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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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# Annex I

## Interviews

<b>Name</b>	<b>Date</b>	<b>Geographical spread</b>
UNHCR official #1	12 February 2013	Geneva
UNHCR official #2	29 April 2013	West Africa
UNHCR official #3	29 October 2013	North America and the Caribbean
UNHCR official #4	17 June 2014	Western Europe
UNHCR official #5a	9 September 2014	Geneva
UNHCR official #5b	10 September 2014	Geneva
UNHCR official #6	9 September 2014	Geneva
UNHCR official #7	9 September 2014	Geneva
UNHCR official #8	9 September 2014	Geneva
UNHCR official #9	10 September 2014	Geneva
UNHCR official #10	10 September 2014	Geneva
UNHCR official #11	10 September 2014	Geneva
UNHCR official #12	6 November 2014	Western Europe
UNHCR official #13	12 November 2014	Central Europe
UNHCR official #14	10 November 2014	Western Europe
UNHCR official #15	10 November 2014	-- (former High Commissioner)
UNHCR official #16	7 April 2015	Western Europe
UNHCR official #17	26 January 2016	Northern Europe
UNHCR official #18	26 January 2016	Northern Europe
UNHCR official #19	15 March 2016	East Asia and the Pacific
UNHCR official #20	16 March 2016	North America and the Caribbean
UNHCR official #21	23 March 2016	East Asia and the Pacific
UNHCR official #22	23 March 2016	Latin America
UNHCR official #23	14 April 2016	Latin America
UNHCR official #24	14 June 2017	Latin America
UNHCR official #25	19 June 2017	East Asia and the Pacific

## Annex II

### Interview questionnaire

Thank you for taking the time to answer these questions. The outcomes of this questionnaire will be used to illustrate my Ph.D. research on the supervisory task of UNHCR with regard to the 1951 Convention. In this research I analyse to what extent UNHCR is capable of effectively supervising the 1951 Convention. Answers will be used either in a generic way ('most UNHCR offices spend a lot of time investing in the good relations with civil servants') or in an anonymized way ('one of the legal officers stated that it was very hard to influence draft policy once it was sent to the parliament'). Please be as specific and candid as possible: name examples when possible, data, number of persons, etc.

I Name:

II Job description:

III Number of years working with UNHCR:

1. How many staff members at your office are involved with the supervisory task of the 1951 Convention?
2. By carrying out the supervisory task, what is, in your opinion, your office's main goal?
3. By carrying out the supervisory task, what is, in your opinion, your office's core task?
4. I have identified three phases in a supervisory mechanism: interpretation of the norms (in this case: the 1951 Convention), monitoring of norm compliance, and enforcement in case of violations of the norms. Are each of these phases executed by your office and if so, in what manner? If not, why not?
  - a. Interpretation:
  - b. Monitoring:
  - c. Enforcement:

5. Is your office involved with the legislative branch of government? If yes, please elaborate; if no, please indicate why not.
6. Is your office involved with the executive branch of government? If yes, please elaborate; if no, please indicate why not.
7. Is your office involved with the judicial branch of government? If yes, please elaborate; if no, please indicate why not.
8. Is your office involved with civil society (for example: NGOs, academic institutions, interest groups) in your country? If yes, please elaborate; if no, please indicate why not.
9. How would you describe the relationship of your office with other UNHCR units in terms of cooperation? Please elaborate.
  - a. other national offices
  - b. regional office / Bureau
  - c. DIP
10. Could you indicate one or a few of the biggest challenges that your office is facing with regard to the execution of its supervisory task? How should, in your opinion, this or these challenges be addressed?
11. Do you have any additional comments?

Thank you so very much!



## Summary

UNHCR is the world's leading agency for humanitarian aid to refugees, asylum seekers, stateless persons, internally displaced persons and others uprooted by violence and persecution. But when the refugee agency was set up in the wake of World War II, providing direct material and development aid to forcibly displaced people was specifically excluded from being its task. Instead, the UN General Assembly (GA) entrusted the agency with the provision of 'international protection' and the finding of durable solutions for refugees; tasks that signified an agency at arm's length from humanitarian aid work. According to the agency's Statute, one aspect of providing international protection is the supervision of states' application of international conventions for the protection of refugees, including the cornerstone of the international refugee regime: the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The drafters of that Convention made sure to incorporate a corresponding obligation for states parties to cooperate with UNHCR in the exercise of that supervisory task, although no clarity has ever been given on the meaning of supervision or on the manner in which the cooperation between states and the agency would take place.

Over the past seven decades, UNHCR has expanded the manner in which it supervises the 1951 Convention, establishing an exceptional practice of intense engagement with all branches of government and employing a broad range of activities in the exercise of its supervisory task. However, UNHCR has also received criticism on the manner in which it executes its supervisory task. Scholars claim, amongst others, that because of the agency's humanitarian work, UNHCR is no longer at a remote distance from the implementation of the international law on refugee protection that it is mandated to supervise. Concerns are also raised that UNHCR is too dependent on states for its funding and for securing their consent for the agency's ongoing presence in their territories, in order to successfully provide in particular humanitarian assistance to refugees.

The lack of guidance from UNHCR's mandate providers, and the criticism on and concerns about the agency's supervision, make up a list of potential inadequacies, constraints and weaknesses that may influence the effectiveness of UNHCR's supervisory task. Ineffective supervision of in particular the 1951 Convention, and, as a consequence, prolongation of inadequate or even a wrong interpretation, implementation or application of its provisions, is detrimental to

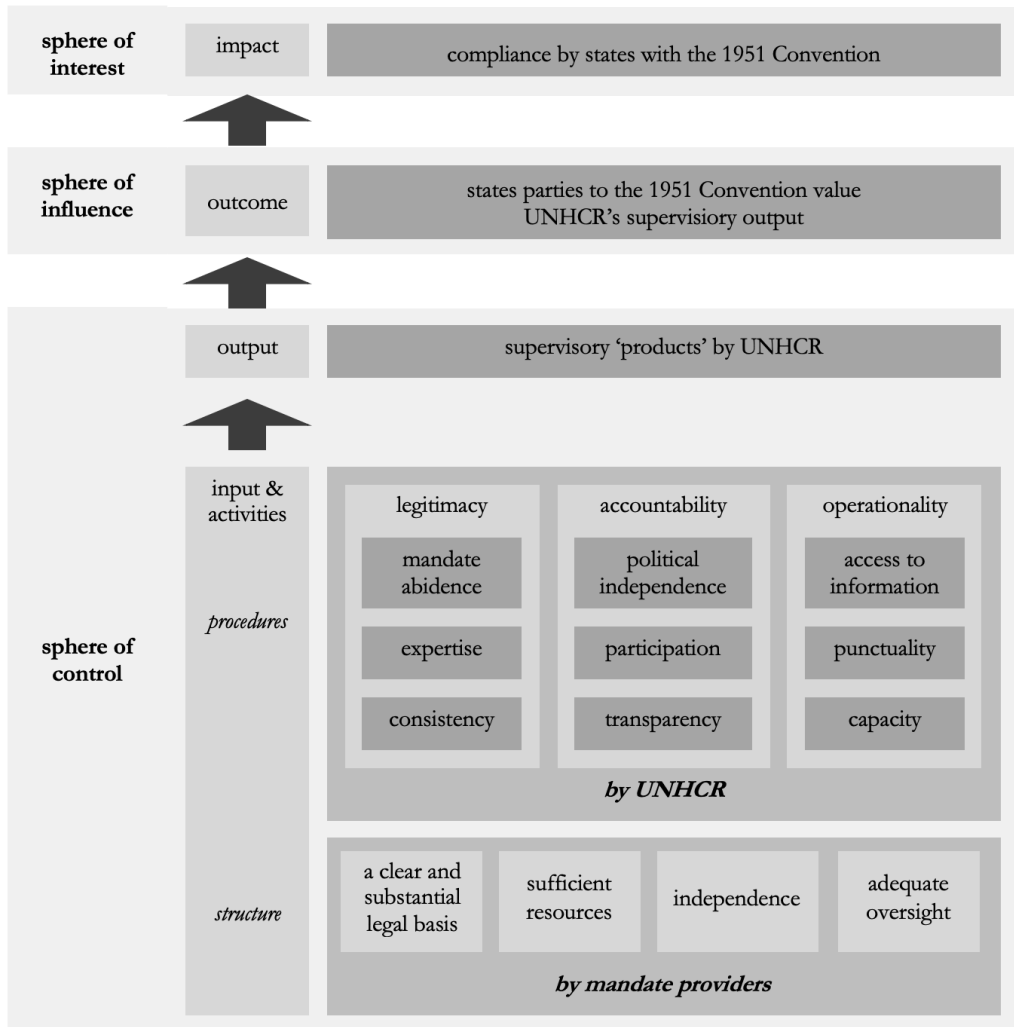
all parties involved: asylum seekers and refugees, states parties, and UNHCR itself. This thesis therefore aims to analyse the merits of the scholarly concerns and criticism by asking the question: how should UNHCR's supervisory mandate and its supervisory activities regarding the 1951 Convention be assessed in terms of effectiveness?

Assessing the effectiveness of UNHCR's supervision necessitates a clear understanding of what is meant with effective supervision. Supervision by international organizations is, in essence, the overseeing of states' acts to promote and ensure that these acts are in compliance with the law that these organizations are mandated to supervise. Given that the international legal order lacks one clear and central legal enforcing authority, these organizations should, in order to be effective, *i.e.* to ensure that there is compliant behaviour, 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. These motives are not static: they can change over time, and some states may be drawn more to one motive than to the other. Ideally, an international organization must therefore 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 this supervision is carried out depends to a great extent on the structures that the international organization's 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. These structural elements form the supervisory mechanism provided for by the mandate providers, granting the international organizations the competence to authoritatively interpret the law, monitor state behaviour, and enforce compliance with the law. 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 identified 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'. For each of these procedural elements, three underlining factors were also defined: mandate abundance, expertise and consistency for legitimacy; (political) independence, participation and transparency for accountability; and access to information, punctuality and capacity for operationality.

The diagram 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 its interpretation, monitoring and enforcement), making it more likely that states will value that output, and, ultimately, act in compliance with their international obligations. Accordingly, this research is substituting an outcome or impact assessment, or empirical analysis, with the evaluation of structure and procedures as proxies for outcome or impact.



*Theory of Change*

UNHCR is a subsidiary organ of the General Assembly (GA) and 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. 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. In particular, UNHCR's legal basis and powers for monitoring states' compliance and for enforcing the norms are insignificant at best. The agency is not alone in this though: most other international institutions charged with the supervision of states' international obligations have limited monitoring powers, and even more 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 that has plagued UNHCR for decades is the lack of sufficient financial resources for its work, signified by a funding gap in 2019 of 45 per cent. To add insult to injury, its financial resources are almost all coming from a few major donor states who have the tendency to earmark their contributions. This is hampering the independence of the agency. Although the funding 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 the past seventy years, the growth of this operational task was instigated by the different High Commissioners who secured a place for the agency on the international plane. However, the agency's mandate providers have also supported this shift to becoming a multi-faceted enterprise that now has a budget that is more than 28,000 times as high as it was in its initial years. Through this humanitarian work, the agency provides meaningful and often life-saving assistance to millions of asylum-seekers, refugees, stateless persons, IDPs and others. However, this operational work has undermined the agency's supervisory task. It has done so by creating a great dependency on states' resources and permission to access their territories and the refugees present there, which in turn has sometimes led to inconsistent or weak responses to non-compliant behaviour of important donor or host states. In addition, through the taking on of an increasing number of responsibilities, the agency is no longer at arm's length from the implementation of the international law on refugee protection that it is mandated to supervise. Instead, it is now the principal provider of protection to millions of people. The fact that UNHCR lets the scale tip in favour of these operational aspects of its work is leading to a void in the supervision of states' compliance with their obligations under the 1951 Convention.

But not all is to blame on UNHCR's humanitarian work: its accountability is also weak, because the agency has not sufficiently invested in the participation of all the relevant stakeholders, including refugees and other persons of concerns to the agency, and the transparency of its international protection work. Moreover, the operational task has reinforced the supervisory task as well: because of UNHCR's physical presence in 137 countries, the agency has a great deal of expertise and access to information, which has significantly contributed to the agency's legitimacy.

These weaknesses have not gone unnoticed by scholars. They have put forward numerous proposals to increase the effective supervision of the 1951 Convention. These proposals reveal a broad gamut of opportunities. Some 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. 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. The supervision as it is currently carried out by UNHCR must, however, not be undermined by others taking over a significant share of this task. A mushrooming of supervisory mechanisms may result in duplication, and, worse, also in inconsistencies, cherry-picking and even competition, which will not be helpful for increasing compliant behaviour of states.

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' sovereign interests may diverge from UNHCR's protection and supervisory tasks; this, by nature, is the dilemma that refugee protection entails. Shifting the international protection component to another organization or body will not solve this dilemma. In addition, even though UNHCR does not have all the monitoring tools that are available to for example the human rights treaty bodies, such as individual complaint mechanisms, the agency's supervisory practices and possibilities match and often go well beyond the ways and means of these more 'traditional' monitoring bodies. What UNHCR and these monitoring bodies have in common though is that they are not in a position to coerce states into complying with their treaty obligations. Only states parties have a standing *vis-à-vis* each other regarding the compliance of treaties' provisions, but this inter-state accountability is not functioning properly

- neither under the 1951 Convention nor under any other human rights treaty. What UNHCR can do is induce compliance by soft persuasion or by hard confrontation, by backdoor diplomatic encouragement or by public denunciation. But only through the commitment of states to cooperate with UNHCR can the latter effectively exercise its supervisory task. This commitment of states is the Achilles heel of any international monitoring or supervisory body.

However, there is still considerable leeway for UNHCR to move within the boundaries that are provided by states. In the past seven decades, the agency has used its relative autonomy to develop its mandate and ways of working, which indicates that not all roads lead back to the 'dictating' state. The agency could use that autonomy to enhance and improve its supervisory task so as to make it more effective. Three enhancements in particular are worthwhile to explore.

First, UNHCR should scale down its humanitarian footprint by slowly but steadily handing 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. 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. Plus, it would satisfy the criticism that UNHCR is a supervisor of its own work.

Secondly and concomitantly, UNHCR should expand its internal focus on protection. As the history of UNHCR shows, various High Commissioners had the power and authority to push the agency in a particular direction. 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 public statements, but also to his staff members, that protection is at the forefront of UNHCR's work, to which adequate time, commitment and resources need to be attributed. A first step in that direction is strengthening the role and capacity of the agency's Department of International Protection (DIP), as this department is highly experienced in coordinating and supporting UNHCR's country and regional offices in carrying out the supervisory task. Revaluing the DIP would also contribute towards more engagement with the judicial branch of governments. As national (and some regional) courts are the only institutions that can actually enforce laws that protect refugees (assuming that the 1951 Convention is adequately incorporated in domestic law), UNHCR's supervisory work of empowering the judiciary is thus meaningful.

Thirdly, UNHCR should invest in more public scrutiny of states' compliance with their international obligations. Public scrutiny in this sense is understood as the act of observing states closely and in the limelight; it is 'public supervision'. According to the realist school, this will speak particularly to states who are fearful of reputational damage. But there are more benefits to conducting the

supervisory process in public. First and foremost, it encourages states to (continue) to comply with 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. When the supervisory process is at least partly taken out of the shadows, it would also increase the opportunities for NGOs and other relevant voices to become part of that process. Finally, when the supervisory work is being done more openly, UNHCR itself also becomes more accountable towards its stakeholders - its mandate providers and states in the first place, but also NGOs, civil society organizations, academic institutions, corporate actors, and of course the persons of concern to the agency.



## Samenvatting (in Dutch)

UNHCR is de grootste organisatie ter wereld voor humanitaire hulp aan vluchtelingen, asielzoekers, staatlozen, ontheemden en anderen die op de vlucht zijn voor geweld en vervolging. Maar toen UNHCR werd opgericht in de nasleep van de Tweede Wereldoorlog, werd het verstrekken van deze directe materiële en ontwikkelingshulp aan mensen die gedwongen op de vlucht zijn specifiek uitgesloten van de taak van de organisatie. In plaats daarvan gaf de Algemene Vergadering van de VN UNHCR andere taken, namelijk het verstrekken van ‘internationale bescherming’ en het vinden van duurzame oplossingen voor vluchtelingen. Deze taken zetten de organisatie juist op afstand van het geven van humanitaire hulp. Een onderdeel van het bieden van internationale bescherming is, volgens het statuut van UNHCR, het toezicht houden op de naleving door staten van internationale verdragen voor de bescherming van vluchtelingen. De hoeksteen van het internationale vluchtelingenregime hoort daar ook bij: het Verdrag Betreffende de Status van Vluchtelingen uit 1951 (het Vluchtelingenverdrag) en het bijbehorende Protocol uit 1967. De opstellers van dat verdrag hebben ervoor gezorgd dat staten die partij zijn bij het verdrag ook een verplichting hebben om samen te werken met UNHCR bij de uitoefening van die toezichthoudende taak. Er is echter nooit duidelijkheid gegeven over wat toezicht precies betekent of de manier waarop de samenwerking tussen staten en UNHCR moet plaatsvinden.

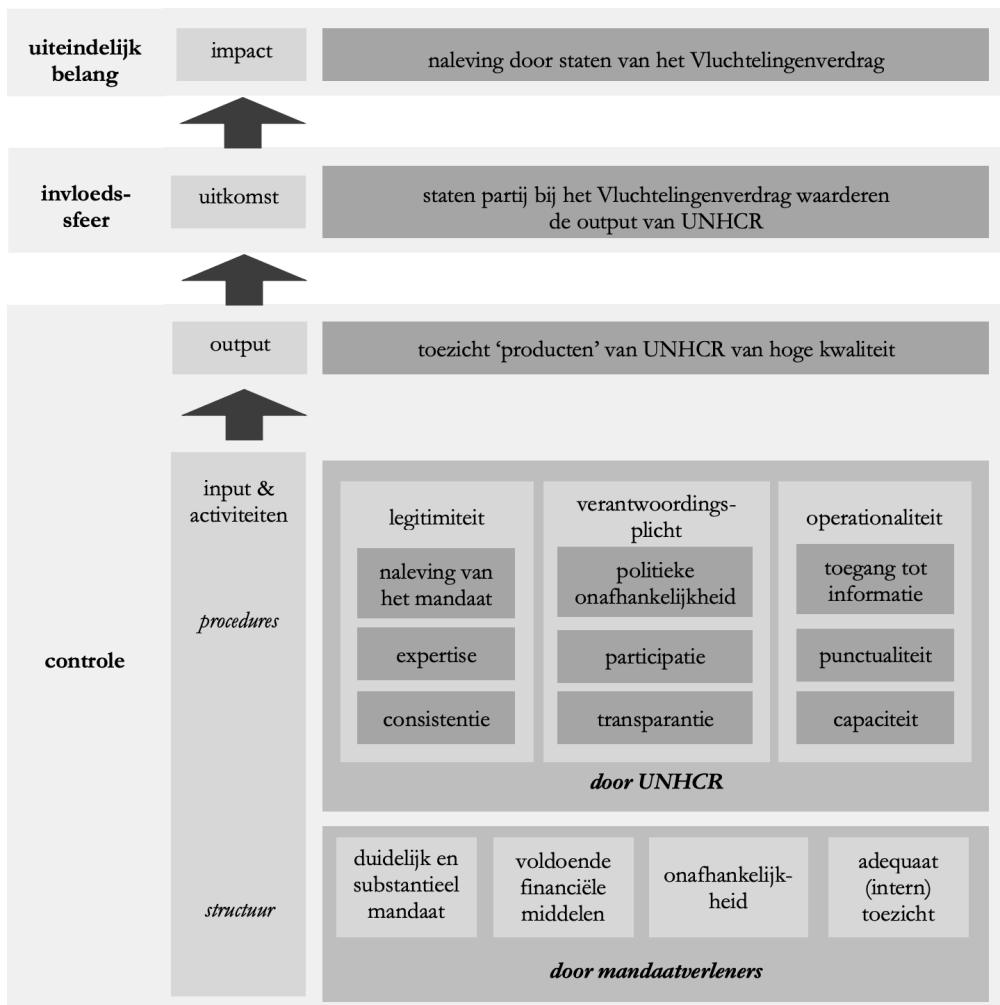
In de afgelopen zeventig jaar heeft UNHCR het toezicht op het Vluchtelingenverdrag enorm uitgebreid. De organisatie heeft een tamelijk uitzonderlijke praktijk tot stand gebracht van intensieve betrokkenheid bij de wetgevende, uitvoerende en rechterlijke overheidsmachten. Het heeft ook een breed scala aan activiteiten ontplooit bij de uitoefening van die toezichthoudende taak. UNHCR heeft echter ook kritiek gekregen op de wijze waarop het deze taak uitvoert. Verschillende (rechts)geleerden beweren onder meer dat UNHCR, vanwege de uitvoering van het humanitaire werk, niet langer op genoeg afstand staat van de implementatie van het internationale vluchtelingenrecht waarop het juist toezicht moet houden. Ook zijn er zorgen dat UNHCR, voor het bieden van met name humanitaire hulp aan vluchtelingen, mogelijk te afhankelijk is geworden van staten voor enerzijds de financiering van deze hulp en anderzijds het krijgen van toestemming voor de aanwezigheid op het grondgebied van staten.

Het gebrek aan richtlijnen van de organen die UNHCR aansturen (de mandaatverstrekkers) en de kritiek op en zorgen over de wijze waarop de organisatie toezicht houdt, zijn mogelijke tekortkomingen, beperkingen en zwakheden die samen de effectiviteit van UNHCR's toezichthoudende taak kunnen beïnvloeden. Ineffectief toezicht op het Vluchtelingenverdrag, en als gevolg daarvan een inadequate of zelfs verkeerde interpretatie, uitvoering of toepassing van de bepalingen ervan, is nadelig voor alle betrokken partijen: asielzoekers en vluchtelingen, staten die partij zijn bij het verdrag, en UNHCR zelf. Dit proefschrift zal daarom de zorgen en kritiek van (rechts)geleerden analyseren door middel van de volgende onderzoeksvraag: hoe moeten het toezichthoudende mandaat en de toezichthoudende activiteiten van UNHCR met betrekking tot het Vluchtelingenverdrag worden beoordeeld in termen van effectiviteit?

Het beoordelen van de effectiviteit van UNHCR's toezichthoudende taak vereist een duidelijk begrip van wat 'effectief toezicht' eigenlijk is. Toezicht door internationale organisaties is het controleren van de handelingen van staten om ervoor te zorgen dat deze handelingen in overeenstemming zijn met het internationale recht waarop deze organisaties toezicht moeten houden. De internationale rechtsorde heeft geen duidelijke centrale handhavingsautoriteit. Daarom zouden deze organisaties, om ervoor te zorgen dat gedrag van staten in overeenstemming is met hun verplichtingen, een beroep moeten kunnen doen op verschillende motieven van staten om hun internationale verplichtingen na te komen. Deze motieven kunnen intrinsiek zijn, gebaseerd op de (morele) overtuiging dat naleving het juiste is om te doen, of extrinsiek, gebaseerd op eigen belang. Motieven van staten zijn echter niet statisch: ze kunnen in de loop van de tijd veranderen, en sommige staten kunnen meer neigen naar het ene motief dan naar het andere. Idealiter moet daarom een internationale organisatie over verschillende middelen beschikken om elk van deze motieven te activeren. Dat doet zo'n organisatie door middel van het interpreteren van het recht, het toezicht houden op de toepassing van het recht en handhaving als het recht niet wordt nageleefd.

Hoe effectief dit toezicht wordt uitgeoefend, hangt in hoge mate af van de structuren die de mandaatverstrekkers (vaak staten) van de internationale organisatie hebben ingesteld. Die structuren zijn de volgende: een duidelijke en substantiële juridische basis, voldoende financiële middelen, onafhankelijkheid om taken uit te voeren, maar ook voldoende toezicht op activiteiten. Door deze structurele elementen kunnen de internationale organisaties het recht op gezaghebbende wijze interpreteren, het gedrag van de staat controleren en de naleving van het recht afdwingen. Dit is echter maar één kant van de medaille: de andere kant is de kwaliteit van de daadwerkelijke inspanning die de organisatie zelf investeert in het toezicht. Deze studie identificeert drie belangrijke procedurele elementen om de kwaliteit van die inspanning te beoordelen. Ten

eerste legitimiteit, gedefinieerd als de geaccepteerde autoriteit van een organisatie door degenen die het object zijn van die autoriteit. Ten tweede verantwoordingsplicht over de uitoefening van gezag door de organisatie. En ten derde het operationeel functioneren van de organisatie in de echte wereld. Voor elk van deze procedurele elementen zijn ook drie indicatoren gedefinieerd. Voor legitimiteit zijn dat naleving van het mandaat, deskundigheid en consistentie. Voor verantwoordingsplicht zijn dat (politieke) onafhankelijkheid, participatie en transparantie. En toegang tot informatie, punctualiteit en capaciteit zijn dat voor het operationeel functioneren van de organisatie.



*'Theory of Change'*



Het bovenstaande diagram toont deze structurele en procedurele elementen. Het laat ook zien hoe deze elementen passen binnen de *Theory of Change* die in deze studie wordt toegepast. De veronderstelling is dat als een organisatie is opgezet met adequate structuren en de interne procedures van hoge kwaliteit zijn, dit zal resulteren in een hoog niveau van toezichthoudende ‘output’ (in de interpretatie, monitoring en handhaving). Door dat hoge niveau is het vervolgens aannemelijk dat staten die output zullen waarderen en zullen handelen in overeenstemming met hun internationale verplichtingen. Dit onderzoek vervangt een impactbeoordeling, of empirische analyse, door een evaluatie van structuur en procedures als substituut voor zo’n beoordeling.

Terug naar UNHCR. De vluchtelingenorganisatie is een subsidiair orgaan van de Algemene Vergadering van de Verenigde Naties. Samen met ECOSOC en UNHCR’s eigen *Executive Committee* zijn dat de mandaatverstrekkers van de organisatie. Al deze organen bestaan natuurlijk uit staten, waarvan de meeste partij zijn bij het Vluchtelingenverdrag. Deze mandaatverstrekkers zijn er niet in geslaagd een adequate toezichtstructuur voor UNHCR op te zetten. Dit belemmert de organisatie in het effectief toezicht houden op het Vluchtelingenverdrag. Met name de juridische basis en bevoegdheden van UNHCR om toe te zien op de naleving door staten en om het verdrag af te dwingen zijn onbeduidend. UNHCR staat hierin echter niet alleen. De meeste andere internationale organisaties die belast zijn met het toezicht houden op de verplichtingen van staten hebben beperkte controlebevoegdheden en nog beperktere handavingsbevoegdheden. Maar deze bevoegdheden zijn wel erg belangrijk, omdat ze de extrinsieke motieven van staten om aan hun internationale verplichtingen te voldoen aanspreken, zoals angst voor vergelding, escalatie en reputatieschade. Het niet kunnen prikkelen van deze motieven ondermijnt UNHCR’s toezicht. Een andere uitdaging die UNHCR al decennialang heeft, is het gebrek aan voldoende financiële middelen. In 2019 was het tekort bijvoorbeeld 45 procent. Bovendien zijn deze financiële middelen bijna allemaal afkomstig van een paar grote donorlanden die ook nog eens vaak hun bijdragen oormerken. Dit belemmert de onafhankelijkheid van UNHCR. Hoewel de financieringskloof vooral het humanitaire werk van de organisatie treft, heeft het ook gevolgen voor de middelen voor de internationale beschermingstaak, waar toezicht onder valt.

Het hebben van deze inadequate structuur is niet gunstig, maar het belet UNHCR in principe niet om adequate procedures voor effectief toezicht op te zetten. Deze procedurele elementen worden echter beïnvloed door één bepalende factor, en dat is het humanitaire werk van UNHCR. In de afgelopen zeventig jaar werd de toename van deze operationele taak gestimuleerd door verschillende Hoge Commissarissen, die allemaal een plek voor UNHCR op het internationale toneel wilden veroverden. De mandaatverstrekkers van UNHCR hebben deze verschuiving echter ook ondersteund. Dat is ook terug te zien in de

begroting van de organisatie: het budget is meer dan 28.000 keer zo hoog als in de beginjaren. Door middel van het humanitaire werk biedt UNHCR zinvolle en vaak levensreddende hulp aan miljoenen asielzoekers, vluchtelingen, staatlozen, ontheemden en anderen. Dit operationele werk heeft de toezichthoudende taak van UNHCR echter ondermijnd. Zo heeft het een grote afhankelijkheid van staten gecreëerd: zowel wat betreft de (financiële) middelen die nodig zijn voor de uitoefening van de operationele taak als ook de toestemming die UNHCR nodig heeft om toegang te krijgen tot het grondgebied van staten en de vluchtelingen die daar aanwezig zijn. Dit heeft soms geleid tot inconsistente of zwakke reacties wanneer belangrijke donor- of gaststaten hun internationale verplichtingen niet naleefden. Bovendien staat UNHCR, doordat het steeds meer verantwoordelijkheden op zich neemt, niet langer op afstand van de implementatie van het internationale recht inzake de bescherming van vluchtelingen, terwijl het daar juist toezicht op moet houden. In plaats daarvan is UNHCR nu de belangrijkste beschermer van miljoenen mensen. Het feit dat UNHCR soms de balans laat doorslaan ten gunste van het operationele werk, zorgt voor een lacune in het toezicht op de naleving door staten van hun verplichtingen onder het Vluchtelingenverdrag.

Maar niet alles is te wijten aan het humanitaire werk van UNHCR. Zo heeft de organisatie ook een zwak ontwikkelde verantwoordingsplicht, omdat er onvoldoende geïnvesteerd is in enerzijds transparantie en anderzijds de deelname van relevante belanghebbenden, waaronder vluchtelingen en andere ontheemden. De operationele taak heeft in sommige opzichten de toezichthoudende taak ook versterkt. Door bijvoorbeeld een fysieke aanwezigheid in 137 landen beschikt UNHCR over veel expertise en toegang tot informatie, wat aanzienlijk heeft bijgedragen aan de legitimiteit van de organisatie.

De zwakheden zoals hierboven genoemd zijn niet onopgemerkt gebleven. (Rechts)geleerden hebben verschillende voorstellen gedaan om het effectieve toezicht op het Vluchtelingenverdrag te verbeteren. Deze voorstellen laten een breed scala aan mogelijkheden zien. Sommige zijn relatief eenvoudig te implementeren, omdat ze betrekking hebben op verbeteringen binnen het institutionele kader van UNHCR. Voorbeelden zijn meer openbare rapportages en meer deelname van ngo's en vluchtelingen zelf aan de toezichthoudende werkzaamheden van de organisatie. Andere voorstellen zijn ambitieuzer en vereisen meer ingrijpende wijzigingen door het opzetten van nieuwe mechanismen, instrumenten of organen buiten UNHCR. Waar de meeste van deze alternatieven op neerkomen, is dat UNHCR niet het monopolie heeft op verdragstoezicht. Staten die partij zijn bij het Vluchtelingenverdrag hebben inderdaad jegens elkaar een verplichting om het verdrag na te komen. Deze interstatelijke verantwoordingsplicht is echter buitengewoon zwak. Het is daarom belangrijk om anderen - zoals internationale toezichthouders van

mensenrechtenverdragen, experts, gerechtelijke organen - ook onderdeel te maken van het toezicht houden op het vluchtelingenrechtregime. Hierdoor kan het werk van UNHCR juist worden versterkt. Het toezicht zoals dat momenteel wordt uitgeoefend door UNHCR mag echter niet worden ondermijnd doordat anderen een aanzienlijk deel van deze taak overnemen. Een toename van toezichtmechanismen kan namelijk leiden tot duplicatie of, erger nog, inconsistenties, *cherry picking* en zelfs concurrentie. Dat zal niet bijdragen aan verbeterde naleving van het Vluchtelingenverdrag.

Het internationale systeem voor vluchtelingenbescherming is een partnerschap tussen staten en UNHCR. Maar deze twee actoren hebben soms ook verschillende belangen. Zo kunnen de soevereine belangen van staten afwijken van de beschermings- en toezichtstaken van UNHCR. Dit kan voor een dilemma zorgen, want welk belang krijgt de overhand? Het verplaatsen van de toezicht naar een andere organisatie of instantie lost dit dilemma niet op. En hoewel UNHCR niet over alle instrumenten beschikt die toezichthouders van internationale mensenrechtenverdragen wel hebben, zoals het individuele klachtmechanisme, heeft de organisatie wel veel andere en soms meer vergaande toezichtmogelijkheden. Wat UNHCR en deze andere toezichthoudende organen echter gemeen hebben, is dat ze staten niet kunnen dwingen hun verdragsverplichtingen na te komen. Alleen staten die partij zijn bij een verdrag kunnen de naleving van die verdragsbepalingen bij elkaar afdwingen. Deze interstatelijke verantwoording functioneert echter niet naar behoren - niet wat betreft het Vluchtelingenverdrag, en ook niet wat betreft andere mensenrechtenverdragen. Wat UNHCR wel kan doen, is naleving nastreven door andere methoden: door vriendelijke overreding of door harde confrontatie, door diplomatieke gesprekken achter gesloten deuren of door *naming and shaming*. Maar alleen als staten toezeggen samen te werken met UNHCR kan de organisatie de toezichthoudende taak effectief uitoefenen. Deze toezegging van staten (en vaak de onthouding ervan) is de achilleshiel van elke internationale toezichthoudende instantie.

Desondanks is er een aanzienlijke marge voor UNHCR om zich binnen de door staten gestelde grenzen te bewegen. In de afgelopen zeven decennia heeft de organisatie een relatieve autonomie laten zien om mandaat en werkwijzen te ontwikkelen. Dit wijst erop dat niet alles afhangt van de 'dicerende' staat. UNHCR zou die autonomie kunnen gebruiken om de toezichthoudende taak te versterken en te verbeteren, en het zo effectiever te maken. Drie voorstellen voor verbetering zijn de moeite waard om te verkennen.

Ten eerste zou UNHCR een aanzienlijk deel van het humanitaire werk moeten overdragen. Dit kan aan anderen die net zo goed of zelfs beter geschikt zijn om directe hulpverlening te geven. Het overdragen van dergelijke taken aan andere actoren leidt niet noodzakelijkerwijs tot het vrijmaken van budget (aangezien deze financiering dan ook naar anderen zou worden overgedragen),

maar het maakt wel een duidelijkere afbakening tussen de dan kleinere operationele rol van UNHCR en de toezichthoudende taak. Het maakt de organisatie ook minder afhankelijk van de staten waarin het actief is. Bovendien komt het tegemoet aan de kritiek dat UNHCR een toezichthouder is van het eigen werk.

Ten tweede zou UNHCR meer aandacht moeten geven aan internationale bescherming. Zoals de geschiedenis van UNHCR laat zien, hadden verschillende Hoge Commissarissen de macht en autoriteit om de organisatie in een bepaalde richting te loodsen. Wat dus vooral nodig is, is een Hoge Commissaris die weer waarde hecht aan bescherming. Dat kan door klip en klare speeches aan UNHCR's mandaatverstrekkers en aan staten. Maar ook door binnen de organisatie duidelijk te maken dat bescherming voorop staat in het werk van UNHCR, en aan die taak voldoende tijd, inzet en middelen toe te wijzen. Een eerste stap in die richting is het versterken van de rol en capaciteit van UNHCR's *Department of International Protection* (DIP). Deze afdeling heeft veel ervaring in het coördineren en ondersteunen van UNHCR's landen- en regiokantoren bij de uitvoering van de toezichthoudende taak. Herwaardering van het DIP zal ook tot meer betrokkenheid en samenwerking met de rechterlijke macht leiden. Nationale (en sommige regionale) rechtbanken zijn de enige instellingen die wetten ter bescherming van vluchtelingen kunnen afdwingen (ervan uitgaande dat het Vluchtelingenverdrag adequaat is opgenomen in de nationale wetgeving). Het is dus zinvol om via het toezichthoudende werk van UNHCR de rechterlijke macht daarin te versterken.

Ten derde zou UNHCR moeten investeren in meer publieke controle op staten en de naleving van hun internationale verplichtingen. Met publieke controle wordt 'openbaar toezicht' bedoeld, door de handel en wandel van staten nauwlettend te volgen en in de schijnwerpers te houden. Volgens de realistische theorie zal dit vooral effectief zijn voor staten die bang zijn voor reputatieschade. Maar er zijn ook andere voordelen aan de uitvoering van het toezichtproces in het openbaar. In de eerste plaats kan het een vriendelijke herinnering zijn aan staten om te (blijven) voldoen aan hun verplichtingen onder het Vluchtelingenverdrag. Maar het bevestigt en versterkt ook de rechten van vluchtelingen in het openbaar, dient als voorbeeld voor andere toezichthoudende instanties en stopt mogelijk schendingen van het vluchtelingenrecht voordat ze zich voordoen. Wanneer het toezichtproces gedeeltelijk in het openbaar wordt gedaan, vergroot dat ook de kansen voor ngo's en andere relevante actoren om deel uit te maken van dat proces. Ten slotte zal een meer publiek functioneren UNHCR ook dwingen verantwoording af te leggen aan alle belanghebbenden. In de eerste plaats aan mandaatverstrekkers en staten, maar ook aan ngo's, maatschappelijke organisaties, academische instellingen, de private sector en natuurlijk aan vluchtelingen en andere ontheemden.



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When UNHCR, the UN refugee agency, was set up in the wake of World War II, it was entrusted with the tasks of providing international protection and finding durable solutions for refugees. Part of providing international protection is overseeing whether states comply with their obligations under, amongst others, the 1951 Refugee Convention and its 1967 Protocol.

Over the past seventy years, UNHCR has established an exceptional practice of supervision, but it has also received a lot of criticism from scholars. This criticism focuses on how UNHCR has prioritized becoming the world's largest provider of humanitarian aid to refugees and other displaced people, and how this has put supervision on the back burner. The operational work has also made UNHCR very dependent on states for funding and (continuing) access, whereas for supervision independency is key.

Ineffective supervision of the international refugee law regime is detrimental to asylum seekers and refugees, states, and UNHCR itself. This book analyzes the effectiveness of UNHCR's supervision by developing a theoretical framework of what constitutes 'effective supervision'. It concludes that states' commitment to cooperate with the agency is key to effective supervision. Nonetheless, UNHCR also has a significant degree of autonomy that allows it to enhance and improve its supervisory task. It can use this potential by scaling down its humanitarian work, expanding its focus on protection, and conducting more of its supervisory work in public.



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