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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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Chapter 7
Conclusion

7.1 Introduction

This research was a journey through the history of UNHCR and the effectiveness of its supervision, while answering the research question 'how should UNHCR's supervisory mandate and its supervisory activities regarding the 1951 Convention be assessed in terms of effectiveness'. The research started with the agency's appearance on the international plane, how it has acquired its supervisory mandate, and how, throughout the past seven decades, it has carved out a space for itself in the international refugee law regime. After a more theoretical analysis of which standards constitute 'effective supervision' by an international organization, UNHCR's own structures and processes were assessed to see whether these are conforming to this set of standards. Finally, the proposals put forward by other scholars to improve the supervision of the 1951 Convention, through UNHCR or other means, were discussed to ascertain whether they would fill the gaps that were identified in previous chapters.

The journey has not provided a binary answer to the research question. This chapter will highlight the most significant findings of the previous chapters and synthesise the findings that emerged. It will then draw a comparison between UNHCR and other treaty monitoring bodies, to emphasize similarities and differences, after which lessons will be drawn for supervision of states' obligations in general. Finally, for UNHCR specifically, some modest suggestions will be proposed.

7.2 A synthesis of supervision

Assessing the effectiveness of UNHCR's supervision necessitates a clear understanding of what is meant with effective supervision. In Chapter 2, it was established that supervision by international organizations is, in essence, the overseeing of states' acts to make sure that these acts are in compliance with the

law that these organizations are mandated to supervise.[1] In order to be effective, *i.e.* to ensure that there is compliant behaviour, these organizations should appeal to different motives of states to observe their international obligations. *Grosso modo*, states' motives could be intrinsic, based on the (moral) conviction that compliance is the right thing to do, or extrinsic, based on self-interest.[2] These motives are not static - they can change over time, and some states may be more drawn to one motive than to the other. Ideally, an international organization must thus have various resources at its disposal to trigger each of these motives, through its interpretation of the law, its monitoring of states' application of the law, and its enforcement in case of non-compliance.

How effective the organization can carry out its supervisory task depends to a great extent on the structures that its mandate providers (which are often states) have put in place: whether the organization has a clear and substantial legal basis, whether it has sufficient financial resources, whether it is independent enough to carry out its task but also whether there is adequate oversight on its activities. This is, however, only one side of the coin: the other side is the quality of the actual effort invested by the organization itself in supervising states' compliance. This study used three main procedural elements to evaluate the quality of that effort: legitimacy, defined as the accepted authority of an organization by those who are the objects of that authority; accountability, defined as the duty to account for the exercise of authority by the organization; and operationality, which encompasses the question 'can the organization do its job in the real world'.

Diagram 3 below shows these structural and procedural elements. It also shows how these elements fit within the Theory of Change applied in this study; namely, that if an organization has been set up with adequate structures and implements its processes in a high quality effort, it would result in a high standard of supervisory 'output' (in all its interpretation, monitoring and enforcement), making it more likely that states will value that output, and, ultimately, act in compliance with their international obligations.

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1 Volker Türk, 'UNHCR's Supervisory Responsibility' (2002) 14 Revue Quebecoise de droit international 135, 139. According to UNHCR, the purpose of its supervision is to promote and ensure compliance with the relevant legal instruments. See UNHCR, 'UNHCR Public Statement in Relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees Pending before the Court of Justice of the European Union' (2012) 10.

2 Jana von Stein, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2003) 478–490; see also Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008).

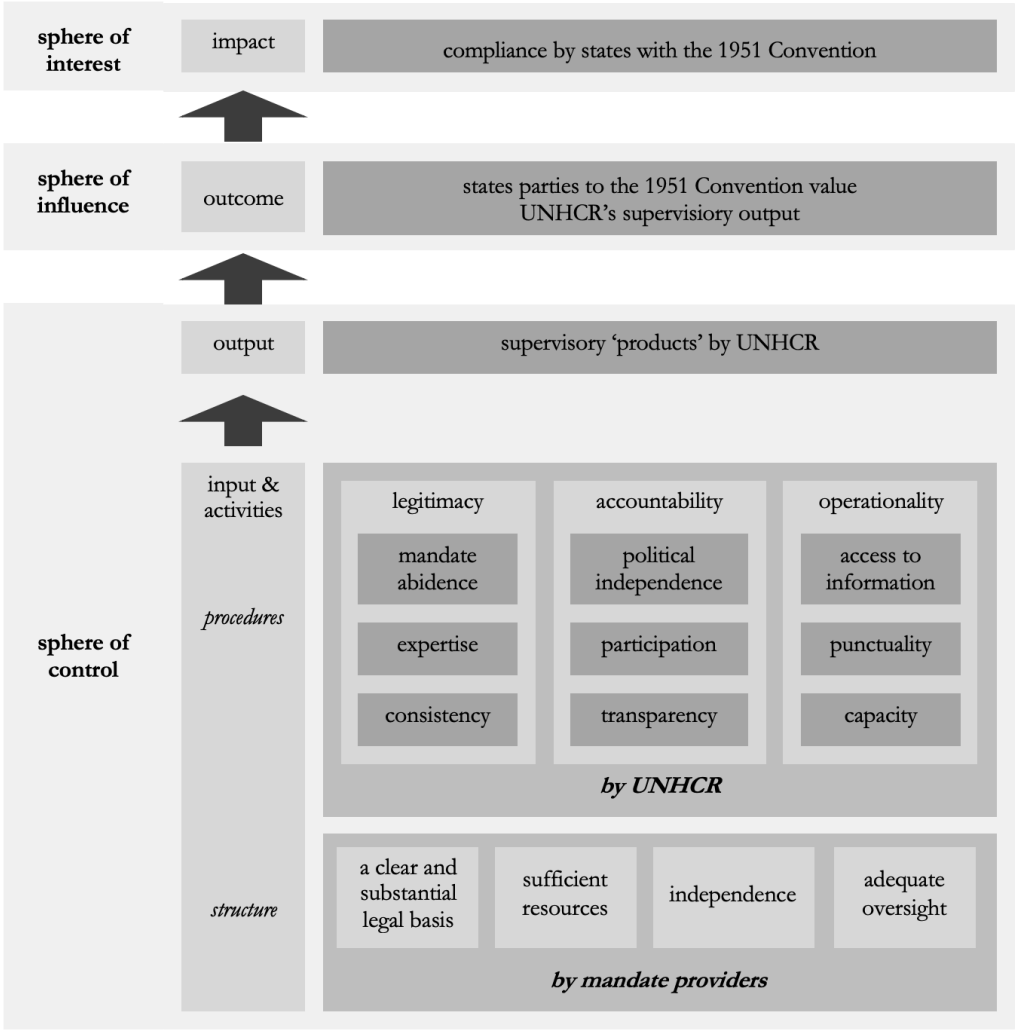

Diagram 3 - Theory of Change, complete framework (repeated)

UNHCR is a subsidiary organ of the General Assembly; according to its Statute, the GA, ECOSOC and the agency's Executive Committee are its mandate providers, although of course all these organs are comprised of states, most but not all of which are states parties to the 1951 Convention. From the analysis in Chapter 4, as well as the historical overview in Chapter 3, it became clear that these mandate providers have failed to set up an adequate supervisory structure for the agency, significantly hampering UNHCR in effectively supervising the 1951 Convention and the 1967 Protocol (as well as other refugee law instruments, such as regional treaties). In particular, UNHCR's legal basis and powers for monitoring states' compliance and for enforcing the norms are insignificant. The

agency is not alone in this though: most other international institutions charged with the supervision of states' international obligations have very limited enforcement powers. These powers are, however, particularly important as they speak to the extrinsic motives of states to comply with their international obligations, such as fear of retaliation, escalation and damage to a state's reputation. Not being able to address these motives undermines the agency's effective supervision. Another serious challenge is the lack of sufficient financial resources for the agency's work, signified by a funding gap in 2019 of 45 per cent.[3] Although this gap is mostly affecting the agency's humanitarian work, it also has an impact on the resources for its international protection task, that includes supervision.

Having this inadequate structure is a strong disadvantage, but it does not prevent UNHCR from setting up adequate processes and procedures for effective supervision. However, these procedural elements have been impacted hugely by one particular factor, and that is the agency's humanitarian work around the world. In Chapter 3, it was explicated how in the past seventy years, the growth of this operational task was instigated by the different High Commissioners and supported by the agency's mandate providers as well. Through this work, the agency provides meaningful and often life-saving assistance to millions of refugees, asylum-seekers, stateless persons, IDPs and others. Chapter 5 showed, however, that the operational work has also undermined the agency's supervisory task. It has done so by creating a great dependency on states for resources and permission to access and remain on their territories, which in turn has sometimes led to inconsistent or weak responses to non-compliant behaviour of important donor or host states. In addition, because there is no hierarchy in the different task that the agency has according to its Statute, it might be legitimate for UNHCR to let the scale tip in favour of the more operational aspects of its work, also in terms of funding, but this choice leads to a void in the supervision of states' compliance with their obligations under the 1951 Convention.

Not all is to blame on UNHCR's humanitarian work though: its accountability is also weak, because the agency has not sufficiently invested in the participation of all the relevant stakeholders and the transparency of its international protection work. Moreover, the operational task has reinforced the supervisory task as well - for example because of UNHCR's physical presence in 137 countries, the agency has a great deal of expertise and access to information.

The weaknesses described in Chapter 4 and 5 have not gone unnoticed by scholars. They have put forward numerous proposals to increase the effective supervision of the 1951 Convention. These proposals, which reveal a broad

3 UNHCR, 'Update on Budgets and Funding (2019, 2020-2021) (as Prepared for the 77th Meeting of the Standing Committee of ExCom)' (2020) EC/71/SC/CRP.6.

gamut of opportunities, were summarized and analysed in Chapter 6. Some of the proposals are relatively easy to incorporate, as they address improvements within UNHCR's institutional framework, such as more public reporting and more participation of NGOs and affected communities in the agency's supervisory work. Other proposals are more ambitious, requiring significant changes by establishing new mechanisms, instruments or bodies outside of UNHCR. What most of these alternatives boil down to is the belief that UNHCR does not have the monopoly on treaty oversight.[4] This is true, as particular states have an obligation *vis-à-vis* each other with regard to compliance with their obligations under the 1951 Convention. However, this inter-state accountability is extremely weak. There is, therefore, some value in letting others - human rights treaty bodies, experts, judicial bodies - do their fair share of overseeing the refugee law regime, thereby reinforcing the work that UNHCR is doing. However, it is argued that the supervision as it is currently carried out by UNHCR will be undermined if others take over a significant share of this task.[5] Although at first glance this may seem as a position that is motivated by a fear for empire-sharing, there is merit in the argument. In Chapter 6, it was argued that a mushrooming of supervisory mechanisms may result in duplication, and, worse, also in inconsistencies, cherry-picking and even competition, which of course will not be helpful for increasing compliant behaviour of states.

Moreover, the system of international protection for refugees is a partnership between states and the supervisor of their compliance, but these two actors also sometimes have different interests: "states, which provide the territorial dimension to both causes and solutions, have their sovereign interests, and from time to time these will conflict with UNHCR's duties of protection and supervision."[6] This, by nature, is the dilemma that refugee protection brings with it, and shifting the international protection component to another organization or body will not solve this dilemma. Any proposal for a new or different set of supervisory mechanisms should therefore take the current - and possibly enhanced - tasks of UNHCR in consideration and build on that.

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4 Although one might recall the heated discussions during the drafting of the 1951 Convention on how states only committed themselves to cooperating with UNHCR (or any other agency that may succeed it), and not to any other agency. See §4.3.2.

5 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) 17.

6 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) 221–222.

7.3 More or less than the human rights' treaty monitoring bodies

The executive director of the Norwegian Refugee Council (NRC) in the USA was not pleased with UNHCR when the agency delayed its release of a public statement following the announcement by the Trump administration to only allow asylum claims of persons who have presented themselves at official ports of entry. "I'm not expecting UNHCR to act like an advocacy NGO. But between being an advocacy NGO and saying absolutely nothing, which has been the pattern, there's clearly a middle ground."[7] Although this seems to be a common frustration of NGOs and academics about the refugee agency[8], in this particular case UNHCR did speak out quite forcibly[9] - and only with a 'perceived delay'[10] of 12 hours after NGOs had criticized the US government. The statement made was, moreover, considered 'appropriately strong' by the same NRC director.[11]

It seems, from this example, that UNHCR is steering a middle ground between strong public denouncements that organizations like Amnesty International and Human Rights Watch are usually using in their advocacy on the one hand, and the silence of states parties to the 1951 Convention against other states' violations of their obligations on the other hand. This middle ground is a subtle and delicate one, but that might precisely be what is expected from UNHCR; as an UN agency, it has a much more diplomatic inclination than human rights and advocacy NGOs. A former UNHCR Head of DIP described

7 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.

8 See §1.1.

9 With the agency pointing failures in the US border policies resulting in unnecessary suffering: 'Long-standing insufficient reception capacity at official U.S. southern border ports of entry is resulting in significant delays in northern Mexico and is forcing many vulnerable asylum-seekers to turn in desperation to smugglers and cross the border irregularly.' 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; 'U.N. Tells Washington to Protect Refugees after Trump Limits Asylum' (*Reuters*, 9 November 2018) <https://www.reuters.com/article/us-usa-immigration-asylum-un-statement/un-tells-washington-to-protect-refugees-after-trump-limits-asylum-idUSKCN1NE27Z?utm_source=ECRE+Newsletters&utm_campaign=10662ffde0-EMAIL_CAMPAIGN_2018_11_12_12_34&utm_medium=email&utm_term=0_3ec9497afd-10662ffde0-420547209> accessed 1 July 2020.

10 Welsh (n 7).

11 *ibid*.

this delicate nature: "We are at the table with governments, but we don't make them comply by banging our fist on the table and by saying 'you have to comply, because we are the supervisor'. It doesn't work like that. It's much more a dialogue."[12]

It is this dialogue that sets UNHCR also apart from the human rights treaty monitoring bodies. Scholars often refer to these bodies as examples of how UNHCR could (or should) function, or how a new and independent supervisory body should be set up for the 1951 Convention.[13] However, even though UNHCR does not have all the monitoring tools that are available to the human rights treaty bodies, such as individual complaint mechanisms, the agency's supervisory practices and possibilities match and often go well beyond the more 'traditional' ways and means of these monitoring bodies.[14]

Monitoring, according to the Office of the High Commissioner for Human Rights (OHCHR) is "a method of improving the protection of human rights […] with the objective […] to reinforce state responsibility [for that protection]".[15] The aim of monitoring is to improve state compliance with international obligations.[16] However, supervision - or at least supervision by UNHCR - encompasses more. The agency's supervision is not just the active collection, verification and use of information to address compliance with the norms[17], which is similar to monitoring, but also includes or is informed by its capacity building,

12 Volker Türk, 'Keynote Speech' (Expertmeeting Europees vluchtelingenbeleid, The Hague, 15 October 2015). See also the tweet from UNHCR's Head of Protection on Malta, mentioning that diplomacy is a craft that is not always suitable for Twitter 'Advocacy does not happen only on twitter. While twitter is a powerful instrument, advocacy, diplomacy and policy making existed way before twitter and will continue to do so for many years to come'. The tweet from Biondi is personal and not an official statement from UNHCR.' Paolo Biondi (30 January 2019) <https://twitter.com/PaoloBiondi82/status/1090501656616275969> accessed 1 July 2020.

13 Welsh (n 7). See also §6.4.2.

14 Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 5) 15. "I consider us to be the treaty monitoring body of the 1951 Convention. We do the same things that others are doing (such as public statements and non-public pressure), but we are the only one that can be found in court with amicus curiae briefs. We have various ways and means that are not available to other monitoring bodies." Interview with UNHCR official #5b (10 September 2014).

15 OHCHR, 'Training Manual on Human Rights Machinery' (2001) Professional Training Series No. 7; in: 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) 161.

16 OHCHR (n 15); in: Edwards (n 15) 161.

17 *ibid.*

training, direct assistance in programmes, and interceding directly on behalf of individuals and groups of individuals.[18] So the real distinction between the monitoring of human rights treaty bodies and supervision by UNHCR in the broadest sense of the word, is that monitoring seems to be a rather passive, periodic and top-down exercise, compared to the more active, on-going, preventive and bottom-up nature of the latter.

This is not to downplay the important work that has been done by the human rights treaty bodies, or the reforms that have been discussed and implemented in the past two decades.[19] The human rights treaty bodies are, besides the actual monitoring, also 'generally good' at promoting human rights through education, capacity-building and providing recommendations.[20] But the most important challenge that plagues these bodies is similar to an important weakness that has been identified in these thesis, namely that they lack strong enforcement powers.[21] And although the human rights treaty bodies now have the option to provide for early-warning and inspection, which enables them to respond to more acute situations, this does not compare to the day-to-day interaction, or even inspection[22], that UNHCR has with the legal, judicial and executive branches of governments.[23]

Besides, UNHCR is a regular 'customer' of the human rights treaty bodies, both for legal and for practical reasons, as the agency cannot always fall back on the 1951 Convention; for example, when it deals with states that have not ratified the Convention. The monitoring systems of the ICCPR and the CAT then

18 As described extensively in previous chapters.

19 Christen Broecker, 'The Reform of the United Nations' Human Rights Treaty Bodies' (*ASIL insights*, 8 August 2014) <https://www.asil.org/insights/volume/18/issue/16/reform-united-nations'-human-rights-treaty-bodies> accessed 1 July 2020; UN High Commissioner for Human Rights, 'Strengthening the United Nations Human Rights Treaty Body System' (2012) UN Doc A/66/860.

20 Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Oxford University Press 2015) 51.

21 *ibid*. Strangely, this weakness was not mentioned in the UN High Commissioner's for Human Rights report on treaty reform in 2012. Challenges that were mentioned are non-compliance with reporting obligations, backlogs, the increase in documentation and thus in workload, capacity gaps, lack of coherence and resourcse. UN High Commissioner for Human Rights (n 19) 20–28.

22 According to Cassese, this prevention, together with the possibility of inspection, is key to handling human rights questions in the international community. Antonio Cassese, 'The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age' in Niels M Blokker and Sam Muller (eds), *Towards More Effective Supervision by International Organizations* (Martinus Nijhoff Publishers 1994) 124.

23 Edwards (n 15) 180.

provide an alternative procedure to guarantee, *inter alia*, respect for the principle of non-refoulement.[24] As was set out in Chapter 6, UNHCR involvement in procedures before these monitoring bodies is already longstanding, although the agency could and should intensify its involvement even more by submitting information and statistics for the draft reports of these monitoring bodies, by contributing input for the General Comments, or by providing expert information.[25] UNHCR has also done essential work in relation to (individual) cases heard before the treaty-based human rights monitoring mechanisms; in relation to some states, the agency's intervention has been decisive.[26] However, as was already stated in Chapter 6[27], this engagement with the human rights monitoring bodies is not a solution for the rights of refugees that are only protected under the 1951 Convention.

7.4 The Achilles heel of supervision

What UNHCR and all human rights treaty monitoring bodies have in common is that they are not in a position to coerce states into complying with their treaty obligations. Compliance has to be induced, by soft persuasion or by hard confrontation, by backdoor diplomatic encouragement or by public denunciation. There are multiple theories on which tactic works best, *i.e.* what is most effective in making states comply with their treaty obligations; in this thesis, it was asserted that tactics that combine an appeal on intrinsic motives - the moral conviction that such is the right thing to do - and extrinsic motives - the rational conviction that non-compliance could lead to retaliation, escalation or damage to a state's reputation - would be most effective.[28] But whatever the motives of states to comply, it is acknowledged that "the effective exercise of UNHCR's [supervisory] mandate both presuppose[s] and is underpinned by the

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

25 See §6.4.2.

26 Fernando M Mariño Menéndez, 'Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees' [2015] Refugee Survey Quarterly 61, 78.

27 See §6.4.2.

28 See §2.2.1.

commitment from states to cooperate with it".[29] This commitment of states is the Achilles heel of any international monitoring or supervisory body.[30]

The agency has access, as part of the UN system, to heads of states and governments, regional organizations, the UN Security Council and the Secretary-General[31]; as well as to its populations of concern through its worldwide presence. This gives UNHCR a degree of independence and moral authority, which might ensure that the agency is treated with more regard by states than other treaty monitoring bodies. This is important, as ultimately, whether UNHCR is effective in its supervisory task, depends to a high extent on the attitude of states towards the agency's supervisory output. And, as has been one of the core arguments in this thesis, the higher the quality of this output, the more effective UNHCR's supervision is: states will then be more inclined to follow the directions that the agency is giving with regards to their obligations under international refugee law.

But, as UNHCR's former Assistant High Commissioner for Operations George Okoth-Obbo said quite candidly in an interview in 2018, "most governments have other interests that might not coincide with those objectives [of protection, assistance and solutions]."[32] This is true of course; their obligations under international refugee law, or any international law for that matter, are not the only concern that states have. Although it seems, according to Henkin, that most states will comply with most of their obligations most of the time[33], this also means that some states will sometimes violate some of their obligations, or are about to do so. Engaging with governments in these instances is highly complex for any agency or organization that has no real powers of enforcement, regardless of any other constrains that they may face. The impact of such an organization's voice can then be limited, even if the organization was perfectly structured and its supervisory output of the highest quality.

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29 Volker Türk and Rebeca Dowd, 'Protection Gaps' in Elena Fiddian-Qasmiyeh, Gil Loescher and Katy Long (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 278.

30 Not the agency's financial dependency, its inconsistencies or its lack of capacity, but "states are UNHCR's major hurdle". James C Simeon, *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 26.

31 The current Secretary-General, António Guterres, is the former High Commissioner for Refugees. Jeff Crisp, 'As the World Abandons Refugees, UNHCR's Constraints Are Exposed' (*Refugees Deeply*, 13 September 2018) <https://www.newsdeeply.com/refugees/community/2018/09/13/as-the-world-abandons-refugees-unhcrs-constraints-are-exposed> accessed 1 July 2020.

32 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.

33 Louis Henkin, *How Nations Behave* (Council on Foreign Relations 1979) 47.

Therefore, effective protection of human rights, be it under the human rights treaty bodies or the 1951 Convention, requires, first and foremost, the full commitment of states to implement the relevant international legal regime in their national legal order, and then abide by it.[34] This necessitates that states are, at the very least, parties to these treaties. Where states have not acceded to such treaties or have made reservations to its provisions, a gap in the international legal regime exists as monitoring of states' compliance with non-existing treaty obligations is of course void. Although this thesis has asserted that - in the case of UNHCR - the agency still has avenues to engage with such states, its supervisory task becomes even more difficult if there is no binding treaty obligation for states to cooperate with UNHCR in supervising their acts and omissions.

But even when states are bound by international human rights treaties, this only establishes a legal commitment, a contract, between states parties. Accordingly, states parties have a standing *vis-à-vis* each other regarding the compliance of the treaties' provisions. When a dispute arises relating to the interpretation or application of these provisions, this may give cause to a state party to bring the matter before the International Court of Justice.[35] Some human rights treaties have other or additional procedures for a state party to file a complaint when it considers that another state party is not giving effect to the provisions of that treaty: from starting a procedure before the relevant Committee[36], the establishment of *ad hoc* Conciliation Committees[37] to inter-state applications lodged before regional courts, such as the European Court of Human Rights.[38]

However, despite the many ways for states to hold each other to account, this inter-state accountability is not functioning properly - not just under the international refugee law regime, but under all human rights' treaties. A case in point is the fact that Article 38, that allows states to settle a dispute before the ICJ,

34 Türk and Dowd (n 29) 278.

35 Convention Relating to the Status of Refugees [the 1951 Convention] 1951 (189 UNTS 137) Art. 38. But see also, inter alia, Convention on the Elimination of All Forms of Discrimination against Women 1979 (1249 UNTS 13) Art. 29(1); Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (1465 UNTS 85) Art. 30(1).

36 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (2220 UNTS 3) Art. 74; Convention against Torture Art. 21.

37 International Covenant on Civil and Political Rights 1966 (999 UNTS 172) Arts. 41-43; International Convention on the Elimination of All Forms of Racial Discrimination 1965 (660 UNTS 195) Arts. 11-13.

38 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 Art. 33.

has never been invoked by any state party to the 1951 Convention.[39] It is also indicative that only in 2018, for the first time, a human rights treaty body received an inter-state communication under one of the complaint mechanisms.[40] Although the use of the inter-state complaint procedure before the ECHR is used slightly more often, it is still at only 24 cases since 1953.[41] Some say that relying on treaty monitoring or supervising bodies to oversee the obligations that states have encourages this situation.[42] Fact is that states are reluctant to take on the responsibility for ensuring that other states comply with their human rights treaty obligations; this is true for the 1951 Convention, but also for the other human rights treaties. The dynamics of one state's persuading or even shaming of other states simply does not occur on a regular basis.[43]

One way out of this conundrum is to strengthen the monitoring and enforcement of all human rights treaties, including the 1951 Convention, at the national level. Establishing effective and strong national level monitoring, with enforcement powers to hold the state to account (for example through the judiciary), makes that there is less need for international monitoring or supervision. It would, in addition, be interesting to research whether states consider their inter-state accountability to be 'bought off' when they establish international monitoring or supervisory bodies, or whether it is simply part of states' DNA to be reluctant in holding other states accountable for their treaty obligations – whether or not there is an international body or agency that is tasked with monitoring or supervising their compliance. It goes, however, beyond the scope of this thesis to explore this in depth.

39 The International Court of Justice has adjudicated in a number of inter-state complaints concerning the human rights treaties, but these cases are few and far between. The vast majority of cases before the ICJ concern border disputes. See for an overview of all the cases of the ICJ <https://www.icj-cij.org/en/list-of-all-cases> accessed 1 July 2020.

40 'CERD Information Note on Inter-State Communications' (*United Nations Human Rights Office of the High Commissioner*, 30 August 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23566&LangID=E> accessed 1 July 2020.

41 Although none of these cases have involved the treatment of third-country nationals. 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' 66; European Court of Human Rights, 'Inter-States Applications' <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed 1 July 2020.

42 James C Hathaway, 'Who Should Watch over Refugee Law?' (2002) 14 Forced Migration Review 23, 25.

43 *ibid*.

7.5 Scaling down, and up

International instruments and institutions on refugee protection are ultimately as weak or strong as states allow them to be.[44] There is, however, some considerable leeway for these institutions to move within the boundaries that are provided by states. Going back to the protagonist of this study, and as was described in Chapter 4 and 5, UNHCR has used its relative autonomy to develop its mandate and ways of working,[45] which indicates that not all roads lead back to the 'dictating' state.[46] The agency could now use that autonomy to enhance its supervisory task. The following section will discuss three of those enhancements: first, scaling down its humanitarian assistance; secondly, expanding its internal focus on protection; and thirdly, increasing its external public scrutiny.

7.5.1 Scaling down humanitarian assistance

Chapter 4 and 5 demonstrated that the agency is quite willing to be involved with protection activities in countries that, in principle, could manage that themselves. UNHCR is often stepping in, substituting *de facto* for states by filling the gaps that are left by governments.[47] UNHCR's involvement in Greece is a case in point: the agency has been delivering food, water, sanitary items, sheets and blankets, to refugees and other migrants on the Greek mainland, particularly after the influx of mainly Syrian refugees in 2015.[48] Although this involvement has decreased in the last two years, the agency is still very much involved in assisting the Greek authorities in its so-called 'hotspots' (Reception and Identification Centres) on the Greek Aegean islands with receiving, assisting, registering and housing refugees.[49] However, these well-developed states should be able to

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

45 See, in particular, §4.5.3 and §5.3.4.

46 Contrary to what MacMillan and Olsson say in: MacMillan and Olsson (n 44) 41.

47 Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 5) 11; Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 International Journal of Refugee Law 1, 28.

48 UNHCR, 'UNHCR Assists Refugees at Greece-FYR Macedonia Border, Where Calm Is Returning' (*UNHCR*, 24 August 2015) <http://www.unhcr.org/55db16146.html> accessed 1 July 2020.

49 UNHCR, 'UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect' (*UNHCR*, 22 March 2016) <http://www.unhcr.org/56f10d049.html> accessed 1 July 2020; UNHCR, 'UNHCR Greece Factsheet - April 2019' <https://reliefweb.int/sites/reliefweb.int/files/resources/69780.pdf> accessed 1 July 2020; UNHCR, 'UNHCR Greece Factsheet - February 2020' <https://data2.unhcr.org/en/documents/download/74972> accessed 1 July 2020.

provide for protection and assistance to refugees themselves, or to call in the help of their neighbours. In the case of Greece, this means that the European Union and its member states should be assisting the Greek government. The agency could then focus solely on its supervisory task in such countries, including capacity building and training of national authorities, if appropriate.

It will not be easy for UNHCR to step away from the more operational work in countries. This eagerness of UNHCR to fill governments' gaps is sometimes explained by empire-building[50], or by the analysis that the agency is part of an inescapable securing of its share in the market vis-à-vis other international institutions and organizations.[51] However, states have also played a major role in creating, directing and stimulating the agency's institutional focus on its humanitarian and operational work.[52] They have done so through the General Assembly's 'good offices' approach[53], which broadened the agency's mandate

50 Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 61.

51 Jerôme Elie, 'The Historical Roots of Cooperation Between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 Global Governance 345; Interview with UNHCR official #5b (n 14). What probably also plays a role is that activities such as providing food and shelter are much easier captured in numbers (and pictures), satisfying audit and donor requirements more easily. Monitoring, training and supervising in general, on the other hand, is more qualitative, and "less immediate [but] more of a longer term investment". 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. There have been attempts to quantify the supervisory aspect of UNHCR's work, significantly improve the reporting on protection. The output of this attempt, 'Measuring Protection by Numbers', enumerates inter alia the number and types of actions that the agency has taken on refoulement and detention of asylum seekers and refugees. The document also contains a helpful overview of the number of staff members working on protection. However, for unclear reasons, 'Measuring Protection by Numbers' only saw one edition. UNHCR, 'Measuring Protection by Numbers (2005)' (2006).

52 This is perhaps due to, what Cuellar has called, the 'grand compromise' of global refugee policies. It points to UNHCR's ability to deliver humanitarian aid as a way for donor states in the Global North to thwart their responsibility of hosting refugees in their own territories. States in the Global South, on the other hand, are assisted by UNHCR to avoid "imposing a burden on their own societies". Mariano-Florentino Cuellar, 'Refugee Security and the Organizational Logic of Legal Mandates' (2006) 37 Georgetown Journal of International Law 583, 622, 659; in: 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 3.

53 See UN General Assembly Resolution 1388 XIV (20 November 1959) ("authorizing the High Commissioner, in respect of refugees who do not come within the competence of

significantly through granting it the authority to raise funds and initiate assistance programmes, through approving its annual budget in ExCom (and subsequently funding that budget, albeit insufficiently), and through allowing UNHCR on its territory to actually executive its humanitarian work.

Since the Statute does not prioritize any of the (non-exhaustive) tasks that are mentioned in Article 8, it is legitimate for UNHCR to consider letting the scale tip in favour of the more operational aspects of its work. But if it does, and Chapter 5 identified that this prioritization is already happening, a void in the supervision of states' compliance with their obligations under the 1951 Convention is the consequence. This is particularly the case as there is no inter-state accountability on compliance with the 1951 Convention, and other supervisory and monitoring mechanisms (described in Chapter 6) have some serious shortcomings and flaws as well.

The agency should therefore slowly but steadily hand over significant parts of its humanitarian work to others who are equally (or even better) suited to carrying out direct service delivery, also in less developed states.[54] Other UN agencies, such as the World Food Program, UNICEF and the WHO, could, under the leadership of the Office for the Coordination of Humanitarian Affairs, be more in the front seat. In a similar vein, (local and national) NGOs can play a much larger role in humanitarian responses, as these local and national partners are often the first to respond to crises and will remain the longest, long after international organizations have moved on to the next emergency.[55] Increasing funding to such local responders is also in line with the Grand Bargain, an agreement made in 2016 between the largest donors and humanitarian

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the United Nations, to use his good offices in the transmission of contributions designed to provide assistance to these refugees".) See also Gil Loescher, Alexander Betts and James HS Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection Into the 21st Century* (Routledge 2008) 23.

54 As former High Commissioner Ruud Lubbers mentioned: "We have got to see what people are doing. Is it relevant? Does it need to be done by us?" Ray Wilkinson, 'My Focus Is Protection - Safeguarding and Nurturing It' (2001) 122 *Refugees* 16. He added: "[UNHCR] has been heavily burderned by one crisis after another over the past decade and its involvement in all of these humanitarian emergencies can divert emphasis from other, equally important protection needs."

55 Of course this response of NGOs needs to be done in full accordance with the responsibility of the state concerned, neither contributing to state neglect nor to state humilitation through capture of a non-state power. Hugo Slim, 'What Happens to Governments' (*Global Policy Forum*, 12 April 2007) <https://www.globalpolicy.org/component/content/article/176/32099.html> accessed 1 July 2020.

organizations to improve the effectiveness of humanitarian actions.[56] Carrying over tasks to other actors would not necessarily lead to freeing up budget (as this funding would then be carried over to others as well), but it would make a clearer demarcation between the agency's then-smaller operational role and its supervisory task. It would also make the agency less dependent on states in which territories it operates, although maintaining some access would remain important to effectively exercise its supervisory task. Finally, it would satisfy the criticism that UNHCR is a supervisor of its own work.[57]

7.5.2 A new focus on protection

With the agency progressively carrying over its humanitarian work to appropriate other organizations, it would gain more space to focus on its other major task: the protection work. An interview with former High Commissioner Ruud Lubbers shows that this work has, particularly in last decades, not been a priority for the agency, despite the emphasis he put at the beginning of his tenure on protection[58]:

> "I don't recall that Ogata [the predecessor of HC Lubbers] had told me that we should rap states on their knuckles. That was not even considered then. We were proud that we were an organization that assisted people, that offered assistance. […] The lawyers, they went to meetings, but neither Ogata nor I spent a lot of time on thorough legal discussions. This was probably partly due to our believe that we had to praise [governments which were cooperative] for what they were doing. And that we had to persuade them to do more – to give more money, so that we could offer more assistance. Now and then, there were very intelligent people that said: you have to use this opportunity to talk to that government. But then I always tried to bring the conversation with these governments around to assistance." [59]

He also said:

> "The organization that I encountered, as I can remember, viewed itself mainly as a provider of assistance, and not of protection. My first memory was of action and doing things." [60]

56 See <https://interagencystandingcommittee.org/grand-bargain> accessed 1 July 2020. See in particular workstream 2: 'More support and funding tools to local and national responders'.

57 Hathaway (n 42).

58 See above, note 54.

59 Interview with former High Commissioner Ruud Lubbers [10 November 2014].

60 *ibid.*

Of course, this extensive quote is only to a certain extent indicative of the period in which High Commissioners Ogata and Lubbers were heading the agency (1990 – 2005). But the Q&A session with the ICVA when the current High Commissioner Filippo Grandi was still a candidate for the post is also telling. When he was asked "How do you see the role of the High Commissioner and UNHCR today?", he did not mention the agency's supervisory task and its protection work.[61] Nor did any of the other candidates, for that matter.[62] This tendency to talk more about 'humanitarian action and implementation' rather than 'international protection' was already detected in 1999 by Goodwin-Gill.[63] There is indeed a strong inclination to characterise UNHCR in terms of humanitarian action, despite the efforts of the agency in the past few years on some global and significant international processes that manifest UNHCR's protection mandate.[64]

Focusing more on its international protection task requires an institutional change; for example, through making a more public commitment to this part of its mandate by a powerful voice from within the organization. There is a need for this to come from the highest ranks of the agency, as has also been acknowledged by Chimni.[65] He says that directives given by senior management play a significant role in shaping the agency's culture.[66] Indeed, as was pointed out in Chapter 3 as well by the quote from High Commissioner Lubbers, the history of UNHCR shows that the various High Commissioners had the power and authority to push the agency in a particular direction.[67] So what is needed, foremost, is a High Commissioner who values protection, and who makes clear to UNHCR's stakeholders (including its mandate providers and states) through

61 International Council of Voluntary Agencies, 'Who Wants to Be the next UN High Commissioner for Refugees?' (ICVA 2015) 3–4, 13.

62 The candidate from Pakistan even mentioned that "UNHCR is not strictly a norms and standards setting agency, but is more implementation-orientated". *ibid.*

63 Goodwin-Gill (n 6) 224.

64 In particular the Global Compact for Refugees (GCR) and getting states to sign on to it, as well as managing the objectives of the GCR, for example by organizing the Global Refugee Forum in 2019. See <https://www.unhcr.org/global-refugee-forum.html> accessed 1 July 2020. There is disagreement as to whether the GCR and the 2019 Forum have been a successful manifestation of this mandate though. See, in particular: James C Hathaway, 'The Global Cop-Out on Refugees' (2018) 30 International Journal of Refugee Law 591; BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30 International Journal of Refugee Law 630.

65 BS Chimni, 'Reforming the International Refugee Regime: A Dialogic Model' (2001) 14 Journal of Refugee Studies 151, 161.

66 *ibid.*

67 See, in particular, §3.3 and §3.5.

public statements, but also to his staff members within the agency, that protection is at the forefront of UNHCR's work, to which adequate time, commitment and resources are attributed.

In this respect, it is troublesome that the department that is mainly responsible for carrying out one of the two statutory tasks of the agency, namely the Department of International Protection, seems to be understaffed and underfinanced[68], and is not featuring in the yearly 'big' reports of the agency. The DIP is highly experienced in assisting governments in drafting legislation and policy, in engaging in court cases, and in conducting training of and outreach to all branches of government[69] – in other words, in carrying out the supervisory task *par excellence*. But this is not very visible. A case in point is UNHCR's Global Focus website, which is the agency's main reporting portal.[70] The portal provides almost real-time updates of the protection risks that refugees and other populations of concern to UNHCR face across the world, as well as other information about the agency's programmes, operations, financial requirements and donor contributions. The website does not, however, publish any information about the work that the DIP carries out; the number of *amicus curiae* submitted, the number of governments assisted in implementing proper refugee legislation, the latest Guidelines on International Protection or Eligibility Guidelines – they are not found through this portal.[71] The lack of (financial and personal) capacity as well as the hiatus on reporting is undesirable.

Strengthening the role of the DIP would thus be a good step towards a new institutional focus on protection – a suggestion that was already made in 2001 by Loescher[72] and was, in the same year, proposed by the states parties to the 1951 Convention during the Ministerial Meeting at the Global Consultations.[73] This strengthening should not result in going back to the situation in the 80s, when the DIP (then called the Division of International Protection) dominated an inflexible

68 See §5.4.3.

69 Hathaway (n 42) 24.

70 See <http://reporting.unhcr.org> accessed 1 July 2020.

71 Arguably, some of this output from the DIP can be found on the other website that UNHCR is publishing (apart from its main website), Refworld. Although this website does contain the latest information and published materials by the agency, it serves mostly as a reference point, rather than a reporting site for accountability purposes. One would expect that the global reporting website would also contain information on the supervisory task as this is part and parcel of UNHCR's overall mandate.

72 Loescher (n 50) 377–378.

73 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) 2.

hierarchy and excessive legalism, according to Goodwin-Gill.[74] What is needed is rather a more flexible cooperation between offices in countries, the regional bureaus and the DIP, in which the latter helps coordinate and supports country and regional offices in carrying out their role in fulfilling the supervisory mandate. Allowing for more coordination between the different levels in the agency would also ensure more consistency between these levels, with the bureaus and national offices reporting consistently on the implementation of their international protection mandate, and the DIP having sufficient capacity to intervene and play a steering role, if appropriate.

Mending the DIPs understaffing and underfinancing would also contribute towards more engagement with the judicial branch of governments.[75] In the previous section, it was already mentioned that national (and some regional) courts are the only institutions that can actually enforce the laws that protect refugees (assuming that the 1951 Convention is adequately incorporated in domestic law). Empowering the judiciary to do so is thus meaningful.[76] UNHCR's supervisory effectiveness would be strengthened if the DIP had more capacity to closely monitor court cases and submit *amicus curiae* briefs, through which it can shape jurisprudence[77], as well as work with the judicial branch through trainings and submission of guidelines. This was precisely the reason why some scholars argued for instituting an International Judicial Commission for Refugees.[78] Ultimately, the most effective sanctioning instruments are all on the national level.[79] As UNHCR cannot be omnipresent[80], its involvement in improving these national instruments and creating a (national) culture of protection will be worth investing in.

74 Goodwin-Gill (n 6) 235 and note 60.

75 Judith Kumin (ed), *The State of the World's Refugees 2012: In Search of Solidarity (A Synthesis)* (UNHCR 2012) 2 <http://www.unhcr.org/4fc5ceca9.html> accessed 1 July 2020.

76 Hathaway (n 42) 24.

77 This is, however, more meaningful in common law systems, where judicial opinions are of primary importance, than in civil law systems.

78 Simeon (n 30) 23. But, as was discussed in Chapter 6, UNHCR already has all of the features of such a commission and could – through its collaboration with national courts – actually achieve enforcement of the Convention's articles; something that is not foreseen when setting up a Judicial Commission. 'These opinions [of the Judicial Commission] would be neither binding nor enforceable.' 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, 105–106.

79 Deirdre Clancy, 'Reflections on Accountability and Refugee Protection' (2001) 3 *Talk Back - The Newsletter of ICVA* 16, 19.

80 Guy S Goodwin-Gill, 'Closing Address Principles and Protection: Making It Work in the Modern World' (1999) 19.

7.5.3 More public scrutiny of states' compliance

Finally, in Chapter 2, on what constitutes effective supervision by an international organization, under the realist approach, fear of reputational damage was mentioned as one of the reasons for states' compliance with their international obligations.[81] The issue of 'naming and shaming' has been touched upon a few times in the previous chapters. But since UNHCR seems to feel ill at ease with particularly the 'shaming' part (as most international institutions charged with monitoring compliance), and this is more a strategy that fits with advocacy NGOs, it is proposed that UNHCR invests in more public scrutiny instead.[82] Public scrutiny in this sense is understood as the act of observing states closely and in the limelight; it is 'public supervision'. It focuses mostly on the 'naming' part of 'naming and shaming', although there is arguably not a sharp line between the two.

Various proposals that would increase public scrutiny were already mentioned in this thesis. It should include the publication of the annual protection reports on countries, which would provide for a public forum to discuss the progress states made on implementation of the 1951 Convention.[83] It should also include submissions of more *amicus curiae* briefs, which are already public documents and contribute to hard law development.[84] It would also need to include more (and more timely) press releases calling on states to comply with their obligations under the 1951 Conventions and the wider refugee law regime. The discussion and publication of Notes on International Protection by ExCom, which are generally prepared by UNHCR, and which focus specifically on areas of the refugee law regime that are not sufficiently adhered to by states, is another opportunity that is already within grasp of the agency. Perhaps this could be done in the re-established Sub-Committee on International Protection, as proposed in Chapter 6.[85]

There are a number of benefits to conducting the supervisory process more in public. First and foremost, it encourages states to (continue) to comply with

81 See §2.2.1.

82 This is not refering to more public scrutiny of UNHCR's activities, as is suggested by Simeon. Simeon (n 30) 336.

83 See §6.2.3.

84 In addition, *amicus curiae* are mentioned by many UNHCR officials who were interviewed for this thesis as a tool that they would like to use more but are not able to do so due to capacity constraints at their country level and at the agency's headquarters in Geneva. Interview with UNHCR official #8 (9 September 2014); Interview with UNHCR official #10 (10 September 2014); Interview with UNHCR official #13 (12 November 2014); Interview with UNHCR official #14 (10 November 2014); Interview with UNHCR official #19 (15 March 2016); Interview with UNHCR official #22 (23 March 2016).

85 See §6.4.3.

their obligations under the 1951 Convention, in the sense that it would provide a 'gentle reminder' to states. It would reaffirm and strengthen the rights of refugees in public, serve as an example to other monitoring bodies, and it would potentially be able to stop violations before they occur.[86] Importantly, when the supervisory process is at least partly taken away from the shadows, it would also increase the opportunities for NGOs and other relevant voices to become part of that process, an issue that was highlighted in Chapter 2 and 6.[87] Apart from these third parties being able to feed into the supervisory process, they would also be able to use and build upon UNHCR's public output for their own advocacy purposes.

An important side effect of the supervisory work being done more out in the open, is that UNHCR itself also becomes more accountable towards its stakeholders: states in the first place, but also NGOs, civil society organizations, academic institutions, corporate actors, and of course persons of concern to the agency. Opening up the supervisory process, becoming more transparent and having increased external output would increase UNHCR's accountability (one of the procedural aspects that was most hampered), and make it easier to external actors to participate in the functioning of the agency.[88] In other words, public scrutiny with the main aim of 'naming' states would contribute as well to opening UNHCR up to public scrutiny.[89]

7.8 Final remarks

Over the past almost 70 years, UNHCR has assisted millions of people who needed protection, by providing them with humanitarian and development aid, and by standing up for their rights. It has done so under often very challenging circumstances, operating in a highly politicized context and dealing with a variety of stakeholders with competing interests. The agency deserves praise, even when it has been far from perfect: this thesis has mapped out several fundamental flaws in its mandate and in the way UNHCR carries out its work of overseeing the 1951 Convention. Overall, UNHCR is a legitimate institution[90], and with its presence in more than three-quarters of all the countries worldwide, and its ever-increasing mandate, it is a force to be reckoned with. The institution as such

86 Although it would of course be quite challenging to ever prove that this has happened. MacMillan and Olsson (n 44) 40.
87 See §2.4.2 and §6.2.2.
88 See also §2.4.2.
89 Simeon (n 30) 336.
90 See §5.2.4.

deserves a kind of "impersonal respect"[91], even when serious criticism is voiced. There is clearly a need to reform the way in which UNHCR conducts its tasks; signalling this reform as the appropriate objective is, however, different from wholly rejecting the work the agency has done and could be doing. This debate on reforming UNHCR's supervisory role is stirred up every couple of years.[92] It is my hope that this thesis will be fuel for any future discussion.

91 Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & international affairs 405, 407.

92 Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of Its Mandate' (n 5) 16.