

## UNHCR'S SUPERVISORY RESPONSIBILITY

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La *Convention de 1951* et son *Protocole de 1967* ont créé le HCR en tant qu'organisation internationale ayant le mandat de fournir une protection internationale aux réfugiés en supervisant, entre autres, l'application de ce régime juridique international. Le HCR peut ainsi mettre en place des procédures afin de s'assurer du bon fonctionnement de l'ordre juridique en obligeant les états signataires à respecter les obligations qui leur incombent. Cet article a pour but de décrire le rôle de supervision du HCR dans le contexte plus large de son mandat international, d'analyser son contenu et d'entrevoir les voies possibles afin de renforcer et de développer ce rôle.

The *1951 Convention* and its *1967 Protocol* created UNHCR as the international institution mandated to provide international protection to refugees, *inter alia* by supervising the application of this international legal regime. Supervision is defined as a legal process that empowers authorized institutions to apply certain procedures to assure the proper functioning of the legal order by inducing subjects to observe obligations incumbent on them. This paper describes UNHCR's supervisory role within the broader context of its international mandate, analyses its content and proposes possible avenues that could be developed to enhance that role. The author points out that in the context of refugee protection, it is important to ensure the resolution of refugee problems and harmonization of international refugee law on the basis of objective evaluations and judgements.

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## I. Introduction

Since the establishment of the United Nations, a wide range of issues of an international dimension, on the fact that states are unable to solve problems in isolation from each other, have been regulated at the universal level. The General Assembly recognized the issue of forced displacement as a matter of international concern as early as 1946<sup>1</sup>. This awareness has translated into the establishment of a universal legal and institutional framework providing for the protection of refugees, at the core of which is the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*. The overall framework also included the creation of the UNHCR as the international institution mandated to provide international protection to refugees, *inter alia* by supervising the application of this international legal regime.

The question of the UNHCR's supervisory role has received heightened attention in the nineties, not least because it was felt that full and effective implementation of the *1951 Convention* was lacking in many parts of the world and that strengthened international supervision could ensure better norm compliance. One observer has highlighted the main concern by arguing that it is domestic implementation which allows states unilaterally to manipulate the refugee definition "to suit their perceived national and foreign policy interests"<sup>2</sup>. There have been a number of attempts by the UNHCR<sup>3</sup> to strengthen and even formalise oversight in the refugee protection area. A number of NGOs<sup>4</sup> have also been particularly vocal in pressing for enhanced international supervision of the international refugee instruments. This topic has recently been the subject of discussion in the context of the second track of the *Global Consultations on International Protection*<sup>5</sup>. Furthermore, its consideration takes place against the background of ongoing efforts to reform the human rights treaty monitoring system<sup>6</sup>.

The purpose of this paper is to describe the UNHCR's supervisory role within the broader context of its international protection mandate, to analyse its content, and to propose for discussion possible avenues that could be developed to enhance that role. The international support of national protection in countries of

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<sup>1</sup> See . UN GA , Res.1946, A/45

<sup>2</sup> See E.J. Lentini, «The Definition of Refugees in International Law: Proposals for the Future» (1985) 6 Boston College Third World Law Journal, p.195

<sup>3</sup> See Doc. off. E/SCP/54 and EC/1992/SCP/CRP.10.

<sup>4</sup> See, for instance, 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, Chicago, February 2001; Amnesty International, *Refugees: Human Rights have no Borders*, Recommendation 11, 1997; Canadian Council for Refugees, 'Brief on the Occasion of the 50<sup>th</sup> Session of the Executive Committee of the UHCR, October 1999.

<sup>5</sup> See Walter Kälin, "Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond", background paper commissioned by UNHCR; concluding observations of the Cambridge Expert Roundtable organised by UNHCR and the Lauterpacht Research Centre for International Law, 9–10 July 2001 (both available on UNHCR's Global Consultations website, <http://www.unhcr.ch/issues/asylum/globalconsult/main.htm>)

<sup>6</sup> For more information see A.F. Bayefsky, ed., *The UN Human Rights Treaty System: Universality at the Crossroads* (The Hague, Kluwer Law International, 2000) and P. Alston and J. Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000).

origin, which relates to the UNHCR's direct involvement and concern with the protection of nationals in their own countries, is also treated in diverse instruments which entrust the UNHCR with additional responsibilities. (Among these groups are returnees, the internally displaced, persons threatened with displacement or otherwise at risk, and stateless persons.) Describing the specificities of protection and monitoring in such circumstances, although they are of a similar nature, would, however, go beyond the scope of this paper<sup>7</sup>.

## II. The concept of international protection

The *Statute of the UNHCR* and the *1951 Convention relating to the Status of Refugees* were adopted fifty years ago, in the aftermath of massive population movements. Drafted while the world was still in shock at the horrors of the Second World War that outraged the conscience of mankind, its texts bear witness to the direct experience of the main drafters. They were mindful of the need for a world in which human beings should be able to enjoy freedom from fear. Their strengthened faith in fundamental human rights and in the dignity and worth of the human person, helped to solidify the concept of international protection of refugees.

In accordance with paragraphs 1 and 8 of its *Statute*, the UNHCR has assumed the primary function of providing international protection to refugees<sup>8</sup>. Ever since, this function has remained a central part of the UNHCR's responsibilities. It has a highly dynamic character and emanates essentially from the UNHCR's operational practice and the practice of states in providing protection to millions of refugees.

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<sup>7</sup> For instance, in the context of voluntary repatriation, the Executive Committee has clarified UNHCR's monitoring responsibilities, particularly in its Conclusion No. 40.

<sup>8</sup> See in particular paragraph 8 of the *Statute*, which sets out in more detail the function of international protection:

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 intergovernmental 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.

The concept of international refugee protection, along with human rights law, helped spearhead a revolution in the overall international legal regime. The individual, including those lacking in national protection, was recognised as the inherent bearer of human rights. The absence of effective national protection – the failure or inability by the country of origin to fulfil the responsibility for safeguarding human rights – became a matter of international concern and responsibility. Filling this protection vacuum required the creation of a specific regime of rights for refugees. The main responsibility for safeguarding the human rights of refugees lies with states; the role of the UNHCR is to ensure that governments take the necessary measures, starting with admission and ending with the realisation of durable solutions. Increasingly, especially in situations of large-scale influx, the international community's capacity to support and assist particularly affected states, including through the UNHCR, has become an important element of the effectiveness of international protection<sup>9</sup>.

The underlying broader international framework of international protection predates the establishment of the UNHCR, not least because of the various legal and institutional arrangements that preceded the creation of the UNHCR and the adoption of the *1951 Convention*. It draws heavily on different sources of international law and has evolved generally over time from the idea of international protection as a surrogate for consular and diplomatic protection to including gradually broader notions of human rights protection. Today, the institution of international refugee protection, whilst unique in the international legal system, is embedded in the broader international human rights protection regime<sup>10</sup> and also generally linked to effective forms of international cooperation.

The unparalleled character of the UNHCR's international protection function essentially revolves around two distinctive features: (i) its "operationality"; and (ii) its "supervisory function". Both features, and their expressions in the UNHCR's practice, are intrinsically linked and intertwined. Since the focus of this paper is not on the various facets of the operational role of the UNHCR's international protection mandate, suffice it to say that its extensive field presence enables it to fulfil protection functions and to deliver assistance to refugees and other persons of concern. The *1994 UNHCR Note on International Protection* sets out in some detail the conceptual understanding of international protection<sup>11</sup>, while the *2000 Note on International Protection* focuses in particular on how the UNHCR has "operationalised" its international protection mandate<sup>12</sup>. By contrast, descriptions of the UNHCR's supervisory role are scant. Before proceeding to the UNHCR, it is therefore helpful to explore the concept of international supervision generally.

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<sup>9</sup> See in particular UNHCR background papers on the first theme of the "third track" of the Global Consultations on International Protection on the protection of refugees in situations of mass influx.

<sup>10</sup> The latest (1993) World Conference on Human Rights has acknowledged this link in paragraph 23 of the Vienna Declaration and Programme of Action.

<sup>11</sup> See UN doc. A/AC.96/830.

<sup>12</sup> See UN doc. A/AC.96/930.

### III. The concept of supervision in international law

Supervision of international treaties by an international institution was seen as progress in international affairs at the time of its emergence. Niels Blokker and Sam Muller<sup>13</sup>, write that originally, states themselves supervised international agreements. This, they say, no longer works with more complex international relations and large multilateral conventions. Thus the need arose to establish more objective means of supervision, as opposed to traditional, decentralised and subjective supervision by states. According to them, as a result, international organisations were created with the special task of supervising rule compliance by states. Initially, though, international organisations were vested with restricted powers to supervise rule compliance by states parties to multilateral agreements. They also point out that supervision by international organisations is generally considered more political and mostly lacks the characteristics of judicial supervision, such as independence, objective rules, due process and the binding effect of the decision. This is important background information for a closer assessment of the UNHCR's supervisory role.

It is also useful, against this background, to reflect on the very purpose of international supervision. The purpose of international supervision relating to the application of provisions of international instruments is, first and foremost, to promote compliance with these rules<sup>14</sup>. In this sense, international supervision furthers one of the main objectives of the essence of law itself, which is "... to give effect, through appropriate limitation and international supervision of the international sovereignty of states, to the principle that the protection of the human personality and of its fundamental rights is the ultimate purpose of all law, national and international ..."<sup>15</sup>. Based on this understanding of international supervision, it is now possible to examine the UNHCR's supervisory role.

### IV. Legal basis of the UNHCR's supervisory responsibility

The UNHCR's supervisory responsibility is an integral and inherent part of its international refugee protection function. It is laid down explicitly in paragraph 8 of the *UNHCR Statute*:

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; ... (underlining added).

<sup>13</sup> See in particular N. Blokker and S. Muller, eds., *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers*, vol. 1 (Dordrecht, Martinus Nijhoff, 1994), Some Concluding Observations, pp. 275–80.

<sup>14</sup> See Blokker/Muller, *supra* note 13, p. 275.

<sup>15</sup> See E. Lauterpacht, ed., *International Law: Being the Collected Papers of Hersch Lauterpacht Collected Papers* (Cambridge[Eng.], Cambridge University Press, 1970), vol. II, p. 47.

No specific provisions of the *Statute* elaborate, however, on the UNHCR's supervisory responsibility or provide the UNHCR with any specific enforcement powers.

Articles 35 and 36 of the *1951 Convention relating to the Status of Refugees*<sup>16</sup>, Article II of its *1967 Protocol* and Article VIII of the *1969 OAU Convention* governing the specific aspects of refugee problems in Africa contain the corresponding treaty obligations of states in this area. In essence, states parties to these international refugee instruments undertake to co-operate with the UNHCR in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of these instruments. This is specified further in Article 35(2) and Article 36 of the *1951 Convention*. Pursuant to Article 35(2), states undertake to provide the UNHCR, in the appropriate form, with information and statistical data concerning the condition of refugees and the implementation of the *1951 Convention*, including laws, regulations and decrees relating to refugees. Article 36 requires states parties to communicate to the UN Secretary-General the laws and regulations which they may adopt to ensure the application of this *Convention*. While Article 36 nominally mentions the Secretary-General, in practice these communications are directed to the UNHCR. After all, the UNHCR is the main body within the UN system responsible for refugee matters and as such a subsidiary organ of the UN General Assembly<sup>17</sup>.

Broader states' acceptance of the UNHCR's supervisory responsibility is also reflected, *inter alia*, in recommendation (e) of the *1984 Cartagena Declaration* and the *Preamble* to the *1957 Agreement relating to Refugee Seamen*. Furthermore, both Article 28 of the *1990 Schengen Implementation Convention* and Article 2 of the *1990 Dublin Convention*<sup>18</sup> reaffirm the commitment of the contracting parties to co-operate with the UNHCR in the implementation of the international refugee instruments, which extends to the UNHCR's supervisory role. The declaration to the final act of the *1997 Treaty of Amsterdam*, which foresees consultations with the UNHCR in the area of harmonisation of refugee law and policies, can be seen as a concrete implementation by European Union member states of their responsibility to co-operate with the UNHCR in the exercise of its supervisory responsibility. Indeed, in practice, the UNHCR actively contributes to the EU harmonization process by providing detailed policy and legal opinions on the various draft texts, as well as by preparing substantive background documentation both on state practice and on relevant international refugee law standards<sup>19</sup>.

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<sup>16</sup> See also the Preamble of the 1951 Convention:  
Nothing 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...

<sup>17</sup> See Article 22 of the UN Charter.

<sup>18</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community.

<sup>19</sup> See UN doc. A/AC.96/930, para. 42.

In those cases where the UNHCR's supervisory responsibility is not referred to in a refugee instrument explicitly or where states are not party to any international refugee instrument, state obligations in this area can more broadly be found in Articles 1(3), 2(2), 2(5), 55 and 56 of the *UN Charter* in combination with paragraph 8(a) of the *UNHCR Statute*. Arguably, the content of Article 35 of the *1951 Convention* could possibly constitute a rule of customary international law, not least because a specific organisational supervisory practice developed by the UNHCR, coupled with a consequent acquiescence by states in relation to this practice, is discernible<sup>20</sup>. In the light of the foregoing analysis, it is also important to note that Article 2(7) of the *UN Charter* is not a valid argument against an intervention by the UNHCR in the area of international refugee protection<sup>21</sup>.

In summary, a closer analysis of the provisions regulating the UNHCR's supervisory role and of corresponding states' obligations leads to the conclusion that, apart from Article 35(2) and Article 36, there is no proper procedure implementing the UNHCR's supervisory responsibility. Nor has an international enforcement mechanism as such been established in this area. It is therefore essential to analyse the actual content of this responsibility and of states' corresponding obligations by examining the practice of the UNHCR, its Executive Committee and states in this area.

## V. Scope of application of the UNHCR's supervisory role

Before proceeding to a more detailed analysis of how the UNHCR's supervisory role has been implemented, it is valuable to clarify to whom this function applies and in respect of which instruments. In order to arrive at this clarification, it is important to interpret this role in light of its ordinary meaning, guided by the object and purpose of the UNHCR's broader international protection function and the applicable international refugee instruments. Regard is also had to the *travaux préparatoires*, as applicable in this specific context.

### A. Application *ratione personae*

Paragraph 8 of the *UNHCR Statute* refers to refugees. It is generally understood that this term comprises also asylum-seekers and refugees in the broader sense. The UNHCR's competence in respect of refugees covers all forms of forced displacement originating from man-made disasters. This may, however, not

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<sup>20</sup> This practice is described in more detail later under the subheading "State practice".

<sup>21</sup> The ICJ stated that '... a matter within the State's domestic jurisdiction, will cease to be such if the State has undertaken obligations towards other States with respect to that matter ...' (*Aegean Sea Continental Shelf Case*, ICJ Reports 1978, p. 25). See also Advisory Opinion of the ICJ, 'Interpretation of Peace Treaties with Bulgaria, Hungary and Romania', ICJ Reports 1950, pp. 70-71: '... The interpretation of the terms of a treaty ... could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law ...'.

necessarily be matched by obligations formally accepted by states<sup>22</sup>. Sometimes it has been argued that the UNHCR's supervisory role does not apply to persons outside the scope of the particular country's formal legal responsibilities. The General Assembly, however, entrusted the UNHCR with providing international protection to, and seeking durable solutions for, all refugees, whether formally recognised or not, who fall within the Office's mandate, and this mandate is not restricted by international obligations assumed by a particular state. In summary, it is argued in this paper that the UNHCR's supervisory responsibility extends to all refugees falling under the UNHCR's competence in accordance with relevant General Assembly resolutions, whether or not they are considered refugees within the scope of these International refugee protection instruments, including in countries that have not acceded to these instruments.

The dichotomy between the UNHCR responsibilities on the one hand and limited obligations formally accepted by certain states on the other remains a major challenge. In this connection, the *1994 Note on International Protection* observed that the tasks of international protection which the international community had conferred upon UNHCR had to some extent outgrown the legal tools that were available to accomplish them. The *Note* also observed that significant numbers of people who were in need of international protection were, for a variety of reasons, outside the effective scope of the principal international refugee instruments<sup>23</sup>. The question arises whether the UNHCR's supervisory role and corresponding state obligations in this regard could be activated as a legal basis to address precisely the protection needs of those categories of persons who are in need of international protection, but, at present, not within the application of the international legal framework of refugee protection.

This proposition requires further elaboration. By way of recapitulation, Article 35 of the *1951 Convention* is in essence a provision that concretises the general obligations of UN member states to cooperate with the UN<sup>24</sup>. At the same time, it establishes an explicit contractual link between the *1951 Convention* and the *UNHCR Statute*, that is, the legal framework of the UNHCR's mandate and competence. Arguably, this strengthens indirectly the authority of the General Assembly resolutions in relation to the UNHCR, not least because the *UNHCR Statute* itself has foreseen the possibility of expanding the scope of the UNHCR's activities in its paragraphs 3 and 9. When acceding to the *1951 Convention*, it is assumed that states would be aware of the fact that the UNHCR has a broader competence *ratione personae* and that its mandate is a living phenomenon evolving dynamically through subsequent General Assembly resolutions. In this connection, it

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<sup>22</sup> See V. Türk, "The Role of UNHCR in the Development of International Refugee Law", in F. Nicholson & P. Twomey, eds., *Refuge Rights and Realities: Evolving International Concepts and Regimes* (Cambridge, Cambridge University Press, 1999), pp. 153–73; I.C. Jackson, *The Refugee Concept in Group Situations* (The Hague, Martinus Nijhoff, 1999); UNHCR, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN doc. EC/50/SC/CRP.18.

<sup>23</sup> See UN doc. A/AC.96/830, paragraph 68.

<sup>24</sup> See Article 56 in conjunction with Article 55 of the UN Charter.



is important to bear in mind that the UNHCR at the time of its establishment was already required to follow an unrestricted refugee definition, while states could restrict the geographical or temporal applicability of the refugee definition. In this sense, the gap between broader UNHCR responsibilities and the more limited formal, legal obligations of states was already apparent at the time of the drafting of the *Convention*. The wording of Article 35 itself does not seem to limit cooperation with the UNHCR to the obligations formally undertaken by states, including those circumscribed by reservations made at the time of accession. The “dynamic” character of the obligation to cooperate with the UNHCR is, to some extent, also reflected in the reference contained in Article 35(1) to “any other agency of the United Nations which may succeed it”. In this sense, the provision contemplates that, should the UNHCR be abolished and a successor agency be established, states would continue to be obligated to any such future agency.

The functional link established in Article 35 between the *1951 Convention* and the *UNHCR Statute*, including its subsequent development by the General Assembly, may be construed to enable an evolutionary adaptation of the provisions of the *1951 Convention* to the changing actual situation and its manifestation in the evolving competence of the UNHCR<sup>25</sup>. In this sense, it could be argued that Article 35 has the potential to address the gap between institutional responsibilities entrusted to the UNHCR and the often limited obligations formally accepted by states by creating obligations to cooperate with the UNHCR proportional to the UNHCR's competencies *ratione personae* and *ratione materiae*.

By way of additional argument, an analysis of the *travaux préparatoires* of the *1951 Convention* would seem to support this proposition. When examining the various drafts of Article 35, it is possible to discern an evolution in the deliberations starting from lesser forms of cooperation and resulting in a more elaborate, open and evolutionary role for the UNHCR<sup>26</sup>.

## B. Application *ratione materiae*

To exercise its international protection function vis-à-vis states, the UNHCR relies on its *Statute*, including the extension of its competence through subsequent General Assembly and ECOSOC resolutions, and on the whole body of universal and regional refugee law and standards, complemented by relevant international human rights and humanitarian law instruments, as well as relevant national legislation and

<sup>25</sup> See also more generally N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation; a Commentary* (New York: Institute of Jewish Affairs, 1953), p. 142, who writes in a footnote that the General Assembly envisaged UNHCR as a means of making the Convention a dynamic and living reality (UN doc. SR.24), p. 22.

<sup>26</sup> See UN docs. E/AC.32/L.3, E/AC.32/L.26 ; E/AC.32/L.32 ; E/1618 and Corr.1 ; E/AC.32/5 and Corr.1 : E/OR(XI)/Annex 32 ; E/AC.32/L.40 ; E/1850 ; E/AC.32/8 ; A/Conf.2/1. See also Robinson, *supra* note 25, who writes on p. 143 that Article 35 is the result of the existence of UNHCR and of paragraph 6 of the Preamble to the Convention and who sees in Article 35 the transformation of the General Assembly resolution calling upon all states to cooperate with UNHCR into a legally binding obligation for states.

key jurisprudence. This body of law and standards constitutes the international refugee protection regime at the core of which are the *UNHCR Statute* and the *1951 Convention/1967 Protocol*. It is a dynamic set of explicit and implicit rules. To obtain a better overview, given the different sources of law involved, it may indeed be a useful exercise to consolidate these rules in a comprehensive manner. Inherent in this regime is also a certain legal authority that states have vested in the UNHCR's international protection function in the form of its supervisory role. The values which constitute the fundamental assumptions that underlie this particular regime and define its very nature are: universality, impartiality and fundamental notions of humanity. This is particularly relevant to efforts by the UNHCR to strengthen the international protection regime through its supervisory role.

Clearly, in accordance with paragraph 8 of the *UNHCR Statute*, the UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. The UNHCR is therefore competent *qua* its *Statute* to supervise all conventions relevant to refugee protection, and has in fact done so in practice. Moreover, as described earlier, most international refugee conventions explicitly establish a link to the UNHCR's supervisory function as regards the application of their provisions.

Since related international standards concerning the protection of refugees, adopted by the Executive Committee, the General Assembly or by regional organisations, often constitute guidelines or even "implementing tools" in application of these conventions, the UNHCR's supervisory role necessarily also extends to these standards. They do not have the same legal value as international treaties, but they are nevertheless important tools in the appraisal of how international refugee conventions are being applied.

The same applies to regional instruments, even, arguably, to those that do not specifically refer to the UNHCR's supervisory role, because they relate to the provision of complementary protection<sup>27</sup>. Most of these regional instruments either refer to the *1951 Convention/1967 Protocol* or contain a provision according to which the regional agreements apply without prejudice to them<sup>28</sup>. For instance, the various resolutions and directives harmonising asylum policy and practice within the European Union explicitly foresee some form of a consultative role for the UNHCR, which implies recognition of the UNHCR's supervisory function<sup>29</sup>.

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<sup>27</sup> See Executive Committee Conclusions Nos. 41 (i), 42 (h), 52 (1).

<sup>28</sup> For instance, both Article 28 of the Schengen Implementation Convention and Article 2 of the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community reaffirm the commitment of the Contracting Parties to co-operate with UNHCR in the implementation of the international refugee instruments, which extends to UNHCR's supervisory role.

<sup>29</sup> See, for instance, Declaration No. 17 annexed to Treaty of Amsterdam on Article 63 of the Treaty Establishing the European Community; Council Resolution on Minimum Guarantees for Asylum Procedures, 20 June 1995, paragraph 31; Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons, June 2001, paragraph 11.

The UNHCR, in the exercise of its supervisory role, may also have recourse to provisions in human rights treaties that refer either explicitly to refugees (for example, Article 22 of the *1989 Convention on the Rights of the Child*)<sup>30</sup> or apply to them implicitly. While, clearly, the respective treaty monitoring bodies have the primary competence to supervise, the UNHCR may, arguably, fulfil a subsidiary function regarding the application of these provisions as long as treaty monitoring by the competent bodies has not been activated<sup>31</sup>. More generally, the UNHCR has undertaken a number of activities to identify and strengthen the linkages between international refugee law and international human rights law so that each could be better used for the protection of refugees<sup>32</sup>. In this sense, the UNHCR has, for instance, followed closely the work of the six human rights treaty monitoring bodies and regional human rights institutions, such as the European Court of Human Rights, to reinforce the understanding and coverage of refugee protection issues in these forums.

In countries that have not acceded to any international refugee instrument, the legal basis for the UNHCR's supervisory role is its *Statute* and those norms and principles of international law applicable to refugees that apply to all states, regardless of accession to international instruments. Norms of customary international law relating to the protection of refugees, such as the principle of *non-refoulement*<sup>33</sup> could, arguably, be covered by the UNHCR's supervisory role, although the term "convention" in paragraph 8 of the *Statute* seems to refer only to one source of international law, namely international treaties<sup>34</sup>.

## VI. Supervision in the context of the UNHCR

The supervisory competence of an international organisation is generally determined by the very objective of the treaty and the reasoning for establishing the

<sup>30</sup> See also Article 45 of this Convention, which provides that UN organs may be represented, may provide expert advice on the Convention's implementation in areas falling within the scope of their respective mandates, when implementation of the Convention of the Rights of the Child is considered. The Article also states that the Committee shall transmit to competent bodies reports from States Parties that contain a request, or indicate a need, for technical advice or assistance.

<sup>31</sup> See, for instance, UNHCR's submission to the Supreme Court of Canada in *Suresh v. The Minister of Citizenship and Immigration* (S.C.C. No. 27790). This case raises some important issues of international refugee law and international human rights law, particularly the relationship between Article 33 of the 1951 Convention and Articles 3 and 16 of the UN Convention Against Torture.

<sup>32</sup> See, UN Doc. A/AC.96/898 (3 July 1998) ; B.Gorlick, " Human Rights and Refugees : Enhancing Protection Through International Human Rights Law", UNHCR New Issues in Refugee Research, working paper n°30, ( october 2000) .

<sup>33</sup> See, D. Bethlehem & E. Lauterpacht, "The Scope and Content of the Principle of *Non-refoulement*", paper presented at the Cambridge meeting of the second track of the Global Consultations on International Protection, (July 2001).

<sup>34</sup> For the legal reasoning justifying a broad understanding of "conventions", see V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen, UNHCR*, (Berlin: Duncker & Humblot , 1992) at 167.

international organisation in the first place<sup>35</sup>. While no definition of the UNHCR's supervisory role exists, the *Statute* has provided the basis for a broad concept of supervision which goes beyond any treaty basis, extending to all refugees falling under the UNHCR's competence and including regional instruments and standards, as well as general principles and norms of international law applicable to refugees. In this connection, it is also useful to recall that the UNHCR has an implied power *qua* its *Statute* to define and adopt such measures as are reasonably necessary in order to achieve the object and purpose of supervising the international legal framework governing refugee protection. With this in mind, it is now important to agree on a conceptual framework against which it is possible to analyse how supervision has developed in practice.

Tareq Chowdhury, who has analysed the concept of international supervision extensively, defines supervision as:

a legal process which empowers authorized institutions to apply certain procedures to assure the proper functioning of the legal order by inducing subjects to observe obligations incumbent on them. All the procedures by which existing substantive rules of law are further elaborated, applied and enforced, would be considered to have contributed to the supervision. A discussion of international supervision is therefore, a discussion of those procedures through which legal order induces subjects to observe law.<sup>36</sup>

While the above conceptualisation may not necessarily always be applicable in the specific context of international refugee protection, it provides a useful analytical framework, which may help to advance the analysis of the UNHCR's supervisory responsibility. For the purpose of this paper, supervision by an international institution contains (i) an element of collection of information concerning the application of provisions of the international refugee instruments by the respective contracting states; (ii) the assessment of this information in light of the applicable norms; and (iii) some kind of enforcement mechanism to ensure remedial action and norm compliance by the states concerned<sup>37</sup>. All three actions are closely inter-related and core components of any supervisory role.

According to *Chowdhury*, when the review process leads to the identification of an unlawful act, the enforcement phase of the supervisory function is activated. Enforcement has two objectives: the prevention of wrongful behaviour and the redress of wrongful behaviour, by means of either punitive or non-punitive measures<sup>38</sup>.

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<sup>35</sup> This refers to the "general interest", as Chowdhury put it; see Tareq. M.R. Chowdhury, *Legal Framework of International Supervision*, (Stockholm: University of Stockholm, 1986) at 176.

<sup>36</sup> *Ibid.* at 7.

<sup>37</sup> *Ibid.* at 181, 258.

<sup>38</sup> *Ibid.* at 9–10, 258: "As international organizations are an institutionalized means of international co-operation, the coercive element in "enforcement" plays a rather insignificant role compared to other "enforcement" techniques." He has preventive action in mind.

As can be seen from the above analysis and apart from Articles 35(2) and 36 of the *1951 Convention*, no specific legal provisions elaborate on the implementation of the UNHCR's supervisory function. It is therefore essential to examine the actual practice of the UNHCR in this area, to see to what extent this practice has been formalised by the Executive Committee and to analyse how it corresponds to actual state practice. Other supervisory mechanisms, particularly in the area of human rights law, have served as useful models on which to draw in the analysis of supervisory tools.

## VII. The UNHCR's organisational practice

As regards the *first element of supervision* ("*information gathering*"), Article 35(2) (b and c) and Article 36 of the *1951 Convention* set out clear obligations for states to provide information on the application of the *Convention*. This is indicative of how the UNHCR's supervisory function is intended to be exercised.

Information gathering is greatly facilitated by the presence of the UNHCR offices in the majority of states parties to the international refugee instruments. Without an effective field presence it would be difficult for the UNHCR to monitor the broad range of state and non-state measures in relation to asylum-seekers and refugees and to keep up-to-date with administrative practice, jurisprudence and relevant legislative processes. By being present, the UNHCR, in its dealings with its government and other counterparts, is generally able to gather necessary information, which enables an appropriate monitoring of state practice. Relevant domestic laws, regulations, decrees, instructions, administrative decisions and other related administrative measures are regularly measured against the international refugee instruments. This task obviously needs to be performed by qualified legal staff who are experts in the national legal framework and well versed in international refugee/human rights law.

The *second element* of international supervision relates to *the assessment of this information* in the light of international refugee law and standards. In the UNHCR's context, this essentially means analysis of and reporting on state practice by the Office itself. Reporting by the UNHCR serves not least to ensure some consistency in the application of standards, to achieve harmonisation of interpretations of provisions of international refugee law, to set in train the development of common standards, and to ensure international co-operation. Effective reporting would entail that at any point in time the UNHCR would be able to provide an overview and analysis of current state practice in a given country in relation to a specific issue affecting asylum-seekers and refugees. This has obvious resource and staffing implications. There is, however, currently no mechanism available that would ensure institutionalised reporting on inconsistencies or violations ascertained. By contrast, in human rights law it is generally recognised that state reporting procedures are of central importance to the effectiveness of the international human rights regime. State reporting is regarded as a multi-faceted undertaking that serves a variety of objectives both domestically and internationally and is based on

the assumption that the examination of such reports by the treaty monitoring body would lead to a dialogue between that state and the experts and to progressive improvements in compliance<sup>39</sup>.

As for the *third element, enforcement*, international refugee law and international human rights law have institutionally developed in different directions. In human rights law, three different systems have in essence evolved institutionally to “enforce” human rights: (i) political processes, such as the Commission on Human Rights; (ii) quasi-judicial models, such as the specialist human rights treaty monitoring bodies charged with the oversight of treaty performance; and (iii) judicial mechanisms, such as the European Court of Human Rights whose judgements are binding and enforceable in member states. The genesis of the UNHCR’s supervisory role predates the institutional developments that have taken place in the human rights area. While prescribing this supervisory responsibility, neither the *UNHCR Statute* nor any other provisions of international refugee law explicitly provide for a mechanism of enforcement that would induce states parties to the international refugee instruments to fulfil their obligations. It has therefore been argued in academic literature that the UNHCR’s effectiveness as an enforcement mechanism remains unclear<sup>40</sup>.

It is true that the UNHCR cannot as such “enforce” its views. In the UNHCR’s practice and understanding, “enforcement” means in effect a wide range of intervention and advocacy activities covering the whole spectrum of displacement ranging from admission, reception, determination of refugee status to improvement of standards, regularisation of stay or return. The objective of these activities is to ensure the adherence of states to internationally accepted standards of conduct with regard to refugees and asylum-seekers and to assist in building up the capacity of authorities to do so. In efforts to harmonise the application of the refugee definition criteria, the UNHCR has, for instance, sought to influence state practice by providing guidance on the eligibility of certain groups of refugees and by advising the authorities, courts and other bodies on the interpretation and practical application of the provisions of the international refugee instruments<sup>41</sup>. The UNHCR’s involvement in precedent-setting cases, including through submissions to courts, has also often resulted in positive developments in a number of countries.

Intervention generally encompasses the political, diplomatic and legal work that is required to address protection issues, to take remedial action and to influence legislation and national practice. This is done by conducting a constructive dialogue with the government concerned, relevant regional and local authorities at all levels, the parliament, the judiciary, the academic community and other relevant institutions,

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<sup>39</sup> See, Independent expert study, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights*, UN Doc. A/44/668 (8 November 1989), at 4.

<sup>40</sup> See, E.G. Lentini, *supra* note 2 at 197; See, also C. Tomuschat, “A Right to Asylum”, (1992) *Human Rights L.J.*, at 257.

<sup>41</sup> The fact that UNHCR issued a *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992) is indicative of UNHCR’s role in this regard.

including even non-state actors, by making formal or informal representations or submitting the UNHCR's observations to them in an appropriate form. Depending on the interlocutor, the UNHCR's views are generally communicated in the form of letters, *notes verbales*, *aide-mémoires*, public domain positions, or "non-papers". In the case of the judiciary, they are communicated as *amicus curiae* briefs or other submissions, and for parliamentary commissions, often by means of written or oral statements. For the UNHCR, this dialogue can be carried out at the local, the regional and/or the headquarters level. When legislation is in the process of being adopted or implemented, it also entails the submission of quality expert opinions based on in-depth knowledge of and familiarity with national state practice and international refugee law.

In addition, the UNHCR engages in standard-setting and promotional activities<sup>42</sup>, making its special expertise available by offering advisory services, technical assistance and training<sup>43</sup>. A number of these activities are described in more detail in the *2000 and 2001 Notes on International Protection*<sup>44</sup>. The UNHCR may also issue public statements in case of concerns or departures from the international refugee instruments and standards<sup>45</sup>.

In summary, although the UNHCR as such does not have an enforcement mechanism comparable, for instance, to the human rights treaty monitoring bodies, the aforementioned activities on their own or taken together, depending on the circumstances, could have the effect of soft "enforcement".

### **VIII. Elaboration of the UNHCR's supervisory responsibility by the Executive Committee of the High Commissioner's Programme**

The Executive Committee is the only specialised forum, which exists at the global level for the development of international standards relating to refugees. The annual conclusions adopted by the Executive Committee on matters related to international protection are indicative of international consensus in certain areas and fulfil an important standard-setting function. The Executive Committee has, to some extent, conceptualised the UNHCR's supervisory role, albeit not always by referring explicitly to the concept of supervision. The understanding of the Executive Committee mirrors to a great extent the UNHCR's own understanding of this function. The various elements identified by the Executive Committee provide an

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<sup>42</sup> See, Executive Committee Conclusions, Nos 47 (s)(u), at 53- 55 .

<sup>43</sup> See, Executive Committee Conclusion ,No 72 (e)(f).

<sup>44</sup> See, UN Doc. A/AC.96/930 and UN Doc. A/AC.96/951.

<sup>45</sup> See, Executive Committee Conclusion No. 41 (o), which notes the importance of promoting a favourable climate of public opinion in order to facilitate the exercise of UNHCR's international protection function. It also emphasises the need for the special situation and needs of refugees and asylum-seekers to be brought fully to the attention of the public, welcomes UNHCR's efforts in this regard and states that these should be fully supported by governments.

important framework and the necessary tools for the effective exercise of the UNHCR's supervisory function. They are summarised below:

#### **A. Monitoring**

The UNHCR is entitled to monitor and report on the situation of refugees and asylum-seekers and to follow up its interventions with states in this regard. Intervention includes making representations to governments and other relevant actors on protection concerns [1(g)]<sup>46</sup>.

#### **B. State reporting**

The UNHCR could follow up on the application and implementation of the *1951 Convention* and *1967 Protocol* as well as applicable regional instruments in various states parties to the *1951 Convention*, including national practice and procedures for the recognition of refugee status, and submit a report to the Executive Committee on the subject [2(c)]. Governments should co-operate with the UNHCR in matters relating to the implementation of the international refugee instruments [16(h)]. In order to facilitate the UNHCR's supervisory role, they should provide information and statistical data concerning implementation [57 (preamble)].

The UNHCR was requested in 1989 to prepare a more detailed report on implementation of the *1951 Convention*. The Executive Committee called upon states to facilitate this task, including through the timely provision to the UNHCR, when requested, of detailed information on implementation of the *Convention* in their respective countries [57(d), 61(I), 65(l)(m), 77(e), 79(f)]. Only 28 states replied to a questionnaire on implementation of the *1951 Convention* and *1967 Protocol* circulated by the UNHCR. In 1991, when the UNHCR submitted to the Executive Committee the interim report on implementation<sup>47</sup>, the Executive Committee requested the UNHCR to accord public access to states' replies to this questionnaire with the agreement of the states concerned [65(l)(m)]. In 1992, the Executive Committee called upon the UNHCR and all states to work together to strengthen implementation, through heightened promotional efforts, better monitoring arrangements and more harmonised application of the refugee definition criteria [68(c)]. In 1995, the Executive Committee reminded states parties to provide the High Commissioner with detailed information on the implementation of the *Convention* and urged those which had not complied with this undertaking to do so [77(e)].

#### **C. UNHCR access**

The UNHCR shall be given prompt and unhindered access to asylum applicants, refugees and returnees [22(III), 33(h), 72(b), 73(b)(iii), 77(q), 79(p)] and

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<sup>46</sup> The numbers in brackets refer to the relevant Executive Committee Conclusions.

<sup>47</sup> See, UN Doc. EC/SCP/66.



shall be allowed to supervise the well-being of persons entering reception centres, camps or other refugee settlements [22(III), 48(4)(d)]. The UNHCR may monitor the personal security of refugees and asylum-seekers and take appropriate action to prevent or redress violations thereof [72(e)].

**D. Right to contact the UNHCR**

Asylum applicants and refugees, including those being detained, shall be entitled to contact the UNHCR and should be duly informed of this right [8(e)(iv), 22 III, 44(g)].

**E. Participation in refugee status determination procedures**

The UNHCR may participate in various forms in procedures for determining refugee status [28(e)]. It may be necessary for the UNHCR, with the consent of the authorities of the asylum country, to certify that a person is considered a refugee within the UNHCR mandate [35(e)].

**F. The UNHCR advisory services**

The UNHCR should provide constant advice on the practical application of the provisions of international refugee instruments by countries exposed to large-scale influx of refugees [19(d)]. As for the application of the cessation clauses, the UNHCR should be appropriately involved [69 (preamble)]. It is considered important to maintain a constant dialogue on developing standards of protection with governments, non-governmental organisations and academic institutions and to fill *lacunae* in international refugee law, particularly regarding asylum-seekers and the physical protection of refugees and asylum-seekers [29(j)]. The fact that the UNHCR issued a *Handbook relating to procedures and criteria for determining refugee status* and that the UNHCR was asked to circulate significant decisions on the determination of refugee status is indicative of the UNHCR's role in any harmonisation process [8(g)].

In summary, it may be useful to consolidate the various elements of the UNHCR's supervisory role in a single conclusion of the Executive Committee and to identify practical suggestions to strengthen implementation of the UNHCR's supervisory function. Such a conclusion could also be used to clarify the UNHCR's supervisory role in relation to international conventions relating to stateless persons<sup>48</sup>.

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<sup>48</sup> See, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness; as for UNHCR's role, see, *UNHCR's Activities in the Field of Statelessness: Progress Report*, UN Doc. EC/51/SC/CRP.13, at para. 5; *Evaluation of UNHCR's Role and Activities in Relation to Statelessness Issues*, EPAU/2001/09, (July 2001).

## IX. State practice

States' support of the various elements and tools of the UNHCR's supervisory responsibility has found an important expression in the Conclusions of the Executive Committee as summarised above. The aforementioned listing can therefore be considered to be a basic operational framework for the exercise of the UNHCR's supervisory role.

In terms of other expressions of state practice, notably in national legislation and administrative practice, obligations stemming from Article 35 of the *1951 Convention* have primarily been implemented by involving the UNHCR in national refugee status determination procedures. The UNHCR has generally worked with states, offering its expertise as required, in order to ensure that procedures work effectively, taking into account the nature and scale of the refugee caseload, as well as the prevailing circumstances in the particular country concerned.

The role of the UNHCR in refugee status determination procedures can take different forms, ranging from membership in a status determination commission, to an advisory function whereby the UNHCR can express its views to the authorities that are making decisions at the first instance and/or appeal levels. In a number of countries, the UNHCR sits as an observer on the committee that advises the authority competent to determine refugee status<sup>49</sup>. In some states, a UNHCR representative is a member of the appeals commission that reviews decisions denying or withdrawing refugee status<sup>50</sup>.

The UNHCR's participation in the process of refugee status determination may contribute to a harmonisation of practices in applying the refugee definition. Although a number of states have found it appropriate to entrust the UNHCR with a substantive role in their determination procedures, in the UNHCR's view, it is neither necessary nor in line with its general functions to assume alone the decision-making responsibility<sup>51</sup>. Instead, a meaningful participatory role should be tailored to the country situation. In countries that have not acceded to international refugee instruments, the UNHCR has undertaken determination of refugee status under its own mandate.

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<sup>49</sup> The following references are not exhaustive but reflect particular aspects of countries' international obligations under the Convention at the national level, 1951, art.35.; See, for instance, the Law on Asylum of Albania, 1998, art.20(4); Law No. 1952-893 of France, art.3.; the Aliens Act of Poland, art.49(2); Refugee Law of Romania, 1996, art 9(1).; the Law on Asylum of Slovenia, art.30.; the Implementing Decree of Law 5/1984 of Spain, art.2(1); the Law of Angola, 8/1990, art.10.; Ordinance 77053 of Djibouti, art.3. and Ordinance 77054 of Djibouti, art.6.; the Asylum Law of Ghana, 1992, section 4,9(3) (a).; the Refugees Act of Namibia, 1999, section 7.; Decree 464/1985 of Argentina, art.3.; Decree No. 19639 of Bolivia; the Law No. 9474 of Brazil, 1997, art.14(7) (1).; Bill C - 31 of Canada, section 161, 2000.; Executive Resolution No. 461/1984 of Panama, art.5.

<sup>50</sup> See, for instance, the Law No. 1952-893 of France, art .5; Presidential Decree No. 61/99 of Greece, art.3(5).

<sup>51</sup> Even in Belgium, a longstanding party to the 1951 Convention, UNHCR used to be fully responsible for the determination of refugee status; see, Johnson, "Refugee Law Reform in Europe: The Belgian Example" (*Columbia Journal of Transnational Law*, 1989) at p. 591.

A quick survey of the various forms of UNHCR involvement in refugee status determination procedures leads to the conclusion that most countries foresee, at a minimum, an advisory-consultative role for the UNHCR. To perform this role, the UNHCR is, as a rule, notified of asylum applications, informed of the course of the procedure and has guaranteed access to files and decisions which may be taken up with the authorities, as appropriate<sup>52</sup>. The UNHCR is also entitled to submit its observations on cases should it deem so necessary<sup>53</sup>. Asylum applicants and refugees are generally granted access to the UNHCR and vice versa, either by law or administrative practice<sup>54</sup>. In some countries, the UNHCR is more substantially involved in special procedures at the airport or in expulsion or deportation procedures<sup>55</sup>. To ensure conformity with international refugee law and standards, the UNHCR is entitled to influence the legislative process and is generally requested to provide comments on and technical input into draft refugee legislation and related administrative decrees<sup>56</sup>.

Compared to other international involvement in national legal and administrative systems, the exercise of the UNHCR's supervisory role is rather unique in this respect. In fact, it may be the only UN organisation that is directly involved in national law-making, national procedures and national decision-making. This is not to say that such involvement does not have its own sets of difficulties, such as the possibility of being perceived to be closely associated with government policies. Other problems concern a real or perceived lack of independence because of dependency on the funding of donor countries as well as operational obstacles hindering the implementation of certain aspects of supervision, for instance, through denial of access to refugees or inadequate involvement in the legislative process. These difficulties are, however, of a practical nature that would need to be addressed at the practical, operational level. It would be wrong to deduce from these problems a need to change the supervisory system as a whole. Before embarking on a discussion

<sup>52</sup> See, for instance, the Law on Asylum of Albania, 1998, art. 27(4); the Law on Refugees of Bulgaria, 1981, section 4(2); Presidential Decree No. 61/99 of Greece, art. 1 (7), 2 (8), 3 (10), and 4 (7); the Refugee Act of Ireland, 1996, sections 11 (3), 16 (8); Immigration Act of Norway, 1991, art. 21.; the Law 15/98 of Portugal, art. 11 (4), 14 (3), 18 (1)-(4), 22 (3), and 24 (2); the Law on Asylum of Slovenia, art. 10(3); the Implementing Decree of Law 5/1984 of Spain, art. 19 (3), 20 (1) (a), 21 (1); Bill C - 31 of Canada, section 161.; Executive Resolution No. 461/1984 of Panama, art. 22.

<sup>53</sup> See See, for instance, the Law 15/98 of Portugal art. 19 -23.; the Law on Asylum of Slovenia, art. 10(3); the Asylum Law 5/1984 of Spain, art. 5 (5).

<sup>54</sup> See, for instance, the Asylum Law of Albania, 1998, art. 16 (3), 20 (1) and 23 (3); the Asylum Law of Austria, art. 39 (4); the Law on Refugees of Bulgaria, 1999, sections 4 (2) and 20.; the Asylum Act of the Czech Republic, sections 37 and 38.; the Asylum Procedure Act of Germany, art. 9 (1); Decree No. 95-507 of France.; the Presidential Decree No. 61/1999 of Greece, art. 2 (11); the Refugee Law of Latvia, 1998, art. 6 (1); the Immigration Act of Norway, 1991, art. 34.; the Aliens Act of Poland, art. 49 (1); the Asylum Law 15/98 of Portugal, art. 49 (1); the Ordinance of Romania, 2000, art. 22(5); the Law on Asylum of Slovenia, art. 31 (3); Decree No. 1598 of Colombia, 1995, art. 13.; Decree 464/1985, art. 4.; the Law on Refugees of Armenia, 1999, art. 19. In most countries in all regions of the world, UNHCR access to asylum applicants, refugees and returnees is granted in practice.

<sup>55</sup> See, for instance, Implementing Decree of Law 5/1984 of Spain, art. 20 (1) (a) and 21 (1); the Law on Asylum of Switzerland, 1998, art. 23 (3).

<sup>56</sup> Slovenia has even legislated on this, see, the Law on Asylum art. 10 (2).

about how to enhance the UNHCR's supervisory role, it is therefore crucial to acknowledge the achievements that have been made by involving an international institution in domestic legal and administrative contexts and to build any strengthening of the UNHCR's role around these achievements.

## X. Possible areas for further discussion

At the conceptual level, a number of initiatives have been taken over the past ten years to move the discussion forward. In response to the unsuccessful attempt to install a reporting mechanism by states parties on the implementation of their responsibilities under the applicable international refugee instruments, the Sub-Committee of the Whole on International Protection made a number of suggestions that were partly followed up in practice. The proposals ranged from a more regularised system of reporting, periodic meetings of states parties to review problems and progress with implementation, to harmonised regional processes for interpretation and application of the refugee instruments.

The debate was again taken forward by the informal consultations on measures to ensure international protection to all who need it. These so-called "gap-consultations" discussed, *inter alia*, the UNHCR's supervisory role and encouraged the UNHCR to use the existing legal framework and its own discretion to strengthen its supervisory responsibility, for instance, through enhanced dialogue with states and/or in terms of regular reporting to the Executive Committee or, through ECOSOC, to the General Assembly<sup>57</sup>.

In the context of the Global Consultations on International Protection, a number of concrete proposals were developed on the basis of a discussion paper prepared by Walter Kälin and as a result of the Cambridge Expert Roundtable held in July 2001<sup>58</sup>. Kälin's paper focused less on the UNHCR itself. It rather compared different models of international supervision and examined their potential relevance to the refugee law context, suggesting in essence a differentiation between the exercise of the UNHCR's supervisory role on the one hand and oversight mechanisms to be established by the states parties themselves, for instance, in the form of a "peer review" within the Executive Committee framework, on the other. The Cambridge Expert Roundtable discussed in some detail the pros and cons of various approaches, such as the appointment by the High Commissioner of expert advisers to assess implementation in relation to particular issues/situations or peer review mechanisms within and outside the Executive Committee framework. It remains to be seen how this will develop further, particularly in the context of discussions at the forthcoming Ministerial Meeting on the occasion of the 50<sup>th</sup> anniversary of the *1951 Convention*, which will be held in Geneva on 12–13 December 2001.

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<sup>57</sup> See, UN Doc. EC/47/SC/CRP.27., at para. 7–9.

<sup>58</sup> See, the concluding observations of the Cambridge Expert Roundtable organised by UNHCR and the Lauterpacht Research Centre for International Law, (9–10 July 2001),  
**on line** : < <http://www.unhcr.ch>>.

This paper has set out the basic framework for the exercise of the UNHCR's supervisory responsibility. Four areas have emerged as subjects requiring further examination in the context of the various discussions concerning the strengthening of the UNHCR's supervisory role. In essence, these are: (i) differing interpretation regarding the content/application of provisions of the international refugee instruments, standards and principles; (ii) state reporting as a whole; (iii) the question of institutionalising a constructive dialogue with states parties to the international refugee instruments on their implementation at regular intervals; and (iv) measures of enforcement<sup>59</sup>.

Based on these four areas, the following paragraphs set out the current state of debate and examine a number of suggestions<sup>60</sup> that could be considered further:

**A. What happens when a conflict arises between the UNHCR's assessment and those of a state concerning the application of provisions of the international refugee instruments?**

An important way to resolve differences of interpretation on disputed concepts is the UNHCR's active and meaningful involvement in regional harmonisation efforts. This may, however, not be adequate, particularly in regions with no regional harmonisation processes. Borrowing from the human rights treaty monitoring bodies, it would be possible for the UNHCR to issue 'general comments on the interpretation of provisions of the international refugee instruments and disseminated its legal positions on a formalised basis (as UN documents). It is doubtful, though, whether a more formalised publication of legal positions would resolve the question of establishing the UNHCR as the ultimate legal authority for interpreting the provisions of the international refugee instruments.

**B. Would it be useful to regularise a system of periodic reporting on implementation of the international refugee instruments and an ensuing assessment of these reports by the UNHCR on a more structured basis?**

An interesting idea that has been put forward in this connection is the organisation of periodic meetings of states parties to review problems and progress on implementation<sup>61</sup>. Alternatively, the UNHCR could request specific information on an ad hoc basis as regards the implementation of specific articles of the international

<sup>59</sup> These are areas which were, for instance, identified in the context of the informal consultations on measures to ensure international protection to all who need it. See ,UN Doc. EC/47/SC/CRP.27, at para .7-9.

<sup>60</sup> Some of these suggestions were put forward for consideration by the Sub-Committee of the Whole on International Protection: see ,UN Docs. EC/SCP/54; EC/SCP/66; and EC/1992/SCP/CRP.10. As for academic literature on the subject, which is scarce, see, in particular Kälin, *supra* note. 5, but also Lentini, *supra* note. 2, at pp. 196-7.

<sup>61</sup> See, the concluding observations of the Cambridge Expert Roundtable organised by UNHCR and the Lauterpacht Research Centre for International Law, 9-10 July 2001 , **on line : UNHCR's Global Consultations:** <<http://www.unhcr.ch>>.

refugee instruments. Whatever form the reporting procedure took, it would be essential for it to strike a balance between the need to be independent and the UNHCR's actual dependence on donor countries. It would also need to strike a balance between the need for the UNHCR to maintain credibility and ensure norm compliance by states on the one hand and continued co-operation by states on the other.

The options below and any variations thereof as regards reporting procedures could, for instance, be discussed further:

- States parties to the international refugee conventions would report at regular intervals on legislative, judicial, administrative or other measures they have taken to give effect to the provisions of these instruments following a questionnaire that specifies the information to be supplied. States would be required to publish their initial reports. The UNHCR would examine whether the state's law and practices agree with or differ from the provisions and standards of the relevant international instruments. In doing so, the UNHCR may also consider responses to the report submitted by NGOs, individuals and other states. The UNHCR would make a preliminary report, which would be discussed with the authorities of the state concerned in a confidential manner. The UNHCR would conclude its evaluation after this discussion, make recommendations and send its report to the state which would be given reasonable time to respond. The UNHCR would include its concluding observations and recommendations together with any state response in its report to the General Assembly. The state in question would be required to report on the implementation of the recommendations within a given timeframe. This proposal may be rather straightforward and in line with other known reporting mechanisms, but it is also important to bear in mind that state reporting has only worked to a limited extent and often not necessarily improved implementation effectively. As described earlier, there have been various attempts on the part of the UNHCR and its Executive Committee to establish a procedure, without much success. States appear reluctant to take on another reporting obligation.

- If state reporting in the above form is not considered viable, a more formal direct supervisory mechanism initiated by the UNHCR could perhaps be feasible. Such a direct monitoring system, which the UNHCR offices to some extent already perform all over the world, could be based on systematic monitoring studies undertaken by the UNHCR at regular intervals. It could, for instance, be conceived that a UNHCR monitoring team would visit a state to discuss its policies, to review legal provisions, administrative decrees and decisions and state practice as a whole in the area of refugee protection. Whilst the local UNHCR office would act as Secretariat, NGOs, other states and individuals would be entitled to submit their views. The UNHCR team would then deliver a "reasoned opinion" on the state's compliance with international refugee law and standards and provide recommendations. This opinion would, first, be discussed confidentially with the government. The UNHCR team would conclude its evaluation after this discussion, make precise concluding recommendations and send its report to the state which would be given reasonable time to respond. Finally, the UNHCR would include the

concluding observations and recommendations together with any state response in its report to the General Assembly. The state in question would subsequently report on the implementation of the recommendations within a given timeframe.

- In a variation of the above procedure, it has also been suggested that an advisory group of independent experts be appointed by the High Commissioner (perhaps in consultation with the Executive Committee)<sup>62</sup>. The independent experts would be required to carry out their task with discretion, objectivity and independence and fulfil the functions foreseen by the UNHCR monitoring team (as under bb). The full independence of such a group would have a particularly positive effect on the "review process". Alternatively, surveys regarding the implementation of the *1951 Convention/1967 Protocol* or the appointment by the High Commissioner of special experts or of a working group on certain themes, countries or regions could be other similar measures of supervision in this regard. This might have the benefit of providing a broader approach that did not "point the finger" at a single state.

- Another possibility could be the development of an institutionalised dialogue on the basis of the annual protection reporting exercise undertaken by the UNHCR which could be made accessible to governments and eventually also the public. Every year, the UNHCR offices are required to carry out a thorough review of national state practice on the basis of a detailed questionnaire. This information assists the UNHCR generally in monitoring compliance with the international refugee instruments. A more systematic use of this reporting process could be useful to ensure compliance. In this case, UNHCR offices would prepare the report on an annual basis. They would submit the report to their government counterparts for comments within a certain timeframe. In the course of a "constructive dialogue" with the government, the local UNHCR office would elaborate specific concluding observations/general comments on this process and make recommendations, including offers for advisory services and technical assistance. This information could be used in the UNHCR's annual reporting to the Executive Committee and to the General Assembly.

**C. Are there other effective instruments of supervision that would ensure compliance by States with their international obligations?**

It could be considered, for instance, that an optional protocol to the *1951 Convention* be drafted, granting individuals or groups a right to submit communications to the UNHCR concerning non-compliance with the *Convention* and the UNHCR to pronounce itself on violations ascertained. This, however, could lead to a fragmentation of the *Convention* regime in that it would be up to each state individually to opt for and accept such an enforcement mechanism.

These issues illustrate the complexity of the subject and show that a ready-made, full-fledged model does not easily come to mind. Discussions concerning the way forward require great care in order not to upset what has already been achieved.

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<sup>62</sup> See, also in this connection the concluding observations of the Cambridge Expert Roundtable.

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The UNHCR's supervisory responsibility is a specific emanation of the UNHCR's international protection function that is directly linked to ensuring a principled application of existing treaty obligations. The rationale behind this role is that supervision by an international organisation is indispensable for a functioning, predictable and credible framework of international co-operation and to ensure the proper functioning of such a system. In the context of refugee protection, it is important to ensure the resolution of refugee problems and harmonisation of international refugee law on the basis of objective evaluations and judgements.

The UNHCR has adopted a certain organisational practice, which aims at realising this objective and basic function without jeopardising operational effectiveness on the ground. This practice has, generally, met with the acquiescence of states whose cooperation is a necessary pre-condition for the exercise of any supervisory function. The practice, coupled with states' acceptance, also forms the backdrop to the basic framework of the UNHCR's supervisory role. It needs to be consolidated and strengthened. In developing supervision further, it is crucial to bear in mind the lessons learned from the human rights mechanisms where the proliferation of different supervisory mechanisms has led to duplication, compartmentalisation and coordination problems, thus undermining their effectiveness. This must be avoided in the refugee context. Whatever further model or mechanism finally emerges in the area of refugee protection, it will need to build on the existing structure (which is the UNHCR) and advance the achievements that have already been made.

Against this background, the Global Consultations on International Protection which were launched in 2000 to revitalise the international refugee protection regime will provide an opportunity to take this debate further in the interest of effective and principled refugee protection.