.

101 Deschamp and Dowd (n 99).

102 See <<https://www.unhcr.org/excom/scaf/5bbc66644/excom-composition-period-october-2018-october-2019.html>> accessed 1 July 2020.

103 See §4.2.

Nonetheless, when setting up a new Special Committee quasi similar to how the SCIP was organized, one would need to take into account the reasons to dissolve the SCIP in 1995 in the first place. A quite clear and convincing note on ExCom Working Methods concluded that because of the limited number of meeting days for the plenary meeting of ExCom, both SCIP and SCAF were becoming the primary venue for substantive discussions.¹⁰⁴ However, only the plenary meeting was empowered to make decisions.¹⁰⁵ Discussions in SCIP and SCAF were therefore not ‘decision-oriented’ but merely creating a large volume of documentation, on the basis of which it was hard for the plenary meeting to have a focused and effective discussion.¹⁰⁶ As a result, the drafting of decisions was left to a smaller group, known as the ‘Friends of the Rapporteur’¹⁰⁷, which undermined the transparency of the decision-making process and jeopardized “the principle of consensus on which the decisions and conclusions of [ExCom] are based”.¹⁰⁸ These disadvantages need to be addressed rigorously before a new Special Committee is to be instituted. A prerequisite for this Special Committee to be successful would be that it prepared and put forward, in a transparent and participatory manner, clear and ‘decision-oriented’ conclusions on international protection for the plenary meeting to agree on. Only then would current deficiencies in the supervisory mechanism be addressed.

6.5 Relocation

The previous proposals all aspired to improve the supervision of the 1951 Convention by changing the mechanism through which UNHCR supervises or by broadening or deepening the supervision of the Convention while still attributing a significant role to the agency. However, there are also scholars who do not see merit in involving UNHCR in supervisory activities of the 1951 Convention at all, or who would rather see another body added to the international refugee regime. These are the scholars that propose to put supervision wholly or partly outside UNHCR’s influence. They often refer to the fact that it is peculiar that the 1951 Convention is the only human rights treaty (apart from the Genocide Convention) that does not have a free-standing mechanism to promote ‘interstate accountability’ through a treaty monitoring

104 UNHCR, ‘Note on Executive Committee Working Methods’ (1995) EC/1995/SC.2/CRP.2 para 3(b).

105 *ibid* 3(e).

106 *ibid* 3(h).

107 *ibid* 3(g).

108 UNHCR, ‘Note on Executive Committee Working Methods’ (n 104).

body.¹⁰⁹ Furthermore, they point out that the 1951 Convention does not give UNHCR a monopoly on its oversight and that states have responsibilities towards each other in the first place.¹¹⁰

Others¹¹¹ argue that the monitoring of states' compliance, which is a highly visible task, should be separated from those who provide humanitarian assistance, which requires access to the population of concern. They suggest that being visible and critical does not go well with the requirement of neutrality to gain this access.¹¹² Indeed, a serious tension between the supervisory function and the provision of humanitarian assistance was illustrated in Chapter 5 through the issues surrounding the publication of eligibility guidelines. Hence, the following section deals with proposals that discuss supervisory mechanisms that do not involve UNHCR by establishing new mechanisms, instruments or bodies.

6.5.1 Individual complaint mechanism

A proposal that keeps resurfacing is the one suggested for the first time during the 1976 Consultation on European Refugees in Geneva¹¹³: to institute a quasi- or full judicial body¹¹⁴ that can hear appeals by individuals against negative eligibility decisions.¹¹⁵ Such hearings would, according to the participants present at this Consultation, facilitate a more uniform interpretation and application of

109 Hathaway, 'Who Should Watch over Refugee Law?' (n 12) 24. However, the lack of a formal treaty supervisory mechanism is merely the result of the time in which the 1951 Convention was drafted. Goodwin-Gill, 'The Dynamic of International Refugee Law' (n 61) 655.

110 Hathaway, 'Who Should Watch over Refugee Law?' (n 12) 23. This argument on the responsibility of states is true, but according to the drafters of the 1951 Convention, UNHCR did indeed have a monopoly with regard to the supervision of the Convention. Under Art. 35, states parties to the Convention only had an obligation to cooperate with UNHCR, not with any other agency (unless it would be an agency that succeeds UNHCR). See §4.3.2.

111 Guy S Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospect' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 235; Hathaway, North and Pobjoy (n 42).

112 Clancy (n 21) 14.

113 This Consultation was organized by the 'International University Exchange Fund', a fund that was set up to assist South African refugee students with grants for scholarships. Atle Grahl-Madsen, 'International Refugee Law Today and Tomorrow' (1982) 20 *Archiv des Völkerrechts* 411, note 23.

114 'Petitions to a judicial organ with the power to take binding decisions exist at the regional level only, whereas quasi-judicial bodies are the rule on the universal level.' Kälin (n 44) 650.

115 Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980) 100.

particularly Article 1 of the 1951 Convention.¹¹⁶ The possibility to petition a judicial or quasi-judicial body at the international level regarding individual human rights is often considered as an effective form of supervision.¹¹⁷ The idea for an individual complaint mechanism has therefore surfaced repeatedly, for example in an article by MacMillan and Olson in 2001¹¹⁸ and at the 2010 York Conference.¹¹⁹ In both instances it was argued that hearings by an individual complaint body would potentially halt non-compliant behaviour.¹²⁰ Such an independent body would have the authority to, for example, call for injunctive relief, refer back to state officials with advice on how to decide in the individual's case, or give a disposition that concurs with the decision of the state concerned.¹²¹

Scholars who proposed this idea often found inspiration in the individual complaint bodies of eight other international human rights treaties.¹²² Indeed, the 1951 Convention is the only international human rights treaty that does not offer an optional individual complaint mechanism. This hiatus is mainly a historic one: even though the representative of Australia asked whether it was “[...] the intention that refugees should appeal to the High Commissioner against alleged contraventions of the Convention and that he should hear such appeals”¹²³, the whole concept of what supervision in this context was and how it would be carried out was unclear. However, at the same time in Europe, the drafters of the European Convention on Human Rights had already included the possibility for

116 *ibid.*

117 Kälén (n 44) 450; James Crawford, ‘The UN Human Rights Treaty System: A System in Crisis?’ in Philip Alston and James Crawford, *The future of UN human rights treaty monitoring* (Cambridge University Press 2000) 2.

118 MacMillan and Olsson (n 60).

119 Centre for Refugee Studies, York University York 2010 International Conference: Forced Displacement, Protection Standards and the Supervision of the 1951 Convention and its 1967 Protocol and other International Instruments (n 58).

120 MacMillan and Olsson (n 60) 41; Simeon (n 42) 22–23.

121 MacMillan and Olsson (n 60) 40.

122 See the First Optional Protocol to the ICCPR; the Optional Protocol to CEDAW; Art. 22 of the CAT; Art. 14 of the CERD; the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Art. 31 of the International Convention for the Protection of All Persons from Enforced Disappearances; the Optional Protocol to the ICESCR; Art. 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not in force yet).

123 Statement of Shaw (Australia), Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.25 (27 November 1951), p. 13 in: 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) 1472–1473.

individuals to send a petition to the (then) European Commission of Human Rights.¹²⁴ So the question from the Australian representative, even though it was not answered, was not wholly unfounded. Later, during the drafting of the ICCPR in the late 1950s and early 1960s the possibility of an individual right to petition was discussed more in depth.¹²⁵ The international human rights bodies that hear individual petitions are all quasi-judicial, in that their procedures end with the adoption of ‘views’ that are not legally binding. Nevertheless, because of “their judgment-like style” and follow-up procedures by some of the bodies¹²⁶, there is a high degree of compliance with these views.¹²⁷

There is also criticism on these bodies. Their capacity is limited which results in procedures taking too long, which is acknowledged by the bodies themselves.¹²⁸ At the same time, and rather contradictory, the UN system seems to be completely underutilized: the European Court of Human Rights, for example, disposes of more complaints each month than all the UN human rights bodies combined.¹²⁹ According to the latest report of the Human Rights Committee (the treaty body of the ICCPR), there were 190 new cases registered in 2018 and 101 cases concluded.¹³⁰ (At the same time, 746 cases were still pending.¹³¹)

Despite the potential benefits of more detailed responses to non-compliant behaviour of states, the individual complaint procedures of other human rights treaties do not offer a convincing template for the international refugee regime. How a new committee would relate to the supervision conducted by UNHCR¹³², and what the procedure would be in case that supervision is not consistent with

124 Much later, in 1998, this Commission was abolished, and individuals allowed to apply directly to the Court. See, for the old text of the Convention: European Convention on Human Rights and its Five Protocols (1952-1966) 1950 Art. 25, available at <<http://www.hri.org/docs/ECHR50.html#Convention>> assessed 1 July 2020. See, for the individual complaint procedure under the current Convention: European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 Art. 34.

125 Erik Mose and Torkel Opsahl, ‘Optional Protocol to the International Covenant on Civil and Political Rights, The’ (1981) 21 Santa Clara L. Rev. 271, 274–276.

126 See in particular, ICCPR, ‘Measures Adopted at the Thirty-Ninth Session of the Human Rights Committee to Monitor Compliance with its Views under Article 5’, A/45/40, vol. 2, Annex XI, pp. 205–206, in: Kälin (n 44) note 184.

127 *ibid* 650.

128 ‘Report of the Committee against Torture’ (2015) A/70/44 3; ‘Report of the Human Rights Committee’ (2017) A/72/40 4.

129 Rhona Smith, Textbook on International Human Rights (Oxford University Press 2016) 77.

130 ‘Report of the Human Rights Committee’ (2019) A/74/40 4.

131 *ibid*.

132 Kälin (n 44) 656.

the output of the committee (which is highly problematic) remains unclear, unless it is accepted that UNHCR terminates its supervisory role. Having multiple mechanisms side by side may not only lead to inconsistencies, but also to duplications, ‘pick and choose’ behaviour of states, competition, and monitoring fatigue by states. One of the biggest drawbacks was already acknowledged in 1985, when Lentini stated that an individual complaint mechanism would require either a new Protocol or an amendment of the current 1951 Convention, which would lead to a rift in the protection for refugees, with some states accepting such a mechanisms and others not.¹³³ In addition, if many states would sign up and an individual procedure would become possible, the new committee would likely be overburdened immediately with many cases of (rejected) asylum seekers who would want to try their luck.¹³⁴ Nevertheless, Lentini also envisaged that in all likelihood a new Protocol or amendment to the Convention would not materialize in the near future.¹³⁵ She was right: more than forty years later, an individual complaint procedure is still as far away as it was back then.

6.5.2 *A Refugees Rights Committee*

Rather than focusing on opportunities for individuals to file a complaint, some scholars have argued that there needs to be a greater role for states. One of the proposals to involve states outside UNHCR’s institutional framework is by instituting a ‘Refugees Rights Committee’ that takes on the role of ensuring accountability of and between states.¹³⁶ The proposal was made by Chimni, noting that UNHCR’s views on the interpretation of the 1951 Convention are often side-lined or even openly resisted.¹³⁷ He therefore saw the need for another body that would focus on dialogue between states. The main part of this new body’s work would be to assess reports that states would be required to submit on

133 ‘Ratification would not be universal. States following more restrictive lines of interpretation than the majority of States Parties and thus more likely to “lose” cases would probably be especially hesitant about accepting [such a new protocol].’ *ibid*; Lentini (n 27) 198.

134 Kälin (n 44) 656.

135 According to Lentini, ‘especially given the apparent lack of international consensus on the entire subject of the status of refugees in international law.’ Lentini (n 27) 198.

136 BS Chimni, ‘Reforming the International Refugee Regime: A Dialogic Model’ (2001) 14 *Journal of Refugee Studies* 151, 157. As Hathaway states: ‘the Convention, as an international pact, is the responsibility of the states that signed it. [...] it is states that have the fundamental right and duty to ensure that other states actually live up to their obligations under the Refugee Convention.’ Hathaway, ‘Who Should Watch over Refugee Law?’ (n 12) 23–24.

137 Chimni (n 136) 157; by referring to: Dennis McNamara, ‘UNHCR and International Refugee Protection’ (1999) 5.

a regular basis. By dissecting these reports, the Committee would offer a “common interpretative framework”¹³⁸ for states on how to correctly implement the provisions of the 1951 Convention. Through this framework, the current numerous interpretations and, as a result, the diverging implementation of the 1951 Convention would be limited.¹³⁹

MacMillan and Olsen have made a similar proposal, stating that a body that is responsible for ensuring the correct implementation of the 1951 Convention should also be able to determine how the Convention is to be interpreted.¹⁴⁰ They did not explicitly state that this work would need to include UNHCR: “we do not suggest where in the UN system this body would be placed”.¹⁴¹ Indeed, as they envision that an optional or additional protocol would need to be created, UNHCR would probably not be the agency to spearhead this new body since the agency is already mandated to interpret the Convention and ensure its correct implementation.

Focusing on the role of states and involving them more in a supervisory mechanism is a smart idea. It would potentially address some of the current weaknesses, most notably the lack of political independence and insufficient capacity on the side of UNHCR. However, in neither Chimni’s nor MacMillan and Olson’s proposals are there any elaborations on why states would be more compelled to comply with the non-binding outcomes of a new independent body than with the directions already given by UNHCR. Replacing one body with another, without addressing the root causes of the alleged failings of the system in which states are not likely to adhere to directions given by international organizations, is not very meaningful. Burdening states with frequent reporting obligations on their implementation and application of the 1951 Convention is furthermore likely to meet the same reluctance states have regarding reporting under other human rights treaties. All human rights treaty monitoring bodies mention the long delays in the submission of states’ initial or periodical reports.¹⁴² The difficulties these bodies experience with effectively implementing their monitoring work should be addressed first in order to avoid transposing the same difficulties on the international refugee law regime. Finally, setting up a Committee with the legal authority to ensure the correct interpretation of the 1951 Convention raises again the question of what consequences this would have when these interpretations differ from those of UNHCR (or whether the agency

138 Chimni (n 136) 157.

139 *ibid* 157–158.

140 MacMillan and Olsson (n 60) 41.

141 *ibid*.

142 See, for example: ‘Report of the Human Rights Committee’ (2015) A/70/40 21–27; ‘Report of the Committee against Torture’ (n 128) 12–13.

would not be interpreting the Convention at all anymore). It also would encounter the same drawback as setting up an individual complaint mechanism: it will be very unlikely that states will be enthusiastically embracing a new Protocol or amendment to the 1951 Convention.

6.5.3 *International Judicial Commission for Refugees*

Some scholars have mentioned the International Court of Justice as a means of supervising compliance with the 1951 Convention. Article 38 of the Convention indeed states that “any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute”. However, this clause has never been invoked. The likelihood of disputes over the interpretation of the 1951 Convention ever to be brought before the ICJ is therefore remote.¹⁴³ “While states in Europe have taken each other to [...] court over the treatment by states of their own nationals using the machinery of the European Convention on Human Rights, no state has yet challenged another state on the treatment of third-country nationals.”¹⁴⁴ So although the ICJ has been referred to by scholars, no one has really seen any potential in this proposal.¹⁴⁵

The divergence in interpretation of the 1951 Convention, in particular Article 1, has nevertheless been a thorn in the side of many scholars. North and Chia have therefore, in 2006, come up with the idea to institute an International Judicial Commission for Refugees. The aim of this Judicial Commission would be to reduce the aforementioned divergence in interpretation by reviewing factual cases from different jurisdictions, giving semi-judicial opinions on major areas of

143 Anthony M North and Joyce Chia, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees’ in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 232–233.

144 Landgren (n 34) 66. However, states taking each other to the European Court of Human Rights have become a rare practice too. Since 1998, there have been four cases between Georgia and the Russian Federation, ten cases between Ukraine and the Russian Federation (with two of them on the Crimea), and one case between Slovenia and Croatia. European Court of Human Rights, ‘Inter-States Applications’ <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed 1 July 2020.

145 Kälin (n 44) 652–653; Alysia Blackham, ‘A Proposal for Enhanced Supervision of the Refugee Convention’ (2013) 26 *Journal of Refugee Studies* 392, 397–398; Anthony M North and Joyce Chia, ‘Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees’ (2006) 25 *Aust. YBIL* 105, 119.

debate and, possibly, examining the legality of state actions.¹⁴⁶ Although they state that a permanent international court with competence to bind states parties would be the best vehicle for such tasks, they both acknowledge that aspiring to have such a vehicle is not very practical.¹⁴⁷ They therefore adhere to the judicial character of the commission, because it would endow it with authority and with independence, impartiality, integrity and legal expertise.¹⁴⁸ The selection of cases would be through suggestions of “UNHCR, leading academic commentators, governments, the legal profession and NGOs”¹⁴⁹, and its target audience would be decision-makers and the judiciary.¹⁵⁰

This is precisely what makes the proposal different and more ambitious from the Committee of Experts as mentioned in the previous section, which would be mostly at the service of the High Commissioner. Although North and Chia emphasize that the Commission would be ‘created under the supervisory mandate of UNHCR’¹⁵¹ (as is the case with the Committee of Experts), carefully analysing their proposal shows that the Commission would be entirely independent from UNHCR all but in name: the Commission, “a new and unique body”¹⁵² which “would have to be, and be seen to be, independent from the UNHCR”¹⁵³, in formulating its opinions, in its funding model and in its secretarial arrangements.¹⁵⁴ North and Chia state that the Commission would be created pursuant to the existing supervisory mandate of UNHCR to supplement the authority of the agency. It, however, seems that North and Chia are mainly interested in this existing mandate due to practical reasons: that is, avoiding having to go through the painstakingly procedure of convincing states to sign on to a new Protocol or an amendment of the 1951 Convention. A proposal by Kälin, to create a judicial body that can issue preliminary rulings on the interpretation of the 1951 Convention upon request by domestic authorities or courts (or by UNHCR) runs into the same issue of a new Protocol.¹⁵⁵ Therefore, the idea of North and Chia is quite resourceful.

146 North and Chia (n 143) 253.

147 North and Chia (n 145) 119.

148 North and Chia (n 143) 235.

149 North and Chia (n 145) 136.

150 *ibid* 130.

151 The creation of the ‘limited body’ would fit under wording of UNHCR’s Statute, in particular Art. 8. “In essence, the proposal involves little more than giving the Global Consultations process a permanent form.” *ibid* 127.

152 *ibid* 133.

153 *ibid*.

154 North and Chia (n 143) 248–250.

155 Although Kälin did see this as an option deserving thorough discussion for a long-term perspective. Kälin (n 44) 656.

This idea of Judicial Commission has surfaced several times. In 2001, at the Expert Roundtable during the Global Consultations, it was proposed as a possibility in the long term.¹⁵⁶ During the 2010 York Conference, where it was discussed again, the proposal received both praise and criticism.¹⁵⁷ It might indeed be the case that the Commission would be successful in persuading state officials with sound ‘judgements’, especially if the Commission would consist of eminent jurists giving sound legal advice on the interpretation of the Convention. Another advantage of the Commission would be that it would be created pursuant to UNHCR’s mandate, which does not require a new Protocol. The success of the Commission would nevertheless be contingent on the support of states parties to the 1951 Convention, as they are the ones that would need to bring cases before the Commission and, in particular, follow up on the views given by it. In fact, states not endorsing these views would negatively affect the authority and standing of this commission, and thus its effectiveness.¹⁵⁸ The support of states is thus of crucial; although this is true for all other proposals to enhance supervision of the 1951 Convention as well.

Instituting an International Judicial Committee for Refugees mirror the drawbacks on instituting a Committee of Experts, as mentioned in the previous version: what would this Commission add to the current supervisory output and authoritative interpretation as provided by UNHCR, with its seventy years of expertise and experience on the ground? And, more importantly, what would happen if the Commission comes to a different conclusion than UNHCR regarding the proper interpretation of the 1951 Convention? This would not only undermine the authority of UNHCR but could also cause states to choose the interpretation that fits them best, undermining the whole purpose of having an interpretative body in the first place and create a race to the bottom that is ultimately detrimental to the rights of refugees. North and Chia raise the possibility of handing over some of UNHCR’s supervisory responsibility to the commission¹⁵⁹, but it remains unclear how much ‘some’ is. If indeed cases can be suggested by the number of stakeholders mentioned above, resources and capacity also will turn into a concern for the new commission.

156 Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 671.

157 Simeon (n 42) 22–23.

158 Shany states that the ability of an organization to satisfy the goals as set by the mandate provider may be jeopardized if stakeholders become disappointed by the organization. Yuval Shany, *Assessing the Effectiveness of International Courts* (International Courts and Tribunals Series 2014) 35–36.

159 North and Chia (n 145) 128.

In addition, there are already various judicial and quasi-judicial options available to UNHCR (its *amicus curiae* briefs, its Guidelines).¹⁶⁰ UNHCR also - in theory - ensures that the protection for refugees is universal, incorporating the experiences and developments in the Global South as well, instead of for example relying too heavily on jurisprudence of the ECHR or the EUCJ which only focus on rights in the Global North. It is, in fact, an advantage that UNHCR can choose when to engage in strategic litigation, or when it refrains from doing so, relying instead on its authoritative guidance and developing this guidance through Guidelines, ExCom Conclusions, or Notes on International Protection.

160 Gilbert (n 78) 634.