PROVIDING

'INTERNATIONAL PROTECTION'

TO REFUGEES

UNHCR's mandate lost in interpretation?

Candidate number: 104

Number of words: 34 200

JUS398 Master's thesis

Faculty of Law

UNIVERSITY OF BERGEN

Contents

Abbreviations

ECOSOC	–	Economic and Social Council
EXCOM	–	Executive Committee of the High Commissioner's Programme
ECJ	–	European Court of Justice
ICRC	–	International Committee of the Red Cross
ICJ	–	International Court of Justice
IDP	–	Internally Displaced Person
IRO	–	International Refugee Organization
NGO	–	Non-Governmental Organization
MoU	–	Memorandum of Understanding
RSD	–	Refugee Status Determination
UDHR	–	Universal Declaration on Human Rights
UNC	–	United Nations Charter
UNHCR	–	United Nations High Commissioner for Refugee
UNGA	–	United Nations General Assembly
UNREF	–	United Nations Refugee Fund
VCLT	–	Vienna Convention on the Law of Treaties

Part I:

Research question, contextualization and methodology

Chapter 1: Why defining 'international protection' matters

1.1 Subject matter and research question

'Protection' is the most central concept in the international refugee protection regime. When talking about 'protection' within this legal regime we are talking about the lack of protection of refugees in its country of origin; about the potential state responsibility according to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol[1] and about the United Nations High Commissioner for Refugees' (UNHCR) mandate to provide 'international protection' to refugees. In sum, the definition of 'protection' shapes both the duties of states *and* UNHCR, and establishes refugee entitlements. In spite of its obvious significance, the term 'protection' is left undefined in binding sources of law and there is currently no universal consensus on its implications.

The focus of this thesis is on the meaning of 'international protection' in Article 1 of the 1950 UNHCR Statute, which states that the UNHCR

> shall assume the function of providing *international protection*, under the auspices of the United Nations, to *refugees* who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees.[2]

Established in 1950, the UNHCR was originally restricted to provide 'international protection' to people who became refugees prior to 1 January

* I wish to extend my heartfelt gratitude to my two supervisors, who came in at just the right time and provided me with crucial support and guidance. I cannot overstate what it has meant to have your moral and academic support during the past six months. Thank you! Also, big thanks to Jørn Øyrehagen Sunde for giving me wise advice at a time when it was most needed. I am of course solely responsible for the content of the thesis.

[1] I will refer to these as the 1951 Refugee Convention and the 1967 Protocol.

[2] Article 1, Statute of the Office of the United Nations High Commissioner for Refugees. Italics mine.

1951.[3] Dr. Gerrit Jan van Heuven Goedhart, the first High Commissioner – who commanded a staff of thirty three and an annual budget of $ 30,000[4] – originally interpreted UNHCR's mandate in the following way:

> It was to be a 'non-operational' relatively small unit, mainly charged with providing international protection and assisting governments to find solutions for refugee problems. For its activities it was to rely heavily on the many excellent voluntary agencies working in this field. Moreover, the United Nations were not to pay more from their regular budget than the administrative expenses involved in the running of a Head Office in Geneva and Branch Offices wherever they might be established.[5]

The above quote illustrates the dominant view in the 1950s, which considered the UNHCR as a provider of 'international protection' that left field presence to other humanitarian agencies and promoted the interests of refugees by serving as liaison with governments.

Since 1950, UNHCR has grown to become the institutional centrepiece of the international refugee protection regime. Today the agency has 10,800 employees and an annual budget of $ 7, 5 billion.[6] It describes its 'international protection' activities in the following way:

> Providing emergency help to those forced to flee is often the first step towards l*ong-term protection* and rehabilitation. To meet these and other *operational needs*, UNHCR has developed a global network of suppliers, specialist agencies and partners. Projects can range from dispatching emergency teams to the scene of a crisis, providing emergency food, shelter, water and medical supplies, and arranging major airlifts for a large exodus of refugees or a flotilla of small boats for smaller numbers of fleeing civilians. Among a host of other programmes, there are projects to help protect the environment, build schools and raise awareness of such problems as HIV/AIDS.[7]

The two quotes clearly illustrate that the activities performed by UNHCR to meet the function of providing 'international protection' has both increased in scope and changed in content. From being a non-operational and time limited agency, UNHCR now has "a host of programmes" in order to provide "long-term protection". The significantly altered approach to its man-

[3] Article 5 and 6, ibid.
[4] Feller, 2001a, 131. This equal approximately $ 300.000 today.
[5] Goedheart, 195508.05.2017.
[6] UN High Commissioner for Refugees, 2017a.
[7] UN High Commissioner for Refugees, 2017b.

date could imply that the UNHCR Statute has been amended. However, the wording of this legal document is left unchanged and 67 years after its adoption the Statute remains the defining document for the agency's mandate.[8] This raises questions related to rules of interpretation and methodological choices within international refugee law. In order to shed light on these questions, the aim of this thesis is to describe and analyse how the meaning of 'international protection' in the UNHCR's Statute has evolved over time. As such, the overall research question is:

> *How has the meaning of 'international protection' in the UNHCR Statute evolved over time?*

In order to capture how the meaning of 'international protection' has changed, I need to establish a point of reference. As such, the following sub-question requires an answer:

> *How was 'international protection' understood at the time of adoption of the UNHCR Statute?*

Furthermore, as will be explained in Section 1.2 and 1.3, the world currently faces a protection crisis which has placed UNHCR under unprecedented pressure. In order to meet this crisis, there is a need to establish what exactly UNHCR's responsibilities are. Because UNHCR is bound by its Statute the current interpretation of 'international protection' brings us one step closer to mapping the international legal obligations of UNHCR. Consequently, the final sub-question is:

> *How is 'international protection' in the UNHCR Statute understood today?*

A focus on the *interpretation* of 'international protection' in UNHCR's mandate, as opposed to for example the implementation, requires the maintenance of a legal focus. Thus, this thesis maps how both new sources of international law and new approaches to interpretation have shaped the understanding of 'international protection' over time. By interpreting the UNHCR Statute in light of the legal sources available in 1950 and tracking how the interpretation of 'international protection' has evolved up until to-

[8] Lewis, 2012, 13.

day I seek to come closer to what lays at the core of UNHCR's statutory international legal responsibilities.

1.2 Introducing the international refugee protection regime

1.2.1 Key concepts

The lack or denial of protection is arguably the defining characteristic of being a refugee.[9] Grahl-Madsen describes a refugee as "a person who is not being given the protection which a State normally may give its nationals".[10] As such, the lack of protection relates to the relationship between the refugee and its state of origin. According to the UNHCR Statute, a person is entitled to refugee status if

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country (…) Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as "country of former habitual residence.[11]

Hathaway argues that "[r]efugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community". As noted in Section 1.1, the entitlements of refugees largely depend on the interpretation of 'protection'.

The international refugee protection regime is understood as the set of norms, rules, principles, and decision-making processes grounded in refugee law, human rights law and general principles of international law which regulate the behaviour of States and other autonomous legal personalities in regards to refugees.[12] The 1951 Refugee Convention and the 1967

[9] Goodwin-Gill, 1989, 6, UNHCR, Note on International Protection, 7 September 1994, para. 11 and Helton, 2003, 19-33.
[10] Grahl-Madsen, 1966, 98-99. For an analysis of the refugee as the object of surrogate protection, see *i.e* Kneebone, 2014, 98-121.
[11] UNHCR Statute. It should be noted that this definition differs from the 1951 Refugee Convention and its 1967 Protocol on that these documents also include "*membership of a particular social group"* in grounds for seeking protection. Furthermore, the UNHCR Statute includes a provision giving refugee status to person falling within the mandate of previous refugee agencies, see article 6 i).
[12] This definition is based on Betts, Milner and Loescher, 2008, 2 and Deschamp and Dowd, 2008, 4. The definition applied in the thesis adds autonomous legal personality un-

Protocol and the UNHCR Statute form the "two pillars" of the regime[13] which jointly express the core principles on which the international protection of refugees are built.[14] These pillars aim to balance the inherent conflict between principles of state sovereignty and territorial supremacy on the one hand, and humanitarian norms of protection on the other.[15] Arguably, this conflict of interests characterises the international refugee protection regime and causes it to be deeply politicized and – arguably – incomplete.[16] It is within this contested legal space on the international plane that the interpretation of UNHCR's mandate to provide 'international protection' takes place. The politics of refugee protection adds a challenging dimension to the interpretation of the legal responsibility of UNHCR and raises intricate questions as to what is law and what is policy.

In order to understand the international refugee protection regime, one needs to separate between providing 'international protection' and 'state protection'. Both concepts relate to remedying the legal situation of the refugee. However, the terms suggest different types of protection. The distinction between the two was highlighted by UNHCR's in its response to EU legislation that applied the concept of 'international protection' to protection accorded by an EU Member State:

> While acknowledging that this use of the term is common, UNHCR would like to point out that from an international law perspective, international protection is the protection that the international community accords to individuals or groups through special organs and mechanisms. The regime of international refugee protection exists independently of any State having accepted responsibility to protect the refugee in question. In conformity with paragraphs 1 and 8 of the Statute of UNHCR, adopted by General Assembly resolution 428(V) of 1950, the responsi-

---

der international law, as this, in my view, highlights the role UNHCR holds in the international production of norms within refugee law. While the term 'regime' typically belongs to studies of international relations, scholars of international law applies the term to describe the legal framework within a specific sphere on the international plane. Despite of 'regime' being a reoccurring concept in work by international refugee law scholar, it not often defined. Alternatively, one could use 'the refugee law regime', however, this, in my view, excludes actors and focuses solely on the law. For both uses in one text, see *i.e* Gammeltoft-Hansen and Hathaway, 2015.

[13] Einarsen, 2011, 40.

[14] Türk, Nicholson and Feller, 2003, 6.

[15] Goodwin-Gill and McAdam, 2007, preface and 1 and Loescher, 2001, 2.

[16] Goodwin-Gill and McAdam, 2007, 1.

> bility for providing international protection to refugees lies with the High Commissioner for Refugees.[17]

The quote reminds us that 'international protection' is something qualitatively different from 'state protection'. While the latter is dependent on States *accepting* responsibility to protect refugees, the former establishes a parallel and autonomous mechanism under the international community as a whole. In sum, UNHCR concludes that

> the protection that States extend to refugees is not, properly speaking, 'international protection', but national protection extended in the performance of an international obligation. This form of national protection is better described, in UNHCR's view, as 'asylum'.[18]

Briefly stated, the 1951 Refugee Convention and the 1967 Protocol regulates 'state protection' provided by states, while the 1950 UNHCR Statute regulates 'international protection' provided by UNHCR.[19] One major point in this regard is that the institutional responsibility of the UNHCR extends to every person falling under the refugee definition in Article 6 of the UNHCR Statute. It is the legal responsibility of UNHCR to provide 'international protection' to refugees that will the focus in the following chapters.

1.2.2 UNHCR's mandate and its autonomous legal personality

According to the International Court of Justice (ICJ),

> international organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[20]

If we accept the premise that UNHCR holds an autonomous legal personality under international law, the organisation is legally responsible under in-

[17] UNHCR, UNHCR's Observations on the European Commission's proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. 2001/0207, 12 September 2001, para. 9-10.
[18] Ibid., para. 15 and 16.
[19] 1951 Refugee Convention does not include neither a right to seek nor an obligation to provide asylum. This will be touched upon in Section 4.5.
[20] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, p. 73, 89-90.

ternational law to fulfil its mandate, as defined in the UNHCR Statute.[21] But, as pointed out above, there is no universal consensus on what 'international protection' actually obligates UNHCR to do. Furthermore, as was made clear in Section 1.1, how UNHCR has executed its mandate has evolved significantly over time. Thus, as put by Stevens, "seeking to understand what we mean by 'protection' is not simply an exercise in academic analysis with little relevance to the real world; it has significant practical implications".[22]

'State protection' and 'international protection' are closely connected and often build on each other. Thus, one could say that there is an interdependence between the functions of the UNHCR and the responsibilities of States. As highlighted by Goodwin-Gill;

> UNHCR has been accorded a functional role and responsibility by the international community, but possesses neither territory nor jurisdiction. Yet it is on the territory of States and within their jurisdiction, that the practical problems of protection, assistance and solutions must be worked out.[23]

No State is obligated to admit UNHCR to its territory. In order to remedy this obstacle to provide 'international protection' to refugees, UNHCR frequently forms partnerships with states through cooperation agreements, often through a so-called Memorandum of Understanding (MoU). These agreements permit the agency physical presence in a given country.[24] As the UNHCR quote from 2017 illustrates, and under the function of providing 'international protection' to refugees, the agency delivers services spanning from emergency aid, to food and medical assistance, building schools and protecting the environment. Clearly, these services are being delivered within the territories of sovereign states. Zieck points to an important challenge in defining the meaning of 'international protection' that arises when UNHCR "is co-acting in the same territory [as States] and engages in tasks that appear to stretch far beyond those originally entrusted to it". She asks a

[21] For a deliberation on the question of UNHCR's autonomous legal personality under international law where it is concluded conformingly, see *e.i* Janmyr, 2014, 229-237 and Goodwin-Gill and McAdam, 2007, 430. For the opposite, see *e.i*; Venzke, 2012, who concludes that "UNHCR is not itself an international organization but part of the UN" and as such, not an autonomous legal personality, 76-87, 78.
[22] Stevens, 2013, 234.
[23] Goodwin-Gill, 1989, 13.
[24] Zieck, 2006, 321.

timely question: "Where does [state] protection end and international protection begin?"[25]

In sum, the international refugee protection regime consists of mechanisms that regulate both state behaviour and UNHCR protection responsibilities towards refugees. While the scope of 'state protection' varies, UNHCR's mandate to provide 'international protection' applies to all persons that fall within the Statute. What this mandate actually obligates UNHCR to do, however, is less certain and appears to evolve over time. This is the topic of the thesis.

As emphasised above, the international protection regime is highly politicized, and while adopting the 1951 Refugee Convention and the 1950 UNHCR Statute to curb the interests of sovereign states in order to protect those of refugees, protection efforts are not left unchallenged. The next section places UNHCR's 'international protection' mandate into a contemporary context – the so-called *refugee crisis*.

1.3 Contextualization: the international refugee protection regime in crisis?

> (W)e have been largely failing. Failing the long-suffering people of Syria, in not ending the war in its infancy. Failing others in now-chronic conflict zones, for the same reason. Failing millions of migrants who deserve far more than lives marked by cradle-to-grave indignity and desperation. It is shameful that the victims of abominable crimes should be made to suffer further by our failures to give them protection.[26]

The High Commissioner for Human Rights, Ra'ad Al Hussein, gives voice to understandable frustration with an apparently malfunctioning international refugee protection system. From a legal perspective, whether we have failed to offer 'protection' to the many millions of people whom according

[25] Ibid., 324.
[26] Ra'ad Al Hussein, 19.09.2016. UN Summit on Migration and Refugees in September 2016.

to UNHCR are currently forcedly displaced largely depends on how we define 'protection'.

Due to the longstanding conflicts in Afghanistan, the Central African Republic, the Democratic Republic of the Congo, South Sudan, Yemen and Central America, in addition to the more recent conflicts in Syria, Burundi, Libya, Niger and Nigeria, the international refugee protection regime has come under unprecedented pressure since 2015.[27] Currently, an overwhelming 63.9 million are defined as 'people of concern' to UNHCR.[28] At the same time, the inherent conflict between state sovereignty and refugee protection has sharpened. By focusing on numbers and the need for control, states legitimize the shrinking of the existing legal protection framework and the implementation of deterrence policies.[29] Because UNHCR's mandate applies to all refugees independently of whether its host states recognise their status as refugees or not, the agency's ability to provide 'international protection' is seemingly pushed to the limit. One should also keep in mind that major refugee hosting states such as Lebanon and Jordan have ratified neither the 1951 Refugee Convention nor the 1967 Protocol, while Turkey has done so with significant reservations. Furthermore, 86 per cent of the refugees entitled to 'international protection' under UNHCR are located in developing countries with limited resources available. These factors all contribute to a situation UNHCR now refers to as a 'protection crisis'.[30]

1.4 Previous work on UNHCR and 'international protection'

A complete analysis of how the meaning of 'international protection' has evolved over time, from the time of the Statute's adoption in 1950 and up until today is yet to be written. Nevertheless, this thesis will be drawing on a useful body of research on UNHCR's role within the international refugee

[27] Refugees, 2016b, 6.
[28] Within the 63.9 million we find refugees, asylum-seekers, stateless, internally-displaced people (IDPs) and returnees. Returnees, stateless and IDPs are covered by other legal mechanisms. It should also be noted that Palestinian refugees are not included, as they fall within the mandate of UNRWA.
[29] Refugees, , 34.
[30] Ibid., 7.

protection regime and on accounts of 'international protection' related to a specific period.

A significant contribution to understanding the drafting process leading up to the adoption of the UNHCR Statute is made by Louise Holborn in 'Refugees. A Problem of Our Time'. While the account is especially valuable in understanding the purpose and objectives behind UNHCR's 'international protection' mandate, it has been criticized for its lack of analysis and interpretation[31] and as such, should be supplemented with other sources of the drafting history.

Important contributions to understanding UNHCR's mandate within the international refugee protection regime have been made by scholars of international relations, and it is interesting to note that legal scholars draw extensively on key works coming from this discipline. For instance, Gil Loescher and Alexander Betts have analysed UNHCR's role as an international actor in international politics and highlighted the fundamental challenges faced by UNHCR in fulfilling its mandate due to its dependency on State funding and private donors.[32] However, while international relations offers a highly relevant perspective on UNHCR and its mandate to provide 'international protection', legal shortcuts are sometimes made to illustrate a bigger point. For example, Loescher simply states that the 1950 UNHCR Statute "sets out a clear mandate, defining the scope and role of the organization".[33] This stands in sharp contrast to a legal reading of the Statute, which is represented well by a quote from Marjoleine Zieck; "while the meaning of [durable] solutions are comparatively straight forward, the meaning of the function of providing international protection is much less so".[34] Moreover, because scholars of international relations use UNHCR as a case to investigate phenomenon in power relations and structural premises on the international plane, changes in the interpretation of the agency's mandate does not require the same degree of critical assessment as it would in a legal analysis. As such, there is a need to supplement these works with one that focuses on

[31] Copeland, 1997, 503
[32] See *e.g* Loescher, 2001, Betts, Milner and Loescher, 2008, Betts and Loescher, 2011
[33] Loescher, 2014, 215.
[34] McAdam, 2011, 1493.

the legal responsibility that flows from the interpretation of 'international protection'.

In terms of defining 'international protection', many authors have contributed with enlightening deliberations on the meaning of the concept. Paul Weis, former chief legal advisors at UNHCR, provided one of the first accounts of the term. He held that "international protection of refugees purports to remedy the situation created by the fact that they lack the protection which is usually afforded to nationals abroad by the state of nationality"[35] and describes 'international protection' as both complementary to, and independent of, the protection accorded to refugees by the refugee hosting state. In contrast to 'state protection', Weis argued that the 'international protection' offered by refugee organizations had never been limited to the protection of already established rights. Thus, according to Weis,

> [t]he promotion of the rights of refugees, the improvement of their legal status by means of the establishment of international instruments or the enactment of appropriate municipal legislation, have always been an important part of their function. Apparently, the particular precariousness of the legal position of refugees, the vagueness of their position in international law, has led to the inclusion of this reformatory task in the mandate of the various international bodies.[36]

This is often framed as 'legal protection', because it grounds the mandate in the rights of refugees expressed in either existing or in future sources of law. Similar to Weis, Grahl-Madsen also highlights 'international protection' as a function to strengthen the rights and legal status of refugees. In sum, he argues that

> the word 'protection' denotes measures of some kind or other taken by a subject of international law in order to safeguard or promote the integrity, rights, or interests of an individual. Protection may take many shapes. We may do distinguish between internal protection ("the protection of the Law") and external protection (diplomatic or consular protection etc). Moreover, protection may be active or passive.[37]

The terms 'diplomatic' and 'consular protection' understood the mandate of UNHCR as to fill the role a state would normally fill if one of its citizens

[35] Weis, 1954, 218.
[36] Ibid., 220.
[37] Grahl-Madsen, 1966, 381.

were in need of legal support abroad. Today, and as illustrated in Section 1.1, 'international protection' seems to be interpreted in a substantially different way. As such, the contributions made by Weis and Grahl-Madsen are necessary to understand the starting point from where 'international protection' started to evolve but are no longer sufficient in mapping the international legal responsibilities of UNHCR.

Dallal Stevens has contributed significantly to disentangling the concepts of 'protection' in general and of 'international protection' in particular. She argues that protection might be regarded as positive obligations resting on both hosts states and UNHCR, but interestingly observers that the actual 'international protection' measures undertaken by UNHCR are not of one universal standard. In sum, she claims that "where the UNHCR is fundamental to the provision of protection, the context will again matter",[38] meaning that how UNHCR executes its mandate to provide 'international protection' will depend on a range of different factors. While this might not seem problematic or surprising, it tells us that the meaning of 'international protection' not only evolves over time but also that it evolves according to context. When planning "action on the ground", UNHCR interprets its mandate as flowing from the Statute legal sources such as MoUs, refugee law and policy, human rights, humanitarianism and development approaches in addition to guidance on how to interpret the Statute.[39] To some extent, Stevens questions whether the results of this evolutionary interpretation are in line with the statutory mandate of UNHCR. Nevertheless, her focus seems lay on the contemporary conceptual level of 'international protection' and on how the language applied by UNHCR contributes to the confusion as to the actual meaning of 'international protection'. Stevens notes that 'international protection' is often used simply as a term to describe the activities undertaken by UNHCR[40] – a point also made in the recent contribution by Puggioni. In Puggioni's view, "the lack of clarity is often conflated with the concept of assistance to the point that refugee protection tends to refer to any policies for refugees, irrespective of the ultimate outcome".[41] This rais-

[38] Stevens, 2014, 78.
[39] Stevens, 2016, 265.
[40] Stevens, 2014, 78
[41] Puggioni, 2016, 1

es serious concerns in regards of UNHCR's accountability towards the entitlements of refugees. Presumably, it must be possible to define a legal baseline standard from which UNHCR cannot depart over time nor space. Currently, it seems like UNHCR is left with considerable latitude to orient 'international protection' in a direction of its own choosing.

1.5 Scope and limitation of thesis

Analysing how the meaning of 'international protection' in Article 1 of the 1950 UNHCR Statute has evolved over time requires a *de lege lata* analysis of how the concept has been interpreted within different epochs in the international refugee protection regime. This is an ambitious project. Due to time, space and practical limitations, coupled with a wish to spare the reader from too many details, I focus the analysis on interpretation developments that represent the most marked departures from, or additions to, previous practices.

When discussing the legal responsibilities of UNHCR, one should keep in mind that the refugee protection framework derived from the 1951 Refugee Convention, its 1967 Protocol and the 1950 UNHCR Statute could be supplemented by protection mechanisms found in other spheres of international law. This is reflected in the definition of the international refugee protection regime used in this thesis which includes norms derived from international human rights law and international humanitarian law, all of which constitute legal sources that entitle refugees to some form of protection[42] Within this legal complexity, a myriad of protection-related concepts has evolved. In addition to 'international protection' and 'state protection', 'temporary protection, 'surrogate protection', 'complementary protection', 'preventive protection', 'humanitarian protection', 'protection space', and 'diplomatic protection', can all be related to refugee protection in one way or the other. While UNHCR's legal responsibility towards refugees might be grounded in some or all of these sources of law, this thesis focuses specifically on the responsibility to provide 'international protection' grounded in UNHCR Statute Article 1.

[42] Stevens, 2013, 234.

As within all fields of international public law, state acceptance is key when it comes to the evolution of refugee law. Due to the inherent conflict between state sovereignty and refugee protection within this legal sphere, international political and economic interests constitute major concerns when states decide how UNHCR's mandate is to evolve. As such, it is not always possible to keep a strict separation between refugee policy and refugee law. That being said, questions of *realpolitik* will only be mentioned when this adds to the understanding of interpretation practices.[43]

1.6 Structure of thesis

The thesis consists in three parts and seven chapters. *Part I: research question, contextualization and methodology* provides essential knowledge in analysing how the meaning of 'international protection' has evolved over time, and places the research question in a contemporary context. The conclusions reached in this thesis largely flow from the answers to challenging questions related to methodology and sources of law. I address this in Chapter 2. *Part II: The evolving meaning of 'international protection'* starts off with Chapter 3, which introduces the legal situation of refugee prior to the adoption of the UNHCR Statute and highlights key institutional and legal developments that define the origins of 'international protection'. This chapter provides us with insights that will be drawn upon in the *de lege lata* analysis of how 'international protection' was interpreted at the time of adopting the UNHCR Statute. This will be the topic of Chapter 4. The conclusions reached in Chapter 4 equips us to assess how the meaning of 'international protection' evolved over time. Chapter 5 handles the timeframe 1950 to 1980, while 1980-2017 is dealt with in Chapter 6. *Part III: Findings and concluding remarks* is made up by the thesis' seventh and final chapter and draws together the key findings of each chapter and offers concluding remarks.

[43] For accounts on a change in the UNHCR's approach to protection from a "monistic" to an "instrumental", see; Whitaker, 2002. For an in depth analysis of refugees in international relations, see; Betts and Loescher, 2011

Chapter 2: Methodology and legal sources

2.1 Introductory reflections

In any situation of legal interpretation, your specific background from a given legal culture necessarily affects how you understand the legal sources at hand.[44] By asking *how the meaning of 'international protection' in the UNHCR Statute has evolved over time,* I need to analyse legal sources established over a timespan of almost 70 years. This requires reflection on my own position in the contemporary legal culture to identify possible biases I might have as interpreter. For instance, international human rights protection has evolved radically since the drafting of the UNHCR Statute,[45] which should not be reflected in the reading of 'international protection' in the 1950 context. Acknowledging the challenge is a first step in avoiding any inclination towards bringing subjective and contextual premises into the interpretation process.[46] Nevertheless, there is a need to recognize that the researcher will always make choices. This inclination is presumably subdued by strictly observing and providing justification of the conclusions reached throughout the process.[47] In the following sections, I address questions of methodology and legal sources in order to establish a framework for interpretation.

2.2 Interpreting the 1950 UNHCR Statute

In December 1950, the United Nations General Assembly (UNGA) passed Resolution 428 (V) with the UNHCR Statute attached as an annex. Grounded in UN Charter (UNC) Article 22,[48] UNHCR became a subsidiary organ of UN. UNGA resolutions are normally non-binding on states, and, as a result, the UNHCR Statue is not considered treaty law.[49] In practice, this entails that only UNHCR is party to the Statute. Another key feature with

[44] Mathisen, 2010, 204.
[45] See *e.g.* Chetail, 2014.
[46] Mathisen, 2010, 205.
[47] I would like to thank Jussi Pedersen, Associate Professor at the Arctic University of Norway whom at the National master student seminar challenged me to reflect on this issue.
[48] Article 22, ref. Article 7, Charter of the United Nations.
[49] Sands and Klein, 2001, 29 and 455. See footnote 61.

the UNHCR Statute is its status as a constituent instrument. As typical of constituent instruments, the UNHCR Statue defines the agency's mandate and places it in a structural hierarchy within the UN system.[50]

When asking how the meaning of 'international protection' in the UNHCR Statute has evolved over time, one first needs to answer the fundamental question of what rules of interpretation apply for the Statute.

According to ICJ, the general rules of interpretation as expressed in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) hold status as international customary law.[51] It is widely accepted that these are applicable even in cases when the treaty at hand was drafted before VCLT.[52] Moreover, ICJ has expressed that the customary rules of interpretation also applies to constituent instruments of international organisations, if the instrument at hand is a treaty.[53] As already noted, and in contrast to what is the case for the majority of international organisations, the constituent instrument of UNHCR is not a treaty, but in fact a resolution.[54] Presumably, the UNHCR Statute needs to be interpreted in line with rule of resolution interpretation.

The question then, is how a resolution of international organisations should be interpreted. As pointed out by Michael Wood, little attention has been paid to this issue.[55] Tellingly, none of the standard works on international law in general, and the law of international organisations in particular, elaborate on this issue. A natural explanation might be that most resolutions are non-binding political instruments. Hence the need for rules of interpretation is less pressing than with binding treaties.[56] Although there seems to be some agreement on applying a more flexible approach when interpreting

[50] Ibid., 442.
[51] See *e.g:* Beagle Channel Arbitration (Argentina/Chile) 52 ILR 93.
[52] Aust, 2007, 10.
[53] *Certain Expenses of the UN*, ICJ Reports 1962, p. 157. See also, Article 5, Vienna Convention on the Law of Treaties.
[54] Sands and Klein, 2001, 442.
[55] C. Wood, 1998, 73.
[56] However, it should be noted that resolutions in specific circumstance could be argued to embody a consensus of opinion about what is law, and indirectly, thus become evidence of law, see *i.e* Sands and Klein, 2001, 29. Furthermore, the literature recognises that what is categorised as a resolution might in fact be a treaty, ref. "the nature of the resolution determines if it is considered binding on States", United Nations, 2017. See *i.g* Oppenheim, Jennings and Watts, 1992b, 1188-1192, Aust, 2007, 25.

political instruments, there is no codification of rules of resolution interpretation.[57] The question then, is where this leaves us.

Wood argues that it is necessary to examine the particular nature of the instrument at hand in order to establish a framework of interpretation suitable for the particular instrument.[58] The atypical nature of the UNHCR Statute, being both a constituent instrument and the result of a resolution, makes the process of identifying its particular nature somewhat challenging. The question seems unresolved in both case law and relevant literature. Illustrative in this regard is the account in Bowett's Law of International Institutions, were it is simply stated that "[t]he constituent instrument of an international organisations is almost always a treaty", whereupon recourse to VCLT is made without mentioning alternative interpretational rules for non-treaty constituent instruments.[59]

Applying the general rules of treaty interpretation to the UNHCR Statute would fit well within an already established tradition of constituent instrument interpretation. However, one could argue that applying rules expressed in Article 31 and 32 removes the flexibility that is traditionally kept when interpreting resolutions. In the specific case of the Statue, the need for flexibility might not be as strong due to the 'non-political' clause of Article 2 in the Statute.[60] One could rather argue that the UNHCR Statute shares similarities with a treaty, in so far as it places legal rights and duties on subjects of international law, which is the defining feature of a treaty.[61] Although according to the definition, a treaty must consist of more than one party,[62] it could be argued that the act of establishing UNHCR is based on an 'element of agreement' between States, and therefor can be seen as sharing certain key characterises with treaties.[63] To be specific; when UN member states adopted Resolution 428 (V) and established the UNHCR it created

[57] Einarsen, 2000.
[58] C. Wood, 1998, 74.
[59] Sands and Klein, 2001. Aust simply states that "[a]n international organisations is established by treaty", Aust, 2007, 393.
[60] "The work of the High Commissioner shall be of an entirely non-political character", Article 2, UNHCR Statute.
[61] "[t]he decisive factor is still whether the instrument is intended to create international legal rights and obligations between the parties", Oppenheim, Jennings and Watts, 1992b, 1202.
[62] Ibid., 1199-1202.
[63] Ahlborn, 2011, 410, with reference to Rosenne, 1966.

an autonomous legal person in an act that could be described as an act of state to "'contract out' a given general regime of international law on the basis of their sovereign autonomy".[64] To be specific, UNGA entrusted UNHCR with the role of providing 'international protection' to refugee on behalf of the international community. In conclusion, the UNHCR Statute shares significant features with that of a treaty which – in my view – serves as an argument to abide by the general rules of treaty interpretation.

Lastly, objectives of coherence and predictability within the international refugee protection regime leads us to applying the rules derived from the VCLT Article 31 and 32 because the 1951 Refugee Convention, being a treaty, has to be interpreted on that basis. On the same note, it could also be added that the UNC from which UNHCR derives its authority is categorised by ICJ as a treaty, although with "certain special characteristics",[65] and therefore is to be interpreted in accordance with Article 31 and 32. By applying the same rules of interpretation as applies to other constituent instruments, to the UNC, and to the 1951 Refugee Convention, we create a system of coherent interpretation practice which is both logical and stable. In my view, it would seem somewhat unsatisfactory to develop a parallel framework of interpretation to apply on the UNHCR Statute when valid arguments point us to the general rules of interpretation within international law.

As will be explained in Section 2.3.2, the doctrine of implied powers allows for a flexibility within the Article 31 and 32 interpretation framework, which arguably pays due consideration to the resolution aspect of the Statute. However, first, we establish as our point of departure the general rules of treaty interpretation as expressed in VCLT Article 31 and 32.

2.3 Principles of interpretation

2.3.1 General rules of interpretation based on VCLT 31 and 32

In line with the general rules of treaty interpretation expressed in VCLT Article 31.1, the UNHCR Statute shall be interpreted in "*good faith* in ac-

[64] Ahlborn, 2011, 437.
[65] *Certain Expenses of the UN*, , 157.

cordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in *the light of its object and purpose*".[66] According to the VCLT Article 31.2, 'context' for the purpose of interpretation shall be understood as "the text, including its preamble and annexes" along with, amongst others, "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".[67]

Whether there is a hierarchy between "the ordinary meaning", "the context" and "its objectives and purpose" is subject to some dispute. Aust argues that in order to give effect to the expressed intention of the drafters the ordinary meaning cannot be read in the abstract but in relation to their context.[68] ICJ has expressed that "if the relevant words in their natural and ordinary meaning make sense in their context, that is the end to the matter",[69] implying that the objective and purpose is to be left out if this would alter a perfectly sensible result of interpretation of the ordinary meaning in light of its context. This position, Oppenheim argues, "is (…) of limited usefulness". In his view, the question of whether the meaning of a treaty text is clear or not is the result of the whole process of interpretation, not a starting point to assess the other factors of interpretation.[70] Such a view finds support in the fact that Article 31 is entitled 'General rule of interpretation' thus emphasising – with its use of a singular noun – that the article is expressing one rule. Consequently, if read literally, all three elements are to be considered when interpreting the UNHCR Statute.[71] Furthermore, this would also imply that other instruments made in connection with the conclusion of the UNHCR Statute and accepted by the other parties as an instrument related to the treaty should be given due consideration when interpreting the meaning of 'international protection'. That does not mean, however, that all elements must be granted equal weight in reaching a conclu-

[66] Article 31,1, VCLT, italics mine.
[67] Article 31.2 a, ibid. The article also includes "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" in 31.2 b, but as this will not be used in the following analysis, I leave this out from the presentation.
[68] Aust, 2007, 235, who also cites McNair, 1961, 365 for support.
[69] *Arbitrary Award of 31 July 1989, Guinea-Bissau v Senegal*, ICJ Reports 1991, p. 53, 69. Other examples are mentioned in Oppenheim, Jennings and Watts, 1992b, 1267.
[70] Oppenheim, Jennings and Watts, 1992b, 1267.
[71] Aust, 2007, 234. See also Oppenheim, Jennings and Watts, 1992b, 1272, footnote 6.

sion. The interpretation process is fundamentally about determining what sources are relevant in uncovering the parties' intentions and what weight each of these are to be given in the final subsumption.[72]

The above account marks our point of departure for the analysis of how 'international protection' was interpreted at the time of adoption of the UNHCR Statute, which is the topic addressed in Chapter 4. Furthermore, in this chapter, "relevant rules of international law applicable in the relations between the parties"[73] will also be taken into account.

Article 32 permits recourse to supplementary means of interpretation, either to "confirm the meaning resulting from the application of Article 31", or to "determine the meaning of the interpretation according Article 31 leaves the meaning ambiguous."[74] The list of supplementary means of interpretation include 'preparatory work' and the 'circumstances of its conclusion', but, and as will be explained below, the list is not exhaustive. In Chapter 3, I describe the origins of 'international protection' and the circumstances of the drafting of the UNHCR Statute. This account is closely linked to Section 4.3.1, where parts of the preparatory work are assessed. As the category preparatory work comprises a wide range of sources, I focus the analysis on selected minutes of formal negotiations and sessions.[75] As a general rule, value and relevance of preparatory work vary according to factors such as the type of legal instrument at hand, what the subject matter of the instrument is and the degree of clear indications of the parties' intentions expressed in the available documents.[76] Furthermore, preparatory work should be judged by its authenticity, completeness and availability.[77] Questions specific to preparatory work analysed in this thesis will be addressed in Section 4.3.1.

[72] Oppenheim, Jennings and Watts, 1992b, 1271.
[73] Article 31.3, VCLT.
[74] Article 32, ibid.
[75] Sands and Klein, 2001, 450. Preparatory work could also include written material, such as successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chair of a drafting committee and International Law Commission Commentaries, see; Aust, 2007, 246.
[76] Oppenheim, Jennings and Watts, 1992b, 1276-1277.
[77] Aust, 2007, 246.

As already mentioned, the list of supplementary means of interpretation in Article 32 is not exhaustive.[78] When used to "confirm" the meaning according to Article 31 one can add other sources than the ones already discussed. In the case of interpreting the UNHCR Statute, so-called *acquiescence* is relevant. Acquiescence is applied to describe the situation that occurs if a party, for instance UNHCR, communicates its understanding of the meaning of 'international protection', and applies this meaning in its activities without objections being made by UNGA. This might be considered a tacit approval of this specific interpretation and could be argued to represent the authoritative interpretation of the Statute. Supplementary means of interpretation are central to the discussions of Chapter 5 and 6.

Other important sources in Chapter 5 and 6 are "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", which according to Article 31.3 are to be taken into account in the interpretation process.[79] This suggests that the meaning of 'international protection' might be subject to change. International jurisprudence confirms that Article 31.3 is to be applied in this way, and as will become evident in Chapter 5 and 6, this is highly relevant in understanding how and why the meaning of 'international protection' has evolved over time. Furthermore, as mentioned above, relevant rules of international law are legitimate means of interpretation. As international law evolves constantly, this source of interpretation could also affect the subsequent interpretation of a treaty. As a general rule, any treaty is presumably intended to be in accordance with existing international law.[80] Indeed, if evolution within relevant legal cultures of international law takes place, this could affect the interpretation of an instrument of international law. In the Namibia case, ICJ held that;

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – "the strenuous conditions of the modern world" and "the well-being

[78] Article 32 a and b, VCLT.
[79] Article 31 3 a and b, ibid.
[80] Oppenheim, Jennings and Watts, 1992b, 1275.

> and development" of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[81]

The above quoted case illustrates that the interpretation of the UNHCR Statute necessarily will adapt in light of the evolution of the legal framework of the international refugee protection regime as a whole. As such, the weight accorded to the Statute's preparatory work and the circumstances of its conclusion might decrease over time due to their status as supplementary means of interpretation.

In sum, the general rules of treaty interpretation expressed in VCLT Article 31 and 32 establish a dynamic framework for interpreting UNHCR's mandate to provide 'international protection' as expressed in Article 1 of the UNHCR Statute, though there should be no doubt that ordinary meaning, the textual context and its object and purpose is the absolute cornerstone of interpretation. The next section briefly introduces the doctrine of implied powers – an approach to interpretation related to the question of evolutionary interpretation as discussed above, although specifically in regards to international organizations.

2.3.2 Implied powers

To be sure, this section does not aim to present a new approach to interpretation, distinct from the general rules expressed in VCLT. The doctrine of implied powers can be traced back to the 'Repatriations' case, where ICJ stated that the UN "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary impli-

[81] *Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) Nothwithstanding Security Council Resolution 276 (1970)*, ICJ Report 1971, p. 31, para. 53.

cation as being essential to the performance of its duties".[82] The European Court of Justice (ECJ) has followed suit and concluded that interpretation allows for the international organisation to be granted those powers necessary to "safeguard its prerogatives".[83] This approach to interpreting a constituent instrument has also been branded as the doctrine of effectiveness. In the 'Effect of Awards' case, ICJ found that General Assembly could establish an administrative tribunal if "it was essential to ensure the effective working of the secretariat" and clarified that "capacity to this arises by necessary intendent out of the Charter".[84] Skubiszewski describes the doctrine as a method to "read into the organization's statute not in order to modify it or add to the members' burdens, but in order to give effect to what they agreed by becoming parties to the constitutional treaty".[85] Stated differently; when the express powers of an organisation, that is, the powers one can read from the principles of interpretation derived from VCLT Article 31 and 32, are perceived as insufficient to meet the intentions of the drafters, the doctrine of implied powers/doctrine of effectiveness are invoked as a tool for extension.[86] The general rule of interpretation defines clear limits to this approach, and requires the effectiveness to be grounded in the objective and purpose of the instrument at hand. This could be referred to as a 'teleological approach' to interpretation.[87] In essence;

> The doctrine of effectiveness is thus not to be thought of as justifying a liberal interpretation going beyond what the text of the treaty justifies. Effectiveness is relative to the objective and purpose of the treaty, a decision as to which will normally first have to be made.[88]

As we shall see, the doctrine of implied powers and effectiveness is of considerable importance to the evolution of 'international protection' in the UNHCR Statute.

---

[82] *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p. 174, 182.
[83] *Parliament v. Council*, Case C-70/88, E.C.R. I-2041, para. 23 and 27.
[84] *Effect of Awards Case of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports p. 47, 57.
[85] Skubiszewski, 1989, 856.
[86] Engström, 2003, 129.
[87] Sands and Klein, 2001, 450.
[88] Oppenheim, Jennings and Watts, 1992b, 1281.

2.4 Primary sources of interpretation

2.4.1 Introduction

Since 1950, an enormous amount of various sources has been added to international refugee protection regime which now constitutes a comprehensive body of law.[89] These sources will be addressed in Chapter 5 and 6. Some of the sources hold status as international law – so-called 'hard law' – while others could be framed as 'soft law'. A third category that does not hold status as law, but nevertheless feeds into the regime is political in nature and could be categorised as 'policy'. The categorization of these sources is of great importance to the interpretation of 'international protection' in the UNHCR Statute in so far as their status determines the weight they are accorded. However, what will become evident in these chapters is the deeply politicised nature of international refugee law, which often makes it challenging to separate the three categories from each other. Legal interpretation in this sphere of international law is political. Arguably, interpretation of 'international protection' within the international refugee protection regime could be described as a semantic struggle where states and UNHCR develop their legal interpretation in an attempt to implement meanings into 'international protection' that are aligned with their convictions or interests.[90]

The international refugee protection regime embodies a plethora of sources that deals with the meaning of 'international protection'. It is far beyond the intentions of this thesis to address them all. In the next subsection, I introduce what I view as the principal, relevant sources in assessing "the standing of UNHCR".[91]

[89] Goodwin-Gill argues that refugee law consists of "UNHCR Statute; successive General Assembly and ECOSOC resolutions; multilateral and regional treaties on human rights or specific refugee problems; customary international law; the 1951 Convention/1967 Protocol; and national laws and procedures. In appropriate cases, the decisions of the Executive Committee and its conclusions on protection must also be taken into account, although their precise weight in the normative context will vary with subject-matter, wording and intent", Goodwin-Gill, 1989, 17.
[90] Venzke, 2012, 58.
[91] Goodwin-Gill and McAdam, 2007, 430.

2.4.2 UNGA resolutions and ECOSOC recommendations

According to article 3 of the UNHCR Statute, UNHCR "shall follow policy directives given him by the General Assembly or the Economic and Social Council". Based on the ordinary understanding of "shall", it is clear that resolutions passed by either of these organs have binding force on UNHCR. As a result, these are highly relevant sources when interpreting 'international protection' and its evolution over time.

2.4.3 ExCom Conclusions

More important to the day to day activities of UNHCR, however, are the conclusions adopted by the ExCom.[92] The ExCom was established in 1958 as a subsidiary organ of the ECOSOC and reports to UNGA. It replaced the United Nations Refugee Fund (UNREF) and was mandated to "advise" the Office on its statutory "functions" and on "questions related to providing international assistance" in order to solve specific refugee problems, if the High Commissioner requested it to do so. The ExCom consists of States and representatives of specialized agencies that have been "elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in and devotion to the solution of the refugee problem".[93]

Today the ExCom regularly adopts 'Conclusions on International'[94] protection regarding the interpretation of the 1951 Refugee Convention, its 1967 Protocol and on the UNHCR Statute.[95] A lot could be said about the historic developments of the ExCom and its conclusions, however, due to space limitations, it is sufficient to state that its influence on the interpretation of UNHCR's mandate has increased gradually and is now of considerable importance.[96]

---

[92] Ibid., 430.
[93] International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees. 1166, 26 November 1957b.
[94] Hereafter referred to as ExCom Conclusions.
[95] For more on the evolution of the ExCom, *see*; Goodwin-Gill and McAdam, 2007, 428-430.
[96] Ibid., 429.

As noted above, the ExCom was intended to "advise" the UNHCR on its functions. From an ordinary understanding of the term it is not clear whether the advisory statements of ExCom have binding effect on UNHCR or not. In relation to States and the interpretation of the 1951 Refugee Convention and its 1967 Protocol, there seems to be an overall consensus on considering these statements as non-binding.[97] This could suggest that one should be somewhat reluctant in viewing ExCom conclusions as binding to the interpretation of the UNHCR Statute. However, as made clear inn Section 2.2.1 when discussing the nature of the Statute, only UNHCR is bound by its provisions. In contrast to questions related to States' legal obligations according to 1951 Refugee Convention and its 1967 Protocol, issues of sovereignty are not evoked when the Statue is interpreted. To the contrary; UNHCR is a subsidiary organ of the General Assembly, and in so far as the ExCom was established by the General Assembly specifically to advice the UNHCR there are no obvious legal challenges to a possible binding effect of ExCom interpretation of UNHCR 'international protection' mandate. The fact that UNGA established the ExCom with an exclusive and dedicated objective and purpose to advice UNHCR could imply that UNGA intended it to be binding.

In resolution 1673 (XVI) of 1961, the General Assembly explicitly requested the High Commissioner for Refugees to "abide by directions" given by the ExCom on "situations concerning refugees".[98] Surely, how 'international protection' is interpreted by UNHCR concerns the situation of refugees. However, from the wording in the resolution, it is not entirely clear if it is meant to apply to questions of interpreting UNHCR's mandate. It seems plausible to conclude that the General Assembly meant to grant the ExCom with power to not only advise, but also bind the UNHCR. An observable shift in the practice of the ExCom following the resolution appears

[97] See *i.e:* Sztucki, 1989, 306 and McAdam, 2011, 79. UNHCR and many authors use the term 'soft law' to describe the ExCom Conclusion's legal authority in the context of State practice, although there is debate on whether the term 'soft law' is misleading as it blurs the fact that 'soft law' is neither legal nor binding. For an interesting account, see Sztucki, 1989, 303-308. As this thesis' focus is on the interpretation of the UNHCR Statute, further elaboration on this issue will not be offered.

[98] UNGA, Report of the High Commissioner for Refugees. 1673 (XVI), 18 December 1961. This was repeated in UN, Continuation of the Office of the United Nations High Commissoner for Refugees. 1783 (XVII), 7 December 1962.

to support this conclusion.[99] The General Assembly repeated the message in a 1963 resolution, where it requested the High Commissioner to "continue to afford international protection to refugees (…) in conformity with the (…) directives of the Executive Committee".[100] As there is no doubt about the binding nature of UNGA resolutions on the practice of UNHCR, the agency is clearly bound by these resolutions.

Due to its composition of representatives from governments with "demonstrated interest in, and devotion to the solution of the refugee problem" it could be argued that the ExCom has the legitimacy needed in terms of representation of the international refugee protection regime. Because the ExCom is an intergovernmental body, critics have argued that it is "not even nominally independent of the political will of states".[101] What implications this has on the legal authority of the conclusions passed by the ExCom, however, is not completely clear. Arguably, criticism like this raises valid concerns on the intentions of the ExCom members. However, the fact that it is states who adopt these conclusions actually gives them considerable weight, in so far as only states can create laws at the international plane. On the other hand, the weight of these interpretations might be restrained by accusations of member States violating fundamental cornerstones of the international refugee protection regimes, such as the principles of *non-refoulement.* Accusations of the "lack of dedication to the common protection cause"[102] and the "over-politicisation" of the conclusions[103] contributes to the questioning of their legal authority.

That being said, several observers point to UNHCR's central role prior to the adoption of ExCom conclusion. In fact, Venzke argues that "[o]nly on the face of it does ExCom resemble an intergovernmental body where state delegates are in charge".[104] Indeed, he finds that the critical questions are discussed and settled by the UNHCR bureaucracy outside of ExCom meetings. Thus, state representatives are heavily influenced by

[99] Goodwin-Gill and McAdam, 2007, 430-432.
[100] UNGA, Reports of the High Commissioner for Refugees. 1959 (XVIII), 12 December 1963.
[101] Takahashi, February 2001, 3, *cited in* Chetail, 2014 65.
[102] Betts, Milner and Loescher, 2008, 109-110.
[103] Feller, 5 October 2005.
[104] Venzke, 2012, 80.

UNHCR itself.[105] In spite of ExCom Conclusions being a result of a mixture of formal and informal decision making processes, they are oftentimes viewed to "document consensus of the international community".[106] In this regard, they arguably bear resemblances to what in Article 31 of the VCLT is termed "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[107] In any case, ExCom conclusions could be said to represent practice confirming the interpretation suggested by UNHCR, and as such, a legitimate source of interpretation according to VCLT Article 32. It is also worth noting that the ExCom is the only multilateral international forum that contributes to the development of international standards relating to refugees,[108] and as such, inhibits specialised knowledge about the legal framework of the international refugee protection regime.[109] Arguably, these characteristics serve to strengthen its significance in the interpretation of 'international protection'.

While there is some uncertainty as to how much legal authority one should give the ExCom conclusions, there is little doubt that the committee has considerable leverage to influence UNHCR on matters specifically regarding 'international protection'. As a result, its conclusions are highly relevant when analysing the evolution of 'international protection' in UNHCR's mandate.[110]

2.4.4 UNHCR practice

In Section 2.2.1 above, on the atypical nature of the UNHCR Statute, I argued that the creation of UNHCR entailed that the member states created an autonomous legal person by using their sovereign autonomy. Ahlborn de-

[105] Ibid., 80.
[106] Türk, 1999, 165.
[107] Article 31 3, a and b, VCLT. Similarly, ExCom conclusion on the 1951 Refugee Convention and its 1967 Protocol could be argued to be good evidence for state *practice* as they represent state parties to these treaties, Janmyr, 2014, 61.
[108] Fresia, 2014, 515.
[109] Janmyr, 2014, 61.
[110] The conclusion seems to be in line with the one reached by Sztucki, as he argues that "[s]ince the resolutions of the General Assembly on international matters of the Organisation have binding effect, and given that the Committee's involvement in protection matters has been confirmed in practice, such recommendations and requests must be regarded as binding on the High Commissioner", Sztucki, 1989, 298-299.

scribes this as a conferral of powers that gives UNHCR a "distinct will".[111] Ahlborn argues that

> It is this collective conferral of powers to a new legal person, and the correlative creation of an autonomous legal order, that decisively distinguishes the constituent instruments of international organizations from other international contracts, including multilateral conventions.[112]

Whether one frames it as 'distinct will' or not, it is clear that UNHCR is provided with a mandate and competency to create secondary law in form of resolutions, decisions, recommendations, declarations, guidelines, regulations, directives or standards.[113]

On a general level, this could hardly be categorized as law. However, and as touched upon in Section 2.3.1, UNHCR's interpretation of what 'international protection' entails could become authoritative sources of interpretation if UNGA gives a tacit approval. Furthermore, giving it more weight, UNGA, ECOSOC and ExCom could give their active approval to UNHCR's interpretation by passing resolutions and conclusions based on the secondary law of UNHCR. As explained in Section 2.4.2, this is not uncommon. The Annual Reports of the High Commissioner and UNHCR's Notes on International protection are the most central documents in shaping ExCom Conclusions and UNGA resolutions, and is the primary source of UNHCR secondary law drawn upon in this thesis.

[111] Ahlborn, 2011, 415.
[112] Ibid., 413-414.
[113] Ibid., 417.

Part II:

The evolving meaning of 'international protection'

Chapter 3: The origins of 'international protection'

3.1 Introduction

In order to answer *how 'international protection' was interpreted at the time of adoption of the UNHCR Statute,* it is essential to understand the context of its drafting. As explained in Section 2.3.1, VCLT Article 32 allows recourse to the 'circumstances of the conclusion' of the UNHCR Statute if used as a supplementary element of interpretation to confirm the meaning reached in light of VCLT Article 31. This chapter offers a short introduction to the legal status of refugees prior to adoption of the 1950 UNHCR Statute and the 1951 Refugee Convention. In doing so, I seek to summarize key developments between 1921 and 1950. These represent the formative years of 'international protection' as a concept within the current international refugee protection regime and constitute the 'circumstances of the conclusion' of the UNHCR Statute.

3.2 The legal status of refugees in traditional international law

In traditional international law, "states only and exclusively" were viewed as legal subjects.[114] The individual was merely an object, with nationality functioning as the principal legal link between her and the international plane.[115] In practice, this entailed that an individual abroad did not hold an autonomous legal status as a rights-bearing subject, but nevertheless en-

[114] Oppenheim, Jennings and Watts, 1992a, 16, footnote no. 1. While this is no longer the dominating view, it is a crucial point in order to understand the context of which the international refugee protection regime arose. As noted in Oppenheim's International Law, "[t]he question whether there could be any subjects of international law other that states was at one time a matter of strenuous debate (…) it is now generally accepted that there are subjects other than states, and practice amply proves this".
[115] Holborn, 1975, 154.

joyed some sort of protection under international law by virtue of her status as a national of a legal subject, that is, another state.[116] Recalling that the legal definition of a refugee, as presented in Section 1.2.1, consists in two core elements; 1) she is outside her state of origin and; 2) she has a well-found fear of being persecuted. No longer enjoying protection by a nation-state and at the same time being unable to invoke protection under international law, refugees suffered from what Hannah Arendt referred to as the "abstract nakedness of being human and nothing but human".[117] This so-called legal nakedness arose from the fact that the nationality the person possessed was unlikely to afford her any protection or otherwise provide her with the benefits normally flowing from the possession of a nationality.[118] Holborn characterises this as a lacunae in international law;

> In the nation-state system of modern times, refugees, who by definition are either *de facto* or *de jure* stateless, and thus people of no-man's land, are an anomaly. Therefore, the general rules of international law had a lacunae which had to be filled with special provisions to secure a legal status for refugees.[119]

In sum, refugees were considered an anomaly in international traditional law. Writing in 1954, Paul Weis held that "[t]he status of refugees is precarious in many ways".[120] During the post-World War I period, the precarious status of refugees had become painfully evident. As a means to remedy this situation the President of the International Committee of the Red Cross (ICRC) in 1921 called for the establishment of a supra-national authority working to strengthen the 'legal protection' and 'representation' of refugees in Europe.[121] The initial steps in erecting an international framework for refugee protection – spanning the period between 1921 and 1945 – will be covered in the following section.

[116] See Oudejans, 2014, 10, with further reference to Panhuys, 1959, 44.
[117] Arendt, 1958, 297.
[118] Oppenheim, Jennings and Watts, 1992b, 891.
[119] Holborn, 1975, 154.
[120] Weis, 1954, 193.
[121] Holborn, 1975, 5-6.

3.3 Legal and political protection, the same as international protection?

3.3.1 Refugee protection under the League of Nations (1921-1945)

The term 'international protection' was not introduced until 1949,[122] but the 1921 appointment of Dr. Fridtjof Nansen as the League of Nation's (LoN) – and history's – first High Commissioner for Refugees marks the beginning of an international and coordinated effort to provide support to refugees. These efforts would eventually culminate in the adoption of the UNHCR Statute.[123] Authorized to define the legal status of refugees, organize their repatriation or allocation to other countries, assisting them in finding work in their country of residence and, with the assistance of aid groups, extending refugees with relief efforts,[124] the High Commissioner's mandate was defined in terms of the provision 'political and legal protection' to refugees.

When Dr. Nansen entered into office, no international refugee law was in existence,[125] but according to Arendt, states generally agreed that an "outside body" was needed to provide refugees with a guarantee of their elementary rights.[126] Throughout his period, Dr. Nansen negotiated several legal instruments aimed at remedying the lack of a legal status of refugees[127] and a system based on conventional treaty law began to emerge.[128] The Nansen Passport System represented one such legal instrument.[129] From 1923, it provided Russian and Armenian refugees with travel documents whose importance, argued Holborn, "hardly can be overestimated".[130] Although the Nansen Passport System did not hold the status of treaty law, it represents the first international identity paper that granted refugees of specific categories with a legal and juridical status.[131] In 1933, the Convention Relating to the International Status of Refugees became the first treaty law

[122] The term was introduced by the French delegate during the deliberations of the UNHCR Statute. More on this in Section 4.6.
[123] Jaeger, 2001, 727. Principles of refugee protection can be traced as far back as to the Antiquity where the customs of granting asylum was a tradition, though not universal. For history of asylum, see *e.i*; Grahl-Madsen, 1980, 3-4 and Einarsen, 2000, 90.
[124] The Secretary General's proposal to the Council of the League, cited in Lewis, 2012, 3, footnote 7.
[125] Ibid., 4.
[126] Arendt, 1958, 274-275.
[127] Lewis, 2012, 4.
[128] Skran, 2011, 14.
[129] Ibid., 13.
[130] Holborn, 1975, 10.
[131] Ibid., 10.

instrument to address the legal status of refugees.[132] The convention only applied to a limited group of refugees,[133] and merely eight states ratified it, but for the first time in history, a written source of international law expressed the principle of *non-refoulement*.[134] From Article 3, it follows that

> [e]ach of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.[135]

Moreover, the 1933 Refugee Convention ensured refugees "the enjoyment of civil rights, free and ready access to courts, security and stability as regards establishment and work, facilities in the exercise of the professions, of industry and commerce, and in regard to the movement of persons, admission to schools and universities".[136] As we shall see below, the convention would later serve as a model for the 1951 Refugee Convention.[137]

Between 1933 and 1947, a host of temporary and non-universal refugee protection agencies and high commissioners were established, with an ever-increasing number of people and groups falling under their mandate.[138] The normative and institutional protection framework that started to evolve under the LoN received criticism for its lack of universality, both due to inherent geographic restrictions and low rates of ratification. Notwithstanding these practical limitations, 'political and legal protection' under LoN had profound implications on what later became UNHCR's mandate to provide 'international protection'. Not least owing to its focus on remedying the refugee's lack of legal status under international law and on securing the physical safety of refugees by defining and strengthening the principle of *non-refoulement*.

---

[132] Lewis, 2012, 7.
[133] Russians, Armenians, Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks, Jaeger, 2001, 730.
[134] Einarsen, 2000, 96-97.
[135] Article 3, Convention Relating to the International Status of Refugees.
[136] Preamble, para. 6, ibid.
[137] Jaeger, 2001, 730.
[138] These were; The Nansen Office for Refugees (1931-1938), High Commissioner for Refugee coming from Germany (1933-1938), High Commissioner for Refugees Under the Protection of League of Nations (1936-1946), Intergovernmental Committee on Refugees (1938-1947). See *i.g* Holborn, 1975, 13-20.

3.3.2 Refugee protection under the International Refugee Organizations (1947-1950)

In its very first session, the UN General Assembly passed a resolution stating that "the problem of refugees and displaced persons of all categories is one of immediate urgency" and that the problem of refugees was "global in scope".[139] Established as a temporary response to the post-World War II refugee situation, the International Refugee Organization (IRO) started its operations in 1947.[140] The organization was given a comprehensive mandate, and would provide for the "repatriation, identification, registration and classification; care and assistance; legal and political protection and the resettlement and re-establishment of refugees".[141] Its constitution also stated that IRO was mandated to conclude agreements with states to receive refugees for the purpose of protecting their "legitimate rights and interests".[142] This part of IRO's mandate became defining to the agency's activities, which was known as a "resettlement agency".[143] In opposite to its predecessors, IRO operated individual status determination processes, as to opposite to group based ones, but continued the tradition of only recognising persons of specific nationalities as potential refugee.[144] By the end of June 1950, IRO had resettled more than 700,000 refugees, while 174,000 so-called 'hard core refugees' remained in European camps.[145]

3.4 'International protection' and the creation of UNHCR

By the end of World War II, a majority of Western states reached general agreement on the following four premises of refugee protection; 1) refugees had legitimate needs for legal status under international law, which entailed

[139] Para. 8 (I), UNGA, Question of Refugees. A/RES/8, 12 February 1946
[140] Weis, 1954, 210.
[141] Article 2, section 1, Constitution of the International Refugee Organization and Feller, 2001a, 130.
[142] Article 2, section 2, j, IRO.
[143] Jaeger, 2001, 732.
[144] Barnett, 2002, 244.
[145] Barnett and Finnemore, 2004, 79. On the resettlement process and challenges regarding these specifically vulnerable groups of refugees, see i.e Suhrke, 1998, 403-405 and the highly interesting account, though in Norwegian, Grahl-Madsen, 1959s.

both a recognition of the refugee's lack of protection from a state of origin and of the entitlement to some sort of alternative protection; 2) the respect for the principle of *non-refoulement*; 3) refugees' basic needs would have to be met by the refugee hosting state, and 4) a common and/or coordinated protection system needed to be established.[146]

Already in 1946, the Commission on Human Rights asked UN to consider "the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality, as regards their legal and social protection and their documentation".[147] The UN General Secretary followed suit and published the report *A Study of Statelessness*, which stands as "a key document" in establishing the international refugee protection regime.[148] The study describes refugees as mostly *de jure* stateless and sometimes *de facto* stateless, and recommends that this category of people should be "granted an international legal status guaranteeing them the enjoyment of fundamental human rights, and assured of the protection of an international organ of an intergovernmental character".[149] This long, but nevertheless useful extract from the study sums up the point of departure of the drafting of what later became the 1950 UNHCR Statute and the 1951 Refugee Convention;

> The conferment of a status is not sufficient in itself to regularize the standing of stateless persons and to bring them into the orbit of the law; they must also be linked to an independent organ which would to some extent make up for the absence of national protection and render them certain services which the authorities of a country of origin render to their nationals resident abroad. Such an organ is undoubtedly needed. The status of stateless persons, however carefully determined, cannot become a reality unless there is an organ of *international protection*. Such an organ would need to work in close collaboration with the Governments of the reception countries. It should comprise a central office with subsidiary branches in the countries concerned.[150]

[146] Smyser, 1987, 7.
[147] ECOSOC, 6th Session, Official Record. Supplement No. 1, 1946.
[148] Jaeger, 2001, 733.
[149] General, 1 August 1949, Recommendations submitted by the secretary general to the Economic and Social Council.
[150] Ibid., Chapter II, 1, italics mine.

As noted in Section 3.3, the term 'international protection' replaced 'legal and political protection' during 1949 and as the above quote shows us, the concept was used in the report *A Study of Statelessness*. In the report, 'international protection' is left undefined, but the quote tells us that the overall aim was to bring the refugee "into the orbit of the law". Originally, the UN initiated a process of drafting a legal instrument collecting both the legal and institutional framework of refugee protection. As such, what is now known as the 1950 UNHCR Statute and the1951 Refugee Convention were envisaged as one treaty and were drafted "almost simultaneously".[151] This approach was eventually abandoned, partly due to the growing tension between the Western and Eastern European States. Holborn argues that the processes of drafting the UNHCR Statute and the Refugee Convention was separated because the drafting states were willing to give a new international refugee agency a broad scope of concern, but they were less willing to accept new, equally broad legal obligations themselves.[152]

Notwithstanding the separation of the UNHCR Statute and the Refugee Convention, there was an intended complementarity between the responsibilities of the UNHCR as amended in the Statute and the new refugee convention,[153] and both sprung from the common objective of providing protection to refugees through remedying the legal lacunae in which refugees were placed. The implications of these circumstances on the interpretation of 'international protection' at the time of adopting the UNHCR Statute will be linked with the analysis of the relevant preparatory work in the following chapter.

3.3.3 Fragmented implementation

Between 1921 and 1950, approaches to refugee movement were represented by *ad hoc* responses based on the principles that refugees belonged to a specific group of migrants with a special need of help that – owing to persecution – could not be returned to their country of origin.[154] The evolution of a

[151] Einarsen, 2011, 40.
[152] Holborn, 1975, 79-81.
[153] Goodwin-Gill, 2008, 2.
[154] Skran, 2011, 6.

legal framework strengthened the mandate and scope of the protection agency, and vice versa. Neither the conventions adopted nor the agencies established were universal in scope, however. Furthermore, even though providing 'legal and political protection' defined the mandate of each and all of the protection agencies in this period, the concept was never defined in sources of law.[155] Weis claims that in spite of the considerable amount of agencies dedicated to the protection of refugees before UNHCR, "their activities in the exercise of this function have been remarkably uniform". Weis categorizes the work of promoting legal and political protection in four, broad areas of activity; 1) the promotion, conclusion and ratification of international refugee law and supervision of its application; 2) consultation of governments on administrative and legislative measures to overcome legal disabilities of refugees and ensure improvements in their status; 3) conclusion of agreements with governments in order to gain territorial access to set up offices for the practical execution of their protection function, particularly as regards direct contact with refugees; and; 4) the representation of individuals' interests vis-à-vis central and local authorities.[156]

The description of the agencies' pursuit of 'legal and political protection' offered by Weis in the above quote concurs with the definition offered by IRO's Executive Secretary. It understands 'legal and political protection' as

> one single form of protection, which is both legal and political in character. It is legal in so far as its object is to safeguard the rights and legitimate interests of refugees, and in particular to provide for, observe and regulate the application of existing agreements on the legal status of refugees; to provide, if necessary, for their revision; to supervise their day-today application in particular cases; to provide, if necessary, for the conclusion of new agreements; and to exercise quasi-consular functions (…) protection is at the same time of a political nature, in that it implies relations with the government.[157]

As suggested in Section 3.3.1, the core of 'legal and political protection' seemed to focus on remedying the refugee's lack of legal status under inter-

[155] Weis, 1954, 211.
[156] Ibid., 211-214.
[157] Memorandum to ECOSOC, 11 July 1949.

national law. The term consequently obligates the refugee protection agency to promote access to legal instruments that entitles the refugee to a status.

Chapter 4: Interpreting 'international protection' in 1950

4.1 Introduction

In Chapter 4, the analysis of how 'international protection' has evolved over time continues. Specifically, it asks how the concept was interpreted at the time of adoption of the UNHCR Statute. The following chapter builds on the discussions on methodology in Chapter 2, primarily Section 2.1 – 2.3. As such, the first step in the following chapter is to analyse the "ordinary meaning" to be given to 'international protection' "in [its] context" and in "the light of its object and purpose". Furthermore, relevant rules of international law will be assessed. Each of these elements are to be analysed on an equal footing, though not necessarily be granted the same weight in the final stages of the interpretation process. After having followed the rule of interpretation as expressed in VCLT Article 31, a preliminary conclusion will be reached. The second step of Chapter 4 is taken by recourse to the preparatory work of the UNHCR Statute, as we recall is considered a legitimate supplementary means of interpretation according to VCLT Article 32. In the final part, Section 4.4, I gather, compare and weigh the different findings under VCLT Article 31 in light of VCLT Article 32. In this final section, I also bring in the circumstances relevant to the interpretation as identified in Chapter 3, and finally offer a conclusion.

4.2 'International protection' in light of VCLT Article 31

4.2.1 Ordinary meaning…

In accordance with the rules of interpretation presented in Section 2.3.1 of Chapter 2, the interpretation of 'international protection' start with the 'ordinary meaning of the term.

> To repeat, Article 1 of the UNHCR Statute states that:
>
> The United Nations High Commissioner for Refugees (…) shall assume the function of providing *international protection* (…) to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees.[158]

[158] UNHCR Statute, article 1.

'International' is something qualitatively different from 'regional' or 'national' and thus implies an arrangement or interaction between states or other subjects of international law. The concept of providing 'protection' implies ensuring some sort of safety or security measure, but the term is elusive and read in isolation it could span from everything between legal to physical provisions aiming to safeguard someone or something. The coupling of 'international' and 'protection' does not result in a separate meaning that stands alone,[159] but by reading the concept in its context, we might get a better understanding of what 'international protection' means.

4.2.2 … in its context

Recall that according to the VCLT Article 31.2, 'context' for the purpose of interpretation shall be understood as "the text, including its preamble and annexes". In so far as the UNHCR is *itself* an annex, with no preamble, these sources of context are not available in determining the ordinary meaning of 'international protection'. The UNGA resolution to which the UNHCR Statute is attached – UNGA Resolution 428 (V) – simply calls upon Governments to co-operate with UNHCR and does not elaborate further on what the UNHCR's protection function entails.[160] Thus, 'context' in the case of the UNHCR Statute is limited to the Statute as a whole. In the following, I focus on Article 1, 6 and 8. In my view, these articles provide most to the understanding of 'international protection'.

We have already established that Article 1 addresses the mandate of UNHCR, and that the mandate consists both in providing 'international protection' and finding 'permanent solutions' to refugees. Article 1 is located in *Chapter I: General Provisions*. Article 6 defines who is a refugee while Article 8 lists nine activities that the UNHCR is expected to engage in. Both articles are located in *Chapter II: Functions of the High Commissioner.*[161] The question to be addressed in the following section is what the ordinary

[159] Lewis, 2012, 19.
[160] UNHCR Statute, Resolution A/RES/428(V), para. 2-3. The resolution also links the Statute to Resolution 319 A (IV), which I address in Section 4.3.1 on the preparatory work.
[161] The UNHCR Statute consists of three chapters; *(I) General Provisions, (II) Functions of the High Commissioner* and *(III) Organization and finances*, and has 22 articles.

meaning of ‘international protection’ is in light of Article 1, 6 and 8 in the UNHCR Statute. I begin with Article 6.

As presented above, Article 6 defines who is entitled to refugee status under the auspices of the UNHCR. Without going into detail on what the eligibility criterions are (see Section 1.2.1 for the definition), for the purpose of interpreting ‘international protection’ it is sufficient to point to the fact that being recognised as a refugee is the entrance point for being granted ‘international protection’. This is made clear by the fact that UNHCR’s mandate is demarcated to provide ‘international protection’ to “refugees” only and that “refugees” are stated as the beneficiaries of every activity listed in Article 8 (to be discussed below). Stated differently: recognition as a refugee is a prerequisite for being entitled to ‘international protection’ under the UNHCR. In my understanding, this is a strong indicator that ‘international protection’ begins with recognising the need for a special status for people beyond the sphere of state protection. This implies that the mere recognition as a refugee *is* in itself a part of ‘international protection’. The question is of course, whether ‘international protection’ means more than simply receiving a special legal status under international law. Article 8 brings us closer to an answer.

According to Article 8, UNHCR shall provide for the ‘international protection’ of refugees falling under its competence 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 measure 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 is 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 list is comprehensive, and raises the question of whether Article 8 in fact offers a definition of 'international protection'. In my view, the answer is no. Article 8 defines a range of activities that the UNHCR must carry out in order to meet its obligations, but provides no answer as to what the UNHCR is actually set to achieve by performing these activities. To "provide international protection to refugees" must surely entail that the refugees are receiving something that could be considered 'international protection'. Article 8 does not tell us what that something is. This could be framed as the difference between establishing a framework to facilitate 'international protection' and articulating the actual nature of the mandate.[162] Nevertheless, the common characteristics of the range of activities listed in Article 8 might bring us closer to what 'international protection' meant in 1950.

I suggest categorising Article 8 into four groups of activities, though some of the sub-articles fit into more than one category. The first group aims at promoting the physical safety of refugees (para. c and d), the second group aims at strengthening the legal status of refugees (para. a, b, e, f); the third group of activities aim at obtaining durable solutions for refugees (para. c); while the fourth and last group gives UNHCR the function of coordinating efforts made by States, governmental and non-governmental organisations (NGOs) (para. g, h, i).[163] Based on these four groups, 'international protection' could be said to encompass both legal and physical measures which have the potential of contributing to ending the refugee's need for a special status under international law. These measures should be imple-

[162] Stevens, 2013, 239.
[163] For another way of categorizing these, see Holborn, 1975, 9.

mented through state and NGO action, while UNHCR is given a mandate to promote, facilitate, strengthen and supervise these measures. In sum, the list suggests an international refugee agency focused on obstacles on a legal and structural level, that seeks solutions on an international level, and leaves the national implementation of these measures to states and NGOs. This understanding of UNHCR as working on a structural level, as compared to for instance assisting individual refugees, finds support in Article 2, which states that the work of UNHCR "shall relate, as a rule, to groups and categories of refugees". The focus on groups and categories suggest that the activities under UNHCR's mandate is limited to convincing states to strengthen the treatment of refugees through new international or national legislation.

This conclusion could to some degree be modified by Article 8 b, which permits the UNHCR to make special agreements with states to promote "any measure" calculated to improve the "situation of refugees". The term "any measure" suggests that there are no limits as to what kind of activities the UNHCR can engage in, provided they are conducted in order to strengthen the situation of refugees.

If we accept the notion that 'international protection' entails *anything* that has the potential of remedying the situation of refugees *and* the potential of reducing the number of refugees, then mapping UNHCR's international legal responsibility becomes extremely difficult. However, read in connection to the refugee definition in Article 6, the term "situation of refugees" refers to the fact that refugees lack national protection. Thus, in my view, when Article 8 b refers to "improving the situation of refugees", it gives UNHCR competency to improve the protection framework within a specific state as a means to eventually remove the need for a special status. This harmonizes well with its function of promoting the conclusion and ratification of international conventions, as stated in Article 8 a and seems to establish coherence among the activities listed in Article 8. Furthermore, it seems to be in line with the second part of UNHCR's mandate, which according to Article 1 is 'seeking permanent solutions' to refugees.

Judging from the wording of Article 1, 'providing international protection' and 'seeking permanent solutions' are to be understood as two separate, but nevertheless interrelated, functions. While it is beyond the scope of

this thesis to analyse what 'permanent solutions' mean in practice, reading 'international protection' in light of the former could give us useful insight in the nature of the latter. Thus, and if considered as a whole, Article 1 suggests that 'international protection' is a first step towards 'permanent solutions'. As such, one could argue that 'international protection' would be limited only to measures that promote solutions. On the other hand, if that were the case, 'international protection' holds no independent meaning. From a legislative point of view, that conclusion seems unsatisfactory as it would make little sense to include both concepts in the text. While it is uncertain how 'seeking permanent solutions' to refugees influences the interpretation of 'international protection', it is beyond doubt that 'permanent solutions' depend on the provision state protection. If seen as two aspects of reaching the same goal, 'international protection' must be understood as a temporary measure.

In light of Article 1, 6 and 8 of the UNHCR Statute, the ordinary meaning of 'international protection', as a minimum, entails being recognised as a person bereft of state protection. Refugee status under the UNHCR springs from this recognition. Furthermore, 'international protection' entails standing under the auspices of an international organ that represents the refugee on the international plane. Lastly, 'international protection' is a temporary measure in pursuit of a permanent solution. In other words, international protection is rendered redundant as soon as permanent solutions are found. What this tells us is that 'international protection' can never fully compensate for protection under a state.

4.2.3 … in light of objective and purpose

In so far as the lack of state protection is the defining characteristic of all refugees, remedying this situation must presumably be the primary objective of 'international protection'. Framed differently, "the need for *international* protection is premised on the failure of national protection".[164] By establishing a High Commissioner for a specific group of people, the UN recognises that there is a need for international representation not provided for through

[164] Janmyr, 2014.

other mechanisms. As such, the overall purpose of establishing UNHCR seem to be to provide refugees with representation on the international plane. The objective and purpose of the UNHCR Statute seems to coincide well with the preliminary conclusion reached above, however, because defining 'international protection' is so closely interconnected with defining the organisation's objective and purpose, this source of interpretation adds little to the overall analysis. What it does tell us, is that the reflections based on the ordinary meaning of the word and on the context are well founded and seemingly in line with the intentions of the drafters. Before we go on to discuss the drafting process, we look to relevant rules of international law to see whether they can contribute to the understanding of what 'international protection' meant in 1950.

4.2.4 Relevant rules of international law

In Chapter 2, we saw that rules of international law should be taken into account when interpreting the ordinary meaning of 'international protection' if these are considered "relevant". While the term *relevant* is broad, in the case of the UNHCR Statute, Article 1 narrows its scope by stating that UNHCR provides 'international protection' "under the auspices" of the UN. In Section 2.2, I mentioned that the UN Charter is the constituent instrument of the UN. Arguable, the fact that UNHCR is executing its mandate "under the auspices" of the UN must entail that UNHCR is bound to operate in compliance with the principles expressed in the UN Charter. Moreover, and due to the UNHCR's status as a subsidiary organ of the UN, established because it was "deemed necessary for the performance of [UN's] functions",[165] the agency must also be held responsible for the promotion of the principles embodied in the UN Charter.

Of particular relevance to the interpretation of 'international protection' is the overall aim of UN, expressed in Article 1 of the UN Charter as to "promoting and encouraging respect for human rights and for fundamental freedoms".[166] Because UNHCR was established as a subsidiary organ of the

[165] Article 22, UN Charter.
[166] Article 1, para. 3, ibid.

UN in order to represent refugees in international law, in my view, it is a logical extension of responsibilities that the agency is tasked to promote the human rights of this group when performing its mandate. At the time of adoption the Universal Declaration of Human Rights (UDHR) had been passed by the UNGA. In spite of being a non-binding legal instrument, the preamble of UDHR expresses a clear linkage to the UN Charter and thus establishes a presumption that these two are two be read in connection to each other.[167]

According to UDHR Article 14, "everyone has the rights to seek and enjoy in other countries the asylum from persecution".[168] Although the UNHCR Statute does not mention the right to seek asylum, Article 6 defines the "fear of being persecuted" as a cornerstone in the definition of refugees. As such, both the provision of 'international protection' under UNHCR and promoting the rights to seek and enjoy asylum in UDHR starts with the recognition of a person being exposed to persecution. Thus, in my view, the two legal instruments are established to safeguard the same group of people. Indeed, though not formulated as clearly as in UDHR Article 14, Article 8 d of the UNHCR Statute states that the agency shall promote "the admission of refugees (…) to the territories of States" in order to promote 'international protection'. In conclusion, recourse to the UN Charter Article 1 and UDHR Article 14 indicates that 'international protection' must be understood as both the recognition of refugee status *and* access to territory where they will no longer be subject to persecution.

It should not go unnoticed however, that relevant rules of international law at the time of the UNHCR statute's adoption also encompassed the 1933 Refugee Convention. Although the convention was limited in scope (see Section 3.3.1 of Chapter 3), it nevertheless contained a list of civil rights that refugees were entitled to. Most importantly, Article 3 of the

[167] "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms", Preamble, Universal Declaration of Human Rights.
[168] Article 14, ibid.

1933 Convention expressed the principle of *non-refoulement.* In 1950, the 1933 Refugee Convention was still the only convention pertaining to the rights of refugees, and as such, according to Article 8 of the UNHCR Statute, a part of UNHCR's 'international protection' mandate entailed "promoting the conclusion and ratification" of the 1933 Refugee Convention and "supervising" its application. As such, and despite the fact that the Statute does not explicitly mention "rights" in its wording, there are legal ties between an instrument of international law that expresses civil rights accorded to refugees and UNHCR's mandate to provide 'international protection'. Because the UNHCR Statute applies to all nationalities, the geographical limitations of the 1933 Refugee Convention do not apply. In my view, this must entail that 'international protection' under UNHCR, as a minimum, must be understood as the promotion of refugee rights as expressed in the 1933 Refugee Convention. By linking the principle of *non-refoulement* in the 1933 Refugee Convention with both Article 8 d of the UNHCR Statute and Article 14 of UDHR, I find it clear that 'international protection' at the time of adopting the Statute, obligated the UNHCR to promote some form of territorial protection to refugees.

4.2.5 VCLT 31: preliminary findings

After having analysed 'international protection' by recourse to its ordinary meaning (4.2.1) in light of its context (4.2.2), object and purpose (4.2.3), and eventually by looking at relevant rules of international law (4.2.4), I suggest separating UNHCR's mandate to provide 'international protection' to refugees into two levels. The first level encompasses the overarching responsibility placed on UNHCR to represent refugees on the international plane. The UNHCR's aim of promoting both an international and national legal framework that recognizes refugees as subjects of law, is a defining characteristic of 'international protection'. As such, the overarching objective and purpose of 'international protection' seems to be representation on a structural level.

The second level consists of two fundamental cornerstones and helps us to understand the actual content of 'international protection': 1) recogni-

tion under international law through refugee status, and 2) physical safety from persecution through access to the territories of states.

The first cornerstone – refugee status – is derived by reading the UNHCR Statue Article 1 in light of Article 6 and 8. Whether providing 'international protection' entailed that the UNHCR would perform the determination process is not answered, but judging from the activities listed in Article 8, my answer would be no. This does not imply that the UNHCR did not have room in its mandate to pursue such measures, however. As we remember from the discussions in Section 2.3.2 of Chapter 2, the doctrine of implied powers might give UNHCR leeway to interpret 'international protection' to encompass more than what is explicitly expressed in the Statute.

The second cornerstone – access to territories of states – is derived by reading Article 8 d in compliance with UDHR Article 14 on the right to seek and enjoy asylum and Article 3 of 1933 Refugee Convention that codifies the principle of *non-refoulement*. Because UNHCR does not possess territory, their role is limited to promoting the admission of refugees.

In sum, the above conclusion is both partly clear and partly "ambiguous and obscure". Recalling that VCLT Article 32 permits recourse to preparatory work, either to "confirm the meaning resulting from the application of Article 31", or to "determine the meaning of the interpretation according Article 31 leaves the meaning ambiguous In order to "confirm" what is clear and "determine" what is not, Section 4.3.1 looks at the preparatory work of the UNHCR Statute.

4.3 VCLT Article 32: Preparatory work as supplementary interpretation

In Chapter 3, we learned that the concept 'legal and political protection' was used to define the responsibilities of UNHCR's predecessors and that 'international protection' was introduced as a concept in 1949. We now pick up on the origins of 'international protection' as outlined in Chapter 3 and go further into depth on the discussion related to adopting the concept in the Article 1 of the UNHCR Statute.

As mentioned in Section 2.3.1, preparatory work refers to a category that spans a wide range of potential sources. As a general rule, preparatory works should be judged by their authenticity, completeness and availability.[169] Within the scope of this thesis, it is simply impossible to cover the breadth of all documents that could be taken to fall within the category preparatory work related to the UNHCR Statute. There is a lot. As such, I have not aimed at offering a complete presentation of this supplementary source but chosen to emphasize the parts which – in my view – give a representative picture of the views expressed during the drafting of the Statute. When analysing the preparatory works, I have encountered a so-called availability issue, meaning that some sources of interest have proven very difficult to locate. As such, some parts of the preparatory work could have proven central may not have been identified. Furthermore, others might have chosen differently. Consequently, the weight accorded to the preparatory work in this thesis will not be sufficient to dismiss any of the above preliminary conclusions. However, according to VCLT Article 32 they could be used to confirm or at least strengthen an interpretation, or hopefully, supplement the conclusion. In the following text, I highlight some of the findings which in my view are relevant as a supplement to what is already covered.

The term 'international protection' was first introduced by the French delegate during the introductory deliberations in ECOSOC.[170] The term won ground, and in Resolution 248 (IX) A, ECOSOC called for the UNGA to "decide the functions and organizational arrangements within the framework of the United Nations necessary for the international protection of refugees after the IRO terminates its activities".[171] The resolution resulted in the extensive *Report on Refugees and Stateless Persons* which deliberated on the concepts of both 'legal protection' and 'international protection'. In the introduction, the report states that it is to deal mainly with the future of "international protection and related functions" and with "the nature and extent of legal protection functions" following the dismantling of IRO.[172]

[169] Aust, 2007, 246.
[170] ECOSOC, 9th Session, Official Record. Summary Record of the 326th Meeting, 1949, 628-629 and 4th Session, Official Record. Summary Record of the 256th Meeting, 1949.
[171] ECOSOC, Resolution 248 (IX) A, 6 August 1949.
[172] Para.5, Report on Refugees and Stateless Persons, 26 October 1949.

The document seems to either equate 'international' with 'legal' protection, or at least recognise that the terms hold overlapping aspects. Notably, the second chapter of the report is titled "The nature and extent of international protection functions" and then lists 'international legal protection' as the function of the new refugee protection agency. It goes on to deliberate three main disabilities usually encountered by the refugee, which are; (a) conditions of residence, (b) international travel and (c) legal status in the country of residence, and concludes that "[l]egal protection would consist in efforts to remove these and similar disabilities of refugees who do not enjoy the protection of their Governments of nationality or former habitual residence".[173]

Based on this conclusion, the *Report on Refugees and Stateless Persons* suggested specific activities that the new agency would be mandated to exercise. As such, it in many ways defined the point of departure for the lengthy deliberations that later took place within ECOSOC, the Third Committee and the Planetary Sessions of UNGA that took place during the last six months of 1949. As such, it is a preparatory work of great importance. In my reading, it supports the conclusion that the granting of a legal status under international law lies at the core of 'international protection', which represents a continuation of what had been the primary concern of High Commissioners ever since Dr. Nansen. The question then arises as to why there was a need to introduce a new concept.

When UNGA chose to replace a more or less well-established concept of international law, the presumption must necessarily be that the aim is to gain some form of substantive change of legal implications. As was illustrated in Chapter 3, the different refugee protection agencies implemented its mandates to provide 'legal and political protection' in a range of different ways. To my understanding, this implies that the concept was, to a reasonable degree, flexible. What then, was it that UNGA wanted to achieve by changing the concept?

The French delegate who introduced the need for the new concept argued that it had become necessary to highlight the difference between

[173] Ibid., Chapter II, para. 18-22.

protection as extended by UNHCR, and protection as extended by states. By using the term 'international it would be made clear that UNHCR would only have the function "of a higher direction, liaison and control service"[174] that would provide "guidance, supervision, co-ordination and control" with the protection offered by states.[175]

Under the IRO, protection activities had been underprioritized relative to the provision of material assistance. The *Report on Refugees and Stateless Persons* concludes that "legal and political protection has on the whole been a secondary task, which has been performed largely within the framework of material assistance".[176] This situation, it seems, was something the delegates sought to avoid under the new agency. "Unlike IRO", the UK delegate argued, "the High Commissioner with his small staff would not constitute an operational agency; furthermore, he would concern himself with refugee problems of a broader and more universal nature than those faced by the IRO".[177] This view received support from the US whose representative – in spite of maintaining that the ultimate solution to the refugee problems was found in economic development – argued that this would be provided for through the Marshall Plan, not UNHCR-led programs.[178] As a compromise between the US delegate, who wanted no funding for material assistance what so ever, and the French delegate, who held the view that legal protection in many cases was meaningless without material assistance, it is clear from Article 10 of the Statute that UNHCR was granted access to distribute funds to both private and public agencies in order to provide for assistance to refugees, though not carry out direct assistance work on its own. The fact that UNGA Resolution 319 A (IV), the last UNHCR related resolution passed before the adoption of the UNHCR Statute, proclaims that UNHCR was only to consist of "a small staff of persons devoted to the purpose of the Office"[179] supports this as activities of a more physical or mate-

[174] Holborn, 1975, 100.
[175] Mr. Rochefort's statement at UN General Assembly, Forth Session, Third Committee Meeting, Lewis, 2012, 14
[176] Para.14, 26 October 1949.
[177] UK representative, Mr. Corley, at UN General Assembly, Fourth Session, 256th Meeting, cited in Lewis, 2012, 14.
[178] Barnett and Finnemore, 2004, 80.
[179] Para. 10, Annex, Refugees and Stateless Persons, 3 December 1949.

rial character would prove challenging under such conditions.[180] It should be noted in this regard, that the UNHCR Statute is silent both on the question of UNHCR presence in field, which had been an important part of IRO's activities, and on the concept of material assistance.

On the basis of available preparatory works, I find it safe to conclude that refugees' legal status under international law is at the core of what 'international protection' meant in 1950. Consensus seems to have been reached on limiting the scope of activities under UNHCR, and on granting the agency with responsibilities of representation, supervision and coordination.

4.4 Conclusion

In order to capture how the meaning of 'international protection' in the UNHCR Statute has evolved over time, there is a need to understand the origins of the concept and establish how it was interpreted when the Statute was adopted in 1950. This has been the aim of Chapter 3 and 4. Within the frames of VCLT Article 31 and 32, my overall conclusion is that UNHCR's mandate to provide 'international protection' to refugees should be understood in two levels;

1) 'International protection' is the overarching responsibility placed on UNHCR to represent refugees on the international plane. The UNHCR's aim of promoting both an international and national legal framework that recognizes refugees as subjects of law, is a defining characteristic of 'international protection'.
2) The overarching responsibility to represent refugees on the international plane can be separated into two fundamental cornerstones;
    a) recognition under international law through refugee status
    b) physical safety from persecution through access to the territories of states.

[180] When first created, the UNHCR had 35 employees and a budget of $ 300,00. See; Zieck, 2006, 38-41.

In sum, ‘international protection’ shares key features with ‘legal and political protection’ under UNHCR’s predecessors. The mandate to provide ‘international protection’ was to be carried out by UNHCR through supervising and supplementing the protection activities undertaken by States on their respective territory. ‘International protection’ in the UNHCR Statute was understood to provide UNHCR primarily with a liaison function. Importantly, UNHCR’s ‘international protection’ mandate covered ‘refugees’, as defined in the Statute Article 6. It should be noted however, that in the section on the preparatory work, a tension between legal protection and material assistance was identified. In my view, a clear consensus was never reached as to whether material assistance should be regarded as a part of providing ‘international protection’. As we shall see in the chapters below, this got significant consequences for the evolution of ‘international protection’.

Chapter 5: 1950-1980: Expanding the scope of 'international protection'

> The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was first established. Briefly, *the movement has been from the Statute through good offices and assistance, to protection and solutions*.[181]

5.1 Introduction

In the following two chapters, we continue to analyse how the meaning of 'international protection' in the UNHCR Statute has evolved over time. The above quote refers to what Goodwin-Gill and McAdam seem to identify as three stages in the evolution of interpreting UNHCR's mandate. The first stage is represented through the establishment of the agency with the adoption of the UNHCR Statute. The second stage, referred to as 'good offices' and assistance can be placed within the 1950-1980 time frame, while the third and so far the last stage, 'protection' and 'solutions', started during the 1980s as is arguably still in play.

In Chapter 3 and 4, we answered how 'international protection' was understood at the time of adoption of the UNHCR Statute. In doing so, we established what UNHCR's responsibilities entailed during the first stage of the evolution process. Stated briefly: in 1950, 'international protection' meant providing a status to refugees and promoting their physical safety. UNHCR would meet its responsibilities by acting as an international liaison focused on the representation of refugees on the international plane and promoting legal mechanisms on their behalf.

The aim of Chapter 5 and 6 is to analyse the second and third stage of the evolution of UNHCR's responsibilities. Both chapters will be structured in a semi-linear way. By this I mean that I will follow the historic development, however organized around concepts related to what Goodwin-Gill and McAdam suggest as overarching themes of these decades. In Chap-

[181] Goodwin-Gill and McAdam, 2007, 29.

ter 5, I focus on 'international protection' in light of the 1951 Refugee Convention (Section 5.3); material assistance (Section 5.4), 'good office' (Section 5.5) and 'humanitarian task' (Section 5.6). In Chapter 6, I focus on 'solutions', 'human rights' and 'protection crisis' (more on this in Section 6.1).

In the remainder of this chapter, I first give a short introduction to the political and institutional context 'international protection' started to evolve in. In Section 5.3, I argue that already in 1951, the interpretation of 'international protection' started to change significantly, as the 1951 Refugee Convention provided what has later been framed as 'baseline rights' in refugee protection. Section 5.4-5.5 analyse UNHCR practice and interpretation in addition to UNGA Resolutions and argues that the meaning of 'international protection' expanded significantly between 1950 and 1980. The account will focus on what I identify as the refugee situations that played the most central role in the evolution of 'international protection', notably in Hungary, China, Algeria and Pakistan-Bangladesh. I will not, however, go into detail in regards to the realities on the ground.

5.2 Contextualization

5.2.1 Cold War and institutional conditions

UNHCR was established at a point in history where Cold War politics dominated, and UNHCR was quickly caught in the middle of it. Refugees were seen as an element of power in the East-West rivalry.[182] In 1950, approximately one million people fell within UNHCR's mandate, while its initial budget amounted to $ 30,000.[183] Furthermore, the 1951 Refugee Convention was yet to be adopted, thus, the legal protection framework in existence only applied to specific groups of nationalities.[184] Indeed, the UNHCR's institutional and financial conditions were meagre and the agency's opportunities to promote the interests of refugees were rather limited.[185] UNHCR's

[182] Loescher, 2003, 7.
[183] As compared to IRO's $ 150 million, Loescher, 2001, 51.
[184] See Section 3.3-3.4.
[185] Loescher, 2001, 50-53.

early work mainly focused on ensuring entry and ease integration of refugees in Europe.[186] And even though the early days of UNHCR have been characterized as "modest and uncertain",[187] the agency was nonetheless able to navigate within and capitalize on world events that uprooted millions of people both in Europe and elsewhere during the first decade of the organisation's existence.[188] While not going further into depth on questions of *realpolitik*, it is necessary to understand the context in which the interpretation of 'international protection' took place in order to understand how UNHCR could "transformation from a small legal protection agency to the world's largest humanitarian relief agency".[189]

5.2.2 Extending the legal refugee protection framework

The adoption of the 1951 Refugee Convention is of fundamental importance to the evolution of 'international protection' in the UNHCR Statue. Along with its 1967 Protocol and the 1969 OAU Convention on Refugee Problems in Africa[190], it arguably brought "a profound change for the better in the body of international law".[191] As pointed by Goodwin-Gill, policies of protection must be derived from "principles explicit or implicit in the existing law, as developed and interpreted in practice, and from the principles of fundamental human rights acknowledged by the international community".[192] To UNHCR, the expansion of the refugee protection framework that started with the 1951 Refugee Convention, and which later expanded on an international, regional and national level, widened UNHCR's authority when adopting protection policy under its 'international protection' mandate. As we recall from Chapter 4, the UNHCR Statute does not elaborate in detail on what 'international protection' means in terms of refugee entitlements. Thus, the new conventions gave UNHCR room to adopt policy based on entitlements accorded to refugees in binding legal instruments of interna-

[186] Feller, 2001a, 131.
[187] Holian and Cohen, 2012, 315, quoted in Elie, 2014, 25.
[188] Barnett and Finnemore, 2004, 73.
[189] Betts, Milner and Loescher, 2008, 33.
[190] Convention Governing the Specific Aspects of Refugee Problems in Africa.
[191] Holborn, 1975, 176.
[192] Goodwin-Gill, 1989, 17.

tional law and thus provided what UNHCR itself called a "firm foundation of for the work of international protection".[193]

The next section focuses on how refugee entitlement expressed in the 1951 Refugee Convention affected the meaning of 'international protection'[194] and later manifested itself in ExCom Conclusions on International Protection.

5.3 'International protection' as legal entitlement

5.3.1 The 1951 Refugee Convention as a source of interpretation

In Chapter 4, I argued that UNHCR's mandate to provide 'international protection' had to be interpreted in light of the 1933 Refugee Convention. At the time of the UNHCR Statute's adoption, it was a "relevant rule of international law applicable in the relations between the parties".[195] From Chapter 2, on the ordinary rules of interpretation, we recall that ICJ have stated that an "international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[196] In 1951, when the new Refugee Convention replaced previous international refugee protection law, hereunder the 1933 Refugee Convention,[197] the 1951 Refugee Convention became a "relevant rule of international law" that would have to be addressed when interpreting the UNHCR Statute. Furthermore, due to Article 35 of the Refugee Convention which states that contracting states "undertake to co-operate with the Office of the UNHCR (…) in the exercise of its functions, and shall in particular facilitate

[193] UNHCR, Annual Report of the United Nations High Commissioner for Refugees, 1951, 1 January 1952, para. 10.
[194] Due to space limitation, this thesis will not elaborate further on how the adoption 1967 Protocol, the 1969 African Refugee Convention directly affected the interpretation of 'international protection'. As the 1951 Refugee Convention is still seen to represent the second pillar of the international refugee protection regime alongside UNHCR, I concentrate the analysis on this instrument. It should also be noted that in 1984, Central America, Mexico and Panama adopted a convention on refugee protection, which despite of being non-binding has played an important role in promoting the rights of refugees, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.
[195] Article 31.3, VCLT. See Section 4.2.4.
[196] See Section 2.3.1.
[197] Article 37, 1951 Convention Relating to the Status of Refugees.

its duty of supervising the application of the provisions of this Convention", a legally binding link between the international organ of refugee protection and the international instrument regulating their status had been established[198] and the mandate to provide 'international protection' had thus found a conventional base.[199]

The 1951 Refugee Convention codifies what has later been described as a "critical group of baseline rights".[200] Without going into too much detail, it is important to get an idea of what the refugee became entitled to under the 1951 Convention. Importantly, Article 33 holds that

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The article gives express to the principle of *non-refoulement*, which we recall had first been included in a written source of international law in the 1933 Convention. The principle is coupled with the prohibition of penalising a refugee on account of illegal entry or presence.[201] Furthermore, a refugee has the right to freedom of religion, the rights to work, the rights to elementary education, the right to own property, the right to assembly, access to court, and some other welfare-based rights. Importantly, and reflecting the recommendations made in the *Report on Refugees and Stateless Persons* (Section 4.3), the refugee is also entitled to identification and travel documents, in addition to freedom of movement.[202]

It is important to note that the 1951 Refugee Convention regulates 'state protection'. This means that the adoption of the convention did not make UNHCR responsible for the actual fulfilment of the above listed entitlements. However, because UNHCR's mandate to provide 'international protection' includes "[p]romoting the conclusion and ratification of interna-

[198] Weis, 1954, 195.
[199] Grahl-Madsen, 1983, 13.
[200] Hathaway, 2005, 161-163.
[201] Article 31, 1951 Refugee Convention.
[202] Article 4, 13-17, 20-21, 23-24, 26-28, ibid.

tional conventions for the protection of refugees",[203] the agency is responsible for promoting the entitlements expressed in the 1951 Refugee Convention. As was explained in Chapter 3, the two legal instruments were originally drafted in one common process, but were eventually separated. At the time, states were willing to give a new refugee protection agency a broad scope of concern, but less willing to undertake equally broad legal obligations on themselves. Based on that, one can deduce that UNHCR was never meant to have a narrower set of obligations than that of states.[204] Consequently, the list of rights in the convention are understood as a minimum content of 'international protection'.[205] This conclusion seems to comply with the intentions expressed by the parties to the 1951 Refugee Convention. At a late stage in the drafting process, the Belgian delegation noted that it was highly desirable to have the UNHCR collaborate with the contracting states in the execution of the treaty. It was argued that Article 35 established a relationship between the UNHCR and states that would severe as a guarantee for refugees. The Belgian delegation emphasised that;

> Although the need for such a guarantee might not often be felt, it was none the less true, as the Belgian delegation had already pointed out, that the authorities of the country of reception would be at the same time both judge and party in every appeal submitted by a refugee and in every request concerning the exercise of a right by a refugee. Article [35] gave refugees moral satisfaction in that it amounted to the setting up of the "refugees government" to which they had long aspired.[206]

Being a preparatory work of the 1951 Refugee Convention, this specific quote holds relatively little weight in the interpretation of the UNHCR Statue. Nevertheless, it gives express to a principle that eventually became treaty law through Article 35 of the 1951 Refugee Convention. As such, it is safe to conclude that by the passing of this convention, the meaning of 'in-

[203] Article 8 a, UNHCR Statute.
[204] See Section 3.4.
[205] Support for this view is found in *i.g* Feller, 2001b, 585 and 593 and Kälin, 2003, 619.
[206] UNGA, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 27 November 1951.

ternational protection' evolved towards a more comprehensive understanding of what the concept entailed.[207]

5.3.2 ExCom Conclusions on cornerstones of 'international protection'

By jumping almost 30 years ahead, I wish to highlight how some of the principles codified in the 1951 Refugee Convention were later endorsed as cornerstones in providing 'international protection'. We recall from the analysis in Section 2.4.3 that the conclusions adopted by ExCom are highly relevant when analysing the evolution of 'international protection' in UNHCR's mandate. In 1977, ExCom publishes its first Conclusions on International Protection. Ratification of the 1951 Convention and to the 1967 Protocol Relating to the Status of Refugees,[208] access to asylum,[209] the fundamental humanitarian principle of *non-refoulement*,[210] protection against expulsion,[211] determination of refugee status,[212] and the principle of family reunification[213] are highlighted as cornerstones of 'international protection'. This accords well with the conclusions reached in Chapter 4 and give express to principles that prevailed in UNHCR annual reports between 1950 and late 1970s. What is noteworthy, however, is the fact that the 1977 ExCom conclusions bear no mentioning of material assistance or operations in the field, which – as we shall see below – would become central in the protection activities of UNHCR in the same period. The listed conclusions fails to include material assistance, which as we shall see below, had been at the forefront of UNHCR's 'international protection' efforts up until 1977. This perceived discrepancy between the formal and the operational interpretation of 'international protection' is noteworthy.

In an account of the evolution of the term 'refugee', Barnett and Finnemore separate between the *legal* and the *operational* definitons of the

[207] For instance, the principle of *non-refoulement* has arguably gained status as customary international law, amongst other due to UNHCR's practice. See Section 6.3.3 and *i.*e Lauterpacht and Bethlehem, 2003.
[208] ExCom, Conclusion no. 4 (XXVIII), International Instruments, 1977a.
[209] ExCom, Conclusion no. 5 (XXVI), Asylum, 1977b.
[210] ExCom, Conclusion. no 6 (XXVIII), Non-Refoulement, 1977d.
[211] ExCom, Conclusion no. 7 (XXVIII), Expulsion, 1977c.
[212] ExCom, Conclusion no. 8 (XXVIII), Determination of Refugee Status, 1977a.
[213] ExCom, Conclusion no. 9 (XXVIII), Family Reunion, 1977b.

concept.[214] This might also help us to understand how the meaning of 'international protection' evolved to encompass both legal entitlement on behalf of refugees and the provision of material assistance in the field. With the operationality of UNHCR evolving, there seems to have become a greater gap between the operational and the legal understanding of 'international protection', meaning that the formal or legal interpretation of UNHCR's 'international protection' mandate might very well coincide with the 1950 understanding of the term, while the operational aspects of the term is more fluid. At the time of drafting the UNHCR Statute, the potential operational aspects of 'international protection' were never really explored and developed due to the non-operational consensus at the time. Because movements of people outside their country of origin had become larger and more complex than in the past,[215] the concept of providing 'international protection' had to be interpreted in a manner that would make sense not only legally, but operationally.

The next section looks at how material assistance became a part of 'international protection' through UNHCR's own practice of interpretation and subsequent endorsement by UNGA.

5.4 'International protection' towards material assistance

5.4.1 UNHCR's interpretations

In January 1952, UNHCR delivered its annual report to UNGA. The report called for both emergency aid and long-term economic assistance to support the livelihoods of refugees. With reference to Article 8 b of the Statute, UNHCR argued that the mandate to provide 'international protection' had to be seen in light of seeking 'permanent solutions', allowing for "any measure" to be used.[216] UNHCR questioned the adequacy of 'international protection' to meet the needs of refugees and tried to utilise the ambiguous wording of the Statute. As was discussed in Chapter 4, Article 8 b can be

[214] Barnett and Finnemore, 1999, 711.
[215] Sztucki, 1999, 69.
[216] UNHCR, 1 January 1952, para. 25.

held to leave room for interpretation outside of the four categories of activities that I suggested. Nevertheless, as pointed out by Holborn; the predominant role of UNHCR was seen as being to stimulate and encourage action by governments to achieve more favourable treatment of refugees rather than to perform direct services for individual refugees or groups of refugees.[217] It might be recalled from Section 4.4 on the preparatory work, that it was agreed that UNHCR would not turn into a new IRO. As such, the appeal for long-term economic assistance did not gain immediate recognition by UNGA. With is limited budgets, UNHCR was fully dependent on UNGA's approval for raising funds for assistance if the agency would be able to act on its wish to widen the scope of 'international protection' activities.

From UNHCR's point of view, both the phraseology of Article 8 and the drafting process confirmed that 'international protection' encompassed measures of material assistance. According to UNHCR, the various functions outlined in Article 8 highlight the intended change from the mandate to provide 'legal and political protection', to providing 'international protection'.[218] It was argued that while it was clearly not the intention of UNGA to create another operational organization like IRO, it was equally clear that the majority of governments did not wish to restrict UNHCR to the purely legal aspects of protection. UNHCR argued that when the drafters deliberated on the question of material assistance, a clear consensus was never really reached. As was concluded in Chapter 4, whether providing material assistance was to be seen as a part of 'international protection', in addition to providing 'legal protection', the drafters only agreed to limit UNHCR's ability to handle funds for assistance, though it was not completely ruled out.[219] Holborn observes that "the consistent interpretation of the UNHCR has been that par. 8 is not meant to be exhaustive".[220] She goes on to argue that from the very beginning, UNHCR established a practice of ignoring "the obscurities of par. 8 and to rely instead on the broad phrasing of the

[217] Holborn, 1975, 88. This stands in starks contrast to the range of services UNHCR offers to refugees today, see Section 6.5.
[218] UNHCR, Annual Report of the United Nations High Commissioner for Refugees, 1953, 1 Januar 1954.
[219] For details on this, see *i.e* Holborn, 1975, 71-71.
[220] Ibid., 98.

paragraph and the general tenor of the Statute to support its contention that international protection should be interpreted broadly".[221]

The fact that the UNHCR's "consistent interpretation" has not met with protests from UNGA, implies that it could eventually become a legitimate source of interpretation when used to confirm a specific interpretation. As explained in Chapter 2, by establishing UNHCR, an autonomous legal personality within international law came to existence. It was argued that one could see UNHCR to hold a 'distinct will' that empowered it to produce secondary sources of law. Whether agreeing to this analysis or not, what is certain is that UNHCR proved central in driving evolution in the meaning of 'international protection' during its first years of functioning. Although the views expressed in the annual UNHCR reports did not receive direct approval of UNGA, it is possible to argue that the annual reports later became central sources of interpreting 'international protection'. It might be recalled that VCLT Article 32 allows recourse to a wide range of sources when looking to confirm the interpretation of a legal instrument. The term *acquiescence* was used to describe the situation when UNHCR develops a specific practice of interpretation which UNGA indirectly gives status as authoritative by means of tacit approval. Consequently, UNHCR's interpretation of Article 8 of the Statute proved central to broaden the scope of the meaning of 'international protection'.

5.4.2 UNGA Resolutions

In February 1952, UNGA passed Resolution 538 (VI) B and authorized UNHCR to call for funding "for the purpose of enabling emergency aid" to the most "needy refugees".[222] The wording of the resolution clearly demarcates against other forms of assistance, and effectively rejected the appeal for long-term funding to livelihood assistance. Furthermore, it had a clear reference to UNHCR Statute Article 10, which only mandates UNHCR to "administer" and "distribute" funds received.

[221] Ibid., 100.
[222] UNGA, Assistance to and protection of refugees. 358 (VI) B, 2 February 1952, para. 1.

Zieck observes that the granting of emergency assistance in accordance with UNHCR Statute Article 10, marked the beginning of UNHCR's expanding budget for the material assistance to refugees.[223] Although the above quoted resolution only approved calls for emergency aid, UNHCR later actually used the resolution to argue that its mandate to provide 'international protection' to refugee had to be broader than that of his organization's predecessors, due to the fact that UNGA had authorised it to issue appeals for emergency funds.[224] What is more, by 1953 UNHCR argued that 'international protection' encompassed both the traditional legal and political protection work *and* providing economic assistance in the field, as this had been "an integral part of the general work of providing international protection" during the early 1950's.[225] As such, UNHCR refers to its own interpretation and practice as relevant sources to argue for an expansion from providing legal protection to a broader scope of assistance activities.

The same year, 1953, the Ford Foundation granted UNHCR $ 2,9 million for long-term efforts on behalf of Refugees, which was more in line with the funding UNHCR had previously asked UNGA for.[226] The money received from Ford Foundation was earmarked to be used on housing, agriculture, youth projects and vocational training. Within a year, governments and private donors supplemented the Ford fund with approximately $ 8 million. In compliance with Article 10 of the UNHCR Statute, UNHCR had yet to engage directly with service delivery in the field and still used NGOs as its "operational arm". Although limited to identifying and coordinating partners for the implementation of the long-term assistance programmes, Loescher describes this as a kick-start that had far-reaching consequences for how UNHCR's would subsequently provide 'international protection'.[227] Although UNGA had only formally approved appeals for emergency funds, the fact that governments provided UNHCR with funding to allow for an

[223] Zieck, 2006, 37-38.
[224] UNHCR, 1 Januar 1954, para. 7-13.
[225] Ibid., para. 14.
[226] UNHCR, Annual Report of the United Nations High Commissioner for Refugees and Addendum, 1952, 1 January 1953, para. 9.
[227] Loescher, 2001, 67.

increased scope of activities could be viewed as a form of approval that confirmed UNHCR's interpretation of the Statute.

The establishing of UN Refugee Fund (UNREF) in 1955 was arguably the first recognition of UNHCR as a deliverer of long-term material assistance to refugees in Europe.[228] The ECOSOC resolution sanctioned programmes of long-term assistance to refugees that went beyond the scope of emergency aid. To my understanding, the establishing of UNREF effectively sanctioned UNHCR's interpretation of Article 8 b as presented above and approved of the approach to 'international protection' as measures not only focusing on legal aspects of the plight of refugees.

With the Hungarian Revolution in 1956 and the consequent uprooting of approximately 200 000 persons, the interpretation of 'international protection' was further pushed in an assistance approach direction. The Austrian government called on UNHCR to assist the refugees arriving from Hungary[229] and only after UNHCR had started to respond to the Austrian request for help, did UNGA endorse the activities.[230] UNHCR argued that its mandate encompassed the persons in question and that offering material assistance to them fell under the function of providing 'international protection'. In an emergency special session, UNGA confirmed UNHCR's interpretation and passed a resolution calling for UNHCR to make "speedy and effective arrangements for emergency assistance to refugees from Hungary".[231] In subsequent resolutions, UNGA asked UNHCR, "in accordance with his responsibility (…) to provide international protection to refugees, (…), to develop a comprehensive assessment of the needs, both material and financial, of the Hungarian refugees".[232]

It is worth noting that UNGA explicitly asks UNHCR, with reference to its mandate to provide 'international protection', to map the material and financial needs of the Hungarian refugees. As was made clear in Chap-

[228] ECOSOC, International Assistance to refugees within the mandate of the United Nations High Commissioner for Refugees. 565 (XIX), 31 March 1955.
[229] Venzke, 2012, 99.
[230] Loescher, 2001, 84.
[231] UNGA, Second emergency special session. 1006 9 November 1956.
[232] UNGA, Resolution, 21 November 1956 and UNGA, Report of the High Commissioner for Refugees. 1039, 23 January 1957

ter 4, the UNHCR Statute bears no mentioning of UNHCR providing neither material nor economic assistance to refugees. However, as discussed in Chapter 2, the doctrine of implied powers might support the implementation of measures not necessarily expressed in an international institution's constituent instrument, if these are necessary to execute its mandate in an effective manner. It should also be noted that the UNGA resolution does not ask UNHCR to actually deliver the material and economic support the refugee might require. Nevertheless, UNGA's endorsement of UNHCR overseeing other aspects than the legal aspects of the refugee reality has been argued to start the process of the agency evolution from a "strictly non-operational agency with no authority to appeal for funds to an institution with a long-range program emphasizing not only protection but increasingly material assistance".[233]

UNHCR's response to the Hungarian refugee situation has been framed as *"the first specific expansion of UNHCR"s activities",*[234] *and is* arguably also the first example of what Goodwin-Gill and McAdam calls the "incremental, 'after the event', and sometimes accidental growth of UNHCR's area of institutional responsibilities".[235] Loescher argues that during this crisis, UNHCR demonstrated a capacity to have independent influence on events at the centre of the Cold War politics.[236] Due to the political climate, one should not underestimate the weight UNHCR's secondary law and its practice had on shaping how the meaning of 'international protection' evolved during the first years of the organisation's existence. Because UNGA followed suit, the legal impact was profound.

As we will see in the next section, the interpretation of 'international protection' continued to evolve as a result of an interplay between UNHCR and UNGA.

[233] Betts, Milner and Loescher, 2008, 24.
[234] McBride, 2009, 6.
[235] Goodwin-Gill and McAdam, 2007, 29, footnote no. 73.
[236] Loescher, 2003, 8.

5.5 'Good offices' and new groups 'of concern to the international community'

5.5.1 *UNHCR practice*

Already within UNHCR's first year of existence, the agency argued that "it would be unrealistic to envisage merely a central organ in Geneva from which international protection of refugees could be undertaken" and that "the requirements of the international protection of refugees (…) would call for the establishment of eleven field offices, some of which could cover several countries".[237] UNHCR assured that the offices would exclusively seek to "assist government in resolving their refugee problem" and that "their initiative should be limited to drawing attention to refugee problems in the areas with which they were concerned".[238] In the subsequent resolution, UNGA remained silent on the request. Within one year, UNHCR established branch offices in Austria, Belgium, Colombia, the Federal Republic of Germany, Greece, Italy, the United Kingdom, the US and Hong Kong and held that more would be coming.[239]

Zieck identifies the branch offices as key facilitators of the expansion of UNHCR's 'international protection' mandate throughout the 1950s. In her view, the field offices made it possible for UNHCR provide legal protection to individual refugees, thus "initiating a process that would level UNHCR as a non-operational agency and exchange the matching intermediate mode of implementing Statutory tasks for an immediate one".[240] From being a liaison and representing groups and categories of refuges, UNHCR started practicing its mandate on an individual basis. Although lacking formal approval by UNGA, the doctrine of implied powers is useful to understand how UNHCR was able to expand its geographical presence. Arguably, the expressed mandate of providing 'international protection' would be more effectively executed if the agency was allowed to come closer to both the governments it was to supervise and to the refugees it was to provide

[237] UNHCR, 1 January 1952, para. 26 and 29.
[238] Ibid. para. 28 and 15.
[239]UNHCR, 1 January 1953, para. 7.
[240] Zieck, 2006, 37-38.

'international protection' to. As such, the opening of branch offices was an implied necessity of meeting its responsibilities.

5.5.2 UNGA Resolutions

An important development that further gave fuel to a broadening understanding of UNHCR's mandate to provide 'international protection' was the agency's involvement with Chinese refugees in Hong Kong. Already in the annual UNHCR report of 1953, the agency asked for guidance as to how to act in regards of the Chinese refugee situation and highlighted that fact that its branch office in Hong Kong would be at UNGA's disposal.[241] In spite of UNHCR's mandate being restricted to people becoming refugees as a result of "events occurring before 1 January 1951",[242] UNGA Resolution 1167 (XII) defined the Chinese refugees as "of concern to the international community" and authorised UNHCR to use its so-called "good offices" to "encourage arrangements for contributions" for both "emergency and long-term assistance".[243] Thus, by 1957, UNHCR received express approval of its branch office already set up in Hong Kong and was encouraged to use it to deliver assistance.

The resolution bears no mentioning of neither 'international protection' nor 'permanent solution' and it is not clear which of the two categories UNGA intended it to fall within. However, in a resolution from 1958, UNGA refers to UNHCR's assistance and emergency aid activities under UNREF as "protection activities" and welcomes ECOSOC's call for these activities to "increase".[244] And so it did. Under 'good office' and people 'of concern to the international community' phrase, UNHCR expanded its 'international protection' function to North-Africa when the Algerian refugee movement began in 1957.[245] By 1959, UNGA authorised UNHCR to extend "good offices in the transmission of contributions designed to provide assistance" to "refugees who do not come within the competency of the United Nations",

[241] UNHCR, 1 Januar 1954.
[242] Article 6 A (ii), UNHCR Statute.
[243] UNGA, Chinse refugees in Hong Kong. 1167, 26 November 1957a.
[244] Report of the High Commissioner for Refugees. 1284 (XIII), 5 December 1958.
[245] Betts, Milner and Loescher, 2008, 25-27 and Venzke, 2012, 99-101.

which referred to the Algerian refugees.[246] The resolution was the first ever to draw a distinction between mandate refugees and other,[247] but due to the political climate at the time, this was arguably a necessary move to get the world community's approval. The operations targeting Algerian refugees laid the groundwork of UNHCR movement into the developing world and became the blueprint for UNHCR in practically all the following programs during the 1960s and 1970s.[248]

5.5.3 Legal implications

By 1965, UNGA abandoned the term 'good office' in a resolution that requested the UNHCR "to pursue (…) efforts with a view to ensuring an adequate international protection of refuges and to provide satisfactory permanent solutions to the problems affecting the various groups of refugees within [its] competence".[249] By first introducing the term 'good office' and then later abandoning it, profound changes to UNHCR's mandate to provide 'international protection' had occurred. Originally, the 'good office' refugees were often viewed as not in need of legal protection, but of material assistance. According to Barnett and Finnemore, the 'good office' formulation gave UNHCR legal authorization to provide and coordinate assistance to people in need of material assistance rather than legal protection.[250] The notion that UNHCR's shift from Europe to Africa entailed an extension of the assistance activities of the agency, but not 'international protection' have been shared by others.[251] Holborn states that "[w]hat was required [in Algeria] was material assistance; there was no need of international protection and no chance of achieving a permanent solution except through repatriation of the refugees to their homeland".[252] What is notable is that different understandings of 'international protection' appear to be emerging, according to the

[246] UNGA, Report of the High Commissioner for Refugees. 1388 (XIV), 20 November 1959.
[247] Barnett and Finnemore, 2004, 89.
[248] Loescher, 2001, 108.
[249] UNGA, Reports of the High Commissioner for Refugees. 2039 (XX), 7 December 1965, para. 1.
[250] Barnett and Finnemore, 2004, 88-89.
[251] Betts, Milner and Loescher, 2008, 27-28.
[252] Holborn, 1975, 437.

contexts in which UNHCR operates. In developing countries, protection is seen as assistance, while in Europe, the 1951 Refugee Convention was the point of departure for refugee protection. This could be framed as a decoupling of 'international protection' as a concept that places responsibilities on UNHCR.

The viewing 'good office' refugees and mandate refugees under a common 'international protection' function, it became clear that 'international protection' was definitely to be understood both as providing legal protection and material assistance. In the annual report January 1965, UNHCR stated that "[t]he UNHCR programmes for material assistance to refugees have again proved to be an indispensable corollary to its basic function of international protection".[253] Venzke argues that leaving the 'good office' concept behind was a part of UNHCR's political strategy. In his words, "refugees outside its competence and under the umbrella of its good offices came to be part of its competence, not by amending the Statute or changing the black letter definition of refugees, but by way of a subtler semantic shift".[254] UNHCR itself presents the term 'good office' as "the most significant" in the evolution of UNHCR's mandate and the organization's ability to adapt to new refugee problems.[255] As we shall see in the next section, UNHCR grew to become a massive operational player in humanitarian crises.

5.6 'International protection' as humanitarian task

5.5.1 UNGA Resolutions

Despite of the domination of material assistance, UNHCR's activities up until 1971 was not yet characterized as operational. The still limited budget

[253] UNHCR, Annual Report of the United Nations High Commissioner for Refugees, A/6311/Rev. 1 1 January 1966, para. 73.
[254] Venzke, 2012, 102.
[255] UNHCR, Annual Report of the United Nations High Commissioner for Refugees, 1971, 1 January 1972, para. 8.

of the organization has been pointed out as one of the practical reasons for this.[256]

Due to the separation of Pakistan, 1971 became a "pivotal moment" in UNHCR's history as it opened the door for an operational approach to providing 'international protection'.[257] UNGA endorsed UNHCR as the "focal point in co-ordinating international relief assistance for refugees from East Pakistan in India" and for their "meritorious humanitarian action for the relief of the suffering of refugees and of the population in East-Pakistan".[258] Later, this has been viewed by many as the resolution that drove UNHCR to become operational.[259] As a result of this operation, UNHCR arguably "grew well beyond its original mandate"[260] as the focal point mandate had required great UNHCR presence in the field.[261] By 1972, Africa had an estimated refugee population of more than one million. It was argued that these people were not in need of an 'international protection' understood as legal and diplomatic sense of the term. Instead of legal status under international law, the refugees were understood as in need of monetary support and the development of direct assistance programs for refugees.[262]

In 1974, UNGA passed resolution 3271 which introduced the concept "special humanitarian task" to describe UNHCR's "duties".[263] The resolution marked a new approach to interpreting the organisation's two mandates, and it was unclear whether the term 'humanitarian task' added a new mandate to UNHCR responsibilities or applied to 'international protection' and 'permanent solutions'. Judging from a subsequent resolution the following year, the latter question seems to be confirmed, though not unambiguously. In subsequent resolutions, UNGA urge states to support UNHCR in

[256] Loescher, 2001, 113-114.
[257] UN High Commissioner for Refugees, 27 March 2012.
[258] United Nations Assistance to East Pakistan refugees through the United Nations focal point and United Nations humanitarian assistance to East Pakistan. 2790 (XXVI), 6 December 1971.
[259] Zieck, 2006 and Loescher, 2001.
[260] Betts, Milner and Loescher, 2008, 32.
[261] See *i.e* Refugees, 1972
[262] Gallagher, 1989, 583.
[263] UNGA, Report of the High Commissioner for Refugees. 3271 (XXIX), 10 December 1974.

its humanitarian tasks, by "[f]acilitating the accomplishment of [UNHCR's] tasks in the field of international protection" and strengthen durable solutions and the organisation's assistance programmes.[264] As such, it seems as if the Statute mandates were to be understood as humanitarian in character, which is was clearly stated in Article 2 of the UNHCR Statute. Coles argue that between 1950s and 1970s 'protection' and 'solutions' were considered political, while material assistance, which was viewed as 'humanitarian', began to take up more space in the interpretation of 'international protection'.

Resolution 32/68 from 1977 comments on UNHCR's "outstanding work" in "providing international protection and material assistance to refugees and displaced persons" and in Resolution 35/41 from 1980, UNGA welcomes UNHCR efforts in "protection and assisting refugees and displaced persons throughout the world".

5.6.2 Implications

Between 1977 and 1980, the agency's budget increased from $ 103 to 500 million, which reflects the broadening scope of UNHCR's activities. At the same time, between 1977 and 1982, the number of refugees grew from 3 million to over 10 million, and UNHCR increasingly engaged in operations in developing countries. According to Loescher, UNHCR became increasingly operational, running more and more programmes by itself and offering greater variety of services to refugees. In his observations, "UNHCR began to give greater priority to material assistance than to protection".[265]

It might be recalled, that the ExCom published its first Conclusions on International Protection in 1977, about at the same time as UNHCR had become highly operational with a strong field presence. It is noteworthy, that up until ExCom started adopting the conclusions, it does not seem as if

[264] See *i.e* UNGA, Report of the High Commissioner for Refugees. 3454 (XXX), 9 December 1975 and UNGA, Report of the High Commissioner for Refugees. 31/35, 30 November 1976.
[265] Loescher, 2001, 202.

defining 'international protection' was very central. UNGA resolutions did not clearly express what 'international protection' meant, while UNHCR did so in their reports, though these hold very limited legal weight. One could say that UNGA resolutions have been used as a system of authorizations. One part of the explanation might be that, as noted in Section 2.4.3, the UNHCR's ExCom did not enter into power until 1958. Furthermore, up until 1961, neither UNREF nor ExCom are viewed as to have addressed substantive matters of protection.[266] Due to the application of unspecific language in UNGA resolutions, UNGA gave room for manoeuvre to the UNHCR.[267] The same has been held to apply for the ExCom up until 1975, when the Sub-Committee of the Whole of International Protection was established.[268] It has been argued that the UNGA Resolutions of this period did not reflect changes in or for UNHCR itself.[269] Goodwin-Gill has argued that "the underlying rationale for the General Assembly's endorsement of UNHCR protection activities appears to be necessity; the lack of protection creates a vacuum which the international community tries to fill".[270]

Arguably, at some point, UNHCR viewed the operational effects of protection as more important than the need to clarify the concept itself.[271]

5.7 Conclusion: 'international protection'

By 1980, 'international protection' was both an operational and legal concept, with a perceived discrepancy between the two interpretations. Centrepieces in the legal understanding were the 1951 Refugee Convention with the right to a legal status under international law and the prohibition of *refoulement* as the most fundamental. In many ways, this is similar to the meaning of 'international protection' as it was understood at the time of adopting the UNHCR Statute, though arguably with a more prominent focus

[266] Sztucki, 1989, 290.
[267] Goodwin-Gill and McAdam, 2007, 28.
[268] See Section 2.4.
[269] McBride, 2009, 8.
[270] Goodwin-Gill, 1989, 12.
[271] See Stevens, who argues that humanitarian organisations frequently regard this to be the case, Stevens, 2013, 244.

on refugee entitlements. The operational counterpart focused on material assistance in a humanitarian approach, aiming to be non-political and thus acceptable in the Cold War context.

Throughout the 1950s and 1960s, UNGA was not always explicit on whether it endorsed UNHCR's interpretations of 'international protection' or not. During this period, UNHCR gained a growing autonomy, both due to the refugee crisis that prevailed in its early years and the recognition of the agency's ability to actually handle the situations, and due to the actual mandate expansion given by UNGA. This again strengthened UNHCR autonomy,[272] and arguably gave the agency leeway to interpreting its mandate. This also led to a discrepancy between the operational and the legal interpretation of 'international protection'.

[272] Barnett and Finnemore, 2004, 92.

Chapter 6: 1980 – 2017: 'International protection' under strain

6.1 Introduction

The aim of Chapter 6 is to analysis the evolution of 'international protection' between 1980s and up until today, which is understood to represent the third stage in the movement of UNHCR's responsibilities. This stage has been framed as 'protection and solutions'. Somewhat paradoxically, this period could be described both as a time where 'international protection' is allowed to expand in scope and as a time where delivering 'international protection' came under strain.

By focusing on questions of human rights, durable solutions and current protection challenges, I will highlight key developments that mark the most important shifts away from the previous interpretation of the concept. In Chapter 5, we learned that between 1950 and 1980, 'international protection' widened both in terms of who were covered by it and in terms of what it meant. UNGA resolutions and UNHCR Annual reports were used as primary sources to grasp the legal evolution that took place. As explained, ExCom did not adopt annual conclusions on international protection until 1977. In Chapter 6, the conclusions passed by ExCom will make out a considerable source to interpret 'international protection'. It might be recalled that in Chapter 2, I concluded that there are good reasons to hold these as binding on UNHCR, and if not, as a source of great importance in interpreting 'international protection'. Furthermore, UNHCR's own *Notes on International Protection* is a second source of importance in this chapter. To some extent, UNGA resolutions will also be analysed. Due to the shift in the legal sources I primarily draw upon, the structure will also be somewhat different. However, as in Chapter 5, I start the remainder of this chapter with a short section on the political context 'international protection' was interpreted in. Section 6.3 is focused on the strengthening of the role of human rights to the evolving meaning of 'international protection', while Section 6.4 looks on how seeking solutions to the problem of refugee became imperative in the interpretation of 'international protection'. In Section 6.5, I

map how the notion of 'protection space' has affected 'international protection' over the course of the 2000s.

6.2 Context

In the introduction of this thesis, I highlighted the inherent conflict between principles of state sovereignty and territorial supremacy on the one hand, and humanitarian norms of protection on the other as a key feature of the international refugee protection regime. While during the Cold War, UNHCR seemed to have been able to both confront and work with governments to strengthen refugee protection, towards the end of this epoch, the relationship between UNHCR and states became more strained.[273] At the end of the 1980s, UNHCR expressed hopes for a brighter future for refugee protection, but was disappointed:

> Hopes that the new era would bring concerted international action to promote human rights, foster economic development and address other causes of forced migration in a context of international peace and security have not thus far been realized (…) The cumulative effect of these developments has been to place even more severe strains on the international system for the protection of refugees and particularly on the institution of asylum.[274]

Political instability, intercommunal violence, armed conflicts and violations of human rights forced millions of people to flee. In addition, economic disruption, global recession, unemployment, disparities of wealth within and among industrialized and developing countries, demographic pressures, environmental degradation and relentless poverty have fuelled migratory flows while complicating efforts to respond to the needs of refugees.

Owing to an "explosion of refugee numbers", funding decreased per refugee, despite the fact that budgets soared.[275] So-called protracted refugee situations grew in numbers, and *encampment* became a term to describe the situations of many refugees. As I have argued throughout the thesis, chang-

[273] Ibid., 95.
[274] UNHCR, Note on International Protection, 31 August 1993
[275] Betts, Milner and Loescher, 2008, 37-38.

ing political environments have had far-reaching implications for UNHCR's interpretation of its mandate.[276] In 1980, UNGA notes that "refugees encounter serious difficulties in many parts of the world in obtaining asylum and that they are exposed to the threat of *refoulement*, arbitrary detention and physical violence".[277]

Deterrence policies and restrictive asylum regulations evolved. In 2015, Hathaway and Gammeltoft-Hansen observe that

> over the last three decades, even as powerful states routinely affirmed their commitment to refugee law, they have worked assiduously to design and implement non-entree policies that seek to keep most refugees from accessing their jurisdiction, and thus being in a position to assert their entitlement to the benefits of refugee law.[278]

It is within this context that 'international protection' has continued to evolve.

6.3 Human rights approach to 'international protection'

6.3.1 1980s: 'Basic human rights'

An increased focus on human rights is noticeable in both UNGA resolutions and ExCom conclusion form the end of 1970s and onwards. As a consequence of grave armed attacks against refugee camps during the late 1970s and early 1980s,[279] human rights were lifted higher on the agenda. In Chapter 5, Section 5.3.2, we saw that the ExCom in 1977 defined fundamental rights of the refugee as cornerstones of 'international protection'. By 1978, UNGA called for the necessity of ensuring refugee's "basic human rights, protection and safety" as a part of delivering 'international protection'.[280] This was followed up in subsequent resolutions and, after considerable de-

[276] Ibid., 50.
[277] UNGA, Report of the High Commissioner for Refugees. 35/41 A, 25 November 1980.
[278] Gammeltoft-Hansen and Hathaway, 2015, 240-241.
[279] Janmyr, 2014, 9-10.
[280] UNGA, A/RES/33/26, 29 November 1978.

bate,[281] the ExCom adopted conclusions noting that 'international protection' includes promoting "measures to ensure the physical safety of refugees and asylum-seekers".[282] Arguably, the use of the term “physical safety” is just a re-phrasing of the principles that could be derived from UNHCR Statute Article 2, the UDHR Article 14 and the 1951 Refugee Convention Article 33 (see Section 4.2.4 and 4.4). However, the concept of ‘basic human rights’ is arguably a new way of approaching ‘international protection’.

ExCom conclusions no. 21 and no. 22 marked the start of a more distinct human rights approach to the interpretation of ‘international protection’ that prevailed during the 1980s. In a series of conclusions, human rights principles are being held as a fundament to the mandate of providing ‘international protection’. In Conclusion no. 21, adopted in 1981, ExCom repeats the term and proclaims that “despite an increasingly broad understanding of the principles of international protection, the basic rights of refugees had been disregarded in a number of areas in the world”.[283] The question that arises is what ‘basic human rights’ in the context of ‘international protection’ entails. ExCom conclusion no. 22 lists a set of “minimum basic human rights standards” to be respected under the obligation to provide protection to refugees. The list includes, among others; the principle of non-penalisation for crossing a border, the principles set out in UDHR, access to the basic necessities of life, including food, shelter and basic sanitary and health facilities, non-discrimination, protection under law. Moreover, it highlights that “the fundamental principle of *non-refoulement* including non-rejection at the frontier-must be scrupulously observed”.[284] As such, ‘international protection’ is seen to encompass a responsibility to promote these rights which are held as ‘basic’ and applicable to all human beings. This interpretation was endorsed by UNGA the same year.[285]

[281] Janmyr, 2014, 11.
[282] ExCom, Conclusion no. 29 (XXXIV), General, 1983.
[283] ExCom, Conclusion no. 21 (XXXII), General, 1981a.
[284] ExCom, Conclusion no. 22 (XXXII), Protection of asylum-seekers in situations of large-scale influx, 1981b.
[285] UNGA, Report of the United Nations High Commissioner for Refugees. 36/125, 14 December 1981.

6.3.2 1990s: 'International protection': premised on human rights principles

By 1990, a human rights-based approach to 'international protection' was widely applied in UNHCR secondary law instruments. Although long, the below quote from the 1994 Note on International Protection is an illustrating example on how wide-reaching 'international protection' has been understood by UNHCR itself following the human rights impetus. It argues that the preamble of the 1951 Refugee Convention is a fundamental source for understanding the objective of UNHCR's mandate to provide 'international protection' and frames the convention as a human rights instrument;

> The overall objective of international protection is summarized in the Preamble to the 1951 Convention: "to assure refugees the widest possible exercise of ... fundamental rights and freedoms" which all "human beings [should] enjoy ... without discrimination". *International protection is thus premised on human rights principles*. From this human rights perspective, the reason for the United Nations (meaning, in this context, not merely the institution but the community of nations assembled within it) to assume responsibility for the international protection of refugees seems clear: fundamental rights and freedoms are normally secured for the individual by his or her Government. Since refugees do not enjoy the effective protection of their own Government, this normal remedy is unavailable, and it falls to the international community as a whole to provide the "international" protection necessary to secure to refugees the enjoyment of these rights.[286]

The quote raises many questions; some in terms of rules of treaty interpretation and others in terms of the validity of previous conclusions drawn in this thesis. Regarding questions of treaty interpretation, it is necessary to point to the fact that the 1950 UNHCR Statute came into force one year before the 1951 Refugee Convention. While I have argued that 'international protection' in the 1950 UNHCR Statue should be interpreted in light of the 1951 Refugee Convention (see discussion in Chapter 5, Section 5.3.1) there is no obvious legal argument for entrenching the objective of 'international protection' directly in the Refugee Convention's preamble. By doing so, the provision of 'international protection' can be understood to be almost all-encompassing. If the initial objective of 'international protection' was to

[286] UNHCR, 7 September 1994.

provide refugees with a legal status under international law, it could now be understood to place major and almost utopic responsibilities on UNHCR.

The Note on International Protection published by UNHCR in 1994 represent one of the agency's most detailed accounts of how 'international protection' is understood by the organisation. While it holds status as what I have referred to as secondary source of law, the Note has informed the discourse on 'international protection' and is much quoted. As such, as argued in Chapter 2, Section 2.4.4, it might represent a source to 'confirm' an interpretation of 'international protection' in so far as it has received approval by UNGA.

What is certain is that the human rights approach to interpreting UNHCR's mandate to provide 'international protection' caused its activities to widen even more.

> The tools of international protection range from the legal and diplomatic to the material and practical, from international conventions to national legislation, to diplomatic démarches to secure asylum for individual refugees threatened with refoulement, to such concrete measures as arranging basic food rations, clean water, and even planting defensive thornbush hedges around refugee settlements. Presence in the field and unhindered access to refugees (including asylum-seekers whose refugee status has not been determined) by UNHCR and others responsible for their protection have proved to be "tools" of crucial importance which are an indispensable complement to protection activities in the legal and political domains. Practical protection in the field requires close working relationships with government officials at all levels, particularly those in direct contact with refugees. Since material assistance is often essential for refugees' survival, it can also be a sine qua non of international protection.[287]

6.3.3 1996: The rights to seek asylum and the principle of *non-refoulement*

The institution of asylum, which according to ExCom "derives directly from the right to seek and enjoy asylum set out in Article 14 (1) of the 1948 Universal Declaration of Human Rights" has been manifested "among the most

[287] Ibid., para. 14.

basic mechanisms for the international protection of refugees".[288] In ExCom conclusion no. 25, adopted in 1982, the principle of *non-refoulement* is described as the basic principle of 'international protection' which "progressively acquiring the character of peremptory rule of international law".[289] While it has been argued that the principle of *non-refoulement* was somewhat disputed during the Cold-War,[290] an overall consensus on the importance of this principle started to manifest by the 1990s. In 1991, ExCom proclaimed *non-refoulement* and asylum "as cardinal principles of refugee protection"[291] and in 1993, UNHCR's annual Note on International Protection defined asylum as the "heart of international protection", which was defined as "admission to safety in another country, security against refoulement, and respect for basic human rights".[292] In its following resolution, UNGA confirms "asylum as an indispensable instrument for the international protection of refugees" along with "the fundamental principle of non-refoulement".[293] In 1996, ExCom adopted a conclusion stating that "the principle of non-refoulement is not subject to derogation",[294] meaning that it was vied as to hold status as *jus cogens*. Allian frames it as the "final bulwark" of 'international protection'.

6.3.4 Questions of interpretation

From an interpretation point of view, the discussion above raises questions as to where the ExCom and UNGA finds legal support for the human rights approach to interpreting UNHCR's responsibility to provide 'international protection'. It might be recalled that the term 'human rights' neither occurs in the 1950 Statute nor did it occur in the preparatory work (see Section 4.6). As held by Feller, "[w]hile [the 1951 Refugee Convention] traced its origins broadly to human rights principles, it was more about states' respon-

[288] ExCom, Conclusion no. 82 (XLVIII), Conclusion on safeguarding asylum, 1997.
[289] ExCom, Conclusions no. 25 (XXXIII), General, 1982.
[290] Allain, 2001, 546.
[291] ExCom, Conclusion no. 65 (XLII), General, 1991.
[292] UNHCR, 31 August 1993, para. 8 and 10.
[293] UNGA, Office of the United Nations High Commissioner for Refugees. 48/116, 24 March 1994.
[294] ExCom, Conclusion no. 79 (XLVII), General, 1996a.

sibilities than individuals' rights".[295] Stevens notes that "[t]he push by the UNHCR towards a human rights conception of protection is striking in light of the origins of international refugee law".[296]

Although Stevens may be right in calling the development striking, interpreting 'international protection' in light of human rights principles is well-grounded in the rules of interpretation found in VCLT Article 31 and ICJ jurisprudence. Recall that in Section 2.3.1 it was argued that other sources of law can be applied in the interpretation of legal instruments, if considered relevant. This has, as we remember, been confirmed by ICJ in the *Namibia case*, among others. As such, the UNHCR Statute will necessarily adapt in light of the evolution of the legal framework of the international refugee protection regime as a whole. Consequently, the weight accorded to the Statute's preparatory work and the circumstances of its conclusion might decrease over time due to their status as supplementary means of interpretation.

As human rights law and humanitarian law started to evolve on the international plane, it is relevant to consider whether 'international protection' should be interpreted in light of this evolution. When ExCom adopt conclusions confirming this, UNHCR is most likely obligated to act accordingly. Chetail goes as far as to argue that human rights law has transformed the legal protection framework within the international refugee regime "to such an extent that (…) human rights law is the primary source of refugee protection, while the [refugee law] is bound to play a complementary and secondary role".[297] A less radical approach could be grounded in the work of Arthur Helton who states that "refugees are no less protected than are all other person under international human rights law".[298] He concludes that;

> [i]n sum, refugee protection encompasses two basic issues. One is determining the coverage afforded to refugees under international law; the other concerns compliance where coverage exists. The 1951 Convention/1967 Protocol and the Statute of the Office of the United Nations High Commissioner for Refugees are tradition-

[295] Feller, 2001a, 131.
[296] Stevens, 2013, 242.
[297] Chetail, 2014, 22.
[298] Helton, 1990, 128.

> al sources of protection of refugees. Principles embodied in humanitarian, human rights and aliens law also apply to their situation.[299]

The implications of this is that is that UNHCR's 'international protection' mandate must be interpreted in light of these principles and thus, UNHCR's responsibilities will also be encompass human rights obligations.[300] The evolution towards a human rights approach to interpreting 'international protection' has been criticised for being "largely illusory", due to the political, economic and diplomatic determinants of the protection delivered to refugees.[301] Parallel to the human rights approach to 'international protection', UNHCR also sought to strengthen its focus on seeking 'durable solutions'.[302] Eventually, from the beginning of the 1980s, UNHCR was accused of an "increased tendency to violate refugee rights".[303] This will be the subject of Section 6.4 below.

6.4 'International protection' as 'durable solution'

6.4.1 1980s: Durable solutions: precondition for 'international protection'

UNHCR's transition from being a non-operational to operational agency is closely connected to the mandate as 'focal point' in large humanitarian operations as discussed in Chapter 5, Section 5.6 and with the subsequent shift towards interpreting 'international protection' in light of 'durable solutions'.

---

[299] Ibid., 128-129.

[300] Besides interpreting 'international protection' in light of human rights principles, UNHCR might also hold human rights obligations through attribution and derivative international legal personality. See *i.g* Janmyr, 2014, 228-272, Kinchin, 2016 and Edwards, 2005. Also, in 1991, UNHCR looked to general human rights law and humanitarian law, as sets of principles that could complement refugee protection in situations not specifically covered by international refugee law. See *i.e* UNHCR, Note on International Protection, 9 September 1991.

[301] Hathaway, 1991, 115.

[302] UNHCR replaced 'permanen' with 'durable' in the 1970s. In 1979, ExCom started applying the term 'durable' instead of 'permanent' to describe the solutions sought. The UNHCR Statute remains non-amended, see *i.e* ExCom, Conslusion no. 15 (XXX), Refugees without an asylum country, 1979. Arguably, the shift had "significant" implications, see *i.e* Barnett and Finnemore, 2004, 99.

[303] Barnett and Finnemore, 2004, 74.

This started in the 1980s, and was strengthened under High Commissioner Jean-Pierre Hocke.[304]

In UNHCR's Note on International Protection from 1986, 'international protection' is defined to revolve around three components; 1) legal protection on an individual level; 2) strengthen refugee law on an international level and/or in national legislation, and; 3) search for 'durable solutions'. UNHCR goes on to argue that 'international protection' must ultimately be defined as the search for solutions, which entails a need for "action on the ground".[305]

What is worth noting is that 'durable solutions' is held as the "perhaps most important" of the three components of 'international protection' and is now seen as to represent "an essential precondition for the effective exercise of the High Commissioner's international protection function". In the Note, UNHCR argues that because reaching a 'durable solution' is the primary goal of the agency's activities, 'international protection' is essentially of a temporary nature.[306] The Note argues that 'durable solutions' might be "lost sight of" if the agency is preoccupied with the provision of 'international protection';

> durable solutions may sometimes be lost sight of in the process of meeting immediate protection objectives. For example, the non-refoulement of refugees, their admission to camps and the provision of assistance can meet immediate material and physical needs; but living as well as life itself requires attention.[307]

Somewhat radically, it is concluded that "providing immediate protection without identifying durable solutions should not be regarded as an end in itself".[308] The Note seems to depart from a series of UNGA resolutions and ExCom conclusions which separate UNHCR's mandate into two distinct functions: 1) providing 'international protection' an; 2) seeking 'permanent

[304] In 1985, Jean-Pierre Hocke, became High Commissioner for Refugees. He was former director of Operations at the International Committee of the Red Cross, "the most operational humanitarian agency" at the time, and apparently headhunted to make UNHCR more operational. See *i.e* Loescher, 2001, 240.
[305] UNHCR, Note on International Protection, 5 July 1986.
[306] Ibid.
[307] Ibid.
[308] Ibid.

solutions'. Furthermore, since 1981, both ExCom and UNGA proclaimed the "fundamental importance of international protection as the primary task entrusted to" UNHCR.[309] To my understanding, the wording implies that 'international protection' is to be understood as an independent mandate of primary priority to UNHCR. As such, when UNHCR in the Note quoted above expresses concern that the search for 'durable solutions' is under-prioritized due to the safeguarding of protection needs, it seems somewhat out of touch with the conditions of interpretation laid out in ExCom conclusions and UNGA resolutions. As might be recalled from the discussion in Chapter 2, Section 2.4 on primary sources of interpretation, these are sources granted either binding force, or close to decisive weight in determining how 'international protection' is to be interpreted. As such, the Note seems to depart from established practice of superior organs.

UNHCR's new practice of interpreting 'durable solutions' as a precondition for 'international protection' stands in stark contrast to the notion that providing 'international protection' is in fact an end in itself. It might be recalled that in Chapter 4, Section 4.2.2, I asked whether 'international protection' was to be interpreted in light of 'permanent solution' or not, and if so, whether that would construct limits as to what the mandate to provide 'international protection' would encompass. With recourse to the VCLT Article 31, I argued that 'international protection' had to be given meaning in light of its context, which included UNHCR's second mandate to seek 'permanent solutions'. That being said, I noted that it would seem somewhat unsatisfactory to provide UNHCR with a two-tier mandate without both levels filling a distinct function. Thus, the conclusion reached was that 'international protection' should be understood as to hold as autonomous meaning, although – and due to its nature as a substitute for state protection – 'international protection' must be understood as a temporary measure.

This conclusion seems to find support in Goodwin-Gill's interpretation of UNHCR's 'international protection' mandate, which he argues is an end in itself, "so far as it serves to ensure the fundamental human rights of the individual". Furthermore, it is held that "[n]either the objective of solu-

[309] ExCom, 1981a.

tions nor the imperatives of assistance, therefore, can displace the autonomous protection responsibility which is borne, in its disparate dimensions, by both states and UNHCR".[310]

While the conclusion reached in UNHCR's Note on International Protection seems to stand in contrast to the practice of interpretation that evolved in UNGA and ExCom, it did not take long before these organs followed suit. As we saw in Chapter 5, this is not uncommon for UNHCR, which often gives express to a certain degree of 'distinct will' to create secondary law which is later endorsed through active or tacit approval. By 1987, ExCom notes that "international protection is best achieved through an integrated and global approach to protection, assistance, and durable solutions"[311] and in 1991, it states that *"*the protection of refugees remains an ongoing, difficult challenge in need of solution-oriented approaches".[312] By 1995, ExCom proclaims that "that the search for solutions to refugee problems is an integral part of the High Commissioner's mandate for international protection".[313] ExCom's Standing Committee argues that "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".[314]

As we shall see below, the increasing focus on durable solutions altered UNHCR's policy priorities towards repatriation and prevention.

6.4.2 1990s: Repatriation and prevention

In the above section, we saw that from the beginning of the 1980s, the meaning of 'international protection' evolved from a focus on providing a legal status to refugees, promoting the rights to seek and enjoy asylum and securing the principle of *non-refoulement,* to also include the achievement

[310] Goodwin-Gill, 2014, 37.
[311] ExCom, Conslusion no. 46 (XXXVIII), General, 1987.
[312] ExCom, 1991.
[313] ExCom, Conclusion no. 77 (XLVI), General, 1995. See also ExCom, Conclusion no. 71 (XLIV), General, 1993.
[314] Committee, Overview of Regional Developments, 1996b.

of ‘durable solutions’. ‘International protection’ seemingly ceased to be the primary aim of UNHCR, replaced by the aim of seeking ‘durable solutions’. As we have seen above, UNHCR even held that targeting short-term ‘international protection’ could in fact obstruct a clear focus on ‘durable solutions’.

From the beginning of the 1990s, repatriation became the favoured approach to ‘durable solutions’ and High Commissioner Sadako Ogata named the 1990s ‘The Decade of Repatriation’. Repatration, she argued, was a part of the comprehensive approach to ‘international protection’ of refugees.[315] In 1992, UNHCR argued that the organisation needed to “strike(s) a humane balance between the interests of affected States and the legal rights, as well as humanitarian needs, of the individuals concerned”.[316] The quote points to the fundamental conflict between state sovereignty and the rights of refugees described in Chapter 1, and represents a new trend in UNHCR’s official interpretation of its mandate. To my knowledge, nowhere before had UNHCR seen it as its task to consider the interests of States in defining the scope of its mandate. In the previously quoted Note on International Protection of 1994, UNHCR states that

> [f]rom the standpoint of the international protection of refugees, finding remedies for the lack of protection in countries of origin is essential to achieve the preferred solution of voluntary repatriation, and also to prevent future refugee flows.[317]

The above quote illustrates how the merging of providing ‘international protection’ and seeking ‘durable solutions’ eventually resulted in UNHCR targeting the situation of refugees both outside and *inside* countries of origin. Suddenly, UNHCR identified the prevention of refugee movements as an objective of ‘international protection’.

As we learned in Section 6.3, the 1980s were partly characterized by UNHCR’s focus on defining ‘international protection’ from a human rights perspective. This continued into the 1990s, at least in formal legal instru-

[315] “As political settlements sprout in this new global environment of reconciliation, I see 1992 becoming the first year in a decade of repatriation for refugees”, Ogata, 25 May 1992.
[316] UNHCR, Note on International Protection, 25 August 1992, para. 38 and 39.
[317] UNHCR, 7 September 1994, para. 58.

ments, and we saw a strengthening of the principles of asylum and *non-refoulement*. However, critics have argued that the human rights focus within the international refugee protection regime was short-lived,[318] and that the regime developed into a two-tiered system favouring European asylum-seekers. In practice, this arguably entailed that UNHCR's response to refugee movements was largely limited to "localized material and other aid in tandem with the ad hoc promotion of voluntary repatriation" which sought to "localize and contain refugees in the less developed world" on the one hand, and facilitate "exile abroad for European refugees" on the other.[319] Barnett and Finnemore hold that "the ultimate form of protection was defined as getting refugees home as soon as possible", which caused the refugees' own choices to be neglected.[320]

The evolution of the understanding of 'international protection' as a means towards the end – 'durable solutions', must be understood in light of the political context. In Section 6.2 I highlighted the growth of restrictive asylum policies and significantly increasing numbers of refugees worldwide as factors that put UNHCR and 'international protection' under strain. Furthermore, in a conclusion from 1989, ExCom recognised that refugee movement could have "destabilizing effects"[321] and in ExCom conclusion no. 80, it is stated that "involuntary displacement (…) can impose significant intra-regional burdens, and may also affect security and stability at the regional level".[322] Moreover, between 1991 and 2000, the Security Council adopted a number of resolutions linking refugee movements with security concerns.[323] As such, the so-called 'preventative protection' shift was a result of outside pressure. Due to its implementation of policies aiming to push for repatriation, UNHCR has been accused of violating the fundamental principle of *non-refoulement*.[324] Furthermore, due the policy orientation towards preventing people from becoming refugees, UNHCR implemented

[318] Kneebone, 2009, 18.
[319] Hathaway, 1990, 165.
[320] Barnett and Finnemore, 2004, 75.
[321] ExCom, Conclusion no. 58 (XL), Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 1989.
[322] ExCom, Conclusion no. 80 (XLVII), Comprehensive and regional approaches within a protection framework, 1996.
[323] For an overview, see *i.e* Goodwin-Gill and McAdam, 2007, 5-9.
[324] See *i.g* Barnett and Finnemore, 2004, and Loescher, 2001.

measures that later resulted in jeopardising the right of refugees to flee their countries, to seek asylum from persecution in other countries.[325] Clearly, this represents a critical breach of some of the cornerstones of 'international protection'.

6.4.3 Questions of interpretation

Restricting ourselves to this shift in interpretation, rather than the actual and partly failing implementation, a question that arises is whether the repatriation and prevention approach to interpreting 'international protection' is in line with rules of interpretation outlined in Chapter 2.

To my understanding, the focus on 'durable solutions', hereunder repatriation, is in accordance with Article 31 of the VCLT (see general discussion on 'durable solutions' above, Section 6.4.1). However, the 'prevention protection' approach – illustrated by the quote from the 1994 Note on International Protection – is more challenging, and for several reasons. First of all, applying VCLT Article 31, the concept of 'international protection' in Article 1 of the UNHCR Statute seem to flow from a premise that the person being provided protection is *outside* of their country of origin (Section 1.2.1 and 4.2.2). While the ordinary meaning of 'international protection' gives no clear answer, in my understanding, the context does. It might be recalled that in order to be granted status as refugee in accordance with UNHCR Statute Article 6 (see Section 1.2.1), a person needs to have crossed an international border. Furthermore, every activity highlighted in Article 8 of the Statute as measures of 'international protection' are directed towards the refugee. As such, UNHCR's mandate seems to come into force at the moment a person leaves her country of origin.[326] Thus, to interpret preventative measure as the ultimate form of 'international protection' seems to be incompatible with the textual context of Article 1 in the

[325] Chimni, 1993, 444, with reference to newspaper article by Bill Frelick, 1993.
[326] "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee", Handbook on procedures and criteria for determining refugee status: under the 1951 Convention and the 1967 Protocol relating to the status of refugees, 1988.

UNHCR Statute. Furthermore, it might be recalled that in Chapter 4, Section 4.2.3, I concluded that because the lack of state protection is the defining characteristic of all refugees, remedying this situation must presumably be the primary objective of 'international protection'. This, I argued, would be done through the representation of refugees on the international plane. However, and again, it is conditioned on the lack of state protection actually having manifested. Indeed, to my knowledge, the preparatory work does not even mention prevention activities as a part of the mandate to provide 'international protection' (see Section 4.3).

The above analysis is not necessarily a hindrance to the doctrine of implied powers being activated. From Chapter 2, Section 4.2.2, it might be recalled that when the express powers of an organisation, that is, the powers one can read from the principles of interpretation derived from VCLT Article 31, are perceived as insufficient to meet the intentions of the drafters, the doctrine of implied powers (or doctrine of effectiveness) is invoked as a tool for extension. This, however, is not a carte blanche doctrine to evoke any activity remotely related to its original mandate. On the contrary, it has to be entrenched in the objectives of the international organisation and "essential to the performance of its duties".[327] It is clear that the objective of 'international protection' has evolved since 1950, and arguably encompasses more than providing refugees with a legal status under international law, securing the principle of *non-refoulement* and promoting the fundamental entitlement according to the 1951 Refugee Convention. That being said, it is hard to accept that the concept also entails preventing people from becoming refugees. Not only would it pose challenges to the non-political character of UNHCR flowing from Article 2 of the Statute, but to my knowledge, there are no UNGA resolutions or ExCom conclusions confirming such an interpretation. In spite of the fact that UNHCR adopted the already quoted Note on International Protection in 1994, stating that repatriation and prevention are the primary aims of 'international protection', this bears little weight on its own.

[327] *Reparations for Injuries Suffered in the Service of the* United *Nations*, . See Section 2.3.2.

In conclusion, the prevention approach to interpreting 'international protection' is not in line with rules of interpretation. This conclusion is echoed in the words of Barutciski, who warns against a "non-legal approach to UNHCR's mandate extension" and concludes that "[a] regime that is not based on coherent and workable legal principles is destined to fail the world's refugees".[328]

Although currently faced with a current protection crisis and decreasing funding, UNHCR seem to have left the 'prevention protection' policies. And while seeking 'durable solutions' is still a priority, it is broadly recognised that to many refugees, neither repatriation, resettlement nor integration are available in the foreseeable future. To add to the challenge, millions of the world's refugees are situated in countries where the legal framework of the international refugee protection regime does not apply. After a short introduction to interpretation of 'international protection' in 2000s, Section 6.5 analyses how 'international protection' is understood specifically in this context.

6.5 'International protection' in crisis?

6.5.1 2000: 'International protection': solving refugee problems in the field

> We recognize that millions of refugees around the world at present have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection.[329]

The above quote is taken from the New York Declaration for Refugees and Migrants of 2016, which was adopted after the first ever UN Summit on migration. The quote raises a question; when 'durable solutions', one of the principal goals of 'international protection', is unavailable, how does UNHCR meet its international legal responsibility to provide just that – 'international protection'?

[328] Barutciski, 2002, 381. For an interesting exchange on UNHCR and its engagement inside countries of refugee origins, see *i.e* Morris, 1997 and Barutciski, 2002.
[329] UNGA, New York Declaration for Refugees and Migrants. A/RES/71/1, 3 October 2016.

As the quote indicates, 'international protection' is understood to embody several goals. In the annual Note of International Protection from 2009, UNHCR stated that

> International protection function has evolved greatly from being a surrogate for consular and diplomatic protection to ensuring the basic rights of persons of concern to the UNHCR. International protection encompasses a range of concrete activities, covering both policy issues and operational concerns, and is carried out in cooperation with States and other partners, with the goal of enhancing respect for the rights of people of concern and resolving their problems.[330]

UNHCR thus identifies the enhancement of respect for the rights of refugees *and* resolving their problems as the goal of its mandate to provide 'international protection'. The Note leaves it unclear what the term "problems" of refugee specifically entails. However, judging from the original objective and purpose of UNHCR, it could refer to the lack of legal status. While this is part of the answer, we have seen that UNHCR has widened its scope of activates significantly. As a consequence, it now targets a broad range of problems refugees face as a result of being forced to leave its home. Key to UNHCR's problem-solving is service and assistance delivery in the field. And while we recall that field operations started as early as in the 1960s and 1970s, there seemed to be a discrepancy between the legal and the operational understanding to 'international protection'. In my view, this discrepancy seems to an extent to have dwindled.

Already in 2003, ExCom conclusion no. 95 confirms that "international protection is both a legal concept and at the same time very much an action–oriented function" which should be operationalised.[331] In its subsequent session, UNGA passed a resolution which represents a vivid exemplification of how far away from the original 'international protection' mandate we have come. In the resolution, it is proclaimed that "international protection of refugees is a dynamic and action-oriented function". It then goes on to note that "the delivery of international protection is a staff-intensive service that requires adequate staff with the appropriate expertise,

[330] Refugees, 2009, 20.
[331] Conclusion no. 95 (LIV), General, 2003.

especially at the field level".[332] In sum, from being a non-operational agency, with a small staff, a limited budget and a mandate focused on remedying the legal aspect of the refugee situation, UNHCR is now a staff-intensive service-provider. As this is sanctioned in UNGA, there are no legal grounds for objecting to such an evolution. One current challenge, however, is what Stevens frames as a plethora of 'protection' oriented concepts and "a lack of a clear or consistent meaning" of what 'international protection' really means.[333] In the next section, we shall see how 'international protection' is interpreted within a 'protection space'.

6.5.2 2010: 'Protection spaces'

> Protection is first and foremost about direct protection delivery in the field.[334]

In the 2010 Note on International Protection, UNHCR begins by stating that the world is facing "challenges to the protection space", but nowhere in the note is the concept defined.[335] Nevertheless, under the headline "protection space", UNHCR describes the 'international protection' activities undertaken in countries that have not ratified the 1951 Refugee Convention or its 1967 Protocol. Thus, the term 'protection space' is taken to describe the space in which UNHCR delivers 'international protection' in countries outside of the legal refugee protection framework, but nevertheless a part of the international refugee protection regime.

Barnes describes 'protection spaces' as a measure to provide 'international protection' to refugees. In her words; "before UNHCR can provide refugees with protection, an environment conducive to the facilitation of this protection is required. In certain contexts, such an environment has come to be called 'protection space'".[336] In the above quoted Note on International Protection, UNHCR lists several activities in which the agency engages in a

[332] UNGA, Office of the United Nations High Commissioner
for Refugees. 59/170, 2004.
[333] Stevens, 2013, 234 and Stevens, 2014, 55.
[334] Feller and Klug, Max Planck Encyclopaedia of Public International Law, Oxford,
[335] UNHCR, Note on International Protection, 2010.
[336] Barnes, 2009, 7.

'protection space'. This includes refugee status determination (RSD), which is described as "the basis for the delivery of protection and assistance". As recognised in the UNGA resolution from 2004, this is a staff-intensive activity that requires presence in the field. Furthermore, the Note lists activities that bear resemblance to the legal protection measures provided by the very first refugee protection agencies under LoN, including individual legal guidance and liaison functions. Importantly, the supervision of compliance with the principle of *non-refoulement* is central. In such an environment, one would assume that the promotion of the 1951 Refugee Convention was defined as a top-priority in providing 'international protection'. It might be recalled that the Refugee Convention is recognised as the fundamental pillar of the international refugee protection regime. What is noteworthy, however, is that the Note bears no mentioning of the 1951 Refugee Convention.

While writing the article on 'protection spaces', Barnes worked as an associate resettlement officer at the UNHCR. Recognising that UNHCR offers no clear definition of the concept, she argues that 'protection space' could be understood

> as an environment which enables the delivery of protection activities and within which the prospect of providing protection is optimized. It is important to remember that that protection space is fluid and expands and retracts, thus requiring a variety of efforts to ensure its continued existence and expansion.[337]

The quote highlights the need to ensure a "continued existence and expansion". One could argue that promoting the 1951 Refugee Convention would be one significant manner in which UNHCR could meet this objective. However, as for instance in Lebanon, which currently hosts 1.1 million refugees, though not a signatory to the Refugee Convention, UNHCR has "toned down" its request that the country becomes party to the treaty.[338] Martin Jones raises several valid concerns in this regard;

> The adoption of the language of 'protection space' to describe the task to be performed in countries that have not signed the 1951 Refugee Convention raises concerns based upon how it privileges international interests, fora and UNHCR as the

[337] Ibid., 12.
[338] Janmyr, 2016, 64.

> negotiator; devalues the normative strength of obligations towards refugees; and allows the underlying responsibilities for the provision of refugee protection to drift from the state to UNHCR.[339]

There are two aspects I would like to dwell on; 1) the drift of responsibilities from the state to UNHCR, and; 2) the normative strength of obligations towards refugees.

Already in 2009, Slaugther and Crisp argue that UNHCR had been transformed to an organisation that "shares certain features of a state".[340] This characterisation was given due to UNHCR taking on tasks such as RSD, issuing documents, providing access to shelter, food, water, health care and education, administering and managing refugee camps, and establishing policing and justice mechanisms that enable refugees to benefit from some approximation to the rule of law.[341] While Puggoini questions whether such activities could be understood as 'international protection' at all,[342] Zieck points to a fundamental challenge in defining the meaning of 'international protection' that arises when UNHCR "is co-acting in the same territory [as states] and engages in tasks that appear to stretch far beyond those originally entrusted to it", that is; "where does national protection end and international protection begin?"[343]

From Chapter 3 and up until now, we have seen that 'international protection' in the UNHCR Statute has expanded immensely from when it was adopted. This has been grounded in UNGA resolutions, ExCom conclusions, tacit approval or the doctrine of implied power. As such, the actual expansion into a protection sphere that is strikingly overlapping with that of state's is not necessarily a breach of the rules of interpretation as outlined in VCLT Article 31 and 32. Indeed, the fact that some of the key refugee hosting countries at the moment have not ratified the 1951 Refugee Convention or its 1967 Protocol might actually obligate UNHCR to take on bigger responsibility of meeting the 'basic human rights' of refugees and seeking to

[339] Jones, 2014, 257.
[340] Slaughter and Crisp, 2009, 2.
[341] Ibid., 2.
[342] Her conclusion is no. In Puggioni's view, UNHCR only delivers assistance, Puggioni, 2016, 59.
[343] Zieck, 2006, 324.

'solve their problems'. Nevertheless, in a time of so-called protection crisis there is need for a clarified division of obligations. If not, how do we know what actor to hold accountable? This raises a bigger question; when UNHCR's mandate to provide 'international protection' has been interpreted to encompass such a wide range of mechanisms, how could the obligations possibly be met? In my understanding, it boils down to identifying what UNHCR *has to do*. This relates to the second point in Jones' concerns on 'protection spaces'; the normative strength of obligations towards refugees.

According to the UNHCR Statute Article 8 a, UNHCR "shall provide for the protection of refugees falling under the competence of his Office by promoting the ratification of international conventions for the protection of refugees". As we know, the 1951 Refugee Convention is *the* convention to be promoted under UNHCR. The question which arises is whether UNHCR is acting in compliance with its own constituent instrument by not promoting the ratification of the 1951 Refugee Convention.

To interpret Article 8 a of the UNHCR Statute, we apply the VCLT Article 31 as outlined in Section 2.3.1. According to Article 31, we have to start in the ordinary meaning of the term – in our case – "shall".

The term "shall" is an imperative giving express to an obligation. Judging from reading the word in isolation, it seems to leave little, if no, room for exceptions. However, according to VCLT Article 31 and 32, when interpreting a legal instrument, recourse must also be made to its 'context', 'objective and purpose', in addition to 'preparatory work' and 'circumstances of the conclusion', if to 'confirm' an interpretation (see Chapter 2). Article 32 also allows for subsequent practice of UNHCR to be used as a source of interpretation, if used to 'confirm' the above conclusion, and if approved, either through active endorsement or tacit approval, by states.

As the UNHCR Statute holds no articles expressing that exceptions are to be made under certain circumstances, I find that the context supports the above reading of 'shall'. Furthermore, the objective and purpose does not seem to allow for UNHCR to deviate from one of the fundamental activ-

ities placed on the organisation in order to achieve 'international protection'. It might be recalled that representation on the international plane in order to remedy the lack of legal status under international law was seen to be at the heart of UNHCR's objective and purpose (see Section 4.2.3). As the international refugee protection regime evolved, the 1951 Refugee Convention became key to meeting UNHCR's statutory obligations. To my understanding, neither the findings in the preparatory work nor in the circumstances at the time of the Statute's conclusion indicate that a clear conclusion in light of VCLT Article 31 should be doubted.

In numerous ExCom conclusion and UNGA resolutions highlight and stress the promotion of the 1951 Refugee Convention and its 1967 Protocol as the most central pillar of 'international protection'. Almost paradoxically, the 2010 Note on International Protection, where UNHCR deliberates on 'protection spaces', defines the 1951 Refugee Convention as "the cornerstone of international refugee law".[344] Furthermore, in the latest UNGA resolution, the organ reaffirms that the 1951 Refugees Convention is "the foundation of the international refugee protection regime" and recognizes the importance of "their full and effective application by States parties and the values they embody".[345] After applying the rules of VCLT Article 31 and 32, I find that UNHCR's non-promotion of the 1951 Refugee Convention in major refugee hosting countries to raise serious concerns as to whether the organisations fulfils its international legal responsibilities. That being said, the doctrine of implied powers and effectiveness might alter this preliminary conclusion.

As we have seen throughout the thesis, the doctrine of implied powers and effectiveness has been used as to entrench the expansion of 'international protection'. Perhaps we are able to ground the non-promotion of the 1951 Refugee Convention in this doctrine?

In the Repatriations case, where we first saw express given to the doctrine of implied powers, ICJ stated that an international organisation

[344] UNHCR, 2010.
[345] UNGA, Office of the High Commissioner for Refugees. 71/172, 2016.

"must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".[346] The ECJ has held that the doctrine shall be used in order for an international organisation to "safeguard its prerogatives". At first glance, one might conclude that the doctrine of implied powers cannot be taken to allow UNHCR to deviate from a defining aspect of its mandate, that is, promote the legal status of refugee under international law. In Section 2.3.2 it was concluded that the doctrine of implied powers/doctrine of effectiveness can be invoked as a tool for extension. However, if UNHCR decides not to promote the 1951 Refugee Convention, in order to gain access to refugees, the answer to this question is less obvious. As we have seen throughout the thesis, the meaning of 'international protection' has expanded beyond the legal representation of refugees on the international plane. It also includes providing material assistance and meeting the basic human rights of refugees, understood to encompass access to shelter, food, sanitation, health care and primary education. When a conflict arises between one aspect of 'international protection, that is, the promotion of the 1951 Refugee Convention, and another aspect, that is, providing assistance and services to refugee, the doctrine of effectiveness could arguably allow exceptions to be made. As for now, I will suggest no final conclusion. To my understanding, this question will have to be continued to be debated in the future. My hope is that I have contributed to this debate by establishing a point of departure, that is, concluded on the international legal responsibility as originally derived from the UNHCR Statute. However, one might ask whether UNHCR's mandate to provide 'international protection' to refugees, as this was meant at the time of adopting the Statute, has been lost in interpretation.

6.5.3 Conclusion: The meaning of 'international protection' today

In its 2016 Note on International Protection, UNHCR describes the current state of affairs in the following way:

[346] *Reparations for Injuries Suffered in the Service of the United Nations*, , 182. See Section 2.3.2.

> Eighty-six per cent of those in need of international protection remained in middle-income and developing countries, particularly States neighbouring those mired in displacement-inducing conflicts, such as the Islamic Republics of Iran and Pakistan. Half of the top 10 refugee hosting countries – Chad, Ethiopia, Kenya, Uganda and Sudan – are located in sub-Saharan Africa. With respect to the Syria crisis, just five countries – Egypt, Iraq, Jordan, Lebanon and Turkey – have shouldered the responsibility of hosting over nine tenths of all of the refugees. Turkey is currently the largest host country in the world, with 2.7 million Syrian refugees, while Pakistan follows as the second-largest host country, with 1.6 million refugees – almost all from Afghanistan. Beyond these, in other countries in Africa, the Americas, Asia, Europe and the Middle East, refugees were also received and hosted in numbers that were smaller in absolute terms, but which, nonetheless, tested or overstretched the capacity of national reception and asylum systems and host communities.[347]

In this context, Stevens argue that because key refugee hosting states are not parties to the 1951 Refugee Convention, the current situation is more precarious and subject to change than it would be if these states has acceded to the treaty.[348] Does this context matter to the interpretation of 'international protection'?

Throughout the thesis, we have seen that the interpretation of 'international protection' is a highly dynamic activity. Many have pointed to the lack of a consistent and truly comprehensive definition of 'international protection', a lack that renders the entitlements of refugees unstable and volatile. The below quote highlights the flexibility in how 'international protection' is understood;

> Persons having fled Syria who cross international waters in search of international protection should be allowed to disembark at a place of safety, meaning a place which is physically safe, where basic needs can be met, and where they are safe from *refoulement*. UNHCR appeals to all States to ensure that civilians fleeing from Syria are protected from *refoulement* and afforded international protection, the form of which may vary depending on the processing and reception capacity of countries receiving them, while guaranteeing respect for basic human rights.[349]

[347] UNHCR, Note on International Protection, 2016a.
[348] Stevens, 2016, 275.
[349] International protection considerations with regards to people fleeing the Syrian Arab Republic, update II, 22 October 2013, in Stevens, 2014, 89.

‘International protection’ is thus conditioned by a fundamental core of access to seeking asylum, the principle of *non-refoulement* and basic human rights. The rest seem to depend on the context. In the 2016 Note on International Protection, UNHCR discusses the future strengthening of ‘international protection’ and lists “core elements” of which to build this on. These are

> access to territory, registration and group-based or individual asylum processes, the establishment of adequate reception arrangements, and the granting of an appropriate status and associated rights for those found to be refugees

The ExCom conclusion of the same year seem to confirm these elements, while at the same time expressing an all-encompassing approach to understanding ‘international protection’. The conclusion states that the following quote represents the most central measures to provide ‘international protection’;

> the principle of non-refoulement, as well as the importance of providing assistance and seeking comprehensive approaches towards the implementation of durable solutions, as appropriate, from the outset of a displacement situation, while ensuring that no-one is left behind.[350]

In my view, the above quote more or less captures all aspects of what we have seen to fall within the scope of proving ‘international protection’ throughout UNHCR’s 67 years of existence. In many ways, we again see a discrepancy between the operational understanding of ‘international protection’ and the legal one. Perhaps this is what Puggioni points to when stating that we are seeing the emergence of a “non-protection regime”, characterised by “questions of sovereignty, borders control, crisis management, challenges in the south, and interpretation of legal definitions”?[351] Without a meaningful definition of what ‘international protection’ entails it is close to impossible to hold UNHCR accountable for its international legal responsibilities towards providing refugee with ‘international protection’ and it is

[350] ExCom, Conclusion no . 112 (LXVII), On international cooperation from a protection and solutions perspective, 2016.
[351] Puggioni, 2016, 59.

equally challenging for refugees to voice demands for their entitlements under UNHCR to be met.

Part III:

Conclusions

Chapter 7: Concluding remarks and thoughts for the future

Providing International Protection to Refugees – UNHCR's mandate lost in interpretation? is an analysis of how the meaning of 'international protection' in Article 1 of the UNHCR Statute has evolved over time. My overall conclusion is that the meaning of 'international protection' has been subjected to a tremendous evolution in the course of UNHCR's 67-year long history.

At the time of adoption of the UNHCR Statute, 'international protection' meant providing refugees with represent on the international plane. In 1950, refugees were described as an anomaly under international law (Chapter 3) and UNHCR was established as the institutional centrepiece of the emerging international refugee protection regime as a means to remedy this. Thus, I concluded that 'international protection' evolved around to core objectives;

- Promoting recognition under international law through refugee status
- Promoting physical safety from persecution through access to the territories of states.

'International protection' was a non-operational concept that provided UNHCR with a supervisory function.

Today, 'international protection' is a highly flexible concept, but seemingly consists of the following core elements;

- The respect for *non-refoulement*
- Status under international law
- The rights to seek asylum
- Basic human rights, including the rights to shelter, food, and basic sanitary and health facilities
- Non-discrimination
- Protection under law.

‘International protection’ has become an operational concept, which also includes objectives of ‘durable solutions’.

Through this an attempt to come closer the core of UNHCR’s statutory international legal responsibilities, I find that the concept of ‘international protection’ is a highly flexible and volatile term. This raises considerable questions related to accountability of UNHCR and the entitlements of refugees. While in legal documents, UNHCR seem to act in compliance with Article 1 of the UNHCR Statute, in practice, it seems like the original meaning of ‘international protection’ has been lost in interpretation. ‘International protection’ is a concept in flux, and raises challenging legal questions in regards of responsibility. This should in my opinion be subject to more research, as currently millions of refugees are dependent on UNHCR mandate to provide ‘international protection’. They should be entitled to a clear and concise meaning of what the rights under the international refugee protection regime are.

References

Treaty, Constitution, Statute

Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*. 22 November 1984.

League of Nations. *Convention Relating to the International Status of Refugees*. 28 October 1933.

Organization of African Unity. *Convention Governing the Specific Aspects of Refugee Problems in Africa*. 10 September 1969.

UN General Assembly. *Universal Declaration of Human Rights*. 10 December 1948.

———. *Statute of the Office of the United Nations High Commissioner for Refugees*. 14 December 1950.

———. *Constitution of the International Refugee Organization*. 15 December 1946.

———. *Vienna Convention on the Law of Treaties*. 23 May 1969.

———. *Charter of the United Nations*. 24 October 1945.

———. *1951 Convention Relating to the Status of Refugees*. 28 July 1951.

United Nations General Assembly Resolutions

Assistance to and Protection of Refugees. 358 (Vi) B. 2 February 1952.

Refugees and Stateless Persons. 3 December 1949.

New York Declaration for Refugees and Migrants. A/Res/71/1. 3 October 2016.

Report of the High Commissioner for Refugees. 1284 (Xiii). 5 December 1958.

Continuation of the Office of the United Nations High Commissoner for Refugees. 1783 (Xvii). 7 December 1962.

Reports of the High Commissioner for Refugees. 2039 (Xx). 7 December 1965.

Report of the High Commissioner for Refugees. 3454 (Xxx). 9 December 1975.

Second Emergency Special Session. 1006 9 November 1956.

Report of the High Commissioner for Refugees. 3271 (Xxix). 10 December 1974.

Reports of the High Commissioner for Refugees. 1959 (Xviii). 12 December 1963.

Question of Refugees. A/Res/8. 12 February 1946.

Report of the High Commissioner for Refugees. 1673 (Xvi). 18 December 1961.

Report of the High Commissioner for Refugees. 1388 (Xiv). 20 November 1959.

Resolution. 21 November 1956.

Report of the High Commissioner for Refugees. 1039. 23 January 1957.

Chinse Refugees in Hong Kong. 1167. 26 November 1957a.

International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees. 1166. 26 November 1957b.

A/Res/33/26. 29 November 1978.

Report of the High Commissioner for Refugees. 31/35. 30 November 1976.

Office of the United Nations High Commissioner

for Refugees. 59/170. 2004.

Office of the High Commissioner

for Refugees. 71/172. 2016.

International Protection Considerations with Regards to People Fleeing the Syrian Arab Republic, Update Ii. 22 October 2013.

Note on International Protection. 2010.

Note on International Protection. 2016a.

United Nations Assistance to East Pakistan Refugees through the United Nations Focal Point and United Nations Humanitarian Assistance to East Pakistan. 2790 (Xxvi). 6 December 1971.

Report of the United Nations High Commissioner for Refugees. 36/125. 14 December 1981.

Office of the United Nations High Commissioner for

Refugees. 48/116. 24 March 1994.

Report of the High Commissioner for Refugees. 35/41 A. 25 November 1980.

4th Session, Official Record. Summary Record of the 256th Meeting. 1949.

Economic and Social Council

Resolution 248 (Ix) A. 6 August 1949.

International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees. 565 (Xix). 31 March 1955.

6th Session, Official Record. Supplement No. 1. 1946.

9th Session, Official Record. Summary Record of the 326th Meeting. 1949.

Executive Committee of the High Commissioner's Programme

Conclusion No. 4 (Xxviii), International Instruments. 1977a.

Conclusion No. 5 (Xxvi), Asylum. 1977b.

Conclusion No. 7 (Xxviii), Expulsion. 1977c.

Conclusion. No 6 (Xxviii), Non-Refoulement. 1977d.

Conclusion No. 80 (Xlvii), Comprehensive and Regional Approaches within a Protection Framework. 1996.

Conclusion No. 95 (Liv), General. 2003.

Conclusion No . 112 (Lxvii), on International Cooperation from a Protection and Solutions Perspective. 2016.

Conclusion No. 8 (Xxviii), Determination of Refugee Status. 1977a.

Conclusion No. 9 (Xxviii), Family Reunion. 1977b.

Conslusion No. 15 (Xxx), Refugees without an Asylum Country. 1979.

Conclusion No. 21 (Xxxii), General. 1981a.

Conclusion No. 22 (Xxxii), Protection of Asylum-Seekers in Situations of Large-Scale Influx. 1981b.

Conclusions No. 25 (Xxxiii), General. 1982.

Conclusion No. 29 (Xxxiv), General. 1983.

Conslusion No. 46 (Xxxviii), General. 1987.

Conclusion No. 58 (Xl), Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection. 1989.

Conclusion No. 65 (Xlii), General. 1991.

Conclusion No. 71 (Xliv), General. 1993.

Conclusion No. 77 (Xlvi), General. 1995.

Conclusion No. 79 (Xlvii), General. 1996a.

Conclusion No. 82 (Xlviii), Conclusion on Safeguarding Asylum. 1997.

Overview of Regional Developments. 1996b.

Cases

International Court of Justice. *Arbitrary Award of 31 July 1989, Guinea-Bissau V Senegal.* ICJ Reports 1991, p. 53.

International Court of Justice. *Certain Expenses of the Un.* ICJ Reports 1962, p. 157.

International Court of Justice. *Effect of Awards Case of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion.* ICJ Reports p. 47.

International Court of Justice. *Interpretation of the Agreement of 25 March 1951 between the Who and Egypt, Advisory Opinion.* ICJ Reports 1980, p. 73.

International Court of Justice. *Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) Nothwithstanding Security Council Resolution 276 (1970).* ICJ Report 1971, p. 31.

European Court of Justice. *Parliament V. Council.* Case C-70/88, E.C.R. I-2041.

International Court of Justice. *Reparations for Injuries Suffered in the Service of the United Nations.* ICJ Reports 1949, p. 174.

UNHCR Notes on International Protection

Note on International Protection. 5 July 1986.

Note on International Protection. 7 September 1994.

Note on International Protection. 25 August 1992.

Note on International Protection. 31 August 1993.

Note on International Protection. 9 September 1991.

Reports

Memorandum to Ecosoc. 11 July 1949.

Refugees, UN High Commsissioner for. 2016b. "Global Trends. Forced Displacement in 2015." In *Global Trends*, edited by UNHCR, 67. Geneva: United Nation High Commsissioner for Refugees.

Refugees, United Nations High Commissioner for. 2009. "Unhcr Global Report." In.

UNHCR Annual Reports

Annual Report of the United Nations High Commissioner for Refugees, 1953. 1 Januar 1954.

Annual Report of the United Nations High Commissioner for Refugees, 1951. 1 January 1952.

Annual Report of the United Nations High Commissioner for Refugees and Addendum, 1952. 1 January 1953.

Annual Report of the United Nations High Commissioner for Refugees, a/6311/Rev. 1 1 January 1966.

Annual Report of the United Nations High Commissioner for Refugees, 1971. 1 January 1972.

Statements by UNHCR High Commissioner for Refugees

Goedheart, Dr. Gerrt van Heuven. 1955. '*Refugee Problems and Their Solutions*'. http://www.unhcr.org/admin/hcspeeches/3ae68fb918/refugee-problems-solutions-address-dr-gerrit-jan-van-heuven-goedhart-united.html.

Ogata, Sadako. 25 May 1992. '*Statement by the United Nations High Commissioner for Refugees at International Management Symposium, St. Gallen, Switzerland*'. http://www.unhcr.org/admin/hcspeeches/3ae68faec/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-international.html.

Manuscripts

Feller, Erika. 5 October 2005. '*Operationalising Protection*'. http://www.unhcr.org/admin/dipstatements/4343ff484/operationalising-protection-statement-mrs-erika-feller-director-department.html.

Ra'ad Al Hussein, Zeid. 19.09.2016. '*Un Summit for Refugees and Migrants*'. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20524&LangID=E.

Takahashi, Saul. February 2001. '*Effective Monitoring of the Refugee Convention*'.

UNHCR Documents

Handbook on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. 1988.

Unhcr's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection. 2001/0207. 12 September 2001.

United Nations General Secretary

General, UN Secretary. 1 August 1949. "A Study of Statelessness." In. New York.

Report on Refugees and Stateless Persons. 26 October 1949.

Books

Arendt, Hannah. 1958. *The Origins of Totalitarianism* (George Allen & Unwin: London).

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. 27 November 1951.

Aust, Anthony. 2007. *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge).

Barnett, Michael N., and Martha Finnemore. 2004. *Rules for the World : International Organizations in Global Politics* (Cornell University Press: Ithaca, N.Y).

Betts, Alexander, and Gil Loescher. 2011. *Refugees in International Relations* (Oxford University Press: Oxford).

Betts, Alexander, James Milner, and Gil Loescher. 2008. *Unhcr : The Politics and Practice of Refugee Protection* (Routledge: London).

Einarsen, Terje. 2000. *Retten Til Vern Som Flyktning: Med Hovedvekt På Fns Flyktningebegrep, De Historiske Traktatforutsetninger Og Gjeldende Rett* (Cicero Publisher: Bergen).

Goodwin-Gill, Guy, and Jane McAdam. 2007. *The Refugee in International Law* (Oxford University Press: Oxford).

Grahl-Madsen, Atle. 1959. *Menneskerett Og Sunt Vett : Utvalgte Artikler Om Flyktninge- Og Befolkningsproblemer, 1949-1959* (Flyktningevenner i Vest-Norge: Bergen).

———. 1966. *The Status of Refugees in International Law : 1 : Refugee Character* (Sijthoff: Leyden).

———. 1980. *Territorial Asylum* (Almqvist & Wiksell: Stockholm).

Hathaway, James C. 2005. *The Rights of Refugees under International Law* (Cambridge University Press).

Holborn, Louise Wilhelmine. 1975. *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972*.

Janmyr, Maja. 2014. *Protecting Civilians in Refugee Camps : Unable and Unwilling States, Unhcr and International Responsibility* (Nijhoff: Leiden).

Kneebone, Susan. 2009. *Refugees, Asylum Seekers and the Rules of Law : Comparative Perspectives* (Cambridge University Press: Cambridge).

Lewis, Corinne. 2012. *Unhcr and International Refugee Law: From Treaties to Innovation* (Routledge: London).

Loescher, Gil. 2001. *The Unhcr and World Politics : A Perilous Path* (Oxford University Press: New York).

McNair, Arnold Duncan McNair Baron. 1961. *The Law of Treaties* (Clarendon Press: Oxford).

Oppenheim, Lassa Frances Lawrence, Robert Jennings, and Arthur Watts. 1992a. *Oppenheim's International Law: Volume 1 : Peace Introduction and Part 1* (Longman: Harlow).

———. 1992b. *Oppenheim's International Law: Volume 1 : Peace Part 2 to 4* (Longman: Harlow).

Panhuys, H. F. van. 1959. *The Role of Nationality in International Law : An Outline* (Sythoff: Leyden).

Puggioni, Raffaela. 2016. *Rethinking International Protection : The Sovereign, the State, the Refugee* (Palgrave Macmillan: London).

Refugees, UN High Commissioner for. 1972. *A Story of Anguish and Action : The United Nations Focal Point for Assistance to Refugees from East Bengal in India* (Geneva).

Sands, Philippe, and Pierre Klein. 2001. *Bowett's Law of International Institutions* (Sweet & Maxwell: London).

Smyser, W. R. 1987. *Refugees : Extended Exile* (Praeger: New York).

Türk, Volker, Frances Nicholson, and Erika Feller. 2003. *Refugee Protection in International Law : Unhcr's Global Consultations on International Protection* (Cambridge University Press: Cambridge).

Venzke, Ingo. 2012. *How Interpretation Makes International Law : On Semantic Change and Normative Twists* (Oxford University Press: Oxford).

Zieck, Marjoleine. 2006. *Unhcr's Worldwide Presence in the Field : A Legal Analysis of Unhcr's Cooperation Agreements* (Wolf Legal Publ.: Nijmegen).

Book Chapters

Chetail, Vincent. 2014. 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law.' in Ruth Rubio-Marín (ed.), *Human Rights and Immigration* (OUP Oxford: Oxford).

Einarsen, Terje. 2011. 'Drafting History of the 1951 Convention and Its 1967 Protocol.' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press: Oxford).

Elie, Jérôme. 2014. 'Histories of Refugee and Forced Migration Studies.' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies* (Oxford University Press: Oxford).

Goodwin-Gill, Guy. 2014. 'The International Law of Refugee Protection.' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies* (Oxford University Press: Oxford).

Helton, Arthur. 2003. 'What Is Refugee Protection? A Question Revisited.' in Niklaus Steiner, Gil Loescher and Mark Gibney (eds.), *Problems of Protection : The Unhcr, Refugees, and Human Rights* (Routledge: New York).

Jones, Martin. 2014. 'Moving Beyond Protection Space: Developing a Law of Asylum in South-East Asia.' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds.), *Refugee Protection and the Role of Law. Conflicting Identities*.

Kneebone, Susan. 2014. 'Refugee as Objects of Surrogate Protection: Shifting Identities.' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds.), *Refugee Protection and the Role of Law. Conflicting Identites*.

Kälin, Walter. 2003. 'Supervising the 1951 Convention Relating to the Status of Refuges : Article 35 and Beyond.' in Volker Türk, Frances Nicholson and Erika Feller (eds.), *Refugee Protection in International Law : Unhcr's Global Consultations on International Protection* (Cambridge University Press: Cambridge).

Lauterpacht, E, and D Bethlehem. 2003. 'The Scope and Content of the Principle of Non-Refoulement: Opinion.' in Volker Türk, Frances Nicholson and Erika Feller (eds.), *Refugee Protection in International Law : Unhcr's Global Consultations on International Protection* (Cambridge University Press: Cambridge).

Loescher, Gil. 2003. 'Unhcr at Fifty: Refugee Protection and World Politics.' in Niklaus Steiner, Mark Gibney and Gil Loescher (eds.), *Problems of Protection : The Unhcr, Refugees, and Human Rights*.

———. 2014. 'Unhcr and Forced Migration.' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies* (Oxford University Press: Oxford).

Mathisen, Gjermund. 2010. 'From Rendezvous to Relationship.' in Knut Einar Skodvin and Jørn Øyrehagen Sunde (eds.), *Rendezvous of European Legal Cultures* (Fagbokforlaget: Bergen).

McAdam, Jane. 2011. 'Interpretation of the 1951 Convention.' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press: Oxford).

Skran, Claudena M. 2011. 'Historical Development of International Refugee Law.' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press: Oxford).

Skubiszewski, Krzysztof. 1989. 'Implied Powers of International Organizations.' in Shabtai Rosenne, Yoram Dinstein and Mala Tabory (eds.), *International Law at a Time of Perplexity : Essays in Honour of Shabtai Rosenne* (Nijhoff: Dordrecht).

Stevens, Dallal. 2014. 'Shifting Conceptions of Refugee Identity and Protection: Europaen and Middle Eastern Approaches.' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds.), *Refugee Protection and the Role of Law. Conflicting Identities* (Routledge: London).

Sztucki, Jerzy. 1999. 'Who Is the Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson and Patrick M. Twomey (eds.), *Refugee Rights and Realities : Evolving International Concepts and Regimes* (Cambridge University Press: Cambridge).

Türk, Volker. 1999. 'The Role of Unhcr in the Development of International Refugee Law.' in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities : Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press: Cambridge).

Articles

Ahlborn, Christiane. 2011. 'The Rules of International Organizations and the Law of International Responsibility', *International Organizations Law Review*, 8: 397-482.

Allain, Jean. 2001. 'The Jus Cogens Nature of Non-Refoulement', *International Journal of Refugee Law*, 13: 533-58.

Barnes, Anne Evans. 2009. 'Realizing Protection Space for Iraqi Refugees: Unhcr in Syria, Jordan and Lebanon', *New Issues in Refugee Research*, Research Paper No. 167 http://www.unhcr.org/research/working/4981d3ab2/realizing-protection-space-iraqi-refugees-unhcr-syria-jordan-lebanon-anne.html, accessed 20.05.2017.

Barnett, Laura. 2002. 'Global Governance and the Evolution of the International Refugee Regime', *International Journal of Refugee Law*, 14: 238-62.

Barnett, Michael, and Martha Finnemore. 1999. 'The Politics, Power, and Pathologies of International Organizations', *International Organization*, 53: 699-732.

Barutciski, Michael. 2002. 'A Critical View on Unhcr's Mandate Dilemmas', *International Journal of Refugee Law*, 14: 365-81.

C. Wood, Michael. 1998. 'The Interpretation of Security Council Resolutions', *Max Planck Yearbook of United Nations Law Online*, 2: 73-95.

Chimni, B. S. 1993. 'The Meaning of Words and the Role of Unhcr in Voluntary Repatriation', *International Journal of Refugee Law*, 5: 442-60.

Copeland, E. A. 1997. 'Louise W. Holborn Archives, Schlesinger Library, Radcliffe College', *Journal of Refugee Studies*, 10: 503-06.

Deschamp, Bryan, and Rebecca Dowd. 2008. 'Review of the Use of Unhcr Executive Committee Conclusions on International Protection ', *Policy Development and Evaluation Service*: http://www.unhcr.org/research/evalreports/487b672d2/review-use-unhcr-executive-committee-conclusions-international-protection.html, accessed 23.05.2017.

Edwards, Alice. 2005. 'Human Rights, Refugees, and the Right to Enjoy Asylum', *International Journal of Refugee Law*, 17: 293-330.

Engström, Viljam 2003. 'Implied Powers of International Organizations: On the Character of a Legal Doctrine', *FinnishYearbook of International Law*, 14.

Feller, Erika. 2001a. 'The Evolution of the International Refugee Protection Regime', *Washington University Journal of Law & Policy*, 5: 129-39.

———. 2001b. 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, the Present and the Future', *International Review of the Red Cross*, 83: 581-605.

Frelick, Bill. 1993. 'Preventing Refugee Flows: Protection or Peril?', *World Refugee Survey*: 5-13.

Fresia, M. 2014. 'Building Consensus within Unhcr's Executive Committee: Global Refugee Norms in the Making', *Journal of Refugee Studies*, 27: 514-33.

Gallagher, Dennis. 1989. 'The Evolution of the International Refugee System', *The International Migration Review*, 23: 579.

Gammeltoft-Hansen, Thomas, and James C. Hathaway. 2015. 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia journal of transnational law*, 53: 235-84.

Goodwin-Gill, Guy. 1989. 'The Language of Protection', *International Journal of Refugee Protection*, 1: 6-19.

———. 2008. 'Convention Relating to the Status of Refugees. Protocol Relating to the Status of Refugees', *United Nations Audiovisual Library of International Law*: http://legal.un.org/avl/ha/prsr/prsr.html, accessed 20.05.2017.

Grahl-Madsen, Atle. 1983. 'Identifying the World's Refugees', *The Annals of the American Academy of Political and Social Science*, 467: 11-23.

Hathaway, James C. 1990. 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, 31: 129-83.

———. 1991. 'Reconceiving Refugee Law as Human Rights Protection', *Journal of Refugee Law*, 4: 113-31.

Helton, Arthur C. 1990. 'What Is Refugee Protection', *International Journal of Refugee Protection*, 2: 119-29.

Holian, Anna, and D. Daniel Cohen. 2012. 'Special Issue: The Refugee in the Postwar World, 1945-1960: Introduction', *Journal of Refugee Studies*, 25: 313-25.

Jaeger, Gilbert. 2001. 'On the History of the International Protection of Refugees', *Revue Internationale de la Croix-Rouge/International Review of the Red Cross*, 83: 727-38.

Janmyr, Maja. 2016. 'Precarity in Exile: The Legal Status of Syrian Refugees in Lebanon', *Refugee Survey Quarterly*, 35: 58-78.

Kinchin, Niamh. 2016. 'The Implied Human Rights Obligations

of Unhcr', *International Journal of Refugee Law*, 28: 251–75.

McBride, Mike. 2009. 'Anatomy of a Resolution: The General Assembly in Unhcr History', *New Issues in Refugee Research*, Research Paper No. 182: http://www.unhcr.org/4b192a069.pdf,

Morris, Nicholas. 1997. 'Protection Dilemmas and Unhcr's Response: A Personal View from within Unhcr.(United Nations High Commissioner on Refugees)', *International Journal of Refugee Law*, 9: 492-99.

Oudejans, Nanda. 2014. 'The Right to Have Rights as the Right to Asylum', *Netherlands Journal of Legal Philosophy*, 43: 7-26.

Rosenne, Shabtai. 1966. 'Is the Constitution of an International Organization an International Treaty? : Reflections on the Codification of the Law of Treaties', *Comunicazioni e studi*, 12: 21-89.

Slaughter, Amy, and Jeff Crisp. 2009. 'A Surrogate State? The Role of Unhcr in Protracted Refugee Situations', *New Issues in Refugee Research*, Research Paper No. 168: http://www.unhcr.org/research/working/4981cb432/surrogate-state-role-unhcr-protracted-refugee-situations-amy-slaughter.html, accessed 23.05.2017.

Stevens, Dallal. 2013. 'What Do We Mean by Protection?', *International Journal on Minority and Group Rights*, 20: 233-62.

———. 2016. 'Rights, Needs or Assistance? The Role of the Unhcr in Refugee Protection in the Middle East', *The International Journal of Human Rights*, 20: 1-20.

Suhrke, Astri. 1998. 'Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action', 11: 396-415.

Sztucki, Jerzy. 1989. 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the Unhcr Programme', *International Journal of Refugee Law*, 1: 285-318.

Weis, Paul. 1954. 'The International Protection of Refugees', *The American Journal of International Law*, 48: 193-221.

Whitaker, Beth Elise. 2002. 'Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania', *New Issues in Refugee Research*, Reseach Paper nr. 53: http://www.unhcr.org/research/working/3c7528ea4/changing-priorities-refugee-protection-rwandan-repatriation-tanzania-beth.html, accessed 23.05.2017.

Encyclopedia

Feller, Erika, and Anja Klug. 2013. "United Nations High Commissioner for Refugees (Unhcr)." In *Max Planck Encyclopaedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press.

Webpages

UN High Commissioner for Refugees. 27 March 2012

'Unhcr Honoured by Bangladesh for Helping Millions in 1971 Conflict', Accessed accessed 29.05.2017.

———. 2017a. *'Figures at a Glance'*, Accessed accessed 05.05.2017. http://www.unhcr.org/figures-at-a-glance.html.

———. 2017b. *'Protection'*, Accessed accessed 08.05.2017. http://www.unhcr.org/protection.html.

United Nations. 2017. *'Are Un Resolutions Binding? '*, Accessed accessed 18.05.2017. http://ask.un.org/faq/15010.