



## Providing for Protection

### Assisting States with the assumption of responsibility for refugee status determination

#### *A preliminary review*

Wilbert van Hövell, independent consultant  
Constantin Hruschka, PDES  
Helen Morris, PDES  
Machiel Salomons, PDES

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Policy Development and Evaluation Service  
United Nations High Commissioner for Refugees  
Case Postale 2500  
1211 Geneva 2  
Switzerland

Tel: (41 22) 739 8433

Fax: (41 22) 739 7344

e-mail: [hqpd00@unhcr.org](mailto:hqpd00@unhcr.org)

internet: [www.unhcr.org](http://www.unhcr.org)

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## Executive summary

Mandated to provide for the protection of refugees and to supervise the implementation of the 1951 Convention and the 1967 Protocol, one of UNHCR's most fundamental tasks is to assist States with the assumption of responsibility for individual refugee status determination through fair and efficient national procedures. While RSD conducted by UNHCR generally yields important protection dividends, only States are in a position to ensure effective, comprehensive refugee protection and durable solutions.

There has been steady progress in the establishment of national RSD systems, which has been a longstanding objective of UNHCR and the Executive Committee. Currently 117 Convention States out of 148 are operating a specific and regulated RSD procedure, which includes 41 new procedures since the year 2000.

Scenarios of establishing a national RSD procedure vary considerably and range from the first establishment of a procedure where previously no system was in place to the transition of RSD responsibility from UNHCR to the State concerned. This report looks primarily at the latter scenario. However, many of its findings are also relevant to the scenario where a new asylum system is built from scratch. Transitions can be gradual or at times abrupt and they can be more or less organized.

UNHCR is currently engaged in initiating or supporting RSD transitions in several States, two of which figure in the top five list of mandate RSD operations with the biggest number of registered individual applications. A clear added interest in assisting States to assume responsibility for RSD is the increasing volume of UNHCR's mandate RSD activity from 398,000 applications (for the period between 2003 and 2007) to 503,900 applications (for the period between 2008 and 2012). This development is outpacing additional RSD staff allocations and has led to considerable backlogs in several operations, often with significant consequences for the protection of persons of concern.

UNHCR should, however, not only focus on efforts to increase the number of national procedures but also on enhancing the quality of RSD transition processes. Although new systems, established by law, generally stay in operation, there have been examples of national procedures being inactive for prolonged periods. There are also RSD procedures with important procedural gaps or resulting in seriously flawed decisions.

This preliminary research has found that, while country offices are generally very active in supporting RSD transitions, their involvement needs to be more structurally organized, broader in scope, and better sustained in the first five to ten years of the new procedure.

The formulation of a responsible transition strategy with policies and additional tools should enable UNHCR to strengthen its support and help States to meet the challenges involved in individual RSD. The ability to influence matters is predicated on a government's willingness to involve UNHCR and will often also depend on the context specific motives behind the new procedure.

Experience shows that political buy-in and national ownership are key ingredients for establishing well-functioning and sustainable RSD systems. Political willingness is on the other hand not a safeguard for correct RSD decision-making in compliance with international norms.

UNHCR seems to have taken as a general starting point that when States are interested in establishing a national procedure, the opportunity should not be missed. There often seems to be a certain eagerness to exploit rather than delay prospects for national RSD procedures, as these fit UNHCR's policy objective to promote such procedures and would enable the phasing out of mandate RSD.

In exceptional situations UNHCR's accountability may entail that it refrains from supporting the establishment of national RSD and investing international resources in it for the time being. The review *recommends* (1) the identification of a limited set of global indicators for continued mandate RSD to capture these situations.

As regards strategizing and planning for RSD transition, research thus far has mostly come across examples of analyses of gaps in legislation and knowledge of refugee protection, much less so of forward looking assessments of a country's capacity to adequately implement the RSD function and of possible consequences for protection and solutions.

Ideally, when UNHCR is able to influence the timelines of RSD transition, country strategies need to be preceded by a comprehensive assessment of gaps and needs in the future system. Based on such assessment, the review *recommends* (2) the identification of "benchmarks" as an agreed, country specific road map towards the creation or reform of RSD in a number of areas such as legislation, organisation of RSD, reception services, transfer arrangements and operational support.

For strategic planning purposes a further useful category would be that of country specific "foundations" towards a sustainable, quality RSD system which is fully integrated in national structures and embedded in national checks and balances. These foundations require a much longer perspective and should fit in agendas for development, good governance and the rule of law.

Country offices often tend to focus their energy and resources on influencing legislation and capacity building through training. While these support actions are generally appreciated by governments and should therefore be maintained, the report *recommends* (3) that UNHCR should pay more attention to advice on the most effective configuration of national RSD structures, to avoid unnecessary delays in and promote quality of decision-making, reduce staff turnover and ensure adequate responses to changes in the volume of applications.

Decision-making through or by collective inter-ministerial eligibility bodies, serviced by technical secretariats, is a model that has been replicated in many countries with little apparent regard to local conditions. Its advantages and disadvantages have, as far as known, never been fully assessed by UNHCR. It is *recommended* (4) to examine, during the second phase of this project, different institutional models in more detail – for potential use by country offices including when openings for discussing changes in existing frameworks arise.

Related to the need for guidance on the best institutional set-up, the report *recommends* (5) that UNHCR clarifies the minimum procedural requirements for RSD based on a realistic appreciation of the challenges involved. Especially in the area of independent appeals and legal assistance international standards and practice have evolved.

After the start of the new national procedure, responsible strategies may require continued operational UNHCR involvement for a specified period, through joint activities in the national procedure or, if necessary, the continued processing under the mandate of certain categories of asylum applicants. Especially where UNHCR offices are faced with considerable backlogs, UNHCR can facilitate a smooth transition by agreeing to continue processing applications registered before a certain cut-off date. There seems to be no uniform practice in this regard. Much will depend on the wishes of the government, possible protection gaps, the risk of national structures becoming overwhelmed from the start, and standards of fairness. The report *recommends* (6) that different options for continued processing are considered in a future strategy on transition.

Country offices seem to be well aware that, before and after the transfer of the RSD function, States as well as UNHCR need to avoid policies that will put pressures on new RSD systems which these cannot reasonably handle. The review *recommends* (7) that research on recent experience with protection sensitive alternatives to individual RSD, in the field of asylum and migration management, be undertaken to complement the review of UNHCR's support actions from a more strategic angle.

Transitions from UNHCR do not end the moment States start operating the new procedure, on the contrary, they have just begun. New RSD authorities appear to face challenges in two main areas: the expedient functioning of procedures, including the capacity to respond to increasing numbers, and the correct application of the refugee definition.

While country offices exercise UNHCR's supervisory responsibility in many different ways in support of the new procedure, continuing or resuming mandate RSD for protection purposes for individual or groups of applicants may in specific cases be a necessary element of responsible transition strategies. Mandate RSD is still carried out in a considerable number of countries where a national procedure exists, mostly as an exceptional response to serious protection risks. Although it has sometimes strained relations with governments, in several instances it has facilitated practical solutions, often through resettlement. For the purpose of greater consistency, the preliminary report *recommends* (8) policy formulation on principles, considerations and criteria, based on a residual accountability in the context of UNHCR's supervisory responsibility. It should include the development of model SOPs for such mandate RSD procedures.

In some countries, notwithstanding the seriousness and humanitarian spirit with which national RSD is conducted, there is room for more UNHCR initiative to involve national actors of protection. This should strengthen the RSD system for the future and make it less dependent on inputs from UNHCR through its observer role in many eligibility bodies.

UNHCR has continuously provided financial support to RSD structures in most developing or low income countries, in some cases for decades. From UNHCR's Focus - a software to support results based management, including planning, monitoring and reporting as well as budgeting - the expenditures on this (as well as expenditures on

mandate RSD) are not readily available, *inter alia* because implementing partner agreements for the purpose of RSD are not easily traceable in this tool.

Moreover, UNHCR is experiencing considerable difficulties in terminating the financial dependency of government RSD structures and promoting national ownership, including in rapidly developing economies. Although funding may provide general leverage, its use as a tool for encouraging concrete improvements in RSD appears to be difficult and limited. The preliminary report *recommends* (9) a closer look at the funding of national RSD structures, including the possibility of gradual phasing out schedules and ways to improve the accessibility and analysis of data in the context of results based management where funding continues.

The information recorded in UNHCR's Focus under the output "handover of RSD initiated" does not seem to give a comprehensive overview of activities in UNHCR related to transitions. It is *recommended* (10) to either review the Results Framework in this regard to provide for clearer planning, reporting and information gathering or to provide for a separate more detailed monitoring and reporting tool.

Country offices seem to be seriously hampered by staffing limitations. Adequate resources are not only necessary to support authorities when they start the new procedure but throughout the transition process, from assessment and planning to transfer, implementation and consolidation. Resource inputs are also necessary to work on the foundations for a sustainable protection environment at same time. The staffing limitations are compounded by a seeming tendency within UNHCR to see the disengagement from mandate RSD as an opportunity for staff reductions, rather than an opportunity to seriously invest in the on-going transition and effectiveness of UNHCR's changing role. Transitions tend to be seen as moments, as in the term RSD "handover," rather than processes.

The report *recommends* (11) that UNHCR considers establishing benchmarks for protection staffing in situations of transition. They could serve as a useful complement to those formulated in 2010 for mandate RSD operations.

The answers to the questionnaire and additional research have resulted in a historical graph, which is contained in annex III to the report. Although information can be retrieved from different sources, the report *recommends* (12) the creation of a consolidated historical database on the relevant phases (adoption of legislation, establishment of procedure, actual functioning of RSD).

In conclusion, looking at State and UNHCR practice, transitions rarely follow a linear and quick pattern of fully effective responsibility and quality RSD. UNHCR therefore needs to take a long term perspective and stay actively engaged when systems are created or undergo fundamental reform. Even so, there are limits to what UNHCR and responsible transition strategies can contribute. Ultimately, the political willingness to invest in an adequate system and the humanitarian spirit with which it is operated will be decisive for the proper identification of refugees.

For the second phase of the project the report recommends in depth research regarding the following priority themes: i) the identification of indicators for premature RSD transitions;



ii) the effective organization of national RSD, including institutional set-up and minimum procedural requirements; iii) models for operational support in the initial phase of new procedures; iv) the variable supervisory impact in RSD and ways to enhance it; and v) the allocation by UNHCR of human and financial resources, coupled with the inclusion of transition related activities and resource allocations in UNHCR's results framework.

In addition, it is proposed (vi) to complement the findings with a more strategic inquiry into recent alternative, protection sensitive strategies which have helped to relieve pressures on individual RSD systems. In order to put RSD transition policy and practice in a broader perspective, it is finally recommended (vii) to review the functioning and resourcing of mandate RSD in selected countries that are engaged in RSD transition. In the proposed methodology, it is foreseen to pay attention to the views of asylum-seekers and refugees and to make good use of the expertise of experts from governments and NGO partners.



## Introduction

1. The establishment of national procedures for refugee status determination has been a longstanding objective of UNHCR. In a context of increasing individual applications for refugee protection, including under UNHCR's mandate, the objective has received renewed attention. In his 2013 statement to the Executive Committee the Director of UNHCR's Division of International Protection made a strong plea to Member States to work with UNHCR towards further progress in this area.
2. Against this background, PDES embarked as part of its work plan on a global review of UNHCR's recent policy and practice in situations of transition to national RSD procedures. The aim is to facilitate the formulation of strategies, policies and tools for the benefit of UNHCR's operations as currently considered by DIP. It was decided to split the project in two phases, starting with a preliminary review to prepare for further research on selected aspects in a more comprehensive second phase.

### Methodology

3. Different data collection methods were used in accordance with the Terms of reference (Annex I). At the beginning of the project, in the second half of August 2013, a questionnaire was sent to all UNHCR country offices with questions relating, inter alia, to the history of RSD in the country, transition and transfer arrangements and prospects for national RSD, as applicable (Annex II). The response rate was 87.5 %. The replies led in several instances to follow-up communications. A desk review was undertaken of relevant documents, ranging from operation specific documents and inspection reports to global UNHCR publications, Executive Committee documents and academic articles.
4. The review team consisted initially of Mr W. van Hövell (independent consultant and team leader), Mr M. Salomons (PDES) and Ms H. Morris (PDES). In early October 2013 Mr C. Hruschka (PDES) joined the team as Research Officer. The initial team visited Cotonou (9 to 13 September 2013), Accra (16 to 19 September 2013) and Ankara (7 to 10 October 2013). These countries were selected by PDES following consultation with the regional Bureaux and DIP. In Benin, following a gradual process of transition, the government had assumed full responsibility for RSD in 2007. In Ghana, a country characterized by substantial economic growth, the RSD procedure has been consolidated over the years, but UNHCR still plays an active role. In Turkey, UNHCR is supporting the government in a major RSD reform process, which should in due course decrease substantially UNHCR's mandate processing operation in the country.
5. In Benin and Ghana the mission gathered data and insights in the course of meetings with the Minister of Interior, the Coordination Nationale pour l'Assistance aux Réfugiés in Benin, the Refugee Board in Ghana, members of second instance committees and other senior officials. Meetings also took place with NGOs as well as refugees and asylum-seekers. An important method of data collection was the observation of eligibility interviews and of sessions of the inter-ministerial Eligibility Committees in both countries.

6. In Ankara, the mission met with the Director-General for Migration Management of the Ministry of Interior and senior staff. The mission observed the process of pre-registration of large numbers of applicants at the premises of the NGO Asam. A meeting was held at the Delegation of the European Commission, on the process of transition and the EU's financial support for an extensive capacity building program. A telephone interview was held with Helsinki Citizens Assembly in Istanbul, whereas group discussions took place with refugees and asylum-seekers. For a better understanding of UNHCR's RSD activities in Turkey, members of the team also observed registration and interview stages of the mandate procedure in the UNHCR office in Ankara.

7. The review team benefited greatly from the information and analysis it received from the Representatives and their colleagues in the three country offices visited. In addition, the independent consultant undertook two missions to UNHCR headquarters in Geneva, in August and October 2013. The first mission provided insight into expectations from stakeholders, especially the regional Bureaux. During both missions interviews were held with a considerable number of UNHCR staff members, at the senior management level as well as in the Inspector-General's Office, DIP, DPSM and the regional Bureaus. The consultant also conducted interviews by telephone. During the second mission in Geneva, a meeting was held with the International Catholic Migration Commission.

8. As regards the scope of the report several observations need to be made. In accordance with the terms of reference, a review of the assumption of state responsibility for RSD was carried out, irrespective of whether UNHCR was previously engaged in mandate RSD or not. The term "transition" is used in a neutral sense, to capture both situations. In addition, it covers situations where States are expanding and reforming their role in RSD. The emphasis in this preliminary review is on transitions that took place since the year 2000.

9. The review concerns procedures for the determination of individual asylum claims, in accordance with the terms of reference. This is not meant in any way to diminish the importance of group determination on a *prima facie* basis, which in numerical terms continues to benefit far more refugees than individual determinations, including in States which have not acceded to the 1951 Refugee Convention and/or 1967 Protocol.

## **Constraints**

10. A clear limitation of the review is its focus on one aspect of transitions to national asylum systems, i.e. the refugee determination process. It does not deal with closely related aspects of admission to a country, access to RSD procedures and reception conditions, let alone the implementation of positive or negative determinations. Evidently, when States assume responsibility for RSD, their engagement is much broader. The refugee determination process is, however, at the centre of the asylum system and the inclusion of other aspects would not have been possible given the time constraints. This also applies to the costs of RSD systems, which is an understandable consideration for States.

11. Even for a preliminary review the four months' timeframe (mid-August to mid-December 2013) has been a constraint, in particular because of the global nature of the review. Rather than examining only UNHCR's practice in the transitions in Benin, Ghana

and Turkey, situations around the world have been looked into. Each country situation has its contextual and operational specificities and is interesting to study in more depth than a preliminary review allows. Obtaining historical information, in the form of past records or the experiences of (former) staff members who were posted in a given country, has proven to be a challenge.

12. The resulting review should indeed be seen as preliminary. It formulates several recommendations and proposes topics as well as a basic methodology for the second phase of the project.



## Part 1: the Context

### UNHCR's engagement with RSD

13. UNHCR's engagement with RSD flows from its statutory "function of providing international protection, under the auspices of the United Nations," to refugees falling under the competence of the High Commissioner, and of "seeking permanent solutions for the problem of refugees ..." Though not mentioned in the list of activities mandating the High Commissioner "to provide for the protection of refugees..." (Article 8 of the Statute), RSD related functions are inherent in several of them, in particular the promotion and supervision of international refugee instruments. UNHCR's longstanding engagement with RSD is multifaceted and continues to grow in volume and complexity.

#### **Strengthening and broadening the international framework for RSD**

14. Ever since its establishment UNHCR has worked to strengthen the basis for refugee protection by promoting accession to the 1951 Refugee Convention, the conclusion of new international instruments, agreement on regional frameworks and adoption of national legislation. Particularly noteworthy is the Office's role, through a combination of diplomacy and technical advice, in the drafting process of the 1967 Protocol, the 1969 OAU Refugee Convention, the 1984 Cartagena Declaration and, more recently, the European Union Qualification and Asylum Procedures Directives. Among other things these efforts have extended the scope of refugee protection to persons not falling within the 1951 Convention. They have had a major impact on the identification of millions of refugees, in terms of the substantial and increasingly also the procedural aspects of RSD.

15. Over the years UNHCR has played an important role in multilateral conferences, which have influenced, and sometimes even steered, refugee protection at the policy and legal levels. Worth noting are the Arusha Conference (1979), the first and second Conference on Refugees from Indo-China (1979, 1989), the International Conference on Former Yugoslavia (1992 - 1995), the CIS Conference (1996) and the process that led to the Mexico Plan of Action (2004). Several of these became politically possible by the (approaching) end of the Cold War or had to address its consequences. All of them have, albeit in varying degrees, helped to shape the identification of refugees, among other categories of uprooted people, and their access to international protection.<sup>1</sup>

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<sup>1</sup> Whereas the 1979 Conference on refugees from Indo-China resulted in the resettlement of 700,000 boat people from Vietnam, the Comprehensive Plan of Action (CPA) agreed at the second Conference in 1989 introduced RSD in the affected countries prior to resettlement of applicants qualifying for refugee status and the repatriation of those who did not; see Annex to UN General Assembly, *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (A/44/523)*, 22 September 1989, A/44/523, available at: <http://www.refworld.org/docid/3dda17d84.html> [all links provided in the following have been accessed on 18 March 2014].

Under the auspices of UNHCR's chairmanship of the Humanitarian Issues Working Group of the International Conference on Former Yugoslavia (ICFY), the parameters of temporary protection as a possible response to large scale influxes in Europe, and the linkages with RSD under the 1951 Convention, were discussed and generally endorsed by participating States. Afterwards this led to the adoption of the EU's Temporary

## Supporting group determination of refugee status in large scale influx

16. More on the operational side, a constant feature of UNHCR's involvement with RSD has been its cooperation with States in group determination of refugee status on a prima facie basis in large influx situations. Close dialogue about the nature of a particular movement and the conditions which prompted it, the management of possible security concerns and arrangements for emergency assistance has led to the admission, at least on a temporary basis, of the large majority of refugees up until today. In Convention as well as non-Convention States group determinations have been mostly applied on the basis of the extended definition. Even where UNHCR did not explicitly determine prima facie status under the mandate, its protection engagement in these contexts is an RSD related activity in which successive High Commissioners have often had to intervene personally, to keep borders open and prevent refoulement.

17. In most emergencies admission and the granting of refugee status on a prima facie basis, through formal or practical arrangements, has been less problematic than ensuring proper standards of treatment thereafter. The rejection of large refugee groups at borders or situations of prolonged legal uncertainty have nevertheless not been rare either. In situations of disagreement States have often disputed their responsibility to grant asylum rather than the refugee character of the movement.<sup>2</sup>

18. Determining responses to a sudden or ongoing influx has proven particularly challenging in the context of mixed movements of migrants and refugees. Already in the 1980's and early 90's when this phenomenon started manifesting itself more clearly, UNHCR advanced individualized approaches to prevent the wholesale interdiction or rejection of such heterogeneous groups, on the high seas or at land borders - rather than advocate for any group determination. With expedited individual screening mechanisms, in combination with assisted repatriation programmes, these situations could often be managed. Meanwhile, mixed flows have become a much more global phenomenon. Where they are on the rise, their management through efficient and fair RSD is often seriously tested.

19. In the aftermath of the genocide in Rwanda, the domination of the refugee camps in neighbouring countries, between 1994 and 1996, brought home the difficulty of applying the exclusion clauses in situations of mass influx and of identifying and separating armed elements from refugee populations. In the absence of effective State responsibility in the camps in eastern Zaire, UNHCR was put in an extremely difficult position. Since then, although the phenomenon of combatants in refugee settings was not new, these issues have received more attention, including in the form of legal and operational guidance provided by UNHCR to States as the primary responsible actors in this domain.

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Protection Directive in 2001 (*Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212-223 7.8.2001, 2001/55/EC).

The impact of the Conference on displacement in the Commonwealth of Independent States (CIS Conference, 1996), particularly in terms of solutions for several situations of forced displacement, has according to observers been limited. However, the conference and its follow-up by governments, UNHCR, IOM, OSCE, Council of Europe and NGOs resulted in awareness of international norms and over time in the establishment of a refugee protection infrastructure (accession, legislation, institutions, trained officials). See Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001), p. 279-280, and UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, available at: <http://www.unhcr.org/4a4c754a9.html>, p. 200-202.

<sup>2</sup> An example is the temporary closures of the Croatian border for refugees trying to flee from Bosnia pending arrangements for their onward movement to third countries in 1994.



## Providing normative guidance and tools for individual RSD

20. In 1977 the Executive Committee of the High Commissioner's Programme (hereafter Executive Committee or ExCom) requested UNHCR to consider the possibility of issuing, for guidance of governments, a handbook relating to procedures and criteria for determining refugee status.<sup>3</sup> At that point 70 States had ratified the 1951 Convention and/or 1967 Protocol, the number of individual asylum applications in the industrialized world had started to rise and UNHCR had a near "monopoly on information about refugee law and refugee movements" as a result of which it "enjoyed maximum legitimacy."<sup>4</sup> The first edition of the Handbook was issued in 1979 and rapidly became an authoritative reference guide for RSD adjudicators, policy makers and legal practitioners.

21. The issuance of interpretative guidance was boosted by the Global Consultations on International Protection, which UNHCR organized in 2001 on the occasion of the 50<sup>th</sup> anniversary of the 1951 Convention. This year long process of policy dialogue resulted in a convincing re-affirmation by all States Parties of the Convention's "central place in the international refugee protection regime" and its "resilience," coupled with the belief that the protection regime should be developed further "as appropriate."<sup>5</sup> Through the Global Consultations, among other initiatives, UNHCR managed to fend off the critique expressed by some politicians in industrialized countries that the 1951 Convention had outlived its relevance in today's world.

22. Although the idea of complementary legal instruments did not materialize, the Agenda for Protection adopted at the Ministerial Conference triggered the issuance, in the course of the past decade, of an impressive series of ExCom Conclusions and UNHCR guidelines the subjects of which had been discussed in different fora of the Global Consultations. The first eight UNHCR Guidelines on International Protection were added to the 2011 edition of the Handbook, complementing it on subjects ranging from gender and religion-based persecution to exclusion and cessation. The organisation's evolving doctrine and advisory services have advanced national law making on several key aspects of refugee eligibility, notably in the important area of persecution by non-State actors.

23. Following the terrorist attacks in New York in September 2001, UNHCR's normative guidance and representations were instrumental in preserving RSD standards of refugee protection in the context of intensified efforts to combat international terrorism, including through new legal initiatives. Since then national security concerns as well as the related issue of exclusion from refugee status have become more prominent themes in UNHCR's advisory and supervisory work as well as in its mandate RSD operations.

24. In RSD decision-making, UNHCR's normative guidance, although not binding per se on States, carries considerable weight as confirmed by jurisprudence and evidenced by state practice. The fact that this guidance is itself inspired by state practice, jurisprudence and academic research strengthens its impact. Forcible returns to countries of origin contrary to a positive UNHCR eligibility determination in the individual case do occur but

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<sup>3</sup> Executive Committee of the Programme of the United Nations High Commissioner for Refugees (ExCom), *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, available at: <http://www.refworld.org/docid/3ae68c6e4.html>.

<sup>4</sup> See Loescher, *UNHCR and World Politics* (see above note 1), p. 5.

<sup>5</sup> Declaration of States Parties, adopted unanimously at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol, organized jointly by Switzerland and UNHCR on 12-13 December 2001. See UNHCR, *Agenda for Protection [Global Consultations on International Protection/General]*, 26 June 2002, A/AC.96/965/Add.1, available at: <http://www.refworld.org/docid/3d4fd0266.html>.

are still an exception to the rule – which is a clear testimony of the continuous strength of the Office’s supervisory mandate and standing.<sup>6</sup>

25. UNHCR has produced a considerable number of tools in support of RSD operations, including training manuals, mandatory and ad hoc RSD trainings, detailed Procedural Standards for Mandate RSD, and protection policy papers as well as guidelines on complex operational issues.<sup>7</sup> In addition to the upgraded online Refworld database, country specific eligibility guidelines have supported not only better but also more harmonized decision-making. On occasion, UNHCR still has difficulty in coping with the internal as well as external demand for such guidelines, and in some cases it has had to deal with sensitivities of countries of origin concerned. It is widely recognized that, taken together, UNHCR’s legal guidelines and practical tools have served to enhance the quality and consistency of RSD both in and outside the organization, compared with twenty or even ten years ago.<sup>8</sup>

### **Carrying out individual RSD under the mandate**

26. Perhaps the most striking feature of UNHCR’s evolving engagement with RSD is the enormous expansion of its mandate RSD activity. In 2012 UNHCR registered 115,800 individual applications (12% of the global total), more than double the figure for 2003 (61,900).<sup>9</sup> In 2012, UNHCR was the second largest RSD body worldwide, behind South Africa. In the absence of national RSD procedures, or of fully functioning national asylum systems, UNHCR carried out RSD in 67 countries and territories.

27. This is a far cry from the situation in the early days of UNHCR’s existence, when the High Commissioner felt compelled to justify and delineate a possible involvement in individual eligibility determination, in a Memorandum to the High Commissioner’s Advisory Committee. Belgium had requested him to assume the RSD function in its territory and in another country “the delivery of eligibility certificates” had “seemed the

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<sup>6</sup> This is not to say that UNHCR’s supervisory role should not be strengthened. Since the Global Consultations new proposals have been formulated by experts. For a recent example see the *Summary Conclusions of the Roundtable on the Future of Refugee Convention Supervision. Convened at Downing College, University of Cambridge Hosted by the University of Cambridge and the University of Michigan, September 28–29, 2012*, in: *Journal of Refugee Studies* (2013) 26 (3), p. 327 - 330. For an analysis of the multifaceted nature of UNHCR’s supervisory role, see Volker Türk, *The UNHCR’s role in supervising international protection standards in the context of its mandate*, in: James C. Simeon (ed.), *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013), p. 39-58.

<sup>7</sup> Examples are UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.refworld.org/docid/4cd12d3a2.html> and UNHCR, *Guidelines on Exemption Procedures in respect of Cessation Declarations*, December 2011, available at: <http://www.refworld.org/docid/4eef5c3a2.html>. The Division of International Protection (DIP) is working on guidance for credibility assessments in RSD, which in practice often proves to be a difficult area for RSD adjudicators, see also: UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html>.

<sup>8</sup> As regards progress in consistency, see Hugo Storey, *Consistency in refugee decision-making: a judicial perspective*, in: *Refugee Survey Quarterly* (2013) 32 (4), p. 112-125.

<sup>9</sup> UNHCR, *UNHCR Statistical Yearbook 2012, 12th edition*, 10 December 2013, available at: <http://www.refworld.org/docid/52aad29d4.html>, p. 49. The figures include appeals. Over a three year period, the figure rose from 334,000 applications (2005-2008) to 430,500 (2009-2012). According to provisional figures in UNHCR’s Mid-Year Trends report (UNHCR, *Mid-Year Trends*, June 2013, (available at: <http://unhcr.org/52af08d26.html>), UNHCR offices registered 80,300 applications during the first half of 2013 (4,800 of which are appeals), out of a total of 456,000 individual applications to States and UNHCR combined. These figures exclude asylum applications lodged in South Africa. The January - June 2013 figure may well result in a further increased annual figure.

only effective means of implementing international protection” ... “to escape the risk of immediate expulsion.”<sup>10</sup> After noting that the High Commissioner’s work “shall relate as a rule to groups and categories of refugees” (article 2 of the Statute), he also stated that governments were at liberty to seek UNHCR’s cooperation and that “urgent demands of international protection may make it necessary” for UNHCR to determine individual refugee eligibility. Stating that the procedure “should be regarded as an exceptional one”, he referred to “the serious situations, which might arise.”

28. UNHCR’s operation in Belgium was a rare case of delegated authority, by national law, to conduct RSD, even though the Belgian authorities<sup>11</sup> were the official decision makers on the right to stay and work. During the 1950’s UNHCR’s RSD involvement steadily expanded in Europe, in countries which did not yet have a national procedure or which requested UNHCR to become a member of new national RSD decision-making bodies, in particular France and Italy.

29. However, already in the 1950’s UNHCR started undertaking RSD outside Europe, in Cairo, based on a Memorandum of Understanding with the Egyptian government, which is still valid today and which commits the authorities to grant residence permits to refugees recognized under the mandate. In the 1960’s and 70’s UNHCR began carrying out RSD in other regions, mostly in Africa and Asia, sometimes with the help of UNDP offices in capitals where it did not have a presence. Absent specific foreign policy or security concerns in the individual case, countries would normally allow refugees recognized under the mandate to stay in their territory, even in the absence of a national law or formal agreement with UNHCR to this effect.

30. In an important development, UNHCR expanded its RSD activities to Yugoslavia pursuant to an agreement with President Tito reached in 1976. In the middle of the Cold War this was a historic breakthrough – the first RSD operation in an Eastern European State able to help tens of thousands of refugees from other countries with a communist system of governance to freedom and safety in resettlement countries. It was a rare, early example of UNHCR’s entire presence in a Convention State being made contingent, for political reasons, on the resettlement of all recognized mandate refugees.

31. In the 1980’s and 1990’s UNHCR’s mandate RSD activities expanded further, in tandem also with the increasing number of country representations and rising number of people on the move. On all continents UNHCR became involved in promotion, advice and capacity building in relation to new national RSD procedures. Situation specific RSD arrangements were also supported. Of particular note are the contributions to the design and implementation of ad hoc RSD mechanisms in five countries of first asylum in South-East Asia in the context of the Comprehensive Plan of Action for Indochinese Asylum-Seekers in the early 90’s.<sup>12</sup>

32. It is difficult to provide a detailed and accurate picture of the evolution of mandate RSD operations in the absence of easily accessible statistical and other relevant global data before 1994. What is certain is that the volume of mandate RSD applications has increased in absolute terms. During the last ten years there has not been an increase in relative terms,

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<sup>10</sup> High Commissioner’s Advisory Committee on Refugees (First Session 1951), *Memorandum by the High Commissioner on certain problems relating to the eligibility of refugees*, Conference Room Document No. 1, 15 November 1951, available at: <http://www.unhcr.org/4419921c2.html>, p. 3.

<sup>11</sup> Jacques Vernant, *Les Réfugiés dans l’Après-Guerre* (Monaco : Editions du Rocher, 1953), p. 331.

<sup>12</sup> See Arthur C. Helton, *Refugee Status Determination under the Comprehensive Plan of Action: Overview and Assessment*, in: *International Journal of Refugee Law* (1993) 5 (4), p. 544-558.

since UNHCR's share of global RSD (States plus UNHCR) has remained at between 10 and 12%.

33. An inquiry into the precise scope of and reasons for the rise in individual applications, in national as well as UNHCR procedures, goes beyond the scope of this preliminary review. It is assumed that the main set of reasons revolves around the number of people on the move, as a result of new and intensifying situations of conflict and persecution as well as increasing mixed population movements which complicate group based responses. Irregular secondary movements due to various push and pull factors, such as deteriorating conditions in countries of asylum and smuggling networks, may also be a contributing factor.

34. A second set of possible causes is linked to asylum management policies adopted by governments in some situations. This includes resorting to individual RSD in situations where group based determinations had been the traditional approach. Depending on each country situation such policy changes seem to be inspired by a variety of factors, in particular: deteriorating economic conditions, less receptive attitudes in host societies, considerations of security, evolving relations with countries of origin and perceived improvements in conditions there. UNHCR has also been required to undertake RSD in special emergency situations such as Libya in 2011 and in Syria in 2013/2014. In addition, more restrictive migration and security policies may prompt persons who had been able to secure informal protection, to seek formal protection by accessing RSD procedures.

### **Challenges for UNHCR's mandate RSD**

35. As noted in internal as well as external reports, UNHCR has difficulties in coping with the volume of mandate applications, in particular in the larger operations. Although the total number of staff conducting RSD has risen from 370 in 2011 to 400 in 2013,<sup>13</sup> UNHCR's relative RSD capacity, i.e. in relation to the number of applications, has decreased to 47% over the past decade.

36. In 2002, the then Director of DIP wrote in an internal memorandum: "There does not appear to be one single UNHCR office with a large number of asylum-seekers that is adequately staffed to process all applications within a reasonable time. Shortages of staff qualified to undertake RSD have resulted in very large backlogs, the worst being Cairo with an astounding 12,000 cases (including appeals)."<sup>14</sup> At the end of 2012 the figure of pending applications in Cairo stood at 17,000, out of a global UNHCR backlog of 146,800. The latter figure is a historical high, up from 73,700 in 2003.<sup>15</sup>

37. In 2012, the largest mandate RSD operations in terms of individual RSD applications registered were in Kenya, Malaysia, Turkey, Indonesia, Egypt, Libya, Pakistan, Cameroon, Somalia and Yemen. At the time of writing, the number of pending applications in Kenya

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<sup>13</sup> The number of full time RSD staff stood at 265 in 2012 - up from 200 in 2011. These and several other data have been obtained from DIP's RSD Unit. Depending in large measure on cooperation with the Regional Bureaux and country operations and functioning with only few staff, the RSD Unit tracks and analyses RSD related developments in UNHCR and beyond, and provides guidance and support to operations involved in conducting mandate RSD or in building the capacity of Government RSD procedures. The Unit also develops and delivers RSD trainings for UNHCR, Government and NGO staff; manages the UNHCR RSD Deployment Scheme and Roster; and advises on, and advocates for, proper resource allocation for RSD related activities.

<sup>14</sup> *Memorandum of 11 March 2002* by the Director of DIP to the High Commissioner (internal document).

<sup>15</sup> UNHCR, *Statistical Yearbook 2012* (above note 9), p. 49. In 2012, UNHCR's decision making capacity (decisions rendered versus asylum claims registered) dropped to 47%, after it had exceeded 60% almost consistently between 2003 and 2010.

stands at 52,200.<sup>16</sup> As analysed in a recent public survey of UNHCR's urban refugee policy, asylum applicants are faced with long waiting periods in some of the larger operations.<sup>17</sup> In 2012, in Kenya the waiting time for first instance decisions was 14 months, whereas in Turkey the first RSD appointment could take 15 months. In the meantime, existing reception facilities are often not equipped to take care of large numbers of applicants. While most of them seek to survive in the informal labour market, others see no alternative than to move on in an irregular manner.

38. The human and strategic cost of UNHCR's inability to comply in some operations with its RSD Procedural Standards is therefore high. It can impact negatively on the organization's credibility and even discourage national authorities from assuming the RSD responsibility. There are, however, also operations where UNHCR, through combinations of effective case management and staffing increases, has managed to reverse considerable backlogs. In India for example, this has improved relationships with refugee communities and the authorities and contributed to an expansion of the protection space in the country.<sup>18</sup>

39. In the view of several interlocutors, the level of quality and safeguards required by UNHCR's Procedural Standards makes full compliance extra challenging. For example, the processing standard of four "regular cases" per RSD staff per week<sup>19</sup> (interviewing and assessing), albeit indicative, may be fully justified for optimal refugee determinations and staff welfare, but will make it difficult in many operations to keep pace with the number of new applications.

40. According to one senior UNHCR staff member, UNHCR "basically continues to operate RSD on a shoestring", notwithstanding the repeated urgings by especially DIP and NGOs to increase resources and notwithstanding some important improvements in this regard (such as post creations in the context of the High Commissioner's Special Initiatives). Insufficient staffing, including at the RSD supervisory level, and the over reliance on affiliate workforce arrangements<sup>20</sup> (currently at 50% of full-time RSD staff), have over the years been recurrent themes in country inspection reports by UNHCR's Inspector-General, in addition to staff safety and welfare concerns.

41. Especially in the course of the last decade the rising volume of RSD operations has pushed UNHCR to resort to alternative case processing strategies, such as enhanced registration, and to greater openness for pragmatic protection alternatives.<sup>21</sup> This includes temporary protection arrangements and the suspension of RSD processing - for a limited period of time until the situation in the country of origin becomes clear or stable, and voluntary return or a resumption of RSD becomes possible. The persons concerned are

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<sup>16</sup> UNHCR Nairobi, *Statistical summary of 30 November 2013* (internal document). The increase in applications of nationals of South Sudan plays an important role.

<sup>17</sup> For more data on waiting periods and other issues, see UNHCR, *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas*, 2012, available at: <http://www.refworld.org/docid/51c7fa9e4.html>, p. 20.

<sup>18</sup> UNHCR, *Destination Delhi: A review of the implementation of UNHCR's urban refugee policy in India's capital city*, 13 August 2013, PDES/2013/09, available at: <http://www.refworld.org/docid/520a419a4.html>, p. 10-11.

<sup>19</sup> DIP, *UNHCR Protection Staffing Benchmarks and Related Recommendations*, March 2010 (internal document), which was addressed to all Representatives.

<sup>20</sup> Concerns include the high turnover of RSD affiliate staff, prolonged vacancies, need for re-recruitment and training, loss of experience and expertise, and lack thereof among the regular UNHCR workforce.

<sup>21</sup> In April 2006, an internal report by DIP looked at alternatives for individual mandate RSD.

registered by the local UNHCR office and issued with a corresponding certificate.<sup>22</sup> Opportunities for such approaches are, however, context specific. While they may be a logical response to relieve RSD systems, the offices concerned are faced with the challenge to build in protection safeguards at the same time, preferably through an agreed arrangement with the national authorities. As part of a broader protection strategy individual RSD is then reserved for specific categories, such as persons in detention, particularly vulnerable persons who may need resettlement and possible exclusion cases.

42. As regards situations of mixed refugee and migration flows, UNHCR launched some years ago the Ten Point Plan of Action on Refugee Protection and Mixed Migration,<sup>23</sup> which includes the early profiling and channelling of non-refugees into channels for migration or return in safety and dignity. This initiative has gained much currency but often seems to be hampered by a dearth of easily accessible avenues for legal migration as well as obstacles, including non-admission, to return to countries of origin.

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<sup>22</sup> Examples are the temporary protection certificates in Malaysia for Achenese (2003) and the renewable asylum-seeker certificates for Sudanese in Egypt (2004/5). More recently, in Turkey UNHCR has suspended the processing of applicants from Afghanistan; they are registered by the Turkish authorities.

<sup>23</sup> UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev.1, available at: <http://www.refworld.org/docid/45b0c09b2.html>.



## State responsibility for RSD

43. Having examined the main aspects of UNHCR's engagement with RSD, it is now time for a closer look at the responsibility of States in this area, starting with the legal basis and the evolution of national RSD procedures over the past decades.

### Legal basis

#### *Convention States*

44. Although the 1951 Convention and 1967 Protocol are silent on the matter, the legal responsibility of States having ratified these instruments, or either of them, to properly identify persons meeting the refugee definition is generally undisputed. Without such identification States would not be able to accord the treatment set forth in the 1951 Convention.<sup>24</sup> Sometimes the assessment of refugee status by States is referred to as an implied duty.<sup>25</sup> In its first Note to the Executive Committee on determination of refugee status (1977), UNHCR called such determination an "inherent requirement" of the 1951 Convention.<sup>26</sup> Importantly, State responsibility for RSD under the 1951 Convention has been confirmed by jurisprudence in several countries.<sup>27</sup>

45. States must know to whom they owe their treaty-based commitments, even while the determination itself is of a declaratory and not of a constitutive nature. It is in principle a matter for States themselves to decide on the manner in which they wish to determine refugee status, be it on an individual or group basis. The principle of good faith in fulfilling treaty obligations, in particular when these have a protection objective, is, however, a strong argument for the establishment of specific determination procedures with a set of inbuilt guarantees<sup>28</sup> – if only to avoid that mistakes are made with far reaching negative consequences and to promote consistency. From the perspective of the applicant, basic principles of due process, as reflected in human rights treaty obligations and administrative law systems around the world, reinforce the legal argument for such procedures.

46. UNHCR has for a long time advocated for the establishment of formal procedures, instead of resorting to informal or ad hoc arrangements within the existing administrative

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<sup>24</sup> "The legal consequences which flow from the formal definition of refugee status are necessarily predicated upon determination ... that the individual or group in question satisfies the relevant legal criteria." Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 51.

<sup>25</sup> James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), p. 180.

<sup>26</sup> UNHCR, *Note on Determination of Refugee Status under International Instruments*, 24 August 1977, EC/SCP/5, available at: <http://www.refworld.org/docid/3ae68cc04.html>, p. 1.

<sup>27</sup> For example, the High Court of Australia referred to compliance with "Convention obligations of non-refoulement and determination of refugee status" in its judgement *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*; and *Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, Australia: High Court, 31 August 2011, available at: <http://www.refworld.org/docid/4e5f51642.html>, para 234.

<sup>28</sup> A rare dissenting view on the need for formal procedures can be found in Hathaway, *Rights of Refugees* (above note 25), p. 180, with the argument that States parties must "simply respect the rights of persons who are, in fact, refugees."

framework.<sup>29</sup> In 1977 the Executive Committee, still rather timidly, “expressed the hope” that States parties to the 1951 Convention would take steps to establish formal procedures.<sup>30</sup> Since 1986 the General Assembly has emphasized the “importance of fair and expeditious procedures”<sup>31</sup> and of ensuring access for persons seeking protection to “fair and efficient procedures”<sup>32</sup> in several resolutions.

### *Non-Convention States*

47. There are 46 UN Member States which have not yet acceded to the 1951 Convention or the 1967 Protocol.<sup>33</sup> In these States, the principle of *non-refoulement* and basic standards of due process should nevertheless be compelling arguments in favour of designated procedures incorporating specific safeguards for correct decision-making. As analysed by judges, scholars and UNHCR itself, the binding character of the prohibition of refugee *refoulement* as a customary rule of international law is supported by an overwhelming body of state practice coupled with *opinio iuris*, including in non-Convention States.<sup>34</sup>

48. Many non-Convention States, particularly in the Middle East and Asia, have been or continue to be host to large refugee populations. Laws on foreigners, ad hoc decrees and administrative policy form the basis for this humanitarian practice, or specific aspects to it such as the right of temporary residence. In several non-Convention States the principle of *non-refoulement* is anchored in national law.<sup>35</sup>

49. When the 1951 Convention is not applicable, refugee eligibility would *stricto sensu* need to be assessed only to determine whether a person is entitled to protection against *refoulement* – not whether durable stay or other rights should be granted. In essence, however, the legal test – does the person have a well-founded fear of persecution – is the same, and should entail an independent inquiry into the inclusion as well as possible exclusion aspects set forth by international law. This point is brought home in the new law on asylum and migration of Turkey. Although the country is maintaining its geographic reservation to the 1951 Convention, all asylum applicants will undergo RSD on the basis of the same, accepted refugee definition. Only the resulting status will differ, with refugees falling under the geographic reservation being granted only temporary stay.

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<sup>29</sup> See *Note on Determination of Refugee Status* (above note 26), p. 2.

<sup>30</sup> ExCom Conclusion No. 8 on *Determination of Refugee Status* (above note 3).

<sup>31</sup> See for example UN General Assembly, *Office of the United Nations High Commissioner for Refugees: resolution adopted by the General Assembly*, 4 December 1986, A/RES/41/124, available at: <http://www.refworld.org/docid/3b00f2332d.html>, para 8 and *resolution adopted by the General Assembly*, 15 December 1989, A/RES/44/137, available at: <http://www.refworld.org/docid/3b00f21328.html>.

<sup>32</sup> UN General Assembly, *Office of the United Nations High Commissioner for Refugees: resolution adopted by the General Assembly*, 24 February 1995, A/RES/49/169, available at: <http://www.refworld.org/docid/203b00f30bc.html>.

<sup>33</sup> The issue is also relevant in the few Convention States, which still maintain a geographic reservation to the 1951 Convention.

<sup>34</sup> The customary international law character has also been confirmed by the International Criminal Court in its judgement in *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute), ICC-01/04-01/07-3003 (ICC TC II, Jun. 09, 2011), available at: [http://www.worldcourts.com/icc/eng/decisions/2011.06.09\\_Prosecutor\\_v\\_Katanga.pdf](http://www.worldcourts.com/icc/eng/decisions/2011.06.09_Prosecutor_v_Katanga.pdf), para 68. More generally, see also UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html>, which states in Article 1: “3. It shall rest with the State granting asylum to evaluate the grounds for the granting of asylum.”

<sup>35</sup> In several States, for example Bahrain, Kuwait, Libya, Oman, Syria and the United Arab Emirates, the principle is included in the Constitution.



50. An advantage is that the refugee protection test can be combined with the assessment of the need for protection against risks of torture or other cruel, inhumane or degrading treatment, as required in the 154 States party to the Convention against Torture.

51. In a ground breaking judgement the Court of Final Appeal of the Hong Kong Special Administrative Region considered in March 2013 that the “duty of independent inquiry to ensure respect for the principle of non-refoulement” is required by the high standards of fairness that must be met given the “serious consequences” and “momentous” importance of decisions to return a person claiming to be a refugee to his country of origin.<sup>36</sup> Hong Kong had already established a mechanism to assess claims for protection under the Convention against Torture. Importantly, the Court decided that the authorities were not entitled to merely rely on UNHCR’s mandate RSD, especially in cases of rejection (as was the case in point). Basing itself directly on the rule of law,<sup>37</sup> the Court did not even find it necessary to invoke and pronounce itself on the binding character of *non-refoulement* of refugees under customary international law. Further study of the legal basis for RSD procedures in non-Convention States would be useful, taking into account recent developments such as the Hong Kong SAR judgement.

### **The protection rationale of State responsibility**

52. In Conclusion No. 81 (1997) the Executive Committee emphasized “that refugee protection is primarily the responsibility of States, and that UNHCR’s mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States.”<sup>38</sup>

53. In practice, UNHCR is often called to assume State functions, from hiring teachers for refugee camps to registering the birth of refugee children. Clearly though, only States are able in a durable manner to provide physical protection and the range of services they owe towards people finding themselves on their territory. Even for the enforcement of its legally mandated RSD decisions, UNHCR depends to a considerable extent on States.

54. The importance of State responsibility is underscored by several more specific considerations in the area of RSD. Only States are in a position to integrate RSD in a broader framework of rule of law, adequate reception conditions and durable solutions. States have technical and diplomatic possibilities to verify exclusion and security threats, which UNHCR does not have. States are in a position to ensure independent appeals against negative RSD decisions, whereas internal UNHCR appeal decisions are beyond “the reach of legal review.”<sup>39</sup>

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<sup>36</sup> Judgement *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, available at: <http://www.refworld.org/docid/515010a52.html>.

<sup>37</sup> See also the Supreme Court of Canada, which ruled in 1985 that refugee claimants are entitled to “fundamental justice” under the Canadian Charter of Rights and Freedoms, which normally requires an oral hearing, *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, Canada: Supreme Court, 4 April 1985, available at: <http://www.refworld.org/docid/470a4a6dd.html>.

<sup>38</sup> UNHCR, *General Conclusion on International Protection*, 17 October 1997, No. 81 (XLVIII) -1997, available at: <http://www.refworld.org/docid/3ae68c690.html>, para (d).

<sup>39</sup> This argument was advanced by Justice Bokhari in the Hong Kong SAR judgement (above note 36). See also Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, in: *International Journal of Refugee Law* (2006) 18 (1), p. 1-29.

55. Only States can enforce RSD decisions by giving follow-up to positive as well as negative decisions, thus promoting the credibility of the institution of asylum. Practical follow-up by States to eligibility determinations by UNHCR is often much less evident than implementation of RSD decisions taken by their own administration. The non-enforcement of mandate RSD decisions, be they positive or negative, risks adding to situations of illegal stay and irregular onward movement.

56. In practice mandate RSD by UNHCR may provide a substantial degree of protection in countries that are yet unwilling to assume the RSD function themselves. Especially for applicants in detention or threatened with removal, the “protection dividends” of mandate recognition and UNHCR representations are often evident. UNHCR certificates enable applicants and refugees to move around, to the extent governments have not imposed restrictions on free movement. However, the stark reality is that, absent an official status in the country concerned, large numbers of applicants and refugees continue living in situations of legal uncertainty, dependency on assistance and exposure to exploitation.

57. Undertaking mandate RSD at the request of governments may be beneficial to UNHCR’s image in the country concerned and may yield influence and other strategic benefits for refugee protection more broadly. At the same time, the reliance on UNHCR to replace State responsibility makes UNHCR increasingly vulnerable to external critique, which over time may also affect its credibility. The increasing attention on exclusion determinations is a particular area of risk, as wrong decisions cannot always be avoided with the information that is normally available to UNHCR.<sup>40</sup>

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<sup>40</sup> For an example of the difficulties in assessing exclusion, the tensions it may cause with governments and the negative publicity it may generate, see Amnesty International, *Return to Torture: Extradition, forcible returns and removals to Central Asia*, 3 July 2013, available at: <http://www.refworld.org/docid/52453b634.html>.

## The evolution of national RSD

58. Currently 117 UN Member States and 4 non-State entities operate a specific procedure for the determination of refugee status pursuant to legislation. Taking into account that 148 States have ratified the 1951 Convention and/or 1967 Protocol, this means that 31 States parties, i.e. some 21%, are not currently implementing such a procedure. 7 States, including 3 non-Convention States, have adopted a legal framework but have not yet established a procedure.

59. For the purpose of this review efforts have been made to reconstruct the adoption of national RSD procedures from a historical perspective. Until 1989 UNHCR submitted on a regular basis a Note on the subject to the Executive Committee, keeping it informed of progress in this area.<sup>41</sup> In addition to this Note the review used a questionnaire that was sent to all country offices as well as other sources of information. The resulting graph is included in Annex III to this report.

60. The preliminary review *recommends* that this research be finalized and that UNHCR creates a consolidated historical database, which will include the relevant phases (adoption of legislation, establishment of the procedure, actual functioning of RSD). The database could usefully include information on the establishment of any specific procedures in the context of prima facie group determination or alternative stay arrangements.

61. In addition to procedures conducted by the government ("G") or UNHCR ("U"), UNHCR's Annual Statistical Report (ASR) uses a category of procedures conducted "jointly" by governments and UNHCR ("J").<sup>42</sup> Analysis of the data provided in the questionnaires and research related to statistical reporting have brought to light that this category has given rise to misunderstanding. Moreover, the data provided for "joint" procedures, which is relevant in relation to a small group of countries only, is not or may no longer be accurate. Out of the eleven countries reporting joint processing in the context of the 2012 ASR only three had joint processing according to the respective instructions in place. It is recommended to assess whether strengthened guidance or a binary framework of only government and UNHCR procedures could enhance the quality of data. Taking the legal responsibility for the RSD decision as the starting point, a binary framework would not preclude the useful collection of information on UNHCR contributions in national procedures through other means.

62. Since 2000, 41 States have joined, or in some cases re-joined, the list of countries implementing individual RSD procedures (plus 4 non-State entities).<sup>43</sup> Transition

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<sup>41</sup> United Nations GA, *Note on Procedures for the Determination of Refugee Status under International Instruments*, Document: A/AC 96/INF.152/Rev.8, 12 September 1989, available at: <http://www.refworld.org/pdfid/4d6258792.pdf>.

<sup>42</sup> The respective definition in the UNHCR Manual (Chapter 4, Section 6.8 – Population Statistics, p. 14) has been revised for the December 2013 update. "Joint procedure" refers to a situation where the State has established a national procedure and is responsible for granting refugee status, "but UNHCR has formal responsibility, either alone or with some degree of Government involvement, for one or several steps in the national RSD procedure (for example registration, interviews, recommendations in first or second instance)."

<sup>43</sup> These are in chronological order: Guinea, Sudan, Malta, Mexico, Togo, Cyprus (South), Paraguay, Tajikistan, Guatemala, Mozambique, Azerbaijan, FYROM (Macedonia), Fiji, Moldova, DRC, Venezuela, Timor Leste, Albania, Croatia, Bosnia-Herzegovina, Ethiopia, Honduras, Turkmenistan, Tanzania, Mauretania, El

processes are currently under way in several countries,<sup>44</sup> including in Kenya and Turkey, which figure in the top five list of biggest mandate operations. Most recently, the governments of Hong Kong SAR and Morocco expressed their intention to establish determination procedures, respectively for *non-refoulement* and refugee status. In another important development, the government of Pakistan, a non-Convention State, adopted in July 2013 a national policy on the management and repatriation of Afghan refugees, which includes the intention to develop a refugee law and may eventually lead to a national RSD procedure.

### **The background and motives behind the adoption of national RSD procedures**

63. Independence in Africa, the return to constitutional rule in Latin America, the demise of the Soviet Union and the end of apartheid in South Africa are all examples of fundamental political change combined with a legacy of persecution and suffering, playing a key role in advancing frameworks for refugee protection. Moreover, as Gil Loescher writes, political leaders of most newly independent governments in Africa, Asia and the CIS region cared deeply about their international image and sought international legitimacy through cooperation with organizations such as UNHCR.<sup>45</sup>

64. More generally, governments have often been swayed by a positive willingness to conform to international norms and good practice, in combination with other factors. Countries such as Burundi, Japan, Korea, Mexico and the Philippines are some examples from the more recent past. Governments, parliaments and opinion makers are also moved by feelings of national pride and sovereignty, wishing to show their country's ability to manage the challenges of population movements in a modern, efficient and humanitarian way.

65. A potent driver for refugee legislation and RSD procedures is a country's own experience with incoming refugees, especially when a particular emergency arouses public sympathy or fits the government's political interests. It happened when 11,000 citizens of Czechoslovakia fled to Canada after the invasion of their country in 1968, when thousands of Cubans sought refuge in the Peruvian Embassy in Havana in 1980, when large numbers of asylum-seekers from the Middle East were stranded in Poland in 1991, and when Uganda was faced with new refugee influxes in mid-2000. These are only a few examples of events and influxes, which put the refugee issue clearly on the domestic political agenda. Once on the agenda, the events triggered a process of policy making and eventually RSD procedures in the countries concerned.

66. States have been motivated to establish RSD mechanisms as a conduit to manage mixed migration or to control new arrivals, especially when numbers increase. In some cases RSD procedures have been initiated not only to identify legitimate protection needs but also to prevent the infiltration of security threats. There are also States where, according to observers analysing asylum statistics and political discourse, RSD appears to

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Salvador, Rwanda, Congo, Uganda, Uruguay, Guinea-Bissau, Montenegro, Serbia, Israel, Cambodia, Sierra Leone, Kazakhstan, Gambia, Nauru, Mauritania, Djibouti. In addition the following non-State entities: Macao SAR, Kosovo (UNSCR 1244), Montserrat, Cayman Islands. Some of the listed States have conducted individual RSD during previous periods, but undertook reform and recommenced RSD.

<sup>44</sup> According to data available in UNHCR's Focus software, 11 country offices have applied the newly introduced output "handover of status determination procedure from UNHCR to government initiated" between 2012 and 2015 (six for 2012, seven for 2013, six for 2014 and four for 2015). In several cases the output was chosen for only one year.

<sup>45</sup> Loescher, *UNHCR and World Politics* (above note 1), p. 5.

be applied foremost to discourage asylum applicants, so as to maintain the reputation of the country concerned as a “transit” country. Clearly, the motives of States to establish RSD frameworks are not only of a humanitarian nature, but also security and control oriented. More generally, the use of RSD procedures for political reasons, including to legitimize the return of opponents from neighbouring States, is far from new.

### **The impact of promotional efforts**

67. The continuing spread and growing influence of civil society has in many countries helped to move governments to adopt or improve RSD frameworks. In several cases, the NGOs concerned were at one point established with the active support of UNHCR. As a result of pro-active legal action, national judiciaries have also come to play an increasingly vocal role in promoting refugee protection standards, as seen in countries as diverse as Belize, Israel and Kenya.<sup>46</sup> In addition, national human rights institutions can be influential actors of change, as UNHCR has experienced in for example South Africa and more recently Kazakhstan and Morocco.

68. The influence of external actors should neither be over stated nor be under estimated. Efforts by the European Union in particular have not only impacted policy making and capacity building in countries that have subsequently joined the EU but also further away, in other parts of the world. The EU’s pre-accession talks with Turkey and the country’s on-going interest in visa free travel arrangements appear to have been a major factor in convincing the Turkish government to upgrade the RSD system, even while efforts to convince Turkey to lift its geographic reservation to the 1951 Convention have not been successful.

69. It is difficult to measure the precise impact of UNHCR’s own work to socialize refugee protection standards. Looking at the statistics, there seems to be a correlation between UNHCR conferences and increased legislative activity, as was the case following the Cartagena symposium, the CIS Conference and the Global Consultations process. Often, the positive image and leverage resulting from UNHCR’s support in a large scale emergency has made a difference. In most situations, though, UNHCR’s long standing awareness and capacity building efforts have at one point come to fruition as an element in the interplay of specific contextual factors, political motives and the influence of other actors.

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<sup>46</sup> In 2009, the Supreme Court of Belize decided that the government was obliged to re-activate the RSD procedure (Supreme Court judgement of 7 May 2009, referenced in: UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Belize*, 5 March 2013, available at: <http://www.refworld.org/docid/5135afde2.html>). In Kenya in 2013, the High Court found the government’s refugee encampment policy in contravention of international law (*Kituo Cha Sheria and others v. The Attorney General*, Kenya: High Court, 26 July 2013, available at: <http://www.refworld.org/docid/51f622294.html>). Also in 2013, the Israeli Supreme Court of Justice found the prolonged detention of illegally entering asylum-seekers and other aliens unconstitutional (*Adam and others v. The Knesset and others* (7146/12); *Doe and others v. Ministry of Interior and others* (1192/13); *Tahangas and others v. Ministry of Interior* (1247/13), 7146/12, 1192/13, 1247/13, Israel: Supreme Court, 16 September 2013, available at: <http://www.refworld.org/docid/524e7ab54.html>). Less recent but noteworthy is the example of a class action in the US in American Baptist Churches versus Thornburgh brought forward in 1985. Alleging a pattern of discrimination in the adjudication of asylum claims based on geography and ideology, the US Immigration and Naturalization Service eventually agreed to settle the claim by offering the re-adjudication of all rejected applicants from El Salvador and Guatemala (*American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), 31 January 1991).

70. The current RSD transition process in Turkey illustrates the point.<sup>47</sup> The adoption in April 2013 of the comprehensive and in many ways progressive law on foreigners and international protection has a long history of awareness and capacity building by the UNHCR office in Ankara, lobbying by Turkish organisations, court judgements and dialogue with the EU. Work on the transition, which includes a new structure for RSD processing, is now in full motion with the close involvement of UNHCR, the Helsinki Citizens Assembly and others, and is positively motivated by the shared wish to achieve an efficient as well as humane system.

### **Why do other States refrain from establishing RSD procedures?**

71. Of the 31 States party to the 1951 Convention that do not yet operate a national procedure, five figure in UNHCR's top 15 list (2012) of RSD mandate operations (Kenya, Egypt, Somalia, Yemen, Cameroon, by order of volume of applications). In Cameroon preparatory work for such a procedure is under way and in Kenya it is well advanced. A special situation exists in Turkey where, pending the reform process, the national and mandate procedure operate in parallel and are closely linked. Djibouti resumed national RSD in 2013. The other eight countries in the list are non-Convention States (Malaysia, Libya, Indonesia, Iraq, India, Pakistan, Jordan, Syria).

72. Several States that have not established a national RSD procedure provide asylum to significant numbers of refugees of certain nationalities. It should also be noted that several countries practise some form of internal process for the granting of asylum in high profile political cases, which is however neither regulated nor accessible for asylum-seekers more generally.

73. In States that grant asylum on a collective basis to specific groups, political reasons may have thus far worked against the adoption of refugee legislation and RSD procedures for applicants from other nationalities. Sometimes the numbers involved may be too small for political traction in favour of legislative initiatives. The reverse also applies, even though it is harder to prove: where numbers have swollen, national authorities seem to become less inclined to take over the responsibility for RSD from UNHCR, unless political or security related circumstances change and the authorities become keen to take matters into their hands.

74. Fears of adding to already existing migratory pressures and rising anti-foreigner sentiments are also claimed by States to resist regulating refugee protection. The resistance can be especially strong where these fears are compounded by a country's geographical location, for example in Malaysia, or its relatively small size coupled with continuing refugee influxes and security concerns, such as currently in Lebanon. In countries from the Caribbean region to South Asia capacity problems continue to be quoted to resist the granting of refugee status and adoption of procedures for this purpose.

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<sup>47</sup> For an historic appraisal, see Kemal Kirişçi: *Turkey's New Draft Law on Asylum: What to Make of It?* in: Seçil Paçacı Elitok/Thomas Straubhaar (eds.): *Turkey, Migration and the EU: Potentials, Challenges and Opportunities* (Hamburg: Hamburg University Press, 2012), pages 63-83 (also available at: [http://hup.sub.uni-hamburg.de/volltexte/2012/118/pdf/HamburgUP\\_HWWI5\\_Elitok\\_Migration.pdf](http://hup.sub.uni-hamburg.de/volltexte/2012/118/pdf/HamburgUP_HWWI5_Elitok_Migration.pdf)). Another interesting and less protracted example of this interplay can be found in Venezuela in 2001. Cautionary measures by the Inter-American Commission on Human Rights, interventions by the Roman-Catholic Church and NGOs, and advice from UNHCR created the synergy that convinced the government to adopt refugee legislation in response to new influxes from Colombia.



75. Some governments still appear to see little tangible benefit in assuming a responsibility that has been implemented, sometimes for decades, by UNHCR with limited national involvement. In some countries UNHCR's longstanding engagement in RSD seems to have created a certain comfort zone and is moreover regarded as being consistent with the international nature of the refugee problem and UNHCR's mandate to solve refugee problems. In some countries a culture of dependency on international aid and involvement seems to have generated a mind-set that ignores State responsibility in the area of RSD.

### **Different scenarios of transition to national RSD systems**

76. In States that have assumed responsibility for RSD, procedures have by and large developed in the following manners:

- States establish a procedure (in most cases following legislation, but sometimes earlier) and assume full responsibility from the start. Previously there was no RSD procedure, or it was done by UNHCR under the mandate;
- States establish a procedure, take the RSD decision and gradually start taking over all preparatory phases (registration, interviewing, assessing) from UNHCR;
- States undertake RSD, however UNHCR still conducts RSD on an ad hoc basis for protection reasons, such as non-admission to the national procedure; or
- States undertake RSD, including in the form of enhanced registration, for some groups only, UNHCR conducts RSD for all others.

77. Although the first scenario has been the most frequent one, the second scenario has been prevalent for some decades in many developing countries where UNHCR used to carry out RSD under its mandate. Typically several years would lie between each or several of the following stages: accession to the 1951 Convention, adoption of primary legislation, adoption of decrees for the establishment of the RSD structure, the convening of the decision-making body followed by first decision-making, the establishment of a technical secretariat, and the gradual taking over of responsibility for all phases of the procedure from UNHCR.

78. Such gradual taking over often lasted many years. Although UNHCR is still or again carrying out the preparatory phases of government decision-making in some countries, this has become more exceptional than in the past.

79. In many countries individual procedures are preceded by the collective accommodation and group based recognition of larger groups. Based on administrative directives, collective approaches may have involved a rudimentary individual examination or verification of the nationality of the individuals concerned (as was also practised in several countries in Europe in the 1950's to 70's). RSD is then introduced when persons of different nationalities start to request protection. In many parts of the world a similar evolution to individual RSD has taken place, often as a complement to group based determinations in situations of mass influx.

80. Especially in countries hosting large refugee populations on a prima facie recognition basis, registration is an activity where States have often started assuming more responsibility. Where there was no registration system in place and UNHCR did it, e.g. for the purpose of distribution of assistance, often joint registration practices have developed.

These have in many countries led to the taking over of this important phase by the authorities, including the issuance of documentation.

81. State practice shows that national RSD systems, once functioning, continue undergoing change. This can be in the area of material refugee law, the procedure, organizational set-up or reception conditions. Governments respond to changing circumstances (increasing or decreasing numbers, political factors, attitudes in society, legal developments etc.) and views also change. In a broader sense, therefore, transitions of RSD systems are continuous processes.

82. Based on State and UNHCR practice, the conclusion would seem justified that transitions rarely follow a linear and quick pattern. They have tended to be long term processes, with hurdles and changes along the way, and often with a gradual expansion of the national role. Once States are in full charge, reforms tend to continue to respond to new challenges and circumstances.



## Part 2: Making transitions work

### Prioritizing and professionalizing support for RSD transitions

83. The establishment of RSD procedures by States has been a longstanding UNHCR objective. As analysed earlier, declarations of recognition under the mandate, while carrying weight in law and practice, cannot guarantee effective protection and durable solutions, which only States can provide. In view of the difficulties in sustaining its increased mandate RSD operation, UNHCR now has a clear added interest in strengthening efforts to support States in adopting or improving RSD systems.

84. Further to the 2013 Note on International Protection, the Director of DIP made a strong plea in his statement to ExCom for Member States to work with UNHCR towards the assumption of State responsibility in this area. In UNHCR's Statistical Yearbook for 2012 the volume of UNHCR's RSD work has been termed "unsustainable." This sense of urgency does however not seem to permeate all levels of the organization.

85. In 2013, for the first time the Annual Programme Review, an important mechanism for resource allocation decisions, organised a thematic session devoted to RSD operations and resource needs. Building sustainable national procedures, and where necessary ensuring quality RSD under the mandate, has, however, not yet been elevated to the level of UNHCR's eight strategic priorities, which are established for every biennium.

86. Based on several interviews, there seems to be an ambivalent attitude within UNHCR towards mandate RSD at current levels. This state of affairs may be due to a variety of factors, including a certain resignation regarding the resource constraints; concerns about the risk of protection failures in case of transfer to States; or the frequently heard view that mandate RSD provides not only "immediate protection dividends" but also a "strategic edge" to UNHCR.

87. Interlocutors agreed that UNHCR should not focus exclusively on increasing the number of national procedures at the expense of quality and efficiency. Some of the Convention States in UNHCR's top 15 list of mandate RSD operations are moreover going through a difficult period of instability, which diminishes the prospect of national procedures in the near future.

88. At least as important are UNHCR's efforts to enhance the quality of RSD transition processes and to consolidate national RSD procedures once they have taken off. Work is in progress to enhance indicator guidance to measure, as objectively as possible, the quality and efficiency of RSD procedures and decision-making. However, even without an elaborate framework for measurement, some recurrent problems in the functioning and capacity of national RSD systems can be pointed at.

89. Although a definite collapse of the national system has been rare, research thus far has revealed seven country operations where since the year 2000 national RSD was not functioning for at least two years, up to nine. This includes procedures established before and after 2000. In several other situations, eligibility committees and second instance

bodies (which do not yet exist in all countries) have had serious problems to convene on a regular basis, causing long waiting periods and backlogs. One country office reported that the waiting period for the decision can be up to seven years.

90. Although the reasons for the irregular functioning of eligibility bodies may often be of a practical nature, sometimes a wish to stem the flow of new arrivals has reportedly also played a role. In other cases the system has been unable to cope with an increase in the number of applications coupled with resource constraints. As a result, in some States UNHCR had to step back in with operational support or even a partial resumption of mandate RSD. There are, however, also States that have managed to bring backlogs under control.

91. There are procedures that are functioning well but where UNHCR nevertheless feels compelled to carry out mandate RSD on a more than incidental basis for individual or groups of applicants, because RSD outcomes show serious and structural flaws. This issue will be looked at later in the report. The virtual non-recognition of refugees in a few countries is another indicator of problems, especially when the respective groups or individuals belong to profiles benefitting from high global protection rates. Whereas this may be linked to specific foreign policy and security considerations, in many situations of transition RSD authorities face considerable challenges in the area of standards of proof and credibility assessment, the notion of persecution, applying exclusion and other issues. In these situations the transition to national RSD is likely to be in need of improvement for substantive reasons of protection rather than reasons of capacity or sustainability.

92. In view of the above, there is ample reason for UNHCR to prioritize and professionalize its support for responsible RSD transitions. Proper preparation, support and close engagement after the start of new procedures, over a long-term multi-year period, should reduce the risk of stalled transitions as well as evident substantive protection failures.

93. In the view of the review team, UNHCR would be well served with a comprehensive strategy on responsible transitions. Such a strategy should frame UNHCR's accountability, provide policy and technical guidance to country offices and reflect on the Office's changing role in the course of RSD transition. Also the varying *marge de manoeuvre* for UNHCR in transition processes should be reflected. Based on preliminary research, the following sections provide insights and issues that such a strategy may need to take into consideration.

## Considerations for responsible transition strategies

94. This report uses the term “transition” in a neutral fashion to indicate the transition from UNHCR to a new situation, i.e. a national RSD procedure. It covers essentially two situations: where (1) UNHCR used to conduct mandate RSD and where (2) States and UNHCR were both engaged in RSD (e.g. DRC and Turkey). In addition, the term covers situations where States are expanding their role in RSD through important reforms. The findings of the report may in large measure also be applicable to situations where there previously was neither a State nor a UNHCR procedure in place as was the case in most of the countries (see annex III).

### Defining UNHCR’s responsibility and accountability

95. As a starting point for strategy formulation, UNHCR’s responsibility would need to be defined. According to article 8 of the Statute, the High Commissioner “shall provide for the protection of refugees...” The Office provides *for* the protection of refugees by assisting States to assume their responsibility for RSD. Taking into account also current practice and the views of several interlocutors, UNHCR’s responsibility could then be described as assisting States, to the best of its ability, to establish a fair and efficient system that will enable the identification of refugees meeting the definition in the relevant international and regional instruments. It is for States to ensure that they comply with their international obligations under these instruments and deliver the correct RSD outcomes. Taking into account also UNHCR’s often limited *marge de manoeuvre*, its duty is to make a serious, good faith effort to enable such compliance through a responsible process of transition to the new or reformed national system.

96. Supporting a “responsible transition” is more objective and realistic than a “successful transition”. The word “successful” risks confusing the quality of the transition process with the quality of the outcomes of the new RSD system. Irresponsible transitions, such as the dumping of RSD on untrained decision makers, will most likely lead to bad RSD outcomes. However, even if the system is from a procedural perspective sustainable, responsible transitions, while facilitating good RSD outcomes, cannot guarantee these either.

97. UNHCR’s accountability for supporting a responsible transition does not only depend on the quality of its own input, but is also premised on the extent to which a government is willing to involve UNHCR and national actors with expertise. Whereas many transitions are discussed, organized or gradual, some others have been abrupt or have allowed for only limited contributions of the organization. Such cases can be more appropriately described as a “takeover” than a “handover” of individual RSD.

98. In countries where UNHCR carries out mandate RSD, sometimes for decades, its past responsibility and experience should put an additional onus on the organization to facilitate the best possible transition to a national RSD system. On the other hand, when governments show strong determination and take over swiftly from UNHCR, there tends to be much less room for UNHCR input in the system’s configuration and its subsequent performance.

99. UNHCR seems to have taken as a general starting point that when States are interested in establishing a national procedure, the time is in principle always right and the opportunity should not be missed. There often seems to be a certain eagerness to exploit rather than delay prospects for national RSD procedures, as these fit UNHCR's general policy objective and would enable the phasing out of cumbersome mandate RSD.

100. In the view of several interlocutors, in exceptional situations UNHCR's accountability, as a protection agency, for a responsible transition may require it to refrain from or delay its involvement. In these situations it would be premature to encourage the establishment of a national procedure and to invest donor funds in it. As the case may be, and in consultation with the government, UNHCR's accountability would entail that it continues with mandate RSD for the time being, and resists the temptation of opportunities for disengaging from it.

101. In order to avoid UNHCR involvement in transitions, which are bound to be ineffective and highly problematic, the preliminary review recommends the identification of a limited set of basic indicators in favour of continued mandate RSD in such situations. In view of the legal primacy of State responsibility for RSD, the indicators should reflect the exceptional nature of UNHCR decisions not (yet) to support a RSD transition. Doing justice to both State responsibility and UNHCR's protection accountability, the appropriate starting point for the Office's involvement should be "yes, unless ...," rather than "yes, if ... ." The purpose is therefore not to formulate global conditions or criteria for UNHCR involvement, but to capture circumstances in which the transfer of RSD would be clearly unwise and irresponsible. Most frequently mentioned in this regard are combinations of widespread corruption, serious lack of governance capacity in relevant areas, anticipated protection failures on a large scale and lack of any checks and balances.

### **Obtaining buy-in at the political and operational level**

102. Genuine State interest at the political level is probably the best vehicle for the creation of properly capacitated RSD systems. Whether these will fully comply with international procedural and substantive standards is a different matter, which will also depend on the motives of the State in question. In the absence of political willingness transition processes tend to be slow and to produce systems that lack motivation and support. Where the competent authorities do not regard the RSD function as a positive State responsibility, but as a negative burden that would be shifted on them – with moreover little appreciation from the political level of the difficulties involved, transitions from mandate to national RSD risk being problematic.

103. Good contacts at the political level can avoid years of lobbying and stand still at the senior civil service levels, where country offices usually have their main interlocutors. Carefully prepared visits of the High Commissioner, including meetings with the leadership of the country, have often moved things in the context of longer term strategies. However, after such breakthroughs there may still be a long way to go, in the form of legislation, budget allocation and practical organization. In order to avoid delays or even resistance, it is therefore important to obtain the buy-in of both the political and operational level.

104. Political buy-in may be more difficult to obtain when numbers of asylum applicants and UNHCR backlogs are high and/or when media coverage on refugees and asylum processes is negative. However, when numbers are small and do not generate media interest or political issues, there may also be less urgency and incentive for the adoption of RSD procedures – although many countries did establish a specific procedure when numbers were limited. As scenarios are often very different, strategies on when and how best to obtain political buy-in clearly need to be assessed at the national level.



## Preparing for transition: assessment and planning

105. Taking into account that the building of national RSD systems tends to be a long term process, the review team has observed a tendency in many UNHCR operations to take a rather short term view, both in the preparation for transition and the degree of involvement thereafter.

106. Any future policy on responsible RSD transition should insist on the need to start the process with a comprehensive assessment of gaps and needs, as a basis for discussion with the authorities, working on improvements and planning for transition. A positive example of this approach has been the protection gap analysis conducted in Benin with donor funding in the first half of 2005. Followed by consultations with the government, this process led to agreement on a number of concrete steps for the phased transfer of all RSD responsibilities to the national authorities.<sup>48</sup>

107. As a follow-up to the Global Consultations UNHCR's Strengthening Protection Capacity Project led in several countries to a more structured effort at gap and needs identification than is sometimes practised elsewhere. Often, assessments seem to focus on improvements in the legislative framework and training needs. Research has not yet revealed examples of forward-looking appraisals of a country's capacity to adequately implement the RSD function with all its challenges. In countries where the government wishes to resume national RSD after an unsuccessful transition, the reasons for the earlier difficulties would need to be analysed to avoid their re-occurrence.

108. Importantly, the assessment should not only look at lacunae in the normative framework, the institutional set-up and capacity issues, but also at the possible consequences for asylum policies, refugee protection and durable solutions in the country. If for example it is anticipated that individual RSD will be used to abolish group determination policies, UNHCR will need to draw the attention of its interlocutors to the risk of over burdening the system, to discuss possible alternative approaches or to call for additional resources.

109. Ideally, a thorough, comprehensive assessment should lead to an agreed strategy with a road map of legislative and operational initiatives to be taken by the authorities and support actions by other actors, including UNHCR. The review recommends the formulation of *benchmarks* in different areas, especially legislation, organisation of RSD, institutional and staff capacity, reception conditions and transfer arrangements, to lead the way to the creation or reform of the national system. Preferably, such benchmarks would be identified by the authorities with input from national stake holders and UNHCR, rather than the reverse. Practical check lists for use by UNHCR staff should assist offices in providing input.

110. The agreed strategy would be the basis for detailed work planning. In several situations governments appear to opt for rather short time frames once they have decided to assume responsibility. Adopting primary and secondary legislation, setting up new

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<sup>48</sup> See UNHCR, *Rapport des consultations régionales sur le renforcement des capacités de protection des réfugiés au Bénin et au Burkina Faso*, October 2005, available at: <http://www.refworld.org/docid/472896ff0.html>. The project was co-financed by the European Commission, Denmark, Germany, Netherlands and the UK. The gap analysis had been supported by Australia.

structures and building the capacity of new staff are, however, time consuming aspects of RSD transitions. Although much depends on the specific needs in each situation and the pace of the government, UNHCR too needs to ensure realistic time frames for its contributions to RSD transition. Time frames of one or even two years risk being too short to ensure impact on the quality of RSD systems of a certain size and complexity.

111. Realistic and longer term planning may be constrained by UNHCR's biannual programming cycle and when authorities are put under political pressure to start conducting RSD. Offices may also have to wait with planning until aspects of the new system will be clarified in implementing regulations, as has been the case in Turkey. The existence of divergent views on resource needs in specific transfer situations (between managers and operational staff and between offices and Headquarters) has also been cited as a complicating factor for adequate and realistic planning.

112. At the time of writing a good example of detailed UNHCR work planning for the transfer phase, including capacity building, reduction of backlogs, resource planning and requests for additional staff deployments, is taking place in Kenya. The time frame may be ambitious though, as is the case in Cameroon.

113. Planning would not only cover UNHCR support actions in preparation of the new RSD system but, if necessary, also during a specified period of implementation e.g. through certain joint activities. As discussed in more detail further into this chapter, planning needs to include the reaching of a formal agreement on the manner in which UNHCR will phase out its RSD operation and will transfer files and data, while giving due consideration to standards of data protection.

114. While the emphasis in planning will be on the activities and resource needs at the country level, it is important that the support actions and needs at the regional level and Headquarters are taken into consideration given their often extensive contributions during the various stages of transition.

115. The review team has noticed a tendency in planning and strategizing to give much less attention to issues of sustainability than to the legal and practical configuration of the new RSD procedure at a given moment. Ultimately, however, the goal of RSD transitions should be to arrive at systems that are not only efficient and fair but also sustainable in a broad sense and long-term perspective.

116. Three main elements seem to characterize well established and performing RSD systems: they are fully integrated in the governance structures of the country, incorporated in the national budget and, importantly, influenced by national checks and balances. Depending on the development of societies and their economies, the building of such systems will in many countries require long-term approaches and the involvement of a variety of national actors.

117. Although the focus in country specific transition strategies will be on achieving the benchmarks for establishing a fair and efficient RSD procedure in the near future, they should not ignore this longer-term perspective. Identifying and discussing from the outset relevant foundations for a well-capacitated RSD system which is fully embedded in the rule of law should give direction for the future and help to avoid decisions on the set-up and funding of the new procedure that will be difficult to change later on.



## Substantive input into the configuration of a RSD procedure

### Advising on the best institutional set-up

118. UNHCR country offices tend to focus their support to transitions on legislative advice, capacity building through training and coaching, and, if necessary, financial support to the new RSD structures. There seems to be much less advisory activity on how to best organize the national RSD function, although the institutional arrangements, the technical secretariat function, staffing and equipment impact on the performance and sustainability of the new system.

119. Looking at practice in this area, how a country organizes the RSD function will depend on a number of factors, such as the legal system, administrative and cultural tradition, distribution of labour between and in ministries, political factors and, importantly, the number of asylum applicants and refugees in the country.

120. A prominent issue for governments to decide is the extent to which RSD functions, from registration, reception and interviewing to decision-making and appeal procedures, should be decentralized to different parts of the country. Especially in bigger countries, various models are applied. They have implications for the applicants (for example distances to travel), speed and consistency of the RSD process, and UNHCR's ability to support and monitor RSD procedures.

121. In many countries in Africa, Asia and Latin America decision-making on RSD is entrusted to inter-ministerial eligibility committees. By law they normally advise the responsible Minister, but in reality they proceed on the basis of delegation, i.e. they decide *de facto* if not *de jure* on the admissibility and material aspects of the application. In most countries they do so after the preparatory work of interviewing and assessing is carried out by trained personnel working in a technical secretariat or designated Ministry. This inter-ministerial decision-making by committee seems to have been replicated for several decades without much assessment by UNHCR of its advantages and disadvantages.

122. Governments often seem to feel politically comfortable with this model. In addition, in many countries the committees have at some stage been established in the government entity tasked to coordinate and manage all refugee assistance operations. The composition of the eligibility (sub-) committee then followed the structure of the entity, agency or board itself, in which not only Interior and Foreign Affairs Ministries but also those active in emergency operations, social services, education etc. are represented.

123. Strictly speaking, for the purpose of RSD such broad composition is not required. On the other hand, from a refugee protection angle the diversity of perspectives can offer certain advantages. Discussion among several members can also inject a measure of independence in RSD decision-making. Recently, some committees include representatives of civil society, for example in Brazil, or of the national human rights institution. This makes them more pluralistic and impartial and is likely to enhance the credibility as well as the fairness of the system.

124. However, in many countries such committees convene in an irregular manner, sometimes with long intervals of non-activity. Members may be unavailable because their eligibility work comes on top of their normal duties and incentives for this “over time” are considered insufficient. In countries where the chairperson is a political appointee, delayed appointments may lead to long suspensions of the committee’s work. While such issues are perhaps less problematic when numbers of applicants are relatively small, they risk causing serious backlogs when numbers are high. This calls into question the suitability of such models in countries when the number of applicants is high or starts to rise.

125. When committees are big, streamlined and thorough deliberations will be a challenge. This is especially the case in committees, which deliberate on the basis of an oral summary of the claim and the interviewer’s assessment, which is current practice in many countries and was also observed by the review team in Benin and Ghana.<sup>49</sup>

126. A recurrent handicap for eligibility committees, as reported in many countries, is the turnover of members, with the ensuing loss of experience. This also makes it difficult to build up specialized knowledge, which more generally is a challenge in countries with relatively small numbers of asylum applicants.

127. The main other model is decision-making by an individual civil servant, on behalf of the responsible Minister,<sup>50</sup> following a review of the file and the interviewer’s assessment. This model should enable more expedient decision-making and be able to cope with small as well as bigger numbers, as it does not depend on the convening of a composite layer of decision-making but solely on the staff positions assigned to RSD processing at a given time. With this model, it should be easier to build up expertise and retain it. Such integrated model should be a better guarantee for in-built capacity and the sustainability of RSD procedures in the long term.

128. On the other hand, this model benefits much less from the views and perspectives of others, and risks being unsatisfactory when accommodated in aliens police, security or immigration departments which are specialised and trained in applying administrative regulations. The establishment of a new competent authority or structure and the hiring and training of new personnel may then be necessary, as has been decided in the reform process in Turkey.<sup>51</sup>

129. The establishment of a policy advisory committee, within the line Ministry concerned but including representatives of other Ministries and possibly civil society, might combine the advantages of both models. It has been mentioned as a possible compromise, with which governments, which are used to eligibility committees or boards

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<sup>49</sup> In both countries the eligibility committee may request the applicant to be present for additional clarification of elements of the claim. This happens on a regular basis in Benin, and the review team observed two such hearings. In one case this led to the granting of refugee status. The other case raised additional questions, which led the committee (6 members present) to refer the case back to the technical secretariat for further interviewing and assessment. In Ghana, the eligibility board felt that the interviewing by the technical secretariat could sometimes be more thorough to probe deeper into aspects of the claim instead of taking them too easily at face value. In both countries, as discussed with the committees, the quality of country of origin information needs to be improved.

<sup>50</sup> Most countries seem to have opted for the Minister of Interior, however it can also be the Minister of Justice, Foreign Affairs, Immigration, Humanitarian Affairs or others. In some situations, RSD is entrusted to a completely independent institution, such as the Commissariat-général aux Réfugiés et Apatrides in Belgium.

<sup>51</sup> In Turkey for example, the government has decided to move the RSD function from the Aliens Police department to a new Department of Migration Management, which at the time of writing was hiring large numbers of staff for the head office in Ankara as well as its provincial offices.

might still feel comfortable. Altering well-established *modus operandi* may often remain difficult, though.

130. While a professional technical secretariat function is necessary for the preparatory work and follow-up aspects of RSD decisions, such as documentation, an important organizational issue concerns the need for a separate structure to assume this function. When numbers are small, separate structures may not be necessary and cost effective. Flexibility will be required to expand and contract according to need.

131. As mentioned earlier, in many developing countries with large refugee programmes, the eligibility function has been added onto already existing refugee coordination agencies. As these entities usually operate with donor funding, a disadvantage of this option is that it may undermine the prospect of autonomy and sustainability of the RSD responsibility in the country. Several interlocutors referred in this context to the risk of the RSD function becoming part of the “political economy” of refugee management in some countries.

132. As part of a responsible transition UNHCR has an interest in advising States on the number and profile of staff required for RSD processing, the organization of supporting functions such as interpretation services, appropriate management structures and the selection of suitable premises, where necessary. A recent example of good practice in this regard is the support offered by the office in Yaounde, Cameroon. Sometimes country offices assist in the selection of eligibility staff, as happened for example in Burundi in 2009.

133. Importantly, measures should be thought through to reduce staff turnover, which is a frequent phenomenon in technical secretariats funded by UNHCR. Lack of civil service status, alleged inadequate social security coverage and poor career perspectives seem to be some of the contributing factors. They may be additional arguments for integrating the RSD function, in an appropriate manner, into existing government structures.

134. Given the importance of these matters for fair, efficient and sustainable RSD systems, the preliminary review recommends further review and research in phase 2. Experience shows that governments look at practice in other countries, mostly in their own region, and also approach UNHCR for advice. UNHCR needs to understand better what works well, to reduce the risk of systemic problems in similar circumstances. This should include consultation with government and civil society experts on minimum due process requirements for RSD procedures as well as on models for the configuration of RSD structures. This dialogue should be informed by the views of persons of concern on fair and efficient RSD procedures.

### **Clarifying minimum requirements of due process**

135. An updated list of minimum requirements for fair and efficient RSD procedures would provide useful guidance to UNHCR offices in their advisory and capacity building activities. Since ExCom Conclusions 8 (1977) and 30 (1983) standards and practice have evolved. In the context of the Global Consultations (2001), UNHCR already noted that initiatives by States had tended “to spawn an increasingly wide variety of procedures and

processes.”<sup>52</sup> In a paper on Fair and Efficient RSD processes it also suggested to “refocus efforts to establish clearer and simpler procedures, which concentrate on well-resourced, quality initial decision-making with appropriate safeguards.” The document concluded with a compilation of best practice standards, to serve as a basis for a possible Conclusion on RSD procedures. This suggestion was not followed up due to lack of enthusiasm of States at the time.<sup>53</sup>

136. In addition to best practice standards, UNHCR’s cooperation with States on the configuration of RSD procedures would benefit from a realistic set of agreed minimum requirements of due process and models for realising them, which can also be applied in less resourced legal systems. The Division of International Protection is working on minimum requirements. The review team has noted that areas where more clarity is required include in particular access to legal assistance and effective remedies. These rights seem to be much more widely accepted than in the past, either in general administrative law or specific refugee legislation. However, different models are applied which lead to different results.

137. In the absence of national structures that make free legal aid possible, legal assistance is in many countries still hypothetical. Increasingly NGOs provide legal counselling, including as operational partners of UNHCR, but they do not normally assist applicants in the procedure. Some legal counselling projects focus on the appeal stage, as was practised at some point in Benin, others start at the first instance level. The role of legal counsellors during interviews in national procedures and the extent to which applicants should have access to the first instance file during appeal procedures needs to be clarified.

138. When it comes to the right to an effective remedy, RSD law and practice now include at a minimum a different, higher level of decision-making in the second instance where issues of both fact and law can be considered. Effective remedies are not merely relevant for the individual applicant. Appeal bodies can serve as an important vehicle of oversight for monitoring quality and promoting consistency. In Benin, the review team was informed that the ad hoc second instance committee makes efforts to produce such added value, including by recommending improvements to the eligibility committee regarding the reasoning of its decisions.<sup>54</sup>

139. To what extent second instance bodies should be independent from the administration, or at least structurally different from the first instance, does not seem to be clear. The review team noticed lack of clarity among UNHCR staff regarding the concept of independent appeals.

140. In some countries the second instance body in the administrative structure has been given a more independent character by including representatives from a variety of

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<sup>52</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.refworld.org/docid/3b36f2fca.html>, p. 11.

<sup>53</sup> UNHCR took the initiative to establish guidelines with basic requirements for exemption procedures in respect of cessation declarations, which were issued in December 2011 (see above note 7).

<sup>54</sup> As in most countries, decisions are not published and there is therefore no public jurisprudence available. However, in Benin an example of good practice was the annual publication of precedent setting decisions by the first instance eligibility committee for some years.

Ministries, independent human rights institutions or civil society – as is practiced for example in Burundi and Uganda.<sup>55</sup>

141. Several countries, mostly but not exclusively in the industrialized world, have opted for judicial appeals at the second instance, using specialized sections of the local courts or establishing special judicial bodies or courts. A new example of the latter option is the administrative immigration tribunal in Costa Rica. In its new asylum and migration law, Turkey has opted for a combination of the first model, i.e. the local administrative courts, and appeals to a special board in the Ministry concerned.<sup>56</sup>

142. While judicial appeals may offer independent legal and factual scrutiny, they require specialized judges and an active and trained legal profession. According to several interlocutors, this will be an important challenge for the realization of effective remedies in Turkey's new system. Particularly in countries where always full legal representation is required in court, an effective right of judicial appeal will depend on well-functioning systems of legal aid.

143. There also appears to be a need for more clarity regarding appeals at the tertiary level. Especially where second instance decision-making takes place entirely within the administration, there is good reason for access to this remedy. In many jurisdictions general administrative law or specific refugee legislation already renders appeal to the courts possible, mostly on issues of law only. However, as the review team was told, in West Africa and other regions this tertiary level is still rarely practiced – primarily because of a lack of legal aid and of sufficient expertise among lawyers.

144. Frequent involvement of courts in the appeal stage, be it at the secondary or tertiary level, may in many countries delay clarity about the asylum-seeker's plight, as the courts are often over-burdened. Rather, targeted interventions on issues of broader significance might be an efficient manner to strengthen RSD processes, ideally in the form of strategic litigation, which takes into account the national and regional context. In Ghana, the Legal Aid Scheme, which is funded by the Ministry of Justice, expressed an active interest in initiating this type of judicial engagement. If so requested by the courts, UNHCR can inform their judgement by presenting its views as an *amicus curiae*, as was recently the case in Kenya. Not only the quality of RSD adjudication should benefit from such an approach but also the integration of the RSD system in national governance.

### **Promoting a UNHCR role in the national RSD procedure**

145. Promoting an appropriate UNHCR role in the new procedure should be an important element of UNHCR transition policy. The Office's participation, as an observer, in eligibility bodies around the world has proven to be an important vehicle for assistance to RSD adjudicators as well as for the transfer of norms and expertise.

146. Critical observers sometimes allege a loss of autonomy when UNHCR participates in sessions of eligibility bodies. UNHCR's presence when RSD decisions were taken which later proved to be wrong, may in exceptional situations affect its credibility. However, in

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<sup>55</sup> The review team discussed such possibilities in Benin as well as in Ghana.

<sup>56</sup> Appeals to the local courts are reserved for rejections in accelerated and non-admissibility procedures, whereas the International Evaluation Protection Board is the administrative appeals instance in case of rejection in the regular procedure. Decisions by the Board are subject to judicial appeal. Judicial appeals can only be made through an official legal representative.

most situations of transition, being inside the RSD process should provide UNHCR with more and better opportunities to influence it than from the outside.

147. In countries with relatively young RSD systems UNHCR is mostly represented at the first instance level, but (additional) observer status at the appeals level also occurs.<sup>57</sup> In reality UNHCR's input is more that of an advisor than of a passive observer, and some laws explicitly refer to this advisory function. There are laws which mention UNHCR's competence to provide advice at all stages of the procedure, and also to attend interviews. Also a role of UNHCR as a third party intervener in appeals procedures might be a model to secure an adequate role for the office after the transition to a national RSD system.

148. UNHCR's expertise and contributions in the deliberations are generally appreciated by RSD authorities, as the review team could witness in Benin and Ghana. As one interlocutor put it, UNHCR's presence is a "comforting" thought, "to avoid mistakes." Country offices understand the importance of being represented by staff members of high calibre, who are mature and have a good understanding of refugee law. Often these staff will be at the national officer level, which facilitates communication and ensures a degree of continuity. UNHCR should however avoid situations where eligibility bodies only wish to admit national staff members. There can also be a risk of UNHCR's role becoming too preponderant, thus diminishing national ownership and the prospect of a sustainable system.

149. Observer participation in first instance and/or appeal decision-making processes is so relevant in situations of transition that it should be firmly anchored in formal legislation, rather than in executive or policy directives. This helps to avoid situations where UNHCR is sidelined, even on a temporary basis, when relations between the authorities and the country office take a bad turn as sometimes happens. Protection safeguards need to be institutionalized, to weather contextual and policy changes.<sup>58</sup>

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<sup>57</sup> There are many variations. Particularly interesting is the model applied in France, where UNHCR is an observer in the governing board of OFPRA, the first instance entity, where eligibility policy discussions are held. In addition, UNHCR can make its influence felt at the appeals level, the Cour Nationale du Droit d'Asile, through the appointment of assessors who participate in the Court. With some modifications, this system of UNHCR involvement has been in operation for several decades.

<sup>58</sup> Preferably also UNHCR's observer participation should not be worded as optional ("may be invited to attend"), especially when UNHCR is not participating at the first instance level. The review team was told in Turkey that the authorities have expressed their intention to ensure a standing invitation for UNHCR in the appeals instance through an appropriate formula in future secondary legislation.

## Facilitating a smooth start of national RSD

150. Taking on the RSD function will always be a challenge, if only because of lack of expertise, the novelty of systems and processes, the confrontation with desperate human beings, various degrees of external scrutiny etc. Building and operating a system from scratch may be even more difficult than taking over the RSD responsibility from UNHCR after several years of cooperation between country offices and national interlocutors. The situation will be especially challenging when new RSD systems have to start with a legacy of backlogs and high rates of arrival.

151. UNHCR has a clear interest in helping the authorities to cope with these challenges, especially in the early phases of the transition. The positive momentum, which RSD transitions often characterizes should not be diminished by insurmountable difficulties from the start. These may also be exploited by opponents of the reforms, in situations where these were disputed at the political level or within the administration. Supporting a smooth transition is therefore a key element of responsible transition strategies, not only for the quality of refugee protection but also the sustainability of the new system. The review team has found that good practices are developed in Turkey, where the country office takes a strategic as well as hands on approach to supporting the restructuring of the country's RSD system.

### **Different forms of operational support – good practices**

152. There are many ways in which UNHCR assists national authorities in assuming responsibility for the RSD function. Even in transitions with little UNHCR involvement, offices provide training services before and after the authorities start the RSD work. Supported by DIP, regional RSD officers and external consultants, UNHCR has built up a wealth of experience in formal and informal training techniques. On the job training and coaching are used far more often than in the past, and are generally seen as more effective than “hotel and power point trainings.” Currently, future government staff in Kenya are working and being coached in the UNHCR office in Nairobi.

153. Technical support through (modules of) UNHCR's ProGres registration system<sup>59</sup> is another tangible contribution. There are also examples where offices have loaned out interpreters, or have provided support for the translation of protection and country of origin information. Capacity building directed to different non-governmental actors in the asylum system, has positively contributed to building sustainable RSD systems.

154. Especially useful are interventions where UNHCR resources are applied with the dual purpose of skills building and reinforcing, temporarily, the processing capacity of the new RSD structure. In Benin for example, UNHCR protection staff actively assisted and coached the first eight national eligibility staff working for two years (2005-2007) in the UNHCR office in Cotonou. There are several other possibilities. UNHCR staff have worked in government offices, on a secondment basis, as an additional resource in the national procedure including as supervisors; in a UNHCR mentoring capacity; or in the context of joint activities. In only a few new RSD procedures, with relatively small

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<sup>59</sup> ProGres is a UNHCR database application that facilitates registration.

numbers of asylum applicants, UNHCR is still carrying out all preparatory stages before the authorities take the decision, a practice that was quite common in the past.

155. The joint implementation of RSD related activities is most frequently practised in the area of registration, when staff of UNHCR or its implementing partners work alongside national staff, in the same offices or based on a geographic division of labour, to register asylum applicants. There are also examples of joint interviewing activities<sup>60</sup> or of a joint review of RSD interviews and assessments to validate the conclusions. If the interviewing is to take place in a decentralised manner, in several reception centres or other places, UNHCR's operational involvement through co-location may not be feasible without corresponding staff increases, which is an issue in Turkey.

### **Appropriate and supportive transfer arrangements**

156. The following models are the most relevant for transfer arrangements during a transitional period at the end of which the national authorities have taken over responsibility for RSD from UNHCR:

- UNHCR continues processing all applicants registered before an agreed cut-off date;
- UNHCR continues processing all applicants who have been interviewed before the agreed cut-off date (i.e. for decision-making, notification and appeal);
- UNHCR continues processing, for an agreed period, applicants belonging to certain categories (nationalities) or at a certain stage of the procedure (especially appeals), whereas the government takes over the processing of all others.

157. These models do not exclude scenarios where UNHCR, or an operational partner, continues for some time to carry out registration – for use in the national RSD procedure, or in addition to registration by the national authorities for inclusion in UNHCR's own database. The transfer arrangements also do not exclude other forms of operational UNHCR support mentioned in the previous section.

158. There seems to be no uniform practice regarding the processing of applications received by UNHCR before the official start of the national procedure. In some cases it was agreed that UNHCR would continue to be responsible for all applications filed with it before a certain deadline. From a case management point of view this will be of clear benefit to the new national procedure, especially when there is a considerable backlog. The government would, however, have to agree to accept the mandate determinations.

159. In some other countries UNHCR agreed to finalize the procedure only for those whom it had already interviewed. There was also an example where UNHCR continued interviewing but the government made the eligibility determination after the cut-off date.

160. Most country offices reported not to be aware of any specific transfer arrangements for pending applications, but this may be due to difficulties of access to historical data. The review team recommends that a future UNHCR policy on transition stresses the importance of a formal agreement between UNHCR and the government concerned. Although further research may produce additional information, the review team has come

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<sup>60</sup> In Turkey, joint interviewing followed by separate decision-making was piloted in 2009 in the eastern part of the country. The pilot was interrupted as a result of a devastating earthquake in the region, but now serves as a potential model in the transition planning discussions of the Turkish authorities and UNHCR Ankara.



across one clear and solid agreement in writing on these issues (Protocol on the Handover of RSD in Bosnia and Herzegovina, signed in 2004<sup>61</sup>). A model agreement with annotated options would therefore be a welcome tool for country offices. It should facilitate the identification of key questions and assist in formalizing the necessary transfer arrangements.

161. The approach towards refugees who have been recognized under UNHCR's mandate in the past also differs. Subject to further research, mandate refugees seem to be granted refugee status in most of the transition scenarios. This may ideally be foreseen by law or in an explicit agreement. Sometimes they first have to undergo a process of verification, as has recently been the case in Morocco. Problematic situations where they are re-screened, and even rejected, have, however, also occurred.

162. The operation of various models and variations thereof would benefit from further research. Legal as well as practical aspects will play a role. There are also situations where the Ministry concerned is under political pressure to take over the RSD responsibility as soon as possible, and is not interested in a gradual process of the government phasing in and UNHCR phasing out.

163. Whether such interest exists or not, the mandate of UNHCR as well as standards of fairness need to be respected. Especially when applicants have been interviewed after long waiting periods, the unilateral discontinuation of the procedure would not be reasonable. The government concerned, which has to decide on residence and other rights, may however decide differently. Any differentiation between categories of applicants, based on the stage of the procedure or on their nationality, would in any event need to be fully justified for objective reasons to avoid discriminatory practices.

164. The third model, of continued mandate processing for some groups, may be justifiable when prospects of durable solutions plead in favour of differentiated transitional processing arrangements. In Turkey, for example, UNHCR is looking into different approaches, in consultation with the Turkish authorities, to avoid overwhelming the new national RSD system with an anticipated backlog of over 40,000 applications when implementation of the new national procedure starts in 2014 (as planned for by the authorities at the time of writing). As Turkey will in principle only grant temporary stay pending resettlement ("conditional refugee status") to all assessed refugees from outside Europe,<sup>62</sup> one justifiable approach might be for UNHCR to focus its transitional RSD responsibility on categories of applicants with prospects for resettlement.

165. The views of resettlement countries will need to be taken into account in States that are unwilling to provide durable stay despite a positive determination of refugee protection needs by their own administration. This is also relevant for the future refugee determination system in Hong Kong SAR. Assuming that resettlement will remain

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<sup>61</sup> *Protocol on the Handover of Refugee Status Determination and Other Asylum Related Responsibilities from UNHCR to the Ministry of Security of Bosnia and Herzegovina*, signed on 29 December 2004.

<sup>62</sup> Article 62 of the 2013 Law on Foreigners and International Protection. This is a consequence of Turkey's decision to maintain its declaration to apply the 1951 Convention and the 1967 Protocol "only to persons who have become refugees as a result of events occurring in Europe" (for the text of the declaration to the 1967 Protocol see: [https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en#EndDec](https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#EndDec)). It is worth noting that the new law provides for subsidiary protection against torture and a serious threat, to the person, of indiscriminate violence. This status includes the right to work in the same manner as for holders of refugee status (article 89 (4)(b)). "Conditional refugees", i.e. from outside Europe, do not have a right to enter the labour market, but may apply for a work permit during their temporary stay in the country.

available, at least for some categories and for some time, resettlement countries may prefer to maintain submissions through the established UNHCR channels. In that case, they may insist at a minimum on a clear UNHCR footprint in the determination of refugee eligibility of resettlement candidates, unless they would be willing to proceed on the basis of national RSD decisions only.<sup>63</sup>

166. An overarching issue for all transfers of RSD processing is the need for clear guidance on data protection with regard to individual applicants. Adherence to international data protection standards and UNHCR's policy is a key element of a responsible transition. As varying degrees of data protection in RSD transitions have reportedly been applied at the country level, the review team recommends that further guidance and a more precise and comprehensive data protection policy should be developed. The already existing model agreement on the sharing of data in the context of handover of the RSD process, issued to country offices in 2009,<sup>64</sup> may need to be reviewed. An important objective should be to facilitate efficient transfers while ensuring respect for data protection principles. This includes the principle of sharing only what is necessary for a specific purpose as well as the principle that the receiving party respects and implements appropriate safeguards of confidentiality and data security.

#### **Avoiding unnecessary pressures on the new system**

167. Increasing numbers of applicants often lead UNHCR offices to reflect on their RSD policies, which may result in changes in case processing. There may also be large numbers of unregistered or de facto refugees in the country who would be potential applicants in the new procedure. Country offices should reflect on the best approaches in these situations to avoid overwhelming new RSD procedures, and indeed to facilitate their acceptance by the government. Well ahead of the anticipated start of the national procedure, consultations may be required to negotiate alternative protection arrangements or opportunities for legal migration with access to RSD as a safety valve in case of expulsion. The shared objective of a smooth transition may make the authorities amenable to new approaches.

168. Where RSD systems are overwhelmed, as mentioned also in the first part of this report, UNHCR seems to have become more willing to consider alternative approaches at least in its own operations. As regards national procedures, an interesting example is set by South Africa in 2009 when the government alleviated the burden on its RSD system with temporary dispensation measures in the field of migration for people from Zimbabwe.<sup>65</sup> For UNHCR adequate protection safeguards, including a continued right of access to RSD procedures, would need to be an integrated part of pragmatic approaches to relieve RSD systems.

169. Similarly, asylum policy changes that burden new RSD procedures without an evident added value in protection terms, should be an item for discussion with the government. There may be various reasons for the discontinuation of group based

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<sup>63</sup> It should be noted that resettlement is sometimes based on bilateral arrangements.

<sup>64</sup> *Model agreement on the sharing of personal data with Governments in the context of hand-over of the refugee status determination process* available at: <http://www.unhcr.org/50a646f79.pdf> (there are separate model agreements for Registration as well as RSD).

<sup>65</sup> See Alexander Betts/Esra Kaytaz, National and international responses to the Zimbabwean exodus: implications for the refugee protection regime, July 2009 (New Issues in Refugee Research Series, Research Paper No. 175, UNHCR), available at: <http://www.refworld.org/docid/4c232574d.html>. This publication uses the term "survival migrants."

protection, but the implications for the RSD procedure need to be factored in. In Ghana, for example, the processing time for applications of all nationalities has been clearly affected by last year's decision by the authorities to channel new applicants from Côte d'Ivoire into the individual procedure.

170. A second reason for this is the "exemption processing" of Liberians, as recommended by UNHCR. In West Africa, UNHCR's 2011 Guidelines on Exemption Procedures in respect of Cessation Declarations have impacted RSD processing in the region. By September 2013 Liberian refugees had filed over 6,000 requests for exemption. While positive decisions were taken in 25% of the cases interviewed, the exemption processing has increased backlogs in several countries.<sup>66</sup>

171. Some question the need for such institutionalized processing in countries such as Ghana, which, in a truly humanitarian spirit, offered local integration to Liberian refugees not wishing to repatriate. Information campaigns apparently did not manage to change hopes for resettlement, which used to be one of the solutions pursued for Liberian refugees in countries in the region.<sup>67</sup>

172. Not only on-going but also past resettlement programmes may in certain circumstances impact national RSD systems. When the UNHCR office in Cotonou made it clear in 2012 that resettlement would no longer be pursued for mandate refugees from Togo, the government of Benin took the courageous step to offer them local integration. This relieved pressure on the national RSD procedure, as most Togolese who did not chose to repatriate accepted this humanitarian offer. Still, a considerable minority of some 1,200 people decided to enter the individual procedure believing that a positive determination would eventually lead to their resettlement and ignoring the risk that a negative determination might worsen their situation.

173. It would be important in the second phase of the project to pay more attention to the strategic context of responsible RSD transitions, in situations of forced displacement as well as those with a more mixed character. In particular, given the wealth of UNHCR experience a closer examination of specific situations may reveal policy responses in the area of asylum as well as migration management which have helped to avoid unnecessary pressures on and alleviate national RSD systems in a manner which does justice to international protection standards.

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<sup>66</sup> These data are from statistical overviews put together by UNHCR's regional RSD Unit in Dakar. There are three such regional units in Africa (Dakar, Nairobi and Pretoria) that provide technical advice to country offices, promote regional consistency and provide capacity building support. The units have produced valuable overviews and analysis of RSD systems in the respective regions. They have reportedly no responsibility of oversight and depend on cooperation with the country offices.

<sup>67</sup> Counselling campaigns would seem to be less effective when insufficient information is available on the contents of integration schemes. This requires proper sequencing of offers of solutions and information campaigns.



## Moving to a supervisory role through a broad scala of activities

174. In situations where governments take over the RSD responsibility, UNHCR offices normally hope to assume as soon as possible a monitoring role and to invest more time in other aspects of the programme, such as improvements in the reception infrastructure and frameworks for integration. In reality though, UNHCR and other partners of the government will often need to stay actively engaged for several years to support the national procedure through a variety of ways. After the start of the procedure, the transition has in fact only just begun.

175. While the large majority of new systems stay in operation and are consolidated over the years, States face numerous challenges in making them function in a fair, efficient and expedient manner with potentially significant consequences for the protection of persons of concern. Looking at countries where transitions took place since the year 2000, problems seem to lie much more in implementation than in the underlying normative framework.

176. They concern, by and large, the system's functionality in the following areas: length of procedures, requirements for good RSD decision-making (adequate interpretation services, solid interviewing skills and relevant country of origin information), access to legal counselling and possibilities of effective recourse against negative decisions.<sup>68</sup>

177. The fair and efficient functioning of RSD procedures and their capacity to respond to changing needs is not the only challenging area. The main other area mentioned by country offices concerns the correct application of the refugee definition. Main problems are related to assessing credibility using the relevant standard of proof, ensuring consistency in RSD outcomes, recognising the many different forms of persecution in today's world, the availability of accurate and up-to-date country of origin information, applying the exclusion clauses and de-linking RSD from foreign policy considerations.

178. Refugee status determination is known to be influenced by several factors, including the personality of interviewers and decision makers, prevailing attitudes in decision-making entities and eligibility guidelines. Responsible RSD authorities try to do an honest and conscientious job, but may be constrained by considerations imposed either explicitly or implicitly from above, related to foreign relations, security concerns, general attitudes towards foreigners (and specific groups such as LGBTI applicants) or perceived absorption capacities. The educational and cultural background of interviewers and decision makers, and factors such as personal biases and possible case hardening may also have significant effects on RSD outcomes.

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<sup>68</sup> This summary is by no means exhaustive. There are many other challenges, such as protection against fraud, the proper identification of vulnerable applicants, gender and age sensitive processing, and ensuring appropriate reception conditions. Reception conditions can impact in many ways on the implementation of RSD procedures, but due to time constraints they fall outside the scope of this preliminary review. Many States provide for some sort of accommodation, in centres or camps for asylum-seekers. In many other States these are still on their own and depend on charity or informal networks. Some countries, such as Ghana, include applicants in national health schemes and provide the right to work, but more often applicants have to rely on the informal labour market. Ways in which reception conditions impact on RSD include: the distance between reception facilities and RSD locations, and the mental strain of many applicants to sustain themselves during long waiting periods.

179. In the context of UNHCR's supervisory role these challenges evidently require different sets of responses, at the policy and operational level. Especially where States have security concerns linked for example to simmering conflicts in their own territories, practical solutions may need to be found. Assessing the effectiveness of supervisory responses goes beyond the scope of this preliminary review, but a brief description of activities, in the area of RSD alone, is relevant to illustrate the need for UNHCR to stay actively engaged in the transition process.

180. As noted earlier, UNHCR's role as an observer and advisor in eligibility fora serves in many countries as a key vehicle for influencing decision-making and on the job capacity building, after the authorities have assumed responsibility for the RSD function. It involves proper preparation and may require case or theme specific interventions and follow-up.

181. The other area where demands on country offices often increase is training in various aspects of refugee eligibility, from material refugee law and interviewing skills to gender and age sensitive processing and the use of country of origin information. In both Benin and Ghana, the authorities as well as NGOs repeatedly emphasized the need for more training support. In Turkey, the authorities wish to involve the UNHCR office in an extensive training program for the future staff of the new RSD system.

182. A greater emphasis on train-the-trainer projects, as applied for example during the 1990's in Central Asia, should better sustain national capacity building in regions where there is frequent turnover of national eligibility staff and the necessary knowledge transfer is not always guaranteed.<sup>69</sup>

183. A recent staff intensive area of work are the quality assurance initiatives undertaken in close cooperation with RSD authorities. Having started in Europe,<sup>70</sup> such initiatives are now under way in several countries in Latin America and interest has been expressed in Asia as well. In several States the emphasis has been on assessing the quality of RSD decisions. Worthy of note as an example of research based assessment is also a report prepared in 2013 by UNHCR in Pretoria on the adjudication of asylum claims in South Africa, which is serving as a basis for substantive discussion with the authorities.

184. In other cases, government and UNHCR staff are undertaking a joint diagnostic of specific phases of the RSD procedure including capacity issues. In Mexico and Costa Rica the government agreed in 2013 to implement several recommendations, which has led to the creation of additional posts and operational improvements.<sup>71</sup> In these countries, in Panama as well as more recently in Argentina and Brazil, UNHCR is - in the context of the joint Quality Assurances Initiative (QAI) - advocating strongly for dedicated RSD post creation, regular or affiliate, in order to ensure the implementation of the recommendations resulting from the diagnostic phase, and the sustainability of investments that are being made. While quality assurance initiatives are generally perceived as having generated positive results, a proper evaluation would be necessary to learn more about their impact.

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<sup>69</sup> In Benin this was a specific point made by the DG for Immigration in the context of training curricula at the Police Academy for the benefit of police officers, including at border points.

<sup>70</sup> The first quality initiative project started in the United Kingdom in 2004. A similar initiative has been launched subsequently in Central Europe aiming at countries with relatively young RSD systems. Similar projects have been or are undertaken in several European countries with experienced and elaborate RSD systems: Austria, Germany, Ireland, Italy, Sweden and Switzerland.

<sup>71</sup> UNHCR, *Note on regional meeting on Quality Assurance Initiatives*, Mexico, 1 June 2013 (internal document).

185. Depending on the operation there are many other activities. They range from operational support, including advice on case management techniques and the reduction of backlogs, to dialogue on eligibility policy, preparing court interventions and informing public opinion. After the assumption of State responsibility, country offices may have to continue advocating for legislative initiatives, as currently in Benin to improve the appeal procedure. Cooperation in the area of registration, through the gradual transfer of the ProGres system, and on improving documentation for applicants and refugees is often intense - and can be very rewarding as the review team noticed in Ghana.





## The safety valve: exercising mandate RSD after the assumption of State responsibility

186. Although UNHCR offices clearly focus on capacitating and influencing the quality of new national systems, mandate RSD often continues to take place when national procedures are in operation. Based on the questionnaire sent to all UNHCR offices, a considerable minority (22 offices, on all continents) indicated that they sometimes still conduct mandate RSD for refugee protection reasons in cases of non-admission to or rejection in the national procedure. Although UNHCR recognition in such cases will often need to result in processing for resettlement, this RSD activity should be distinguished from resettlement processing of persons found to be refugees in UNHCR's or the national RSD procedure, for example in the context of burden sharing arrangements or in the absence of a durable solution in the country of first asylum.<sup>72</sup>

### Criteria and procedures

187. Based on research thus far few offices seem to have elaborated in writing the criteria and procedures to be followed in this context. Two country offices shared with the team a detailed set of guidelines to guide staff and ensure consistency in the approach. However, based on available information the conclusion can be drawn that UNHCR, at the level of its headquarters as well as country offices, sees the exercise of mandate RSD as an exceptional response to serious protection problems in countries with Government RSD procedures. Clearly, the organization does not wish to be an additional layer of appeal for applicants rejected in the national procedure. Resorting to mandate RSD can moreover impact negatively on the ultimate objective of strengthening national RSD through alternative interventions.

188. This being said, there are different interpretations of what constitutes "exceptional" and "serious" depending on the operational context. The "high" or "sensitive" profile of the applicant seems to play an important role, particularly when applicants have been or are likely to be rejected in the national procedure on grounds of national security. Often also the existence of serious protection risks is mentioned, in particular detention in the RSD country and *refoulement*. Another threshold concerns the "strong" nature of the asylum claim, which may apply to the credibility of the claim as well as to the gravity of the consequences in case of *refoulement*. Only few UNHCR country offices seem to be willing to exercise mandate RSD more frequently, citing for example an unjustified rejection in the national procedure as a potential trigger for mandate RSD.

189. Based on research thus far a frequent trigger for UNHCR mandate processing is the non-admission or (anticipated) rejection of the claim for reasons of foreign policy or national security. These can be linked to extradition obligations arising from inter-State agreements, but other situations also occur.

190. Sometimes rejections based on a different interpretation of the notion of persecution lead UNHCR to step in with mandate RSD. Examples are the rejection of sexual

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<sup>72</sup> Although more exceptional, the resettlement of refugees recognized in the national procedure is sometimes resorted to for reasons of safety, special care arrangements or burden-sharing.

orientation and religious conversion claims. In some countries, offices have pronounced themselves on eligibility in individual cases, for advocacy purposes or in the context of interventions before national or regional courts. UNHCR's judicial engagement for strategic purposes in Europe is particularly noteworthy in this respect.

191. Narrow and incorrect interpretations of the refugee definition seem to be a more prevalent trigger for residual mandate processing than gaps in legislation. Interestingly, research has not come across clear examples of mandate processing to make up for such gaps. Although further research may indicate that this does occur, it might also indicate that RSD systems have increasingly come to consider not only the Convention definition but also the "extended" definition (through the granting of refugee status or complementary forms of protection).

192. Occasionally other criteria are mentioned, such as the non-admissibility or rejection of applications by refugees who have been recognized in another country of asylum but are not re-admitted there. Problems in the national procedure, such as long waiting periods, do not seem to trigger mandate RSD, except sometimes to provide protection and assistance to extremely vulnerable individuals or when acute medical grounds require swift action, i.e. in most cases resettlement.

193. The exercise of mandate RSD rarely takes the form of "parallel processing" in the literal sense, as mandate and national processing taking place at the same time. In most instances UNHCR proceeds with RSD only when applicants approach the office after all remedies in the national system have been exhausted and following a process of pre-screening to detect errors in the application of international standards. There are also situations where UNHCR registers applications because it is known that they fall within a category, which will not be admitted or in any event rejected in the national procedure.

194. The criteria applied by UNHCR offices to decide whether to conduct mandate RSD are influenced by local circumstances, in particular the intensity of problems observed in the national procedure, UNHCR's protection strategy, available staff resources, and the effects on the relationship with the authorities as discussed hereafter. Although not decisive, the prospect of acceptance by resettlement countries may also play a part as resettlement will often be the only durable solution available to refugees recognized by UNHCR but denied protection in the national procedure.

### **Views of RSD authorities and implications for solutions**

195. There have been several situations where the exercise of the RSD mandate has strained relations with the national authorities. In some cases UNHCR was requested to provide in writing the legal justification for its residual RSD activity when governments have assumed this responsibility. In these cases UNHCR's actions were seen as a show of no confidence in the national system.

196. One way to avoid or at least reduce such problems would be for UNHCR to discuss the residual possibility of mandate processing with the authorities and to reflect it in agreed arrangements for the transition, possibly including resettlement. The review team has come across an explicit example in Africa. In another situation, where the Convention is not applicable, the authorities have expressed reservations on this point, even though they count on UNHCR's continued resettlement activities for all individuals who will receive a positive determination in the future national system.

197. It is a truism to say that strained relations with governments can seriously impact on refugee protection and on UNHCR's position and influence in a given country. However, the exercise of mandate RSD does not always have an adverse effect on relations, on the contrary. For a long time third country resettlement has been a way for reluctant authorities to decline asylum without having to expel a person and risking accusations of *refoulement*. There are RSD authorities, which in the course of the procedure signal to UNHCR the likelihood of rejection, in order for resettlement procedures to start in time.

198. There are also situations where UNHCR, based on a tacit understanding with the government, processes certain nationalities which on political grounds will not be granted refugee status. While these scenarios are problematic, mandate processing is the only practical way out, with the consent of the government concerned.

199. There are situations where despite the government's initial disapproval a practical way forward could be agreed. In Japan, for example, where prior to 2003 UNHCR occasionally assessed applications of persons denied protection in the national procedure, solutions were eventually found through a combination of humanitarian status, assisted repatriation and resettlement. Resettlement does therefore not always need to be the only solution where national and mandate RSD, initially at least, lead to different outcomes. In some cases there is also a concern that over reliance on resettlement may have the unintended effect of facilitating negative decisions.

200. Mandate recognitions in spite of national rejections can have long-term implications when neither re-consideration nor resettlement is successful. This should be an extra reason for UNHCR to be on firm ground and to base itself on solid arguments and a rigorous assessment. When they exceptionally resort to mandate recognition, offices need to be able to convincingly explain the refugee character of the individual concerned, or of each individual member of larger groups. Bearing in mind the experience in one country in particular, there is a risk that group recognitions of some sort, which for practical protection purposes may be understandable at a given time, can become a negative legacy for the national RSD procedure, the relationship with the government and UNHCR's credibility for years to come.

201. In several situations the active exercise of mandate RSD has come to an end following improvements in the national RSD framework and performance, and in the relationship with the authorities.<sup>73</sup> This was for example the case in the Republic of Korea where in 2005 changes in legislation and RSD policy started delivering positive results. It also occurred in Burundi where in 2009 a new RSD structure was implemented, supported by Belgium and UNHCR. Although perhaps difficult to prove, over time the exercise of mandate RSD may contribute to positive change through dialogue on areas for improvement and new capacity building initiatives.

202. Whereas the question of mandate RSD in situations of transition would benefit from further research, it is already possible to draw some conclusions. The review team recommends the formulation of guidance on the matter as a matter of priority and as an important addition to responsible transition strategies. Although current practice already indicates certain common aspects, a UNHCR policy including criteria and model standard operating procedures, would be able to enhance consistency and discuss relevant

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<sup>73</sup> Mandate processing is also terminated for other reasons, e.g. when interviews undertaken to determine possible support in the national procedure are misinterpreted as mandate processing and lead to an increase of rejected applicants approaching UNHCR in particular where the Office pursues resettlement as a durable solution.

considerations to be taken into account. It would assist country offices in dealing with difficult dilemmas and support them in their discussions with national authorities. The Division of International Protection is taking steps in this regard.

### **Framing UNHCR's accountability**

203. Different practices in the field may not only reflect situation specific circumstances but also different understandings of UNHCR's role and accountability. At which point, if any, is UNHCR still or again responsible for conducting RSD? Different schools of thought are possible, ranging from a more activist to a more restrictive interpretation of UNHCR's statutory mandate to provide for the protection of refugees. Some humanitarian staff may find it difficult to refrain from RSD when national systems are still trying to find their feet and show weaknesses in protection. Pointing merely at the accountability of States will not always be a satisfactory answer.

204. Based on international practice, there would seem to be sufficient elements to conclude that:

- From both a legal and a practical point of view national RSD processing does not need to preclude mandate RSD on a carefully considered case-by-case basis;
- While every effort should be made to prepare and support RSD transitions in a way that will prevent any need for mandate processing, it can be a necessary and useful component of responsible transition strategies;
- Mandate RSD has functioned primarily as an international safety valve for serious protection risks;
- Engaging in mandate RSD should rest on clear criteria and take into account relevant short and longer term considerations, including the prospect of solutions, the views of the authorities, UNHCR's ability to exercise its mandate and possible effects on the national procedure.

205. As discussed earlier, at the centre of UNHCR's responsibility are the Office's professional and good faith efforts to support a responsible transition to national RSD which enables States to identify refugees and comply with their international obligations. Unless a government requests UNHCR to resume processing *in lieu of* national RSD, in specific circumstances or for specific categories of applicants, mandate RSD is in the view of the review team properly framed as a residual accountability in the context of UNHCR's supervisory responsibility.

206. As a starting point, it should therefore in principle only be used in exceptional circumstances, when the claim for international protection is convincing, when the denial of protection would risk grave results and when other protection avenues have failed.

## Working towards a sustainable system

207. Linked to the development of societies and their economies, the endeavour to achieve sustainable RSD systems goes well beyond UNHCR. However, country offices should be aware that models of institutional and financial organization, chosen in the beginning of RSD systems, are hard to change once they have been put into practice and bureaucracies have become used to them. Good advice on the configuration of new systems is therefore extra important, as discussed previously. The following paragraphs focus on sustainability in the area of funding and protection.

### **Promoting national ownership and financial autonomy**

208. In most countries of the developing world separate RSD structures have from the outset, in some cases since the 1980s, been paid from UNHCR's budget through sub-agreements with the responsible government entity. In most cases this includes salaries, the rent and running costs of buildings, transportation and equipment.<sup>74</sup> In several countries in Latin America it proved possible during the past decade to convince the government to assume these costs, however in many other regions, especially in Africa, UNHCR continues to be involved in the funding of a State responsibility.<sup>75</sup> As witnessed by the review team, offices in countries such as Benin and Ghana continue experiencing how difficult it is to convince governments to apply the national budget.<sup>76</sup>

209. However serious the conduct of RSD may be in a given country, prolonged international funding does not bode well for a system's continuity and integration in the national governance framework. Moreover, although funding normally gives UNHCR a degree of leverage, this influence may in practice exist more in decisions regarding changes in specific budget lines than in the delivery of quality and agreed outputs, including sessions of eligibility bodies. Its use as a tool for encouraging concrete improvements in RSD appears to be difficult and limited.

210. In a responsible transition strategy, the question of funding should be discussed from the outset, at the right political level. UNHCR funding should be an option of last resort, for a limited time frame to be agreed in writing with the responsible government Minister. In countries that benefit from UNHCR funding, governments may be more amenable to take over this responsibility according to an agreed, phased schedule covering a few years. Particularly in quickly developing economies, there may be room for new initiatives in this regard.

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<sup>74</sup> In addition, UNHCR often pays some form of allowance, per session, to members of collective eligibility bodies. In order to obtain a comprehensive picture of the financial implications for UNHCR, research through the UNHCR's Focus software (see below note 77) would first require identifying governments as "implementing partners" and then need to identify per country the items of support for the RSD structure amongst other budget items.

<sup>75</sup> Detailed historical research into implementing agreements would be required to find out in which countries UNHCR has been able to phase out from such funding, and under which circumstances. A consolidated overview of countries where such funding currently takes place does not exist, however the information is available with the regional Bureaux.

<sup>76</sup> During the review willingness was expressed to consider the issue. There have been other such expressions in the past.

211. Preliminary research for the report has shown that it is difficult and time consuming to find the relevant information on UNHCR's overall financial contribution to national RSD structures. The exact expenditures of UNHCR of national RSD structures as well as the use of the respective funds are difficult to extract from Global Focus Insight (GFI).<sup>77</sup> Firstly, it would be necessary to identify the respective implementing partner to which the money is disbursed in a given operation. Secondly, the expenditures to this partner would need to be extracted and analyzed, in order to find out how spending is broken down and whether it is all relates to RSD. As a third step, the expenditures would need to be evaluated. Even though implementing partner agreements are monitored and reported on, the extent to which value for money is provided would need to be assessed for each country operation separately. In conclusion, information on expenditures does not appear to be readily available. Therefore, this report recommends a closer look at the funding of national RSD structures, including the possibility of gradual phasing out schedules and ways to improve the accessibility and analysis of data in the context of results based management.

### **Extending capacity building and partnerships**

212. There still seems to be a tendency in UNHCR country offices to focus their capacity building efforts primarily on the authorities and NGOs that are involved in RSD implementation, from registration onwards. In view of the close cooperation between governments and UNHCR in most countries, this is an understandable inclination, which is reinforced by resource constraints. Working relationships with e.g. bar associations, the judiciary, universities and the media appear to be much less frequent.

213. In countries where UNHCR works almost exclusively with the authorities the basis for a good and durable RSD system will remain fragile, if it continues operating in isolation rather than in a broader and transparent environment of awareness, support and oversight. There is a risk that the external protection function hinges too much on UNHCR's privileged partnership with the authorities. In the many smaller operations, this also means that the departure of the national UNHCR expert, let alone the closure of the office for reasons of economy, can result in major drawbacks for the national RSD system.

214. Without wishing to exaggerate UNHCR's impact, Benin and to a lesser extent Ghana are in the view of the review team examples of this still fragile protection basis. In both countries new initiatives are under way to explore a bigger role of civil society actors. In Cotonou the office is forging ties with Alcrer,<sup>78</sup> an NGO which is already providing refugee counselling services but which needs extensive capacity building support for doing so in the RSD context. Both Amnesty<sup>79</sup> and Alcrer are willing to raise broader protection concerns with the authorities. In Accra, the office has established good contacts with the Human Rights Advocacy Centre.<sup>80</sup> In the more specific area of RSD, the Legal Aid

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<sup>77</sup> UNHCR's Focus is a software to support UNHCR's results based management, including planning, monitoring and reporting as well as budgeting. Global Focus Insight (GFI) is the primary tool for Focus users to extract and analyse the relevant information on expenditures. UNHCR Programme Analysis and Support Section (Focus), Division of Programme Support and Management, *Global Focus Insight. Key reports explained*, September 2013 (internal document).

<sup>78</sup> The full name is Association de Lutte Contre le Racisme, l'Ethnocentrisme et le Regionalisme.

<sup>79</sup> Amnesty International was for some years UNHCR's partner in Benin for the provision of legal counselling at the appeals stage.

<sup>80</sup> This is an advocacy NGO, which in June 2013 produced a public report following research and a monitoring visit to one of the refugee camps in the country.

Scheme is keenly interested to cooperate but will require support to build up the expertise of its legal staff.

215. In some countries, the authorities may still feel uncomfortable with the involvement of legal aid providers, NGOs or even the judiciary in RSD processes and refugee protection more generally. UNHCR is often well placed to foster a different attitude by promoting the quality and non-adversarial nature of local interventions, and by counselling against any unnecessary reliance on legal processes as appropriate in the local context.

216. Given their importance for the sustainability of RSD systems, capacity building efforts cannot start early enough to broaden the circle of sources of protection for the future. As UNHCR has experienced in many places, socializing international norms, providing context-specific training, supporting new organizations and forging partnerships have proven to be long-term investments, which one day will pay off.<sup>81</sup>

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<sup>81</sup> A good example is the Association of Solidarity with Asylum Seekers and Migrants (Asam) in Turkey, which was established in 1995 with the support of UNHCR as the first refugee NGO and is now a well-established and respected organization in the country.





## Ensuring adequate resources

217. It should be clear from the previous chapters that responsible transitions and an effective implementation of UNHCR's supervisory mandate are labour intensive. This applies foremost at the policy and particularly operational levels of country offices, however the necessary engagement and support from the regional level and UNHCR headquarters on many issues can be very staff intensive as well. Responsible transitions require UNHCR's preparedness to continue investing resources well after national authorities have started implementing the RSD function. At the same time, this is also the transition phase in which offices will often need to strengthen partnerships with other actors (the legal profession including the judiciary, civil society, universities and media), in order to make RSD protection sustainable in the country and, in many cases, less dependent on UNHCR.

218. During its mission to West Africa the team observed that staffing limitations make such an agenda virtually impossible to implement. After several years of programme reductions, there is pressure to reduce even more posts, which in the case of the office in Cotonou might lead to only one protection position remaining to accompany the national procedure and undertake all other protection tasks. In the view of the review team Benin is an example where, on the contrary, protection staffing may need to be reinforced in the context of a time bound strategy to make the RSD system more sustainable.

219. In Turkey the team observed the capacity in one of UNHCR's large operations to prepare a complex RSD transition in a strategic as well as practical manner. The presence of a bigger, experienced team may give this sort of advantage, which the many small or mid-size operations in UNHCR do not have. Yet, even in Turkey UNHCR staff are working under enormous pressure, having to handle a major mandate RSD and resettlement operation as well as important aspects of the Syria emergency.

220. More generally, the impression exists that there is a tendency in UNHCR to see the disengagement from mandate RSD as an opportunity for reducing and re-deploying staff, rather than an opportunity to seriously invest into the new system, the on-going transition and the effectiveness of UNHCR's changing role. UNHCR's support for good and sustainable transitions can also be hampered by the closure or downsizing of offices in the context of regionalization efforts. The frequent reference to the term "hand over" of RSD, which points at only one phase and aspect of the process of transition, and is moreover only relevant where UNHCR used to be responsible for RSD, is perhaps symptomatic. It may even contribute to short-term decision-making on resources.

221. Adequate resources are not only necessary to support authorities when they start the new procedure but throughout the transition process, from assessment and planning to transfer, implementation and consolidation. Given the importance of the issue for country offices, the team recommends that the link between resources and responsible transition strategies be reviewed in more detail in the second phase of the project.

222. Although UNHCR's Focus provides a multitude of relevant data, reviews at the country level are required to i) determine the concrete tasking of RSD transition work to various functions (RSD specific and other positions), (ii) put UNHCR's work in the

relevant local context, and (iii) assess possible linkages between UNHCR resources and problematic as well as functioning RSD transitions.

223. A close look at different country situations should also assist in delineating the transition process, to determine at which point reductions of staff resources become justified. Such a review could support the development of benchmarks for protection staffing in different situations and phases of transition. It is recommended that UNHCR considers establishing such benchmarks, to serve as a useful complement to those formulated in 2010 for staffing in mandate RSD operations.<sup>82</sup>

224. UNHCR's Results Framework, UNHCR's primary basis for planning and resource allocation, contains the output "handover of status determination procedure from UNHCR to government initiated." It is questionable whether the Framework promotes and is adapted well enough to UNHCR's longstanding objective to assist States with establishing national procedures. The information recorded under the output and the related singular performance indicator during UNHCR's annual planning processes has also brought to light possible inconsistencies, including in comparison with the information provided by country offices in the questionnaire used for this preliminary review.

225. The figures contained in Focus give an unclear picture of transition processes that have been initiated. In 2012, six country operations (DRC, Guinea, Kenya, Mauritania, Papua New Guinea and Turkey) and in 2013 seven country operations (Afghanistan, Cameroon, Kenya, Mauritania, Tunisia, Turkey and Yemen) had chosen the output. The allocated budget was USD 645,663 (OL) and USD 1,039,435 (OP) for 2012 and USD 431,612 (OL) and USD 992,840 (OP) for 2013.<sup>83</sup> In 2014, six operations (DRC, Kenya, Mauritania, Morocco, Tunisia and Turkey) have chosen the output and the budget has increased to USD 1,170,086 (OL) and USD 4,434,731 (OP). Another aspect of the reporting on this output is, that the contributions to partners vary considerably from year to year. These divergences in approaching transitions should be further explored in the second phase of the project.

226. Even though the performance indicator has been changed from "handover of status determination procedure from UNHCR to government initiated" (in the 2012/2013 Results Framework) to "formal assumption by government of aspects of RSD previously carried out by UNHCR" (in the 2014/2015 Results Framework) the output does not seem to give adequate insight into the many transition related activities for which resources will be required. It is recommended to either review the Results Framework in this regard to provide for clearer planning, reporting and information gathering or to provide for a separate more detailed reporting tool.

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<sup>82</sup> *Memorandum dated 19 March 2010*, with annex, addressed by the Director of DIP to all Representatives (internal). It states that the benchmarks were developed to help regional and country offices to determine their protection staffing requirements for the 2011 and subsequent programming cycles, including in the area of RSD.

<sup>83</sup> The terms "OL" and "OP" refer to budget planning figures. OL: Operating-Level Budget, prioritized results and corresponding budgetary envelope. It represents the budget allocated to address the most urgent priorities. OP: Operations Plan Budget, the overall budget required for implementation of all activities that would address the comprehensive needs.

## Concluding observations

227. There are situations in which continuous investments in capacity-building, legislative advice and dialogue appear to achieve little improvement in the protection outcomes of RSD systems. Sometimes, RSD policies and adjudication become more rather than less restrictive, after an initial period of openness in the first few years of the new system. Fortunately however, the reverse development clearly also occurs, especially in societies which gradually adjust to the arrival of foreigners in their midst.

228. In the end, the best safeguard for the proper identification of refugees is a State's intention to provide protection to those who need it. In countries such as Benin and Ghana, while there may be room for improvement of the RSD procedure, asylum applicants ultimately benefit most from the humanitarian spirit and seriousness with which their protection claim is heard, assessed and decided upon. Without it, even systems that look promising on paper and operate efficient procedures may not live up to expectations.



## Part 3: The way forward

### Recommendations for further review and research

229. This preliminary review has scoped the engagement of UNHCR with RSD, the rationale for State responsibility, the evolution of national RSD procedures and scenarios of transition. In view of the challenges States are often facing in operating and sustaining fair and efficient procedures, the review has found that UNHCR has an interest in professionalizing its approach to RSD transition and in strengthening its support. Based on problematic as well as positive experience in country operations, this applies to UNHCR's engagement during all phases of RSD transition, i.e. well before and well after the start of national procedures.

#### **Substantive areas**

230. Based on the initial findings, the formulation of a strategy, policy and tools for responsible transitions to fair, efficient and sustainable systems would benefit from more in depth evaluation and research, in the following priority areas of UNHCR policy and practice:

- The identification and further development of indicators for situations in which UNHCR should exceptionally refrain from encouraging and supporting national RSD, and continue for the time being with mandate RSD;
- The organization of national RSD, based on minimum requirements of due process, efficient models for the configuration of RSD structures and workable models for legal aid. With the close involvement of DIP, the findings should help to upgrade UNHCR's substantive advisory role and increase the chance of systems being not only fair and efficient in the short term but also sustainable;
- Models for operational UNHCR support in the initial phase of the national RSD procedure or, exceptionally, in well-defined emergency situations;
- Reasons for the variable impact of UNHCR's supervisory mandate after the assumption of State responsibility, and ways to increase it with an emphasis on RSD protection outcomes;
- The allocation of UNHCR human resources during the different phases of RSD transition, from assessment and planning to implementation and consolidation. The findings should help to strengthen UNHCR's operational support and impact in RSD transitions;
- The allocation of UNHCR financial resources in particular to national RSD structures, and possible phasing out strategies;
- The identification of ways to incorporate and give more prominence to specific support actions and resource allocation for RSD transition in UNHCR's results based management framework.

231. Taken together, these priority areas would focus on the strengthening of UNHCR's support for RSD transitions from four main angles: substantive advice, operational support, supervisory impact and resource input, within a framework of results based management. The RBM dimension needs to recognize the often small *marge de manoeuvre* of UNHCR country operations depending on their involvement by the national authorities.

232. While the emphasis would lie on enhancing practical support to the building of new RSD systems, in the view of the review team it would be important to complement the findings with a more strategic perspective. For this purpose it is recommended to analyse recent policy and practice, in some specific situations, regarding alternative protection sensitive strategies in the field of asylum as well as migration management, aimed at relieving unnecessary pressures on individual RSD particularly in situations of transition. The findings may reveal new approaches by governments and UNHCR, which have helped RSD systems to cope and consolidate or may have had the opposite effect. Research in this area would build on analysis available in the Division of International Protection.

233. In order to put UNHCR's transition policies and practice in a broader perspective, particularly of the Office's responsibility to provide international protection to refugees, it would in the view of the review team be important to equally review, in relation to some of the selected country situations, the functioning and resourcing of UNHCR's mandate RSD operations. This would be especially relevant in countries where UNHCR is engaged in planning for RSD transition and the transfer of the RSD function.

234. Phase 2 could be used to provide data and insights into several other aspects, however, in order to allow for thorough research within a reasonable time span they should not deflect from the central subjects in the preceding paragraphs. The areas of interest but lower priority are:

- The more precise identification of foundations for quality and sustainable RSD systems and their integration in agendas of States and relevant organizations for development, good governance and the rule of law;
- The variable impact of long term capacity building through training on the quality of RSD, and strategies for the effective and sustainable transfer of knowledge and skills to those involved in different phases of RSD processing;
- The variable impact of disengagement from mandate RSD on UNHCR's position and, more generally, on the protection space in countries concerned;
- The role and operation of resettlement in spite of the assumption of State responsibility for RSD, in situations where the 1951 Convention is not applicable and where it is.

## Methodology

235. The evaluation in phase 2 would use data and analysis obtained through: a desk review of relevant documents, interviews, country visits, direct observation of RSD adjudication processes, one or possibly two round table meetings with experts from governments, civil society and academia, and one meeting of UNHCR managers and staff with experience in RSD transition work.

236. Written information sources would include the materials collected during the preliminary review. A more systematic analysis of UNHCR inspection and audit reports than the current review was able to do should be undertaken. For the same reason additional efforts should be made to locate and interview UNHCR staff and other persons involved in past transitions, to learn from the processes that were followed, good practices and the challenges they had to cope with.

237. Although the preliminary review has looked into UNHCR's Focus software programme, in phase 2 it should be used more extensively to extract data regarding the use of human and financial resources and results based management applied in specific RSD transitions. The application of Focus may also show to which extent this programme provides useful data for management purposes, to which extent the underlying Results Framework is well adapted to monitor progress and impact in UNHCR's transition work and how this could possibly be improved.

238. *Country visits* are recommended as an important method for data gathering and evaluation. Only an assessment of the challenges on the ground will allow for a proper appreciation of the different strategic contexts and implications of RSD, UNHCR's input regarding the organization of RSD systems and the resources required to support responsible transitions. Given the subjects for review and the often country specific nature of challenges in RSD transition, it is recommended to select a broad spectrum of country operations. The selection of the country operations should ideally reflect combinations of the following factors of diversity:

- Regions, legal traditions and economic development
- Type of movement: primarily forced displacement, mixed and transit movements
- National RSD system: volume of applications, type of RSD structure, financing, new system or consolidating, role of resettlement, challenges
- UNHCR involvement: big or small, (previous) mandate operation or not, type of involvement, challenges in supervisory impact

239. The selection should include country operations where transitions have been problematic and where they are proceeding well. It is proposed that country visits will in any event take place to East Africa, Southern Africa, Latin America, Asia, and possibly Eastern Europe.

240. As suggested by the office in Ankara, it would be useful to undertake a follow-up mission to Turkey to examine progress in the pending RSD reform and UNHCR's support activities for a responsible transition. Such a mission should also evaluate the adequacy of resources for capacity-building, policy support and the continuation of mandate RSD at the same time.

241. In phase 2 contacts with governments, at the policy and operational levels, as well as with international organisations, NGOs and academic experts need to be expanded. In phase 1 the review team has met with RSD authorities, government interlocutors and NGO partners during the three country visits, however phase 2 should provide room for more interaction. The same applies to interaction with refugees and asylum-seekers.

242. The knowledge and experience of national authorities will be especially important for topics such as the effective and sustainable configuration of RSD structures, the clarification of minimum due process requirements and the effective organization of legal counselling. The authorities are the primary actors in this domain and they will moreover be able to share their views on how UNHCR may best support them. RSD authorities of donor countries, which have been or are involved in bilateral capacity building support should also be consulted to share their views, including on the sub-theme of effective capacity building. The experiences and views of NGOs and legal practitioners will be especially relevant in relation to workable models for the organization of legal counselling in RSD.

243. The interaction with RSD authorities as well as government experts in asylum and migration policy should not only take place during the country visits. It is suggested that after the completion of these visits, at a minimum one *international expert roundtable* is organized, involving also NGOs and academic experts, to benefit from the knowledge and insights of a broader circle of experts on minimum requirements for RSD procedures and the configuration of an effective RSD infrastructure.

244. For a review of the quantitative and qualitative use of UNHCR human and financial resources in RSD transitions, the review needs to work closely not only with DIP but also other interested Divisions and the regional Bureaux. The purpose is to examine more closely the linkage between resource inputs and improved support for transitions during all stages of the process, in addition to the findings obtained during the country visits.

245. The evaluation in the second phase should proceed on the basis of Terms of Reference, which are modeled on the follow-up questions formulated in this chapter. They may be developed further in the course of consultations with stakeholders, in particular DIP, DPSM and the regional Bureaux. A steering committee should be foreseen to provide feedback to the consultant(s) on progress and substantive issues which may arise in the course of the review. The committee, consisting of senior UNHCR staff and some external experts, would convene during intervals to be determined. In between there may be working contacts with individual members. The steering committee should be able to comment on the draft report. Final responsibility for the substance of the report lies however with the evaluation team.



## Annex I – Terms of Reference

### **Global review of UNHCR's recent policy and practice in relation to the assumption of responsibility for refugee status determination by States**

#### **Background**

Refugee status determination (RSD) is perhaps the single most important means of securing international protection for those men, women and children who are in need of it. A faulty determination may result in the *refoulement* of refugees and the denial of rights to which they are entitled.

Since its creation, and in accordance with its mandate, in particular its supervisory role, UNHCR has engaged with States in the establishment and implementation of fair and efficient RSD procedures under domestic law to determine individual applications for protection. This engagement takes place in five principal contexts:

1. Fully developed and sophisticated systems in which UNHCR plays primarily a supervisory role. The state is in full control of the RSD process. There is effective access to RSD procedures and there are effective remedies, including independent judicial review.
2. Developed and sophisticated systems as above, but where UNHCR officials are, by law or practice, embedded in national eligibility bodies.
3. Transitional systems, where countries have assumed responsibility for RSD decision making but where parts of the system are not yet fully functional or self-supportive. UNHCR may fund eligibility committees and also be involved in activities such as registration, interviewing and/or making recommendations to the authorities.
4. Transitional situations where the state has indicated a willingness to eventually implement the entire RSD function and/or has started to assume responsibility for some aspects. In the meantime UNHCR continues conducting RSD under its mandate, while providing technical assistance to the authorities.
5. Situations in which the authorities are thus far unable or unwilling to assume responsibility for RSD under national law. RSD is undertaken by UNHCR under its mandate. The state is aware and UNHCR's eligibility determinations lead in practice to varying degrees of protection of refugee rights. In such cases, the country concerned is usually not a party to the international refugee instruments, but also countries, which are, fall in this category.

Over the years UNHCR and its partners have encouraged States, in particular States party to the 1951 Refugee Convention and/or 1967 Protocol, to adopt national RSD procedures. As a result of these efforts as well as other factors the number of States that have established such a procedure or have expressed an interest in doing so has risen.

In many, if not most of the States concerned UNHCR has been conducting RSD under its mandate prior to the establishment of a national RSD procedure. The assumption of State responsibility has therefore changed UNHCR's role in these countries and has permitted it to focus on its supervisory responsibility, including through advisory services and other forms of support to the national RSD authorities concerned.

In some exceptional situations, mandate RSD may still be in operation in parallel with the national RSD procedure, for example as part of a process of transition.

The assumption of responsibility for RSD often creates challenges for the States concerned as well as for UNHCR in the exercise of its supervisory role.

The complete or partial transition of RSD by UNHCR under its mandate to States under national law is likely to have consequences for the protection of asylum-seekers and refugees. There may also be other effects, for example in the area of durable solutions.

### **Objectives of the review**

The overall objectives of the review will be 1) to analyze UNHCR's policy and practice with regard to the assumption of State responsibility for RSD; 2) to assess the need for and facilitate the possible formulation of strategies, policies and tools in this area. While recognizing the importance of prima facie group determinations in the context of mass influxes, the present review will focus on RSD systems to determine individual applications for protection. Given its scope and magnitude the review will be divided into two phases.

#### **Phase 1 (three months)**

During the first phase, PDES has engaged an independent consultant who, with the support and engagement of PEDS staff, will conduct a preliminary review to prepare for a more comprehensive study on the subject in the second phase. The preliminary review will focus on UNHCR's policy and practice in relation to the transition from mandate RSD to national RSD procedures, with an emphasis on recent years and current efforts in this domain. Relevant practice from other situations may also be taken into account, in particular as regards UNHCR's supervisory role.

The preliminary review will prepare the ground for the second phase by collecting information, providing contextual background, and mapping and discussing the issues involved. The review will initially address the following themes, with a more comprehensive list of evaluation questions being developed as the exercise proceeds:

- The legal basis for State responsibility for RSD, and for UNHCR's engagement with RSD.
- The historical evolution of UNHCR's engagement with RSD the extent of UNHCR's current engagement and its different forms, in particular when States (prepare to) assume responsibility for a national RSD procedure.
- Mapping of States which have assumed responsibility for RSD during the past ten years or which are in the process of doing so.
- The principal challenges and issues related to the transition from mandate RSD to RSD conducted by States on the basis of national legislation, in particular from the perspective of UNHCR's protection and supervisory mandate.

The preliminary review will elaborate on the scope of and propose Terms of Reference for a more in depth and comprehensive study involving other stakeholders. It will produce initial findings on substantive issues requiring further analysis and consultation in the course of phase 2.

#### **Methodology Phase I**

The first phase will be conducted by an appropriately qualified independent consultant, with the support and engagement of UNHCR's Policy Development and Evaluation Service for a period of three months. It will be conducted in strict accordance with UNHCR's Evaluation Policy.

The study will be based on:

- a desk review of relevant documents;
- a global mapping of recent UNHCR policy and practice;

- individual and group interviews with relevant individuals, including UNHCR staff, government officials and external experts, asylum-seekers and refugees.
- missions to selected countries identified in consultation with the regional bureaux.

The review will lead to the preparation of a report elaborating on risks and opportunities, challenges and scope of a more comprehensive and in-depth review to be conducted in the second phase, in 2014.

#### **Phase 2 (nine months to one year)**

The comprehensive study to be conducted in the second phase will be based on the findings in phase 1 including proposed methodology and Terms of Reference. The aim is to identify lessons from past experience, examples of good practice as well as areas for improvement, primarily from the perspective of an effective implementation of UNHCR's protection and supervisory mandate.

It is foreseen that the study will have a broader look at the assumption of State responsibility in this area. The study may also examine more closely the challenges States are facing for the proper functioning of emerging RSD systems, and UNHCR's capacity to support States and to exercise its supervisory role as effectively as possible.

*More specifically:*

- The review should identify what, if any, criteria and circumstances there are under which UNHCR considers the option of transferring the RSD function to a state.
- Related to this the review could elaborate on procedures to be employed to assess the viability and sustainability of transferring RSD responsibilities to national authorities
- In addition which models of transfer, including forms of involvement by UNHCR if any, have been applied
- The review should identify what types of support and assistance has UNHCR provided to enable or facilitate the establishment and running of national RSD procedures
- The review should identify in what circumstances does UNHCR assume responsibility for funding national RSD systems
- The review should identify in what instances does UNHCR assume responsibility for the training of eligibility committee members. What kind of training is provided to them and with what results
- The review should identify how UNHCR monitors, evaluates or provide oversight to the quality of RSD procedures and decisions in the process of and after transferring the RSD function to a State
- The review should identify what remedial action is taken by UNHCR if the quality of decision-making by States is deemed to be unsatisfactory following a hand-over of responsibility.

Ms/pdes  
27.08.2013



## Annex II – Questionnaire

### Questionnaire regarding the assumption of State responsibility for RSD in the country or countries you cover

The 2013/2014 PDES annual work plan includes a review of UNHCR's policy and practice in relation to the assumption of responsibility for individual refugee status determination by States. PDES has engaged an international consultant to lead the preliminary phase of this project. To assist in the preparation of the report, the following questionnaire will be dispatched to all Regional Representatives and Heads of Country Offices.

- *Your answers will be extremely valuable for the above mentioned review. The main purpose will be to analyse the challenges arising in this context and to facilitate the possible formulation of policies and tools for the benefit of UNHCR operations, in particular in the context of a transition from mandate RSD to national RSD procedures.*
- *The questionnaire is relevant for all operations, albeit in varying degrees.*
- *Although the Bureaux and DIP are of course familiar with your operations, much of the information requested below, notably the historic part, is very difficult to trace in one go. An historic overview does not yet exist. Also your own insights are important.*
- *You may quickly discover that several questions will not be relevant to your operation (n/a), or can be simply answered (yes/no). Where explanations or views are requested, please be very brief.*
- *This is only meant to provide a first, basic overview and does not cover all questions (e.g. the extent and form of UNHCR's involvement and support). Some of you may be approached for follow-up questions.*
- *It would be much appreciated if you could return the completed questionnaire by email to [morris@unhcr.org](mailto:morris@unhcr.org) and [vanhovel@unhcr.org](mailto:vanhovel@unhcr.org) by 20 September 2013.*

1. Please indicate the country office in which you work.

2. Does your country have a specific RSD procedure for individual asylum applications, regulated by law?

3. In which year has your country established its national RSD procedure (with or without UNHCR involvement in the procedure)?

4. It would be extremely helpful if you could trace in the records of the office or otherwise briefly indicate the likely motives behind the country's decision at the time to establish a national RSD procedure. Were there any particular contextual interests or factors? If the national procedure essentially followed from the country's accession to the 1951 Convention, what led decision makers to decide in favour of accession? Even where this happened long before your current assignment, any documents, testimonies or insights may be interesting for research purposes. We would be grateful to receive them.

5. Is the national RSD procedure in operation?

6. Before the start of the national eligibility procedure, did UNHCR conduct RSD under its mandate?

7. If so, do you know or could you trace if there was any “hand over” process in which the transition from mandate RSD to a State run asylum procedure (including the modalities of such procedure and any forms of UNHCR involvement and support) was discussed and agreed with the government?

8. Is UNHCR still or again conducting RSD under the mandate, despite the existence of a national procedure?

- is this limited to the identification of candidates for resettlement?
- or is it for broader protection purposes in a “parallel” procedure?

Please briefly explain.

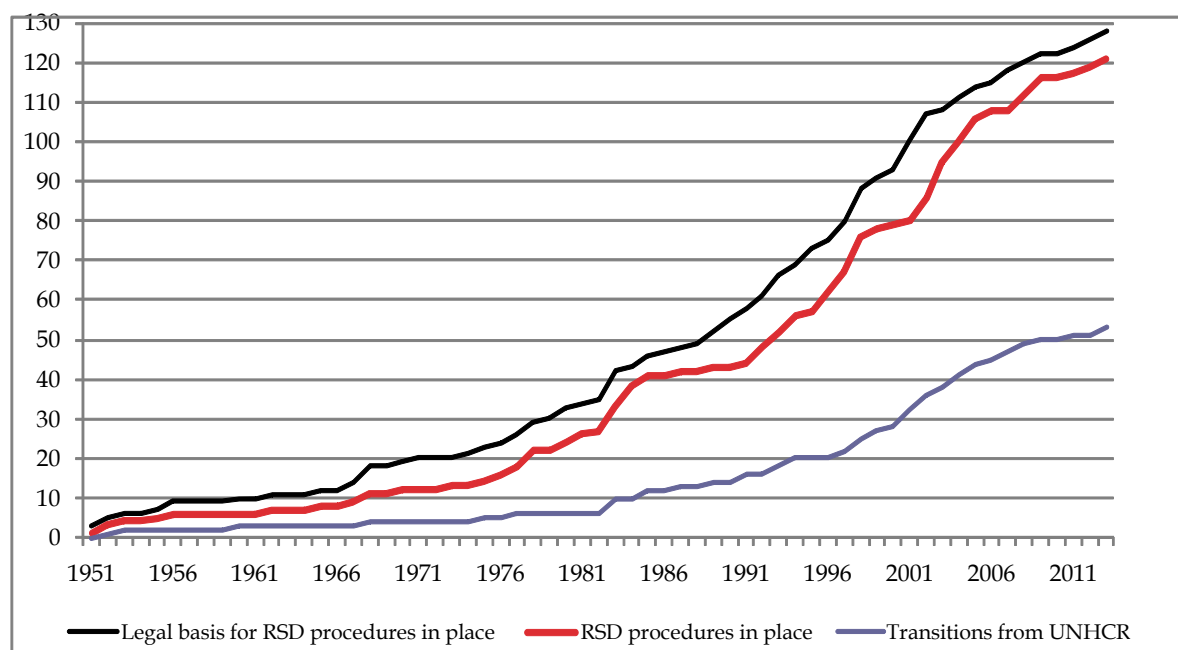
9. In case your office is conducting mandate RSD in the absence of a national RSD procedure, do you see any genuine prospects for the establishment of such a procedure in the foreseeable future? If not, what are the main reservations on the part of the government or of UNHCR? If yes, what is causing this prospect? If you are engaged in discussions on the topic, please mention briefly the main subjects.

THANK YOU

Machiel Salomons, Acting Head PDES  
28-8-2013

## Annex III – Historical Graph

### National RSD procedures



#### Notes:

The main graph (thick line) reflects RSD procedures in place in 117 UN Member States (and four non-State entities). The data was taken from two main sources, a questionnaire sent out by PDES to all country offices in August 2013 and UN document A/AC.96/INF.152/Rev.8 of 12 September 1989 (Note on Procedures for the Determination of Refugee Status under international instruments) submitted by UNHCR to the Executive Committee of the High Commissioner's Programme for information. Additional data was gathered from desk research and direct communications with concerned country offices. The graph is provisional, subject to additional information.

**"Legal basis for RSD in place"** refers to the year of entry into force of the legal act regulating the admission of refugees in a given country, often through aliens' or specific refugee legislation.

**"RSD procedure in place"** refers to the implementation of national RSD procedures, mostly following the adoption of implementing regulations and the establishment of a national authority responsible for RSD. It includes some national procedures in which UNHCR was asked to carry out certain activities, such as registration and/or interviewing, before the national authorities decide on the application. It also includes national procedures, which have not always functioned on a continuous basis.

**"Transition from UNHCR"** refers to national procedures which have been preceded by UNHCR mandate RSD operations and where a more or less organized transfer of responsibility for RSD took place (which may have involved an arrangement regarding UNHCR's activities in support of the establishment and functioning of the national procedure, the transfer by UNHCR of pending applications etc.). The year of the "legal basis for RSD in place" is taken as the reference point, although there may have been a considerable period of time between the adoption of the legal framework and the actual implementation of the national procedure including any transfer by UNHCR.





## Annex IV – List of States

### List of States and entities with a legal basis for RSD in place

#### Africa

Angola  
Benin  
Botswana  
Burkina Faso  
Burundi  
Cameroon  
Cape Verde  
Central African Republic  
Congo, Democratic Rep.  
of  
Congo, Republic of  
Côte d’Ivoire  
Djibouti  
Eritrea  
Ethiopia  
Gabon  
Gambia  
Ghana  
Guinea  
Guinea-Bissau  
Kenya  
Lesotho  
Liberia  
Malawi  
Mali  
Mauritania  
Mozambique  
Namibia  
Niger  
Nigeria  
Rwanda  
Senegal  
Sierra Leone  
South Africa  
South Sudan  
Sudan  
Swaziland  
Tanzania  
Togo  
Uganda  
Zambia  
Zimbabwe

#### Americas

Argentina  
Belize  
Bolivia

Brazil  
Canada  
Chile  
Columbia  
Costa Rica  
Dominican Republic  
Ecuador  
El Salvador  
Guatemala  
Honduras  
Mexico  
Nicaragua  
Panama  
Paraguay  
Peru  
Uruguay  
USA  
Venezuela

#### Asia and the Pacific

Australia  
Cambodia  
Fiji  
Japan  
Kazakhstan  
Korea, Republic of  
Kyrgyzstan  
Nauru  
New Zealand  
Papua-New Guinea  
Philippines  
Solomon Islands  
Tajikistan  
Timor-Leste  
Turkmenistan  
Vanuatu

#### Europe

Albania  
Armenia  
Austria  
Azerbaijan  
Belarus  
Belgium  
Bosnia-Herzegovina  
Bulgaria  
Croatia

Czech Republic  
Cyprus  
Denmark  
Estonia  
Finland  
France  
FYROM (Macedonia)  
Germany  
Greece  
Hungary  
Iceland  
Ireland  
Italy  
Latvia  
Liechtenstein  
Lithuania  
Luxembourg  
Malta  
Moldova  
Monaco  
Montenegro  
Netherlands  
Norway  
Poland  
Portugal  
Romania  
Russia  
Serbia  
Slovakia  
Slovenia  
Spain  
Sweden  
Switzerland  
Turkey  
Ukraine  
United Kingdom

#### Middle East and North Africa

Israel

#### Non-State Entities

Cayman Islands  
Kosovo (UNSCR 1244)  
Macao SAR  
Montserrat

