10.1 Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond

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Contents

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I. Introduction

The expert roundtable process of the Global Consultations on International Protection initiated by the Office of the United Nations High Commissioner for Refugees (UNHCR) is intended to examine selected contemporary issues of international refugee law in detail and provide guidance to UNHCR, States, and other actors. Within this framework, the present study examines UNHCR's supervisory

role under its Statute[1] in conjunction with Article 35 of the 1951 Convention Relating to the Status of Refugees[2] and Article II of the 1967 Protocol Relating to the Status of Refugees.[3] It also looks at ways to make the implementation of these treaties more effective by creating new monitoring mechanisms going beyond the present supervisory regime.

Issues of supervision and implementation of the 1951 Convention have become relevant today not because States would challenge UNHCR's task of providing international protection as such, but because the implementation of the 1951 Convention and the 1967 Protocol is faced with many problems, including a lack of uniformity in the actual application of its provisions. This is true not only for many of the guarantees related to the status of refugees but also for such key provisions as Article 33 of the 1951 Convention on *non-refoulement* or the refugee definition as provided for by Article 1A of the 1951 Convention. UNHCR has repeatedly deplored a trend towards a more restrictive interpretation of the 1951 Convention and its 1967 Protocol in certain countries or even regions of the world.[4] These developments undermine the protection regime created by these instruments. At the same time, they create difficulties for States, for example because restrictive practices turn refugees to countries with a more generous practice.

After the introduction, the second part of this study examines the content of Article 35 of the 1951 Convention and Article II of the 1967 Protocol and their actual application by UNHCR and the States parties to these instruments. The third part of the study is devoted to a discussion of the need to complement UNHCR's supervisory activities with monitoring mechanisms that are linked to but independent of UNHCR. This examination includes a comparative analysis of different supervisory models in different areas of international law, and an assessment of their effectiveness and relevance to the international refugee protection framework. The study ends with a set of recommendations on how to achieve more effective implementation of the 1951 Convention and the 1967 Protocol.

The term 'supervision' as such covers many different activities which range from the protection work UNHCR is carrying out on a daily basis in its field activities on the one hand to the public scrutiny of State practice and the supervision of violations by expert bodies or political organs on the other hand. This makes it necessary to distinguish clearly between *supervision* carried out by UNHCR itself, and *monitoring* by other bodies or organs. The former are covered by Article 35 of the 1951 Convention and Article II of the 1967 Protocol as understood today; the latter may go beyond these provisions even though they would be consistent with their object and purpose. The division of the study into two parts reflects this distinction.

1 Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res. 428(V), 14 Dec. 1950.
2 189 UNTS 150 (hereinafter the '1951 Convention').
3 606 UNTS 267 (hereinafter the '1967 Protocol').
4 On UNHCR's analysis of implementation problems, see the text below at nn. 78–81.

II. UNHCR's supervisory role under Article 35 of the 1951 Convention

A. Main content

The next three subsections outline the main content of the obligations of States under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, as well as the duties of States not party to either instrument.

1. Cooperation duties

Article 35(1) of the 1951 Convention, subtitled 'Co-operation of the national authorities with the United Nations', reads:

> The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

Article II(1) of the 1967 Protocol contains the same obligations in relation to UNHCR's functions, including its 'duty of supervising the application of the present Protocol'.

What is the object and purpose of these provisions? Article 35(1) of the 1951 Convention is directly linked to the sixth preambular paragraph of the Convention,[5] noting

> that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

This in turn refers to UNHCR's Statute granting the organization the power 'to assume the function of providing international protection, under the auspices of the United Nations, to refugees', and to exercise this function, among others, by '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' and by '[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States'.[6] Article 35 is not, however, limited to cooperation in the area of the application of treaties but, as the clear

5 N. Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation* (Institute of Jewish Affairs, New York, 1953), p. 167.

6 Ibid., paras. 1 and 8(a) and (d).

wording shows, refers to 'any and all of the functions of the High Commissioner's office, irrespective of their legal basis'.[7]

As the drafting history of Article 35(1) of the 1951 Convention shows, the significance of this provision was fully realized from the beginning. While the original draft required States to 'facilitate the work' of UNHCR,[8] the present stronger wording ('and shall in particular facilitate its duty of supervising the application of the provisions of this Convention') goes back to a US proposal submitted in order to 'remove the hesitant tone of' the original draft.[9] The fact that Article 35 was regarded as a strong obligation that might be too burdensome for some States led to the adoption of a French proposal to exclude this provision from the list of Articles to which no reservations can be made (Article 42 of the 1951 Convention).[10] The fundamental importance of this provision was also recognized by the High Commissioner when he stressed, in his opening statement to the Conference of Plenipotentiaries, that establishing, in Article 35, a link between the Convention and UNHCR 'would be of particular value in facilitating the uniform application of the Convention'.[11]

The primary purpose of Article 35(1) of the 1951 Convention and Article II(1) of the 1967 Protocol is thus to link the duty of States Parties to apply the Convention and the Protocol with UNHCR's task of supervising their application by imposing a treaty obligation on States Parties (i) to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and (ii) to cooperate actively with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of all provisions of the Convention and its Protocol. These duties have a highly dynamic and evolutive character. By establishing a duty of States Parties to cooperate with UNHCR 'in the exercise of its functions', Article 35(1) of the 1951 Convention does not refer to a specific and limited set of functions but to all tasks that UNHCR has under its mandate or might be entrusted with at a given time.[12] Thus, the cooperation duties follow the changing role of UNHCR.

2. Reporting duties

Article 35(2) of the 1951 Convention provides:

> In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the

7 A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (UNHCR, Geneva, 1997), p. 254.

8 See draft Art. 30 of the Working Group, reprinted in *The Refugee Convention 1951, The Travaux Préparatoires Analysed, with a Commentary by the Late Dr Paul Weis* (Cambridge International Documents Series, Vol. 7, Cambridge University Press, 1995), p. 355. For the discussions at the Conference of Plenipotentiaries, see in particular UN doc. A/CONF.2/SR.25, pp. 10–22.

9 Weis, above n. 8, p. 356, referring to UN doc. E/AC.32/L.40, pp. 59–60.

10 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.27, pp. 10–16.

11 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.2, p. 17, Statement by Mr G. van Heuven-Goedhardt.

12 V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (Duncker and Humblot, Berlin, 1992), p. 162.

competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,
(b) the implementation of this Convention, and
(c) laws, regulations and decrees which are, or may hereinafter be, in force relating to refugees.

Article II(2) of the 1967 Protocol contains an analogous duty for the States Parties to the 1967 Protocol. Both provisions impose reporting obligations on States Parties to facilitate UNHCR's duty to 'report annually to the General Assembly through the Economic and Social Council' as provided for by UNHCR's Statute.[13] This in another area where a link between the Convention and UNHCR's Statute is established.

3. *States not party to the 1951 Convention or 1967 Protocol*

Article 35 of the 1951 Convention and Article II of the 1967 Protocol do not, of course, bind States that have not yet become parties to these two instruments. Nevertheless, these States might still have a duty to cooperate with UNHCR. Such a duty has been recognized in Article VIII of the 1969 OAU Refugee Convention[14] and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees.[15] Like the 1951 Convention and the 1967 Protocol, these instruments reflect the wide supervisory powers granted to UNHCR in paragraph 8 of its Statute to provide for protection of all refugees falling under its competence and, in doing so, to supervise the application of international refugee law. The statutory power of UNHCR to supervise thus exists in relation to all States with refugees of concern to the High Commissioner regardless of whether or not the State concerned is a party to any of these instruments. The corollary duty of States to cooperate is reflected in General Assembly Resolution 428(V) on the Statute of UNHCR which called upon governments 'to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions'.[16] Arguably, this duty is not only a moral one,[17] but has a legal basis in Article 56 of the 1945 United Nations Charter on the obligation of

13 UNHCR Statute, above n. 1, para. 11.
14 Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1000 UNTS 46 (hereinafter the 'OAU Refugee Convention').
15 Declaration on Refugees, adopted at a Colloquium entitled 'Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios', held at Cartagena, Colombia, 19–22 Nov. 1984.
16 UNGA Res. 428(V), 14 Dec. 1950.
17 M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, The Hague, 1997), p. 450.

member States to cooperate with the UN,[18] a duty that extends to UNHCR in its capacity as one of the subsidiary organs of the General Assembly.

B. Current practice

In current practice, Article 35 of the 1951 Convention and Article II of the 1967 Protocol have three main functions: (i) they provide the legal basis for the obligation of States to accept UNHCR's role of providing international protection to asylum seekers and refugees; (ii) they provide the legal basis for the obligation of States to respond to information requests by UNHCR; and (iii) they support the authoritative character of certain UNHCR statements (for example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*,[19] policy guidelines, court submissions, and so forth).[20]

1. UNHCR's protection role

International protection denotes 'the intercession of an international entity either at the behest of a victim or victims concerned, or by a person on their behalf, or on the volition of the international protecting agency itself to halt a violation of human rights' or 'to keep safe, defend, [or] guard' a person or a thing from or against a danger or injury.[21] International protection on behalf of refugees is UNHCR's core function.[22] It has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection by their country of origin into a broader concept that includes protection not only of rights provided for by the 1951 Convention and the 1967 Protocol but also of refugees' human rights in

18 See Grahl-Madsen, above n. 7, p. 252, pointing out that 'it seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter'.

19 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter the 'UNHCR *Handbook*').

20 In addition, these Articles give a certain foundation to bilateral cooperation agreements. See Agreement Between the Government of the People's Republic of China and the Office of the United Nations High Commissioner for Refugees on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China of 1 Dec. 1995 (available on *Refworld*, CD-ROM, UNHCR, 8th edn, 1999), and the Agreement Between the Government of the Republic of Ghana and the United Nations High Commissioner for Refugees of 16 Nov. 1994 (available on *Refworld*), explicitly stating in Art. III that cooperation 'in the field of international protection of and humanitarian assistance to refugees and other persons of concern to UNHCR shall be carried out on the basis', among others, of Art. 35 of the 1951 Convention.

21 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht, 1989), pp. 17 and 20–1.

22 UNHCR Statute, above n. 1, para. 8. See n. 27 below for text of para. 8.

general.[23] It can be defined as the totality of its activities aimed at 'ensuring the basic rights of refugees, and increasingly their physical safety and security',[24] beginning 'with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*, without which the safety and even survival of the refugee is in jeopardy' and ending 'only with the attainment of a durable solution, ideally through the restoration of protection by the refugee's own country'.[25] As has been recognized by the UN General Assembly, such international protection is a dynamic and action-oriented function.[26]

UNHCR's protection activities are listed in some detail in paragraph 8 of its Statute.[27] For the topic of this study, paragraph (a) regarding UNHCR's task

23 V. Türk, 'UNHCR's Supervisory Responsibility', 14(1) *Revue Québécoise de Droit International*, 2001, p. 135 at p. 138.

24 UNHCR, 'Note on International Protection', UN doc. A/AC.96/930, 7 July 2000, para. 2. See also, UNHCR, 'Note on International Protection', UN doc. A/AC.96/830, 7 Sept. 1994, para. 12. On the protection of refugees by UNHCR in general, see, Türk, above n. 12, pp. 139–69; G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), pp. 207–20; F. Schnyder, 'Les aspects juridiques actuels du problème des réfugiés', Academy of International Law, *Recueil des Cours*, 1965-I, pp. 346–7 and 406–23. See also J. Sztucki, 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme', 1 *International Journal of Refugee Law*, 1989, pp. 291–4.

25 Note on Protection 1994, above n. 24, para. 12. See also, Note on Protection 2000, above n. 24, para. 9.

26 UNGA Res. A/RES/55/74, 12 Feb. 2001, para. 8. See also, Executive Committee, Conclusion No. 89 (LI), 2000, Conclusion on International Protection, para. 2.

27 This provision reads:

> 8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
>
> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
> (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
> (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
> (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
> (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

This list of activities is non-exhaustive, as is evidenced by the many UN General Assembly resolutions that have enlarged UNHCR's protection mandate (Türk, above n. 12, p. 148).

of '[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application' is of particular relevance.[28] UNHCR has noted that:

> 2. . . . In carrying out this mandate at a national level, UNHCR seeks to ensure a better understanding and a more uniform interpretation of recognized international principles governing the treatment of refugees. The development of appropriate registration, reception, determination and integration structures and procedures is therefore not only in the national interest of the countries concerned, but also in the interest of the international community, as it helps stabilize population movements and provide a meaningful life for those who are deprived of effective protection. In creating this mandate for UNHCR, the international community recognized that a multilateral response to the refugee problem would ensure a coordinated approach in a spirit of international cooperation.
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> 3. The mandate for international protection gives UNHCR its distinctive character within the United Nations system. International protection involves also promoting, safeguarding and developing principles of refugee protection and strengthening international commitments, namely to treat refugees in accordance with international rules and standards . . .[29]

International protection is ultimately oriented towards finding durable solutions for the protected individuals

> be it in the form of voluntary repatriation, local integration or resettlement. In addition, preventive action is necessary to address the economic, social and political aspects of the refugee problem. The protection mandate is therefore intrinsically linked with the active search for durable solutions. This is necessarily embedded in an international legal framework which ensures predictability and foreseeability as well as a concerted approach within a framework of increased state responsibility, international cooperation, international solidarity and burden-sharing.[30]

In its 2000 Note on Protection, UNHCR mentioned the following activities as particularly important components of its protection work: (i) receiving asylum seekers and refugees; (ii) intervening with authorities; (iii) ensuring physical safety; (iv) protecting women, children, and the elderly; (v) promoting national legislation and asylum procedures; (vi) participating in national refugee status determination procedures; (vii) undertaking determination of refugee status; and (viii) providing

28 On the application *ratione personae* and *ratione materiae* of Art. 8 of the UNHCR Statute, see Türk, above n. 23, pp. 141–5.

29 Executive Committee of the High Commissioner's Programme, Standing Committee, 'Overview of Regional Developments (Oct.–Dec. 1995)', UN doc. EC/46/SC/CRP.11, 4 Jan. 1996, paras. 2 and 3.

30 Ibid., para. 3.

advice and developing jurisprudence.[31] The Executive Committee, in many of its Conclusions, has reaffirmed UNHCR's mandate in these areas of activities, in particular its role:

- to contribute to the development and observance of basic standards for the treatment of refugees, 'by maintaining a constant dialogue with Governments, non-governmental organizations (NGOs) and academic institutions and of filling lacunae in international refugee law',[32] and to provide advice on the application of the relevant instruments of refugee law;[33]
- to monitor refugee status determination and treatment of refugees by 'survey[ing] individual cases with a view to identifying major protection problems'[34] and by participating 'in various forms . . . in procedures for determining refugee status in a large number of countries',[35] either through informal intervention in individual cases or by playing a formal role, as defined by relevant domestic obligations, in decision-making procedures;
- to have prompt and unhindered access to asylum seekers, refugees, and returnees,[36] including those in reception centres, camps, and refugee settlements,[37] asylum applicants and refugees, including those in detention, being at the same time entitled to contact UNHCR and being duly informed of this right;[38] and
- to 'monitor the personal security of refugees and asylum-seekers and to take appropriate action to prevent or redress violations thereof'.[39]

In practice, the obligation to respect and accept UNHCR's international protection activities as provided by Article 35(1) is well established and well rooted in State

31 Note on Protection 2000, above n. 24, paras. 10–29.
32 Executive Committee, Conclusion No. 29 (XXXIV), 1983, paras. b and j, mentioning the areas of asylum seekers whose status has not been determined or the physical protection of refugees and asylum seekers.
33 E.g. in situations of mass influx (Executive Committee, Conclusion No. 19 (XXXI), 1980, para. d) or on the exclusion clauses (Executive Committee, Conclusion No. 69 (XLIII), 1992, second preambular para.).
34 Executive Committee, Conclusion No. 1 (XXVI), 1975, para. g.
35 Executive Committee, Conclusion No. 28 (XXXIII), 1982, para. e.
36 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 33 (XXXV), 1984, para. h; 72 (XLIV), 1993, para. b; 73 (XLV), 1994, para. b(iii); 77 (XLVI), 1995, para. q; 79 (XLVII), 1996, para. p.
37 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 48 (XXXXVIII), 1987, para. 4(d).
38 Executive Committee, Conclusions Nos. 8 (XXVIII), 1977, para. e(iv); 22 (XXXII), 1981, para. III; 44 (XXXVII), 1986, para. g.
39 Executive Committee, Conclusion No. 72 (XLIV), 1993, para. e. See also, Executive Committee, Conclusion No. 29 (XXXIV), 1983, para. b.

practice. Although paragraph 8 of the Statute does not refer to the international protection of refugees as individuals when listing the elements of international protection, it was immediately established by State practice that UNHCR could also take up individual cases.[40] Unlike, for example, in the field of human rights where interventions by an international body on behalf of individual victims or visits to the territory of States often raise problems, States do not object if UNHCR intervenes in individual cases[41] or in general issues relevant to refugees, and do not regard such activities as an intervention in their internal affairs.[42] This general acceptance of UNHCR's protection role is rooted in, among others, the fact that, due to its Statute and Article 35 of the 1951 Convention, 'UNHCR does not have to be invited to become involved in protection matters', something that makes 'UNHCR's mandate distinct, even unique, within the international system'.[43]

While not exhaustively enumerated here, current practice which has broadly met with the acquiescence of States[44] can be described as follows:[45]

- UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
- UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable asylum seekers and refugees.
- In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR

40 S. Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', Academy of International Law, *Recueil des Cours*, 1976-I, p. 332; Grahl-Madsen, above n. 7, p. 254.

41 Goodwin-Gill, above n. 24, p. 213.

42 See Executive Committee of the High Commissioner's Programme, Standing Committee, 'Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It', 8th meeting, UN doc. EC/47/SC/CRP.27, 30 May 1997, para. 7. See also, Türk, above n. 12, p. 158.

43 Note on International Protection 2000, above n. 24, para. 71.

44 See also, UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001, paras. 4 and 5.

45 See Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 7; and Note on Protection 2000, above n. 24, paras. 10–29. See also Türk, above n. 23, pp. 149–54 with detailed references to State practice.

is entitled to intervene and submit its observations on any case at any stage of the procedure.

- UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
- UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
- To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
- UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

2. *Information requests by UNHCR*

Based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol, particularly their subparagraphs 2, UNHCR requests information from States Parties on a regular basis, particularly within the context of its daily protection activities, and States are obliged to provide such information. Such information represents an important source for UNHCR's annual protection reports on the state of refugee protection in individual States (which remain confidential) as well as for certain of its public statements. The gathering of such information on legislation, court decisions, statistical details, and country situations facilitates the work of UNHCR staff. Until recently, it was made available to States and their authorities, to refugees and their legal representatives, and to NGOs, researchers, and the media through the Centre for Documentation and Research (CDR) and its databases. This gathering and dissemination of information is of paramount importance for the protection of asylum seekers and refugees.[46] It helps, for example, to identify State practice in the application of the 1951 Convention and 1967 Protocol and to distribute knowledge about best practices in dealing with refugee situations. Therefore, UNHCR

46 See also Grahl-Madsen, above n. 7, pp. 254 and 255, stressing the importance of Art. 35(2) of the 1951 Convention for the supervision of the application of the Convention.

has a certain duty to make sure that relevant information is made available in an appropriate way.

Information gathering on the basis of Article 35(2) of the 1951 Convention and Article II(2) of the 1967 Protocol has never been regularized, for example in the form of an obligation to submit State reports at regular intervals. From time to time, however, UNHCR has sent questionnaires to States Parties.[47] In recent years, this has been rare and not very successful. After a discussion on issues relating to the implementation of the 1951 Convention and the 1967 Protocol during the 1989 session of the Executive Committee,[48] UNHCR sent out a comprehensive and detailed questionnaire on 9 May 1990. The response was disappointing: by July 1992, only twenty-three States had responded;[49] a call by the Executive Committee to submit outstanding answers yielded only five additional answers.[50]

3. *The authoritative character of the UNHCR* Handbook *and UNHCR guidelines and statements*

In recent years, some courts have invoked Article 35 of the 1951 Convention when deciding the relevance of the UNHCR *Handbook* or UNHCR statements regarding questions of law or of Conclusions by the Executive Committee of the High Commissioner's Programme. While UK courts, for a long time, insisted on the non-binding nature of such documents and their corresponding irrelevance for judicial proceedings,[51] their attitude has been changing recently. In the case of

47 Weis, above n. 8, pp. 362–3.

48 See Executive Committee, Conclusion No. 57 (XL), 1989, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. d, requesting 'the High Commissioner to prepare a more detailed report on implementation of the 1951 Convention and the 1967 Protocol for consideration by this Sub-Committee in connection with activities to celebrate the fortieth anniversary of the Convention and called on States Parties to facilitate this task, including through the timely provision to the High Commissioner, when requested, of detailed information on implementation of the Convention and/or Protocol in their respective countries'. See also, the background document, Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989.

49 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SCP/66, 22 July 1991, para. 3.

50 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions', UN doc. EC/1992/SPC/CRP.10, 15 June 1992, para. 6.

51 See, e.g., Lord Bridge of Harwich in *R.* v. *Secretary of State for the Home Department, ex parte Bugdaycay*, House of Lords, [1987] AC 514, [1987] 1 All ER 940, 19 Feb. 1987, on the *Handbook* and Executive Committee Conclusions: '[I]t is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.' See also, Staughton LJ in *Alsawaf* v. *Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1988] Imm AR 410, 26 April 1988 (quoting Art. 35

Khalif Mohamed Abdi, the English Court of Appeal held that by reason of Article 35 of the 1951 Convention UNHCR should be regarded as 'a source of assistance and information'.[52] In *Adimi*, Simon Brown LJ of the English High Court, when quoting the UNHCR Guidelines on the Detention of Asylum Seekers, went even further, stating: 'Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight.'[53] The House of Lords has sought guidance from the *Handbook*[54] and Executive Committee Conclusions[55] on several occasions, without however referring to Article 35 of the 1951 Convention. In *T.* v. *Secretary of State for the Home Department*, Lord Mustill recognized that 'the UNHCR *Handbook* . . . although without binding force in domestic or international law . . . is a useful recourse on doubtful questions', and Lord Lloyd of Berwick, in the same judgment, called the *Handbook* an 'important source of law (though it does not have the force of law itself)'.[56] Similarly, the US Supreme Court, in *Cardoza Fonseca*, stressed that the *Handbook* had no force of law, but 'provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.'[57] In the Netherlands, the District Court of The Hague acknowledged the relevance of a UNHCR position paper on the basis of UNHCR's supervisory role according to Article 35(1) of the 1951 Convention.[58] The New Zealand Refugee

of the 1951 Convention and referring to Lord Bridge in *Musisi*), and *Thavathevathasan* v. *Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1994] Imm AR 249, 22 Dec. 1993. In *R.* v. *Secretary of State for the Home Department, ex parte Mehari et al.*, High Court (Queen's Bench Division), [1994] QB 474, [1994] 2 All ER 494, 8 Oct. 1993, Laws J stressed the fact that the *Handbook*, Executive Committee Conclusions and UNHCR statements had no particular relevance for the decision of individual cases because Art. 35 had not been incorporated into domestic law.

52 *Secretary of State for the Home Department* v. *Khalif Mohamed Abdi*, English Court of Appeal (Civil Division), [1994] Imm AR 402, 20 April 1994, Gibson LJ.

53 *R.* v. *Uxbridge Magistrates' Court and Another, ex parte Adimi*, English High Court (Divisional Court), Brown LJ, 29 July 1999, [1999] Imm AR 560, [1999] 4 All ER 520.

54 See, e.g., Lord Lloyd of Berwick in *Horvath* v. *Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577, [2000] 3 WLR 379, 6 July 2000, invoking the *Handbook* to buttress his argument, but also counselling that 'there is a danger in regarding the UNHCR *Handbook* as if it had the same force as the Convention itself'.

55 See, e.g., Lord Hoffmann in *R.* v. *Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, and *Islam* v. *Secretary of State for the Home Department*, conjoined appeals, UK House of Lords, [1999] 2 WLR 1015; [1999] 2 AC 629, quoting with approval Executive Committee, Conclusion No. 39, 1985, on 'Refugees, Women and International Protection'.

56 *T.* v. *Secretary of State for the Home Department*, UK House of Lords, 22 May 1996, [1996] 2 All ER 865, [1996] 2 WLR 766.

57 *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, US Supreme Court, 480 US 421; 107 S.Ct. 1207; 1987 US Lexis 1059; 94 L. Ed. 2d 434; 55 USLW 4313, 9 March 1987 (although Powell J, Rehnquist CJ, and White J dissented from this holding). Reaffirmed in *Immigration and Naturalization Service* v. *Juan Anibal Aguirre-Aguirre*, US Supreme Court, 526 US 415; 119 S.Ct. 1439; 3 May, 1999, where the Court, at the same time, recalled the *Handbook*'s non-binding character.

58 *Osman Egal* v. *State Secretary for Justice*, The Hague District Court (Administrative Law Sector/Unity of Law Division for Aliens' Affairs), 27 Aug. 1998, AWB 98/3068 VRWET (available in partial translation on *Refworld*).

Status Appeals Authority after invoking Article 35(1) of the 1951 Convention held that the 'Conclusions of the Executive Committee of the UNHCR Programme . . . while not binding upon the Authority, are nonetheless of considerable persuasive authority'.[59]

This case law is significant as it acknowledges that, as part of States Parties' duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR *Handbook*, UNHCR guidelines, and other UNHCR positions on matters of law (for example, *amicus curiae* and similar submissions to courts or assessments of legislative projects requested or routinely accepted by governments), when applying the 1951 Convention and its Protocol. 'Taking into account' does not mean that these documents are legally binding.[60] Rather, it means they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification.

C. The hybrid character of supervision by UNHCR

The notion of supervision of international instruments covers all activities and mechanisms that are aimed at ensuring compliance with the obligations binding upon State Parties.[61] It comprises the three elements of (i) information gathering, (ii) analysis and assessment of this information, and (iii) enforcement.[62] Activities of UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol cover all three elements.[63] In particular, UNHCR's interventions on behalf of individual asylum seekers and refugees and its dialogue with governments on particular laws or policies serve to enforce the Convention and the Protocol. In this sense, UNHCR is an agency vested with some power to supervise States in their application of relevant provisions of international refugee law. This arrangement reflects the development of international law before and after the Second World War when supervision of rule compliance was no longer left to the highly decentralized, 'horizontal' system of enforcement measures by individual States alone, but was complemented by the creation of international organizations having some limited supervisory power.[64] At the same time, it would be inadequate to regard UNHCR's

59 *ReS.A.*, Refugee Appeal No. 1/92, New Zealand, Refugee Status Appeals Authority, 30 April 1992, available on http://www.refugee.org.nz/rsaa/text/docs/1-92.htm.

60 See Sztucki, above n. 24, pp. 309–11, listing several reasons for what he calls 'the relative low status of the Conclusions'.

61 N. M. Blokker and S. Muller, 'Some Concluding Observations', in *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (eds. N. M. Blokker and S. Muller, Martinus Nijhoff, Dordrecht/Boston/London, 1994), vol. I, p. 275.

62 See Türk, above n. 23, p. 146. 63 Ibid., pp. 147–9.

64 On this development, see Blokker and Muller, above n. 61, pp. 275–80.

activities as supervision only. UNHCR is an operational organization that is not only providing assistance but also carrying out protection work on the ground on a daily basis. In this role, UNHCR is an advisor to and an (often critical) partner of governments, as well as a supporter or advocate of refugees. This creates horizontal relationships which are clearly distinct from the vertical relationship between supervisor and subordinate. As has been stressed by Türk, it is necessary to distinguish clearly between two distinctive features of UNHCR's international protection function: '(i) its "operationality"; and (ii) its supervisory function'.[65] The two functions often complement each other, but they may also come into conflict, for instance, if a strong critique of non-compliance would endanger operations on the ground.

III. More effective implementation through third party monitoring mechanisms

A. The need to move forward

1. The struggle for improved implementation

UNHCR's supervisory role and its positive impact on the protection of asylum seekers and refugees is unique, especially when compared to the monitoring mechanisms provided for by other human rights treaties. Unlike the 1951 Convention and 1967 Protocol, these treaties do not have an operational agency with a presence of 'protection officers' in a large number of countries working to ensure that these instruments are implemented.

However, human rights mechanisms have started to play a significant role in protecting the rights of refugees and asylum seekers. Thus, for example, Article 3 of the 1984 Convention Against Torture[66] states: 'No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' It thus protects among others rejected asylum seekers from forcible return to their country of origin in cases of imminent torture.[67] Similarly, the Human Rights Committee came to the conclusion that Article 7 of the International Covenant on

65 Türk, above n. 23, p. 138.

66 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN doc. A/RES/39/46, 10 Dec. 1984.

67 See, e.g., *Balabou Mutombo* v. *Switzerland*, views of the Committee Against Torture under Art. 22, concerning Communication No. 13/1993, adopted on 27 April 1994 (Annual Report 1994, UN doc. A/49/44), para. 9.3, p. 45; also in 15 *Human Rights Law Journal*, 1994, p. 164, and 7 *International Journal of Refugee Law*, 1995, p. 322.

Civil and Political Rights[68] forbids States Parties from exposing 'individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[69] The Human Rights Committee also decided that forcible return is prohibited if the individual concerned risks a violation of the right to life in the country to which he or she is to be returned[70] and applied this reasoning in the case of a rejected asylum seeker.[71] On the regional level, the prohibition of return to situations of torture and inhuman treatment has led to a particularly rich case law in Europe since the European Court of Human Rights[72] in 1989 derived such a prohibition from Article 3 of the European Human Rights Convention.[73] The Human Rights Committee and the European Court of Human Rights have also addressed other aspects of refugee protection, namely, issues relating to the detention of asylum seekers.[74]

Despite the uniqueness of UNHCR's supervisory role and the positive impact of recent developments in the area of human rights law on the protection of refugees, weaknesses of the present system persist. They have been a matter of debate on several occasions.

In 1986, the Executive Committee called upon States to adopt 'appropriate legislative and/or administrative measures for the effective implementation of the international refugee instruments'[75] and to accept the utmost importance of the 'effective application of the principles and provisions of the 1951 Convention and the 1967 Protocol'.[76] In 1989, the Executive Committee recalled 'the utmost

68 International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 UNTS 171.

69 Human Rights Committee, General Comment No. 20/44 of 3 April 1992 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.5, 26 April 2001, para. 9, p. 140. See also, *Charles Chitat Ng* v. *Canada*, views of the Human Rights Committee, in respect of Communication No. 469/1991, adopted on 5 Nov. 1993, Annual Report 1994, vol. II, UN doc. A/49/40, para. 14.2, p. 189, also in 15 *Human Rights Law Journal*, 1994, p. 149.

70 *Joseph Kindler* v. *Canada*, views of the Human Rights Committee under Art. 5, para. 4, of the Optional Protocol, in respect of Communication No. 470/1991, adopted on 30 July 1993, Annual Report 1993, vol. II, UN doc. A/48/40, para. 13.1, p. 138, also in 14 *Human Rights Law Journal*, 1993, p. 307.

71 *Mrs G.T. on Behalf of Her Husband T.* v. *Australia*, views of the Human Rights Committee in respect of Communication No. 706/1996, adopted on 4 Nov. 1997, Annual Report, vol. II, UN doc. A/53/40, para. 8.2, p. 191; and *A.R.J.* v. *Australia*, views of the Human Rights Committee in respect of Communication No. 692/1996, adopted on 28 July 1997, Annual Report 1997, vol. II, UN doc. A/52/40, para. 6.9, p. 205.

72 *Soering* v. *United Kingdom*, 1989, European Court of Human Rights, Series A, No. 161.

73 Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 Nov. 1950, ETS 5, prohibits torture and inhuman and degrading treatment or punishment.

74 See, e.g., *A.* v. *Australia*, views of the Human Rights Committee, in respect of Communication No. 560/1993, adopted on 3 April 1997, Annual Report 1997, vol. II, UN doc. A/52/40, p. 225; *Amuur* v. *France*, 1996, European Court of Human Rights, *Reports* 1996-III, p. 826.

75 Executive Committee, Conclusion No. 42 (XXXVII), 1986, para. j.

76 Executive Committee, Conclusion No. 43 (XXXVII), 1986, para. 3.

importance of effective application of the Convention and Protocol', underlined 'again the need for the full and effective implementation of these instruments by Contracting States', and linked these calls to Article 35 of the 1951 Convention; in particular, it

> (a) *Stressed* the need for a positive and humanitarian approach to continue to be taken by States to implementation of the provisions of the Convention and Protocol in a manner fully compatible with the object and purposes of these instruments;
> (b) *Reiterated* its request to States to consider adopting appropriate legislative and/or administrative measures for the effective implementation of these international refugee instruments;
> (c) *Invited* States also to consider taking whatever steps are necessary to identify and remove possible legal or administrative obstacles to full implementation.[77]

The background for these calls was the acknowledgment that the implementation of the 1951 Convention and 1967 Protocol was facing considerable difficulties. UNHCR identified three categories of obstacles: socio-economic; legal and policy; and practical.[78] First, regarding socio-economic obstacles, UNHCR stressed that:

> there are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters.[79]

Secondly, as legal obstacles to proper implementation of the Convention and the Protocol UNHCR mentioned:

> the clash of, or inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementation legislation; or implementing legislation which defines not the rights of the individuals but rather the powers vested in refugee officials. As to the latter, this means that protection of refugee rights becomes an exercise of powers and discretion by officials, rather than enforcement of specific rights identified and guaranteed by law.

77 Executive Committee, Conclusion No. 57 (XL), 1989.
78 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989, paras. 8–22.
79 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions', UN doc. EC/1992/SCP/CRP.10, 15 June 1992, para. 9.

> Where the judiciary has an important role in protecting refugee rights, restrictive interpretations can also be an impediment to full implementation. Finally, the maintenance of the geographic limitation by some countries is a serious obstacle to effective implementation.[80]

Thirdly, on a practical level, UNHCR saw:

> bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refuges, a dearth of manpower generally or of adequately trained officials, and the non-availability of expert assistance for asylum-seekers. Finally, there are certain problems of perception at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations.[81]

Many of these obstacles to full implementation persist and continue to create problems at all levels, domestic, regional, and universal. In 2000, the Executive Committee showed itself:

> *deeply disturbed* by violations of internationally recognized rights of refugees which include *refoulement* of refugees, militarization of refugee camps, participation of refugee children in military activities, gender-related violence and discrimination directed against refugees, particularly female refugees, and arbitrary detention of asylum-seekers and refugees; also *concerned* about the less than full application of international refugee instruments by some States Parties.[82]

During informal consultations on Article 35 of the 1951 Convention, conducted under the auspices of UNHCR in 1997, it was recognized that better implementation remains a challenge. Four issues were put forward for further consideration: (i) the problem of '[d]iffering interpretation regarding the content and application of provisions of the international refugee instruments, standards and principles'; (ii) the question whether and how 'State reporting as a whole' should be improved; (iii) the challenge 'of institutionalizing a constructive dialogue at regular intervals with States Parties on the application of the international refugee instruments'; and (iv) the problem of '[m]easures of enforcement'.[83]

2. *Reasons for strengthening the monitoring of the 1951 Convention and 1967 Protocol*

Taking into account that the degree of implementation of the 1951 Convention and 1967 Protocol remains unsatisfactory, strengthening the supervision of the

80 Ibid., para. 9. 81 Ibid. para. 10.
82 Executive Committee, Conclusion No. 89 on International Protection, above n. 26.
83 Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 8.

application of these instruments is in the interest of all actors in the field of refugee protection:[84]

1. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for by international law.
2. Prolonged toleration of non-implementation by one State violates the rights of the other *States Parties* to the Convention and other relevant instruments for the protection of refugees. Obligations to implement the provisions of these instruments are obligations *erga omnes partes*, that is, obligations towards the other States Parties as a whole.[85] This is clearly evidenced by Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, entitling every State Party to the Convention or the Protocol to refer a dispute with another State 'relating to its interpretation or application' to the International Court of Justice even if it has not suffered material damage.[86] The 1969 OAU Refugee Convention contains a parallel provision.[87] Non-implementation is detrimental to the material interests of those States Parties that scrupulously observe their obligations. Disregard for international refugee law might create secondary movements of refugees and asylum seekers who have to look for a country where their rights are respected. It forces States that would be ready to treat refugees fully in accordance with international obligations to adopt a more restrictive policy in order to avoid a greater influx of refugees attracted by the higher degree of protection available on their territory.[88] At a regional level, divergent interpretations of the refugee definition or non-compliance may complicate cooperation in the determination of the country responsible for examining an asylum request.
3. Non-implementation is a serious obstacle for *UNHCR* in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations.

84 On the reasons for improved monitoring of the 1951 Convention and 1967 Protocol, see also L. MacMillan and L. Olson, 'Rights and Accountability', 10 *Forced Migration Review*, April 2001, pp. 38 and 41.

85 On this concept, see, e.g., C. L. Rozakis, 'The European Convention on Human Rights as an International Treaty', in *Mélanges en l'honneur de Nicolas Valticos – Droit et Justice* (ed. Dupuy, Pedone, Paris, 1999), pp. 502–3; M. T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (University of Pennsylvania Press, Philadelphia, PA, 1992), pp. 154–76.

86 See below, text at nn. 100–1.

87 Art. IX of the OAU Refugee Convention, above n. 14, provides that any one of the parties to a dispute 'relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity'.

88 See, e.g., Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 9.

4. Prolonged toleration of non-implementation seriously undermines the system of international protection as it was established fifty years ago and threatens a regime that has often been able adequately and flexibly to address and solve instances of flight for Convention reasons. Non-implementation is thus detrimental to the proper management of current and future refugee crises at the global level and thus hurts the interests of States Parties to the 1951 Convention and 1967 Protocol and even of the *international community* as a whole.
5. On a more practical level, States might consider a strengthening of supervisory mechanisms at the universal level in order to counterbalance emerging regional mechanisms which might respond to regional problems and expectations rather than upholding the universality of these instruments. In this context, recent developments in Europe are of particular importance as the European Court of Justice, in the near future, will be able to decide on the proper application of European Union law on refugee and asylum matters.[89] To create the possibility for regional organizations to become parties to the 1951 Convention and 1967 Protocol[90] would be another measure to safeguard the uniform application and full implementation of these instruments.

3. *The need for third party monitoring*

For all the reasons outlined above, the urgency and timeliness of taking a fresh look at the issue of supervision is evident. While UNHCR's supervisory function is of paramount importance for the protection of refugees, the persistence of

89 With the Treaty on European Union (Treaty of Amsterdam) of 10 Nov. 1997, visa, asylum, immigration, and other policies related to the free movement of persons were shifted from the 'third pillar' to the 'first pillar' of the European Union, that is, they moved from being an intergovernmental matter to become part of the law of the European Community. Art. 63 of the consolidated version of the Treaty Establishing the European Community stipulates among others that:

> [t]he Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: . . . (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status . . .

When implemented into the secondary legislation of the European Community, the European Court of Justice as the supervisor of Community law will, at least indirectly, have the competence on the European level to decide on the application of the 1951 Convention without, however, being bound by this instrument.

90 Ratification of and accession to these instruments is open only to States (Art. 39 of the 1951 Convention and Art. V of the 1967 Protocol).

implementation problems described above makes it necessary to go beyond the traditional discourse on Article 35 of the 1951 Convention and to learn from the different supervisory and monitoring mechanisms in present international law. These mechanisms have in common that they rely, although to a varying degree, on supervision by a third party not directly involved in a dispute regarding implementation of treaty obligations in a particular case.

As a result of the hybrid character of its supervisory function described above,[91] UNHCR's independence must necessarily be limited. UNHCR's 'operationality', namely, its daily protection work on the ground as a partner both of governments and of refugees, often facilitates the carrying out of its supervisory role. At the same time, a tension between the two functions will arise whenever a State or a group of States resents supervision by UNHCR in a particular case. The possibility of providing assistance and protection depends to a certain extent on the degree of confidence that exists between the government concerned and UNHCR, and such trust will often be negatively affected if UNHCR makes its criticism public in order to put more pressure on that State. It is no accident that UNHCR's annual protection reports remain confidential,[92] as their publication might endanger the success of protection and assistance in the country concerned or, in some cases, even the agency's continued presence there. Similarly, there is a tension between UNHCR's interest in putting pressure on States that do not comply with their treaty obligations and its dependence on voluntary financial contributions from the very same States. Operations on the ground and supervision may follow different logics, and conflicts of interest are unavoidable where this is the case. It is therefore necessary to examine forms of supervision that rely on independent bodies or experts, or at least States that are not directly involved in the problem giving rise to supervisory activities, that is, third parties with at least a minimal degree of independence.

The next subsection of this study examines in some detail existing mechanisms that might provide guidance for developing new approaches to supervision in the area of refugee law. In order to distinguish them from supervision by UNHCR under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, the study refers to them interchangeably as 'third party supervision' or 'monitoring by third parties'.

B. Third party supervision in present international law

1. *General framework*

One of the main tasks of international organizations is the supervision of compliance with the rules binding upon the organization and its members.[93] Such

91 See above, section II.C, 'The hybrid character of supervision by UNHCR'.

92 See above, section II.B.2, 'Information requests by UNHCR'.

93 H. G. Schermers and N. M. Blokker, *International Institutional Law* (3rd revised edn, Martinus Nijhoff, The Hague/London/Boston, 1995). I. Seidl-Hohenveldern, 'Failure of Controls in the

supervision can be internal or external. The first oversees 'compliance by an international organization with its own acts', that is the behaviour of its organs and its staff.[94] The latter evaluates 'performance by the members' of the organization 'to which [its] acts are addressed'.[95] External supervision is also at stake where a treaty entrusts an independent body with the task of examining compliance by the States Parties with their treaty obligations. These types of external supervision include 'all methods which help to realize the application of legal rules made by international organizations'[96] or contained in treaties. The present study is limited to forms of external supervision.

External supervision is critical for the effective application and implementation of international law, as '[v]iolations which receive wide attention are more difficult to commit than violations which remain practically unknown'.[97] In present-day international law, such supervision takes many different forms. Based on a categorization developed by Schermers and Blokker,[98] it is possible to distinguish the following forms of supervision:

1. supervision initiated by other States (members of the organization or other parties to the treaty) acting on their own account:
   - dispute settlement by the International Court of Justice;
   - inter-State complaints to treaty bodies or to the organs of the organization;
2. supervision by or on behalf of the organization or the treaty body:
   - supervision based on State reports;
   - supervision based on information collected by the organization;
   - supervision based on requests for an advisory opinion;
3. supervision initiated by individuals:
   - individual petitions;
   - court proceedings.

2. *Supervision initiated by other States*

(a) Dispute settlement by the International Court of Justice

Treaties granting guarantees or even rights to individuals, such as human rights treaties, remain treaties between States. As such, treaty obligations are not only owed to those individuals entitled to its guarantees but are at the same time owed to the other States Parties. This gives all States Parties the right to monitor compliance by other parties with their treaty obligations even if their own interests are not at

Sixth International Tin Agreement', in *Towards More Effective Supervision by International Organizations*, above n. 61, p. 255, regards the supervisory role of international organizations even as their very *raison d'être*.

94 Schermers and Blokker, above n. 93, p. 864. 95 Ibid., p. 865.
96 Ibid. 97 Ibid., p. 867. 98 Ibid., pp. 867–97.

stake.[99] This is an expression of the fact that international law is a highly decentralized legal order where enforcement cannot wait for actions of a centralized agency but depends on the vigilance of all members of the international community.

Many treaties in the area of human rights formalize this right of States Parties to monitor the behaviour of other parties by providing that disputes between States Parties about the interpretation and application of its provisions are to be referred to the International Court of Justice. There is no requirement that the State invoking such a provision should have suffered any material damage as a consequence of a violation; it is sufficient that there persists 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations'.[100] The possibility of referral to the International Court of Justice is not only foreseen in many universal conventions and treaties relating to different aspects of human rights protection,[101] but is also embodied in Article 38 of the 1951 Convention and Article IV of the 1967 Protocol.

(b) Inter-State complaints to treaty bodies

In the area of human rights law, treaties that have established a treaty body specifically entrusted with monitoring its implementation, generally do not include provisions on dispute settlement by the International Court of Justice.[102] Instead, four universal and three regional human rights instruments establish procedures allowing for the submission of inter-State complaints to the pertinent treaty body.[103] The

99 See ibid., p. 867, and also Rozakis, above n. 85, pp. 502–3.

100 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, para. 29, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 74, and referring to *East Timor (Portugal* v. *Australia)*, ICJ Reports 1995, p. 100, para. 22.

101 See Art. 8 of the 1926 Slavery Convention, 212 UNTS 17; Art. 9 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Art. 9 of the 1952 Convention on the Political Rights of Women, 193 UNTS 135; Art. 34 of the 1954 Convention Relating to the Status of Stateless Persons, 360 UNTS 117; Art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195; Art. 29 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13; and Art. 30 of the Convention Against Torture.

102 A notable exception is Art. 30 of the Convention Against Torture.

103 See, on the *universal* level, Art. 41 of the ICCPR; Art. 11 of the Convention on the Elimination of Racial Discrimination; Art. 13 of the 1985 Convention Against Apartheid in Sports, 1500 UNTS 161; Art. 21 of the Convention Against Torture; and, on a *regional* level, Art. 33 of the ECHR; Art. 45 of the 1969 American Convention on Human Rights (ACHR), Organization of American States (OAS) Treaty Series No. 35; Art. 47 of the 1981 African (Banjul) Charter on Human and Peoples' Rights (ACHPR), 21 ILM, 1982, p. 58. See, e.g., Kamminga, above n. 85, p. 147; P. H. Kooijmans, 'Inter-State Dispute Settlement in the Field of Human Rights', 3 *Leiden Journal of International Law*, 1990, p. 87; S. Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful Thinking?', 10 *Human Rights Quarterly*, 1988, p. 249; W. Karl, 'Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte', in *Aktuelle Probleme des Menschenrechtsschutzes* (eds. W. Kälin, E. Riedel, W. Karl, B.-O. Bryde, C. von Bar, and R. Geimer, Berichte der Deutschen Gesellschaft für Völkerrecht 33, C. F. Müller, Heidelberg, 1994), pp. 108–10.

universal instruments normally entitle the pertinent treaty body to refer the matter to an ad hoc conciliation commission if a friendly settlement cannot be reached.[104]

The International Labour Organization (ILO) has a more complicated system.[105] Any member State has the right to file a complaint with the ILO if it is of the opinion that another member is not effectively observing an ILO Convention which both have ratified. The Governing Body (the executive body of the ILO) may refer such a complaint to a Commission of Inquiry which, on the basis of information provided to it by the pertinent member States, will prepare a report with its findings on the relevant facts and its recommendations regarding the steps to be taken. If the State concerned is not willing to implement the recommendations and does not submit the dispute to the ICJ, the matter will be referred to the Governing Body and the ILO Conference.

A mechanism that is less an inter-State complaint mechanism and more an institutionalized conciliation procedure is part of the monitoring system of the 1960 UNESCO Convention Against Discrimination in Education.[106] Articles 12–19 of its 1962 (Additional) Protocol[107] institute a Conciliation and Good Offices Commission, which is responsible for seeking a settlement of any disputes which may arise between States Parties to that Convention.[108]

Inter-State complaints to treaty bodies do not depend on the claimant being a victim of a violation directly affecting its material interests. In this sense, the European Court of Human Rights acknowledged that:

> [u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective

104 Art. 42 of the ICCPR; Art. 21 of the Convention Against Torture; Art. 12 of the Convention on the Elimination of All Forms of Racial Discrimination.

105 Arts. 26–34 of the ILO Constitution. See K. Weschke, *Internationale Instrumente zur Durchsetzung der Menschenrechte* (Arno Spitz, Berlin, 2001), pp. 326–7.

106 UN Educational, Scientific and Cultural Organization (UNESCO) Convention Against Discrimination in Education, 14 Dec. 1960, available on http://www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF.

107 Protocol of 10 Dec. 1962 Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking a Settlement of Any Disputes which May Arise Between States Parties to the Convention Against Discrimination in Education, available on http://www.unesco.org/human_rights/ded.htm.

108 According to these provisions, every State party to this treaty, considering that another State party is not giving effect to one of its provisions is entitled to bring the matter to the attention of that State. Within three months, the receiving State shall afford the complaining State an explanation concerning the matter. If it turns out to be impossible for the States involved to come to a solution bilaterally, either State may submit a complaint to a Commission, which will subsequently draw up a report on the facts and indicate its recommendations with a view to reconciliation. The Commission's reports will finally be communicated to the Director General for publication and to the General Conference, which, upon request of the Commission, may decide that the International Court of Justice be requested to give an advisory opinion on the matter.

> obligations which, in the words of the preamble, benefit from a 'collective enforcement' . . . [T]he Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals.[109]

Inter-State complaints have, however, never been used by States Parties to the pertinent human rights instruments at the United Nations level. There have been a few cases within the framework of the ILO[110] and a few more under the European Convention,[111] but even there they have remained rare.

(c) Assessment

Referral of disputes about the interpretation and application of a treaty provision to the International Court of Justice or submission of an inter-State complaint to a treaty body may serve different purposes. First, proceedings started by a State Party whose own interests have been affected by a violation of international law address isolated cases of non-compliance. Here, the State taking up a case is not so much playing the role of a supervisor but acting as a victim that looks for protection against the violator and hopes for redress.[112]

Secondly, proceedings that are instigated by non-victims are more relevant for monitoring purposes. They are suitable for addressing situations of mass violations[113] or clarifying fundamental issues haunting many States Parties. Here, the *erga omnes* character of human rights[114] and similar guarantees for the individual becomes very clear.[115] States not directly affected by non-compliance have, however, little incentive to become active. First, inter-State complaints are, as Leckie put it, 'one of the most drastic and confrontational legal measures available to states',[116] and thus come with high political costs. Secondly, they obligate the State to do all the fact-finding for itself in order to present a strong case, something a State is not ready to do when international bodies (for example, the UN Commission on Human Rights) have the possibility of investigating the situation on their own.[117]

109 *Ireland* v. *UK*, 1978, European Court of Human Rights, Series A, No. 25, pp. 89–91. See also, European Commission of Human Rights, *Austria* v. *Italy*, 4 *Yearbook of the European Convention on Human Rights*, 11 Jan. 1961, p. 140. See also Inter-American Court of Human Rights, Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention, 24 Sept. 1982, para. 29, reproduced in 22 ILM, 1983, p. 47.

110 Leckie, above n. 103, p. 277.

111 J. Frowein and W. Peukert, *Europäische Menschenrechtskonvention – EMRK-Kommentar* (Engel, Kehl/Strasbourg/Arlington, 1996), p. 516.

112 Within the context of human rights treaties, this constellation is typical for cases of diplomatic protection where the human rights of a citizen of that State have been violated by another State.

113 Karl, above n. 103, p. 108.

114 See above, text at n. 85.

115 Karl, above n. 103, p. 108.

116 Leckie, above n. 103, p. 259.

117 Kälin, above n. 103, p. 17.

3. *Supervision by or on behalf of the organization or the treaty body*

(a) Supervision based on State reports

aa) State reporting under the UN human rights instruments

In the area of international human rights law, State reports are the most prevalent monitoring instrument. Seven universal[118] and two regional[119] human rights instruments oblige States Parties to submit reports on the measures they have taken to implement their treaty obligations and the difficulties they are facing in this process. Treaty monitoring by examining such State reports started in 1970, when the Committee on the Elimination of Racial Discrimination began its operations, and expanded gradually to the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Committee on Economic, Social and Cultural Rights and, in 1991, the Committee on the Rights of the Child.[120] All these treaty bodies require States to report every four or five years.[121]

All these Committees follow a similar procedure:[122] once the report has been submitted, the secretariat, a rapporteur, or a working group of the Committee identifies key issues and questions to be addressed. This is followed by the most important phase of the whole procedure – the dialogue with the delegation of the State Party concerned. After an introduction by the head of delegation, a discussion is held with the members of the Committee asking questions, and the members of the delegation either responding or promising to give a written answer at a later stage. At the end of the meeting, the members of the Committee make individual comments. The examination of the report ends with the adoption of Concluding Observations expressing the opinion of the Committee as such and addressing both

118 Art. 40 of the ICCPR; Art. 16 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3; Art. 19 of the Convention Against Torture; Art. 9 of the Convention on the Elimination of Racial Discrimination; Art. 44 of the 1989 Convention on the Rights of the Child (CRC), UNGA Res. 44/25; Art. 18 of the Convention on the Elimination of Discrimination Against Women; Art. 73 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc. A/RES/45/158.

119 Art. 21 of the 1961 European Social Charter, ETS 35; Art. 62 of the African Charter on Human and Peoples' Rights.

120 H. Klein, 'Towards a More Cohesive Human Rights Treaty System' in *The Monitoring System of Human Rights Treaty Obligations* (ed. E. Klein, Arno Spitz, Berlin, 1998), p. 89. As the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families has not yet entered into force, its Committee has not become operational.

121 Klein, above n. 120, p. 90.

122 See Klein, 'The Reporting System under the International Covenant on Civil and Political Rights' in Klein, above n. 120, pp. 18–23; B. Simma, 'The Examination of State Reports: International Covenant on Economic, Social and Cultural Rights', in Klein, above n. 120, pp. 35–40; R. Wolfrum, 'International Convention on the Elimination of All Forms of Racial Discrimination', in Klein, above n. 120, pp. 55–62; H. B. Schöpp-Schilling, 'The Convention on the Elimination of All Forms of Discrimination Against Women', in Klein, above n. 120, pp. 71–88.

the main areas of progress and of concern. Formalized follow-up procedures do not exist, although some of the Committees under discussion have developed some elements of such procedures.[123]

The objectives of reporting systems were summarized by the Committee on Economic, Social and Cultural Rights in 1994[124] in a manner that can be generalized. First, the reporting duty ensures that the State Party undertakes a comprehensive review of its domestic law and practices 'in an effort to ensure the fullest possible conformity' with its treaty obligations. The second objective is 'to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction'. Thirdly, the reporting process should enable the State Party to elaborate 'clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions' of the pertinent instrument. The fourth objective is to facilitate public scrutiny of government policies. Fifthly, the reporting process should 'provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained' in the pertinent instrument. 'The sixth objective is to enable the state party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range' of the pertinent human rights and to identify the main difficulties in order to be able to devise more appropriate policies. Finally, the reporting process should 'enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the' pertinent guarantees.

bb) State reporting under ILO and UNESCO law

Reporting is an important part of the ILO monitoring system. Member States of this organization are – according to Articles 19 and 22 of the ILO Constitution – requested to report regularly, on the basis of so-called Report Forms,[125] on the measures which they have taken to give effect to the provisions of Conventions binding them, on the implementation of non-binding Recommendations, and even

123 This is particularly true for the Committee on Economic, Social and Cultural Rights: see Simma, above n. 122, pp. 39–41.

124 Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States Parties, third session, 1989, paras. 2–9, in Compilation of General Comments, above n. 69, pp. 13–14.

125 The ILO has published Report Forms for all material Conventions as well as one for the reporting obligation concerning the non-ratified treaties.

on the reasons for not becoming party to all instruments adopted by the ILO.[126] Since 1926, the reports have been examined by two different organs. First, the Committee of Independent Experts[127] – appointed by the ILO Governing Body – inspects the reports in an objective, technical manner. Questions on matters of secondary importance or technical questions concerning the application of a ratified ILO Convention are sent in writing – called a direct request – directly to the government concerned. More serious or long-standing cases of failure to fulfil conventional obligations are reported as so-called observations to the Governing Body and to the annual International Labour Conference. They form the basis for discussions of individual cases in the second supervisory body, the Tripartite Conference Committee.[128] This organ holds public discussions annually on the main cases of discrepancies in the light of the experts' findings.[129] The reporting process ends with the presentation of the reports in the Plenary Sitting of the International Labour Conference.

A reporting system is also part of UNESCO's monitoring system. Article VII of its Constitution stipulates that 'each Member State shall submit to the Organization, at such times and in such manner as shall be determined by the General Conference, reports on the laws, regulations and statistics relating to its educational, scientific and cultural institutions and activities, and on the action taken upon the recommendations and conventions'. The necessary content of these reports is determined by questionnaires elaborated by the organization. The reports are considered by the UNESCO General Conference. The Conference publishes its findings in a report, which is transmitted, among others, to the member States and the United Nations.[130]

cc) Assessment

Reporting mechanisms under the UN human rights treaties serve important functions[131] and deserve a positive assessment on a conceptual level. However, there

126 The Constitution requires member States to report annually on the application of ratified conventions, but due to the large number of conventions and ratifications detailed reports are at present only requested on any given convention at less frequent intervals. See K. Samson, 'The Protection of Economic and Social Rights Within the Framework of the International Labour Organisation', in *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (ed. F. Matscher, Engel, Kehl/Strasbourg/Arlington, 1991), p. 128.

127 The Committee consists of twenty independent persons of the highest standing, with eminent qualifications in the legal or social fields and with an intimate knowledge of labour conditions or administration.

128 This is a political organ, consisting of 200 members who are representatives of governments, employers, or workers' organizations.

129 N. Valticos, 'Once More About the ILO System of Supervision: In What Respect is it Still a Model?' in Blokker and Muller, above n. 61, pp. 104–5; Samson, above n. 126, p. 128; Weschke, above n. 105, p. 325.

130 Adopted by the General Conference at its 5th session, and amended at its 7th, 17th, and 25th sessions.

131 See above, text at n. 124.

seems to be agreement today that in practice reporting mechanisms face serious problems for at least three reasons.

First, many States do not fulfil their reporting duties on time and a very large number of reports are overdue.[132] As of 1 December 1998, there were 124 (out of 151) States Parties with a total of 390 overdue reports within the framework of Convention on the Elimination of Racial Discrimination. The Committee on the Elimination of Discrimination Against Women had 245 overdue reports from 134 (out of 162) States Parties. The relevant 1998 figures for the other Committees were similarly bad.[133] Reasons for this include lack of resources, the burden of a multitude of reporting obligations, fears of criticism, or simply the fact that some countries ratified treaties 'without bothering much about the domestic as well as international procedural obligations entailed'.[134]

Secondly, if all reports arrived on time, the Committees would not be able to process them in due course.[135] Alston estimated in 1996 that, depending on the particular Committee, it would take between seven and twenty-four years to process all overdue reports.[136]

Thirdly, some States have a tendency not to report about the real situation but instead either focus on the law without looking at its implementation or just deny any violations.[137] Especially in these cases, the discussions between the Committees and the States Parties do not always amount to a real dialogue but rather an exchange of routine questions and routine statements that avoid focusing on the real issues.[138]

132 For the following figures see J. Crawford, 'The UN Human Rights Treaty System: A System in Crisis', in *The Future of UN Human Rights Treaty Monitoring* (eds. P. Alston and J. Crawford, Cambridge University Press, 2000), p. 5.

133 Committee Against Torture: 105 overdue reports from 72 out of 110 States Parties; Committee on the Rights of the Child: 141 overdue reports from 124 out of 191 States Parties; Committee on Economic, Social and Cultural Rights: 134 overdue reports from 97 out of 138 States Parties; and Human Rights Committee: 145 overdue reports from 97 out of 140 States Parties (source, ibid., p. 5).

134 Simma, above n. 122, p. 32. See also, Wolfrum, above n. 122, p. 63.

135 International Human Rights Instruments, Twelfth Meeting of Chairpersons of the Human Rights Bodies, 'Plan of Action to Strengthen the Implementation of the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000–2004', UN doc. HRI/MC/2000/4, 5 May 2000, para. 12.

136 'Effective Functioning of Bodies Established Pursuant to United Nation Human Rights Instruments, Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System', prepared by P. Alston, UN doc. E/CN.4/1997/74, 27 March 1996, para. 48.

137 Committee on International Human Rights Law and Practice, 'Report on the UN Human Rights Treaties: Facing the Implementation Crisis' (by A. Bayefsky), in International Law Association, *Helsinki Conference 1996* (International Law Association, London, 1996), p. 341.

138 Klein, above n. 120, pp. 26–7. See also Bayefsky, above n. 137, p. 341.

(b) Supervision based on information collected by the organization

aa) Fact-finding by special rapporteurs or independent fact-finding commissions

Monitoring by or on behalf of an organization can avoid some of the weaknesses and pitfalls of State reporting mechanisms. Monitoring based on fact-finding by independent experts is the most important form of supervision by or on behalf of an organization in the area of human rights outside the treaty mechanisms.

The main example for the use of fact-finding by independent experts is provided by the UN Commission on Human Rights.[139] The Commission for a long time focused on standard-setting and was reluctant to deal with allegations of human rights violations in a specific country.[140] It has relied on fact-finding by Special Rapporteurs and Working Groups since the Economic and Social Council (ECOSOC) adopted Resolution 1235 (XLII) in 1967 authorizing the Commission 'to examine information relevant to gross violations of human rights' in a *public procedure* and Resolution 1503 (XLVIII) in 1970 on the *confidential discussion* of situations appearing to reveal 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'.

In this regard, the Commission has developed different techniques. Within the framework of public procedures,[141] the Commission distinguishes between a 'country-oriented' and a 'thematic' approach. *Thematic procedures*, which are not restricted to the situation in a particular country, deal with specific human rights guarantees; they aim to enhance the protection of individuals and, at the same time, tend to deal with the root causes of such violations.[142] *Country-oriented*[143]

139 The following is adapted from W. Kälin and L. Gabriel, 'Human Rights in Times of Occupation: An Introduction', in *Human Rights in Times of Occupation: The Case of Kuwait* (ed. W. Kälin, Staempfli, Bern, 1994), pp. 9–10.

140 See M. Nowak, 'Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission', 22 *Netherlands Yearbook of International Law*, 1991, p. 39.

141 The confidential procedure in accordance with Resolution 1503 (XLVIII) is not further discussed here. For details, see P. Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights – A Critical Appraisal* (ed. P. Alston, Clarendon Press, Oxford, 1992), p. 145; A. Dormenval, *Procédures onusiennes de mise en œuvre des droits de l'homme: Limites ou défauts* (Presses universitaires de France, Paris, 1991), p. 58.

142 Nowak, above n. 140, p. 44. Thematic procedures currently include the activities of the Working Groups on Enforced or Involuntary Disappearances (set up in 1980) and Arbitrary Detention (1991). They also comprise the work of the Special Rapporteurs or Independent Experts on Summary and Arbitrary Executions (1982), Torture (1985), Religious Intolerance (1986), the Use of Mercenaries as a Means of Violating Human Rights (1987), the Sale of Children (1990), Racism and Xenophobia (1993), Freedom of Opinion and Expression (1993), the Rights of Women (1994), Independence of Judges and Lawyers (1994), Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (1995), Right to Development (1998), Right to Education (1998), Human Rights and Extreme Poverty (1998), Human Rights and Migrants (1999), Structural Adjustment Policies and Foreign Debt (2000), Adequate Housing (2000), Right to Food (2000), and Human Rights and Fundamental Freedoms of Indigenous People (2001).

143 For more information, see Alston, above n. 141, pp. 159–73; and Nowak, above n. 140, pp. 56–76.

procedures address human rights issues in a particular State. The Commission has developed several techniques for such fact-finding.[144] Reports should provide the Commission with the pertinent facts and thus enable it to adopt a resolution. Such resolutions may not only condemn the country concerned for failing to respect human rights but may also urge its government to take specific measures in order to improve the situation.

In all these procedures, the Commission is competent to consider information from all sources[145] concerning violations of any human right. As a political body it may not render a judicial decision,[146] but it can serve as a catalyst to reach a political solution resulting in the improvement of the human rights situation in the country concerned.

What is the task of the Special Rapporteurs and Working Groups? Most often, the relevant resolutions ask them to 'study', 'investigate', 'inquire into', or 'examine' either the situation of a particular human right in all States or the situation of all human rights in a particular country. The role of a Special Rapporteur is neither that of a judge nor that of a politician or diplomat. First and foremost, the task is one of *fact-finding*: he or she has to collect information, analyze it, and, on this basis, describe the pertinent events in order to enable the Commission on Human Rights to draw its conclusions.[147] Although he or she has no judicial functions, the Special Rapporteur can only properly fulfil this task of factual analysis if a study of the relevant legal obligations is included. Thus, a conclusion by the Commission regarding the question of whether and to what extent there have been gross violations of human rights in a particular country must rest not only on a careful establishment of the facts but also on a sound legal analysis; the latter must include a determination of the law applicable in the specific situation.

Besides these basic requirements, the mandates of the Special Rapporteurs and Working Groups regularly leave enough room to adopt different approaches and

144 Alston, above n. 141, pp. 160–1, mentions the appointment of (a) a special rapporteur, (b) a special representative, (c) an (independent) expert, (d) a working group, (e) a Commission delegation, (f) a member of the Sub-Commission to review the available information; in addition, the Commission sometimes asks the Secretary-General to maintain direct contacts with a particular government or to report on a particular country.

145 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht/Boston/London, 1989), p. 65.

146 See the Statement by the Observer Delegation of Ireland, Ambassador Michel Lillis on Behalf of the European Community and its Twelve Member States at the 46th Session of the Commission on Human Rights, 21 Feb. 1990:

> The Commission is not a Court of Law. We do not here place Governments of the world in the dock. Insofar as we can, we must strain to our utmost to achieve progress in human rights in our work here through multilateral cooperation and in a spirit of dialogue and mutual respect between Governments.

Quoted in J. A. Pastor Ridruejo, 'Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies', Academy of International Law, *Recueil des Cours*, 1991-III, p. 244.

147 See also, Pastor Ridruejo, above n. 146, p. 238.

thus to respond to the peculiarities of each case. Alston distinguishes three principal approaches: (i) a 'fact-finding and documentation function', that is, the task of providing 'the necessary raw material against the background of which political organs can determine the best strategy under the circumstances'; (ii) a 'prosecutorial/publicity function', namely, an attempt 'to mobilize world public opinion'; and (iii) a 'conciliation function', where the 'rapporteur's role is not to confront the violators but to seek solutions which will improve . . . the situation'.[148] Which of these functions will be in the foreground in a given case depends on the content of the mandate, the individuals involved, and the specific situation.

The use of Special Rapporteurs or Working Groups has several advantages: it allows for independent fact-finding and has become an important instrument for putting pressure on States that violate human rights seriously and systematically. The rather limited number of country-specific mandates, for example, shows that, as van Dongen has put it, the 'appointment of a country rapporteur is viewed very much as the heavy artillery, brought out only when the situation so warrants'.[149] Pressure can also be exercised because the report may lead to a resolution by the Commission condemning the State and trigger corresponding resolutions by ECOSOC and the UN General Assembly. Weaknesses of the use of Special Rapporteurs and Working Groups include the fact that much depends on the individuals selected for this task. Experience in the Commission on Human Rights shows that the quality of reports varies to a very considerable extent. Another problem is the danger that the creation of a mandate for a Special Rapporteur may become a highly politicized decision. This danger is reduced where a thematic mandate instead of a country-specific mandate is chosen. Finally, Special Rapporteurs and Working Groups often lack adequate resources and staff support, indicating that the number of such mandates should be fixed within the limits of available means. Cost-effectiveness speaks in favour of using individual Special Rapporteurs instead of the more costly Working Groups.

Fact-finding by independent experts also exists in the area of humanitarian law. The International Fact-Finding Commission, which consists of fifteen members of high moral standing and acknowledged impartiality, is competent to 'enquire into any facts alleged to be a grave breach . . . or other serious violation' of the 1949 Geneva Conventions and Protocol I and to 'facilitate, through its good offices, the restoration of an attitude of respect' for the relevant provisions of humanitarian law, provided the countries involved have recognized this competence. The reports are not made public 'unless all Parties to the conflict have requested the Commission to do so'.[150]

148 Alston, above n. 141, pp. 167–8.

149 T. van Dongen, 'Vanishing Point – The Problem of Disappearances', 90/1 *Bulletin of Human Rights*, 1991, p. 24.

150 Art. 90(5)(c) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3. For the four Geneva Conventions, see 75 UNTS 31, 85, 135, and 287.

bb) Policy review

Some international organizations carry out fact-finding which focuses more on an overall assessment of the policy of a particular country than on violations. Such reports try to highlight, at the same time, the main strengths and weaknesses of how a State deals with particular problems in the area of investigation.

One of many examples is provided by the International Narcotics Control Board[151] established by the Single Convention on Narcotic Drugs.[152] This Board is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions. It examines and analyzes, among others, information received from the States Parties to the drug conventions and thereby monitors whether the treaties are being applied throughout the world as effectively as possible. This continuous evaluation of national efforts enables the Board to recommend appropriate actions and to conduct, where necessary, a dialogue with the government concerned. The Board publishes an annual report that is submitted to ECOSOC and provides a comprehensive survey of the drug control situation in various parts of the world as well as an identification of dangerous trends and necessary measures.

The Organization for Economic Cooperation and Development (OECD) has a particularly rich experience with policy review reports. Such reports include Environmental Performance Reviews, which scrutinize the efforts of OECD member States to meet their domestic objectives and international commitments in the area of environmental protection, and Development Cooperation Reviews by the Development Assistance Committee (DAC).[153] Both review systems are based on the principle of peer review. First, a small team composed of representatives of the Secretariat and officials of two member countries is designated. The government of the country to be reviewed prepares a memorandum explaining the main policy developments and changes in its activities. The team then travels to the country concerned in order to talk to the government, members of parliament, and representatives of civil society and NGOs in order to obtain first-hand information about the content and context of the country's environmental or development policy. The report is then submitted to the OECD Group on Environmental Performance or DAC respectively, where, during a session of the Group or Committee, high-level representatives of the country concerned respond to questions asked by members of that body. Depending on the outcome of these discussions, the conclusions of the draft report

151 Information about the Board is available at www.incb.org.

152 Arts. 9–15 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.

153 For a description, see OECD Environmental Performance Reviews, A Practical Introduction, doc. OCDE/GD(97)35 and the forewords to the DAC Development Co-operation Reviews (e.g. Comité d'aide au développement (CAD), 'Examen en matière de coopération pour le développement, Suisse, pré-impression des dossiers du CAD', vol. 1, No. 4, OECD, 2000, p. II-3.

are amended before it is published. The OECD has defined the following as goals of this process:

> to help individual governments judge and make progress by establishing baseline conditions, trends, policy commitments, institutional arrangements and routine capabilities for carrying out national evaluations; to promote a continuous policy dialogue among Member countries, through a peer review process and by the transfer of information on policies, approaches and experiences of reviewed countries; to stimulate greater accountability from Member countries' governments towards public opinion . . .[154]

Both the International Narcotics Control Board and OECD are able to produce good quality review reports on a regular basis. The model of policy assessment and review reports is interesting for three reasons: (i) it rests on independent fact-finding by experts; (ii) it focuses not only on violations but also looks at achievements; and (iii) it combines objective fact-finding with a political process aimed at a process of collective learning. Its weakness lies in the limited capacity to 'sanction' a State in cases of serious violations or continued refusal to undertake improvements.

cc) Review conferences

Review conferences are an implementation mechanism that has gained momentum in recent decades.[155] Their traditional goal was to provide a chance for States to meet on a regular basis and to determine whether there are any gaps that need to be addressed by amendments to the particular treaty.[156] Review conferences may, however, also have the task of monitoring compliance with and implementation of a treaty.

For instance, the review conferences organized under Article VIII(3) of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[157] the first treaty to use this approach,[158] are undertaken in order, among other things, 'to evaluate the results of the period they are reviewing, including the implementation of undertakings of the States Parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future'.[159]

154 Doc. OCDE/GD(97)35, above n. 153, p. 5.

155 The first review conferences aimed at monitoring implementation were convened in the 1980s. See B. M. Carnahan, 'Treaty Review Conferences', 81 *American Journal of International Law*, 1987, p. 226.

156 A recent example is Art. 123(1) of the Rome Statute for an International Criminal Court, providing for a review conference seven years after the entry into force of the Statute that will examine the need to include new treaty crimes.

157 This convention together with the various other disarmament-related conventions cited in this paragraph can be found at http://www.unog.ch/frames/disarm/distreat/warfare.htm.

158 Carnahan, above n. 155, p. 226.

159 Decision 1, para. 7, taken at the 1995 Review Conference, cited by R. Johnson, 'Launching an Effective Review Process of the Non-Proliferation Treaty in April 1997', 13 *Disarmament Diplomacy*, 1997, at http://www.acronym.org.uk/dd/dd13/13launch.htm.

A similar approach is followed by Article XII of the Biological Weapons Convention,[160] Article 13 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended on 3 May 1996),[161] and Article 12 of the 1997 Ottawa Convention.[162] The 1980 Conventional Weapons Convention[163] provides in Article 8(2) for review conferences both as an amendment and as an implementation procedure.

Review conferences are usually organized on an ad hoc basis. The rules of procedure tend to follow those adopted in 1975 to review the NPT. The first step is usually to obtain a resolution of the UN General Assembly authorizing the UN Secretariat to provide administrative support.[164] This is followed by arrangements for the meeting of a preparatory committee[165] to establish the dates for the conference, the agenda, and the draft rules of procedure, to recommend a committee structure, and to nominate a president and other members of the conference board.[166] No guidance is provided in regard to decision making, although decisions on substantive matters are usually taken by consensus[167] and incorporated in a final declaration.

dd) Inspection systems

A particularly effective method of monitoring treaty implementation is to carry out on-site visits or inspections by a monitoring body. Such systems can be found in four areas of international law:[168] (i) arms control and disarmament;[169]

160 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972.

161 Protocol II to the 1980 Convention on Certain Conventional Weapons, as amended on 3 May 1996.

162 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines of 18 Sept. 1997 (Ottawa Convention).

163 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 Oct. 1980.

164 E.g. on 22 Dec. 1993, States Parties to the Convention on Certain Conventional Weapons submitted a letter to the Secretary-General, asking him to establish a group of experts to facilitate preparation for a review conference, and to convene a review conference. See W. Hays Parks, 'Memorandum of Law: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol', *Army Lawyer*, June 1997, p. 33.

165 On the Preparatory Committee for the Non-Proliferation Treaty, see Johnson, above n. 159.

166 Carnahan, above n. 155, p. 228.

167 Ibid.; Johnson, above n. 159. See also J. H. Harrington, 'Arms Control and Disarmament', 35 *International Lawyer*, 2001, p. 581.

168 See the contributions in Association for the Prevention of Torture, *Visits Under Public International Law, Theory and Practice* (Association for the Prevention of Torture, Geneva, 2000).

169 See in particular the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), the 1996 Comprehensive Nuclear Test-Ban Treaty, and the 1997 Ottawa Convention, above n. 162.

(ii) environmental law;[170] (iii) human rights law;[171] and (iv) humanitarian law.[172] Such visits and inspections allow for direct fact-finding to verify the compliance of a State Party with its treaty obligations, and are particularly useful in situations where actions are carried out in places that are not open to the public (for example, prisons and other places of detention, military installations, nuclear power plants, chemical factories, and so forth). As a result of the degree of intrusiveness of inspections systems, they are often based on the confidentiality of the process.[173] As UNHCR is already entitled to have access to refugee camps, detention centres, and similar facilities,[174] such a system would be less significant in the area of refugee protection.

(c) Supervision based on a request for an advisory opinion

A third potential form of monitoring on behalf of an international organization can be found in the Statute of the International Court of Justice and the UN Charter. According to Article 65 of the Statute,[175] the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with Article 96 of the UN Charter to make such a request. On a regional level, the Inter-American Court of Human Rights is competent to give advisory opinions regarding the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American States upon request by any member State of the Organization of American States or by organs of that Organization.[176] Additionally, '[t]he Court, at the request of a member State of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.[177] As outlined above, at the European Union level, the Council, Commission, or an EU member State will be able to ask the European Court of Justice to issue an interpretative opinion on matters relating to asylum which have been implemented into secondary legislation.[178]

170 E.g. Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept. 1987, 1522 UNTS 3.

171 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, ETS 126.

172 Visits of prisoners of war and civilian detainees by International Committee of the Red Cross (ICRC) during an international armed conflict on the basis of the Third and Fourth Geneva Conventions of 1949 or of prisoners based on ICRC's right to offer its services during non-international armed conflicts and situations of internal violence.

173 Confidentiality is the basis of ICRC's visiting activities. See also, Art. 11 of the European Convention for the Prevention of Torture, above n. 171.

174 See above text at nn. 31–9.

175 Statute of the International Court of Justice, annexed to the UN Charter.

176 Art. 64(1) of the ACHR. 177 Art. 64(2) of the ACHR.

178 Treaty Establishing the European Community (consolidated version), Art. 68(3); see also, text above at n. 89.

4. *Supervision initiated by individuals*

The possibility for individuals to petition a judicial or quasi-judicial body at the international level regarding alleged violations of their rights as guaranteed by an international convention or treaty is often regarded as the most effective form of supervision.

However, petitions to a judicial organ with the power to take binding decisions exist at the regional level only,[179] whereas quasi-judicial bodies are the rule on the universal level. Five UN human rights treaties[180] and some regional instruments[181] provide for the possibility of submitting individual complaints to a treaty body if the country concerned has recognized its competence to examine such petitions.[182] The written procedure ends with the adoption of 'views' which are not legally binding,[183] but their judgment-like style as well as the establishment of follow-up procedures by some of the treaty bodies[184] to address situations of non-compliance have contributed to the relatively high degree of compliance[185] with these 'views'.

The number of individual complaints to the UN treaty bodies is significant but still limited.[186] Nevertheless, the capacity of these bodies to deal with such

179 See Art. 25 of the ECHR and Art. 44 of the ACHR.

180 First Optional Protocol to ICCPR, Art. 22 of the CAT, Art. 14 of the CERD, Art. 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc. A/RES/45/158, and the Optional Protocol to CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

181 The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 Nov. 1995 allows certain NGOs to lodge complaints against a State Party to the Protocol alleging unsatisfactory application of the Charter with the Committee of Independent Experts. This Committee prepares and adopts a report that is submitted to the Committee of Ministers of the Council of Europe. In Africa, Art. 55 of the ACHPR permits individuals, groups of individuals, and NGOs, as well as States Parties, to make communications to the African Commission on Human and Peoples' Rights, either on their own behalf or that of someone else.

182 A draft optional protocol to the International Covenant on Economic, Social and Cultural Rights has been elaborated. See in particular UN doc. E/CN.4/1997/105, 18 Dec. 1996 and E/CN.4/2001/62, 21 Dec. 2000.

183 Art. 5(4) of the Optional Protocol to the ICCPR, Art. 22(7) of the CAT, Art. 14(7)(b) of CERD, and Art. 7(3) of the Optional Protocol to the CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

184 See in particular, ICCPR, 'Measures Adopted at the Thirty-Ninth Session of the Human Rights Committee to Monitor Compliance with its Views under Article 5', UN. doc. A/45/40, vol. 2, Annex XI, pp. 205–6.

185 See, e.g., M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Engel, Kehl/Strasbourg/Arlington, 1993), pp. 710–11. In more recent times, however, certain States have criticized some treaty bodies for their views, including in cases regarding asylum seekers.

186 E.g., in 1999, the Human Rights Committee received fifty-nine new cases and adopted fifty-six decisions. During the same year, the Committee Against Torture registered twenty-six new cases and adopted thirty-nine decisions. See Plan of Action, above n. 135, Annexes II and III.

complaints has already reached its limits[187] and procedures take too long.[188] At the regional level, the overload is especially dramatic in Europe.[189]

C. A new mechanism for third party monitoring of the 1951 Convention and the 1967 Protocol

1. Goals

The search for ways to strengthen monitoring of the 1951 Convention and the 1967 Protocol makes it necessary to clarify the goals to be achieved. Of course, the overall goal of new monitoring mechanisms should be to strengthen the protection of refugees, that is, to ensure that their basic rights as well as their physical safety and security are better guaranteed.[190] This overarching goal requires that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, not be undermined by new mechanisms. In this regard, it is of paramount importance institutionally to separate the role of providing international protection and the process of supervising States Parties on the basis of Article 35 of the 1951 Convention and Article II of the 1967 Protocol from the highly visible task of third party monitoring of State behaviour from a universal perspective. UNHCR's work of day-to-day protection and supervision or even its presence in a particular country might be endangered if it had to play too active a role in new monitoring mechanisms. Instead, these mechanisms should be the responsibility of the States Parties to the Convention. At the same time, it is of paramount importance that such monitoring does not endanger UNHCR's supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

The goal of strengthening the protection of refugees through better monitoring can be achieved if such mechanisms are framed in a way that allows:

1. monitoring of violations of applicable international instruments on the rights of refugees with a view to taking the necessary steps to convince or pressure the States concerned to honour their obligations;

187 See Plan of Action, above n. 135, paras. 13–15.

188 See, e.g., Crawford, above n. 132, p. 6, remarking that '[a]rguably, the reason the Human Rights Committee is not itself in breach of the spirit of article 14 of its own Covenant through the delay in dealing with communications is, precisely, its non-judicial character'.

189 The European Court of Human Rights in, e.g., 2000 received 10,486 new applications and delivered 695 judgments (statistical information available at http://www.echr.coe.int/BilingualDocuments/infodoc.stats[2001].bil.htm).

190 On the notion of protection, see above, section II.B.1 'UNHCR's protection role'.

2. harmonization of the interpretation of the 1951 Convention and its 1967 Protocol with a view to achieving a more uniform eligibility practice; and
3. the experience of States Parties within the framework of a policy assessment to enable identification of obstacles to proper implementation, appropriate solutions for current problems, and best practices.

In order to achieve these goals, new monitoring mechanisms should meet several requirements:

1. *Independence and expertise*. It is important that monitoring is based on fact-finding by independent experts or organs. Both independence and expertise are necessary to make monitoring credible and reduce the danger of politicization.
2. *Objectivity and transparency*. The criteria applied to assess the behaviour of a State, in particular whether it has violated its legal obligations, must be objective and transparent, that is, based on recognized norms and standards.
3. *Inclusiveness*. It is important that monitoring mechanisms include all the actors concerned. This has two implications. First, such mechanisms should not single out some States or regions; rather, they should look at all those affected by a particular problem. Secondly, such mechanisms should establish a process that allows not only States but also NGOs, civil society, and refugees to voice their concerns.
4. *Operationality*. Monitoring mechanisms must be set up and resourced in a way that allows them to become operational and work properly. Mechanisms that cannot fulfil their tasks must be avoided.
5. *Complementarity*. Appropriate mechanisms must complement supervision by UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol and avoid any weakening of the 'preeminence and authority of the voice of the High-Commissioner'.[191]

2. *Assessment of models*

Looking at different possible models for an improved monitoring in the area of refugee law, it is possible, on the basis of the goals and criteria defined above,[192] to make the following assessment.

(a) Dispute settlement by the International Court of Justice

Dispute settlement by the International Court of Justice[193] would fit the requirements of independence, objectivity and transparency and would be operational. It

191 Cambridge Expert Roundtable, Summary Conclusions, above n. 44, para. 1.
192 See immediately above, section III.C.1 'Goals'.
193 See above, section III.B.2.a 'Dispute settlement by the International Court of Justice'.

does not, however, offer real potential for strengthening monitoring in the area of international refugee law. The existing possibility of referring disputes relating to the interpretation and application of the 1951 Convention and/or 1967 Protocol to the International Court of Justice[194] has never been used, and it is unlikely that this will change in the near future.

This possibility would only become more relevant if in the future States Parties to the 1951 Convention and/or 1967 Protocol with divergent views decided to refer questions of interpretation to the International Court of Justice in a non-confrontational manner, that is, in a way where both sides to a dispute submitted their case to the Court for the sake of clarifying an important question and not of prevailing over an adversary. In this context, Article 35 of the 1951 Convention seems to imply a possibility for UNHCR to

> ask a Contracting State to intervene with another Contracting State, whose application of the Convention is not agreeable to the High Commissioner, and in case of the intervention being unsuccessful, ask the State concerned to bring the matter before the International Court of Justice according to Article 38.[195]

Whether this will become possible in the near future remains to be seen. In any case, such proceedings would remain exceptional and could not serve as a substitute for regular monitoring.

(b) Inter-State complaints

To create, within the framework of the 1951 Convention and the 1967 Protocol, a new mechanism for inter-State complaints to a treaty body cannot be recommended, although it would meet the requirements mentioned above. Such a mechanism would obviously remain as unused as the existing inter-State complaints provided by several existing human rights treaties.[196]

(c) State reports

There are certain arguments in favour of developing the reporting duties under Article 35 of the 1951 Convention and Article II of the 1967 Protocol into something closer to those under the UN human rights instruments.[197] It is, for example,

194 Art. 38 of the 1951 Convention and Art. IV of the 1967 Protocol. See also, Art. VIII of the 1969 OAU Refugee Convention.

195 Grahl-Madsen, above n. 7, p. 253.

196 See above, section III.B.2.b 'Inter-State complaints to treaty bodies'.

197 On the reporting duties under the human rights instruments, see above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'. The creation of a reporting system that tries to avoid some of the problems of the existing mechanisms is advocated in 'Overseeing the Refugee Convention, Working Paper No. 1: "Reporting"', by A. Pyati, which formed part of a collaboration entitled 'Overseeing the Refugee Convention' between the International

obvious that the implementation of international refugee law would be considerably strengthened if the objectives of reporting identified above[198] could be achieved in this area too. Furthermore, such a step would ensure that State reports are examined by an independent body, whereas reports today go to UNHCR which is not even nominally independent but governed by the fifty-six governments forming the Executive Committee and forced to be sensitive to the main donor countries.[199] Finally, unlike today where reports to UNHCR remain confidential, setting up a formalized mechanism of reporting to an independent body would make the reports public,[200] thus opening up possibilities for putting more pressure on governments not fulfilling their duties properly. As outlined above,[201] however, reporting systems in the area of human rights law are faced with serious problems (the burden on States resulting in overdue reports,[202] the impossibility of dealing with all reports in time, the tendency of some reports to describe the situation inappropriately, and so forth). It must be expected that these problems would also affect State reporting in the area of refugee law. To export current reporting mechanisms to new areas of law is not advisable as long as these problems persist.

(d) Information collected by the organization

UNHCR already collects information on the application of the 1951 Convention and 1967 Protocol and other relevant treaty law in its annual protection reports. These reports serve exclusively internal purposes, however, and are not made public. To publish these reports and to discuss them within an appropriate institutional framework would, of course, be a possible way to strengthen UNHCR's supervisory role under Article 35 of the 1951 Convention, but there are strong reasons speaking against that proposal. Especially in situations of tension between UNHCR and the State concerned, the latter's authorities are unlikely to accept the report as independent, objective, and unbiased, and may well argue that UNHCR as a party to the dispute is biased. For its part, UNHCR might be tempted to tone down its criticism in order not to endanger the effectiveness of its protection activities or even presence in a particular country. As outlined above,[203] it is preferable to separate protection and monitoring clearly on the operational level.

Council of Voluntary Agencies and the Program in Refugee and Asylum Law at the University of Michigan, USA, Dec. 2001, paras. 23–52.

198 See above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'.

199 See S. Takahashi, 'Effective Monitoring of the Refugee Convention', paper presented at 'The Refugee Convention 50 Years On: Critical Perspectives, Future Prospect', Second International Studies Association Conference, Feb. 2001 (manuscript on file with author), pp. 3–4.

200 Ibid., p. 5. The importance of publicity of reports is also stressed by MacMillan and Olson, above n. 84, pp. 39–40.

201 See above, section III.B.3.a.cc, 'Assessment'.

202 In this context, it is also appropriate to recall UNHCR's not very encouraging experiences with the questionnaire sent out in the early 1990s (above, section II.B.2, 'Information requests by UNHCR').

203 See above, section III.A.3, 'The need for third party monitoring'.

In contrast, both the models of special rapporteurs[204] and policy reviews by the organization[205] offer many advantages. They will serve as sources of inspiration for the proposals made below.[206]

(e) Advisory opinions

Under certain circumstances, UNHCR could request an advisory opinion from the International Court of Justice regarding a question of interpretation of the 1951 Convention and the 1967 Protocol.[207] This would be an efficient way of settling disputes that, as a result of divergent interpretations of key notions of these instruments, affect large numbers of refugees and asylum seekers.[208] This possibility has, however, never been used.

States are apparently reluctant to resort to advisory opinions. In 1992, the Sub-Committee of the Whole on International Protection discussed this issue. According to the report on these discussions, 'one delegation felt that resort to the ICJ might be unacceptable to Governments as compromising their sovereignty, and was joined by two other delegations in urging caution before further developing this point. Another noted that the United Nations could ask for an advisory opinion, but that this was not a way to resolve States' differences.'[209] There was no apparent support for the idea of approaching the ICJ with requests for advisory opinions, and no consensus was reached on this point.[210] Even if this attitude were to change in the future, requests for advisory opinions would be exceptional, and they could not replace but only complement other mechanisms.

(f) Individual complaints

In the context of the 1951 Convention and 1967 Protocol, the introduction of an individual complaints procedure to a newly created treaty body would be in conformity with the criteria of independence, expertise, objectivity, and transparency. It would, however, be affected by two fundamental weaknesses.[211] First, individual

204 See above, section III.B.3.b.aa, 'Fact-finding by special rapporteurs or independent fact-finding commissions'.

205 See above, section III.B.3.b.bb, 'Policy review'.

206 See below, section III.C.3, 'Proposal', and section III.D, 'Monitoring beyond the 1951 Convention and the 1967 Protocol'.

207 According to Art. 96 of the UN Charter, the General Assembly or the Security Council may request an advisory opinion on any legal matter, and other organs of the United Nations, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

208 E.g. the question as to whether Art. 1A(2) of the 1951 Convention regards as refugees victims of non-State agents of persecution in situations where the State is unable to provide protection.

209 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Report of the 25 June Meeting of the Sub-Committee of the Whole on International Protection', UN doc. EC/SCP/76, 13 Oct. 1992, para. 12.

210 Ibid., para. 19.

211 On the weaknesses of an individual complaints system and a proposal that aims to avoid such weaknesses, see 'Working Paper No. 2: "Complaints"', by V. Bedford, which formed

complaints procedures would not be inclusive but selective. Since the treaty body would not have compulsory jurisdiction, its competence would only extend to those States Parties that have ratified the optional protocol necessary for introducing such a system. Ratification would not be universal. States following more restrictive lines of interpretation than the majority of States Parties and thus more likely to 'lose' cases would probably be especially hesitant about accepting such supervision. Secondly, if many States, including those with many asylum seekers, ratified such a protocol, the system would probably not function properly as the treaty body would immediately be confronted with a workload of up to tens of thousands of cases with which it could not cope. Rejected asylum seekers, especially in Europe and North America, would not only know about this possibility but also be encouraged to petition the treaty body in order to avoid immediate deportation. In addition, there is a certain danger that the mere existence of individual applications will weaken UNHCR's existing possibility to take up protection issues affecting any asylum seeker or refugee with a government at any time.

This does not mean that judicial or quasi-judicial monitoring of the application of the 1951 Convention and 1967 Protocol is not needed. Judicial supervision has been an issue in Europe for some time.[212] The European Court of Justice will exercise, to a certain extent, such supervision in the near future at the European Union level.[213] This court may provide a potential model for addressing the problem of high numbers of individual complaints. Individuals do not have access to the Court, but, in addition to the EU Commission and the EU member States,[214] every national court has the possibility, even the duty, to request a preliminary ruling from the Court on the interpretation of provisions of EU law.[215] This allows the workload to be kept within limits, while at the same time ensuring that the applicable law is applied in a harmonized way. It might, however, be premature to propose setting up a judicial body on the universal level that has the power to make preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR. Such an option would nevertheless meet all the goals and criteria outlined above and would therefore deserve thorough discussion at least in a long-term perspective.

part of the collaboration 'Overseeing the Refugee Convention', above n. 197, paras. 17–22 and 34–55.

212 See, e.g., the Proposal for an Additional Protocol to the European Convention on Human Rights, presented to a seminar of the European Council on Refugees and Exiles (ECRE) on asylum in Europe in April 1992 and reprinted in Goodwin-Gill, above n. 24, pp. 527–33, which, had it ever been adopted by the Council of Europe member States, would have been applied by the European Court of Human Rights.

213 Above n. 89.

214 Arts. 226 and 227 of the Treaty Establishing the European Community (consolidated version).

215 *Ibid*., Art. 234.

3. *Proposal*

It is proposed to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model which is inspired by mechanisms using fact-finding by independent experts and policy reviews by member States of an organization.[216]

1. A Sub-Committee on Review and Monitoring comprising those members of the Executive Committee that are States Parties to the 1951 Convention or the 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.[217]
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
   - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
   - identifying obstacles to full implementation of these instruments; and
   - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.

   Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other things, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:
   - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol.[218] The Sub-Committee could initiate a review on its own.
   - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered,

216 For a critical discussion of this proposal, see 'Overseeing the Refugee Convention, Working Paper No. 4: "Investigative Capacity"', by B. Miltner, which formed part of the collaboration 'Overseeing the Refugee Convention', above, n. 197, paras. 26–8 and 37–51; and 'Overseeing the Refugee Convention, Working Paper No. 7: "Coordination with UNHCR and States"', by T. Glover and S. Russell, same series, paras. 41–6.

217 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see below, section III.E, 'A "light" version of the new mechanism . . .').

218 Each State Party would have the possibility of nominating one independent expert. Alternatively, these experts could be elected by a meeting of States Parties for a period of five years, but this might need an amendment to the 1951 Convention and 1967 Protocol.

the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
- The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society, and NGOs, and refugees in order to get first-hand information.
- The team would prepare its report and submit it to UNHCR which would transmit it, if appropriate, to the Sub-Committee on Review and Monitoring.
- The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The Sub-Committee would be able to adopt observations.
- The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a document with unrestricted distribution.

3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol, about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

This proposal meets all the goals and criteria mentioned above[219] that are necessary for an appropriate and functioning system of supervision. Refugee Protection Review Reports would allow the monitoring of violations, would contribute significantly to a harmonized interpretation of relevant norms, and would help to identify obstacles to full implementation as well as measures to overcome them and best practices. The Refugee Protection Review Mechanism would allow for a process of collective learning as it combines independent fact-finding and expertise with elements of peer review (discussion of reports by other States Parties). The 1951 Convention and 1967 Protocol provide objective and transparent standards to be used when assessing the behaviour and activities of States Parties. Inclusiveness would be guaranteed, as all concerned (governments, UNHCR, NGOs, refugees) would play a certain role in the process. Experience in other areas shows that policy review mechanisms work well in practice.[220] Finally, the proposed system complements supervision by UNHCR under Article 35 of the 1951 Convention and Article II of

219 See above, section III.C.1, 'Goals'.
220 See above, section III.B.3.b.bb, 'Policy review'.

the 1967 Protocol and does not endanger UNHCR's authority because the review process in a particular case is triggered by UNHCR itself. In addition, the organization could decide whether or not to submit the findings of the review team to the Sub-Committee or to keep them confidential because the State concerned is ready to change its policy and bring it into line with the requirements of the 1951 Convention and 1967 Protocol.

The legal basis for these proposals can be found in Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol. These provisions oblige States Parties 'to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and ... in particular [to] facilitate its duty of supervising the application of the provisions' of the Convention and Protocol.[221] Since the Executive Committee is based on paragraph 4 of the UNHCR Statute and thus is part of the institutional framework created by the Statute, no amendments to the 1951 Convention and 1967 Protocol are needed. A resolution by ECOSOC granting the Executive Committee the power to institute the new model is sufficient. One might argue that even this is not needed, but such a step would be in line with other precedents setting up monitoring mechanisms.[222] In any case, such an approach would provide the new supervisory mechanism with enhanced legitimacy.

D. Monitoring beyond the 1951 Convention and the 1967 Protocol

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and/or 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. Experience in the area of human rights law shows that thematic rapporteurs are well suited to looking into specific problem areas outside treaty mechanisms. They could play an important role in the area of international protection of refugees too.

The mechanism of thematic rapporteurs could be handled by the Standing Committee, the Executive Committee's subsidiary organ that meets several times during the year and comprises among its members States that are not party to the 1951 Convention and 1967 Protocol. This committee was established in 1995 to replace two sub-committees on international protection and on administrative and

221 For an explanation of these provisions, see above, section II.A.1, 'Cooperation duties'.
222 See the examples of ECOSOC Resolutions 1235 and 1503, in the text above following n. 140.

financial matters. The session of the Standing Committee that takes place each June is usually dedicated to international protection issues and would lend itself to the discussion of reports by special rapporteurs.

The following model is proposed here:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees; and access to asylum procedures). The mandates should be determined in a way that avoids overlap with the topics of Protection Review Reports as well as with the thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission to a maximum extent.
2. The reports by special rapporteurs would be transmitted by UNHCR to the Standing Committee,[223] if appropriate, and would be discussed there in the presence of representatives of countries concerned; NGOs would be able to participate in these discussions. The reports, together with observations by the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would be able to reflect the outcome of discussions in its own conclusions on protection.

Nothing hinders UNHCR from commissioning studies on issues relating to its competence and having them discussed at an appropriate level.

E. A 'light' version of the new mechanism as a first step?

The proposals just made are rather ambitious. They not only require strong political will on the part of States to carry out the proposed reviews properly but also put new burdens on the Executive Committee which presently has only limited capacities. In addition, there is a certain danger of an unhealthy politicization of the monitoring process that could negatively affect the position of UNHCR which cannot be entirely excluded. The Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Additional Protocol of 12–13 December 2001 urged 'all States to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol'.[224] At the same time, participants made it clear that it was premature to consider proposals like those made in this study. Instead, many States Parties present wished

223 Or to a revived Sub-Committee on Protection, see below, section III.E, 'A "light" version of the new mechanism . . .'.

224 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09, 13 Dec. 2001, operative para. 9. For text see Part 1.3 of this book.

to 'reconstitute a reformed Sub-Committee on International Protection [which] would provide a forum to bring together the parties most interested in protection issues to address them in a systematic, detailed and yet dynamic way'[225] and to incorporate this proposal formally into the Agenda for Protection.[226]

Under these circumstances, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner could then submit the report for discussion to the reformed Sub-Committee on International Protection which would have the possibility of examining the report. Its discussion could be reflected in the Executive Committee's conclusions. The advantage of this model lies in the fact that it can be easily introduced and used in a very flexible way.

IV. Conclusions and recommendations

The first main section of this study examined UNHCR's supervisory responsibility and the corresponding State obligations under its Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. The main conclusions of this first part can be summarized as follows.

First, Article 35 of the 1951 Convention and Article II of the 1967 Protocol impose a treaty obligation on States Parties to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and also to cooperate actively with UNHCR in this regard in order to achieve optimal implementation and the harmonized application of the Convention and Protocol. Similar duties have also been recognized in Article VIII of the 1969 OAU Refugee Convention and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees. Taking into account UNHCR's Statute and the organization's character as a subsidiary organ of the UN General Assembly, a certain duty to cooperate, binding also upon non-States Parties, can be derived from Article 56 of the UN Charter. These duties have a highly dynamic and evolutionary character.

Secondly, Article 35 of the 1951 Convention and Article II of the 1967 Protocol today have three main functions. They are the legal basis for the obligation of States to accept UNHCR's protection work regarding refugees and to respond to information requests by UNHCR, and they support the authoritative character of certain UNHCR statements.

225 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', 13 Dec. 2001, p. 2.

226 Ibid., p. 3.

Thirdly, current practice regarding Article 35 of the 1951 Convention and Article II of the 1967 Protocol which has broadly met with the acquiescence of States can be described as follows:

1. UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
2. UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable among asylum seekers and refugees.
3. In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure.
4. UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
5. UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
6. To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
7. UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
8. UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
9. UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

The second main section of the study was devoted to a discussion of the need to improve monitoring of the implementation of the 1951 Convention and 1967 Protocol and an analysis of existing monitoring mechanisms outside the field of refugee law. This can be summarized in three key points.

First, since the degree of implementation of the 1951 Convention and other relevant instruments for the protection of refugees remains unsatisfactory, strengthening the monitoring of the implementation of these instruments is in the interest of all actors in the field of refugee protection. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for under international law. It also violates the rights of the other *States Parties* to the Convention and other relevant instruments and is detrimental to their interests because disregard for international refugee law might create secondary movements of refugees. Non-implementation is a serious obstacle for *UNHCR* in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations. Finally, non-implementation affects the whole international community because it seriously undermines the present system of international refugee protection, a regime which has been able adequately and flexibly to address and solve not all but many refugee protection problems in the past.

Secondly, existing supervisory mechanisms include supervision initiated by other States (dispute settlement by the ICJ and inter-State complaints to treaty bodies), supervision by or on behalf of the organization (State reports, policy reviews, review conferences, advisory opinions by the ICJ), and supervision initiated by individuals (individual complaints to a judicial or quasi-judicial organ). Many of the existing models have not found enough support from States in the area of refugee law. In particular, serious reasons speak against transferring mechanisms of State reporting and procedures regarding individual applications from the field of international human rights law to international refugee law and protection. The most promising mechanisms are policy review reports and the use of special rapporteurs, but they need to be adapted to the specific needs and circumstances prevailing in this field.

Thirdly, a strengthened supervisory mechanism for the 1951 Convention and 1967 Protocol should monitor violations of applicable international instruments on the rights of refugees, harmonize the interpretation of the 1951 Convention and its 1967 Protocol, and induce a learning process that allows States and UNHCR to identify obstacles to full implementation, best practices, and appropriate solutions for current problems. Such a system should be independent and based on expertise, it must guarantee objectivity and transparency, and it must be inclusive and operational. It is also important to ensure that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, is not undermined by new mechanisms. This makes it necessary to separate new mechanisms from UNHCR institutionally but, at the same time, to grant UNHCR the possibility of deciding for itself the time and extent of such reviews.

On the basis of these conclusions, it is *recommended* to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model:

1. A Sub-Committee on Review and Monitoring comprising those Executive Committee members that are States Parties to the 1951 Convention and 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.[227]
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
   - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
   - identifying obstacles to full implementation of these instruments; and
   - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.

   Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other matters, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:
   - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol. The Sub-Committee could initiate a review on its own.
   - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered, the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
   - The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society and NGOs, and refugees in order to get first-hand information.
   - The team would prepare its report and submit it to UNHCR which would transmit it, where appropriate, to the Sub-Committee on Review and Monitoring.
   - The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in

227 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see above n. 224).

these discussions. The Sub-Committee would be able to adopt observations.
- The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a public document.

3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol, and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. The following model is proposed:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees, access to asylum procedures). The mandates should be determined in a way that avoids or at least limits overlap with the topics of Protection Review Reports as well as with thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission.
2. The reports by the special rapporteurs should be transmitted by UNHCR to the Executive Committee's Standing Committee,[228] if appropriate, and discussed there in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The reports, together with the observations of the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would have the possibility of reflecting the outcome of discussions in its own conclusions on protection.

228 Or to a revived Sub-Committee on Protection, see above, section III.E, 'A "light" version of the new mechanism as a first step?'.

As the proposed model is rather ambitious, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner would then submit the report for discussion to the Executive Committee which would have the possibility of reflecting the report and the discussion in its conclusions.