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We would be very pleased to receive comments on this paper from those who will not be able to participate in the Roundtable. Comments should be sent to Ms. Kate Jastram, Senior Legal Officer, preferably via e-mail at jastram@unhcr.org or by fax on +41-22-739-7354.

SUPERVISING THE 1951 CONVENTION ON THE STATUS OF REFUGEES: ARTICLE 35 AND BEYOND

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INTRODUCTION

1. The expert roundtable process of UNHCR's Global Consultations is aimed at looking in detail at selected contemporary issues of international refugee law and at providing guidance to UNHCR. Within this framework, the present study examines UNHCR's supervisory role under Article 35 of the 1951 Convention on the Status of Refugees (CSR51)[1] and Article II of the 1967 Protocol Relating to the Status of Refugees (CSRP67)[2]. 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 not only true for many of the guarantees related to the status of refugees but also for such key provisions as Article 33 CSR51 on non-refoulement or the refugee definition as provided for by Article 1 CSR51. 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[3]. These developments undermine the protection regime created by these instruments. At the same time, they create difficulties for States, e.g. because restrictive practices encourage refugees to turn to countries with a more generous practice.

2. This study, in its first part, examines the content of Article 35 CSR51 and Article II CSRP67 and their actual application by UNHCR and the States Parties to these instruments. The second 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 how to achieve more effective implementation of the 1951 Convention and the 1967 Protocol.

3. 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 clearly distinguish between *supervision* carried out by UNHCR itself, and *monitoring* by other bodies or organs. The former are covered by Article 35 CSR51 and Article II CSRP67 as understood today, the latter 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] 189 U.N.T.S. 150.
[2] 606 U.N.T.S. 267.
[3] On UNHCR's analysis of implementation problems see infra, para. 26.

PART I: UNHCR'S SUPERVISORY ROLE UNDER ARTICLE 35 CSR51

I. MAIN CONTENTS OF ARTICLE 35 CSR51

1. CO-OPERATION DUTIES

4. Article 35(1) CSR51 on "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) CSRP67 contains the same obligations in relation to the UNHCR's functions, including its "duty of supervising the application of the present Protocol".

5. What is the object and purpose of these provisions? Paragraph 1 of Article 35 CSR51 is directly linked to the sixth preambular paragraph of the Convention[4], 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 the 1950 Statute of the Office of the United Nations High Commissioner for Refugees[5] granting UNHCR the power "to assume the function of providing international protection, under the auspices of the United Nations, to refugees ..." and to exercise this function, inter alia, 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]". However, Article 35 is not limited to co-operation in the area of the application of treaties but, as the clear wording shows, refers to "any and all of the functions of the High Commissioner's office, irrespective of their legal basis"[7].

6. As the drafting history of Article 35(1) CSR51 shows, the significance of this provision was fully realized since 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

[4] Nehemiah Robinson, Convention Relating to the Status of Refugees, Its History, Contents and Interpretation, New York 1953, at 167.

[5] Statute of the Office of the United Nations High Commissioner for Refugees, Annex to General Assembly Resolution 428(V) of 14 December 1950.

[6] Paragraph 1 and 8(a) and (d) of the Statute, supra note 5.

[7] Atle Grahl-Madsen, Commentary on the Refugee Convention 1951, Geneva 1963 (published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997), at 254.

[8] See draft Article 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 1995, at 355. For the discussions at the Conference of Plenipotentiaries see in particular A/CONF.2/SR.25, pp. 10 – 22.

[9] The Refugee Convention, supra note 8, at 356 referring to E/AC.32/L.40 at 59-60.

Article 35 was regarded as a strong obligation that might be too burdensome for some States lead 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 CSR51)[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 a "would be of particular value in facilitating the uniform application of the Convention"[11].

7. The primary purpose of Article 35(1) CSR51 and Article II(1) CSRP67, thus, is 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 (1.) to respect UNHCR's supervisory power and to not hinder UNHCR in carrying out this task, and (2.) to actively co-operate 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 co-operate with UNHCR "in the exercise of its functions", Article 35(1) CSR51 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 co-operation duties follow the changing role of UNHCR.

2. Reporting Duties

8. Article 35(2) CSR51 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 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 hereafter be, in force relating to refugees."

Article II(2) CSRP67 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 and the 1967 Protocol

9. Articles 35 CSR51 and II CSRP67 do, of course, not bind States that have not yet become parties to these two instruments. Nevertheless, these States still might have a duty to co-

[10] Conference of Plenipotentiaries, A/CONF.2/SR.27, pp. 10 – 16.
[11] Conference of Plenipotentiaries, A/CONF.2/SR.2, at 17, Statement by Mr. van Heuven-Goedhardt.
[12] Volker Türk, Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR), Berlin 1992, at 162.
[13] Paragraph 11 of the Statute, supra note 5.

operate. Such a duty has been recognized in Article VIII of the 1969 OAU-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 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 they are a party to any of these instruments. The corollary duty of States to co-operate 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 UN Charter on the obligation of Member States to cooperate with the UN[18], a duty that extends to UNHCR in its quality as one of the subsidiary organs of the General Assembly.

II. CURRENT PRACTICE

10. In current practice Articles 35 CSR51 and II CSRP67 have three main functions. They are (1) the legal basis for the obligation of States to accept UNHCR's role of providing international protection to asylum-seekers and refugees and (2) to respond to information requests by UNHCR, and (3) they support the authoritative character of certain UNHCR statements (e.g. the "Handbook", policy guidelines, court submissions, etc.). In addition, they give a certain foundation to bilateral co-operation agreements.

1. UNHCR'S PROTECTION ROLE

11. 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, guard" a person or a thing from or against a danger or injury[19]. International protection on behalf of refugees is UNHCR's core function[20]. 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"[21], beginning "with securing admission, asylum, and respect for basic hu-

[14] Organization of African Unity, 1969 Convention on the Specific Aspects of Refugee Problems in Africa, 1000 U.N.T.S. 46.
[15] Declaration on Refugees, adopted at a Colloquium entitled „Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problema Jurídocos y Humanitarios", held at Cartagena, Colombia from 19-22 November 1984.
[16] General Assembly Resolution 428(V)
[17] Marjoleine Zieck, UNHCR and voluntary repatriation of refugees: a legal analysis, The Hague 1997, at 450.
[18] See Grahl-Madsen, supra note 7, pointing out at 252 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 Charter."
[19] B.G. Ramcharan, The Concept and Present Status of the International Protection of Human Rights, Dordrecht 1989, pp. 17, 20-1.
[20] Paragraph 8 of the UNHCR's Statute, infra note 24.
[21] Executive Committee of the High Commissioner's Programme, Fifty-first Session, Note on International Protection, A/AC.96/930, 7 July 2000, para. 2. Similarly Executive Committee of the High Commissioner's Programme, Forty-fifth session, Note on International Protection, A/AC.96/830, 7 September 1994, para. 12. On the protection of refugees by UNHCR in general see, Türk, supra note 12, pp. 139-169; Guy Goodwin-Gill, The

man 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"[22]. As has been recognized by the UN General Assembly such international protection is a dynamic and action-oriented function[23].

12. UNHCR's protection activities are listed in some detail in paragraph 8 of its Statute[24]. For the topic of this study, paragraph (a) regarding UNHCR's task of "[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application" is of particular relevance. 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.
>
> 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 com-

Refugee in International Law, 2nd ed., Oxford 1996, pp. 207-220; Felix Schnyder, Les aspects juridiques actuels du problème des réfugiés, Recueil des Cours 1965 (I), pp. 346-7 and 406-23. See also Jerzy Sztucki, The Conclusions of the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, 1 IJRL (1989), at 291-294.

[22] Note on Protection 1994, supra note 21, para. 12; similarly Note on Protection 2000, supra note 21, para. 9.

[23] General Assembly Resolution A/RES/55/74 of 12 February 2001, para. 8; similarly Executive Committee, Fifty-First Session, October 2000, Conclusion on International Protection, para. 2.

[24] 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, supra note 12, p. 148).

> mitments, namely to treat refugees in accordance with international rules and standards."[25]

13. 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."[26]

14. In its 2000 Note on Protection, UNHCR mentioned the following activities as particularly important components of its protection work: (1) Receiving asylum-seekers and refugees, (2) intervening with authorities, (3) ensuring physical safety, (4) protecting women, children and the elderly, (5) promoting national legislation and asylum procedures, (6) participating in national refugee status determination procedures, (7) undertaking determination of refugee status, and (8) providing advice and developing jurisprudence[27]. The Executive Committee, in many of its Conclusions, has reaffirmed UNHCR's mandate in these areas of activities, in particular

- 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 and academic institutions and of filling lacunae in international refugee law"[28], and to provide advice on the application of the relevant instruments of refugee law[29];
- to monitor refugee status determination and treatment of refugees by "survey[ing] individual cases with a view to identifying major protection problems"[30] and by participating "in various forms ... in procedures for determining refugee status in a large number of countries"[31] either through informal interventions in individual cases or by playing a formal role, attributed by relevant domestic obligation, in decision-making procedures;
- to have prompt and unhindered access to asylum-seekers, refugees and returnees[32], including those in reception centers, camps and refugee settlements[33]; at the same time, asylum

[25] Executive Committee of the High Commissioner's Programme, Standing Committee, Overview of Regional Developments (October to December 1995), EC/46/SC/CRP.11, 4 January 1996, para. 2 and 3.
[26] Id., para. 3.
[27] Note on Protection 2000, supra note 21, paras. 10 - 29.
[28] ExCom 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.
[29] E.g. in situations of mass-influx (ExCom Conclusion No. 19 (XXXI) - 1980, para. d), or on the exclusion clauses (ExCom Conclusion No. 69 (XLIII) - 1992, second preambular paragraph).
[30] ExCom Conclusion No. 1 (XXVI) - 1975, para. g.
[31] ExCom Conclusion No. 28 (XXXIII) - 1982, para. e.
[32] ExCom Conclusions No. 22 (XXXII) - 1981, para. III; No. 33 (XXXV) - 1984, para. h; No. 72 (XLIV) - 1993, para. b; No. 73 (XLV) - 1994, para. b(iii); No. 77 (XLVI) - 1995, para. q; No. 79 (XLVII) - 1996, para. p.
[33] ExCom Conclusions No. 22 (XXXII) - 1981, para. III; No. 48 (XXXXVIII) - 1987, para. 4(d).

applicants and refugees, including those in detention, are entitled to contact UNHCR and should be duly informed of this right[34]; and

- to "monitor the personal security of refugees and asylum-seekers and to take appropriate action to prevent or redress violations thereof"[35].

15. 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 practice. Although Article 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[36]. Unlike, e.g., 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 takes up individual cases[37] or general issues relevant for refugees, and do not regard such activities as an intervention into their internal affairs[38]. This general acceptance of UNHCR's protection role is, *inter alia*, rooted in the fact that due to its Statute and Article 35 CSR51, "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"[39].

16. While not exhaustively enumerated here, current practice which has broadly met the acquiescence of States can be described as follows[40]:

- UNHCR is entitled to monitor, report on and follow up its interventions with governments regarding the situation of refugees (e.g. 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.
- In general, UNHCR is granted, at a minimum, an advisory-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.
- The Office is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of amicus curiae briefs, statements or letters.

[34] ExCom Conclusions No. 8 (XXVIII) - 1977, para. e(iv); No. 22 (XXXII) - 1981, para. III; No. 44 (XXXVII) - 1986, para. g.
[35] ExCom Conclusion No. 72 (XLIV) - 1993, para. e; similarly, ExCom Conclusion No. 29 (XXXIV) - 1983, para. b.
[36] Sadruddin Aga Khan, Legal problems relating to refugees and displaced persons, Recueil des Cours, Collected Courses of the Hague Academy of International Law, vol. 149-I, Leyden 1976, at 332; Grahl-Madsen, supra note 7, at 254.
[37] Goodwin-Gill, supra note 21, at 213.
[38] See Executive Committee of the High Commissioner's Programme, Standing Committee, 8th meeting, Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It, EC/47/SC/CRP.27, 30 May 1997, para. 7. See also Türk, supra note 12, at 158.
[39] Note on International Protection 2000, supra note 21, para. 71.
[40] See ExCom Standing Committee, Progress Report on Informal Consultations, supra note 38, para. 7 and and Note on Protection 2000, supra note 21, paras. 10 - 29.

- Asylum applicants and refugees are granted access to UNHCR 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. The Office is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular the Office's supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum-seekers and refugees.

2. INFORMATION REQUESTS BY UNHCR

17. Based on Article 35 CSR51 and Article II CSRP67, particularly their paragraphs 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. This information is an important source for UNHCR's annual protection reports which remain confidential as well as for certain of its public statements. Collected information on legislation, court decisions, statistical details and country situations is made available not only to UNHCR staff but also to other States and their authorities, to refugees and their legal representatives, 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[41] as it helps, e.g., to identify State practice in the application of the 1951 Convention and 1967 Protocol or to distribute knowledge about best practices in dealing with refugee situations.

18. Information gathering on the basis of Article 35(2) CSR51 and Article II(2) CSRP67 has never been regularized, e.g. 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[42]. 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[43], UNHCR sent out a comprehensive and detailed questionnaire

[41] See also Grahl-Madsen, supra note 7, at 254 and 255, stressing the importance of Article 35(2) CSR51 for the supervision of the application of the 1951 Convention.
[42] Weis, supra note 8, at 362-3.
[43] 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, EC/SPC/54, 7 July 1989.

on 9 May 1990. The response was disappointing: by July 1992, only 23 States had responded[44]; a call by the Executive Committee to submit outstanding answers yielded only five additional answers[45].

3. Authoritative Character of the "Handbook", UNHCR Guidelines and Statements

19. In recent years, some courts have invoked Article 35 CSR51 when deciding about the relevance of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Handbook) or UNHCR statements regarding questions of law or of conclusions by the Executive Committee of the High Commissioners Programme (ExCom). While British Courts, for a long time, insisted on the non-binding nature of such documents and their corresponding irrelevance for judicial proceedings[46], their attitude has been changing recently. In its Khalif Mohamed Abdi case, the UK Court of Appeal held that by reason of Article 35 CSR51 UNHCR should be regarded as "a source of assistance and information"[47]. In the UK High Court's Adimi case, Simon Brown, LJ when quoting the UNHCR Guidelines on the Detention of Asylum Seekers went even further, by stating: "Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight"[48]. The House of Lords has sought guidance from the Handbook[49] or ExCom Conclusions[50] on several occasions. 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,

[44] 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, EC/SCP/66, 22 July 1991, para. 3.

[45] 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, EC/1992/SPC/CRP.10, 15 June 1992, para. 6.

[46] See, e.g., Lord Bridge of Harwich in: House of Lords, Bugdaycay v Secretary of State for the Home Department; Nelidow Santis v Secretary of State for the Home Department; Norman v Secretary of State for the Home Department; In re Musisi, 19 February 1987, [1987] 1 AC 514, [1987] 1 All ER 940, regarding the Handbook and ExCom Conclusions: „... it is, as it seems to me, neither necessary nor desirable that this House should attempts to interpret an instrument of this character which is of no binding force either in municipal or international law." Similarly, Staughton LJ, Court of Appeal (Civil Division), Alsawaf v Secretary of State for the Home Department, 26 April 1988, [1988] Imm AR 410 (quoting Article 35 CSR51 and referring to Lord Bridge in Musisi), and Court of Appeal (Civil Division), Thavathevathasan v Secretary of State for the Home Department, 22 December 1993 , [1994] Imm AR 249. The High Court (Queen's Bench Division), in R v Secretary of State for the Home Department, Ex parte Mehari et. Al, 8 October 1993, [1994] QB 474, [1994] 2 All ER 494, Law J stressed the fact that the Handbook, ExCom conclusions and UNHCR statements had no particular relevance for the decision of individual cases because article 35 had not been incorporated into domestic law.

[47] United Kingdom, Court of Appeal (Civil Division), Secretary of State for the Home Department A Special Adjudicator v Khalif Mohamed Abdi, 20 April 1994, [1994] IMM AR 402, Gibson LJ.

[48] United Kingdom, High Court (Divisional Court), R v Uxbridge Magistrates Courts & Another ex parte Adimi, Brown LJ.

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

[50] See, e.g., Lord Hoffmann in: House of Lords, Shah and Islam quoting approvingly the 1985 ExCom Conclusion 39 „Refugees, Women and International Protection"

in the same judgement called the Handbook an „important source of law (though it does not have the force of law itself)“[51]. Recently, Lord Steyn recalled the duty to cooperate under Article 35 CSR51 and stressed that “[i]t is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals”[52]. 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“[53]. In the Netherlands, the Hague District Court acknowledged the relevance of an UNHCR position paper on the basis of UNHCR’s supervisory role according to Article 35(1) CRR51[54]. The New Zealand Refugee Status Appeals Authority after invoking Article 35(1) CSR51 held that the “Conclusions of the Executive Committee of the UNHCR Programme ..., while not binding upon the Authority, are nonetheless of considerable persuasive authority”[55].

20. This case law is significant as it acknowledges that, as part of their duty to co-operate with UNHCR and to accept its supervisory role under Articles 35 CSR51 and II CSRP67, States Parties have to take into account Executive Committee Conclusions, the Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR guidelines and other UNHCR positions on matters of law (e.g. amicus curiae and similar submissions to courts or assessments of legislative projects requested or routinely accepted by governments) when applying the Refugee Convention and its Protocol. “Taking into account” does not mean that these documents are legally binding[56]; however, they must not been dismissed as irrelevant but regarded as authoritative statements whose disregard needs justification.

4. Bilateral Co-operation Agreements

21. Finally, Articles 35 CSR51 and II CSRP67 have gained some practical, although limited importance in the area of bilateral co-operation agreements between national governments and UNHCR. Thus, e.g., the 1995 Agreement between the Government of the People’s Republic of China and UNHCR[57] explicitly invokes these provisions as one of the foundations of the

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

[52] R v. Secretary of State for the Home Department, ex parte Adan / R v. Secretary of State for the Home Department, ex parte Aitseguer, (19 December 2000); [2001] 1 All E.R. 593; [2001] 2 W.L.R. 143, Lord Steyn.

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

[54] The Hague District Court, Osman Egal v. State Secretary of Justice, ... (available in partial translation on Refworld [37bd4d1e30].

[55] New Zealand, Refugee Status Appeals Authority, Refugee Appeal No. 1/92 Re SA (available on Refworld [378f3a1e06].

[56] See Sztucki, supra note 21, at 309 - 311 listing several reasons for what he calls “the relative low status of the Conclusions.”

[57] 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 December 1995 (available on RefWorld

co-operation between the Government and UNHCR, inter alia, in the area of UNHCR-funded projects for refugees and UNHCR's unimpeded access to refugees and projects sites[58].

PART II: MORE EFFECTIVE IMPLEMENTATION TROUGH REVIEW AND MONITORING MECHANISMS

I. THE NEED TO MOVE FORWARD

1. THE STRUGGLE FOR IMPROVED IMPLEMENTATION

22. 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 world-wide presence and "protection officers" in a large number of countries working to ensure that these instruments are implemented.

23. In addition, human rights mechanisms have started to play a significant role in protecting the rights of refugees and asylum-seekers. Thus, e.g., Article 3 of the 1984 Convention against Torture (CAT)[59] forbids States to "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" and, thus, protects *inter alia* rejected asylum-seekers against forcible return to their country of origin in cases of imminent torture[60]. Similarly, the Committee on Human Rights came to the conclusion that Article 7 of the International Covenant on Civil and Political Rights (ICCPR)[61] forbids States Parties to "expose 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".[62] The Committee also decided that forcible return is prohibited if the individual concerned risks, in the country to which he or she is returned, a violation of the right to life,[63] and applied this reasoning in a case of a re-

[37a07fc76]). Another examples is the Agreement between the Government of the Republic of Ghana and the United Nations High Commissioner for Refugees of 16 November 1994 (available on RefWorld [37a07fca152]), explicitly stating that co-operation "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", inter alia, of Article 35 CSR51.

[58] Article III of the Agreement.

[59] Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 10 December 1984.

[60] See, e.g., Views of the Committee against Torture under Article 22, concerning Communication No. 13/1993 submitted by Mr. Balabou Mutombo. Date of communication: 18 October 1993; Date of Views: 27 April 1994, para. 9.3 (Annual Report 1994 (UN Doc A/49/44), p. 45; also in HRLJ 1994, p. 164 and 7 IJRL 322/1995).

[61] International Covenant on Civil and Political Rights of 16 December 1966.

[62] Human Rights Committee, General Comment 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.1) at 30 [1994]), para. 9. Similar: views of the Human Rights Committee in respect of communication No. 469/1991, Charles Chitat Ng v. Canada, adopted on 5 Nov. 1993, paras. 14.2 (Annual Report 1994, UN Doc. A/49/40, Vol. II, p.189; also in HRLJ 1994, p.149).

[63] Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 470/1991, submitted by Joseph Kindler, para. 13.1. Date of communication: 25 September 1991; Date of Views: 30 July 1993 (Annual Report 1993, UN Doc. A/48/40, Vol. II, p.138; also in HRLJ 1993, p. 307).

jected asylum-seeker[64]. On the regional level, the prohibition of return to situations of torture and inhuman treatment has lead to a particularly rich case law in Europe since the European Court of Human Rights, in 1989[65], started to derive such a prohibition from Article 3 of the European Human Rights Convention[66]. The Committee on Human Rights and the European Court of Human Rights have also addressed other aspects of refugee protection, i.e. issues relating to the detention of asylum-seekers[67].

24. 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.

25. 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"[68] and to accept the utmost importance of "effective application of the principles and provisions of the 1951 Convention and the 1967 Protocol"[69] In 1989, the Executive Committee recalled "the utmost 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 CSR51; 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."[70]

26. The background for these calls was the acknowledgment that the implementation of the 1951 Convention and 1967 Protocol is facing considerable difficulties. UNHCR identified three categories of obstacles: socio-economic, legal and policy, or practical[71].

(i) Regarding socio-economic obstacles, it stressed that

[64] Views of the Human Rights Committee in respect of communication No. 706/1996, Mrs. G. T. on behalf of her husband T. v. Australia, adopted on 4 November 1997, para. 8.2 and views of the Human Rights Committee in respect of communication No. 692/1996, Mr. A.R.J. v. Australia, adopted on 28 July 1997, para. 6.9.

[65] Soering v. United Kingdom, Judgment of the European Court of Human Rights of 7 July 1989, Series A, No. 161.

[66] Art. 3 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 prohibits torture and inhuman and degrading treatment or punishment.

[67] See, e.g. Case of A v Australia, Views of the Human Rights Committee, of 3 April 1997 regarding communication No. 560/1993, submitted by A; European Court of Human Rights, Amuur v. France, judgment of 25 June 1996, *Reports* 1996-III at 826 seq.

[68] ExCom Conclusion No. 42(XXXVII) - 1986, para. j.

[69] ExCom Conclusion No. 43(XXXVII) - 1986, para. 3.

[70] ExCom Conclusion 57(XL) - 1989.

[71] 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, EC/SPC/54, 7 July 1989, paras. 8 -22.

> "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."[72]

(ii) 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. Where the judiciary has an important role in protecting refugee rights, restrictive interpretation 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:"[73]

(iii) 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 at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations."[74]

27. Many of these obstacles to full implementation persist and continue to create problems at all levels, domestic, regional and universal. Recently, 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."[75]

28. During informal consultations on Article 35 CSR51, 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: (1.) the problem of "[d]iffering interpretation regarding the content and application of provisions of the international refugee instruments, standards and principles"; (2.) the question whether and how "State reporting as a whole" should be improved; (3.) the challenge "of institutionalizing a constructive dialogue at regular intervals with States parties on the application of the international refugee instruments"; and (4.) the problem of "[m]easures of enforcement"[76].

[72] 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, EC/1992/SCP/CRP.10, 15 June 1992, para. 9
[73] Id., para. 9.
[74] Id. para. 10.
[75] 2000 Conclusion on International Protection, supra note 23.
[76] Progress Report, supra note 40, para. 8.

2. Reasons for Strengthening the Monitoring of the 1951 Convention and 1967 Protocol

29. Taking into account that the degree of implementation of the 1951 Convention and 1967 Protocol remains unsatisfactory, strengthening the supervision of the application of these instruments lies in the interest of all actors in the field of refugee protection:

(i) Non-implementation violates legitimate interests of *refugees* as well as their rights and guarantees provided for by international law.

(ii) 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*, i.e. obligations towards the other States parties as a whole[77]. This is clearly evidenced by Article 38 CSR51 and Article IV CSRP67, 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 encountered a material damage[78], and the parallel provision of the 1969 OAU Convention[79]. 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 one pull-factor resulting in a greater number of refugees looking for protection on their territory[80]. At a regional level, divergent interpretations of the refugee definition or non-compliance with that notion may complicate co-operation in the determination of the country responsible for examining an asylum-request.

(iii) 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.

(iv) Prolonged toleration of non-implementation seriously undermines the system of international protection as it was established 50 years ago and threatens a regime that has often been able to adequately and flexibly address and solve instances of flight for Convention reasons. Non-implementation is thus detrimental to the proper management of today's and future refugee crisis at the global level and, thus, hurts interests of the States Parties to the 1951 Convention and 1967 Protocol and even of the *international community* as a whole.

(v) On a more practical level, States might consider a strengthening of supervisory mechanisms at the universal level in order to counter-balance emerging regional mecha-

[77] On this concept see, e.g., Christos L. Rozakis, The European Convention on Human Rights as an International Treaty, in Dupuy (ed.), Mélanges en l'honneur de Nicolas Valticos – Droit et Justice, Paris 1999, pp. 502-3, Menno T. Kamminga; Inter-State Accountability for Violations of Human Rights, Philadelphia 1992, pp. 154-176.

[78] See infra para. 34.

[79] Article IX of the OAU Convention 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."

[80] See, e.g., Progress Report, supra note 40, para. 9.

nisms which might respond to regional problems and expectations rather than to uphold 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 about the proper application of EU law on refugee and asylum matters[81]. To create the possibility for regional organizations to become parties to the 1951 Convention and 1967 Protocol[82] would be another measure to safeguard uniform application and full implementation of these instruments.

II. MONITORING MECHANISMS IN PRESENT INTERNATIONAL LAW

30. For all the reasons outlined above, the urgency and timeliness of taking a fresh look at the issue of supervision is evident. Such an endeavor should not be limited to the traditional discourse on Article 35 CSR51 but try to learn from the different supervisory and monitoring mechanisms in present international law. This part of the study starts with some short remarks on different types of monitoring and then examines in some detail important existing mechanisms that might provide guidance for developing new approaches to supervision in the area of refugee law.

1. General Framework

31. One of the main tasks of international organizations is the supervision of compliance with its rules[83]. Such supervision can be internal or external. The first oversees "compliance by an international organization with its own acts", i.e. the behavior of its organs and its staff[84]. The latter evaluates "performance by the members" of the organization "to which [its] acts are addressed"[85]. External supervision is also at stake where a treaty entrusts an independent body with the task of examining compliance of the States parties with their treaty obligations. These types of external supervision include "all methods which help to realize the application

[81]: With the Treaty on European Union (Treaty of Amsterdam) of 10 November 1997 the visa, asylum, immigration and other policies related to the free movement of persons were shifted from the third to the first pillar of the European Union, i.e. they became part of the law of the European Community. In this sense article 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 have the competence, at least indirectly, to decide on the European level about the application of the CSR51 without, however, being bound by this instrument.

[82] Ratification of and accession to these instruments is only open to States (Article 39 CRS51 and Article V CSRP67).

[83] Henry G. Schermers & Niels M. Blokker, International Institutional Law, 3rd revised ed., The Hague/London/Boston, 1995; Ignaz Seidl-Hohenveldern, Failure of Controls in the Sixth International Tin Agreement, in: Niels M. Blokker and Sam Muller (eds.), Towards More effective Supervision by International Organizations, Essays in Honour of Henry G. Schermers, Vol. I, Dordrecht/Boston/London 1994, at 255 regards the supervisory role of international organizations even as their very *raison d'être*.

[84] Schermers/Blokker, supra note 83, at 864.

[85] Id., at 865.

of legal rules made by international organizations"[86] or contained in treaties. The present study is limited to forms of external supervision.

32. 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"[87]. In present-day international law, such supervision takes many different forms. Based on a categorization developed by Schermers and Blokker[88] it is possible to distinguish the following forms:

(a) 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
   - Interstate Complaints to Treaty Bodies or to the organs of the organization

(b) 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

(c) Supervision initiated by individuals:
   - Individual petitions;
   - Court proceedings.

This categorization provides a useful framework for the purposes of this study. These forms of external supervision will be called "monitoring" here in order to distinguish it clearly from the supervisory activities of UNHCR.

2. Monitoring Initiated by Other States

a) Dispute Settlement by the International Court of Justice

33. 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 by its guarantees, but at the same time to the other States parties. This gives all States parties the right to monitor the other parties with regard to their willingness to properly apply the treaty obligations even if their own interests are not at stake[89]. 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.

[86] Id., at 865.
[87] Schermers/Blokker, supra note 83, at 867.
[88] Id., at 867-897.
[89] See id., at 867; similar Rozakis, supra note 77, pp. 502-3.

34. Many treaties in the area of human rights formalize this right of States parties to monitor the behavior 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 (ICJ). There is no requirement that the State invoking such a provision has 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'"[90]. 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[91] but also in Article 38 CRS51 and Article IV CSRP67.

b) Interstate Complaints to Treaty Bodies

35. In the area of human rights law, treaties that have established a treaty body specifically entrusted with monitoring its implementation, do most often not comprise provisions on dispute settlement by the International Court of Justice[92]. Instead, four universal and three regional human rights instruments establish procedures allowing to submit inter-state complaints to the pertinent treaty-body[93]. The 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[94].

36. The ILO has a more complicated system[95]: 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 a ILO Convention which both have ratified. The Governing Body, i.e. the executive body of the

[90] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgement of 11 July 1996, I.C.J. reports 1996, para. 29, quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74 and referring to East Timor (Portugal v. Australia), I.C.J. reports 1995, p. 100, para. 22.

[91] See Article 8 of the 1926 Slavery Convention, Article 9 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article 9 of the 1952 Convention on the Political Rights of Women, Article 34 of the 1954 Convention Relating to the Status of Stateless Persons, Article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 29 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDW), Article 30 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

[92] A notable exception is Article 30 CAT.

[93] On the *universal* level: Article 41 of the 1966 Covenant on Civil and Political Rights (CCPR), Article 11 of (CERD), Article 13 of the 1985 Convention Against Apartheid in Sports, Article 21 CAT; on a *regional* level: Article 33 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Articles 45 et seq. American Convention on Human Rights (ACHR), Art. 47 of the 1981 African (Banjul) Charter on Human and Peoples' Rights (ACHPR). See, e.g., Kamminga, supra note 77, pp. 147 et seq.; Pieter H. Kooijmans, Inter-State Dispute Settlement in the Field of Human Rights, Leiden Journal of International Law 3, 1990, pp. 87 et seq.; Scott Leckie, The Inter-State Complaint Procedure in International Law: Hopeful Prospects of Wishful Thinking, Human Rights Quarterly 10, 1988, pp. 249 et seq.; Wolfram Karl, Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte, in: Walter Kälin/Eibe Riedel/Wolfram Karl/Brun-Otto Bryde/Christian von Bar/Reinhold Geimer, Aktuelle Probleme des Menschenrechtsschutzes, Berichte der Deutschen Gesellschaft für Völkerrecht 33, Heidelberg 1994, pp.108-10.

[94] Article 42 CCPR, Article 21 CAT, Article 12 CERD.

[95] Articles 26 – 34 ILO Constitution. See Katrin Weschke, Internationale Instrumente zur Durchsetzung der Menschenrechte, Berlin 2001, pp. 326-7.

ILO, may refer such 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 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.

37. A mechanism that is less an interstate complaint mechanism but more an institutionalised conciliation procedure is part of the monitoring system of the UNESCO Convention against Discrimination in Education of 14 December 1960. According to articles 12 – 19 of its (Additional) Protocol[96] instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to that Convention, 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.

38. Interstate 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 the 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 obligations which, in the words of the preamble, benefit from a 'collective enforcement.' ... the 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."[97]

39. Inter-state complaints have never been used by States parties to the pertinent human rights instruments at the UN level. There have been a few cases within the framework of ILO[98] and a few more in Europe[99], but even here they have remained rare.

[96] Protocol to the Convention against Discrimination in Education, of 12 December 1962.

[97] Ireland v. UK, 18 January 1978, European Court of Human Rights, Series A, vol. 25, pp. 89-91. Similar European Commission of Human Rights, Austria v. Italy, 11 January 1961, 4 Yearbook of the European Convention on Human Rights 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 September 1982, para. 29, reproduced in 22 ILM (1983), p. 47.

[98] Leckie, supra note 93, pp. 277 et seq..

[99] Jochen Frowein/Wolfgang Peukert, Europäische Menschenrechtskonvention – EMRK-Kommentar, Kehl/Strassburg/Arlington 1996, p. 516.

c) Assessment

40. 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:

(i) Where a State party is pursuing its own interests which have been damaged such proceedings 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. Within the context of human rights treaties, this constellation is typical for cases of diplomatic protection where a citizen of that State has been violated in his or her human rights by another State.

(ii) Proceedings that are instigated by non-victims are more relevant for monitoring purposes. They are suitable to address situations of mass violations[100] or to clarify fundamental issues haunting many States parties. Here, the *erga omnes* character of human rights[101] and similar guarantees for the individual becomes very clear[102]. However, States not directly affected by non-compliance have 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"[103], and thus come with high political costs. Second, 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 (e.g. the UN Commission on Human Rights) have the possibility to investigate the situation on their own[104].

3. MONITORING BY OR ON BEHALF OF THE ORGANIZATION OR THE TREATY BODY

a) Monitoring Based on State Reports

aa) State Reporting under the UN Human Rights Instruments

41. In the area of international human rights law, State reports are the most prevalent instrument of monitoring. Seven universal[105] and two regional[106] 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 when, in 1970, the Committee on the Elimination of Racial Discrimination (CERD) began its operations, and expanded gradually to the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination against Women

[100] Karl, supra note 93, at p. 108.
[101] See supra para. 29.
[102] Karl, supra note 93, at p. 108.
[103] Leckie, supra note 93, p. 259.
[104] Walter Kälin, Menschenrechte als Gewährleistung einer objektiven Ordnung, in: Walter Kälin/Eibe Riedel/Wolfram Karl/Brun-Otto Bryde/Christian von Bar/Reinhold Geimer, Aktuelle Probleme des Menschenrechtsschutzes, Berichte der Deutschen Gesellschaft für Völkerrecht Band 33, Heidelberg 1994, at p. 17.
[105] Article 40 CCPR, Articles 16-19 of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR), Article 19 CAT, Article 9 CERD, Article 44 of the 1989 Convention on the Rights of the Child (CRC), Article18 CEDW, Article 73 of the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
[106] Articles 21-4 of the 1961 European Social Charter, Article 62 ACHPR.

(CEDAW), the Committee against Torture (CAT), the Committee on Economic, Social and Cultural Rights (CESCR) and, in 1991, the Committee on the Rights of the Child (CRC)[107].[108] All these treaty bodies require States to report every four or five years[109].

42. All Committees follow a similar procedure[110]: Once the report has been submitted, the secretariat, a rapporteur or a working group of the Committee prepares the dialogue with the State party concerned by identifying key issues and questions to be addressed to its representatives. 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. The dialogue concludes with individual comments by the members of the Committee. The examination of the reports ends with the adoption of Concluding Observations expressing the opinion of the Committee as such and addressing both the main areas of progress and of concern. Formalized follow-up procedures do not exist, although some of the Committees have developed some elements of such procedures[111].

43. The objectives of reporting systems have been summarized by CESCR in 1994[112] 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. Fifth, 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

[107] Helga Klein, Towards a More Cohesive Human Rights Treaty System, in: Eckart Klein (ed.), The Monitoring System of Human Rights Treaty Obligations, Berlin 1998, at 89.
[108] As the 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 operative.
[109] Helga Klein, supra note 107, at 90.
[110] See Eckart Klein, The Reporting System under the International Covenant on Civil and Political Rights, in Klein, supra note 107, at 18 - 23; Bruno Simma, The Examination of State Reports: International Covenant on Economic, Social and Cultural Rights, in Klein, supra note 107, at 35 - 40; Rüdiger Wolfrum, International Convention on the Elimination of All Forms of Racial Discrimination, in Klein, supra note 107, at 55 - 62; Hanna Beate Schöpp-Schilling, The Convention on the Elimination of All Forms of Discrimination against Women, in Klein, supra note 107, at 71-88.
[111] This is particularly true for the CESCR, see Simma, supra note 110, at 39-41.
[112] Committee on Economic, Social and Cultural Rights, General Comment 1, Reporting by States parties (Third session, 1989), paras. 2 - 9, in: Compilation of General Comments and General Recommendations, Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 43 (1994).

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

44. Reporting is an important part of the ILO monitoring system. Member States of this organisation are – according to articles 19 and 22 of its Constitution –requested to report, on the basis of so-called Report Forms[113], regularly not only on the measures which they have taken to give effect to the provisions of Conventions binding them but also on the non-binding Recommendations and even on the reasons for not becoming party to all instruments adopted by the ILO. The Constitution requires member States to report annually on the application of the 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[114]. Since 1926, the reports are examined by two different organs. Firstly, the Committee of Independent Experts[115] – appointed by the ILO Governing Body – inspects the reports in a objective, technical manner. Matters of secondary importance or technical questions concerning the application of a ratified ILO Convention are sent in a written comment – called direct request - directly to the government concerned. Direct requests do not appear in the report of the Committee of Experts to the Labour Conference. 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[116]. This organ holds public discussions annually on the main cases of discrepancies in the light of the experts findings[117]. The reporting process ends with the presentation of the reports in the Plenary Sitting of the International Labour Conference.

45. Finally a reporting system is also part of the 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 organiza-

[113] The ILO has published Report Forms for all material Conventions as well as one for the reporting obligation concerning the non ratified treaties.
[114] Klaus Samson, The protection of economic and social rights within the framework of the International Labour Organisation, in Franz Matscher (ed.), die Durchsetzung wirtschaftlicher und sozialer Grundrechte, Kehl/Strassburg/Arlington 1991, p. 128.
[115] The Committee consists of 20 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.
[116] This is a political organ, consisting on 200 members being either representatives of governments, employers or workers organisations.
[117] Nicolas Valticos, Once More about the ILO System of Supervision: In What Respect is it Still a Model? in: Blokker/Muller, supra note 83, at pp. 104–5, Samson, supra note 114, at 128, Weschke, supra note 95, at 325.

tion. According to the Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution [118] the reports are considered by the UNESCO General Conference. This organ subsequently publishes its finding in a report, which "shall be transmitted to Member States, to the United Nations, to National Commissions, and to any other authorities specified by the General Conference".

cc) Assessment

46. Reporting mechanisms under the UN human rights treaties serve important functions[119] and deserve a positive assessment on a conceptual level. However, there seems to be agreement today that in practice reporting mechanisms face serious problems for at least three reasons:

(i) Many States do not fulfill their reporting duties on time and a very large number of reports are overdue[120]: As of 1 December 1998, there were 124 (out of 151) State parties with a total of 390 overdue reports within the framework of CERD. CEDAW had 245 overdue reports from 134 (out of 162) States parties. The relevant figures for the other Committees were similarly bad[121]. 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"[122].

(ii) If all reports would arrive in time, the Committees would not be able to process them in due course[123]. Alston has estimated in 1996 that, depending on the particular Committee, it would take between seven and 24 years to process all overdue reports[124].

(iii) At least some States have a tendency not to report about the real situation but either focus on the law without looking at its implementation or just deny violations which have occurred[125]. Especially in these cases, the discussion between the Committees and the

[118] Adopted by the General Conference at its 5th session, and amended at its 7th, 17th and 25th sessions.1.
[119] See supra para. 43.
[120] For the following figures see James Crawford, The UN Human Rights Treaty System: A System in Crisis, in: Philip Alston and James Crawford (Eds.), The Future of UN Human Rights Treaty Monitoring, Cambridge 2000, at 5.
[121] CAT: 105 overdue reports from 72 out of 110 States parties; CRC: 141 overdue reports from 124 out of 191 States parties; CESCR: 134 overdue reports from 97 out of 138 States parties; and HRC: 145 overdue reports from 97 out of 140 States parties (source: id. at 5).
[122] Simma, supra note 110, at 32. Similar Wolfrum, supra note 110, at 63.
[123] 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, HRI/MC/2000/4, para. 12.
[124] Effective functioning of bodies established pursuant to United Nation human rights instrument, Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system prepared by Philip Alston , UN Doc. E/CN.4/1997/74, para. 48.
[125] International Law Association, Helsinki Conference (1996), London 1996, Committee on International Human Rights Law and Practice, Anne Bayefsky, Report on the UN Human Rights Treaties; Facing the Implementation Crisis, at 341.

State Parties do not always amount to a real dialogue but rather an exchange of routine questions and routine statements not really focussing on the real issues[126].

b) Monitoring Based on Information Collected by the Organization

aa) Fact-finding by Special Rapporteurs

47. 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.

48. The main example for the use of fact-finding by Special Rapporteurs or Working Groups is provided by the UN Commission on Human Rights[127]. The Commission which for a long time focussed on standard-setting and was reluctant to deal with allegations of human rights violations in a specific country[128], has used this method 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".

49. In this regard, the Commission has developed different techniques. Within the framework of public procedures,[129] 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 at the protection of individuals and, at the same time, tend to deal with the root causes of such violations.[130] *Country-oriented*[131] procedures address human rights issues in a particular State. The Commission has

[126] Klein, supra note 110, at 26-27. See also Bayefsky, supra note 125, at 341.

[127] The following is adapted from Walter Kälin/Lara Gabriel, Human Rights in Times of Occupation: An Introduction, in: Walter Kälin (Ed.), Human Rights in Times of Occupation: The Case of Kuwait, Bern 1994, pp. 9 – 10.

[128]See MANFRED NOWAK, Country-oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission, 22 Netherlands Yearbook of International Law 39 (1991).

[129]The confidential procedure in accordance with resolution 1503 (XLVIII) is not further discussed here. For details see Philip Alston, The Commission on Human Rights, in: Philip Alston (ed.), The United Nations and Human Rights – A Critical Appraisal, Oxford 1992, p. 145; Agnes Dormenval, Procédures onusiennes de mise en œuvre des droits de l'homme: Limites ou défauts, Paris 1991, p. 58.

[130]Nowak, supra note 128, 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), and on Right to Food (2000)

[131]For more information see Alston, supra note 129, pp. 159-173 and Nowak, supra note 128, pp. 56-76.

developed several techniques for such fact-finding[132]. 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[133].

50. In all these procedures, the Commission is competent to consider information from all sources[134] concerning violations of any human right. As a political body it may not render a judicial decision;[135] however, it can serve as a catalyst for reaching a political solution resulting in the improvement of the situation of human rights in the country concerned.

51. What is the task of 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.[136] Although he or she has no judicial functions, the Special Rapporteur can only properly fulfill 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 not only rest 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 Special Rapporteurs and Working Groups regularly leave enough room to adopt different approaches and thus to respond to the peculiarities of each case. Alston distinguishes three principal approaches, (1) “fact-finding and documentation function” i.e. the task of providing“ the necessary raw material against the background of which political organs can determine the best strategy under the circumstances”, (2) “ the prosecutorial/publicity function”, i.e. attempt “to mobilize world public opinion”, and (3) “the conciliation function” where the “rapporteur's role is not to confront the violators but to seek solutions which will improve ... the situation”[137]. Which of

[132]Alston, supra note 129, 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 requests the Secretary General to maintain direct contacts with a particular government or to report on a particular country.

[133]See, as examples Commission resolutions, 1991/67 and 1992/60, Part III, *infra* p. 148.

[134]B.G. Ramcharan, The Concept and Present Status of the International Protection of Human Rights, Dordrecht/Boston/London 1989, pp. 65.

[135]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 February 1990: "The Commission is not a Court of Law. We do not here place Governments of the world on 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 Jose Antonio Pastor Ridruejo, Les procédures publiques spéciales de la Commission des droits de l’homme des Nations Unies, Académie de Droit International, Recueil des Cours 1991 (III), p. 244).

[136]Similarly Pastor Ridruejo, supra note 135, p. 238.

[137]Alston, supra note 129, pp. 167/8.

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.

52. The use of Special Rapporteurs or Working Groups has several advantages: It allows for independent fact-finding by experts and has become an important instrument to put pressure on States that violate human rights seriously and systematically. The rather limited number of country specific mandates, e.g., shows that, as van Dongen has put it, "(t)he appointment of a country rapporteur is viewed very much as the heavy artillery, brought out only when the situation so warrants"[138]. 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 favor of using individual Special Rapporteurs instead of the more costly Working Groups.

bb) Policy Review

53. Some international organizations do 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.

54. One of many examples is provided by the International Narcotic Control Board[139] established by the Single Convention on Narcotic Drugs[140]. This Board is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions. It examines and analyses, inter alia, 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.

55. The Organisation for Economic Co-operation and Development (OECD) has a particularly rich experience with policy review reports. Such reports include the Environmental Per-

[138]Toine van Dongen, Vanishing point - the problem of disappearances, in: United Nations, Bulletin of Human Rights 90/1, Geneva 1991, p. 24.
[139] Information about the Board is available at www.incb.org.
[140] Articles 9 –15 of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.

formance Reviews which scrutinize efforts of the OECD member States to meet their domestic objectives and international commitments in the area of environmental protection, and the Development Co-operation Reviews by the Development Assistance Committee (DAC). Both review systems[141] 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 developments of its policy 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 get first-hand information about the content and context of the country's environmental or development policy. The report is then submitted to 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 are amended before it is published. 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 ...".[142]

56. Both the International Narcotic Control Board and OECD are able to produce review reports on a regular basis with good quality. The model of policy assessment and review reports is interesting for three reasons: (1.) it rests on independent fact-finding by experts; (2.) it focuses not only on violations but also looks at achievements, and (3.) 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) Inspection Systems

57. 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[143]: (1) arms control and disarmament[144], (2) environmental law[145], (3) human

[141] For a description see OECD Environmental Performance Reviews, A Practical Introduction, Doc. OCDE/GD(97)35 and the forewords to the D AC Development Co-operation Reviews (e.g. CAD, Examen en matière de coopération pour le développement, Suisse, pré-impression des dossiers du CAD, Vol. 1, No. 4, OECD 2000, at II-3

[142] OCDE/GD(97)35, supra note 141, at 5.

[143] See the contributions in APT, Visits under Public International Law, Theory and Practice, Geneva 2000.

[144] See in particular the International Atomic Energy Agency Safeguards, the Chemical Weapons Convention, the Comprehensive Nuclear-Test-Ban-Treaty and the Landmine Ban Treaty (Ottawa Convention).

[145] E.g. Montreal Protocol on Substances that Deplete the Ozone Layer.

rights law[146] and (4) humanitarian law[147]. Such visits and inspections allow for direct fact-finding to verify compliance of a State party with its treaty obligations and are particularly useful for situations where an activity is carried out in places that are not open to the public (e.g. prisons and other places of detention, military installations, nuclear power plants, chemical factories etc.). Because of the degree of intrusiveness of inspections systems, they are often based on the confidentiality of the process[148]. As UNHCR already has access to refugee camps, detention centers and similar facilities[149], such a system would be less significant in the area of refugee protection.

c) Monitoring Based on a Request for an Advisory Opinion by a Court

58. 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 its Statute[150], 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 Charter of the United Nations 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 the said Organization[151]. 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"[152].

4. MONITORING INITIATED BY INDIVIDUALS

59. 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 monitoring. Petitions to a judicial organ having the power to take binding decisions exist at the regional level only[153] whereas quasi-judicial bodies are the rule on the universal level.

60. Five UN human rights treaties[154] and some regional instruments[155] provide for the possibility to submit individual complaints to a treaty body if the country concerned has recognized

[146] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987.
[147] Visits of prisoners of war and civilian detainees by ICRC on the basis of the Third and Fourth Geneva Conventions of 1948 or of prisoners based in ICRC's right of initiative.
[148] Confidentiality is the basis of ICRC's visiting activities. See also Article 11 of the European Convention for the Prevention of Torture, supra note 146.
[149] See supra paragraph 14.
[150] Statute of the International Court of Justice.
[151] Article 64(1) ACHR.
[152] Article 64(2) ACHR.
[153] See Articles 34 ECHR and 44 ACHR.
[154] First Optional Protocol to the CCPR, Article 22 CAT, Article 14 CERD, Article 77 Migrant Worker Convention, Optional Protocol to the CEDW.
[155] The Additional Protocol to the European Social Charter Providing for a system of Collective Complaints of 9 November 1995 allows certain non-governmental organizations to lodge complaints against a State party to the

its competence to examine such petitions[156]. The written procedure ends with the adoption of "views" which are legally not binding[157]. However, not only their "judgement"-like style but also the establishment of follow-up procedures by some of the treaty bodies[158] addressing situations of non-compliance have contributed to the relatively high degree of compliance[159] with these views.

61. The number of individual complaints to the UN treaty bodies is important but still limited[160]. Nevertheless, the capacity of these bodies to deal with these complaints has already reached its limits[161] and procedures are lasting too long[162]. At the regional level, the overload is especially dramatic in Europe[163].

III. MONITORING THE 1951 CONVENTION AND THE 1967 PROTOCOL

1. GOALS

62. Looking for possibilities 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, i.e. ensure that their basic rights as well as their physical safety and security are better guaranteed[164]. This overarching goal requires that UNHCR's present supervisory role under Articles 35 CRS51 and II CSRP67 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. In this regard, it is of paramount importance to institutionally separate the role of providing international protection and, in doing so, of supervising States parties on the basis of Articles 35

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, Article 55 of ACHPR.

[156] 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 of 18 December 1996 and E/CN.4/2001/62 of 21 December 2000.

[157] Article 5(4) of the Optional Protocol to the CCPR, Article 22(7) CAT, Article 14(7)(b) CERD, Article 7(3) Optional Protocol to the CEDW.

[158] See in particular Measures adopted at the thirty-ninth session of the Human Rights Committee to monitor compliance with its views under article 5, Covenant on Civil and Political Rights, UN. Doc. A/45/40, vol. 2, annex XI, at 205-206.

[159] See, e.g., Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, Kehl/Strassburg/Arlington 1993, pp. 710-1. In more recent times, however, certain States have criticized some treaty bodies for their views, including in cases regarding asylum-seekers.

[160] The Committee on Human Rights, in 1999, e.g., received 59 new cases and adopted 56 decisions. During the same year, the Committee Against Torture registered 26 new cases and adopted 39 decisions. See Plan of Action, supra note 123, Annex II and III.

[161] See Plan of Action, supra note 123, paras. 13 – 15.

[162] See, e.g. Crawford, supra note 120, 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".

[163] The European Court of Human Rights, e.g., in 1999 received over 12000 new applications and delivered 177 judgments.

[164] On the notion of protection see supra note 21.

CRS51 and II CSRP67 from the highly visible task of monitoring State behavior 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 the High Commissioner's Office had to play an active role in new monitoring mechanisms. Instead, these mechanisms should be the responsibility of the States Parties to the Convention.

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

(i) to monitor violations of applicable international instruments on the rights of refugees with a view to taking the necessary steps to convince or pressure States concerned to honor their obligations;

(ii) to promote a harmonized interpretation of the 1951 Refugee Convention and its 1967 Protocol with a view to achieving a more uniform eligibility practice; and

(iii) to learn from experiences of States Parties within the framework of a policy assessment with a view to identifying obstacles to proper implementation, appropriate solutions for current problems and best practices.

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

(i) *Independence and Expertise*: It is important that monitoring is based on fact-finding by independent experts. Both independence and expertise are necessary for making monitoring credible and to reduce the danger of politicization.

(ii) *Objectivity and Transparence:* The criteria applied to assess the behavior of a State, in particular whether it has violated its legal obligations must be objective and transparent, i.e. based on recognized norms and standards.

(iii) *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 but look at all those affected by a particular problem. Second, it should allow for a process that allows not only States but also NGOs, civil society and refugees to voice their concerns.

(iv) *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.

2. Assessment of Models

65. 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[165] to make the following assessment:

[165] Paras. 63 and 64.

a) Dispute Settlement by the International Court of Justice

66. Dispute settlement by the International Court of Justice[166] would fit the requirements of independence, objectivity and transparency and would be operational. However, it does not provide a 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 the 1969 Protocol to the International Court of Justice[167] has never been used, and it is unlikely that this will change in the near future.

67. This possibility would only become more relevant if in the future States parties to the 1951 Convention and/or 1967 Protocol with divergent views would decide to refer questions of interpretation to the International Court of Justice in a non-confrontational manner, i.e. in a way where both sides to a dispute would submit 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 CSR51 seems to imply the 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 concerened to bring the matter before the International Court of Justice according to Article 38"[168]. 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) Interstate Complaints

68. To create, within the framework of the 1951 Refugee Convention and the 1967 Protocol, a new mechanism for interstate-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[169].

c) State Reports

69. There are certain arguments speaking in favor of developing the reporting duties under Article 35 CSR51 and Article II CSRP67 into something coming close to those under the UN human rights instruments[170]. It is, e.g., obvious that the implementation of international refugee law would be considerably strengthened if the objectives of reporting identified above[171] 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 57 governments forming the Executive Commit-

[166] Supra, para. 34.
[167] Article 38 CSR51 and Art. IV CSRP67. See also Article VIII of the 1969 OAU Refugee Convention.
[168] Grahl-Madsen, supra note 7, at 253.
[169] See supra paras. 35 - 39.
[170] See supra paras. 41 - 43.
[171] See supra para. 43.

tee and forced to be sensitive to the main donor countries[172]. 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[173], thus opening up possibilities to put more pressure on governments not fulfilling their duties properly. However, as outlined above[174], reporting systems in the area of human rights law are faced with serious problems (burden on States resulting in overdue reports[175], impossibility to deal with all reports in time, tendency of some reports to not appropriately describe the situation, etc.). 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

70. Already today, UNHCR is collecting information about the application of the 1951 Refugee Convention and 1967 Protocol and other relevant treaty law in its Annual Protection reports. These reports, however, serve exclusively internal purposes and are not made public. To publish these reports and to discuss them within an appropriate institutional framework, would, of course be a possibility to strengthen UNHCR's supervisory role under Article 35 CSR51. However, there are strong reasons speaking against that proposal. Especially in situations of tensions between UNHCR and the State concerned, its authorities will not accept the report as independent, objective and unbiased but argue that UNHCR as a party to the dispute is biased. UNHCR, on its side, 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 mentioned above, it is preferable to clearly separate protection and monitoring on the operational level.

71. In contrast, both the models of Special Rapporteurs[176] and policy reviews by the organization[177] provide many advantages. They will serve as sources of inspiration for the proposals made below[178].

e) Advisory Opinions

72. Based on an authorization by the General Assembly UNHCR could request from the International Court of Justice an advisory opinion regarding a question of interpretation of the 1951 Convention and the 1967 Protocol[179]. This would be an efficient way of settling disputes

[172] See Saul Takahashi, Effective Monitoring of the Refugee Convention, paper presented at: The Refugee Convention 50 Years On; Critical Perspectives, Future Prospects, II. International Studies Association Conference, February 2001, at 3-4.
[173] Id, at 5.
[174] Supra para. 46.
[175] In this context it is also appropriate to recall UNHCR's not very encouraging experiences with the questionnaire sent out in the early 1990s (supra para. 18).
[176] Supra, paras. 47 - 52.
[177] Supra, paras. 53 - 56.
[178] Infra, paras. 75 and 80.
[179] According to Article 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 au-

that, as a result of divergent interpretations of key notions of these instruments, affect large numbers of refugees and asylum-seekers[180]. However, this possibility has never been used. Apparently, States are 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"[181]. 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[182]. Even if this attitude would change in the future, requests for advisory opinions would be very exceptional, and they could not replace but only complement other forms of monitoring.

f) Individual Complaints

73. In the context of the 1951 Refugee 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. However, it would be affected by two fundamental weaknesses: (1.) Individual complaints procedures would not be inclusive but selective: As 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. Especially States following more restrictive lines of interpretations than the majority of States parties and thus more likely to "lose" cases would probably hesitate to accept such supervision. (2.) The system would not function properly as the treaty body would be immediately confronted with a workload going up to tens of thousands of cases that could not be coped with. 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 escape 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 and refugee with a government at any time.

74. This does not mean that judicial or quasi-judicial monitoring of the application of the 1951 Refugee Convention and 1967 Protocol are not needed. Judicial supervision has been an issue in Europe for some time[183]. The European Court of Justice will exercise, to a certain

thorized by the General Assembly, may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

[180] E.g. the question as to whether Article 1A(2) CSR51 regards as refugees victims of non-state agents of persecution in situations where the State is unable to provide protection.

[181] 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, EC/SCP/76, 13 October 1992, para. 12.

[182] Id., para. 19.

[183] See, e.g. the Proposal for an Additional Protocol to the European Convention on Human Rights, presented to an ECRE Seminar on asylum in Europe in April 1992 and reprinted in Goodwin-Gill, supra note 21, at 527-533, which, had it ever been adopted by the Council of Europe member States, would have been applied by the European Court of Human Rights.

extent, such supervision in the near future on the level of the European Union[184]. This court may provide a potential model for addressing the problem of high numbers of individual complaints. Individuals do not have access to this Court, but besides the EU Commission and the EU-member States[185] every national court has the possibility or even duty to request a preliminary ruling from the Court on the interpretation of provisions of EU law[186]. This allows to keep the workload within limits but, at the same time, to make sure that the applicable law is applied in a harmonized way. It might be premature to propose the setting up of 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, however, would fit all goals and criteria outlined above, and therefore, would deserve thorough discussions at least in a long-term perspective.

3. PROPOSAL

75. It is proposed to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model:

(i) A Sub-Committee on Review and Monitoring comprising those ExCom members that are States parties to the 1951 Convention or the 1967 Protocol is set up as a permanent Sub-Committee within the framework of the Executive Committee.

(ii) The Sub-Committee on Review and Monitoring is 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,
- to identifying obstacles to full implementation of these instruments, and
- to drawing lessons from actual experiences in order to overcome obstacles and to achieving a more effective implementation of these instruments.

Situations or countries to be reviewed are identified on the basis of transparent and objective criteria, taking into account, *inter alia*, 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:

- The Sub-Committee identifies the situation to be reviewed and its chairperson appoints 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[187].
- The governments of the countries affected by a particular refugee situation to be reviewed 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.

[184] Supra note 81.
[185] Articles 226 and 227 of the Treaty Establishing the European Community (consolidated version).
[186] Article 234 of the Treaty Establishing the European Community (consolidated version).
[187] Each State party would have the possibility to nominate one independent expert. Alternatively, these experts could be elected by a meeting of State Parties for a period of five years, but this might need an amendment to the 1951 Convention and 1967 Protocol.

- The governments concerned 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 prepares its report and submits it to the Sub-Committee on Review and Monitoring.
- The report is discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs may participate in these discussions. The Sub-Committee may adopt observations.
- The report of the review team together with the Sub-Committee‘s observations, as the case may be, is transmitted to the States Parties as a document with unrestricted distribution.

(iii) In addition, the Sub-Committee on Review and Monitoring starts 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 a 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 requests by domestic authorities or courts, or by UNHCR.

76. This proposal meets all the goals and criteria mentioned above[188] that are necessary for an appropriate and functioning system of supervision. Refugee Protection Review Reports allow monitoring of violations, contribute significantly to a harmonized interpretation of relevant norms, and help to identify obstacles to full implementation as well as measures to overcome them and best practices. The Refugee Protection Review mechanism allows 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 will provide objective and transparent standards to be used when assessing the behavior and activities of States parties. Inclusiveness is guaranteed as all concerned (governments, UNHCR, NGOs, refugees) play a certain role in the process. Finally, experience in other areas shows that policy review mechanisms work well in practice[189].

77. The legal basis for these proposals can be found in Article 35(1) CSR51 and Article II CSRP67. 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 the Protocol[190]. As the Executive Committee is based on Article 4 of the UNHCR Statute and thus part of the institutional framework created by the Statute, no amendments to the 1951 Refugee 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

[188] Supra paras. 57-58.
[189] Supra paras. 54 and 55.
[190] For an explanation of these provisions see supra paras. 4- 7.

monitoring mechanisms[191]. In any case, it would provide the new supervisory mechanism with enhanced legitimacy.

IV. MONITORING BEYOND THE 1951 CONVENTION AND THE 1967 PROTOCOL

78. 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 endanger the present international refugee protection system, too. Therefore, it would be appropriate to create a mechanism that would permit examination of whether States that are not party to the 1951 Refugee Convention and 1967 Protocol are respecting their obligations under international customary law and instruments binding upon them that are pertinent for the protection of refugees and asylum-seekers. Experience in the area of human rights law shows that thematic Rapporteurs are well suited to look into specific problem areas outside of treaty mechanisms. They could play an important role in the area of international protection of refugees, too.

79. 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 also 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 financial matters. The session of the June Standing Committee is usually dedicated to international protection issues and would lend itself to the discussion of reports by Special Rapporteurs.

80. The following model is proposed here:

(i) The Standing Committee appoints, where appropriate and necessary, Special Rapporteurs with thematic mandates to look at issues of special concern (e.g. on women and children refugees; physical security of refugees; access to asylum procedures). The mandates should be determined in a way that avoids overlapping 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 to a maximum extent.

(ii) Reports of Special Rapporteurs are discussed by the Standing Committee, if appropriate in the presence of representatives of countries concerned; NGOs may participate in these discussions. The reports, together with observations by the Standing Committee, are disseminated as documents with unrestricted circulation.

(iii) The Executive Committee has the possibility to reflect the outcome of discussions in its own conclusions on protection.

81. Arguably, nothing hinders the Executive Committee to commission studies on issues relating to its competence and to discuss them at an appropriate level. Nevertheless, the legitimacy of such monitoring mechanism would be greatly enhanced if it would rest on an explicit authorization by ECOSOC.

[191] See the examples of ECOSOC resolutions1235 and 1503, supra para. 48.

CONCLUSIONS AND RECOMMENDATIONS

82. This study first examined UNHCR's supervisory responsibility and the corresponding State obligations under Article 35 CSR51 and Article II CSRP67. The main *conclusions* of its first part can be summarized as follows:

(a) Article 35 CSR51 and Article II CSRP67 impose a treaty obligation on States Parties (1.) to respect UNHCR's supervisory power and to not hinder UNHCR in carrying out this task, and (2.) to actively co-operate with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of the Convention and its Protocol. Similar duties have also been recognized in Article VIII of the 1969 OAU-Convention and Recommendation II (e) of the 1984 Cartagena Declaration on Refugees. Taking into account UNHCR's Statute and its character as a subsidiary organ of the UN General Assembly, a certain duty to co-operate binding also upon non-States parties can be derived from Article 56 of the UN Charter. These duties have a highly dynamic and evolutive character.

(b) Today, Articles 35 CSR51 and II CSRP67 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.

(c) Current practice regarding Articles 35 CRS51 and II CSRP67 which has broadly met the acquiescence of States can be described as follows:

- UNHCR is entitled to monitor, report on and follow up its interventions with governments regarding the situation of refugees (e.g. 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.
- In general, UNHCR is granted, at a minimum, an advisory-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.
- The Office is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of amicus curiae briefs, statements or letters.
- Asylum applicants and refugees are granted access to UNHCR 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. The Office is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.

- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular the Office's supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum-seekers and refugees.

83. The second part of the study devoted to a discussion of the need to improve monitoring of the 1951 Convention and 1967 Protocol and an analysis of existing monitoring mechanisms outside the field of refugee law can be summarized as follows:

(a) As the degree of implementation of the 1951 Refugee Convention and other relevant instruments remains unsatisfactory, strengthening the monitoring of the application of these instruments lies in the interest of all actors in the field of refugee protection. Non-implementation violates legitimate interests of *refugees* as well as their rights and guarantees provided for by international law. It also violates the rights of the other *States parties* to the Convention and other relevant instruments for the protection of refugees 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 and, finally, affects the whole international community because it seriously undermines the present system of international protection, i.e. a regime which has been able to adequately and flexibly address and solve not all but many problems in the past.

(b) Existing supervisory mechanisms include supervision initiated by other States (dispute settlement by the International Court of Justice and interstate complaints to treaty bodies), supervision by or on behalf of the organization (State reports, policy reviews, Advisory Opinions by the ICJ), and supervision initiated by individuals (individual complaints to a judicial or quasi-judicial organ). Many of the existing models do not meet these requirements or have not found enough support by States in the area of refugee law. In particular, serious reasons speak against transferring mechanisms of States 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 .

(c) A strengthened supervisory mechanism for the 1951 Refugee Convention and 1967 Protocol should monitor violations of applicable international instruments on the rights of refugees, harmonize the interpretation of the 1951 Refugee 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 Articles 35 CRS51 and II CSRP67 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, making it necessary to institutionally separate new mechanisms from UNHCR.

84. 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:

a) A Sub-Committee on Review and Monitoring comprising those ExCom members that are States parties to the 1951 Convention and/or the 1967 Protocol is set up as a permanent Sub-Committee within the framework of the Executive Committee.

b) The Sub-Committee on Review and Monitoring is 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,
   - to identifying obstacles to full implementation of these instruments, and
   - to drawing lessons from actual experiences in order to overcome obstacles and to achieving a more effective implementation of these instruments.

   Situations or countries to be reviewed are identified on the basis of transparent and objective criteria, taking into account, inter alia, 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:
   - The Sub-Committee identifies the situation to be reviewed and its chairperson appoints 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[192].
   - The governments of the countries affected by a particular refugee situation to be reviewed prepare a memorandum explaining the main features of their policy and setting out the main the problems encountered, the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
   - The governments concerned 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 prepares its report and submits it to the Sub-Committee on Review and Monitoring.
   - The report is discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs may participate in these discussions. The Sub-Committee may adopt observations.

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

- The report of the review team together with the Sub-Committee‘s observations, as the case may be, is transmitted to the States Parties as a public document.

(iv) In addition, the Sub-Committee on Review and Monitoring starts 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 a 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 requests by domestic authorities or courts, or by UNHCR.

85. 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 affect non-States Parties to these instruments, too. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would permit examination of whether States that are not party to the 1951 Refugee Convention and 1967 Protocol are respecting their obligations under international customary law and instruments binding upon them that are pertinent for the protection of refugees and asylum-seekers. The following model is proposed:

a) The Executive Committee’s Standing Committee appoints, where appropriate and necessary, Special Rapporteurs with thematic mandates to look at issues of special concern (e.g. on women and children among asylum seekers and refugees; physical security of refugees, access to asylum procedures). The mandates should be determined in a way that avoids or at least limits overlapping 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.

b) Reports of Special Rapporteurs are discussed by the Standing Committee, if appropriate in the presence of representatives of countries concerned; NGOs may participate in these discussions. The reports, together with observations of the Standing Committee, are disseminated as documents with unrestricted circulation.

c) The Executive Committee has the possibility to reflect the outcome of discussions in its own conclusions on protection.