FORMATIVE EVALUATION OF RSD TRANSITION PROCESS IN KENYA

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Summary of Selected Points Discussed at Meetings of the Steering Committee

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Madeline Garlick, Elspeth Guild, Machiel Salomons

UNHCR
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Refugee Agency

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Introduction: the Formative Evaluation and Steering Committee

1. A formative evaluation of the ongoing transition to a national Refugee Status Determination (RSD) procedure in Kenya, led by UNHCR's Policy Development and Evaluation Service (PDES) commenced on 1 October 2014, to continue until 31 January 2015. A Steering Committee (SC) comprising experts from Europe and Africa has been set up to advice the evaluation team and monitor the process of the formative evaluation. At the first meeting of European-based members of the SC, on 27 October 2014, participants heard presentations from the evaluation team and from various SC members and discussed a number of key questions and priorities for the evaluation. A discussion paper, attached, was used as basis for discussions. The key conclusions of the meeting are reflected below. A second meeting of Africa-based SC members is scheduled to take place on 29 November 2014 in Nairobi. Subject to availability of funds, hope was expressed that the entire SC would have an opportunity to meet in 2015.

2. At a global level, UNHCR has seen a significant increase in mandate RSD applications over recent years, which makes transitions to well-functioning national RSD systems all the more relevant and necessary. The need for further guidance, clarity and consistency in approaches to transition has been underlined in PDES' March 2014 evaluation, 'Providing for Protection'. In addition to Kenya, transition processes are underway at different stages in other countries including Cameroon, China (Hong Kong), Israel, Morocco, and Turkey. In this context, as a second phase of UNHCR's work on this critical issue, the SC members agreed that the Kenya transition process provided an optimal choice for this formative evaluation, in terms of timing and substantive issues. From a country specific point of view, Kenya illustrates and provides insight into relevant characteristics in the RSD transition process which could potentially be of wider relevance.

Context and objectives

3. The shared objective of governments and UNHCR should be to achieve RSD systems which are not only fair and efficient, but also sustainable in the long run as part of national legal and governance systems. Participants agreed that the success of transition processes depends to a large extent on the political support of governments, as well as willingness to ensure protection to those who need it, commitment to humanitarian objectives, close cooperation between all concerned and adequate resourcing.

4. The context in which transition is taking place in Kenya involves many complex and challenging factors (including human and financial resources, serious security challenges in the country, prevailing policies regarding urban refugees, the asylum/migration debate, a significant backlog and other protection related issues). While the evaluation will need to take all these factors into consideration, it must focus on providing concrete and practical observations and recommendations to facilitate the

process of handover of RSD, enabling the Kenyan authorities to assume full responsibility for a fair, well-functioning, and sustainable RSD process, as part of a strong protection system in Kenya. This should include an independent appeals process.

Scope of the evaluation

5. As UNHCR guidance on several important subjects (including prima facie status; approaches to RSD) is in the process of updating/preparation, there remains no specific, generally applicable guidance on when and how to effect transition or handover. The formative evaluation, to the extent possible, should endeavor to identify elements which could form part of such guidance. Further to the March 2014 phase I report, this would include such topics as assessing, planning and preparation for transition, best practices in support of national authorities, protection risk management strategies and alternative approaches to individual RSD. A key issue for UNHCR operations worldwide is the availability of adequate staffing resources to properly prepare, support and assist with the consolidation of national RSD. As its major focus and source of information will be the Kenya operation, however, the current evaluation's recommendations will specifically seek to address the Kenya context.

RSD procedures and registration

6. There are currently a number of different procedures, and differentiated streams within procedures, in use during the transitional process. It will be important to examine these and consider how to ensure that these can (a) enhance protection (b) ensure efficient case management and processing with limited delays for asylum-seekers; and (c) be sustainable in the longer term, including after handover. These must take into account the relevant parts of the international and Kenyan legal framework, including the 1951 Convention and the OAU Convention, as well as the relevant Kenyan legislation. It will be of crucial importance to ensure that the RSD process, during and after handover, is fully embedded in Kenyan legislative and legal structures and institutions. This is essential, not only to ensure a firm legal basis for ongoing RSD processes and outcomes, but also to guarantee their sustainability in the longer term. The commitment of the Kenyan authorities to maintain and uphold the RSD process in accordance with Kenyan and international law could be reflected in a memorandum of understanding which could be concluded at the conclusion or during the transition process.

7. Registration is a key step, in all of the different locations and modalities in which it takes place. Recommendations should focus on ensuring there is effective and on-going access to registration for all those seeking protection, and that the essential data is gathered, ideally one time only, to enable provisions of services and access to a fair and efficient RSD process. Confidentiality of personal and RSD-related information is also critical (both for data currently in the system and to be gathered in future during and after transition). Safeguards must be in place to ensure its protection on an ongoing basis. Given the resource-intensive nature of registration, efficiency is also a crucial aspect.

8. The backlog of pending claims represents a major challenge. Ways should be sought to reduce and potentially eliminate this before handover is completed, to enable the post-handover process to respond to new claims in a swift manner. The Steering Committee also noted in this regard the recent positive progress in reduction of the backlog as a result of the government's decision to provide refugee protection on a prima facie, group basis to applicants from South Sudan.

9. In addition to adequate resource allocations to national RSD procedures and efficient case processing techniques, it was therefore important for the evaluation to pay full attention to RSD and asylum policies. The Steering Committee moreover felt that individual RSD procedures, in case of a positive outcome, should result in a status which confers clear added value in terms of rights and benefits as foreseen under the international refugee instruments.

Capacity-building

10. Building of the institutional capacity of the DRA is an essential part of the transitional process. A significant investment in post-recruitment, to attract staff with the required profile and background as well as on-going training of staff will be needed, during and after the transition. Steps need to be taken to ensure continuity and retention of performing trained staff, which has been problematic in other situations. Management capacity is also crucial, and should be developed and supported to ensure successful ongoing operation of the RSD system.

Supporting the quality of the process and its outcome

11. Benchmarks and tools for handover of different aspects of an efficient RSD process may be helpful, to encourage and to measure progress during the on-going transition phase. These could also be adapted to provide a useful basis for subsequent quality assurance activities for the RSD process in the longer term. Indicators measuring substantive outcomes in procedures could form an integral part of this endeavor. Whilst reviewing the RSD process, attention is required to the procedures used to assess the applicability of exclusion clauses.

Roles of UNHCR and other actors

12. The ongoing capacitating and supervisory role of UNHCR should be considered as part of the evaluation process, including potentially as an active observer in the national RSD adjudication process once the authorities have assumed full responsibility. The role of monitoring will be important. These issues are relevant for the purpose of preparatory work during the transition, and for defining ongoing roles and activities thereafter.

13. The place and contribution of other actors, including notably civil society/NGO, legal counsellors and legal aid schemes, should be considered, in order to make use of their skills and knowledge in support of RSD and to nurture the protection system more broadly.

Solutions

14. Solutions are a crucial part of the protection framework for refugees in all countries and contexts. Ways to strengthen the prospects for durable solutions for refugees, in ways which respect legal norms and ensure the wider public interest, should be an important part of the analysis. A distinct analysis should be made on the relationship between RSD and voluntary repatriation, RSD and resettlement and RSD and local integration with special reference to long-term integration prospects.

Timeframes

15. Realistic timeframes for the transition process, which also provide incentives and momentum for progress, will be essential. Currently-envisaged timeframes will be reviewed in connection with the question of the form and content of a Memorandum of Understanding or exchange of letters relating to the handover and other relevant aspects.   A clear strategy for phasing down and , where relevant, concluding UNHCR involvement in any aspect of the formal process should be defined.

31 October 2014

Kenya Refugee Status Determination (RSD) Evaluation Project:

Minutes of Meeting 29 November 2014, Nairobi Kenya

Present: Evaluation team: Machiel Salomons, Madeline Garlick and Elspeth Guild

Steering Committee members: Professor Bonaventure Rutinwa, Solomon Wasia Masitsa (advocate) Professor Gilbert Khadiagala, Ann Encontre, Deputy Director Africa Bureau and Catherine Hamon Sharpe, Assistant Representative (Protection) UNHCR Kenya; Geoffrey Wafula, Head of Protection, Department of Refugee Affairs, Kenya.

Guest: Richard Grindel (UNHCR RSD Officer).

Attached at Annex 1 please find the agenda of the meeting. This meeting was held according to Chatham House rules. This note provides only a general overview of each presentation and cannot be cited or quoted as representative of the speaker's view or contribution even less so regarding the speaker's institution.

Welcome by Professor Elspeth Guild (member of the evaluation team)

Presentation: Machiel Salomons, Principal Policy and Evaluation Officer UNHCR and Madeline Garlick, Fellow Migration Policy Institute – description of the project and its objectives.

The team presented the history of the project and what the intended outputs are. In 2013 UNHCR's Policy Development and Evaluation Service (PDES) was asked for a formative evaluation of UNHCR's involvement in RSD. This resulted in a report in 2014.[1] There are many ways in which UNHCR is involved in RSD. Whether a specific evaluation about the question of transfer of RSD from UNHCR to the government may be required in each situation is an aspect of careful individual review. UNHCR policy explicitly states that state conduct of RSD is a desirable policy objective. However, there are no benchmarks. Kenya is unique because even without clear instructions, the relationship of the DRA, UNHCR and civil society actors provides an ad hoc framework which permits such a transfer. Perhaps the Kenya model could provide guidance to UNHCR as it pursues its policy to transition RSD to national governments. An information collection process is going on as part of the present project whereby enumerators are interviewing asylum seekers to find out what those in the RSD process think of the current procedures. The objective of today's meeting is to receive the input of the steering committee.

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[1] UNHCR, Providing for Protection, Assisting States with the assumption of responsibility for refugee status determination, A preliminary review (PDES/2014/01), http://www.unhcr.org/53314b7a9.html

Today's meeting is not intended to deal with technical issues but to hear about the issues of principle and context of RSD in Kenya and Africa generally. There has already been an extensive information gathering exercise carried out by the evaluation team about the transition procedures. Among issues which the team is looking at are:

- Importance of ensuring correct implementation of national legislation;
- Ensuring all elements are in place to ensure that the DRA receives any capacity development assistance which may be necessary;
- The outcomes must be sustainable – including the registration process;
- The role of UNHCR post-transition in its supervisory capacity needs to be clarified;
- The back log issue needs to be addressed;
- Quality assurance needs to be addressed so that decision making meets national and international expectations;
- Solutions are a key area – the three durable solutions (local integration, resettlement or repatriation) are at play in the discussion and basic services need to be assured for those granted status;
- Questions of the resourcing of the process need to be dealt with.

With these objectives and expectations in mind, the meeting has been organised.

DRA's perspective on the transition of RSD functions from UNHCR to DRA

DRA's Representative commenced with an explanation that he is providing a personal perspective of Kenyan RSD transition process from UNHCR to DRA. Starting with the background, the presentation examined the process and outstanding strengths, weaknesses and opportunities and the way forward. RSD as a legal process in Kenya is based on the Refugee Act 2006. Sections 3 and 11 provide the legal basis for RSD and the 2009 Regulations provide the detail. Pre 1 July 2014, the official hand over date, the process had already been started officially by the DRA. Before that date UNHCR carried out RSD on behalf of the government. Now documentation of asylum decisions is Kenyan and provides status under Kenyan law. There are three procedures in Kenyan law – full, simplified and prima facie RSD. Prima facie (PF) constitutes group recognition. The DRA team together with UNHCR began working together to manage transition into a full RSD process by government well before the handover date.

The Kenyan government decided to take responsibility for RSD as it is a pillar of the Kenyan DRA's five year strategic plan. Refugee management in general and asylum in Kenya forms part of the strategic plan. The DRA began to implement the strategic plan according to which RSD must be assumed by 2015. This transition is consistent with the 1977 UNHCR Ex Com recommendation for national responsibility for RSD.

There is also a security concern in Kenya as regards asylum seekers and refugees. This is recognised even by the Office of the President. The security concerns have increased over the past 4/5 years as an increase in terrorist attacks have occurred in the country. Kenya is on high alert for terrorist attacks and there is generalised concern about threats at the highest levels. These concerns have also manifested through a need to know who is living on the territory of Kenya hence the concern to take responsibility for RSD.

There are opportunities and challenges in the RSD transition. The DRA secretariat has been strengthened in the past few months. The transition of registration is key as it is the place where the determination of which type of RSD occurs. For instance the *prima facie (*PF) treatment of South Sudanese claims requires identification at registration. There has been much coordination between the urban and camp officers of DRA and UNHCR.

Originally it was planned that there would be two channels but these have been collapsed into one. The first is the pre 1 July 2014 back log and the other the new cases. The DRA has now decided to handle all the cases, including the backlog cases. Handling both has been successful so far.

As regards training, RSD staff includes lawyers who have now undergone an RSD training programme over the past 18 months. There is a clear training programme and career progression which has been determined on the basis of months spent in each capacity. There will be benchmarking. The first group graduated one month ago and moved to the next stage. If there is a second group next year then DRA will be ready with competent staff knowledgeable about their work and ready to undertake all RSD tasks. The 18 months' time line is realistic.

There has been a full assessment of what needs to be done over the 18 months and how it will be carried out. The programme is one created for Kenya, not taken from Cameroon or Tanzania but focused on Kenyan needs. There is a task force in place examining a refugee policy for Kenya and when its work has been completed and the Commissioner will finalise that refugee policy which will clarify the big lines of Kenya's policy and provide assistance to the courts if issues arise before them. The team is dedicated and has the support from the very top of the Kenyan government. There is substantial political will for the process and a genuine interest at the highest level in the successful completion of the project.

What are the challenges? The existing law is good but needs additions correctly to reflect international obligations and revised Constitution of the country. There is mutual respect and cooperation among the partners which needs encouragement. One of the weaknesses has been the lack of an appeal structure. It has not been possible to issue rejection letters since 1 July 2014 because the appeal structure is not yet in place. Structural changes within the DRA are one reason with its move from the immigration ministry to the ministry of interior. The DRA has submitted names for the members of the appeals board as required under the 2006 Act but this need to be adopted and 'gazetted" (published in the national gazette which has the effect of making a measure legally binding, a requirement of the Act).

There are staff issues, 80% of the DRA are contract staff whose contracts ended yesterday (28 November 2014). The staffs are taking a month's leave before the new contracts are likely to be issued but this is not guaranteed. Because of the external funding nature of their salaries, which is limited to one year, some of them may find better jobs over the Christmas break. There needs to be more stability in the funding of the staff. DRA has a database – there was funding from DANIDA for this but it has not been particularly successful. The best option on registration in a database will be to share the UNHCR database. There are issue of confidentiality which need to be dealt with.

At the moment, there is a separation of registration procedures. DRA and UNHCR each carry out registration. There are people registered in each of the systems which have not been included in the system of the other. This is a challenge. A unified database will, of course resolve many of these

problems. The current situation may be detrimental to protection of refugees as people may ,at least in theory, fall through the cracks. Some people ask why the Kenyan authorities want to take this RSD processing over and external people sometimes question DRA's capacity. This weakens confidence and trust in the transition process. The transition of RSD is a clear objective of the Kenyan government.

Coordination works well at headquarters but this need to be replicated in the field. The Technical Advisory Committee (which proposes decisions on individual cases) needs to work more smoothly. Regarding opportunities these are perhaps less obvious but the development of DRA with motivation to undertake RSD is an excellent opportunity. The Government of Kenya and UNHCR regional office have been very supportive. The regional office has been central in providing support. The DRA hopes that the evaluation will assist the transition. Finally, there are human resources issues: there are some excellent and motivated young Kenyan advocates available to work for the DRA. If they have an opportunity and are well paid they are willing and able to do the job.

The Kenyan authorities are determined to take over RSD. Whether this is within the next 18 months or longer is flexible. There will be an excellent RSD process which will be the model for the region. UNHCR assistance and guidance will continue to be very important. Possibly a UNHCR appointee could have a one year advisory role with DRA. The DRA is concerned that international standards are fully reflected. The Kenyan authorities need funding to fulfil these objectives. RSD is the most expensive part of refugee protection. Here UNHCR has a role to play in the funding and support of the transition process. There needs to be closer cooperation. From the Kenyan side there is a clear strategy which needs to be completed. Any mistrust needs to be addressed.

UNHCR Kenya's Perspective

The RSD transition process is fully supported by the UNHCR Africa Bureau and most welcome. The focus of this presentation is the main strengths and weaknesses of the RSD process from the perspective of UNHCR. The objective of the process is pursued in a constructive and collaborative manner notwithstanding some concerns. The main strengths of the process need to be examined from the institutional and the operational perspectives separately. There are many venues where the transition is taking place and a number of transitions (camps, registration, RSD etc). This is a reference point also possibly for other transition processes. Direction and support is provided from senior management in the branch office providing guidelines and support. From DRA there is strong commitment to take up the responsibilities.

At the operation level UNHCR has been doing RSD on the government's behalf for many years and the UNHCR processes are credible and fair. Documentation and registration are in good shape. Transition is in motion but there are still procedural aspects to be dealt with. Asylum seekers' applications are being dealt with in the joint procedures of the transition. At the UNHCR and DRA, there is a commitment to work together.

The key weaknesses are outcomes of the context to some extent. The context is seen rather differently from the perspective of UNHCR and DRA and this affects the transition. There is, on the part of the authorities, a state security context and formulation of a nexus between refugees (in particular Somali refugees) and insecurity and terrorism threats in Kenya. DRA's move into the ministry of interior reporting to that ministry means that there is a more direct security framework

for refugee management. UNHCR sees the Kenyan government's perspective of refugee management as part of a security/insecurity continuum. The encampment policy, and specifically the enforcement actions in March 2014 requiring and forcing Somali refugees to move to the camps together with a call to Kenyans to report the presence of Somalis in their neighbourhoods has had a negative impact on asylum environment in Nairobi and hindered the provision of protection (and thus also RSD). The encampment policy is still in force but refugees are not currently being relocated to the camps. The government is trying to implement the relocation of the urban refugees to the camps except for those who have been specifically exempted. There is some uncertainty about the exemption policy and whether it has been properly defined let alone implemented. The scope is also unclear as to whom it applies – new asylum seekers or only ones already established. Since 2012 there has been no registration going on in urban centres (following the first encampment policy). Registration in Nairobi is only available for the most vulnerable persons, for whom an exemption is available. Where refugees cannot register and get access to the asylum process in Nairobi as they are required to move to Kakuma or Dadaab to do so, is an obstacle in UNHCR's view. Applicants in urban areas are being given movement passes to move to Kakuma or Dadaab, but most people remain in Nairobi undocumented and thus even more vulnerable. The policy also appears to be fuelling a false documents industry.

From an institutional point of view, DRA was created in 2006. Most of the senior staff are still only seconded from other ministries. There are no existing DRA specific civil service positions. At a senior level, there is a lack of capacity and knowledge. There is no senior level position to provide guidance and vision of the RSD policy. In the two camps and Nairobi there are DRA RSD officers but all of them are at the same level. Some carry out the functions of coordinators and administrators but technically they are all at the same level. They need a management structure which is more firmly embedded. The insertion of DRA into the ministry of interior (from the ministry of immigration) has coloured the context with security concerns. There are also questions about the funding. There is limited government funding for DRA and it depends strongly on UNHCR and DANIDA (the Danish government aid agency). The approved budget for 2015 is limited which will impact the future of the hand over and the ability of UNHCR to address the back log.

At the operational level, generally there is a lack of RSD staff both in DRA and UNHCR in particular at the review level to deal with the backlog. The frequency of the Technical Advisory Committee meetings (TAC) which from 1 July 2014 permits UNHCR and DRA to review cases for a final decision (this follows interview and first proposal from interviewers and review by a reviewer). There is a back log here too. The issue of decisions has become cumbersome as UNHCR prepares all the decisions for the Commissioner. The current set up means that DRA is not able to issue decision letters which means that the UNHCR staff must move to DRA headquarters to issue the letters once a week. There is a large backlog particularly in Kakuma and UNHCR does not wish to hand over RSD with the backlog to DRA.

Other operational challenges which are acknowledged on both sides are the questions of staff retention. UNHCR invests weeks and months on DRA staff training to do quality case interviews and recommendations and hopefully in the future reviews as well but sadly some of the staff move to other jobs. This is not a major issue but it does impact the RSD transition. Some DRA staff have been less than ideal in their performance which is also a matter of concern.

The lack of an appeal process which is a critical gap in the process may permit a challenge in court. Some people have not received their decisions after 1 July 2014 because it would be negative . But such negative decisions cannot be issued because without information on the appeal and the appeal structure which has not been put into place they would not be consistent with the 2006 Act. One option would be for UNHCR to take back the pre 1 July 2014 cases and process them for appeal under the UNHCR mandate. This is a weak legal option but would be a way out for people being left without a decision for too long. Currently, the information available to asylum seekers regarding the process has not yet been set out in a leaflet as had been anticipated. UNHCR does provide information at the start of the procedure but there is no written package of information available at the beginning of the process. At the moment there is no legal basis for the TAC.

Since 2012 UNHCR has trained 28 staff and yesterday (28 November 2014) their contracts ended and all went off on a one month's leave. There has been substantial loss of this staff. DRA has assumed responsibility but UNHCR fills gaps where there is a lack of capacity. This will continue for the next 18 months. All positions are currently on hold. There have been 18 meetings of the TAC and all cases have been endorsed by the Commissioner. All rejection cases (more than 500 waiting in the queue) are on hold. The joint issuance is going ahead. DRA is undertaking registration and then UNHCR carries out registration once the individual arrives with the DRA registration document. There are no DRA reviewers for the moment. The Commissioner endorses the decisions from the TAC. There is a well-designed training plan for the DRA staff which takes into account the complexity of the cases and includes training on reviewing cases.

According to UNHCR, the DRA staff are intended to graduate to become reviewers. The full course of on-the-job training takes more than 18 months. The capacity building is designed for the end result. UNHCR has a detailed plan for DRA to implement on training. Prior to the 4th of July meeting between the Rep and the Commissioner, the 'step by step RSD handover plan' was based on a 'handover' of responsibilities after a period of capacity development with regular evaluations and with progression to the next stage being contingent upon established quality benchmarks. This approach was discontinued as a result of the 4th of July meeting and, from the 1st of July, the Commissioner and other DRA staff assumed RSD responsibilities, with HCR acting as a backup in areas where their capacity remained to be developed: the 'handover' happened at the beginning of the transition process, not at the end. Therefore the transition plan for Kenya (version of November 2013, or version of May 2014) is no longer the plan which is being implemented. The Step-by-Step plan [entitled *'Phased handover of REG and RSD responsibilities from UNHCR to the Government of Kenya (GoK's) Department of Refugee Affairs (DRA), developed and discussed during a joint UNHCR/DRA RSD retreat from the 13th to the 15th of November 2013'* which was Annex 1 to those versions of the RSD project proposal) has been replaced by the document entitled 'Workplan for Transition of RSD Responsibilities from UNHCR to DRA [June 2014-Dcember 2015]. It would seem logical that a responsible transition of RSD responsibilities should be closely linked to the progress made in terms of RSD training and the development RSD competencies of the DRA RSD staff, in line with the training plan. Meanwhile, there is no indication whether the philosophy and plan will not change again soon and/or whether it might possibly be again amended by DRA.

Presentation: Solomon Wasia Masitsa, advocate to the High Court, Kenya

The objective of this presentation is to examine how to achieve an effective appeal system in Kenya. The objective is to examine the available processes and institutions in place with specific reference to the appellate procedures. The Refugees Act 2006 is under review but it is the basis of the current discussion. This presentation is based on the Act as it currently stands (un-amended). Section 9 provides for the establishment of the refugee appeals board, requires its independence and seeks to ensure expertise of the members and chair of the board.

The board is to receive appeals from aggrieved asylum seekers who have received a decision by the DRA denying them status. The individual has 30 days to appeal against it. S 10(3) states that an aggrieved person still may have recourse to the High Court within 20 days of receipt of the appeal decision. This legislation effectively provides for an administrative and judicial procedure within RSD.

From 1 July 2014, UNHCR which was undertaking RSD has been replaced in name by DRA. The administrative functions of UNHCR are not subject to the appeal provisions under the Act.

Prior to 1 July 2014, one of the key issues for applicants has been the long delays in decision making and review after rejection carried out by UNHCR staff (reviews take very long periods of time). An aggrieved person may not know whether to appeal or seek a review or how to prepare either. As the same entity which has made the decision also determines the appeal (even if to a UNHCR official at a slightly different level) the UNHCR 'appeal' process is simply an internal, administrative review and it is difficult to define this procedure as a judicial appeal.

The recent changes to the Kenyan constitution and subsequent legislation resulted in the creation of a new structure, namely the Citizens and Foreigners Appeal Tribunal. When the discussion of the 2014 Bill is discussed in Parliament, there is a proposal to move the appeal structure to the Citizen and Foreigner Appeal Tribunal. The opinion of Kituo (non-governmental organization) is that it is not a good idea to lump this asylum appeal into the Tribunal's responsibilities which are very wide. The appeal system for refugee status decisions should be concentrated in the one act, in their view, and not diluted over a number of different pieces of legislation and bodies without specialised expertise.

Under the Refugee Act 2006 once the Appeals Board rejects an appeal, the aggrieved individual has the right to lodge appeal to the High Court. Actually, constitutionally, there is no need for such a provision as there is a right to seek judicial review of an administrative act. Where an ultra vires argument can be made that the decision was made inconsistently with the powers granted under the Act, there is always a right to judicial review.

Currently the High Court of Kenya has its own substantial backlogs. UNHCR has had a partnership with the judicial training institute to increase capacity. This initiative should continue and possibly be intensified so that the judiciary will be confident to deal with refugee issues with the sensitivity which is required. There is a specialisation move in the High Court but this has not been achieved at the moment. In any administrative review of executive or administrative action there is always the question of the protection of the legitimate prerogatives of the executive branch and its execution.

It also is a mistake to forget the current context of securitization of refugee matters even when one is thinking about issues such as fair and equitable appeal rights.

The new challenges which are apparent from the proposed set up include the issues of aggrieved individuals being reluctant to challenge the state from fear of the possible consequences for their security. Legal representation is also a challenge as it is fairly limited at the moment. There are only two non-governmental organizations offering legal services to these persons. So far refugee law is not well developed. If there are a lot of claims which end up in the High Court, representation may be difficult to find.

Among the recommendations is the need for capacity building of the judiciary (which is on-going with UNHCR). Judges' sensitivity where someone's life is at stake must be highlighted. Advocates need training and sensitization to the new procedure. Also, pro bono legal legal representation for refugees should be encouraged. The rights of claimants in the process need to be respected and ensured. Advocacy efforts may be valuable to promote the establishment of refugee or refugee and immigration chambers. The good will of the government is necessary for the establishment of a special chamber. In the proposed amendment to the 2006 Act, there needs to be some lobbying to ensure that the Board is retained and not substituted by the Tribunal.

The duty to provide written notification with full reasons for refusal must be respected. The grounds of refusal must be full and individualised so the applicant can appeal based on knowledge of what issues must be addressed. There should also be, by right, access to the file itself for the advocate of the asylum seeker whose claim has been rejected.

The Refugee Appeals Board, once established, is entitled to hold meetings as frequently as it sees fit. The frequency of these meetings must be sufficient so that the work can be expeditiously dispatched. The Board has the power to adopt its own rules of proceedings but it needs to have a duty of expeditious action. Any new appeal right will have cost implications and these need to be addressed fully. The appeal institutions, including possibly the chamber of the high court, must remain independent and be properly resourced.

Presentation: Professor Bonaventure Rutinwa, University of Dar es Salaam School of Law

The issue of prima facie (PF) grants of status in RSD decisions is a possible way to fulfil state obligations not least under the OAU refugee definition. An ideal system of RSD needs to be defined as set out in the inception report: fair, efficient, sustainable and effective. First we need to define PF, then decide under what circumstances PF should be used, what is it juridical status, what are the procedures, what are the limitations of such a procedure, the rights of persons with PF status and the implications for solutions.

PF is a status determination not based on individual circumstances but the objective circumstances which gave rise to the flight. This is slightly different from the Article 1A Refugee Convention definition which seems to require individualization of the reason for flight. In the extended OAU definition, the objective circumstances in the country of origin such as occupation, aggression, foreign domination etc can be determined independently of the individual, and result in a PF decision There are two circumstances in which PF should be used: (a) where objective circumstances that show the individual in flight is a refugee (in law of evidence – what the court can

take judicial notice of without specific evidence). The examples of wars such as civil war in Somalia in 1992 are such; (b) where it is impractical because the numbers overwhelm the administration. When people pick up their children and belongings and fleeing substantial numbers PF is a useful administrative tool (eg Rwanda 1994).

In East Africa, most refugees flee conflict in mass situations. This means they come in numbers which make individualised RSD inefficient and potentially impossible in any reasonable time frame. The principles of fairness, efficiency and effectiveness require decisions and documentation within a reasonable period of time. People who are registered on objective circumstances may be presumptive refugees. PF status is a presumptive status but conclusive for the purpose of the international instruments. If a presumption has been established then it obtains until and unless it is displaced There are two approaches often used concurrently: ministerial declarations – a group is declared to be refugees by ministerial decree. This approach has a number of features: limitation of need for extensive proof beyond identity, date of departure and country of origin situation. This is common in the legislation. This procedure should be included in legislation as a safeguard both for the administration and people in flight. It helps administrations to overcome bottlenecks. The second approach is to establish a body which puts people through an interview designed only to determine whether the individual actually comes from the place where the civil war is raging. This has been used in Tanzania and also in Kenya already.

In Kenya UNHCR started carrying out RSD in 1991. Before that date the government did so under the immigration act. With the influx of the Somalis, the government considered it impractical to continue the procedure and asked UNHCR to conduct RSD. UNHCR entered into a partnership agreement with the Jesuit Refugee Service to carry out the procedure. JRS issued recognition letters and this procedure continued until 1998 when the US embassy was bombed and the Kenyan government revoked the procedure (se article in IJRL[2] and also article by Moret 2003[3]).

The reasons for PF use in Kenya originally were practical not underpinned by law. It was quick, efficient and fair. The main limitations are (a) there are the provisions of the Art 1A Refugee Convention definition such as exclusion which are hard to apply; (b) people may be admitted who may not be excludable but may not deserve international protection. While these are real problems the advantages can be substantial. Excludable persons are always few and may be covered by cancellation of status where an ex post examination which reveals exclusion grounds. If a refugee is recognised under PF according to the OAU refugee definition the same rights must be accorded as available to those who receive recognition on the basis of an individual examination.

There is value in having legislative provisions for PF and a necessity in East Africa in light of the numbers and available resources.

Presentation: Professor Gilbert Khadiagala, Wits University South Africa

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[2] Rutinwa, Bonaventure, William ONeill, and Guglielmo Verdirame. "The Great Lakes: A survey of the application of the exclusion clauses in the Central African Republic, Kenya and Tanzania." *International Journal of Refugee Law* 12 (2000): 135-170.

[3] Moret, Joelle, Simone Baglioni, and Denise Efionayi-Mäder. "The path of Somali refugees into exile: A comparative analysis of secondary movements and policy responses." SFM, 2006.

What are the issues of regional security as examined through the lens of refugee protection? The RSD process is interesting as a focus regarding the externalities of cooperation among national responsibilities and regional integration.

As regards the prospects for peace in the region, major security challenges facing East Africa are substantial. There has been substantial work on this issue and although some rather depressing research was presented a few years ago, sadly, the situation has not changed much. There is a legacy of refugee production in the region. An important challenge is: how do we reduce refugee production in the region? The objective is a region which does not produce refugees, stateless persons (and reduction of the UNHCR case load). The flip side is what are the causes of refugee production and why does this region remain stubbornly resistant to remedies. Will this area remain unstable?

East Africa is not yet out of the woods as regards instability. The independence of East Africa countries is recent. 50 years is not long in the history of state building, stability and managing diversity which is part of the explanation. East Africa 'proper' is a fairly peaceful region (Kenya, Uganda and Tanzania). There is a legacy of working together and regional integration which cannot be underemphasised in building peace and security. Yet, East Africa has rough neighbours – the Horn of Africa in particular – which has drawn East Africa into its issues and created fragilities. Neighbours come with baggage – for instance how to deal with peace and security issues. The synergies of East Africa can be destabilised by the Great Lakes and Horn of Africa state formation issues. There are still substantially weak states and governments which lack legitimacy and stability in the region leading to instability and refugee creation. Governments which do not have substantial reaches within their territories and only touch the surfaces tend to be common. Such governments tend to lack legitimacy and the capacity to regulate disputes often characterised by diversity issues shadowed by unequal resource allocation. There are ecological and health vulnerabilities which have also diminished the capacity of governments to sustain their regimes. These issues have important impacts on refugee production.

Environmental vulnerabilities will, inevitably, produce more refugees in the region. The region also has a proliferation of marginal groups and lawless communities particularly in the border lands of former and existing states. These are the main sources of refugees. They will remain, for the foreseeable future, areas part of the political landscape which will also be part of an insecurity political dynamic.

There are also the transnational crime threats such as terrorism (in particular since 1989) to which the region is susceptible. Piracy may be diminishing and this is positive, but this is not the end of the problem of transnational crime. Drug trafficking is among those challenges in respect of which there are insufficient state structures.

A further regional issue is integration – the processes of regional integration key solutions to the instabilities current occurring in the border regions. But one cannot forget that the governance crisis is central to the region. Election processes are presented as solutions but too few questions are asked about the quality of those elections. Similarly the constitutional experiments are works in progress which are not fully encompassing regional tensions or providing mechanisms to resolve disputes over allocation of resources. Constitutional struggles are common, including in a country such as Tanzania which seems so much more stable. How are national elites aggregating themselves

around new institutions? The constitutional frameworks have so far not been particularly successful in bringing transparency and legitimacy to governance in this regard. Similarly, elite procrastination does not assist stability in East Africa. These shortcomings in the current political reality do not contribute to the reduction of refugee production.

The new entrants to the East African regional framework such as Rwanda and Burundi bring their own political baggage which include political instabilities. The transitional planning processes in these countries are not clear. The constitutional debates in these countries generate deep issues on elite consolidation and incorporation of diversity. Elections in the region seem to be reproducing problems of ethnic polarization. These are big governance issues, even without discussing South Sudan which has absorbed substantial international resources but been able to achieve little stability.

So the scenario on governance is not good as there is a lack of regional leaders who can promote governance values. Leaders need to recognise the governance weaknesses which are likely to lead to further instability and behave accordingly. The proliferation of so called early warning systems in the region have failed to produce useful results on the ground. Cycles of hunger reflect state neglect and marginalization of communities which are in turn hot beds for instability.

To understand peace and security in the region, the 1960s debates are a useful reference point from which to examine the centrality of regional economic integration as a stability tool. The security horizon must be founded in a regional agenda which is capable to extending beyond individual states. The East African community has admitted a series of new countries with very substantial problems which bring with them their own instability. In such a reality, peace and stability require strong regional institutions. Yet, the debate must be transparent and clarify the objectives and how to arrive at them. Some discussions are well developed such as the East African Brigade as part of the OAU forces but this remains one of the few strong outcomes. One of the key problem is that of values – there needs to be a clear definition of regional values which can then form the basis of policy development. Is it possible to build values around RSD in this region. However, the debates need to be honest – for instance: can the Tanzanian example of naturalization of Burundi refugees be a regional norm on the basis of an agreement that the state of origin must not create even more refugees?

The regional institutions need to be developed clearly and solidly. This is an inherent part of the history of the region and its economic reality. The issues which need to be discussed in a common manner such as terrorism need proper and solid institutions within which these debates take place. Similarly, there is a need to promote effective and responsible leadership which focuses on national and regional agendas for the benefit of the whole region. Border disputes need to be resolved in a coherent manner. The natural resource discoveries in the region are likely to create new insecurities if they are not resolved in proper regional institutions with responsible leadership. Regional mechanisms need to be sufficiently robust to provide the venues of recourse which are accepted as legitimate for states in the region.

One cannot avoid the issue of religious fundamentalism, not simply the Islamic fundamentalism of groups such as Al Shabaab, but also Christian fundamentalism and other forms of religious intolerance. If the region abandons the principle of tolerance it will continue to create refugees.

Members of the Steering Committee for the formative evaluation of

The Refugee Status Determination process in Kenya. Phase II

Chairman: Michael Ross – International Consultant on Refugee Law

Michael Ross is an international consultant specializing in refugee law. Currently he is working with the UNHCR and the Irish government on a project aimed at strengthening the refugee protection system in that country. Over the past several years Michael has led EU/UNHCR multi-country projects examining the causes of divergences in refugee acceptance rates throughout the EU. These projects have also included the provision of training to first instance decision makers in the field as well as to Tribunal members and judges. Michael sits on the governing Council of the International Association of Refugee Law Judges [IARLJ] and is Chair of the Americas Chapter. Prior to retirement, Michael was a judge on the Immigration and Refugee Board of Canada [IRB] serving both in the Immigration Appeal Division and the Refugee Protection Division. Michael holds a Master's Degree in Philosophy from the University of Alberta as well as a degree in law from the University of British Columbia.

Wilbert van Hövell, former Deputy Director DIP.

Wilbert van Hövell has extensive experience in the delivery and management of international protection, including in the area of refugee status determination. After starting his career in 1978 as a lawyer in an Amsterdam law firm, his main field assignments with UNHCR were in Cameroon, Djibouti, former Yugoslavia, Rwanda and Bangladesh. In Geneva he served in the executive office of High Commissioner Sadako Ogata and later as deputy director of the Division of International Protection. Before retiring he was UNHCR's Regional Representative for Western Europe in Brussels (2009-2011). In addition, Mr van Hövell has worked in two peace keeping missions, i.e. as head of office in the humanitarian pillar of UNMIK in Kosovo during the 1999-2000 winter emergency and as director human rights and transitional justice of UNMIT in Timor Leste during the unstable period of 2007-2008. In 2013 Wilbert was, as a consultant, the team leader of Phase 1 of the RSD project of PDES

Tino (Constantin) Hruschka – University of Bielefeld (Germany)

Tino Hruschka teaches EU law and European Asylum Law at the Universities of Bielefeld and Fribourg. In addition to his teaching positions, he works as a scientific project manager at the Swiss Centre of Expertise in Human Rights in Bern (since April 2014) on a project on the evaluation of the Swiss asylum system. He has written extensively on the Common European Asylum System and various aspects of international refugee law (mostly in German). Constantin studied law, history and philosophy in Würzburg, Poitiers and Paris. Subsequently he worked as a scientific researcher at the Universities of Würzburg and Munich. After his bar exam in 2002 he started working as a lawyer in Munich. For almost ten years, Constantin has worked with UNHCR (between 2004 and March 2014) in different positions in Nuremberg (Germany) and Geneva. In his last position as Policy Officer with PDES he has contributed to phase 1 of the RSD project.

Ms. Ann Monica Encontre, Deputy Director Africa Bureau

was born in Tortola, British Virgin Islands. She is a national of (the Former British) Guyana. She is the holder of a Bachelor of Laws from the University of the West Indies (Barbados) and Masters from Norman Manley School in Jamaica. She joined the International Labour Office (ILO) in Geneva in 1992 as a Consultant, legal research, in the Personnel Department. She undertook a mission to Sao Tomé and Principe for United Nations Conference on Trade and Development, (UNCTAD).   Mrs. Encontre joined UNHCR in 1993 as a Consultant, Specialist in the development of Legal databases (REFWORLD), research on the countries of origin of refugees, at the Centre for Documentation and Research, HQ, Geneva. She managed UNHCR's Global Appeals and Reports Unit in the Donor Relations Service for four years before moving to the Field where she worked in Darfur, South Sudan, Djibouti and Chad. In Djibouti, she was UNHCR's Representative for three years before going to Chad, where she was Head of office in Farchana, East Chad. Thereafter, from June 2011 to January 2014, Mrs. Encontre was assigned as UNHCR's Representative to the Republic of Côte d'Ivoire. She assumed her most recent functions in January 2014, as Deputy Director in the Regional Bureau for Africa, covering the East and the Horn of Africa and in March, she was named as the Regional Refugee Coordinator for the South Sudan crisis.

Ms. Stefanie Gross, Senior RSD Officer, RSD Unit/DIP

Stefanie Gross is currently acting as Senior RSD Officer in the RSD Unit in DIP. Previously, Stefanie worked as RSD Advisor and as Associate Protection Officer (RSD) in the RSD Unit. Before joining UNHCR, Stefanie worked as a Human Rights Officer for OHCHR in the field and as Human Rights Observer for an INGO in headquarters and in the field. Stefanie holds an MA in Conflict Resolution and a BA in Politics and International Relations.

Dr Cathryn Costello B.C.L., (N.U.I., Cork), LL.M. (Bruges), B.L. (Honorable Society of King's Inns, Dublin), DPhil (Oxon.)

Cathryn Costello is Andrew W. Mellon Associate Professor in International Human Rights and Refugee Law, at the Refugee Studies Centre, Oxford, with a fellowship at St Antony's College. Since 2003, she has been a fellow and tutor in EU & public law at Worcester College, Oxford, during which time she also completed her DPhil studies on EU asylum and immigration law. Cathryn has published widely on many aspects of asylum and refugee law, in particular access to asylum and asylum procedures. She also write on immigration law, EU Citizenship and third country national family members, family reunification and immigration detention.   Her work on immigration detention includes a journal article, 'Human Rights & the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) *Indiana Journal of Global Legal Studies 257* and a report for UNHCR (with Esra Kaytaz) entitled *Building Empirical Research into Alternatives to Detention.*Cathryn has undertaken research for UNHCR, the European Parliament, and the Council of Europe Parliamentary Assembly. She is regularly invited to address diverse audiences, both academic and practical, such as the European Council of Refugees and Exiles (ECRE) and International Association of Refugee Law Judges (IARLJ). She is also a Senior Research Associate of the Refugee Law Initiative of the University of London.   She previously served on the boards of both the Irish Refugee Council and

Immigrant Council of Ireland, and contributes to the policy work of ILPA. She is also on the Advisory Panel for the [EDAL (European Database for Asylum Law) Database Project](#).

Professor. Bonaventure Rutinwa, Dean School of Law and Director, Centre for the Study of Forced Migration University of Dar es Salaam School of Law.

Dr. Bonaventure Rutinwa is a Professor of Law at the University of Dar es Salaam where he also serves as the Dean School of Law, Director of the Centre for the Study of Forced Migration and Coordinator of the International Migration Programme. He holds, among other qualifications, a Doctorate in Law of the University of Oxford for which he wrote a dissertation on refugee law. He has published extensively on various refugee law topics, delivered lectures on refugee law at various academic institutions in Africa, Europe Japan and Russia. He has served as a consultant for various international organisations including the Africa Union, East African Community, European Union, UNDP, and UNHCR. Between 2007 and 2009, he was the Senior Legal Advisor for the naturalization of 162,000 Burundian refugees in Tanzania. He has also carried out extensive work in relation to migration, citizenship and refugee law and policy reform. He has recently finalized the draft National Migration and Development Policy for Tanzania and he is presently the lead technical expert for the government of Tanzania for the revision of the Tanzania Refugees Act (1998) and the Tanzania Refugee Policy (2003) in Tanzania and is advising the Government on the process of ratification of the international instruments on stateless persons and internally displaced persons (IDPS).

Geoffrey Wafula, Head of Protection, Department of Refugee Affairs (Nairobi)

Geoffrey Wafula works in the Department of Refugees Affairs, Government of Kenya. Wafula holds an MA in Conflict and Coexistence Studies specializing in Forced Migration from the Heller School of Social Policy and Management at Brandeis University, USA. He has also undertaken the International Refugees Law course at the Institute of International Humanitarian Law, Sanremo, Italy. An Alumni of Ford Foundation's IFP Program, Wafula has a vast experience in developing and implementing human security and conflict intervention strategies particularly on forced migrants. As the Head of Protection, Mr. Wafula, among other roles, coordinates the RSD function in the department. As a result, he is currently a member of the Task Force on RSD handing over from UNHCR RSD mandate to the National RSD mandate in Kenya. He is also the Chair of the RSD Technical Advisory Committee (TAC), a committee that has been put in place to advice the Commissioner for Refugees Affairs on RSD issues in the country during and after the transition period.

Catherine Hamon Sharpe, Assistant Representative (Protection), UNHCR Kenya

Catherine Hamon-Sharpe is the current Assistant Representative for protection in UNHCR Nairobi. She joined the UNHCR Operation in Burundi in 1994 and has been working in many different operations since then in Africa and in Europe. She has extensive experience in protection delivery and management including resettlement and RSD. She has been managing the RSD process in Cameroon and currently oversees the gradual RSD hand-over process to the Kenyan authorities. She is a member of the RSD Technical Advisory Committee (TAC), that has been put in place to advice the Commissioner for Refugees Affairs on RSD issues during and after this transition period. She has a MA in international and EU law of economics and a MA in International Administration from Paris X and II Law University.

Professor Gilbert Khadiagala, Wits University South Africa.

Gilbert M. Khadiagala is currently the Jan Smuts Professor of International Relations and Head of Department of International Relation at the University of Witwatersrand, Johannesburg, South Africa. He teaches courses in international dimensions of human security, African international relations, conflict resolution in Africa, and political economy of Africa. Born in Kenya, he did advanced degrees in Canada and the United States. Prof. Khadiagala holds a M.A. in political science from McMaster University in Hamilton, Ontario, Canada, and a PhD in international studies from the Paul H. Nitze School of Advanced International Studies (SAIS), the Johns Hopkins University, Washington, D.C. Before moving to South Africa in 2007, he taught in the United States for 16 years. His research focuses on security, governance, and politics in Eastern Africa, Southern Africa, and the Great Lakes region. Among his recent publications are: Meddlers or Mediators? African Interveners in Civil Conflicts in Eastern Africa (2007), Security Dynamics in Africa's Great Lakes Region (2006), Sudan: The Elusive Quest for Peace (2007), and Conflict Management and African Politics: Ripeness, Bargaining, and Mediation (2008).

Prof. Khadiagala has been a consultant on governance, human rights, security, and politics for the African Union (AU), African Development Bank (AfDB), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the United States Agency for International Development (USAID), the Nations Development Programme (UNDP), the United Nations Economic Commission for Africa (UNECA), and the World Bank. His is currently part of a group that is drafting the AU Transitional Justice Framework.

Sean Safford, Professor of Economic Sociology, Sciences Po

Sean Safford is Associate Professor of Economic Sociology and Director of the Master of Public Affairs at Sciences Po, Paris. His research concerns the dual labor market hypothesis, the future of worker voice and the social, historical and institutional determinants of adaptation to economic change. He was the lead researcher for the MIT Local Innovation Systems Project and is affiliated with the Brookings Institution's Metropolitan Policy Program. His book, "Why the Garden Club Couldn't Save Youngstown: Social Capital and the Transformation of the Rust Belt" (Harvard University Press 2009) won the Sage-Louis Pondy Prize from the Academy of Management as well as Best Book from a dissertation from the American Sociological Association. Sean Safford earned his Bachelor's degree at Cornell University's School of Industrial and Labor Relations and his Ph.D. from the Massachusetts Institute of Technology. He was previously an Assistant Professor of Organizations and Strategy at the University of Chicago's Graduate School of Business, a Lecturer at the London School of Economics and Political Science and a Visiting Professor at the University of Pennsylvania, Wharton School.

Solomon Wasia Masitsa, advocate of the High Court of Kenya and an Associate Member of the Chartered Institute of Arbitrators

Solomon Wasia Masitsa left private legal practice to join the Forced Migration Program of Kituo cha Sheria (Legal Advice Center) in the year 2009. Kituo cha Sheria is a Legal Aid Non-Governmental Organization and an Implementing Partner of the UNHCR in Nairobi, Kenya. He served in the capacity of Program Officer (Legal) and later rose to become the Program Manager in the year 2011. He is an Advocate of the High Court of Kenya and an Associate Member of the Chartered Institute of Arbitrators. He currently serves on the Advisory Committee of the

International Detention Coalition. His present duties entail, among many others, advising refugees and asylum seekers on various issues including eligibility, refugee status determination and durable solutions, counselling refugees on their rights and obligations in the country of asylum, preparation of legal assessments for refugees and asylum seekers, representation of refugees and asylum seekers in courts on charges of unlawful presence under immigration laws, conducting regular detention monitoring and interventions at police stations and prison facilities and identification , filing and prosecution of suits in the interest to the larger refugee fraternity besides undertaking general advocacy and awareness creation actvities aimed at expanding and protecting the asylum space in Kenya. He has, in the course of his work, benefited from a variety of trainings in refugee protection locally, regionally and internationally. Solomon holds a Postgraduate Diploma in Law from the Kenya School of Law and a Bachelor's Degree in Law from the University of Nairobi. He is undertaking a Master of Arts in Diplomacy at the University of Nairobi.