



## Building on the foundation

# Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya

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## LIST OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights 1986
<b>AI</b>	Amnesty International
<b>ALNAP</b>	Active Learning Network for Accountability and Performance in Humanitarian Action
<b>AU</b>	African Union
<b>CEDAW</b>	Convention to Eliminate All Forms of Discrimination against Women 1979
<b>COI</b>	Country of origin information
<b>CRC</b>	Convention on the Rights of the Child 1989
<b>CSO</b>	Civil society organisations
<b>CSR</b>	Convention Relating to the Status of Refugees 1951
<b>DAC</b>	Development Cooperation Directorate (entity within OECD)
<b>DANIDA</b>	Danish International Development Agency
<b>DG DEVCO</b>	European Commission Directorate-General for Development Cooperation - EuropeAid
<b>DG ECHO</b>	European Commission Directorate-General for Humanitarian Aid and Civil Protection
<b>DG HOME</b>	European Commission Directorate-General for Home Affairs
<b>DIP</b>	Division of International Protection (UNHCR HQ division)
<b>DPSM</b>	Division of Programme Support and Management (UNHCR HQ division)
<b>DRA</b>	Department of Refugee Affairs
<b>DRC</b>	Democratic Republic of the Congo
<b>FCO</b>	United Kingdom Foreign and Commonwealth Office
<b>GiZ</b>	Deutsche Gesellschaft für Internationale Zusammenarbeit (German International Development Agency)
<b>HQ</b>	Headquarters
<b>HRW</b>	Human Rights Watch
<b>ICCPR</b>	International Covenant on Civil and Political Rights 1966
<b>IPOA</b>	Independent Policing Oversight Authority (Kenyan agency)

<b>IRC</b>	International Rescue Committee
<b>JRS</b>	Jesuit Refugee Service
<b>KCH</b>	Kituo Cha Seria (Kenyan NGO)
<b>LGBTI</b>	Lesbian, gay, bisexual, transsexual and intersex
<b>LOI</b>	Letter of Intent
<b>LWF</b>	Lutheran World Federation
<b>MYWO</b>	Maendeleo Ya Wanawake Organization (Kenyan NGO)
<b>NGO</b>	Non-governmental organisation
<b>OAU</b>	Organisation of African Unity
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>PDES</b>	Policy Development and Evaluation Service (UNHCR HQ division)
<b>PF</b>	<i>Prima facie</i> refugee status
<b>RAB</b>	Refugee Appeal Board
<b>RCK</b>	Refugee Consortium of Kenya (Kenyan NGO)
<b>RSD</b>	Refugee status determination
<b>SC</b>	Steering Committee
<b>SGBV</b>	Sexual and gender-based violence
<b>SOP</b>	Standard Operating Procedure
<b>TAC</b>	Technical Advisory Committee
<b>TF</b>	Task Force
<b>ToR</b>	Terms of Reference
<b>UN</b>	United Nations
<b>UNEG</b>	United Nations Evaluation Group
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UK</b>	United Kingdom
<b>US</b>	United States
<b>WFP</b>	World Food Programme

**BUILDING ON THE FOUNDATION:  
MOVING TOWARDS FULL NATIONAL RESPONSIBILITY FOR REFUGEE STATUS  
DETERMINATION (RSD) PROCEDURES IN KENYA**

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## EXECUTIVE SUMMARY

1. This formative evaluation aims to provide a country-specific analysis and recommendations on the transition to the full exercise of national responsibility by the Kenyan authorities for Refugee Status Determination (RSD), in line with Kenyan law. The present report examines the roles of UNHCR and Kenyan national authorities during and post-transition, the use of joint RSD procedures during transition, capacity building of national authorities, handling of backlogs and previously adopted decisions, the contribution of other actors and the need for accessible durable solutions.

2. Following the assumption of responsibility for recognising refugees by the Kenyan Commissioner for Refugee Affairs on 1 July 2014, RSD in Kenya has been conducted as a joint DRA-UNHCR process, pursuant to a Work Plan first agreed in late 2013 and subsequently revised in 2014 for the transition period up to 1 January 2016. Various steps in the plan have been substantially delayed, due in part to factors beyond the control of UNHCR and DRA, including the creation of an effective appeal instance, as the Refugee Appeal Board, being the competent entity under Kenyan law to hear appeals against negative decisions on asylum claims, has not been established in January 2014 nor to date.

3. The progressive build-up of DRA's capacity, through recruitment, training and retention of competent staff, is fundamental to the success of the transition. However, difficulties in the recruitment and retention of competent staff in DRA, as well as the lack of senior DRA management capacity with legal expertise to oversee RSD activities, have hampered capacity-building efforts to date, and in turn have constrained the development of DRA's readiness to assume greater responsibility in the process. The challenges around recruiting and retaining staff, which are due largely to limited security of tenure, career prospects and conditions for contract staff, are great; and overcoming them will be crucial for the success of the transition to national RSD in the longer term.

4. UNHCR has nevertheless played an effective role in training and capacity-building activities for DRA to date, an activity which will require on-going investment of additional resources for the remainder of the transition process and subsequently, including as new DRA personnel are hired. At the same time, UNHCR should continue to empower DRA to assume a greater role in training and managerial roles, to ensure sustainability of the institution's capacity in the long term. It is calculated that UNHCR has invested US\$ 4,800,884 in capacity-building of DRA from 2012 to end 2014.

5. At the end of December 2014, Kenya hosted 585,363 registered refugees and asylum-seekers. Somalis comprised the largest nationality group among asylum-seekers and refugees, at some 427,311. Of the total number of refugees and asylum-seekers in 2014, 34,011 were asylum-seekers with pending claims, while 551,352 were refugees. This number represents a slight decrease compared to the total number of refugees in Kenya at the beginning of 2014, which was 587,223; with 608,113 registered at the beginning of 2013.

6. Statistics as of end of December 2014 indicated that the number of persons whose claims were awaiting determination was 34,011, comprising 2,696 in Dadaab and 769 in Alinjugur; 24,120 in Kakuma and 6,426 in Nairobi. The number of pending claims in Kakuma remains substantial, and will require concerted efforts to address it and ensure that decision-making can continue to keep pace with new claims. In other locations, claim numbers of the current order in the other locations are likely to be manageable only if decision-making rates increase progressively beyond those seen in the first six months of the transition process, from July to December 2014, and planned measures are implemented to use simplified processing and other streamlined approaches to claims where appropriate, as well as improving efficiency in regular RSD. The efficacy of decision-making will need to be monitored continuously, and the capacity of the system to manage its caseload may come into question if claims were to increase substantially, current and planned streamlining and efficiency measures cannot be implemented, or significant further backlogs were to build up. In such cases, the possibility of further extension of the transition period, along with other measures to reinforce and expedite claim processing, would need further to be considered.

7. Registration and data-sharing are also crucial issues on which progress has been delayed. At present, DRA and UNHCR register asylum-seekers in parallel, leading to inefficiencies and the risk of discrepancies and errors in recorded data. Registration of asylum-seekers in Nairobi has been suspended by the Government at various times since end of 2012, hindering access to the procedure for many people potentially in need of protection. Planned cooperation between DRA and UNHCR aims at joint registration and data-sharing in all RSD locations in Kenya, but these arrangements need to foresee the ultimate establishment of a comprehensive, cost-effective registration system in DRA which can support RSD and other protection activities Kenya-wide. Plans for future use and eventual handover of information in UNHCR's ProGres database will need to ensure that safeguards to guarantee data protection and limitations on the use of data are developed and maintained, as well as regulating ongoing access for UNHCR to data on asylum seekers and refugees to enable it to carry out its protection and assistance activities.

8. Recognition of refugees, on a *prima facie* basis, as provided for in the Refugees Act 2006, is the swiftest and most efficient way to ensure the consistent and resource-effective provision of protection to large numbers of refugees. The efficacy of this approach in reducing backlogs has also been proven in Kenya, with positive results. There are other procedural approaches which are being used or developed which have served to streamline and speed up RSD processing, ensuring that refugees can be recognised swiftly, including simplified RSD, prioritised processing and enhanced registration, all of which should continue to be applied with full respect for procedural safeguards and high standards of quality. It will also be important to ensure that refugees granted status by UNHCR pursuant to its mandate prior to 1 July 2014 are recognised, and the entitled people granted status, under national law, as has occurred in other contexts. This will be crucial to ensure legal certainty and continued respect of those peoples' rights, without overloading the system with a further large caseload.



9. Quality assurance activities, foreseen but not as yet implemented in the transition Work Plan, should be activated to oversee progress during the remainder of the transition process. A mechanism for on-going self-evaluation and quality assurance by DRA will also be needed in the future. It will be important to clarify the role of UNHCR in supporting RSD after the transition process, as well as other aspects of its supervisory role under the Geneva Convention, along with that of civil society and other partners. A potential role for UNHCR as an observer in the RSD process post-transition, at least for an initial period, should be considered by DRA and UNHCR.

10. At present, it would appear that many refugees recognised in Kenya are not able in practice to exercise entitlements foreseen in law; and it is not clear whether a positive RSD outcome significantly improves their situation. This is particularly the case in camps, where both asylum-seekers and refugees (although in principle not those whose claims are rejected) are entitled to services and support. Further efforts are needed in working with the Kenyan authorities to ensure that the RSD process can lead to accessible, viable durable solutions; in particular rights to work, greater free movement and potential prospects of citizenship in line with Kenyan law. There could be significant risks for the value of RSD unless these obstacles and limits around durable solutions can be addressed by the Kenyan authorities. Asylum-seekers may perceive limited benefit in engaging in the process, other than as a potential means to access UNHCR assistance in the camps and on a more limited basis in Nairobi, which is not necessarily enhanced by receiving a decision. This would be an unsustainable situation, which must be addressed by assumption by the government of responsibility for fulfilling protection responsibilities not only during the RSD process, but also after the grant of status to refugees.

11. Since UNHCR started to conduct RSD in Kenya in 1991, its involvement has attracted academic critique in relation to issues such as the lack of power on UNHCR's part to grant territorial rights to stay as part of mandate status, and problems in the standard of fairness, specifically in appeal procedures. At the same time, however, transition of RSD responsibility to national authorities highlights the vital importance of, as well as the many challenges associated with, mobilising the capacity and willingness of the state to offer protection in line with international obligations.

12. The passing of the Refugees Act 2006 has led a process of 'constitutionalisation' in respect of RSD, reception and treatment of refugees and asylum seekers in Kenya. The Act establishes DRA and sets out a comprehensive institutional RSD framework, yet its implementation proves problematic in practice. Among other outstanding steps still required under the legislation, along with the establishment of the Refugee Appeal Board, the appointment of the Commissioner for Refugee Affairs, and the new form for Notification of Recognition of Refugee Status, have not to date been published in the official Gazette.

13. National security actions taken in 2012-13 and 2014 with regard to encampment.- including measures to enforce encampment rules in the 2006 Act, have highlighted the vulnerability of undocumented urban asylum seekers and refugees in Kenya. Recently-adopted legislative changes under the Security Laws (Amendment) Act 2014, which would compel refugees to relocate in refugee camps and limit the number of refugees in the country to 150,000, would have worsened their situation considerably. While these provisions were annulled by a High Court judgment in early 2015, they demonstrate the level of political sensitivity around the presence of urban refugees, and around refugee issues in Kenya more broadly.

14. The findings of a survey of a small sample of persons of concern selected by UNHCR, conducted in Nairobi and Dadaab, seek to provide some individual expressions of the perspectives of asylum seekers and refugees regarding the ongoing transition process. Responses seemed to identify a lack of effective communication between UNHCR and its population of concern with regards to the progress of their claims. Some of those interviewed expressed a strong desire for a clear and timely outcome from the RSD process. Moreover, the refugee and asylum seekers surveyed voiced significant confusion and misgivings regarding the RSD transition process, and the consequences of full assumption of responsibility for RSD by the Kenyan authorities.

15. In sum, the transitional process has made important progress since the Kenyan Commissioner for Refugees began exercising his legal function of recognising refugees in July 2014. However, in order for Kenya to assume full responsibility for a fair, effective and sustainable RSD process in practical terms, further steps and planning for the subsequent phase must continue on a joint basis, with Kenyan actors progressively assuming a more active role and UNHCR working in support. Activities undertaken in the framework of the transition Work Plans have been directly relevant to the goal of equipping DRA to assume its responsibilities in the envisaged timeframe. However, the effectiveness of some interventions has been limited, due in part to obstacles caused by non-implementation of the legislation, and serious challenges to the recruitment and retention of well-performing DRA staff. This has in turn impacted on the efficiency of some of UNHCR's investments in the process, as DRA's capacity continues to remain limited.

16. It is evident at this stage that in order to provide for a sustainable long-term national RSD system, ongoing efforts and sufficient resources must be mobilised by UNHCR to support RSD, capacity development and related activities throughout the transitional process. Although the Work Plan has provided a comprehensive set of steps which should, once completed, provide for a timely conclusion of the transition process, it has not been possible to adhere to the foreseen timeframes. In light of this inability to implement the Work Plan effectively to date, it is thus proposed that a further review of progress be made in mid-2015, with a view to extending the transitional period for an initial six months beyond its currently-planned end, to July 2016.

17. Such an extension would seem necessary at that stage unless the following key elements are in place, which should be seen as top priority tasks in the ongoing transitional process:

- establishment of the Refugee Appeal Board, or other functioning appeal arrangement with a clear legal basis;
- substantial progress on data-sharing and registration towards the transfer or establishment of an effective national registration system;
- significant strengthening of the staffing and human resources framework at DRA, through the creation of key permanent civil service posts and improved conditions for contract staff.

18. In order to achieve an efficient and sustainable national RSD system, as part of an effective refugee protection framework in Kenya more broadly, it is imperative that the political will on the part of the authorities to take charge of registration and refugee status determination is translated into a commitment to allocate sufficient and sustained resources (both human and financial) in the coming years. Other essential steps include establishment of the relevant institutions and civil service posts, and allocation of national resources to the process. As Kenya continues to be exposed to the serious threat of terrorist acts, there is an evident interest for the country in enhancing oversight and control over who legally resides on Kenyan soil. However, there is also a risk of excessive politicisation of refugee issues in Kenya, which could undermine the RSD process and pose risks for the institution of international protection more broadly, as political rhetoric aimed at forcing Somali refugees to return to their country has increased in volume and intensity. The establishment and ongoing operation of a well-functioning RSD process needs to be clearly separated from political discussions and purely based on legal, technical and practical considerations. Any political pressure disproportionately to curtail the rights of refugees, contrary to national and international law, should be resisted in favour of measured responses that respect the rule of law.

19. The RSD transition process in Kenya provides a number of important insights that could usefully inform preparations for and the conduct of transition in other national contexts. These include the value of careful planning, and setting and adhering to realistic timeframes; the need to commit and ensure deliver of sufficient resources, on the part of UNHCR and national authorities; the importance of a strong national legal framework, reflecting international refugee and human rights law; and ensuring that all of the processes and institutions envisaged thereunder are established and become operative in a timely way.

20. Clarifying the role of UNHCR before, during and after transition, and enshrining it in clear agreements with national authorities, is also an important priority for current and future transition processes. UNHCR is encouraged to take account of the insights and lessons derived from the experience in Kenya and reflect them in guidance, advice and support provide to RSD transitions in other countries and regions worldwide.

# 1. AIMS, CONTEXT AND METHODOLOGY

## *Aims*

21. The aim of this formative evaluation<sup>1</sup> is to provide an assessment and recommendations on the process of transition to the full exercise of responsibility for refugee status determination (RSD) in Kenya by the national authorities, in line with Kenyan law. It will examine the current transition plans and process, as developed by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Kenyan Department for Refugee Affairs (DRA) and currently underway, in light of the agreed objective of achieving a successful assumption of full responsibility for RSD by the Government of Kenya as of 1 January 2016,<sup>2</sup> and the ongoing operation of a fair, effective and sustainable national RSD process.

22. Following over 20 years during which UNHCR has conducted mandate RSD in Kenya, on 1 July 2014, the Kenyan Commissioner for Refugee Affairs began the issuance of notifications of recognition of status to refugees fulfilling the lawful criteria. With this step, a central aspect of the Kenyan Refugees Act 2006 has been put into practical effect. The Kenyan government has expressed its strong commitment to exercising national authority control over RSD, in line with Kenyan law, and to working progressively with UNHCR to build up its capacity to do so.

23. The present report thus does not consider the question of whether or when a formal transfer of responsibility in law or practice for the conduct of RSD from UNHCR to DRA should take place, as that transfer has already occurred. Its focus is rather upon the questions of how the ongoing process of transition should proceed to enable achievement of fair and effective independent national process. This includes an assessment of implementation of the current transition process, including the joint DRA-UNHCR RSD process – see diagram at the end of this section and analysis below. It also examines further steps to be taken, including activities which have been subject to delays in implementation of the Work Plan for the transitional process, as the DRA and other concerned Kenyan entities assume a progressively larger role in the RSD procedure and related functions, towards the point at which they are able to conduct most or all aspects of the process independently with minimal direct involvement by external actors. The analysis includes the question of what UNHCR's ongoing role should entail and the prioritisation of its resources and activities, not only during but also after the end of the transition process.

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<sup>1</sup> A formative evaluation generally takes place before or during a project's implementation with the aim of improving the project's design and implementation, and is characterised by a 'learning and improvement' rather than 'accountability' purpose, which is commonly associated with summative evaluations undertaken at the end of a project. According to OECD/DAC guidelines, a formative evaluation with a 'learning and improvement' objective attempts to systematize knowledge of results and performance to date. This type of purpose is most relevant to participants and immediate stakeholders and those planning or implementing similar projects.

<sup>2</sup> See the *Phased handover of RSD responsibilities from UNHCR to the Government of Kenya (GOK's) Department of Refugee Affairs (DRA), developed and discussed during a joint UNHCR/DRA retreat from 13-15 November 2013*; see also *Work Plan for transition of RSD responsibilities from UNHCR to DRA (June 2014-December 2015)*, adopted at the RSD Taskforce meeting with the Principals of 4 July 2014; and *Workplan for Transition of RSD Responsibilities from UNHCR to DRA (June 2014-December 2015), Updated version reflecting 23 & 25 September discussions, endorsed during the 22 Oct 2014 RSD Task Force meeting* (hereafter 'Work Plan'). These different versions of the Work Plan document and the process in general is discussed in section 2 below.

24. For other country situations beyond the Kenya context, however, value could be seen in a preliminary process, undertaken jointly by UNHCR and national authorities, to assess the needs, options, preconditions and potential obstacles to a future transition process, prior to a decision on whether, when and how transition might be effected. This should involve the development of a staged capacity-development proposal and Work Plan – potentially drawing on relevant elements of the Kenya RSD transition Work Plan – and identification of relevant preliminary steps and preconditions to be put in place, as well as the resources potentially required to support the transition. This initial process could also involve consultation with and input from different parts of the national administrations and stakeholders, and of different parts of UNHCR, as relevant. Agreed arrangements should optimally be enshrined in a memorandum of understanding or other appropriate documentation between UNHCR and the competent authorities.

#### *Context and background*

25. In June 2013, the Policy Development and Evaluation Service (PDES) of UNHCR embarked on a review of UNHCR practice and experience in relation to transition processes leading to the assumption of responsibility for RSD procedures by States.<sup>3</sup> Following extensive research, a report was produced recommending *inter alia* that PDES conduct, in a second phase, country-specific research to identify aspects and elements that could contribute towards ‘professionalising its approach to RSD transition and strengthening its support’, and elements which could contribute to ‘formulation of a strategy, policy and tools for responsible transitions to fair, efficient and sustainable systems.’<sup>4</sup>

26. To this end, the present formative evaluation of the RSD transfer in Kenya was commissioned. A Steering Committee was set up, comprising representatives of DRA, UNHCR, academics and experts in RSD. The evaluation team undertook a mission to Kenya in November-December 2014 to interview participants and stakeholders, and observe relevant parts of the transition in progress. This document represents the final report of the evaluation. The cut-off date for the data and information reviewed in the report is 31 December 2014.

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<sup>3</sup> 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>.

<sup>4</sup> *Ibid.*, paras 229, 230. *Note on terminology:* UNHCR in ‘Providing for Protection’ used 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.’ UNHCR, *op cit*, para 94. The report indicated that promoting an ongoing role for UNHCR in, or in support of, the national RSD procedure was not inconsistent with the objectives of a transition process.

27. Kenya's population numbered approximately 41.8 million in 2014, inhabiting a territory of 582,446 square kilometres. It has a diverse ethnic makeup, with main groups including the Kikuyu, Luhya, Luo, Kalenjin, Kamba, Kisii, Maasai, Ameru and a substantial ethnic Somali population. Kenya became a party to the 1951 Convention Relating to the Status of Refugees in 1966, and acceded to the 1969 OAU Convention Governing Specific Aspects of Refugee Protection in Africa in 1972. Kenya is a party to the 'Great Lakes Pact' providing guiding principles on internal displacement. The Government of Kenya was a co-drafter of the 2009 African Union Convention for the protection and assistance of displaced persons in Africa. The Constitution of Kenya was amended in 2010 to incorporate a Bill of Rights.

28. Kenya hosts one of the largest refugee populations in the world. As of the end of December 2014, it hosted 585,363 registered refugees and asylum-seekers.<sup>5</sup> The total number of persons who applied for international protection between January and end October 2014 was 62,136. Between January and mid-November 2014, 2,156 individual RSD decisions had been taken on protection claims (relating to 3,531 individuals), in addition to refugees recognised on a *prima facie* basis. Of these, 741 cases (concerning 1,427 individuals) had been taken under the transitional arrangements since 1 July. All of these post-July decisions were positive; a direct result of the policy decision taken jointly by DRA and UNHCR to refrain from issuing rejections until an appeal process is established which could hear appeals against such negative outcomes.<sup>6</sup>

29. 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 has taken all these factors into consideration, it has focussed primarily on providing concrete legal 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, within a strong protection system in Kenya.

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<sup>5</sup> UNHCR, *Statistical summary as of 31 December 2014: Refugees and Asylum-Seekers in Kenya*. Somalis comprised the largest nationality group among asylum-seekers and refugees, at some 427,311. Of the total number of refugees and asylum-seekers in 2014, 34,011 were asylum-seekers with pending claims, while 551,352 were refugees. This number represents a slight decrease compared to the total number of refugees in Kenya at the beginning of 2014, which was 587,223; with 608,113 registered at the beginning of 2013.

<sup>6</sup> This contrasts with 11,320 decisions taken by UNHCR under the RSD mandate procedure in 2013 (of which 45% were recognised); and 14,572 in 2012 (with a 59% recognition rate).

### *Scope and criteria for the evaluation*

30. At a global level, UNHCR is involved in mandate RSD determination in 75 countries or territories,<sup>7</sup> primarily in the absence of national RSD processes or fully-functioning national asylum systems, where RSD procedures were not accessible to all asylum-seekers or where it was needed for a solution. In 2013, UNHCR received 203,200 claims in RSD processes where it undertook RSD alone, being 19% of the global total of registered asylum claims, and a significant increase from the 125,500 it received in 2012. The organisation adjudicated 72,100 claims out of a total number of 662,800 claims processed worldwide (11%). This marks a rise compared to 8% in 2012, and has been reported as the highest figure in UNHCR's recent history.<sup>8</sup> Nevertheless, durable solutions for refugees require that states take responsibility for refugee protection, both material and territorial, which makes transitions to well-functioning national RSD systems relevant and necessary. At least three sources of 'soft law' call on States to assume responsibility to take over the RSD function:

- Conclusion No. 81(XLVII) 1997 of the Executive Committee of the High Commissioner's Programme (EXCOM) states 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>9</sup>
- In its previous Conclusion No. 8 (XXVIII) 1977 on 'Determination of Refugee Status,' EXCOM also expressed hope that 'all States parties to the 1951 Convention and the 1967 protocol that had not yet done so would take appropriate steps to establish such RSD procedures in the near future.'<sup>10</sup>
- Para 189 of the UNHCR Handbook and guidelines on procedures and criteria for determining refugee status states inter alia that '*It is left to each contracting state to establish the RSD procedure that is considers most appropriate, having regard to its particular constitutional and administrative structure.*'<sup>11</sup>

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<sup>7</sup> This included 50 countries where UNHCR conducted mandate RSD alone (29% of the countries in which individual RSD takes place), and 25 in which UNHCR conducted RSD jointly or in parallel with states (12% of the total): see UNHCR, [Statistical Yearbook 2013, p 58](#).

<sup>8</sup> *Ibid.*

<sup>9</sup> Paragraph d, UN High Commissioner for Refugees (UNHCR), *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975-2009 (Conclusion No. 1-109), available at:

<http://www.refworld.org/docid/4b28bf1f2.html>

<sup>10</sup> Paragraph d, *ibid.* This conclusion is also cited in paragraph 193 of UNHCR's *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, 1979, reissued 2011, Geneva.

<sup>11</sup> Paragraph 289, UNHCR *Handbook*.

31. None of these pronouncements state unequivocally that responsibility for RSD must be transferred to States by UNHCR at a certain time, or at all, if the requisite conditions identified by UNHCR and the national authorities are not in place. Nonetheless, RSD is primarily a state responsibility as the grant of asylum is the act of a sovereign state conferring a right to remain on its territory, which only states are empowered to perform. Where UNHCR carries out RSD, it must rely on states to provide asylum to those persons whom UNHCR considers entitled to international protection. UNHCR's 2014 report 'Providing for Protection' affirmed that states are in the best position to ensure effective, comprehensive refugee protection and other durable solutions. On this basis, it also concluded that states should undertake RSD as part of a broader national refugee protection framework based on the rule of law.

32. The shared objective of governments and UNHCR should thus 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 administrative governance systems. Effective national RSD must be embedded in national administrative law systems and clearly referenced in national law. That national law needs faithfully to reflect the state's international obligations to refugees. It needs to be characterised by enforceable rule of law guarantees and access to justice mechanisms. 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.

33. Over recent decades, and with some increased emphasis in recent years, UNHCR has transferred responsibility for RSD procedures to national governments in a number of countries. The transfer of responsibility is not necessarily or desirably a single event, but can be seen as a process in which best results may be achieved by sustained cooperation over substantial periods of time during which national authorities gradually assume responsibility for aspects of RSD on a progressive basis. In this context, the embedding of durable solutions for refugees has been a crucial element. The continuing engagement of UNHCR in its supervisory role under Article 35 of the 1951 Convention in assisting countries during and after the transition can also be critical to the long-term sustainability of an effective protection system.

34. The need for further guidance, clarity and consistency in approaches to transition has been underlined by UNHCR in its 2014 report, *Providing for Protection*. In addition to Kenya, transition processes are now underway at different stages in other countries. In this context, as part of the second phase of UNHCR's work on this issue, the Kenya transition process has been chosen because of its timing and of the importance of the substantive issues associated with the RSD transition process. From a country-specific point of view, Kenya illustrates and provides insight into many challenges in the RSD transition process which could potentially be of wider relevance.



35. UNHCR guidance on several important subjects (including *prima facie* status and approaches to mandate RSD) is in the process of preparation or updating. In addition, there remain no generally applicable guidance on when and how to effect transition from UNHCR mandate RSD to national responsibility for the process. This formative evaluation has sought to examine a number of elements which could be relevant to or form part of such guidance. This includes topics linked to the planning of the transition process; respective roles of the national authorities and UNHCR during and as foreseen for after transition; the use of joint RSD procedures during transition; the primacy of, and approaches to, capacity-building for national authorities; dealing with backlogs and previously-adopted decisions; the contribution of other actors, and the need for accessible comprehensive solutions in order to ensure the *raison d'etre* of RSD in Kenya. While the evaluation report seeks to examine these issues in a broad context, its major focus and source of information has been the Kenya operation, with the result that its recommendations focus in particular on Kenya. In this connection, it seeks to identify some potential ways forward to strengthen the transition process so as to improve the identification and provision of protection of refugees in Kenya.

36. Guided by OECD/DAC<sup>12</sup> criteria, this formative evaluation has focussed on several key areas:

- (a) The *relevance* of different elements, activities and goals in the RSD transition process. An assessment has been made of whether the objectives and rationale of RSD and transition-related activities remain valid in relation to identified gaps, needs and impediments.
- (b) *Effectiveness* of UNHCR's activities in the transition process, in terms of achievement of stated goals and objectives. This includes an examination of the degree to which RSD and transition support activities have fulfilled their goals, including in the establishment with DRA of a fair and effective RSD process; capacity-building of DRA; eradication of the backlog and development of effective registration arrangements, among others.
- (c) *Efficiency* of UNHCR's engagement in the transition process, relative to investments made; and
- (d) *Sustainability* of the actions undertaken, and particularly their impact in creating the basis for a fair, effective and strong RSD process and institutions, as part of a wider refugee protection framework in Kenya for the longer term.

#### *Methodology and timelines*

37. In accordance with UNEG<sup>13</sup>, ALNAP<sup>14</sup> and OECD DAC<sup>15</sup> norms, standards and guidelines, the formative evaluation has been conducted by an evaluation team comprising three RSD and evaluation experts who have managed this evaluation over a period of four months in three distinct phases:

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<sup>12</sup> Organisation for Economic Cooperation and Development/Development Assistance Committee.

<sup>13</sup> See [www.uneval.org](http://www.uneval.org)

<sup>14</sup> <http://www.alnap.org/what-we-do/evaluation/eha>

<sup>15</sup> <http://www.alnap.org/resource/5253.aspx>

*Research and inception phase, 1 July-15 November 2014:*

38. An initial literature search or desk study leading to the drafting of the first version of the ToRs. Throughout this phase, key stakeholders have offered suggestions. Main sources reviewed include internal documentation stored electronically, e.g. instruction notes, meeting minutes, and available literature and documents. PDES requested the Representation in Kenya, the Africa Bureau and DIP to share relevant official and non-official documents.

39. A two-day mission to HQ formed part of the inception phase, on the occasion of which senior UNHCR staff members were interviewed in an in-depth, semi structured manner. There were, in addition, telephone interviews with experts and current and former actors involved in RSD processes in Kenya.

40. The evaluation team used both quantitative and qualitative methods for data collection. As well as the interviews conducted with representatives of Kenyan Government agencies and authorities, UNHCR and NGO staff (including in Nairobi, Dadaab and Kakuma, as well as Geneva),<sup>16</sup> a survey was devised and conducted with 415 asylum seekers, refugees and other persons who had been through the RSD process, in Nairobi and Dadaab. Data from different sources has been compared (triangulated) to see whether they support the same findings. The principal sources of information thus included:

- Information from documentation and literature review,
- Interviews both in HQ and in Kenya, and
- Data collected from asylum-seekers and other people who had been through the RSD process in Kenya.

41. In the early stages of the inception phase, a Steering Committee (SC) was set up comprising academics and experts in refugee law, in particular RSD processes, based in Europe and Africa. The SC steered the evaluation through key stages such as establishing the ToR, writing the inception report and drafting of the final report. A total of two meetings with SC members were held in 2014, one in Oxford for European-based SC members, and one in Nairobi for Africa-based members.

*A field phase (24 November – 5 December 2014)*

42. A field mission took place from 24 November till 5 December 2014 which included missions to Kakuma and Dadaab to collect data. Semi-structured interviews with stakeholders were conducted. Interviewees included UNHCR management and staff, NGOs, donors, persons of concern and others. Two teams of post graduate students from the *Sciences Po* in Paris (5) and the *University Of Nairobi, Institute of Diplomacy and international studies* (5) were engaged as enumerators. Each team received training in the use of mobile android systems to record data from persons of concern in the urban environment of Nairobi and in Dadaab. For more details, see section 4.

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<sup>16</sup> See list of interviews conducted by the evaluation team, at Annex IV.

43. The enumerators used a structured survey with semi-structured key informant questions with asylum-seekers, refugees and persons who had otherwise been through the RSD process, randomly selected by UNHCR staff or implementing partners. Those selected for interview included asylum-seekers at the pre-registration stage, asylum-seekers awaiting decisions, registered refugees and some people who had been rejected at the end of the process. The target numbers for interviews was approximately ten surveys per student per day. A total of 415 people were interviewed (143 in Nairobi and 272 in Dadaab). (For further detail, see section 4 below on the data collection methodology).

*An analysis, drafting, presentation and dissemination phase (6 December 2014 – 31 January 2015)*

44. The third phase has been characterized by further data analysis and research, report drafting, reviewing and submission in draft form for comments. During January 2015, the first draft report is been circulated amongst stakeholders for comments and suggestions. The evaluation team will analyse and review all input and will finalize the report for publication on UNHCR's public website and global distribution. The final part of the process will be a phase of follow-up of the recommendations made. A management response matrix containing key recommendations and action officers as well as time-frame for action will be issued and monitored.

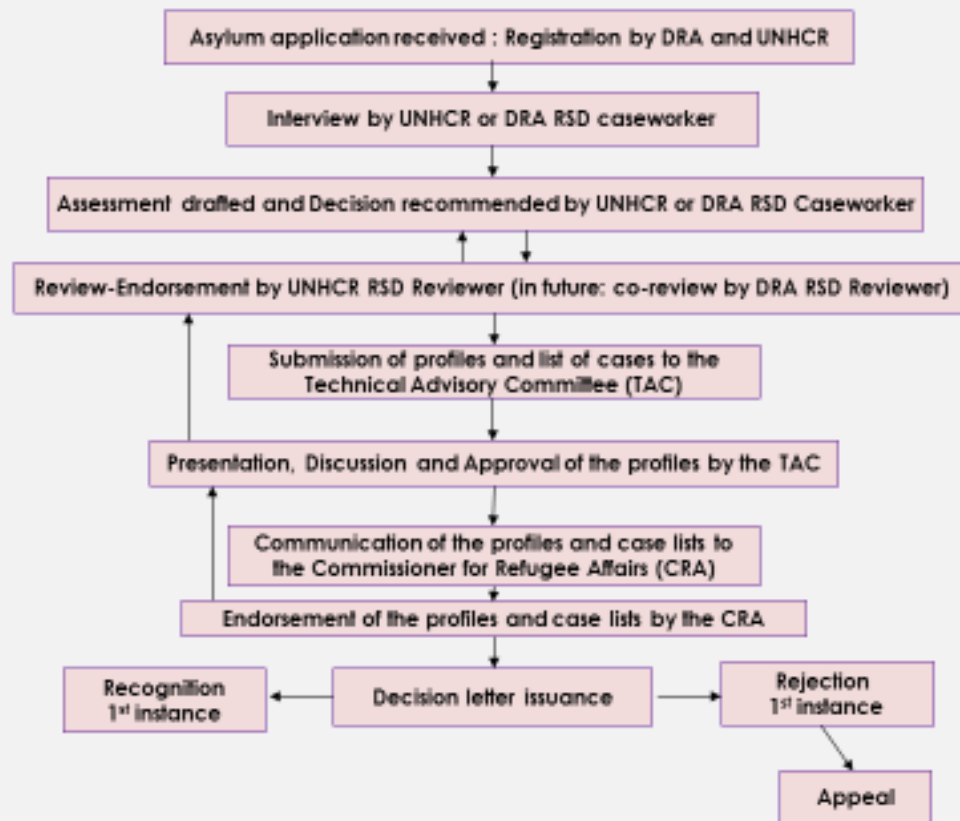
#### *Limitations*

45. The limited time and resources available for the conduct of the evaluation of this complex subject (including a contract period of four months only for the whole evaluation team's involvement) inevitably constrained the range of information, sources and issues that could be examined and analysed. The need to ensure a concise focus on the transition process also limited the range of issues that could be examined, and the depth in which those selected could be addressed. Resource and time constraints also limited ability of the evaluation to explore in extensive depth the prior background to RSD in Kenya, and led to a strategic focus on the transition process as the key priority.

46. Practical and time limitations during the mission in Kenya meant that only a certain number of interlocutors could be met and interviewed, notably in Kakuma and Dadaab. Apart from those two locations and Nairobi, it was not possible to travel to and conduct interviews with interlocutors in other parts of Kenya. Limits on the availability of detailed, broken-down data regarding categories of people, decisions and processes in the RSD processes, registration and associated expenditures may also have limited the level of specificity of some of the analysis.

47. Constraints on the data-gathering process from persons of concern included the fact that all interviews were arranged by UNHCR or its implementing partners and held in their premises, in most cases aided by UNHCR-employed interpreters, which inevitably had an impact on the answers of at least some respondents, along with misunderstandings on the part of the participants about the purpose of the survey and interviews. The limitations on the data-gathering process are further elaborated in Section 4 below. A rapidly-evolving political debate and legislative process was also ongoing throughout and after the evaluation. The evaluation report is thus restricted in its temporal focus up to 31 December 2014, and does not address subsequent developments.

## Joint DRA-UNHCR RSD process during the transitional period (1<sup>st</sup> instance), effective from 1 July 2014.



## 2. RSD IN THE TRANSITION PROCESS: PRACTICAL AND POLICY CHALLENGES

### *Background to the RSD Transition Process*

48. This section will examine some of the achievements and ongoing challenges in the transition process, leading up to and since 1 July 2014 and identify some potential ways forward to strengthen the transition process so as to improve the identification and provision of protection of refugees in Kenya. These form the basis of recommendations in this report to UNHCR. In particular, it will address:

- The joint DRA-UNHCR decision-making process currently in use during the transition.
- Capacity-building activities, current and planned, to develop further the capacity of DRA
- Approaches to the backlog of claims registered, as well as decisions taken on claims, pre-1 July 2014
- Quality assurance in the RSD process
- UNHCR's potential role in relation to RSD following the end of the transition period
- The role of other partners, including civil society and donors
- The need to strengthen solutions for refugees recognised in Kenya

### *Key developments in the Transition Process to date*

49. Since 1 July 2014, when the Commissioner for Refugee Affairs began to endorse and issue Notifications of Recognition to refugees fulfilling the lawful criteria, a central aspect of the Kenyan Refugees Act 2006 has been put into effect.<sup>17</sup> The Kenyan government has expressed its strong commitment to exercising national authority control over RSD, in line with the Kenyan law, and to working progressively with UNHCR to build up its capacity to do so.

50. The present report is thus concerned not with the question of whether or when a formal transfer of responsibility in law or practice for the conduct of RSD from UNHCR to the Department of Refugee Affairs (DRA) should occur, as that transfer has already taken place. Its focus is rather upon the questions of how the ongoing process of transition should proceed, including what further steps should be taken, in what manner and over what timescale, as DRA and other concerned Kenyan entities assume progressively larger role in the RSD procedure and related functions, towards the point at which they are able to conduct most or all aspects of the process independently, with minimal direct involvement by external actors. The analysis includes the question of what UNHCR's ongoing role, could or should entail, and the prioritisation of its resources and activities, not only during but

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<sup>17</sup> As noted below in section 3, while the Commissioner has had *de jure* held power to 'receive and process applications for refugee status',<sup>17</sup> among other things, since entry into force of the 2006 Act, UNHCR continued *de facto* to undertake mandate RSD and issue mandate recognition certificates to refugees up to that point.

also after the end of the transition process, currently scheduled to conclude at the end of 2015.

*DRA-UNHCR Work Plan for the Transitional Period*

51. In late 2013, DRA and UNHCR developed a plan for a 'Phased handover of RSD responsibilities from UNHCR to the Government of Kenya (GOK's) Department of Refugee Affairs (DRA)' which was agreed during a joint UNHCR/DRA retreat in Nairobi from 13-15 November 2013. That plan involved four distinct phases, the first being a preparatory phase in 2013, in which DRA was to hold consultations on 'the planned takeover of RSD' with 'a wide cross-section of stakeholders', while training and deployment of DRA RSD personnel would commence.

52. In Phase 1, spanning September 2013-January 2014, ongoing support and on-the-job training of DRA personnel by UNHCR would continue; a joint RSD Task Force should be established; and Standard Operating Procedures (SOPs) for first instance RSD would be developed and implemented. In Phase 2, it was envisaged that the RAB would be established in January 2014; training would take place of RAB members; and Refugee Advisory Committee (RAC) would be created. Recruitment by DRA of RSD supervisors was planned during the first quarter of the year, office facilities would be constructed and equipped for DRA, and a DRA filing system established. This first plan envisaged that DRA would assume full responsibility for RSD in January 2015, and UNHCR would move out of substantive involvement in RSD to a supervisory role under Article 35 of the 1951 Geneva Convention.

53. In the first half of 2014, however, a number of the planned activities were not realised, including the establishment (and related training and support) of the RAB; appointment of supervisory personnel in DRA; and development of various tools and documents in support of the RSD process. In mid-2014, in a context of heightened political interest in refugee affairs,<sup>18</sup> DRA announced to UNHCR the Commissioner's intention to assume responsibility for RSD decision-making from 1 July, six months ahead of the planned date under the original, ambitious schedule.

54. The plans were then swiftly revised, and on 4 July 2014, the Acting Commissioner for Refugee Affairs and the UNHCR Representative in Kenya (referred to as 'the Principals'), meeting together with senior and working level staff of DRA and UNHCR, endorsed a new 'Work Plan for Transition of RSD Responsibilities', with the goal of 'successful assumption of RSD responsibilities by the Government of Kenya as of 1 January 2016'.<sup>19</sup>

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<sup>18</sup> See section 3 below for a further discussion of the political and legal developments of recent years, an intensified focus on security concerns in Kenya, linked to measures and policies aimed at controlling and managing more closely the presence and movements of refugees.

<sup>19</sup> *Work Plan for transition of RSD responsibilities from UNHCR to DRA (June 2014-December 2015)*, adopted at the RSD Taskforce Meeting with the Principals of 4 July 2014 (see Minutes of the RSD Taskforce Meeting with the Principals, 4 July 2014). See also *Updated Version of the Work Plan*, reflecting discussions of 23-25 September 2014 and endorsed during a meeting of the Kenya RSD Taskforce of 22 October 2014. The Work Plan's timetable replaced previous proposals for a transition process that would start in January 2014 and end by mid-2015, after it was concluded by DRA and UNHCR that the process should commence on 1 July 2014.

55. The Work Plan, prepared by a joint DRA-UNHCR RSD Taskforce, foresaw a new timetable for the pending activities and steps, with revised target dates. The July 2014 Work Plan aimed among other things at continuing the development of the RSD process, including streamlined procedures and SOPs, to be rolled out across Kenya; continuing to build the capacity of DRA, with further development of a training plan, modular training elements, a staff retention strategy, delivery and subsequent evaluation of training. Capacity-building of the appeal entity, engagement with judges, sensitization of stakeholders and resource mobilisation were also planned for 2014.

56. Development of an 'effective and secure' DRA registration database, DRA filing system, and procurement of other elements of the RSD infrastructure were also proposed. The eventual creation of an RSD intranet, which could provide a Country of Origin Information (COI) platform and document repository, was included as a goal for DRA's information management needs. Further development of the registration database, work with stakeholders, quality assurance and backlog reduction were also planned for progressive completion in 2014 and 2015.

57. The record of the Principals' meeting of July 2014 also articulates a 'vision for the future of RSD in Kenya', under which the Commissioner confirmed his intention to assume full responsibility for the endorsement of RSD decisions from that date, as well as his intention to involve DRA staff in all stages of the registration and RSD process. During the planned 18-month transition, UNHCR's role should be to provide 'back-up (to ensure the continuity of the RSD process, through joint RSD activities in the transition process), and a capacity development role.'<sup>20</sup>

58. Pursuant to the Work Plan, preparation of a draft Letter of Intent (LOI) has also begun, which is designed to serve as a formal working agreement governing key aspects of the transition process. This document, which was still under discussion between UNHCR and DRA in December 2014, is expected to clarify the respective roles and responsibilities of the two organisations, and identify next steps on priorities including staffing, registration and timeframes. Close to the end of the transition, a Memorandum of Understanding between DRA and UNHCR is also envisaged, which will regulate the post-transition period, and describe the role of UNHCR once DRA has assumed full operational responsibility for all aspects of RSD. It can be expected that these documents, once successfully negotiated and agreed, will be useful for defining the roles and interaction of the DRA and UNHCR during and after the transition process, to clarify expectations and ensure all needs and priorities are addressed from the perspective of both parties.

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<sup>20</sup> Minutes of the Kenya RSD Taskforce Meeting with the Principals, 4 July 2014.

59. As some tasks have been completed, and others have proven difficult to launch according to the timetable, the Work Plan has been adjusted further, and a new version endorsed by DRA and UNHCR in the RSD task force in October 2014.<sup>21</sup> This reflects important progress that has been made, including the establishment and implementation of procedures, forms and practical arrangements for claim assessment and decision-making during the transition;<sup>22</sup> development of training and capacity-building tools;<sup>23</sup> assessing, developing and implementing strategies to reduce the pending claim backlog;<sup>24</sup>

60. However, it also confirms that all work on capacity-building in relation to appeals has been suspended,<sup>25</sup> pending the establishment of the RAB or other appeal body; and that other key tasks have also yet to make significant progress. These include notably agreement on data-sharing and moves into joint registration, with a view to establishing 'an effective and secure registration database';<sup>26</sup> completion of the set-up of RSD infrastructure;<sup>27</sup> establishing a secure and effective filing system for Nairobi, Dadaab and Kakuma;<sup>28</sup> as well as establishing an RSD intranet<sup>29</sup> and quality audit systems.<sup>30</sup> Yet to be established are also 'comprehensive SOPs for the entire RSD operation' for the post-transition period;<sup>31</sup> something that would appear to be crucial to ensure consistent approaches to RSD and decision-making in Nairobi, Dadaab and Kakuma. A table displaying the Work Plan and progress to date as of 19 December 2014 is set out below.

61. During this evaluation, DRA has confirmed that RSD is a 'key pillar' of its actions towards the assumption of oversight of refugees more broadly, and that it sees RSD as a primary state responsibility. It is acknowledged by the DRA that there has recently been increased government interest in Kenya in refugee matters, not least in connection with concerns about security. Following violent attacks in the country in recent years, the government has taken considerably greater interest in the refugee population, and according to DRA, unfortunately 'terrorism' has been seen as 'infiltrating the asylum space'. At the same time, the greater government engagement in refugee questions is seen as potentially presenting opportunities. This could include increased potential to enlist high-level government support for securing essential resources and staffing, and scope for ensuring greater prominence for the work of DRA. However, this support does not appear to have materialised to date, despite its importance and urgency for effective progress in the transition.

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<sup>21</sup> *Work Plan for Transition of RSD Responsibilities from UNHCR to DRA (June 2014-December 2015): Updated version reflecting the 23 & 25 September discussions, endorsed during 22 Oct 2014 RSD Task Force meeting.*

<sup>22</sup> Ibid, objective 2 ('Assumption by the DRA Commissioner of endorsement of RSD decisions responsibility as of 1 July 2014').

<sup>23</sup> Ibid, objective 3 ('Capacity development of RSD core staff').

<sup>24</sup> Ibid, objective 15.

<sup>25</sup> Ibid, objective 5.

<sup>26</sup> Ibid, objective 11.

<sup>27</sup> Ibid, objective 10.

<sup>28</sup> Ibid, objective 12.

<sup>29</sup> Ibid, objective 13.

<sup>30</sup> Ibid, Objective 14.

<sup>31</sup> Ibid, part of objective 4 ('Developing comprehensive RSD SOPs for all locations').



### *DRA Strategic Plan*

62. In its Five-Year Strategic Plan for 2014-18, DRA articulates five overarching goals related to the Department's aims and responsibilities for protecting refugees, including RSD as the means for 'identify[ing] and register[ing] asylum seekers and refugees'. This section in the plan indicates explicitly DRA's commitment to assuming responsibility for operating a fair and effective RSD process as a core priority. One of the objectives envisaged under this goal is 'completely tak[ing] over the process of RSD by 2014', for which DRA proposes the recruitment and training of competent RSD officers, activities including the establishment of an eligibility [RSD] system; determination of 20,000 cases per year over five years; and the establishment of an Appeals Board, as well as a deportation procedure. Apart from the 20,000 cases per year, other items in the plan are foreseen for completion by 2014 with no specific budget allocation. It might thus be assumed that DRA envisages that the costs associated with these steps will be met through external funding sources. The fact that DRA has not been able to approach these goals - with for example only 741 decisions in the last six months of 2014 to date - clearly highlights the constraints resulting from insufficient staff and financial resources, which must be overcome in order to achieve further progress.

### *National Policy on Refugees and Asylum Seekers*

63. Work has also begun on a Kenyan 'National Policy on Refugees and Asylum Seekers'.<sup>32</sup> A taskforce comprising DRA, UNHCR and several non-governmental organisations is currently working on this document. draft of this document, which was presented to the Ministry of Interior and Coordination of National Government in 2013, is in public circulation and under discussion in Parliament. The draft Policy was mentioned by several interlocutors during the evaluation, including civil society organisations, as a potentially important future source of guidance for the application of the law.<sup>33</sup> It is expected to underline the Kenyan government's commitment to assuming national control of and responsibility for refugee matters, aiming to reinforce the existing legal framework, cement Government ownership of the management of refugees' affairs, improve donor management, cater for national interests and address refugee issues using Government institutions and other key stakeholders.

### *Assessment of Work Plan implementation to date*

64. The initial 2013 transition plan, and further Work Plans as updated subsequently, have concisely identified the key relevant tasks and actions required to move towards full assumption of RSD responsibility by the Kenyan authorities. The need for DRA's capacity to be built from the ground up, from registration, interviewing, claim assessment and reviewing to management, supervision and strategic planning, has been acknowledged and sound plans made to address it. The 2014 revisions to the plans and timetables have realistically acknowledged and sought to make progress despite obstacles beyond the immediate control of UNHCR and its working level interlocutors. The focus of resources on development of procedures, tools and training resources has reflected a practical approach which has led to vital progress in establishing and operating the joint DRA-UNHCR

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<sup>32</sup> Kenyan Ministry of Interior, *National Policy on Refugees and Asylum Seekers*, 2013.

<sup>33</sup> With recent and possibly additional future changes to the Refugees Act 2006, however, it was noted in July 2014 by DRA and UNHCR that some adjustments may also be needed to the Draft Policy.

transitional RSD process successfully, as well as developing levels of capacity among key DRA personnel who remain with the department.

65. The overall impact or effectiveness of some of these interventions in pursuance of the Work Plans have been limited, however, by several factors that are difficult for UNHCR to address alone. The high turnover of staff at DRA is a major obstacle in this regard, resulting in a limited pool of staff who have had the benefit of extensive UNHCR training, which is also a major factor impacting on the efficiency and cost-effectiveness of UNHCR's engagement in this activity. The absence of dedicated senior management capacity with legal qualifications, dedicated to RSD structure, is another impediment to achieving greater results. The fact that UNHCR staff involved in supporting the RSD process, including with a view to reducing backlogs, are also involved in training tasks at the same time, would appear to affect efficiency as well as progress in both areas.

66. The absence of agreement and progress on data-sharing and registration, as well as moves to a comprehensive DRA database, is another area where the outcomes have not corresponded to objectives, and where significant inefficiency has resulted, in the form of parallel registration undertaken both by DRA and UNHCR. On balance, the Work Plan has served as an important tool to guide the transition process to date. However, care must be taken to ensure that some of its objectives are not allowed to continue to fall far behind schedule in the coming months, to safeguard the credibility and outcomes as a whole. For this reason, it is recommended that an assessment be made in mid-2015 of progress overall to that date, and careful consideration be given to postponing the end of the transition process. This decision should take into account in particular whether an appeal instance has been established; agreements on registration and data-sharing at that time; and the staffing levels and capacity within DRA.

67. A Summary of the Work Plan for the RSD transition activities from UNHCR to the Government of Kenya is set out on the next page of this report. It should be noted that this Work Plan contains activities that may have been completed. Subsequent information may however demonstrate that certain objectives were not achieved e.g. activity 3.3: development of a retention strategy. In such instances, it is expected that an audit process of the entire Work Plan will identify failures to achieve objectives. This again is expected to result in the re-engineering of failed activities and incorporating them in a future revised Work Plan.

Objectives	No.	Activities	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15	Sep-15	Oct-15	Nov-15	Dec-15	
O. 1 Establish RSD Taskforce	1.1	Composition and TORs																				
	1.2	Periodicity and outputs																				
	1.3	Draft work plan																				
O.2 Commissioner to assume responsibility for the endorsement RSD decisions	2.1	Interim procedures																				
	2.2	Modification forms																				
	2.3	Notification procedures																				
	2.4	Documentation of refugees procedures																				
O.3 Core RSD staff	3.1	Analyse capacity and assess needs																				
	3.2	Rationalization of organizational structure																				
	3.3	Development retention strategy																				
	3.4	Development capacity building strategy																				
	3.5	Develop modular training approach																				
	3.6	Develop training evaluation tools																				
	3.7	Training conducted																				
O.4 Develop SOPs	4.1	Further development interim SOPs																				
	4.2	Development of final SOPs																				
	4.3	Development of manuals, tools, templates																				
O. 5 RAB capacity building	5.1	Training of RAB																				
	5.2	Advise on decentralisation																				
	5.3	Appeal procedures accessible																				
O.6 Judiciary capacity building	6.1	Awareness and engagement																				
	6.2	Capacity development strategy for judiciary																				
	6.3	Training of judges																				
	6.4	Appeal procedures accessible																				
	6.5	Further development of quality																				
O.7 Law, policy, agreements	7.1	Ensure review of Refugee Act																				
	7.2	Ensure review of National Policy																				
	7.3	Draft interim agreement																				
	7.4	Finalize post-transition MoU																				
O.8 Sensitisation and legal aid	8.1	Mapping of stakeholders																				
	8.2	Conulations																				
	8.3	Assessment of training needs																				
	8.4	Conducting training																				
O.9 Resource mobilization	9.1	Develop resource mobilization strategy																				
	9.2	Develop resource mobilization tools																				
O.10 Infrastructure	10.1	Needs and gaps assessment																				
	10.2	Infrastructure and resource mobilization																				
	10.3	Office space																				
	10.4	Furniture and equipment																				
	10.5	ICT installations																				
	10.6	Camp-based staff accomdation																				
O.11 Registration database	11.1	Liaise with TF on registration																				
	11.2	Installations																				
	11.3	MoU on data sharing																				
O.12 Filing system	12.1	Needs and gaps assessment																				
	12.2	Construction of filing rooms																				
	12.3	Filing procedures																				
O.13 RSD-intranet	13.1	Assessment and gap analysis																				
	13.2	Availability of COI resources																				
	13.3	Identification of COI focal points																				
	13.4	Setting-up procedures																				
O.14 Quality audit	14.1	Design RSD quality assessment tools																				
	14.2	Conduct joint audit of registration and RSD																				
	14.3	Corrective measures																				
O.15 Backlog reduction	15.1	Backlog assessment																				
	15.2	Elements of the backlog reduction strategy																				
	15.3	Backlog reduction strategy finalized																				
	15.4	Implementation of backlog reduction strategy																				

### *Decision-making on asylum claims during the transitional period*

68. Following the Commissioner for Refugee Affairs' assumption of responsibility for the endorsement of all RSD recommendations finalised by the RSD teams, and issuance of Notifications of Recognitions, from 1 July 2014 onwards, RSD has continued as a joint DRA-UNHCR process. DRA is involved directly and increasingly in its different stages, in accordance with the agreed Work Plan for the transition period up to 1 January 2016. (See diagram of the transitional RSD process at the end of section 1 above). This following analysis describes that joint process and seeks to highlight key areas in need of strengthening in the remainder of the transition process and thereafter.

#### *Registration*

69. Registration of information regarding people seeking asylum in Kenya takes place in a database operated by DRA, as well as in UNHCR's ProGres system. DRA's database, which utilises Microsoft Access software, lacks basic functionalities. Among other things, it cannot be used to track the progress of an asylum application through the various stages of the RSD process. DRA's database is also not capable of adding or removing individuals to cases (e.g. newborn babies, deaths) and it is not possible to transfer individuals from one camp location to another, or identify persons who are attempting to register or claim asylum in more than one location, nor can the data be viewed simultaneously in different locations. It also contains significantly less detailed data than UNHCR's tailored ProGres records, which contain registration data dating back to 2008. Ideally, the registration database should ensure that an RSD decision made in one location in Kenya is applicable and enforceable in all locations in Kenya.

70. In Dadaab, registration in the two systems takes place in a single location. In Kakuma, registration by UNHCR and by DRA takes place in separate offices. According to UNHCR field staff based in Kakuma, the data of asylum applicants are also collected on a third occasion, at the border crossing point upon entry to Kenya. In Nairobi, asylum seekers are required first to register at the office of DRA, before being referred to UNHCR in order to register again in the ProGres database as a prerequisite to being added to the RSD schedule and given an appointment for an RSD interview. In some circumstances, at times when DRA has suspended registration for some or all asylum-seekers in Nairobi, UNHCR alone registers asylum-seekers with specific needs, including those for whom there are manifest protection concerns.

71. In Nairobi, registration of newly-arrived asylum seekers at DRA has ceased on several occasions in the last few years, in direct connection with security operations and actions to enforce the encampment policy, including from December 2012 to March 2014, and after a three-week interval, again from the end of March 2014.<sup>34</sup> At the time of this evaluation, registration in Nairobi had resumed for some applicants, including those who were deemed eligible for an exemption from the requirement to reside in camps designated for asylum seekers. This exemption is available for particularly vulnerable asylum seekers, people needing to reside in urban areas for education, employment or medical or other

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<sup>34</sup> A press statement was issued on 25 March 2014 by the Ministry of Interior indicating that urban registration for asylum-seekers in Kenya would cease.

reasons, although the full set of relevant criteria, and the criteria, procedures for applying for and being granted exemption are still in the process of being elaborated, with many applications for exemption pending with DRA. DRA had also, in late 2014, agreed to collect the data of a number of asylum seekers (which was not however characterised by DRA as formal registration) who were instructed to travel to one of the designated camps for registration, and to have their asylum claims examined through RSD. At the time at which asylum seekers register in Nairobi, they are advised that they are not eligible for assistance from UNHCR,<sup>35</sup> to which they would otherwise have access in the camps.

72. Asylum seekers who are registered in the two systems receive an asylum seeker pass from DRA, and an asylum seeker certificate from UNHCR confirming that they have applied for asylum, along with a date for their asylum interview. It is reported that some asylum seekers in Nairobi experience difficulties, including police harassment, even if they have been able to register; the evaluation team was informed that some people claim that their UNHCR documentation has been torn up, apparently evidencing a lack of regard for a document which is not issued by an official Kenyan government source.

73. DRA has expressed its firm intention to maintain a national registration database. Donor funding was provided by Denmark up until 2012 to support development of a national database, but this was never completed. The Danish funding was suspended at the end of 2013 and has not resumed. UNHCR has provided access for DRA to its ProGres database for limited purposes, but discussions between UNHCR and DRA on data transfer have not moved ahead significantly over the past years.

74. The operation of national registration systems is consistent with EXCOM's call to states to 'take all necessary measures to register and document refugees and asylum-seekers on their territory' as quickly as possible upon their arrival, having regard to available resources; and where appropriate, seeking support and cooperation from UNHCR.<sup>36</sup> It is clear that there are mutual interests in continued and stepped-up cooperation between DRA and UNHCR on this issue. Assumption of responsibility for and ultimately control of registration and data management, subject to privacy and purpose limitation safeguards, is an essential step towards equipping and empowerment of DRA to run effective RSD processes and afford protection to refugees, including through the provision of a range of services and entitlements that will require accurate registration systems. Further development of DRA's technical capacity, and ensuring that it eventually secures the necessarily functional equipment and material, is an essential part of this.

75. At the same time, increased interest on the part of law enforcement authorities in access to data on non-Kenyan citizens in the country could give rise to concerns that confidential asylum-seeker data could be used for non-protection-related purposes. Requests to UNHCR for access to data on its persons of concern were reportedly made during the course of operation 'Usalama watch'. RSD-related data has been given by individuals for the specific purpose of their asylum claim, and according to data protection principles, such data cannot be used in a way which is incompatible with that initial purpose. Kenya should be in a position to put in place confidentiality and data-protection arrangements to limit the purposes for which data can be searched, accessed and used, as

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<sup>35</sup> UNHCR does however propose to provide limited medical care to asylum seekers in Nairobi in the future.

<sup>36</sup> *UNHCR Executive Committee Conclusion No. 91(LII) 2001*, 5 October 2001.

well as the identity of officials and institutions that can use it, and provide for judicial review of the use of data if needed.

76. DRA and UNHCR are engaged in ongoing discussions on data-sharing, which include plans for joint registration. Joint registration in the ProGres database appears as a logical and timely part of the overall transition process. It is likely however require support in the form of the relevant technical expertise – including guidance, advice and missions as necessary from UNHCR HQ, as well potentially as new UNHCR registration staff on the ground.

77. UNHCR is legitimately concerned to safeguard the accuracy and quality of the existing data contained in ProGres and ensure its use is limited to protection purposes. At the same time, DRA will need to develop capacity to operate and to maintain the system, and continue to register and update all relevant information regarding persons of concern, using all the necessary functionalities to conduct RSD and carry out other protection-related activities after the transition period. Planning should thus focus on a complete handover of ProGres data, at an appropriate stage when the relevant technical capacity, staffing, safeguards and commitments are in place at DRA to ensure that registration can be maintained for protection purposes in an efficient and accurate ongoing manner. This is the logical consequence and outcome of the transition process, along with other aspects of RSD. Reflection on how to develop a road map to this end, and what preconditions are needed to achieve it as part of the data-sharing and joint registration plans, should take place between the two organisations as soon as practicable.

#### *Grants of refugee status on a prima facie basis*

78. Section 3(2) of the Refugees Act provides that a person shall be:

‘a *prima facie* refugee for the purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge .. Outside his country of origin’.

79. Section 3(3) empowers the Minister to declare a class of persons to be ‘*prima facie* refugees’ if he considers that they fall within the definition. At the time of this evaluation, the Minister had formally declared that South Sudanese refugees would be entitled to recognition on a *prima facie* basis, with that declaration coming into force on 1 August 2014. Refugees from Central and Southern Somalia had also been accorded status *prima facie*, following gazettal of the decision to accord them status *prima facie* under the Refugees Act. In 2014, the gazettal of South Sudanese as a group eligible for refugee status on a *prima facie* basis led to a reduction in the backlog of claims in Kakuma by 60%.

80. Grants of status on a *prima facie* basis would appear to be the swiftest and most efficient way to ensure that refugees in need of protection can receive it in a resource-effective and consistent manner. People who are eligible for refugee status on a *prima facie* basis do not undergo the regular RSD process. Following their initial registration, verification of origin, and absent any indications of grounds on which they could be excluded,<sup>37</sup> such people should receive recognition without a claim interview or further evidentiary or other requirements.

81. UNHCR has recommended to states in numerous situations in the past that refugee status be granted on a *prima facie* basis, where there is a clear presumption of eligibility under the Refugee Convention or the OAU Convention, and where the capacity is insufficient to conduct individual RSD for all refugees.<sup>38</sup> The grant of status *prima facie* would seem likely to continue to be an important tool for application to relevant caseloads in Kenya, where the Minister chooses to exercise his legislative power for this purpose. Given its direct involvement in protection of refugees and detailed knowledge of their conditions in many situations worldwide, UNHCR could continue to act as an important source of information and advice to the Kenyan government in this connection, both during and after the transition period, in a way which can help ensure that refugees are identified and protection provided to them efficiently and effectively, in line with Kenyan and international law.

*Regular Refugee Status Determination: Interviews, assessment and review of claims and proposed decisions*

82. Both UNHCR and DRA staff undertake interviews of asylum seekers at first instance, where necessary with the assistance of UNHCR-employed interpreters, in UNHCR premises in Nairobi, Dadaab and Kakuma. During the asylum interview, applicants will be given information about the RSD process, as well as an explanation of the transition process. This includes informing them specifically that RSD has been conducted as a joint process since July 2014; that information in applicants' files is now accessible to UNHCR and DRA, that the decision will be endorsed by the Commissioner for Refugee Affairs and issued from DRA premises. Information about the transition process and exercise of recognition authority by DRA is also being provided outside the formal process by a number of NGOs working with the asylum seeker and refugee community.

83. Waiting times for interviews in Kenya are lengthy. In Nairobi, an asylum seeker registering in November 2014 would receive an appointment for an interview ten months from registration; while a particularly vulnerable person, identified for an accelerated RSD process, would wait six months. In Kakuma, the evaluation team was informed that waiting times for interview could be two years. While such delays were already occurring in the different locations prior to 1 July 2014, when UNHCR was still solely responsible for mandate RSD, it continues to be a problematic aspect during the transition period that generates frustration among asylum seekers and which, if not addressed, may have the

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<sup>37</sup> Should a person entitled to status *prima facie* be considered potentially excludable, or not to be of the nationality and origin claimed, she or he will be referred to the regular RSD process.

<sup>38</sup> UNHCR's *Handbook on procedures and criteria for determining refugee status* (1979, reissued December 2011) describes status determination on a *prima facie* basis in its para. 44. UNHCR is in the course of preparing new guidelines on *prima facie* recognition of refugee status; see UNHCR, *Draft for external consultation - Guidelines on International protection No. 11: Prima facie recognition of refugee status*, October 2014.

potential to undermine the credibility and feasibility of the RSD process. The principal reason for this appears to be an insufficient number of qualified staff to process applications, due among other things to resource limitations and challenge of recruiting and retaining suitably-qualified personnel in all of the concerned locations.

84. Such concerns motivate the strong and justified interest, both on the part of UNHCR and DRA, to significantly reduce and, if possible, eliminate existing claim backlogs before the end of the transition period, and to continue to apply streamlined and efficient procedural approaches to determining claims, so that DRA is not left with a large caseload of pending applications that will continue to hamper its ability to recognise refugees swiftly in the future.

85. At the time of the evaluation, approximately 48 interviews per week were being conducted in Nairobi; with approximately 30 per week in Kakuma, and 32 in Dadaab. The capacity to conduct interviews is obviously linked to the number of caseworkers, which presently consists of 18 (eight DRA and ten UNHCR) in Nairobi, eight in Kakuma (four DRA, four UNHCR) and eight (four DRA, four UNHCR) in Dadaab. In Nairobi, the limited number of interview rooms within UNHCR is apparently also a constraint that, if overcome, could potentially increase the rate of interviews conducted per week.

86. Following interviews in the 'regular RSD' process, UNHCR and DRA caseworkers are required to evaluate evidence gathered in the interview, undertake any further research, conduct a legal analysis and take other necessary steps to make an assessment of the applicant's claim. They are subsequently responsible for preparing a recommendation for a decision to grant or deny the claim. Given the complexity and importance of the issues at stake, this is a time-consuming process; and in order to simplify and to reduce the time required for claims which are likely to be manifestly well-founded, a number of procedural approaches have been developed for certain caseloads (see paras 93-102 below).

87. Each decision proposal is then reviewed by a more senior staff member or 'reviewer', a function which in November 2014 was performed by two staff in Nairobi; three in Kakuma (two of whom, as consultants and UNVs respectively, were shortly expected to depart); and two staff members in Dadaab. All reviewers in Kenya as of the time of the evaluation were UNHCR staff. DRA personnel are expected to move into training for the review function in future, once the 18-month caseworker training plan (including a 10-month period of on-the-job training on complex casework) has been satisfactorily completed. Based solely on the 18-month period since they were deployed to Kakuma in September 2013, the first batch of DRA caseworkers were expected to start their training on reviewing in March 2015. Indeed, during 2014, UNHCR Kakuma's RSD training plan included sessions focusing specifically on more complex forms of RSD casework. However, at the time of the evaluation, the review of the trainees' RSD assessments for basic cases revealed the need for additional coaching prior to allocating the more complex RSD casework to them, with only one of the team showing the requisite aptitude to develop competencies to permit progression towards more complex casework and, thereafter, towards reviewing.



88. It would appear that the number of cases which each reviewer is able to review can vary depending on various factors including the complexity of the cases under review, experience of the caseworkers which have prepared the decision proposals, and the many other tasks that these people are required to perform. At the time of the evaluation, the review target was 35 reviews per week, while the average in Dadaab was approximately 10-15 per week, due to the lack of dedicated review staff capacity. While this number is less than UNHCR's protection staffing benchmarks would ideally require, the evaluation team was informed that it is difficult to secure competent UNHCR staff in this role for sustained periods in Kenya.

89. As the people who must review the assessments and potentially provide corrections and guidance to every caseworker on every proposed decision in the regular RSD process, the workload of the reviewing officers is vast. In addition to that, their work is of central importance: they carry responsibility for ensuring that claims are correctly analysed, and verifying the work of both DRA and UNHCR staff who, notwithstanding their commitment and training, lack experience for a certain period; their role in ensuring the accuracy of decisions is thus crucial. Despite this demanding and vital function, the extremely competent and committed reviewers met by the evaluation team were relatively junior in UNHCR's staffing structure, and it was striking to learn that there is apparently a reflection on whether to continue some of these posts in the near future, in order to conserve staffing resources.

90. At the review stage, the evaluation team learned that there is a significant proportion of cases in which the reviewer recommends that the applicant be recalled for interview, in order to gather further information on his or her claim. In Nairobi, for instance, this numbered some 35% of decision proposals reviewed at first instance. Such recalls may engender frustration on the part of the asylum seeker – who, in addition to the knowledge that his or her decision will require more time, may face significant costs and inconvenience associated with returning to UNHCR's offices for a second interview, when this can be arranged in the heavily-loaded interview schedule. It also creates delays and additional work for the staff involved, which detracts from their capacity to deal with new cases.

91. While it is very important to ensure that all of the relevant information and evidence is available in order to make a fully informed and accurate decision, it would seem essential to find ways to ensure that all relevant information can be gathered at the first interview so as to obviate the need to recall an applicant. This could be accomplished through further reinforcement of training and capacity building on interview techniques as part of the DRA/UNHCR training plan.

92. A further issue of potential concern relates to divergent approaches to similar caseloads assessed in different locations in Kenya. It would appear that there are instances where asylum seekers of a particular country of origin and profile applying in Nairobi might receive protection in a significantly higher proportion of cases than applicants with a similar background applying in a camp<sup>39</sup>. One example quoted during the evaluation related to Ogaden asylum-seekers from Ethiopia, who apparently have received protection in some

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<sup>39</sup> A detailed review of decision-making on different caseloads and applicant profiles was not possible in the scope of this evaluation, but some instances of divergences were recounted to the evaluation team during the research.

70% of cases where they have applied in Nairobi, compared to a much lower percentage in Dadaab. While it is possible that there are factual and other distinctions between the case profiles of those applying in one location compared to another, such a significant difference in recognition rates is notable.

93. Information gathered during the evaluation suggested that there may be variations in the approaches taken in different locations in Kenya towards assessment of various key elements relevant to eligibility for protection, including on the credibility of asylum seekers; the weight accorded to particular pieces of evidence or COI; and interpretation of protection criteria. This would appear to be a potentially problematic issue which may require further attention on the part of DRA and UNHCR. In addition to raising questions about fairness, legal certainty and the quality or accuracy of decision-making in RSD, it could prompt movement of asylum seekers within Kenya in order to try to secure what may be perceived as a better chance of recognition in one location or another.

94. Variations in approaches to assessment should be the subject of further analysis and reflection during the transition process. It could conceivably be addressed through targeted training, where this might be useful to bring caseworkers up to date on current approaches to a particular evidentiary or legal questions. It could also benefit from centrally-issued guidance from DRA and UNHCR to field and urban offices on key issues arising in claim assessment, which could draw on UNHCR's globally-published guidelines and other tools.

95. Standard Operating Procedures (SOPs) have been developed for DRA RSD staff in UNHCR Nairobi<sup>40</sup> which appear to provide clear, helpful and specific guidance, with links to further resource materials, for the substantive and procedural handling of cases at all relevant first instance stages. Such guidance, which has also been in use in Dadaab, could usefully be developed in a harmonised way for all RSD locations in Kenya, and continually updated by UNHCR and DRA on a progressive basis, in order to encourage consistent and correct approaches to case processing.

#### *Assessment of registration and decision-making on claims under prima facie and regular RSD procedures*

96. UNHCR's efforts to support the creation and operation of workable systems for asylum claim registration; *prima facie* grants of status; interviews, claim assessment and decision-making in regular RSD processes, where applicable, are clearly at the heart of the RSD transition process, and centrally relevant to the needs to be addressed in DRA for that purpose.

97. A number of challenges are evident in relation to the effectiveness of work done to advance registration to date; joint registration and agreement on data-sharing is not yet in place, and significant inefficiencies, duplication and potential risk for inconsistent records appear to result from the present parallel registration processes by DRA and UNHCR. A coherent strategy to move towards a sustainable DRA registration system, supported by joint registration and data-sharing during the transition process, is urgently needed for the longer-term viability of national RSD in Kenya.

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<sup>40</sup> *Standard Operating Procedures (SOPs) on Refugee Status Determination (RSD) for DRA RSD staff deployed to UNHCR Branch Office Nairobi and for endorsement and issuance of joint DRA-UNHCR RSD decisions by the Commissioner for Refugee Affairs*, updated 9 December 2014.

98. The regular RSD process, while now functional and in effective operation Kenya-wide, does appear to maintain some inefficiencies that should be addressed. Delays in waiting times to interview, and thereafter for decisions, result from limited qualified staff and multi-tasking of personnel, notably those who are required to conduct training as well as take part actively in the RSD process. Additional training personnel and resources, which could free up RSD staff to concentrate on their claim assessment responsibilities, could help significantly in this respect, and should be prioritised in UNHCR's resources. Other efficiency gains could be made by ensuring comprehensive evidence-gathering at initial interviews, minimising the need to recall applicants; and enhancing software to enable interview and decision proposal forms automatically to be populated with applicant data. These and other measures to strengthen the output, time- and cost-effectiveness of RSD could help ensure greater progress towards backlog eradication, and a firmer basis for sustainable RSD after transition.

#### *Differentiated procedural approaches within RSD*

99. The establishment of the appeals process is likely to contribute to reinforcing consistent approaches, as the appeals body will hear cases from across Kenya and may be ready and able to issue precedential or guidance-focussed cases that assist caseworkers in this respect. Further, when quality assurance mechanisms are established in future for the transition and post-transition phase, particular attention could be devoted to identifying discrepancies in decision-making practice that are of a systemic nature, and proposing measures to harmonise these and maintain consistency in assessment practice.

100. Apart from grants of status on a *prima facie* basis (see paras 72-75), and the **regular RSD process** (see paras 76-89) outlined above, there are a number of specific approaches that have been devised and used or discussed in Kenya that could help to ensure swifter processing of some categories of claims. These are potentially applicable to the various categories of applicants who are not eligible for status on a *prima facie* basis, and who at present are required to undergo an interview. The following approaches should thus be seen as potential alternative approaches to regular RSD for the relevant categories of people.

101. Within the regular RSD caseload in Kenya at present, certain cases are identified for **accelerated processing**, where this is seen as needed to ensure an urgent protection response for vulnerable people who may have specific needs. These include unaccompanied minors, SGBV survivors, people requiring medical treatment, and those with certain kinds of legal and physical protection needs, which could place them in ongoing danger if obliged to wait during a lengthy asylum procedure. These categories might also include people at risk because of their LGBTI status, political actors and activists, human rights defenders, journalists and others. Such people may come from any country of origin and may be identified at any stage of the process. Their claims will be determined in a regular RSD procedure, but will be prioritised for swifter processing ahead of other claimants.

102. **Simplified RSD** is used in Kenya for applicants with specific national, ethnic or other profiles, who might be presumed to be eligible for status (subject to any evidence rebutting that presumption). On registration, in addition to data about the identity of the claimant and main elements of the claim, nationality and origin, information is registered on possible exclusion triggers and vulnerabilities that could affect them. Unlike grants of status on a *prima facie* basis, an interview is conducted in this process (which may be at the same

time or separately from the registration interview), but it may be shortened in order to focus on credibility regarding identity or origin, as the risk of persecution in the relevant country of origin for the group in question is presumed.

103. If an applicant in this simplified channel is found to lack credibility or potentially be excludable, he or she will be referred to regular RSD - rejection is not possible in the simplified process. A standardised electronic decision-making template is used, enabling caseworkers to save time by using standard text regarding the situation of the concerned groups. According to UNHCR calculations, this approach could enable caseworkers to process some 12 cases per week, by contrast with 6-8 per week in the regular RSD process. Simplified processing has been used in Kenya for Eritreans, Ogaden from Ethiopia, Eastern DRC, Sudan and Somalis from Somaliland and Puntland.

104. **Enhanced registration** is an approach which was not as yet in use, but at an advanced stage of planning and consideration for the Kenyan RSD process, as of November 2014. This process would involve additional questions at the registration stage, designed to ascertain if an applicant originates from a particular area or if there are exclusion triggers in his or her case. It would involve the use of a presumption of eligibility for people from the relevant group, subject to rebuttal, but without the need for a regular RSD assessment. It was seen as being potentially useful to permit the efficient processing of large caseloads. It was foreseen for use for asylum-seekers from Eritrea, Sudan (other than from South Sudan) and potentially others. UNHCR estimated that this could facilitate the processing of some 30 cases per caseworker per week.

105. DRA and UNHCR in Nairobi have also worked on plans to utilise these streamlined procedural approaches more systematically, in combination with staffing numbers and compositions that could optimise their outputs, in order to reduce existing backlogs within a realistic timeframe. For Kakuma, this involved a target of two years to eliminate its backlog; one year in Nairobi, and one and a half for Dadaab. These plans remained subject to the identification of the requisite resources and availability of qualified staff in both DRA and UNHCR.

106. In light of the challenges associated with ongoing large backlogs and significant delays, it would seem particularly important for UNHCR and DRA to continue to explore all possible means of increasing efficiency and reducing waiting times in the RSD process - while applying relevant legal and procedural safeguards, and ensuring decision quality is maintained. The judicious and cautious use of presumptions of eligibility for certain groups would seem to be an appropriate way to speed up the process without compromising the accurate application of the law, nor neglecting important concerns such as excludability and addressing the particular needs of vulnerable people.

107. The evaluation team was told that there are further ways to improve the scope and efficiency of these processes, including technical adjustments to UNHCR software and database functionalities. These could be adapted to enable the automatic generation of interview records and decision templates which would be pre-populated with applicant data taken directly at the registration stage, obviating the need to re-enter applicant details at each stage. Cross-checking of applicant data at the interview stage would remain important, in order to correct or update as necessary, to ensure accurate claimant information and facilitate the making of correct decisions.

108. Investing in the use of such improved technical tools, streamlined processes, and ways to overcome delays caused by the need to recall applicants for interview would seem to be important priorities that merit the necessary investment of budget and staff by DRA, UNHCR and their partners, to enable the transition process to move ahead on continued firm footing with greater efficiency.

109. The possibility for **reopening of claims** is not a separate procedural channel, but is available for any claimant in the RSD process who could be able to bring forward new elements or changed circumstances which have occurred, or come to light, since the making of his or her initial claim, and which may affect his or her eligibility for refugee status. It is not a process for correcting omissions or errors in the asylum process, nor a substitute for the appeal stage. Given the length of time between claims and decisions in the Kenyan process, reopening would nevertheless appear to be an important possibility that a number of asylum seekers, notably those who have seen a deterioration in the conflict or human rights situation in their countries of origin, may need to utilise in order to obtain the protection to which they are entitled, based on the circumstances pertaining at the time their claims are decided. UNHCR and its partners have been making efforts to ensure that applicants are aware that they can use this possibility to adduce new evidence through the reopening of their claims.<sup>41</sup> Continued efforts should be invested in disseminating this information, so that that all claimants in all locations in Kenya for whom this could potentially be relevant are able to take advantage of this opportunity.

#### *Making of Decisions at First Instance*

110. Following their review and finalisation by a reviewing officer, decision proposals are sent to the Technical Advisory Committee (TAC). This body, chaired by the DRA's Head of Protection, and comprising senior DRA and UNHCR personnel involved and holding expertise in RSD, was established on an *ad hoc* basis in 2014, when its role was endorsed by the Commissioner for Refugee Affairs and the UNHCR Representative in Kenya<sup>42</sup> as part of the transition process. The TAC performs a necessary procedural and case management role, although it does not exercise any substantive decision-making power in the RSD process, and is thus not referred to in the Refugees Act or regulations. Described as a 'pipeline' for conveying decision recommendations to the Commissioner, the TAC seeks to facilitate his task of recognising, or denying, refugee status as a final step in the RSD process.

111. The TAC acts as a secretariat, compiling a list of decision recommendations for individual applicants, based on the work of the joint RSD teams in Kakuma, Dadaab and Nairobi. These are assembled under cover of a summary of the case profiles of a group of concerned applicants for whom a recognition of status is recommended. Following endorsement by the Commissioner, the TAC forwards the relevant letters and lists of recognised applicants to the relevant DRA and UNHCR offices for issuance. The TAC also records the progress of cases through the endorsement process, and compiles statistics on the process. It further provides advice to the Commissioner in connection with the coordination and running of RSD, including for the purpose of maintaining consistent protection-oriented approaches in all locations where RSD is conducted, prioritisation of

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<sup>41</sup> It would seem however that not all applicants to whom this might be a relevant course are aware of it as an option: see section 4 below on knowledge about the possibility of reopening an application.

<sup>42</sup> Minutes of the RSD Taskforce Meeting with the Principals, 4 July 2014.

casework and seeking to reduce and avoid accumulation of backlogs.<sup>43</sup> It aims to meet on a regular basis in order to ensure a steady flow of decision recommendations to the Commissioner.<sup>44</sup> At the time of the evaluation, all of the secretarial work and the preparation of all case files to facilitate the work of the TAC was done by UNHCR.

112. Between 1 July and 31 December 2014, 741 cases (relating to 1,802 individuals) had been decided by the Commissioner based on recommendations which had been processed through the TAC.<sup>45</sup> The idea has been suggested that the DRA should consider establishing a separate branch of the TAC in each of Kakuma and Dadaab, in order to further speed up the process of compiling decision recommendations and sending them to the Commissioner. While this would bring the advantage of facilitating communication between the TAC and field staff, providing the staff with more direct contact with the final decision-making stage and increasing the awareness of TAC members of the challenges and realities of RSD outside Nairobi, it could also potentially involve significant costs, organisational challenges and inefficiencies. It might also carry the risk of facilitating the development of yet more divergent approaches to cases, and undermine the TAC's aim of ensuring coordinated and harmonised recognition practice in Kenya. As an alternative, a further option could be holding occasional sessions of the Nairobi-based TAC (for example, once or twice yearly) in field locations in Kenya. This could facilitate communication while ensuring harmonised approaches without the need to invest in establishing separate decentralised TAC structures.

113. All of the decisions endorsed by the Commissioner to date have involved positive recognitions of refugee status. Since 1 July 2014, decision recommendations which are expected to be negative have not been sent to the TAC, nor endorsed by the Commissioner or issued, pursuant to agreement between DRA and UNHCR, given the absence of an appeal body which could hear challenges to such negative decisions. It is estimated that the number of proposed rejections that have accumulated to date but have not been endorsed or issued is approximately 500. With the passage of three months since 1 July, this number may or is likely soon to include some cases involving applicants who have waited for a decision longer than the statutory 90 days in which they are entitled to receive a decision. (See section 3 below on the potential scope for a legal challenge to this failure to issue timely decisions in negative cases).

114. As an administrative and technical body, the TAC does not duplicate the role of the Refugee Advisory Committee (RAC), foreseen in section 8(1) the Refugees Act, which will involve representatives from different Ministries including foreign affairs, local government, the Attorney-General's department, health, finance, police, national security and registration, in addition to a representative of a host community and of civil society. The RAC was established in 2014 and a series of meetings were held focusing predominantly on the voluntary repatriation of Somali refugees. So far, the RAC has not addressed RSD-related issues.

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<sup>43</sup> Minutes of the inaugural meeting of Kenya's Technical Advisory Committee, 10 July 2014.

<sup>44</sup> The TAC initially set the goal of meeting on a weekly basis but encountered some delays in late 2014, due to scheduling difficulties of its members, which has impacted negatively on the decision figures over that period. Both DRA and UNHCR have expressed their strong desire to ensure that its work receives priority and that it can meet more frequently, potentially twice monthly, in order to maintain a reasonable rate of decision-making and issuance. However, DRA's limited number of senior personnel, with knowledge of RSD and to whom participation in the TAC can be delegated, appears to have hampered the regular convening of meetings.

<sup>45</sup> Source: UNHCR Kenya, *Achievements, RSD 2014*.

115. According to the legislation, the RAC is mandated to ‘assist the Commissioner’ in matters pertaining to recognition of refugees.<sup>46</sup> The legislation does not however task it with direct involvement in the details of the decision-making process. Such hands-on participation in RSD would evidently be impractical given its diverse membership from parts of government which do not deal with, nor possess specified expertise and experience in, legal and procedural matters around refugee status. While there would potentially be important questions around strategizing, resource allocation and the operation of the RSD process and wider protection activities on which the RAC could assist DRA and other competent bodies, it would appear to be unnecessary to involve it directly in RSD on individual cases.

116. The TAC evidently performs a role which is important at this point in the transition process, as the involvement of DRA staff in the different stages of the RSD process is limited, albeit progressively increasing; and as DRA capacity is gradually being built in three RSD locations throughout the country. As the numbers of trained DRA personnel with longer-term experience in RSD grows, including in the review function and in supervision of RSD, it may be that the role of the TAC could be adapted, including potentially de-centralising some of its functions to locations outside Nairobi.

117. While the capacity-building process continues, however, and particularly as efforts to ensure consistency and high standards of accuracy in decision-making continue, it would seem important to have a single body that receives and compiles decision proposals centrally. This appears to serve as an effective way to ensure not only a manageable and orderly method for conveying decision proposals to the Commissioner, but also to permit monitoring of the approaches being taken to particular caseloads and types of claims. Pending establishment of an appropriate quality assurance mechanism (see paras 167-173 below), this would seem to be a crucial function that the TAC is well placed to perform.

#### *Issuance of decisions and documentation*

118. Once the Commissioner has endorsed proposals for recognition of refugee status, UNHCR offices in Nairobi, Kakuma and Dadaab contact the concerned individuals and advise them to go to DRA’s office, where their identity is verified, by checking fingerprints and biodata against that recorded in UNHCR’s ProGres database. For this purpose, UNHCR attends the DRA office with a read-only copy of ProGres. Notifications of Recognition, generated from UNHCR’s ProGres database, based on ProGres data, signed by the Commissioner and on DRA letterhead, are jointly issued, and the concerned individuals’ case file data updated in ProGres. As of end of December 2014, 350 Notifications of Recognition (concerning 568 persons) had been printed for those refugees recognised in the transitional process since 1 July 2014. Issuance of decisions has been taking place on a weekly basis, on Wednesday mornings, at DRA premises in Nairobi, with UNHCR present in support.

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<sup>46</sup> Refugees Act 2006, section 8(2).

119. However, it is noted that a number of refugees whose decision notifications have been printed have failed to attend to collect the document. This may signal a lack of clear information and understanding of the significance of recognition decisions; or, more problematically, a perception that the grant of status will not materially alter the person's situation. The fact that the Notification of Recognition document has not as yet been officially gazetted might also undermine its effectiveness. It is reported that some national authorities are not aware of the status and implications of the document, and have not been prepared to accept its validity in all cases – a problem that would be likely to reduce refugees' estimation of its importance. (See also paras 203-215 on comprehensive solutions below).

120. A person recognised as a refugee is entitled to a refugee identity document,<sup>47</sup> and subsequently to a refugee identity card.<sup>48</sup> Issuance of refugee ID cards is the responsibility of the National Registration Bureau. However, the evaluation was informed that such ID cards are not systematically issued, and that NRB has not issued new cards in Nairobi since 2008, although some previously-issued have been renewed. In Dadaab, it is reported that some cards have been issued which applicants have never arrived to collect. In the absence of an efficient distribution mechanism for the cards, many of them expire before refugees can collect them, also undermining their value and practical utility.

#### *Appeals*

121. As will be noted in section 3, the non-establishment of the Refugee Appeal Board (RAB) represents a major gap in the implementation of the legal framework for RSD and the operation of a credible and effective asylum procedure. The evaluation team was informed that the necessary preparations have been made for the Board's establishment and the appointment and gazettal of members, but this appears to have been delayed for reasons that are most likely linked to the absence of resources.

122. While UNHCR substantially funds the operation of DRA and its role in the first instance procedure, the organisation does not have funds for the appeals stage as well; and without a source of external funding, the RAB would require the allocation of budget from Kenyan treasury funds. If the RAB cannot be established in the immediate future – bearing in mind the pressure that will build up progressively as more unissued negative decisions accumulate, along with the legally irregular situation this represents – it has been suggested that various alternative ways be found to deal with appeals against negative decisions on claims. Some proposed options have included the following:

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<sup>47</sup> Refugees Regulations, reg. 32(1).

<sup>48</sup> Refugees Regulations, reg. 33(1).



- (a) The **Kenya Citizens and Immigration Service Appeals Tribunal** is another statutory body which is foreseen under legislation adopted in 2011.<sup>49</sup> Although neither the Refugees Act nor the Kenya Citizens and Foreign Nationals Management Service Act foresee that this body would hear appeals against decisions on claims for refugee status, it was suggested to the evaluation team during its research that this body could be accorded a wider mandate (presumably through amendments to the relevant laws). Like the RAB, this Tribunal is yet to be established in practice and its membership and budgetary resources identified. It was not clear if or when its early establishment is more likely to occur before that of the RAB. Some interlocutors expressed reservations about the idea that the Tribunal, as a body responsible for wider matters, including immigration control, and whose members might not necessarily have refugee law expertise or experience generated through the refugee-specific work of the RAB over time, would be less well equipped to perform the appeal function than the specific entity designed in law for that purpose. The disadvantages associated with giving a non-specialised body an additional workload for which it does not have specific resources or expertise are not insignificant.
- (b) **Appointment on an *ad hoc* basis of selected individuals** with legal qualifications to hear appeals on a short-term basis, pending establishment of the RAB. Such people, it was suggested, could potentially come from some of the various Ministries foreseen for participation in the Refugee Affairs Committee under section 8 of the Refugees Act, or otherwise. The legal basis for such an arrangement – and the sustainability of their decisions if challenged – is not presently in place, and would presumably require a special transitional legislative basis.
- (c) The **High Court** could be invited to receive and determine appeals, as the only existing judicial entity which holds clear jurisdiction over refugee law matters. Although the High Court’s current jurisdiction under the Refugees Act is limited to hearing appeals against decisions of the Appeals Board,<sup>50</sup> it was suggested that the Court could be asked exceptionally to receive appeals directly. However, the Court may be reluctant to assume such a role on an ongoing basis, as a matter of legal principle and practicality, given that the number of appeals could conceivably reach a volume that would be unmanageable for the Court.
- (d) **UNHCR** could be asked to (re)assume responsibility for determining appeals on an interim basis, pending establishment of the RAB. In the same way that UNHCR was responsible prior to 1 July for appeals against negative RSD decisions under its mandate, it was suggested that it could hear appeal determinations against negative decisions issued since 1 July. However, this option would also lack any basis in Kenyan law, and any appeals that were purportedly decided thereunder would be extremely vulnerable to legal challenge. Moreover, it would not serve the principled aim of the Government of Kenya to assume its full legal responsibilities and exercise authority over refugee matters. An ‘exit strategy’ for UNHCR from such an arrangement might also be hard to envisage.

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<sup>49</sup> Section 23, Kenya Citizenship and Foreign Nationals Management Service Act, No. 31 of 2011, commenced 4 October 2011.

<sup>50</sup> Refugees Act 2006, section 10(3), provides that ‘any person who is aggrieved by the decision of the Appeal Board may within twenty-one days appeal to the High Court’.

123. Under current circumstances, if a legal challenge were brought by an aggrieved asylum seeker against the non-issuance of a negative decision pending establishment of the RAB, the Court may conclude that the responsible government entities are obliged to establish the Appeal Board, and to take all necessary steps to equip it to function.

124. While efforts to find a creative solution to this serious problem are to be commended, there are disadvantages with the various options listed above. The general question of a lack of legal basis for an interim arrangement – which could render any *ad hoc* appeal decisions unlawful and thus waste more time and resources in further legal challenges – is problematic. Specific legislative adjustments to cure this problem are not presently foreseen in the draft Bill to amend the Refugees Act and other statutes, and could meet opposition in the National Assembly, which has already created a tailor-made structure for this purpose in the RAB. At the very least, such a process would consume administrative resources and time that could be better spent in trying to secure the establishment of the Board itself.

125. As a further concern, the various interim arrangements that could be considered might have the unwanted effect of making the eventual establishment of the Board itself more difficult than ever. If appeals were being heard under a temporary interim arrangement, the strong incentive to invest national budget in the RAB in order to avoid being found liable by the High Court for non-compliance with the Refugees Act may be lost. An interim solution may thus seal the fate of the RAB as an entity never to be established. In this context, the preferable legal and practical option would appear to be continuing work and advocacy for the establishment of the RAB. This could include through work to secure the necessary initial funding from external donors if at all possible, even though the long-term sustainability of the Board as an independently-run and -funded Kenyan entity must be the ideal goal.

*An overarching challenge: waiting times for RSD decisions*

126. The progress made by DRA and UNHCR in establishing and operating the RSD system in place since July 2014 is impressive. However, the time during which asylum seekers are required to wait for decisions on their claims in many cases remains excessively long. At the time of the evaluation (and bearing in mind that many of these statistics relate to cases which began in the mandate procedure under sole UNHCR responsibility), average, unverified time estimates for a decision in the regular RSD process in Kenya were quoted as 18 months from registration to decision issuance; while those awaiting a decision on appeal (prior to 1 July 2014) could in some cases wait two years, and in occasional instances, up to five.

127. While efforts have been made since the transition process began to ensure that decisions for new applicants (post-July 2014) can be made in a reasonable timeframe<sup>51</sup> – bearing in mind the 90-day maximum period for decisions stipulated in the Refugees Act<sup>52</sup> – the reality is that many asylum applicants in Kenya have waited an unacceptably long time for an outcome.

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<sup>51</sup> In Nairobi, efforts are made to produce decisions within 90 days of interview for particularly vulnerable people; while for other non-urgent cases, the timeframe is currently around six months.

<sup>52</sup> Refugees Act 2006, section 11(5); Refugee Regulations, regulation 29(2).

128. While the prioritisation of emergency cases, where asylum seekers or refugees may be at particular risk, as well as people with specific needs, manifestly well-founded cases and other categories, is important and can all contribute to ensuring that such people receive decisions much faster than the long-standing asylum seeker population in regular RSD, the fact that the process moves extremely slowly for a large proportion of the caseload remains of concern. In Dadaab, the evaluation team met refugees and asylum seekers who spoke of this as a particular concern, and the deep despair of many people caused by the perceived absence of apparent solutions for their future.

129. While an RSD outcome may not in all cases solve the problems of asylum seekers and refugees – bearing in mind that RSD may lead to rejection, which can worsen an individual’s situation at one level – it was noteworthy that the evaluation team also heard that at least some asylum seekers would strongly prefer to receive any decision, whether positive or negative, rather than continuing to wait indefinitely for their cases to be determined.<sup>53</sup> This perception of at least some asylum seekers runs counter to the assumption that could be made that people who have asked for protection might be better off, at least in the camps, without a decision, as they can continue to enjoy assistance on a long-term basis, even if their legal and personal status remains uncertain. Status granted *prima facie*, or other means of swiftly recognising those who can be presumed to need protection, must form a crucial part of the solution to this conundrum.

130. It would thus seem crucial, in the interest of a credible process as well as respect for the rights, dignity and well-being of refugees, that every effort be made to ensure that the ongoing transition process will continue to reduce backlogs and waiting times, to enable DRA to inherit and move forward with an efficient process, noting that resource constraints are likely to be an ongoing concern.

*Assessment of differentiated procedural approaches, first instance decision-making, issuance of documentation and appeals*

131. UNHCR’s work together with DRA on streamlining procedures, including through the use of differential approaches, as well as ensuring a well-functioning first instance process overall, is clearly highly relevant to the goal of establishing a workable national RSD procedure. While decision-making rates have proceeded significantly less swiftly than in UNHCR’s previous mandate process,<sup>54</sup> this would seem to be a foreseeable consequence of the launch of an entirely new joint system, as well as challenges in convening regular meetings of the TAC.

132. An increase in the rate of efficient production of decisions should result in 2015, as familiarity with the process develops and the TAC steps up its meeting schedule. Effective and strategic use of differentiated procedures, which could limit the number of cases where interviews or extensive evidence-gathering are required, as well as automation of data-population and otherwise in the use of forms in the software, should also help. Ways to achieve greater volume and efficiency in issuance of decision Notifications and ID cards

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<sup>53</sup> See section 4 below on perceptions of the process and some applicants’ concerns about lengthy periods awaiting further steps in the process.

<sup>54</sup> By contrast with the 1,802 people recognised as refugees through the full RSD process in Kenya in the second half of 2015, UNHCR in the 12 months of 2013 issued decisions for 11,230 refugees in the mandate RSD process (which may be approximated, if decision-making rates were steady, to around 5,500 for each 6-month period); and 14,572 people in 2012 (around 7,000 in each half-year at a consistent pace).

should be sought as a priority in the next phase of transition, to ensure that RSD has an effective documented outcome for those recognised.

133. Efforts to support the establishment of an appeals stage, while earnestly pursued through advocacy and work with DRA, have not been successful. The viability and sustainability of RSD will remain in question unless and until this can be achieved.

### ***Building the capacity of DRA***

#### *Training activities*

134. In the latest development in the ongoing process of DRA capacity development that has continued since its creation, DRA and UNHCR in 2012 agreed and began implementation of a training plan for DRA RSD caseworkers and reviewers participating in the first instance process. This plan envisages an 18-month programme of training for DRA caseworkers, followed by an 18-month process of training in the review function, for those who complete the caseworker training and are ready to move into the process of reviewing decision proposals.

135. Reviews are currently carried out solely by UNHCR personnel, pending completion of the 18-month caseworker training by the first batch of DRA staff to move through the system. Upon satisfactory completion of that caseworker training plan (which is notably dependent upon both the aptitude of the trainees and the availability of UNHCR staff to provide training and mentorship), the reviewer's training plan will commence, also for an 18 month period. However, the depletion of the DRA RSD staff team - following the departure at the end of 2014 of eight persons (48%) of the 17 who had been trained during the course of the year - means that this more advanced reviewing capacity in DRA is likely to be limited in the short- to medium-term.

136. The 18-month caseworker training programme consists of six weeks of intensive induction training, where the trainee 'shadows' more experienced caseworkers and receives instruction in key refugee law concepts, on interview techniques, COI research and other relevant topics. In the second phase, lasting eight months, the trainee caseworker moves into casework for 'standard' cases (without particularly complex issues), including the conduct of interviews and preparation of draft decision recommendations. This phase includes continued on-the-job training, with each caseworker spending time individually with reviewers who have examined their draft decisions, and who provide feedback and other guidance directly. This phase also includes specific training events and instruction on relevant themes. In the third phase, DRA caseworkers move into handling complex cases, which could include exclusion or other issues involving difficult legal and evidentiary concepts.

137. The reviewers' training programme involves a further 18 months: six weeks of reviewer 'induction' training, followed by ten months of work on reviewing 'standard' cases, and a further six months on complex cases before completion of the training cycle. As of November 2014, 28 DRA staff had undergone RSD caseworker training in Nairobi, with a number of those subsequently deployed to the field to continue their work and training phases II and III. Nine DRA RSD caseworker staff were working in Nairobi at the time of the evaluation (including eight trainees and one person in a supervisory role as RSD coordinator); four DRA staff in Kakuma and four in Dadaab.

138. Positive feedback was provided by DRA during the evaluation on the caseworker training system as devised and implemented to date.<sup>55</sup> It was perceived as moving at generally the right pace, and addressing the relevant legal and other substantive questions on which caseworkers needed knowledge and skills to perform their jobs well. UNHCR's commitment and expertise were also unreservedly endorsed by trainees, as well as the sense of teamwork and camaraderie that the system fostered between DRA and UNHCR staff - one trainee explicitly affirmed that they felt like a real team working together, rather than representatives of two separate organisations.

139. Asked for any specific suggestions to improve the training, trainees proposed that more group work could be helpful, involving caseworkers exchanging information and experiences, in addition to the individual feedback and coaching received from UNHCR personnel. 'Peer-to-peer' training sessions, in which one trainee might be asked to research and present to others on a relevant subject, were seen as another beneficial possibility. Specific topics - including the concept of 'particular social group', relating to asylum seekers claiming protection based on their LGBTI identity - were seen as subjects on which further intensive training and guidance would be beneficial. 'Benchmarking' during the training process, to measure progressive development and identify gaps, was seen a further proposal worthy of exploration.

140. More exposure of DRA trainees to the caseload, and experience of working in other RSD locations after the induction phase, could also be a way to broaden their knowledge and facilitate the development of consistent approaches.

141. These broadly positive conclusions are also reflected in written assessments provided by DRA trainees to UNHCR, in training evaluation surveys conducted in 2014.<sup>56</sup> The survey reflected trainees' positive endorsement of the programme overall, and particularly for classroom training and on-line courses, training on basic RSD concepts, and provision of feedback by RSD caseworkers. Specific recommendations included more training on particular themes (particular social group, exclusion and internal flight alternative) and more timely feedback. The conduct, analysis and measures taken on the basis of these surveys is a good practice on UNHCR's part that reflects a commitment to improving the training, and should be continued.

142. A crucial and evident limitation on the training system at present is that it relies entirely on UNHCR personnel who are already fully occupied with substantive responsibilities, drawn from the UNHCR's protection and RSD teams in Kenya. Reviewers in particular must devote extensive time to one-on-one feedback to caseworkers, in addition to their heavy workloads of decision proposals to review. While there are clearly great benefits in the involvement of reviewers in precisely this role, given their experience and direct knowledge of the gaps revealed by their work examining decision proposals written by caseworkers, it creates enormous pressure on these personnel that may ultimately be unsustainable.

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<sup>55</sup> Note that no assessment could be made of the reviewers' training module as it has not been utilised to date; but this should be a priority for DRA and UNHCR as and after the first cohort of review trainees moves through the system from March 2015.

<sup>56</sup> UNHCR Kenya, *Analysis of the evaluations of the RSD training of DRA eligibility staff in Kenya*, December 2014.

143. It would seem crucial to explore ways to supplement and increase the efficiency of training activities, not only in order to enhance further the positive impact of the current programme, but to ensure that other key priorities in RSD, including swift decision-making and backlog reduction, can be pursued. It is of serious concern that UNHCR Kenya's staffing plans for 2015 and beyond have been revised to cut the numbers of staff proposed to provide essential further training services, over and above those offered by protection personnel directly involved in the RSD process. If operational RSD staff are under pressure to carry major training responsibilities as well as their RSD-related tasks, a direct conflict is likely to arise between these two activities, both of which are essential for a successful transition.

144. It thus seems imperative to identify resources to enable additional training staff to be engaged, freeing up the RSD personnel to concentrate on decision-making and backlog reduction, while still being available, if practicable, to advise generally on training activities based on their extensive knowledge and experience.

145. Kenya has an impressive array of academic talent, including university professors and students teaching, researching and following closely developments on refugee law at international and national level. This pool of expertise should be tapped, by involving or potentially even outsourcing the design of training programmes on refugee law and other RSD-related topics, subject to appropriate arrangements to ensure consistency and coherence in approaches and coverage. Such training activities could also involve – as trainers but potentially also as students, if opened to the public – experts with an interest or expertise in the subject, including the many legal practitioners and NGOs who are active on refugee affairs in Kenya. Such a broadening of the trainer base could be particularly useful for judicial training and for the future members of the RAB.

146. While acknowledging budget limitations, it would seem that finding ways to provide additional human resources for training – which could also include calling upon Regional Hub personnel; engagement by UNHCR of dedicated training personnel on a consultancy basis, or arranging for missions from other offices, HQ or the Global Learning Centre for training – should be considered. While missions and consultancies are not a substitute for the necessary reinforcement of ongoing training capacity, they could help in meeting immediate and short-term needs, as resources and plans for more systematic increased training capacity are identified.

147. Progressively bringing DRA representatives into training roles – through peer-to-peer or train-the-trainer activities, as well as encouraging them to take up relevant UNHCR training opportunities where appropriate<sup>57</sup> – could also help supplement the current limited resources, and reinforce this capacity in a more sustainable way for the longer term. As a means to raise awareness and broaden the pool of expertise, UNHCR could also encourage Kenyan universities to include and promote refugee law in their curricula, which could ultimately yield a larger number of legally-qualified graduates who might be interested in RSD work in the future.

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<sup>57</sup> At least one DRA caseworker has undertaken a UNHCR Protection Learning Programme module, a positive approach which has the potential to expose DRA personnel to a wider range of information and refugee law expertise than even the current training programme can provide.

### *Infrastructure and equipment*

148. Capacity to produce swift, high-quality assessments does not depend on training and knowledge alone. The infrastructure and equipment at the disposal of some DRA personnel in Kakuma and Dadaab was apparently less than optimal. UNHCR-provided office space was in need of renovation or replacement by new premises in Dadaab, which UNHCR intends to prioritise in the near future from its own resources. Internet connections and other equipment – needed in order to undertake COI research, for example – were said to be unreliable and substandard, potentially undermining DRA caseworkers' capacity to produce swift assessments. DRA staff members do not have secure Kenyan government email accounts, which raises concerns about maintaining confidentiality.

149. There is also as yet no secure and effective filing system in place for the three RSD locations. Moreover, ambitions expressed in the transition Work Plans to create an RSD intranet, with a COI platform and electronic document repository, have been obstructed by the lack of access to secure email for DRA staff. If it proves impossible to identify resources to support development of the RSD intranet, at the very least, DRA should be equipped with secure email and confidential filing systems to protect refugees' and asylum-seekers' data and the integrity of the process.

150. While DRA staff in Nairobi benefit from UNHCR's office premises and facilities, the ultimate objective under a post-transition framework is logically for RSD processes to take place in DRA's premises. This will require resources to provide for all of the necessary facilities for secure and confidential interview rooms and office space, where possibilities for harassment and extortion from asylum seekers and refugees is minimised, as well as waiting areas, ICT equipment and other needs.

151. Accommodation for trainee caseworkers in camps must also be of an appropriate standard, bearing in mind the remoteness and potential discomforts associated with the camp locations, which have the potential to affect performance over the longer term.

### *Staff retention*

152. Capacity in DRA, while on a steady trajectory, remains limited by a chronic problem of staff retention. Of the total number of staff recruited by DRA and trained through the tailored training programme over the period 2012-13, only 60% remained with the Department at the end of 2013. After their contracts concluded in November 2014, a further eight trainees did not return to work for DRA in 2015. The overall retention rate from 2012 to end 2014 is thus 32%, comprising nine out of 28 DRA staff who were hired and trained during that three-year period.

153. Staff deployed to all three of the RSD locations in Kenya, but particularly in Kakuma and Dadaab, have in many cases resigned during - and sometimes at an advanced stage of - the training process, depriving DRA of staff resources that could contribute to the progressive build-up of expertise, familiarity with systems and processes related to RSD, management capacity and institutional memory that will be essential to enable it to exercise full responsibility for RSD in a more independent way in the future.

154. While limited salary levels and working conditions at DRA were seen as among the factors leading well-performing trainees to look for other opportunities, the evaluation team concluded that the most important obstacle to staff retention appears to be the lack of contract security for caseworkers at DRA. In 2014, 100% of DRA's caseworkers were on short-term contracts with DRA, financed entirely by UNHCR project funds. Their contracts to date commenced 1 January and ran until end of November in each year, after which the contracted staff were expected to take one month's compulsory leave without pay (although some staff continued to work on a volunteer basis, signalling their high levels of professionalism and commitment). Leave is not available otherwise to DRA staff members throughout the year.

155. Those finishing contracts in Kakuma and Dadaab were required to finance their own travel back to their homes from their duty stations. By the expiry of their contracts at the end of November 2014, DRA caseworkers had not been informed of whether their contracts would be renewed the subsequent year. DRA attributed the reason for the inability to renew contracts to UNHCR's inability to provide funding contributions that would extend for more than one calendar year. DRA's preferred approach would be to have a commitment to three successive years of funding from UNHCR or another donor (which is problematic given UNHCR's global budget cycles and funding structures).

156. In the past, the Danish Agency for International Development (DANIDA) has provided extensive donor support to DRA. DANIDA is apparently ready to make a further contribution to DRA resources for staffing in and potentially after 2015, which it would propose to provide directly to the Kenyan national Treasury, rather than directly to DRA or via a third party. DANIDA would however understandably expect to see a commitment to and evidence of effective use of those resources, which would presumably not be satisfied by the current unproductive staff recruitment and retention picture.

157. Linked to overall staff retention issues, the limited numbers of trained DRA staff in RSD mean that management and supervisory capacity is also limited. While there is a DRA RSD coordinator who is responsible for RSD Kenya-wide, and one of the caseworkers acts as RSD supervisor in Nairobi,<sup>58</sup> there is no incumbent appointed to supervise or guide the DRA personnel in Dadaab and Kakuma.

158. They thus remain under the formal supervision of the DRA Camp Coordinator, who has a wide range of other responsibilities unconnected to RSD. In short, DRA supervisors have lacked legal expertise and experience in RSD. UNHCR RSD supervisors in the camps have sought to fill this gap to some extent by providing guidance and support to DRA RSD staff, to the extent possible and appropriate, and close cooperation and rapport between the UNHCR and DRA RSD teams in Kakuma and Dadaab has developed as a positive result.

159. However, the risk of emergence of further problems associated with a lack of RSD supervision and management capacity in DRA over time is evident. DRA also spoke of its concern that their camp colleagues were 'out of the picture' and did not always receive important information first-hand, a potential result of a gap in the hierarchy, with no supervisor between DRA senior management in Nairobi and working-level trainees on the ground.

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<sup>58</sup> Minutes of the Inaugural TAC meeting, 10 July 2014.



160. Given their lack of job security, problematic contract conditions, and uncertain prospects for advancement in DRA or otherwise, it is unsurprising that DRA staff retention levels are low. It would appear that ambitious and qualified young people among the trainees prefer to seek positions in other parts of the civil service (including the Department of Public Prosecutions and the Attorney-General's Department), as well as the private sector and international humanitarian agencies and NGOs. The situation is effectively a waste of resources, which undermines the goal of building DRA's capacity to operate a fair and effective RSD system that can contribute to fulfilment of Kenya's national and international refugee protection responsibilities.

161. There are at least three areas of action that could help potentially to reduce, if not necessarily comprehensively solve, the problems of recruitment and retention of competent staff:

- (a) Work to encourage the **creation of permanent posts for at least some personnel in DRA**. At present, senior DRA management – as well as the Commissioner himself – are seconded from other branches of the civil service, as there are no dedicated positions attached to the Department. In November 2013, a 'scheme of service' for DRA, providing for the creation of a number of secure civil service posts, was endorsed by the Public Service Commission and issued by the Directorate of Public Service and Management. This is a positive step which will apparently mean that at least some DRA personnel will be appointed to long-term, secure positions with salary levels that are likely to be commensurate with other departments and, importantly, other benefits such as pension entitlements. Implementation of the scheme of service in an appropriate fashion, to ensure the early recruitment and assumption of functions of key DRA personnel, might help ensure greater job security and the possibility of building up more longer-term management expertise during the transition process.
- (b) Efforts to encourage the **provision of more secure contracts for junior caseworking staff**, with clearer and more timely commitments to renewal, as well as improvement of conditions through provision for annual leave, travel to home locations and other basic entitlements. UNHCR and DRA need to explore ways to ensure that this is possible, with increased efforts made on both sides, bearing in mind UNHCR's extensive contributions and considerable flexibility to meet DRA's needs to date.
- (c) Pursue **diversified sources of funding** to build up a sustainable financial base for DRA's activities. While UNHCR can be expected to continue supporting DRA as part of its commitment to promoting refugee protection in Kenya, it should not be seen as the sole reliable funding source in perpetuity, especially as budgetary pressures on the organisation are felt worldwide in connection with proliferating refugee crises. Other donors, potentially extending beyond those who have assisted to date, should be approached and their readiness to assist explored. The European Union in particular may be ready and able to provide some funding support as part of its Regional Development and Protection Programme framework, which envisages project funding (from DG DEVCO and DG HOME) for the Horn of Africa in and

after 2015.<sup>59</sup> At the same time, and conscious of its own resource constraints, the Kenyan government should be strongly encouraged to invest in DRA and in particular in helping it recruit and retain competent staff. As a policy area that today generates intense public and political interest and requires sufficient resources and competent management to address refugee issues in the long-term interest of Kenya, this should be a political and fiscal priority.

### *Claim backlogs and previous decisions*

162. Statistics on the backlog of pending asylum claims in Kenya as of end of December 2014 indicated that the number of persons whose claims were awaiting determination was 34,011, comprising 3,696 in Dadaab and 769 in Alinjugur; 24,120 in Kakuma and 6,426 in Nairobi.<sup>60</sup> While still substantial, this represents a significant reduction from the previous backlog, which numbered 68,613 as of 1 April 2014.<sup>61</sup> The decrease results directly from the decision to gazette South Sudanese refugees as eligible for status on a *prima facie* basis, which cut the number awaiting decisions in Kakuma by over 60% from some 64,000 people in Kakuma, and reduced the pending South Sudanese claimants in Dadaab to a few hundred.

163. There are strong arguments in favour of seeking to reduce, and ideally eliminate, the backlog of outstanding claims altogether by the end of the transitional period, a goal to which both DRA and UNHCR have expressed strong commitment throughout the evaluation. Reducing or removing the backlog would firstly enable DRA to move into its future role, as the sole entity with full operational as well as legal responsibility for RSD, free of this residual caseload. A backlog could lead to continued delays in issuance of decisions, which could increase frustration and mistrust in the asylum seeker community, and create an impression of inefficiency and limited competence (which would not be justified, as the delay would to a certain extent have been inherited from UNHCR and the period of joint processing during the transition). In order for DRA to develop and maintain the trust that it will need in order to be able to perform its task, it will be important that its process wins confidence among the refugee and asylum seeker population, and demonstrates its credibility as a competent and impartial decision-making body that can render fair decisions accurately and swiftly.

164. Streamlined differential procedural approaches are another important way to provide protection for individuals where *prima facie* grants are not appropriate or politically feasible. The intensive reflection and careful design work by UNHCR and DRA that has gone into developing models for simplified processing, accelerated procedures, and enhanced registration in Kenya exemplify the potential of these approaches. With decision-making by the Commissioner facilitated by the work of the TAC, this would seem an important further set of measures that could also help further ensure swift backlog reduction.

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<sup>59</sup> The EU envisaging funding new Regional Development and Protection Programmes (RDPPs), including in relation to the Horn of Africa: see Justice and Home Affairs Council conclusions on 'Taking Action to Better Manage Migration Flows' of 10 October 2014, para I(g). Funding was provided to UNHCR under previous EU Regional Protection Programmes initiated in 2009 and 2011-12 for protection and capacity-building enhancement activities.

<sup>60</sup> UNHCR Kenya, *Statistical Summary as of 31 October 2014: refugees and asylum seekers in Kenya*, p. 1.

<sup>61</sup> *Ibid*, p. 7.

Even once existing caseloads are cleared, it is likely that such approaches will continue to hold value for decision-making during the remainder of the transition process and thereafter, to ensure continued efficiency and effective case management.

165. DRA and UNHCR, with involvement of UNHCR's Regional Support Hub in Nairobi in addition to the Kenya office, have discussed and agreed on targets for backlog reduction, which assume the extensive use of streamlined procedures, and developed specific staffing and case management proposals to achieve them. Three main conditions for backlog reduction, and minimising risks of further accumulations of new pending cases, have been identified:

- (a) Steps to cut processing time by improvement and increased use of technology – referring, among other things, to the possibility of enhancing the functionality of ProGres and relevant software, to enable automatic population of RSD assessment forms;
- (b) Providing further tools, additional guidance and investments in ongoing training to caseworkers– including development of case profiles, model interview questions, templates for decision proposals, and more efficient and effective supervision arrangements;
- (c) Monitoring of the RSD process, including individual staff performance.

166. While the evident commitment and practical approach taken by the two organisations to backlog reduction is promising, it will require identification and mobilisation of the requisite staff and other resources. Bearing in mind the staffing retention challenges mentioned above, achieving these objectives will require steps to ensure that DRA can build up its cadre of RSD experts in a more sustainable way. DRA's planned efforts to explore further funding options, and find ways to create long-term government posts within DRA, will be an important part of bringing this effort to fruition. UNHCR must also free up protection staff involved in RSD from extensive training commitments, through the identification of additional resources, as an essential requirement for a successful backlog eradication.

167. Concerning another possible approach to backlog eradication, an alternative suggestion – that UNHCR 'take back' remaining claims submitted prior to 1 July 2014, and resume the mandate RSD process for those cases – would have a number of disadvantages. Firstly, there is no existing legal basis for such decisions under Kenyan law, which could expose grantees to the risk of an insecure status, by comparison to that of other post-1 July refugees. Secondly, it would involve diversion of UNHCR staff and other resources and expertise from the priority task of supporting DRA in building up its capacity.

168. An important positive feature of the joint RSD process currently underway is that it deals with cases while simultaneously providing ongoing training and capacity development to DRA, which would be undermined by the re-introduction of a separate parallel process. Moreover, it is not evident from UNHCR's previous decision-making rates in years prior to 2014 that there would be any sizeable increase in the numbers of cases decided, while the capacity-building process would suffer marked setbacks.

*Cases determined before 1 July 2014*

169. UNHCR estimates there are approximately 550,000 refugees in Kenya that have been recognised under the organisation's mandate prior to 1 July 2014.<sup>62</sup> A proportion of these should hold UNHCR Mandate Recognition Certificates or Kenyan refugee ID cards, as well as a new group who have or should shortly receive post-July 2014 Notifications of Recognition. Under arrangements agreed between DRA and UNHCR at the beginning of the transition period,<sup>63</sup> applicants in the limited number of cases which were assessed and reviewed by UNHCR prior to that date, but for whom decisions were not yet issued, will receive a Mandate Recognition Certificate during the transitional period.

170. Refugees holding previously-issued Mandate Recognition Certificates are being advised to approach UNHCR offices for the time being in order to renew those certificates.<sup>64</sup> However, as these documents do not have any status under Kenyan law, a solution with a firmer legal basis is needed. Based on Kenya's prior readiness to respect UNHCR's mandate function and honour mandate recognition status prior to the transition period's commencement, one course would be for Kenya to commit to recognise pre-1 July decisions taken by UNHCR under its mandate and to issue new Notification of Recognition documents to the holder. This could occur on request of the refugee, based on information advising refugees to approach DRA proactively. In addition, whenever a refugee could seek to renew a mandate recognition certificate, she or he could be referred to DRA for issuance of the relevant notification. This would be most feasible once an agreement for joint registration and sharing of ProGres data between UNHCR and DRA is in place (see paras 63-71 above).

171. That recognition could then provide the basis for a refugee to apply for a refugee ID card, and ultimately to hold the same documentation, issued under Kenyan national law, as other refugees. In the (likely rare) cases in which cessation may be applicable, the holder could be referred exceptionally to the cessation process under the Refugees Act, and similar steps could be taken in case of a need to apply withdrawal.<sup>65</sup> This could be regulated through the proposed Letter of Intent (LOI) that is under discussion between DRA and UNHCR which is planned to govern the further operation of the transition process.

172. While an argument could be made that there would be value in a new process to examine afresh the protection needs of holders of UNHCR's mandate documents in a new RSD process, the delays and resource implications of this would be enormous. Its disadvantages in terms of generating a new caseload of potentially several hundred thousand claimants would be overwhelmingly negative for DRA, as well as legally unnecessary. A preferable course would be for UNHCR to undertake a verification process for refugees currently in Kenya, and seek to identify as relevant those people who are no longer in Kenya, are deceased or otherwise not in need of their refugee status. In case of changed circumstances, cessation could also be considered, in line with Kenyan law; along with withdrawal of status where triggers would be identified that necessitate such a step.

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<sup>62</sup> UNHCR Kenya, *Statistical summary as of 31 October 2014: refugees and asylum seekers in Kenya*, p. 4. As of September 2014, UNHCR reported 552,000 refugees. The approximate figure is derived from a subtraction of the number of positive decisions for September (427), August (257) and July (112).

<sup>63</sup> Meeting between the Principals, 4 July 2014.

<sup>64</sup> Joint DRA-UNHCR powerpoint on *Kenya's Refugee Status Determination (RSD) process during the transition period*, slide 11.

<sup>65</sup> Refugees Act 2006, section 20.

### *Assessment of capacity-building and backlog eradication efforts*

173. UNHCR's efforts around capacity-building and development for DRA – focused on training, development of guidance tools, infrastructure and appropriate staffing structures and policies – have been incisively relevant to the challenges at hand. The impact, as well as the efficiency and cost-effectiveness of these interventions, however, has been limited by difficulties in recruitment and more particularly, retention of well-performing DRA staff. While UNHCR should continue to provide advice and support to DRA to encourage it to develop long-term prospects and job security for personnel, to encourage more staff to stay after initial training, this matter lies to a large extent in the hands of the Kenyan authorities and Government, which must commit resources, political priority and key civil service posts to DRA RSD activities. This is a *sine qua non* for the sustainability of all current efforts in the transition phase.

174. Efficiency in capacity-building would also be greatly enhanced by identifying supplementary training resources, to ensure that RSD activities and training do not continue to divide the time of a limited cadre of UNHCR protection staff. Work on the backlog appears to have progressed, with further reductions in 2014 (notably, but not exclusively due to the grant of status on a *prima facie* basis to South Sudanese). But again, this can only continue if adequate staff resources, based on detailed calculations made by UNHCR Kenya in consultation with DRA, are made available.

175. Work to provide DRA with infrastructure – including office premises, accommodation where relevant, filing systems and internet communication – have progressed less satisfactorily, with little evident explanation other than resource constraints. Efforts should be made to address these, to provide a sustainable physical environment and necessary equipment for DRA's RSD work to continue.

### *Quality Assurance*

176. Over recent years, quality assurance mechanisms and processes for asylum systems have increasingly gained the interest of states conducting national RSD processes in different parts of the world. Many have invested in establishing internal quality monitoring and assurance systems, and others have taken part in UNHCR-led projects and initiatives designed to explore possible models and help states develop systems which are tailored to verify and maintain quality in the most effective way within their specific national context.<sup>66</sup>

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<sup>66</sup> See UNHCR, *Further Developing Asylum Quality in the EU (FDQ): Summary Project Report*, September 2011, available at: <http://www.refworld.org/docid/4e85b41f2.html>; UNHCR, *Building In Quality: A Manual on Building a High Quality Asylum System*, September 2011, available at: <http://www.refworld.org/docid/4e85b36d2.html>; UNHCR, *ASQAEM summary – Asylum Systems Quality Assurance and Evaluation Mechanism project in the Central European sub-region*, February 2010, <http://www.unhcr.org/4e60a4549.html>

177. The importance of monitoring and ensuring ongoing quality in asylum processes is clear, as a means of ensuring that legally correct decisions on asylum claims are made which reflect states' obligations and refugees' rights. Effective quality systems can help ensure that state resources are spent most effectively, that the need for decisions to be revisited on appeal and in courts is minimised, and that public trust in asylum systems is established and maintained, including through the issuance of public reports that transparently recount limitations on asylum decision quality, as well as and measures to uphold or improve performance.<sup>67</sup>

178. Kenya, like many other asylum countries, does not at present have a quality assurance system in law or in its administrative framework. The need for quality audits and planned quality assurance mechanisms is self-evident to scrutinize in particular the risk of corruption, and potentially foresee a complaints mechanism. As part of the transition process, it has been agreed between DRA and UNHCR that internal quality assessment tools should be developed; joint quality audits (foreseen on a quarterly basis) of registration and RSD procedures should be conducted; and that corrective measures should be taken based on audit results.<sup>68</sup>

179. Both the design of the tools and processes for the proposed regular audits, as well as the development of the DRA internal quality assurance mechanism, could benefit from experience and lessons learned in other regional and national contexts. Based on extensive previous UNHCR quality assurance work in cooperation with states in Europe, and initiatives now being rolled out in Asia and the Americas, there are various models that could be considered and assessed, to determine if they offer helpful elements for Kenya to consider. With DRA's agreement, a mission should be arranged for experienced UNHCR and other expert quality initiative managers and personnel to assess and formulate a tailor-made project proposal for quality assurance in Kenya. One possibility would be for an existing RSD Task Force, involving DRA and UNHCR representatives, to play this role, in continuation of its work in following closely and supporting the development of RSD in Kenya and the transition process to date. In any event, steps should be taken to ensure the effective establishment and commencement of operation of a quality assurance mechanism well before the transition period ends.

180. Quality audits could be conducted by DRA and UNHCR personnel, preferably knowledgeable about, but not directly involved in, RSD casework. Relatively senior personnel might be considered at least for a first round of such audits, enabling them to bring management and substantive abilities and experience to bear and to lend the process the weight it needs to guarantee acceptance of findings and readiness to take remedial measures. Alternatively, external quality auditors, specialised in protection and RSD – potentially involving a combination of personnel, who could come from other states or UNHCR operations – could bring impartiality, fresh perspectives and additional knowledge that could enhance the Kenya RSD process in broader ways.

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<sup>67</sup> See, for example, UNHCR *Quality Initiative 'Key Findings'* reports on the UK and Ministerial replies, 2005-2009: <http://www.unhcr.org/pages/4e1188886.html>

<sup>68</sup> *Work Plan for transition of RSD responsibilities from UNHCR to DRA (June 2014-December 2015)*, Updated version reflecting 23 & 25 September discussions, endorsed during the Task Force meeting of 22 October 2014.

181. Methodologies for reviewing quality in the course of such audits will also have to be designed carefully: random sampling of decisions made on different caseloads, involving caseworkers in different locations and distinct legal issues at various points in time, can be a very effective way of ensuring that a representative spread of decisions can be identified, potentially providing insights the range of practices in need of scrutiny. A sample size will need to be sufficiently large to enable meaningful information, yet small enough to be manageable (especially if the relatively intensive schedule of quarterly audits is retained). Amongst other tools that could potentially be needed to support auditing of the progress and effectiveness of the transition process are accurate, detailed, itemised monitoring plans for measuring progress toward achievement of the objectives outlined in the Work Plan, including infrastructure, training, staffing structure, staff retention strategy, and resource mobilisation. It will also be important to monitor the extent to which DRA staff actually take over each of a diverse range of tasks which are currently undertaken by UNHCR RSD, Registration and Data Management staff.

182. A first set of audits might provide a basis for assessment of the experience to that point, and should ideally support the assessment of the possibility of extending the length of the transition period. Their initial recommendations could also then be made from those audits about the possible form of an ongoing, internal DRA quality assurance system. Similar considerations would be relevant to those arising in the design of a quality audit process. Again, the previous experience of other states and UNHCR operations, and the potential role that UNHCR could play in support of ongoing quality assurance, would be important questions to consider.

### ***Roles of other partners***

#### *Non-governmental organisations (NGOs)*

183. Kenya has a strong and vibrant non-governmental sector in the refugee protection field. The various organisations that provide services to asylum seekers and refugees and conduct advocacy and research in the area have demonstrated their potential to make a substantial contribution to the work of the government and UNHCR. Those consulted in the course of this evaluation were all UNHCR implementing partners, albeit with independent management approaches and work which evidenced their critical yet constructive approach to refugee matters in Kenya, including the history, activities and policies both of the state and of UNHCR.

184. It was noteworthy that all NGO representatives met by the evaluation team unequivocally indicated their view that DRA's assumption of responsibility for RSD was a positive, timely and appropriate step. Given the necessary resources and development of capacity for the future, according to one representative, DRA would be capable and 'ready'. However, NGOs expressed concern about DRA's immediate capacity and resource limitations, and the importance of overcoming these before UNHCR could significantly reduce its role without risk of prejudice to the rights and well-being of asylum seekers and refugees. They also expressed serious reservations about the current absence of an appeal process or institution, and the problems around asylum seekers left waiting for negative decisions for an indefinite period. In addition, they emphasised the possible negative

consequences of large backlogs of pending claims, if left unaddressed after the transition period.

185. NGOs also drew particular attention to the lack of information shared to date with or readily available to asylum seekers and refugees about the transition process itself. One spoke of the need for asylum seekers and refugees to be more 'involved' in this process. While some NGOs that met the evaluation team had themselves taken part in disseminating information and briefing refugee community members about the transition process, they felt this had not met all the needs, in terms of the number of people it had reached, or the scope of its content. In particular, the lack of details they could give regarding appeal rights and options for people who would ultimately be rejected in the RSD process was seen as problematic. These limitations on the information they were able to provide effectively were also reflected in the feedback from a limited group of asylum seekers and refugees (see section 4 below).

186. Although DRA and UNHCR have developed and sought to share widely a public PowerPoint presentation on the transition, which NGOs have been encouraged to use,<sup>69</sup> this is not seen as addressing the desire and legitimate entitlement of asylum seekers and refugees for information about what the transition process will mean for them. They are ready to continue providing information and outreach to the refugee and asylum seeker community, a role that is likely to gain in importance in the future, during and after transition. The provision of information at an early stage to applicants could serve effectively to help build trust in DRA on the part of asylum seekers and refugees, an evidently important area for investment.

187. NGO representatives have also evidently played a crucial role as legal advisors and representatives to asylum seekers in Kenya over time, including through participation in major court cases that have defined important principles around refugee rights (see section 3 below). They are ready to continue playing that role, which will potentially be equally or more important once UNHCR's involvement in the RSD process is scaled back in the future. More outreach is likely to be needed to raise awareness among more asylum seekers, from all nationality groups and countries of origin, of the availability of this source of advice and expertise, and of how they could utilise it. Their position as advocates, including with the Kenyan National Assembly, as well as other parts of government and with the international community, will also be pivotal in continuing to draw attention to and balancing discussion on refugees in Kenya at a national and international level. Several were following closely the process of drafting and negotiating proposed legislative amendments to the Refugees Act and other laws, and seeking to ensure that Parliamentarians would be prepared to safeguard refugee rights and international protection principles in any changes that would be made. Some NGOs also referred to the planned national Policy on Asylum Seekers and Refugees as a potentially important text that should be adopted in the near future, which could aid a more protection-oriented approach to the implementation of legislation and practice.

189. The Refugee Act 2006 does not provide for state-funded legal aid in the asylum process. It foresees only that an applicant may be represented in the procedure at his/her own cost. This means that the role of NGOs and support by other donors is extremely important. It will also be necessary for UNHCR to continue supporting NGO implementing

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<sup>69</sup> DRA and UNHCR, *Kenya's refugee status determination (RSD) process during the transition period*, September 2014.



partners in the provision of legal assistance, including during and after the transition period. UNHCR should encourage the Government of Kenya and DRA to explore ways to make available state-funded assistance in the longer run and lawyers as well as the Kenyan Bar Association and other international and local actors to provide support to applicants to make access to legal advice and support possible.

### *Donors*

188. The evaluation team met with representatives of selected donor countries and regional organisations which have supported refugee assistance and development in Kenya in the past. These expressed interest in the RSD transition process, although most had relatively limited access to up-to-date information about its progress and concrete implications. As we have seen above, DANIDA, has been particularly involved in the past – having funded a US\$ 3.5 million programme of support to DRA over several years to 2012, aimed primarily at providing expertise in the form of a technical advisor embedded in DRA’s structure and efforts to develop a comprehensive DRA registration database (the latter not having been completed). DANIDA suspended its aid under this project in at the end of 2013. However, it has recently expressed its intention to resume funding of six posts in DRA.

189. Donors expressed a strong desire to see DRA reach the point of being fully functional and largely independent of international support in institutional, administrative and expertise terms. While ready to consider further financial support to helping it develop this capacity, they underlined that this would be forthcoming only based on clear demonstration of the effective use and concrete positive impact from the use of donor funds on a progressive basis. Mindful of the challenges to recruitment and staff retention linked among other things to low salary levels in DRA, an aversion was expressed by at least one donor to ‘topping up’ salaries in order to attract and keep qualified local personnel, given this is artificial and unsustainable as a means of addressing limited government resources. Donors also sought evidence of commitment across different parts of government to refugee protection principles, which should not, in their views, be excessively compromised by security concerns.

190. Some donors were open about their strong interest in seeing Kenya develop in the longer term into a first asylum country to which non-refugees, who had applied and been rejected in their own territories in the industrialised world, could eventually be returned. However they also acknowledged that there could never be any direct ‘conditionality’ or realistic expectation that capacity-building support could directly translate into more scope for returns to Kenya of refugees from other countries in the region, notably while the challenges to effective protection in the Horn of Africa remain large. It was also noted that UNHCR was playing an important role in the transition process, and should, in the view of donors, continue actively to monitor and support the Kenyan authorities in all aspects of refugee protection on a long-term basis. Donors saw continued work and advocacy by all

actors to encourage the Kenyan government to permit refugees to engage in economic activity, not only to promote their own self-reliance, but also for the benefit of their host communities and Kenya's national interest, as a crucial priority for the future.

### *UNHCR's post-transition role*

192. As this report demonstrates, UNHCR is centrally involved in the transition process and operates across all sectors of refugee protection and support in Kenya. UNHCR has a strong relationship with the government and authorities of Kenya, including DRA. The organisation also enjoys extensive day-to-day cooperation with DRA and other governmental partners, evidencing mutual trust and respect. This has provided a basic foundation for the transition process to date, and notwithstanding differences of view between the two organisations on some matters, affords scope for UNHCR to continue to advise, support and provide concrete assistance to DRA as the process continues. Important elements of their ongoing cooperation over the coming 12 months are expected to be clarified in the LOI that is currently under negotiation.

193. Although the importance of its extensive role in the current joint RSD process is apparent, as well as its involvement in other aspects of the Work Plan during the transition, UNHCR does not have an explicit role in the Kenyan RSD process as defined in the Refugees Act and Regulations for the future. There are some countries where UNHCR participates in RSD processes conducted by national authorities, where such a role is provided for by national law or administrative practice.<sup>70</sup> It's more frequent and widely-recognised function in most States Parties; however, is its general 'supervisory role' with respect to the Refugee Convention. This is referred to in Article 35 of the Refugee Convention, under which States Parties undertake to cooperate with UNHCR in the exercise of its functions, and 'shall, in particular, facilitate its duty of supervising the application of this Convention', including by furnishing information to UNHCR regarding the conditions for refugees, as well as laws and regulations concerning them. This has been interpreted over past decades to include the monitoring of practice in state RSD, as well as implementation of other processes and policies relating to refugees.

194. An implicit recognition and acceptance of this supervisory role could be seen effectively to form part of Kenyan domestic law by virtue of the Refugees Act 2006. The Act provides, in section 3(1), for the recognition of a refugee of all people falling within the definition established by Article 1A of the Refugee Convention; and requires the government to ensure, under section 7(2)(d) 'in liaison with the United Nations agencies.. the provision of adequate facilities and services for the protection, reception and care of refugees'; in addition to conferring on refugees under Article 16(1)(a) all of the 'rights and

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<sup>70</sup> This may include sitting in the first instance or appeals bodies, as in various European countries, making advisory or, in some cases, binding recommendations in relation to refugee status recognition in individual cases.

obligations contained in the international conventions to which Kenya is a party,' including the Refugee Convention.

195. These rules appear to provide a clear basis for UNHCR to take part in those aspects of the RSD process, reception, protection or associated activities as may be necessary to ensure quality, integrity, consistency and correct interpretation of the rights of refugees under the Refugee Convention in Kenya.

196. Given its established expertise in Kenya and elsewhere, UNHCR could continue to offer its services for ongoing capacity building on a systematic basis beyond the transitional process, enabling it to inform and support Kenyan RSD officials in the assessment of protection needs and displacement, as well as doctrinal and other developments in refugee law over time. It could continue to take part in the TAC, membership of which is not constrained by statute, for as long as that body is deemed to provide necessary procedural and case management support to the Commissioner in the process of recognition of refugee status.

197 UNHCR could also, if considered useful by the government of Kenya, offer to serve as a non-voting observer in the Refugee Affairs Committee, mandated to advise the Commissioner in relation to RSD.<sup>71</sup> It could also offer to continue to contribute actively in the system of quality assurance to be established for and within the DRA, including by making available tools, advice and expert personnel to support the development of such a mechanism, as well as to take part in joint quality audits foreseen during and after the transitional process.

198. Other practical contributions that UNHCR could make during and after transition could include making available a technical advisor who could be seconded to DRA<sup>72</sup> for an agreed period, and provide general support to the Commissioner and other DRA staff as necessary to facilitate their work. This could prove particularly useful over the remainder of the transition period, not only as RSD processes and backlog clearance efforts continue, but also to assist in the design of staffing structures, ongoing capacity-building activities, premises for RSD and other purposes, as well as during the immediate post-transition period to ensure continuity and access to UNHCR resources and advice as may be needed.

199. UNHCR would also be expected to follow and contribute to policy and academic discussions, work with the Kenyan legislature and intervene strategically in relevant court processes, as appropriate and useful. Its added value has already been demonstrated in all of these areas in Kenya, and could be expected to continue and potentially grow as DRA is increasingly absorbed in the day-to-day running and strategic leadership of the RSD process.

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<sup>71</sup> Refugees Act 2006, section 8.

<sup>72</sup> Similar to the technical advisors' post funded by DANIDA which was placed in the DRA, in support of the Commissioner, over several years in the late 2000s.

200. The continuing role of UNHCR is without prejudice to the place and contribution of other actors, including notably NGOs, legal counsellors and legal aid schemes. All of these are central to a well-functioning RSD procedure and other aspects of an effective protection system in Kenya.

### *UNHCR's resources in transition*

201. UNHCR's resource management systems<sup>73</sup> indicate that the budget and staffing levels in the operation, including those involved in RSD have been stable over recent years. Compared to other UNHCR operations worldwide, it has had a relatively sizeable budget and staffing allocation to RSD, although the scale of the caseload demonstrates clearly the level of need. It is noteworthy that the total expenditure (including staff and budget) has remained around US\$2.9 million, which is only 1% of the overall budget of the Kenya operation (and 24% of the protection budget). Of this, staffing represents around US\$ 1.3 million.

202. Within the protection budget, a greater amount was spent on other items including office equipment and furniture, stationery, expenditure on birth registration activities and other items. While these are clearly important and necessary expenditures, they highlight that mandate RSD over recent years, and related capacity building and support to the authorities leading up to and since mid-2014, have been a relatively limited sum.

203. It is calculated that UNHCR has invested US\$ 4,800,884 in capacity-building of DRA from 2012 to end 2014. (See summary table below). In addition, UNHCR employed an average of 36 staff members each year during the same period who were involved full- or part-time in the RSD process. It is noted however that there are challenges in identifying expenditures specifically on the RSD process, as distinct from other protection activities in Kenya, due to the different ways in which they can be recorded.

### *UNHCR's budget expenditures relating to RSD in Kenya in 2012-2014:*

Sum of Cost_USD Row Labels	2012	2013	2014	2015 (blank)	Grand Total
Advocacy conducted				54,143.33	54,143.33
Analysis of substantive decisions undertaken				69,000.00	69,000.00
Assessment and analysis undertaken	52,224.00				52,224.00
Birth registration and certificates provided	31,215.43	21,758.17	83,920.85	45,447.92	182,342.37
Capacity development supported	321,127.45	118,828.49	53,422.64	22,396.42	515,775.00
Eligible cases identified and registered			35,000.00	17,806.00	52,806.00
Government or UNHCR status determination procedure implemented	98,644.46	227,617.30			326,261.76
Government provision of material, psychosocial and legal assistance to persons of concern supported		210.00			210.00
Handover of status determination procedure from UNHCR to government initiated	47,671.57		378,032.75	561,249.70	986,954.02
Information provided to persons of concern				30,000.00	30,000.00
Issuance of civil status documentation by national institutions supported			12,880.24		12,880.24
Issuance of ID and travel documents to persons of concern supported			15,987.70		15,987.70
Positions or interventions in judicial, quasi-judicial and administrative appeal proceedings provided			-		-
Profiling of persons of concern undertaken	19,837.00				19,837.00
Registration conducted on an individual basis with minimum set of data required	355,470.77	221,406.53	963,035.33	575,719.55	2,115,632.18
UNHCR status determination procedure implemented			70,425.62		70,425.62
UNHCR supervision of government status determination procedures facilitated		154,448.60	2,000.00	139,957.00	296,405.60
(blank)					
<b>Grand Total</b>	<b>926,190.68</b>	<b>744,269.09</b>	<b>1,614,705.13</b>	<b>1,515,719.92</b>	<b>4,800,884.82</b>

<sup>73</sup> Global Focus is a web site reporting on UNHCR's operations worldwide. Access is restricted to members of the Executive Committee of the High Commissioner's programme and UNHCR staff.

204. Within **staffing** arrangements, there are different approaches at present taken to the seniority level of staff supervising RSD functions in different locations in Kenya. A more coherent, consistent approach is needed, which aligns the degree of responsibility of different personnel (especially in supervisory or management tasks) with their levels. This is a challenge in different UNHCR operations worldwide.

205. In Kenya, the end of the transition process may provide an opportunity to revisit the staffing table and consider the most appropriate structure for the adjusted needs that will exist. At the same time, during the transition process in particular, UNHCR should ensure that it has the staff required to support the RSD process and DRA, and in the longer term, it takes steps to preserve the extensive knowledge and expertise on RSD that has been built up among its RSD staff over time. It may also be that some current UNHCR staff could represent candidates for DRA RSD roles in the future if and as staffing levels are reduced.

206. Whilst appreciating the distinct reporting lines at sub-offices and to the Representation in different locations in Kenya, some differing approaches were noted in country-wide approaches regarding registration and RSD processes, as well as other practices around issuance of documents directly relevant to UNHCR's work. The fact that different approaches in Kakuma, Dadaab and Nairobi are explicitly acknowledged in the country operation plan is a matter of some concern. In light of current and potential future challenges in the foreseeable future, staffing arrangements may need to ensure sufficiently clear and authoritative common guidance, to ensure harmonised approaches to UNHCR's work and timely contributions to RSD processes Kenya-wide.

207. Considering UNHCR's **future planned budgets** related to RSD in 2016-7, it would seem that the foreseen end of the transition process might enable some scope for UNHCR also to adjust its planned expenditure on RSD. However, in the meantime, it would seem crucial to maintain and potentially increase its investment in registration activities and capacity-building in particular during the remainder of the transitional period.

208. It will be essential to maintain ongoing and sufficient levels of staffing and budget to enable intensive **levels of support to RSD**, as well as **capacity-building** activity around RSD. UNHCR Kenya's Operations Plan for 2015 foresees a prominent role for UNHCR in registration and RSD during the year – which would seem to respond to the clear needs for UNHCR to continue to play its active **supporting role** to RSD during the remainder of the transition period, including concerned efforts to reduce the backlog.

209. Thereafter there may be scope for UNHCR to move from a less direct active role in the process itself as DRA shifts to the forefront, but nonetheless in a way that continues to demand UNHCR support. There may also nevertheless be questions and needs around filling any gaps that may arise pursuant to completion of the hand-over process. Ongoing support to the TAC, to quality assurance system design and operation, and/or other functions as part of UNHCR's assistance to the RSD process and DRA's wider protection management activity should also be maintained. The importance of ensuring that these reach all locations where RSD is carried out, and offer adequate levels of standards and support, is also key, in order to encourage consistent approaches across locations.

210. Among the various priority activities that are apparent for the coming months and years, **capacity-building** on RSD is something that is likely to continue not only until end 2015, but where demand will be ongoing thereafter. While DRA's own training capacity

should gradually build up, there will still be a substantial cohort moving through the current 36-month full training programme which DRA at present will not be able to train. It is foreseeable that as DRA recruits more staff who may be deployed to different parts of the country, it may wish to call on UNHCR for the same or similar levels of capacity-building support for a considerable period, as DRA takes a more assertive role for itself in the decision-making process. The possibility of technical advisors embedded within DRA, as averred to during discussions between DRA and the evaluation team, should also be something to which resources should be available to extend.

211. These questions around the **ongoing role of UNHCR** would call for specific consultations (already undertaken during recent budget processes) between UNHCR and DRA on a forward-planning basis. These will need to determine and plan in detail for the tasks that DRA would find it useful for UNHCR to continue to perform on a medium- to longer-term basis. In light of the possibilities and subject to discussion with authorities regarding UNHCR's role after transition (see paras 183-190), UNHCR should continue to develop its plans and budgeting of resources for counselling, as well as advocacy, activities that seem likely to be particularly important in the future. Advocacy, judicial engagement and other interventions in cooperation with other stakeholders would seem essential to continue to promote the Kenyan authorities' assumption of full ownership of a durable, self-sustaining national RSD process in which gender and diversity considerations are mainstreamed, including a rights-based approach to the prioritisation of RSD casework in the urban context.

212. UNHCR is expected to continue to invest in **close cooperation with partners**, including legal service providers, community outreach personnel from the non-governmental sector and other activities that – while not directly a part of the RSD process as such – are crucial to its effective functioning. This support should also form a secure and sufficiently sizeable budget allocation. It will be important also to ensure complementarity with any other contributions by donors to both governmental and non-governmental recipients of UNHCR support, as ongoing and planned.

213. The absence of a functioning **appeals** process also poses significant challenges, which cannot be met through UNHCR intervention alone. The evaluation was not informed of any budgetary provisions being made on UNHCR's side in this connection, and notes that UNHCR cannot be expected to fund national RSD and appellate capacity in all cases. Ongoing advocacy will be required to ensure funds for this activity are retained in the national budget.

214. Future budget allocations and planning more broadly should also provide for effective **monitoring** of resources disbursed by UNHCR through direct implementation, as well as through implementing partner agreements with DRA and other entities. Measuring impact remains a challenge for UNHCR's RSD operations worldwide, including in Kenya. Arrangements will thus be needed to ensure that the results of UNHCR's ongoing support to RSD, as well as its other related activities, can be measured in quantifiable terms, as well as by qualitative means, to the extent possible.

### ***Comprehensive Solutions***

215. This evaluation is primarily concerned with RSD in and after the transition process, rather than durable solutions for refugees in Kenya as such. However, the question of the

outcomes to which RSD can lead - and notably the enforceable and accessible rights which are associated with recognition of refugee status - is fundamental to the utility of RSD overall. If viable and sustainable solutions are not available for people who have been through what may be a complex, lengthy, challenging and for some, traumatic process, the very *raison d'être* of RSD can legitimately be questioned. Thus it will be crucial, for the credibility not only of the RSD process, but for all involved in it, as well as the effectiveness of refugee protection in Kenya in its broad sense, that those who are recognised can enjoy protection and other fundamental rights in line with their entitlements.

216. The three main durable solutions for refugees have traditionally been defined by UNHCR and others as local integration, voluntary repatriation or resettlement. While the adequacy and accessibility<sup>74</sup> of these has been challenged in the Kenya context, and in many other displacement contexts today, they remain the most evident viable options for most refugees over the longer term. However, there may also in some cases be other possible positive outcomes, which are part of comprehensive solutions strategies that states are encouraged to consider. This might, for example, involve the granting to an asylum seeker of another legal right to stay, apart from refugee status, such as a work visa or through family reunification. The following section focusses in particular on local integration, voluntary repatriation and resettlement, however, given that these are likely together to be the most relevant to most refugees in Kenya.

#### *Local integration and other rights*

217. The Refugees Act confirms that those granted status in Kenya are 'entitled to the rights and subject to the obligations contained in the international conventions to which Kenya is party.'<sup>75</sup> They are also 'subject to all laws in force in Kenya'.<sup>76</sup> In practice, the exercise of some of the entitlements conferred by international agreements would appear to be challenging in some cases. The first step to accessing rights - obtaining valid documentation that will be recognised by Kenyan authorities - is already said to be a process where consistent and swift issuance of refugee ID cards is in need of strengthening. While the issuance of notification of recognitions is proceeding smoothly in the RSD process itself, this must be followed by an accessible right to an ID card from the competent body.

218. Rights to free movement for refugees within the country - guaranteed by Article 26 of the Refugee Convention<sup>77</sup> - are far from freely exercisable in Kenya. The encampment policy, firmly enshrined in law and recently reinforced in amendments effected by the Security Law (Amendment) Act 2014, does not appear to comply with this provision of the Convention. It is arguable that it also fails to achieve its implicit aim of controlling refugees' movement to ensure the protection of the host community. Other security measures could be taken to investigate and take steps against particular individuals seen to pose risks to the community's safety; a blanket ban on free movement of recognised refugees is not a proportionate tool to achieve this goal. In order to enable the RSD process to lead to the effective enjoyment by refugees in Kenya of their rights, exemptions to the encampment

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<sup>74</sup> Abdi, A., 'In limbo: dependency, insecurity and identity among Somali refugees in Dadaab camps,' *Refugee* (2005) vol 22(2), 6-14.

<sup>75</sup> Refugees Act 2006, section 16(1)(a).

<sup>76</sup> *Ibid*, section 16(1)(b).

<sup>77</sup> It should be noted that article 26 of the 1951 Convention does not contain an absolute right.

policy should be applied as appropriate and useful, and further avenues explored to widen opportunities for free movement where possible.

219. Economic activity can help to enhance the self-reliance of refugees and contribute to the economic life of Kenya and its citizens. Rights to work, self-employment and creation of businesses, with minimal formalities, could contribute positively to the interests of Kenya as well as its refugee population.

220. Refugees granted lawful stay rights in Kenya can be entitled, like other foreign nationals, to apply for Kenyan citizenship under certain conditions. The Kenyan Citizenship and Immigration Act 2011<sup>78</sup> provides that foreigners may secure citizenship after being 'ordinarily resident' for seven years in Kenya;<sup>79</sup> or after seven years of marriage to a Kenyan citizen.<sup>80</sup> Yet it is reported that naturalisation is accorded in almost no cases to refugees in Kenya; some interlocutors spoke of numerous applications being made in recent years, none of which have been granted.<sup>81</sup>

221. Under its Article 34, facilitating and expediting naturalisation processes is required by the Refugee Convention. Recognising and giving effect to the right of refugees to apply for naturalization could significantly encourage to their integration and enhance their potential to contribute to Kenyan society.<sup>82</sup>

#### *Voluntary Repatriation*

222. In November 2013, UNHCR signed a tripartite agreement with the governments of Kenya and Somalia for voluntary repatriation of refugees,<sup>83</sup> a controversial step that has led to limited concrete results so far. Voluntary repatriation of recognised refugees emerges as a particularly high Kenyan government priority. In early 2014, the Kenyan authorities expressed the goal of effecting voluntary repatriation of 80,000 Somali refugees by the year's end. Yet in December 2014, departure of the first group of voluntary returnees in some time was foreseen for only 485 people, in the framework of a pilot project aimed at providing assistance to spontaneous returns.

223. While over 3000 Somalis had previously registered their provisional interest in returning, it remains to be seen how many of these will come forward for repatriation in 2015. Limited financial assistance (a one-off payment of \$US 100 per person), along with transportation to the border regions, an assistance package comprising non-food and shelter items, and food support for just three months, could make this a less than ideal prospect to

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<sup>78</sup> Kenyan Citizenship and Immigration Act 2011, No. 12 of 2011.

<sup>79</sup> Ibid, section 13(1).

<sup>80</sup> Ibid, section 11. The evaluation mission heard an extraordinary report of a Kenyan national who had married a refugee, and who had moved into the camp with her spouse, rather than being able to reside in the community with him.

<sup>81</sup> It may be that some refugees recognised under UNHCR's mandate may have difficulty proving the requisite period of legal residence in Kenya, unless they hold a refugee ID card or other relevant national documentation. This was however not confirmed by specific reports recorded by the evaluation team.

<sup>82</sup> The evaluation team was informed about Tanzania's recent naturalisation process which conferred citizenship upon thousands of Burundian refugees who had been living in the country in some cases for decades, a pragmatic and principled approach that appeared to bring positive results both for the host community and for the refugees.

<sup>83</sup> *Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees governing the voluntary repatriation of Somali refugees living in Kenya, 2013*: <http://www.refworld.org/pdfid/5285e0294.pdf>



many Somali refugees in Kenya. This interest is likely to be constrained yet further by concerns about deteriorating security and increased violence in parts of Somalia.<sup>84</sup> Nevertheless, voluntary repatriation should remain as an option for those who genuinely wish to pursue it, and which UNHCR should continue to support.

224. Despite what might appear to be limited scope for truly voluntary repatriation to Somalia in the near future, the desire for this to occur on the part of the government remains apparent. The newly-adopted legislative amendments that foresee a limit on the number of refugees in Kenya to 150,000 – even though annulled by the High Court – could also contribute to a perception that at least some political elements in Kenya wish increasingly to insist on return.<sup>85</sup>

225. Recognition of refugee status through RSD should provide a firm legal and practical guarantee against *refoulement*. However, the fact that strong political interest in seeing many Somalis return voluntarily remains evident should not impact upon RSD. Security concerns, unless these relate to particular individuals and can be proven on the available evidence, should affect neither decisions in RSD processes nor the rights and material conditions of refugees who are granted a right to stay. Ensuring that voluntary return remains truly voluntary will be crucial to ensure the ongoing credibility, image of objectivity, and humanitarian character of RSD and protection.

#### *Resettlement*

226. Resettlement, albeit not analysed in detail in this evaluation, is an important protection tool for refugees worldwide, including those in Kenya who cannot find another durable solution, face ongoing persecution or other risks which pursue them in displacement, or have specific needs that cannot be addressed adequately in their host countries. Resettlement remains the desired outcome for which many refugees in Kenya hope.<sup>86</sup> However, the numbers of places for resettlement candidates out of Kenya, particularly for Somalis, who are a dominant proportion of the refugee population, have diminished steadily over recent years. At the time of this evaluation, resettlement was available to 1% of only the refugee population in Kenya.

227. With resettlement countries increasingly engaged in resettlement of Syrians out of the Middle East and of other refugee populations in different crisis regions, the readiness to continue to take refugees in large numbers, notably Somalis, out of Kenya, after many decades of doing so, has declined. The same security concerns around some parts of the Somali refugee population that preoccupy the Kenyan government also limit the interest of some resettlement countries in offering places on a priority basis to Somalis, even where rigorous exclusion safeguards are employed. Demanding background checks have also contributed to extensive delays in the resettlement process for many refugees who wait

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<sup>84</sup> UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with Regard to people fleeing Southern and Central Somalia*, 17 January 2014, HCR/PC/SOM/14/01, available at: <http://www.refworld.org/docid/52d7fc5f4.html>; UK Home Office, *Country information and guidance: Somalia: security and humanitarian situation in South and Central Somalia*, December 2014, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390329/cig\\_somalia\\_security\\_situation\\_v20.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390329/cig_somalia_security_situation_v20.pdf)

<sup>85</sup> Security Laws (Amendment) Act 2014, section 48.

<sup>86</sup> Data gathered from asylum seekers and refugees in the course of the evaluation indicated that a significant proportion of those interviewed hoped to have the opportunity to enjoy protection in another country in the future. (See section 4 below).

years for security clearance prior to departure to their resettlement countries. Security concerns have also limited the readiness of some resettlement countries to conduct resettlement selection missions to Kenya, notably to camp locations, and especially Dadaab.

228. The upshot of this situation is that resettlement opportunities, as a source of durable solutions, are limited for refugees out of Kenya, and likely to remain so. As a result, they should not be seen as a key goal of nor even viable outcome for a significant part of those undergoing RSD processes. Even though RSD may be important for identifying and confirming the status of refugees who are eligible for resettlement to some countries, notably where there are particular vulnerabilities that make their cases urgent, the reality is that it will be a potential durable solution only for a very small proportion of refugees in Kenya overall.

*Assessment of resource planning, quality activities, foreseen roles for UNHCR and other partners, and solutions*

229. Identification and mobilisation of the relevant resources for the transition is an evidently central part of the process. While efforts have been made realistically to project and plan for budget and staffing needs, overall resource constraints facing UNHCR worldwide, including in Kenya, have curbed the operation's ability to secure those to date. A serious investment in the transition process, however, appears to be crucial to guarantee sustainability of the handover in the longer run, and permit UNHCR subsequently to scale back its investment and activities over time.

230. Planning for the post-transition role of UNHCR – and other key stakeholders, including donors who can contribute ongoing support, as well as civil society with its expertise and commitment, is also a centrally relevant activity. While this appears to have been undertaken effectively, and efforts to support the activities of NGOs in particular are ongoing, more will need to be done to clarify with DRA the expectations of UNHCR's future activities. Donors appear interested and willing to engage further, an opportunity for dialogue that should be taken up by UNHCR Kenya with support from the Department of External Relations. Quality assurance will be an important aspect of ensuring a sustainable, high-quality system in the future, and while efforts have understandably focussed to date on putting the transition process together, there will be a need to address quality assurance as a priority in 2015.

231. Durable solutions has received relatively little attention in the RSD transition process as such. However, the lack of accessible prospects for refugees in particular to take up or resume their lives has the potential to cast the entire rationale of RSD into doubt. Increased efforts will thus be needed to ensure that people in need of protection can enjoy not only a fair and effective claim determination, but also the rights associated with that under Kenyan law.

*Conclusions*

232. There is a clear commitment on the part of DRA – both at the level of senior management and the officials who work in demanding conditions on a daily basis with asylum seekers and refugees – to continue building the capacity of the Department and equipping it to identify and provide protection to refugees more effectively in the future.

However, there are serious constraints that should be addressed during the transition process, in order to ensure that Kenya is not left with responsibility for a refugee challenge that it cannot manage effectively and independently, with its own limited resources, and its increasing, but still limited, trained personnel.

233. Among the evident challenges, there are several in particular that emerge from an examination of the RSD process as it functions at present. These are, firstly, establishing and maintaining efficient processes that can deliver protection to people who need it, through fair and accurate decision-making in a swift manner. Secondly, appropriate use of streamlined procedures that afford necessary basic safeguards and are manageable for DRA in the longer term, as well as *prima facie* recognition for appropriate caseloads, must be a key element part of this strategy, and must be in place in a sustainable way before transition can be said to be complete.

234. Thirdly, ensuring the progressive build-up of DRA's capacity, through recruitment, training and crucially, retention of competent staff, will be fundamental to the success of the transition process. Third, continuing efforts must be invested in giving effect to refugee status leading to durable solutions, notably that of permanent residency status. This includes work to encourage opportunities to pursue livelihoods and economic activity, as well as greater free movement, and potentially, prospects of citizenship for those who may qualify for it. While these challenges involve important resource issues, a lack of immediately-available funds cannot be an acceptable reason for failing to look for ways to overcome them. Moreover, there are concrete steps, at the levels of process, administration and policy that can and should be taken to continue to strengthen fair and efficient procedures, and progressively build up DRA's capacity to fulfil its tasks.

### 3. THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR RSD IN KENYA AND THE ENCAMPMENT POLICY

235. The purpose of this section is to set out the background and recent legal history regarding the transition of UNHCR's RSD in Kenya to the Department of Refugee Affairs (DRA) of the Kenyan government. In order to do this, it will address the following issues:

- A brief overview of academic and civil society discussion of UNHCR's RSD in Kenya;
- An examination of the 'constitutionalisation' of RSD in Kenya - that is to say its incorporation into national law starting from 2006;
- Exceptional action of the Kenyan Ministry of Interior in 2012/3 and 2014 regarding asylum seekers and refugees which raised issues about the constitutionalisation of the field;
- Corrective action taken by other state actors in respect of the use of exceptional measures;
- The role of UNHCR in this constitutionalisation from an RSD actor outside national law to a participant in the constitutionalisation process.

This section uses Loughlin's definition:

'Constitutionalisation is the term used for the attempt to subject the exercise of all types of public power, whatever the medium of its exercise, to the discipline of constitutional procedures and norms.'<sup>87</sup>

236. This is a valuable tool as the process which has been going on in Kenya since 2006 is the incorporation of the Kenyan international protection duty towards refugees into national law and the establishment of state institutions with responsibility for the application of that law in accordance with the constitution. It permits an examination of exceptional action taken by the Ministry of Interior in 2012/3 and 2014 in light of that activity of constitutionalisation. The national constitutionalisation project means the incorporation of RSD into national structures.

237. This requires the adoption of laws and regulations, their application by the national bureaucracy (or actors subject to national rules), the subordination of the system to national constitutional guarantee arrangements, first and foremost judicial control of administrative action, executive responsibility in a framework of separation of powers. Any cross-fertilisation activities in pursuit of objectives external to those designated in the national legal framework must be subject to anxious scrutiny by oversight and judicial authorities with power to determine legality and legitimacy.

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<sup>87</sup> Loughlin, M. (2010) 'What is Constitutionalisation?' in Dobner, P. and Loughlin, M. (eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press, 47.

238. Before commencing this section it is important to bear in mind the authority and respect with which UNHCR is held in Kenya. During the course of the evaluation, national interlocutors showed great respect for to the opinions of UNHCR officials and only rarely expressed views contrary to them. The government officials interviewed in the course of the evaluation revealed enormous regard for UNHCR and a willingness to engage with the institution at all levels. This respect is not only evident in the DRA and civil society, but is also apparent from daily practices in Kenya in which UNHCR interacts with local authorities.

239. In short, when UNHCR speaks, Kenya is attentive. This may not always result in the action for which UNHCR might advocate, but it does indicate substantial leverage for the organization. Respect always carries responsibilities – UNHCR is actively engaged in the constitutionalisation of refugee protection in Kenya through the transition. Attention is needed to ensure that its actions, as its role evolves from the delivery of RSD (and other services) to the more traditional supervisory role set out in Article 35 of the Refugee Convention,<sup>88</sup> are consistent and coherent as they will be scrutinised at many levels within the Kenyan bureaucracy and civil society and have substantial impact. Inconsistency in UNHCR’s approaches to constitutionalisation may have negative externalities for refugees in Kenya.

#### *UNHCR and RSD in Kenya – background and critique*

240. The role of UNHCR in RSD has been a matter of wide interest for some time. In 2013, UNHCR carried out RSD alone or together with states in 75 countries,<sup>89</sup> although it has handed over of RSD to national authorities in a number of cases in recent years. This is normally accompanied by a continuing and often quite intensive role for UNHCR in the RSD process. The viability of UNHCR’s direct RSD activity has been the subject of two types of critique. On the one hand there is the problem of demand – with increasing calls on its RSD capacities by virtue of rising numbers of persons of concern in some countries, and some within UNHCR questioning the sustainability of the current arrangements. The Director of International Protection, Volker Türk, stated to the 60<sup>th</sup> meeting of the Standing Committee of UNHCR on 1 July 2014:

‘In 2013, UNHCR experienced a dramatic increase in individual applications for refugee status determination [RSD], registering 203,200 individuals or 19 percent of the 1.1 million individual applications for asylum or refugee status lodged during that year. This is a 75 per cent increase from 2012... One thing is clear: without more robust State engagement, resources, and alternatives to individual processing, dealing with such a high number of individual RSD applications registered by UNHCR is not sustainable.’<sup>90</sup>

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<sup>88</sup> Convention Relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series vol. 189, 137.

<sup>89</sup> UNHCR, ‘Statistical Yearbook 2013’, p 58.

<sup>90</sup> UNHCR (2014) ‘60<sup>th</sup> Meeting of the Standing Committee – Agenda Item 2: International Protection (July 2014), Volker Türk, Director of International Protection’. Available from: <http://www.unhcr.org/53c8d1449.pdf>, 5

241. The second critique of UNHCR's role in RSD has come from academics and practitioners. Moulin and Nyers outline the uneasy articulation of state sovereignty and UNHCR RSD from the perspective of territoriality. Taking a sociological perspective, they examine how refugees whose only claim to protection is UNHCR mandate status try to live with the lack of territoriality which is an inherent component of state sovereignty unavailable to an international organisation.<sup>91</sup> Their sociological approach captures the dilemma which faces all refugees who only have UNHCR mandate status - tremendous dependency on UNHCR to protect them from potentially hostile national authorities.

242. Every step of the mandate refugee's life depends on the intercession of UNHCR with the national authorities to negotiate even the most basic aspect of residence rights. There is little chance for the mandate refugee to change status as he or she is captured only by the UNHCR process and not normally inserted into a national asylum and immigration regime which may lead to permanent status and citizenship. Mandate status refugees tend to remain in a situation of precariousness dependent on UNHCR as interlocutor with state sovereign authorities.

243. Kagan addresses a different problem related to UNHCR RSD and is among the most outspoken of the legal academic critics of UNHCR RSD both in general and in specific.<sup>92</sup> His criticism is based on a number of arguments. The first, documented by practitioners in particular, relates to the standard of fairness of UNHCR's RSD which, according to Kagan, leaves much to be desired. Secondly, UNHCR RSD is based on a fundamental contradiction: refugee protection is premised on effective government action but UNHCR assumption of RSD is premised on at least partial government failure. UNHCR's engagement in RSD in Kenya has been the subject of academic critique specifically by Abuya and Wachira who, in comparing RSD in Kenya with that in Egypt, come to the conclusion that there are fundamental problems with fairness.<sup>93</sup> The work of both authors is based on extensive and detailed research including interviews with asylum seekers in numerous countries.

244. In so far as there is academic analysis of the increased UNHCR engagement with RSD in Kenya after 1990, there seems to be agreement among those academics who have looked at the situation that the assumption of RSD responsibility by UNHCR may have proved detrimental regarding the quality of protection. After UNHCR had assumed responsibility for RSD, in at least some cases, 'it was UNHCR which denied a proper appeal to asylum-seekers and which flouted the [Organisation of African Unity (OAU)]<sup>94</sup> Convention.'<sup>95</sup>

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<sup>91</sup> Moulin, C. and Nyers, P. (2007) "'We Live in a Country of UNHCR" – Refugee Protests and Global Political Society', *International Political Sociology* 1(4): 356-372.

<sup>92</sup> Kagan, M. (2006) 'The Beleaguered Gatekeeper: Protection Challenges posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law* 18(1): 1-29; Kagan, M. (2002) 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002', *American University of Cairo Forced Migration and Refugee Studies Working Paper No 1*; Kagan, M. (2011) "'We Live in a Country of UNHCR": The UN Surrogate State and Refugee Policy in the Middle East', *UNHCR Working Paper No 201*.

<sup>93</sup> Abuya, E. O. and Wachira, G. M. (2006) 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?', *Netherlands International Law Review* 53(2): 171-204.

<sup>94</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, UN Treaty Series vol. 1001, 45.

<sup>95</sup> *Ibid*, 81.

245. It must be borne in mind that there are relatively few academic commentators on the subject and it is often the same authors who are highly critical of the UNHCR's RSD in general who have examined the Kenyan experience. The criticisms focus on unintended consequences which resulted from the 'scrap[ing] the positive aspects of Kenya's pre-1991 refugee policy' such as a *laissez-faire* approach to integration and rights to work, education and free movement.<sup>96</sup>

246. A number of non-governmental organisations (NGOs) have also been critical of UNHCR's RSD. The US based International Refugee Rights Initiative is among the NGOs which expressed concern about the lack of independent appeal procedures and the accessibility of evidence for asylum seekers within UNHCR's RSD systems. This critique was made ahead of the UNHCR Executive Committee meeting on 3-7 October 2005 and is not singular.<sup>97</sup>

247. However, there are a myriad of issues and questions which beleague any effort to shift the main responsibility of RSD from UNHCR to national authorities, in particular where UNHCR has been undertaking the activity for some time. The first and most important is the assessment of the state authorities' capacity and willingness to provide protection in accordance with their international obligations and most specifically from the perspective of UNHCR with the Refugee Convention. A legal analysis of that willingness and capacity entails an examination of the extent to which the national authorities have embedded refugee protection into their national law – the exercising of constitutionalism. The principle of state sovereignty entails that where states take over RSD on their territory, they are entitled, under international law, to do so. There may be very compelling practical issues and problems which cause states to refrain from exercising their sovereign powers but it is important always to remember that those powers are very real.

#### *The evolution of UNHCR's RSD in Kenya*

248. UNHCR's involvement in RSD in Kenya has something of a chequered history. Until 1991, UNHCR only participated as an observer/adviser in Eligibility Committees, which applied the Refugee Convention but not the OAU Convention definition.<sup>98</sup> Decisions were taken by the Kenyan authorities and in principle judicially reviewable, though such review seems not to have been common in practice.<sup>99</sup> The evaluation team was informed about the case of a Ugandan refugee who has been living in camps in Kenya since the 1980s whose status is still evidenced by a Kenyan-issued refugee document dating from 1987. When Eligibility Committees became overburdened in the face of rising numbers of refugees in the early 1990s (due to conflict in Uganda, Somalia and Sudan), the Kenyan government requested UNHCR to set up refugee camps. This resulted in a handover of sorts to UNHCR (which engaged other partners including the Jesuit Refugee Service) in 1992.

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<sup>96</sup> Verdirame, G. (1999) 'Human Rights and Refugees: The Case of Kenya', *Journal of Refugee Studies* 12(1): 54-77, 58; HRW (2002) 'Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala'. Available from: <http://www.hrw.org/reports/2002/kenyugan/kenyugan.pdf>, 57.

<sup>97</sup> UNHCR (2005) '56th Session of the Executive Committee – Report on the Annual Consultations with Non-Governmental Organizations, 27-29 September 2009, Palais des Nations – Geneva, Switzerland. Available from: <http://www.unhcr.org/4381c5832.html>, 16.

<sup>98</sup> HRW (n 10), 57.

<sup>99</sup> Verdirame, G. and Harrell-Bond, B. (2005) *Rights in Exile: Janus-Faced Humanitarianism*, Oxford, Berghahn, 81.

249. Two academic commentators who have examined the subject, Verdirame and Harrell-Bond, express uncertainty as to whether the assumption of RSD responsibility was intended by UNHCR or reluctantly accepted. Their research indicates that at the time, UNHCR attempted to persuade the Kenyan government to resume RSD, expressing the view that it would not necessarily be better-placed to conduct RSD, as it had only one protection officer in Kenya in 1992. According to Verdirame and Harrell-Bond, at the time of their research in 2005, the Kenyan government had never officially accepted UNHCR RSD as full refugee recognition in Kenya and only viewed UNHCR protection documents as a mere invitation to consider the holder as if he or she were an officially recognised refugee.<sup>100</sup> A somewhat different history is provided by Human Rights Watch (HRW) which describes an 'all-or-nothing' approach to the assumption of responsibility on the part of the organisation which 'usurped' the government's RSD function in the country at the time of mass influx in the early 1990s.<sup>101</sup>

250. The process whereby the Kenyan authorities began to (re)constitutionalise refugee protection post-1992 commenced with the adoption of the Refugees Act 2006 which came into force in 2007.<sup>102</sup> This was followed three years later by the adoption of the Refugee Regulations in 2009, providing the detail necessary for the Act's application.<sup>103</sup> Not all provisions of the procedure rules have been brought into force (see below). One weakness inherent in this process of constitutionalisation is the relatively *sui generis* position of the camps. By 2011 the camps had been consolidated into two places - Dadaab and Kakuma (both with multiple camps at each location). While the Kenyan law provides for the Minister to determine places for transit and residence of refugees and duties for the camp managers, neither the Act nor the Rules are specific about who should actually be living there. However, DRA camp directors were appointed in 2009 and are responsible for the camps under national law.

251. There are extensive responsibilities for them set out in the Regulations. Yet it must be recognised that as the full cost of the camps is carried by the international community, the actual power of national camp management is circumscribed in its exercise. For instance, there are approximately 500 Kenyan police officers (both national and administrative) deployed in teams in Dadaab, whose presence is the result of an agreement between the Ministry of Interior and UNHCR to provide security in the camp, the full cost of which is paid by UNHCR. Operational direction under such circumstances must at least in practice be shared. Accordingly the national camp directors operate in close cooperation and conjunction with UNHCR, World Food Programme (WFP) and other international organisation staff in the camps.

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<sup>100</sup> *Ibid*, 82.

<sup>101</sup> HRW (n 10), 57.

<sup>102</sup> The Refugees Act 2006, Kenya Gazette Supplement No 97 (Acts No 13).

<sup>103</sup> Refugees (Reception, Registration and Adjudication) Regulations 2009, Kenya Gazette Supplement No II of 27 February 2009.



252. The lack of clarity about the status of the camps has resulted in all sorts of irregularities such as Kenyan citizens who have resided and/or collected rations in the camps (much diminished following the biometric registration and verification of camp residents for food allocation purposes).<sup>104</sup> Similarly, the lack of any mechanism to require anyone who has registered at a camp to leave it, if their claims are refused, could have diminished the perceived importance of RSD there.

253. For instance, the evaluation team was advised that there are a number of South Sudanese living in Dadaab who are now entitled to refugee documentation as on the basis of their *prima facie* recognition. The ID documents are ready for collection but as the South Sudanese already have their ration cards and so access to food and all other services available to refugees living at the camp, they have not gone to get them. Within the camp, a refugee document appears to provide no additional benefits beyond what is available to asylum seekers with a biometric ration card, while rejection in an RSD procedure may result in the termination of the biometric food card. Similarly, the evaluation team met a number of Burundian nationals living in the Dadaab camp whose RSD had ended in rejection. As a consequence, their ration cards had been deactivated, which resulted in destitution and hunger. The realities on the ground in the camps in Kenya are very different from the urban centres where asylum seekers and refugees receive no material support from UNHCR at present with the exception of some very vulnerable categories of persons with specific needs (although UNHCR is taking steps aimed at extending health cover to more urban residents).

254. Nevertheless, recognised refugees in urban areas have also failed to appear to collect their Notification of Recognition letters in a number of cases. This raises questions about whether refugees are aware and informed of the process; or if they perceive concrete benefits in holding refugee status, that warrant collecting the documentation to prove it. This phenomenon would in any case appear to confirm the need substantially to strengthen the rights and comprehensive solutions associated with refugee status in Kenya (see paras 203-215 above). Some authorities have been reported as failing to recognise the yet-to-be-gazetted Notification of Recognition document, highlighting the urgent need for awareness-raising and briefing of all authorities across security services and other potentially concerned authorities. Another reason for the failure to attend and collect Notification of Recognition documents in Nairobi might relate to fear on the part of refugees of forcible relocation to camps, if they approach DRA's office.

#### *The Refugees Act 2006*

255. The Kenyan Parliament passed the Refugees Act 2006, which provides the current legal basis for national jurisdiction over all aspects of refugee protection in Kenya. It paved the way for the assumption of RSD by the Kenyan authorities, which is the subject of this report. It has not yet been fully implemented, as a number of key secondary measures are still outstanding, for instance the establishment of an appeal instance. However, in accordance with the Act and subsidiary legislation, as from 1 July 2014 all RSD decisions are formally made by the Kenyan authorities and issued on the basis of the Act. In the below review of aspects of the Act, the analysis is limited to those provisions which are important

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<sup>104</sup> ALNAP (2010) *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities*, September 2010, 25. Note that in March 2014 UNHCR underwent a verification process to replace over 80,000 food ration cards in Dadaab. See UNHCR (2014) 'UNHCR Dadaab Update 05/14, 1-31 March 2014'.

for an examination of the RSD transition. Thus this description is not a full analysis of the totality of the Act.

256. The Refugees Act provides for two categories of international protection:

- Section 3(1) defines the statutory refugee: a person who owing to a well-founded fear of persecution for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion;
- According to section 3(2), a *prima facie* refugee is a person owing to external aggression, occupation, foreign domination or events seriously disturbing public order etc;

257. Sub-section (3) provides that the Minister may declare a class of persons *prima facie* refugees as defined in subsection (2), but also amend or revoke such declaration. Under section 3(4), the Minister can expressly exclude or exempt a person from a declaration under 3(3).

258. Section 3(1) reflects the Refugee Convention definition of a refugee. The *prima facie* procedure reflects Kenya's obligations under the OAU Convention, closely following the definition of a refugee under that instrument. Under the Act, the *prima facie* procedure can only be triggered by a decision by the Minister published in the Official Journal (Gazette). The most recent example of this procedure is the publication in the Gazette of the opening of a protection scheme under section 3(2) for persons from South Sudan seeking international protection. Somalis from South and Central Somalia are also provided with status on a *prima facie* basis.

259. Section 16(1) provides that every recognised refugee and member of his or her family in Kenya are (a) entitled to rights and subject to obligations contained in the international conventions to which Kenya is a party (e.g., the Refugee Convention); and (b) subject to all laws in force in Kenya. Asylum is defined in the Act as shelter and protection granted by the Government to persons qualifying for refugee status in accordance with the Act (and international conventions) referred to in section 16(2). More controversially, section 16(2) provides that the Minister may by notice in the Gazette and in consultation with the host community designate places and areas in Kenya to be (a) transit centres for temporary accommodation for asylum seekers during the RSD process; and (b) refugee camps. Section 16(4) states that refugees and their family members are subject to the same restrictions as all other foreigners as regards wage earning employment.<sup>105</sup>

260. Sections 4 and 5 of the Act include provisions on disqualification (or exclusion) and cessation which are largely consistent with international standards. Section 6 provides the legal basis for the establishment of the Department of Refugee Affairs which, in addition to being a public office, is also given responsibility for all administrative matters concerning refugees in Kenya, and in that capacity, for co-ordinating activities and programmes relating to refugees.

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<sup>105</sup> Article 17(2)(a),(b) and (c) of the Refugee Convention provides that where a refugee has completed three years' residence in the state or has a spouse or children with nationality of the host state, restrictive measure to protect the national labour market should not be applied to him or her.

261. The post of Commissioner of Refugee Affairs, the head of the DRA, is created by section 7. The office must be one within the Public Service. Under Kenyan law, this requires the post holder to be appointed and the appointment published in the Gazette. This has not yet happened. There have been three acting Commissioners, all of them civil servants seconded from other parts of the administration, but the necessary notice in the Gazette has not been published; hence their title as 'acting'. This legal situation creates a sense of impermanence. The tasks of the Commissioner are set out in the Act. A Refugee Advisory Committee is also foreseen under the Act to assist the Commissioner, under section 8. This committee, which does not deal with the practicalities of RSD, was re-established in 2014 (see para 107 above).

262. A Refugee Appeal Board is to be established under section 9. Its composition is clearly designated in the Act. So far it has not been established, however, and it appears from national interlocutors that there was some discussion about whether there should be some amendment to the Act to provide that the appeal function of this yet to be established body be subsumed into those of a separate tribunal established under separate legislation.<sup>106</sup> If the Board is established, its members' names must be published in the Gazette. Anyone aggrieved of a decision by the Commissioner is entitled to appeal to the Board and against a Board decision to the High Court.<sup>107</sup> Since the assumption of responsibility for issuance of refugee status recognition notifications by the DRA on 1 July 2014, no negative decisions have been issued. Some lawyers apparently take the view that should a negative decision be issued in the absence of the establishment of the Board, a legal challenge directly to the High Court would be open.

263. Section 11 of the Act sets out rather strict time periods within which the Commissioner must reach decisions on applications. While asylum seekers are required to apply within 30 days of arrival in Kenya, their applications must be referred to the Commissioner who is obliged to hear them within 90 days. Thereafter the Commissioner has 14 days to notify the applicant of his or her decision (with reasons, where it is negative).<sup>108</sup> The period available to the Commissioner to take a decision may be extended on application by a further 90 days.<sup>109</sup> The maximum six month period for DRA's consideration of an asylum claim following the assumption of responsibilities on 1 July 2014 ended on 1 December 2014. Lawyers and NGOs were well aware of the end of this period and the possibility of legal action to examine the legality of failure to issue decisions within the prescribed timeframe for post-1 July 2014 claims.

264. Section 14 provides that every refugee and asylum seeker must be issued with a refugee ID or pass and permitted to remain in Kenya in accordance with the Act. Section 21 provides procedural protection against expulsion of a refugee but permits such expulsion on grounds of national security or public order, grounds rather wider than those found in Article 33(2) of the Refugee Convention. There is a duty of confidentiality contained in section 24 which prohibits any DRA employee or agent from disclosing information

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<sup>106</sup> Namely the Kenya Citizens and Immigration Service Appeals Tribunal established by section 23 of the Kenya Citizenship and Foreign Nationals Management Service Act, No. 31 of 2011. For a discussion on the issue of appeals, see Part 3.3.7 below.

<sup>107</sup> Refugees Act 2006, section 10.

<sup>108</sup> *Ibid*, section 11(5)-(6).

<sup>109</sup> *Ibid*, section 12(2).

acquired under the Act except in the course of duties or with the consent of the Commissioner.

265. There are two aspects of the current Act which raise concern. The first is implementation. The fact that neither has the Commissioner's appointment been published in the Gazette (nor was that of his predecessors) nor has the Appeal Board been established, is problematic. These shortcomings do not engender confidence in the wider commitment of the government to the constitutionalisation of RSD. Secondly, the position of the camps under section 16 is contentious. This issue will take further shape in the context of the Ministry of Interior actions in 2012, 2013 and 2014 requiring refugees and asylum seekers to relocate to the two camps which will be discussed below.

266. A bill proposing to amend the Refugees Act, which would make a number of significant changes, if adopted, was presented to Parliament in October 2014, but had not been debated by the end of 2014. A new Senate Bill proposing further amendments was also published in December 2014.

*The Refugees (Reception, Registration and Adjudication) Regulations 2009*

267. In 2009 the Kenyan government adopted the Refugee Regulations required to provide for reception, registration and adjudication of refugee claims. Reg. 3 provides for the reception of asylum seekers at the reception centre nearest to where he or she makes the application. The asylum seeker must present him or herself to a registration officer (defined as 'an officer designated to register asylum seeker[s]'). More detail about the registration procedure is provided in section 2, suffice it here to note that there are relevant powers for the Commissioner to designate registration procedures and clarify the duties of registration officers. Registered asylum seekers are issued with a pass which is the key for the procedure.<sup>110</sup>

268. There is a duty of confidentiality in the Regulations which, like that in the Act, only permits disclosure of information in accordance with duties or the consent of the Commissioner.<sup>111</sup> Provision is made for vulnerable categories of asylum seekers. The adjudication process is specified in the Regulations with a reinforcement of the time limits set out in the Act.<sup>112</sup> The Regulations provide substantial detail about how the RSD procedure is to be conducted consistent by and large with UNHCR recommendations. The regulations also cover documentation for refugees and procedures for withdrawal of status. Reg. 47 repeats the power in the Act to expel a refugee on grounds of national security or public order. The schedules to the Regulations contain the myriad forms which apply to the procedures.

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<sup>110</sup> Refugees Regulations 2009, Reg. 13.

<sup>111</sup> *Ibid*, Reg. 11.

<sup>112</sup> *Ibid*, Reg. 18 et seq.

## *The Encampment Policy*

269. The process of constitutionalisation of RSD in Kenya faced a complex and difficult challenge first in 2012 then again in 2014, each time with quite different outcomes. On both occasions, national security concerns of the Ministry of Interior were central.

270. On 10 December 2012, apparently at the instigation of the Ministry of Interior, DRA issued a statement that as a result of a series of grenade attacks in urban areas the authorities had decided to stop all registration of asylum seekers in urban areas immediately. Further, all asylum seekers should be directed to Dadaab and Kakuma for registration and RSD. Further, Somali refugees living in urban areas would be repatriated. On 18 December 2012, the Kenyan authorities issued a press release stating that they had decided to cease reception, registration and to close all registrations centres for refugees in urban areas with immediate effect. From that time forward, asylum seekers and refugees would be hosted exclusively in refugee camps. Almost a month later, on 16 January 2013 the instructions were issued to give effect to the decision.

271. A first phase was announced to commence on 21 January 2013, targeting 18,000 people to be rounded up and taken at first instance to a local stadium in Nairobi. From there, they were to be taken to Dadaab and Kakuma camps and ultimately to their home countries. As mentioned earlier in this report, there are an estimated 50,000 urban refugees in Nairobi alone, about 350,000 residents in Dadaab camp and 150,000 in Kakuma.

272. An objective of the order was to oblige all asylum seekers and refugees to register in one of the two main camps. This remains a central objective of DRA. Once an individual is registered in a camp, he or she must obtain from the camp director a pass to travel in Kenya outside the camp. Problems around processing and issuance of movement passes are ongoing: the evaluation team were informed that a non-governmental provider of legal assistance receives up to 50 telephone calls per day from police authorities in their region where refugees and asylum seekers have been detained for failing to have a valid movement pass. These passes are time limited and issued only on a limited number of grounds. Thus any asylum seeker who does not wish to live in a camp will not want to register in a camp but to find a way to register in an urban centre.<sup>113</sup> For refugees, the issue is not dissimilar as it appears that when their current documents expire, at least in theory, they will be required to go to the camps to register to obtain extensions. For a short period in March 2013, and in November 2014, however, such registration was taking place in Nairobi on an exceptional basis for vulnerable asylum seekers (see section 2).

273. In *Kituo Cha Sheria v Attorney-General*,<sup>114</sup> petitions were consolidated and introduced before the High Court of Kenya on behalf of Kituo Cha Sheria, an NGO and UNHCR implementing partner, and seven named petitioners against the 'encampment' order, requesting the quashing of the Government Directive and an injunction against the commencement of the action. UNHCR and the Katiba Institute made *amicus curiae* submissions supporting the position of Kituo Cha Sheria and the petitioners.

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<sup>113</sup> Agier published a detailed account of life in Dadaab which makes most sobering reading. Agier, M. (2010) *Gérer les indésirables: des camps de réfugiés au gouvernement humanitaire*, Paris, Flammarion. It is also worth remembering that the European Court of Human Rights found in *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9 that forcible return to Dadaab camp constituted inhuman or degrading treatment on account of the conditions in the camp.

<sup>114</sup> *Kituo Cha Sheria v Attorney-General* (Petition No 19 and 115 of 2013) [2013] eKLR

274. The legal arguments against the guidelines on relocation of urban refugees to the camps were based on the Kenyan Constitution in the first place. Article 28 protects the right to dignity, Article 29 prohibits arbitrary and discriminatory acts, and Article 39 safeguards the right of free movement. Additionally, and in a second line of argument, the petitioners argued a violation of Kenya's international obligations under the Refugee Convention and the International Covenant on Civil and Political Rights (ICCPR).

275. The facts of the petitioners are representative of the urban refugees in Nairobi, some holding mandate recognition only, others married to Kenyan nationals or with Kenyan national children. The argument of the government was that security concerns required that those urban refugees who were not registered with the Kenyan authorities or were evading registration and living in the cities return (or go) to the camps. In the opinion of the Kenyan authorities, most refugees and asylum seekers holding UNHCR mandate certificates are not recognised by Kenyan law as refugees as they do not have Kenyan-issued refugee IDs or passes.

276. It is clear that the Kenyan Interior Ministry considered the presence of refugees in urban areas who had not been registered and documented by the national authorities as a national security threat. In an extensive and well-argued judgment of July 2013, the High Court gave the petitioners relief first in accordance with the Kenyan Constitution and secondly in light of Kenya's international obligations. An injunction was granted against the enforcement of the encampment directive and the Government Directive itself was quashed.

277. The evaluation team was advised that the Kenyan Attorney-General has filed an appeal notice against the decision. There has not been action to pursue the appeal but it appears that under Kenyan administrative law, there is no fixed deadline within which this must take place. This means that the Attorney-General may commence the appeal proceedings when deemed appropriate. There is the possibility for the petitioners to commence a striking out procedure for failure to pursue the appeal but no such action is currently envisaged according to our interlocutors. Meanwhile, the Kenyan authorities have respected the High Court's judgment, including the injunction, but registration was not resumed in urban areas until March 2014.

278. In 2014, national security issues came to the fore in Kenya again with consequences for asylum seekers and refugees. First, the Cabinet Secretary published in the Gazette an announcement under section 16(2) of the Refugees Act designating the camps in Dadaab and Kakuma as refugee camps. On 26 March 2014, the Government issued a new directive via a press release stating that, owing to the emerging security challenges in urban centres and the need to streamline the management of refugees, in accordance with powers conferred by section 16(2) of the Refugee Act, (a) all refugees residing outside the camps are directed to return [or go] to them immediately; (b) all Kenyans were called upon to report to the police any refugee or illegal immigrants found outside the designated camps; (c) 500 police officers would be deployed in Nairobi, Mombasa and environs to enhance security; (d) in Mombasa a special operation by security agencies would be commenced.

279. As part of a larger operation entitled ‘Operation Linda Nchi’, aimed at preventing terrorist attacks from Al-Shabaab in Nairobi, a security operation named ‘Operation Sanitization of Eastleigh’ (‘Usalama Watch’) was launched on 5 April 2014, in conformity with the directive, under which Kenyan police authorities were called to remove adherents to Al-Shabaab from the country and to search for weapons in Eastleigh, Nairobi.<sup>115</sup>

280. As of May 2014, approximately 350 persons of Somali ethnicity (out of a total number of 481 deportees) had been deported to Mogadishu.<sup>116</sup> At least six of those persons were registered refugees.<sup>117</sup> The operation was carried out with alleged ethnic profiling,<sup>118</sup> unlawful detention and deportation, while allegations of corruption have also been made regarding police officers accepting bribes from members of the public in exchange for avoiding arrest or detention.<sup>119</sup>

281. The Independent Policing Oversight Authority (IPOA), a public authority in charge of police oversight, found that the operation was in fact poorly coordinated and supervised: officers often conducted the operation in unmarked vehicles, and often kept poor arrest and detention records, with examples of detainees’ details recorded on loose papers rather than the cell register. This was deemed to create major opportunities for bribe-taking and harassment by the police.<sup>120</sup> At the time of drafting, IPOA was investigating 29 related cases of extortion.<sup>121</sup>

282. In many cases, detention was applied in violation of the provision on a maximum time-limit of 24 hours for detention prior to arraignment in court, which is constitutionally entrenched. IPOA reported 184 detentions beyond 24 hours in Kasarani and 54 in the Industrial Area Police Station in April 2014.<sup>122</sup> The operation also led to detention in substandard conditions, as the Kasarani police station reportedly hosted well over its 100 person capacity in April 2014.<sup>123</sup>

283. Ten petitioners commenced an action before the High Court in *Samow Mumin Mohamed v Cabinet Secretary*,<sup>124</sup> all of them refugees holding expired refugee ID cards living in Nairobi. In this case, neither Kituo Cha Sheria nor UNHCR itself intervened either directly or with *amicus curiae* submissions. The legal arguments in the second case followed closely those made in the 2012 case – starting with the Kenyan Constitution, they argued their right to dignity and free movement was being violated. They claimed that the Gazette notice designating the camps as the only places where refugees should live must be quashed as inconsistent with the constitution together with a declaration that the press release announcing the action was null and void for violation of the constitution.

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<sup>115</sup> IPOA (2014) ‘Monitoring Report on Operation Sanitization Eastleigh’, 14 July 2014, 2-3.

<sup>116</sup> *Ibid*, 7, plus UNHCR figures.

<sup>117</sup> UNHCR figures; and Amnesty International (2014) ‘Somalis are Scapegoats in Kenya’s Counter-Terror Crackdown’, AFR/52/003/2014, 11.

<sup>118</sup> IPOA mentions that 1,474 out of 2,724 persons screened as at May 2014 were ethnic Somalis. IPOA (n 31), 15.

<sup>119</sup> *Ibid*, 3.

<sup>120</sup> *Ibid*, 6.

<sup>121</sup> *Ibid*, 6.

<sup>122</sup> *Ibid*, 7.

<sup>123</sup> *Ibid*, 10.

<sup>124</sup> *Samow Mumin Mohamed v Cabinet Secretary* (Petition No206 of 2011) [2014] eKLR.

284. The facts of the case are most interesting but go beyond the requirements of this review. The High Court held that, while the refugees are entitled to fundamental rights under the Constitution and international conventions to which Kenya is a party, the directive did not violate those rights and was adopted in conformity with the law. A key element of the judgment is the finding of the judge that the petitioners all had expired ID cards which must be renewed. While the Kenyan authorities did not dispute that these persons were refugees, under the terms of the Regulations on identification documents they were required to present themselves to the registration centres still open – in Dadaab or Kakuma as the urban centres no longer were. Thereafter they could apply for exemption from the requirement to live in the camps and permission to go to Nairobi.

285. The court considered the Regulations on the issue of movement pass to leave the camps and found that the purported limitation on the conditions for the issue of passes was too narrow and violated Article 47(1) of the Constitution, as the discretion of the Commissioner and officers must enable a consideration of the individual circumstances.<sup>125</sup>

286. This finding was not repeated in operative part of the judgment and is presented as *obiter dicta*.<sup>126</sup> It is of some significance nonetheless as it would appear that the court was ready to countenance a requirement to go to register at one of the camps but was sympathetic to the claims of established urban refugees to an entitlement to continue their lives and livelihoods in those urban centres.

287. Nevertheless, the court found that the petitioners had no fear of persecution if required to go to the camps. The claim was dismissed. UNHCR did not officially support the petition to the High Court. It is understood that the petitioners have appealed against the judgment but until recently they have not pursued their appeal. However, apparently an international NGO is putting some resources and assistance at their disposal so it is possible that the appeal will be pursued in the future. The action against urban refugees went ahead with the consequences described above.

288. As mentioned above, a series of complaints about the execution of the Government Directive were made to the Kenyan IPOA, which launched an investigation into what had become known as Usalama Watch. In a fairly strongly worded report published on 14 July 2014, IPOA concluded that the operation was conducted in contravention of the rule of law and of constitutional guarantees such as Article 238(2) of the Constitution, providing for respect for democracy and human rights when national security is pursued. The report is publicly available and sets out in some detail the various human rights violations alleged to have taken place at the instigation of the Kenyan police in the operation. The Authority is currently conducting investigations on complaints with a view to taking criminal or disciplinary action,<sup>127</sup> recalling the right of any person to seek compensation against unlawful detention.

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<sup>125</sup> *Samow Mumin Mohamed*, para 24.

<sup>126</sup> *Ibid.* Judge Majanja uses the words ‘in my view...’

<sup>127</sup> IPOA (n 31), 18.



289. It appears that, after the publication of the IPOA report, the Kenyan authorities ceased to enforce the Usalama Watch action against urban refugees. In late 2014, it was apparent that with the tightening of DRA control over registration, there are fewer asylum seekers and refugees who fail to have Kenyan issued documentation at least among those who present themselves to the authorities. It is not clear whether there is an increase in undocumented potential refugees living in urban centres but unwilling to present themselves to claim asylum.

*The Security Laws (Amendment) Act 2014*

290. In late 2014, significant legislative changes to the Refugees Act were adopted as part of efforts to strengthen security and provide for tougher anti-terrorism measures. The Security Laws (Amendment) Act 2014 amends a number of Kenyan statutes, including several new provisions which could potentially lead to significant negative consequences for asylum-seekers and refugees. These include section 45, which requires refugees to present themselves immediately to the Commissioner upon their entry into Kenya, without the previous period of 30 days in which they were permitted to do so.<sup>128</sup>

291. Under section 46,<sup>129</sup> a strict requirement requires asylum seekers and their families to remain in designated refugee camps until their applications are determined, effectively providing for a rigid application of the encampment policy in all cases. Section 47 provides that no refugee or asylum seeker may leave a camp without the permission of the Refugee Camp Officer,<sup>130</sup> enshrining in legislation a more rigid practice than that currently in force, under the 'exemption policy' that was described to the evaluation team,<sup>131</sup> and has apparently been applied for some time to permit asylum seekers and refugees exceptionally to live in urban areas. In a further change, section 48 also provides that the number of refugees and asylum seekers in Kenya shall limited to 150,000, a number which can be adjusted by the National Assembly for a limited period of six months only.<sup>132</sup>

292. Adopted amid controversy by the Kenyan National Assembly on 19 December 2014, these amendments appear to reflect a security-oriented focus which assumes that free movement on the part of asylum seekers and refugees, as part of the exercise of their rights under the current legislation and practice, could be prejudicial to Kenya's security. This is notwithstanding the lack of established systematic connections between specific terrorist incidents and asylum seekers or refugees in recent years. While Kenya's legitimate desire to ensure the security of its territory and its citizens could justify measures to strengthen its oversight of the non-citizen population, it may be questioned whether the changes brought about by the new Act represent the most effective and proportionate means to achieve that goal. In addition, there could be a potentially negative impact upon the rights of individuals who may be in need of international protection, as well as on overall confidence levels in the prospects for a fair objective and effective asylum process which fully respects due process and the rule-of-law in the longer-term future.

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<sup>128</sup> Security Laws (Amendment) Act 2014, section 45, amending section 11(1) of the Refugees Act 2006.

<sup>129</sup> *Ibid*, section 46, inserting section 12(3) to the Refugees Act 2006.

<sup>130</sup> *Ibid*, section 47, inserting section 14(c) to the Refugees Act 2006.

<sup>131</sup> An 'exemption policy' is applied to permit asylum seekers and refugees falling into certain categories to register, reside and pursue their asylum claims in urban areas. The grounds for exemption apparently include: employment or self-employment in an urban area; undertaking education in an urban area; medical needs that can only be addressed in urban areas; specific needs or vulnerabilities, and others.

<sup>132</sup> Security Laws (Amendment) Act 2014, section 48, inserting section 16A to the Refugees Act 2006.

293. The most concerning aspect of the new Kenyan law as regards persons of concern to UNHCR (bearing in mind the High Court's decision to annul the initially-adopted provision) is the purported establishment of an upper cap on the number of persons who can receive international protection in the country. Any such cap is contrary to the wording and spirit of the Refugee Convention which does not permit the *refoulement* of any person who fulfils the conditions of Article 1. Further, although the OAU Convention is beyond the scope of UNHCR's immediate mandate, there would appear to be contradictions there as well. Exactly how the cap might work is extremely worrying in addition to its appearance at all. It is clearly less than a quarter of the total number of persons currently receiving international protection in Kenya and as is clear from this report, there is a substantial influx of South Sudanese refugees who are being given prima facie protection.

294. Should the cap be interpreted as applying to all persons receiving international protection in Kenya, then it is probable that many people currently receiving protection may be effectively excluded. This is inimical to the Refugee Convention where only on the basis of explicit provisions in the Convention itself can anyone be excluded from international protection. If this cap is intended to apply, in the context of the transition, to all those persons whose status was determined by UNHCR pre-July 2014 based on its mandate, concerns could arise that there may be a particularly adverse effect on Somali refugees in Kenya. This could also constitute discrimination on the basis of nationality in the recognition of international protection.

#### *Assessment of engagement with the legal and institutional framework*

295. UNHCR's engagement with legal processes and development of the institutions and processes around RSD in Kenya are of seminal relevance to the aim of supporting the national authorities to assume responsibility for the process. This work has had some important results in the past, with UNHCR's advocacy apparently contributing to the adoption of a positive and protection-oriented Refugee Act in 2006. However, with an increasingly sensitive political climate around security, this impact may be waning. Advocacy interventions are generally limited in their resource commitment, and thus efficiency would appear to have been addressed whenever a satisfactory legislative outcome has resulted from the process. To ensure sustainable positive results in RSD, however, ongoing efforts in advocacy to ensure correct implementation of laws, in line with refugee law and fundamental rights, will continue to be needed.

#### *Conclusions*

296. It would appear that a wide variety of 'constitutionalising' acts have been undertaken by the Kenyan authorities in respect of RSD and more generally the reception, management and treatment of refugees and asylum seekers. This action began with the passing of the Refugees Act 2006 and has picked up pace ever since. However, it does not appear to be a continuous process but rather one which gains momentum at certain times. This is perhaps not surprising in any constitutional democracy where the demands on political and administrative authorities are diverse and must be balanced. Nonetheless, a number of key steps have yet to be taken such as the publication of various acts in the Gazette to create a permanent RSD structure well integrated into the Kenyan bureaucracy and of course the establishment of the appeal structure.

297. At the same time, it is apparent from the two national security actions, one attempted but stopped in 2012/3 and the second under a Government Directive in 2014 in pursuit of national security objectives and carried out, that urban asylum seekers and refugees are particularly vulnerable on account of their documentation. In particular, it seems that urban asylum seekers and refugees who do not hold documentation issued by the Kenyan authorities and validating their claim to permission to reside in urban areas find themselves in rather difficult positions liable to coercive police action in pursuit of national security objectives. In the first case, UNHCR lent its voice to the plight of these refugees and it would seem that this had a substantial impact on the High Court judgment which ruled against the proposed police action. In the second instance, without the voice of UNHCR or its implementing partners, the petitioners fared much worse at the hands of the court and subsequently the police. Suffice it to mention the example of UNHCR in the European Union (EU) where UNHCR has handed over RSD in all 28 countries to the national authorities and taken very seriously its obligations under Article 35 of the Refugee Convention.

298. The participation of UNHCR in all of the main court cases to the Court of Justice of the European Union on the treatment of refugees and RSD has been consistent, coherent and part of a fully considered policy to assist the EU constitutionalisation of RSD. The most important aspect for UNHCR may lie in the importance of its voice in these kinds of procedures. For the moment, documentation of asylum seekers and refugees under the RSD procedure seems to be among the most problematic aspect of the transition. As long as people hold documents issued by the Kenyan authorities and are in compliance with the conditions of those documents there do not appear to be substantial difficulties. People who hold expired documents or documents issued by UNHCR seem to be the most exposed to negative consequences at the hands of Kenyan authorities which do not appear eager to recognise documents which are not issued by themselves for the purposes of validating presence and residence.

#### 4. DATA COLLECTED AMONG SELECTED ASYLUM SEEKERS AND REFUGEES

299. In line with current United Nations Evaluation Group guidelines, PDES sought the inclusion of feedback from persons of concern in Kenya as a component of this formative evaluation. A survey was devised by the evaluation team in consultation with the UNHCR Kenya Office. The survey sought information from persons of concern on their level of knowledge on the RSD process; the sources of information to which they had access throughout their RSD process and the accuracy of that information; their perceptions about the process and actors concerned, including the transition process; and their expectations of the outcome of the RSD process. Additional information was gathered concerning their status in the RSD process and demographic data.

##### *Methodology*

300. The survey was conducted in Nairobi and in Dadaab camp. Due to budget limitations, it was not possible to extend the survey to Kakuma camp as originally intended. The survey was delivered through one-to-one interviews conducted by ten Masters students from Nairobi University, and Sciences Po, Paris. Information was gathered and stored on hand-held devices provided by mFieldwork, a Nairobi based data collection firm. In Dadaab, interviews were conducted in the UNHCR office. In Nairobi, interviews were conducted in the UNHCR office, and in the HIAS offices in Eastleigh and Kawangware. Small financial incentives were offered to individuals taking part in the evaluation in these two neighbourhoods.

##### *Sample*

301. The sample used in this survey is both non-probability and purposive. Budget and time limitations of this evaluation meant delivering the survey to a representative sample was not possible. It was designed specifically to gather information from asylum seekers and refugees at different stages of the process. Persons of concern receiving *prima facie* status (Somali and South Sudanese) did not participate extensively in this study, with the exception of a small sample undergoing interviews for resettlement, as they are generally not subjected to an RSD interview and many of the other steps in the process undergone by other applicants.

302. The sample is not representative of the overall population of persons of concern in Kenya. A total of 415 cohorts were interviewed using this survey (272 in Dadaab and 143 in Nairobi). The demographic breakdown of participants in Nairobi and Dadaab is as follows:

#### Gender

Location	Male	Female
Nairobi	61%	39%
Dadaab	61%	39%

#### Age

Location	Age: 0-18	Age: 19-44	Age: 44-65	Age: 65+
Nairobi	13%	81%	6%	0%
Dadaab	2%	78%	19%	1%

#### Nationality

Location	Ethiopian	Congolese	Eritrean	Somali	South Sudanese	Tanzanian	Other <sup>133</sup>
Nairobi	20%	51%	9%	4%	-	-	16%
Dadaab	70%	14%	3%	1%	3%	9%	-

#### Self-reported Date of arrival in Kenya

Location	2014	2012-2013	2010-2011	2005-2009	Prior to 2005
Nairobi	27%	24%	15%	21%	13%
Dadaab	8%	15%	21%	32%	24%

#### Refugee Status

Location	Registered by DRA only	Registered by DRA & UNHCR	Interview Scheduled	Awaiting decision	Decision received
Nairobi	6%	11%	22%	12%	49% (n69)
Dadaab	5%	6%	6%	16%	67% (n183)

<sup>133</sup> Other nationalities interviewed were Burundian and Rwandan.

### *Appeal Status*

303. **Nairobi:** Of the 69 respondents who had received a decision, 13 had been rejected. All 13 had submitted an appeal. 9 had received an appeal decision (following an additional interview) and all decisions taken were negative. All 9 had applied to re-open their application. 5 had received a positive decision, and 1 a negative decision.

304. **Dadaab:** Of the 183 respondents who had received a decision, 33 had been rejected. All 33 had submitted an appeal. 10 received a rejection confirmation letter without an additional interview, while the 4 respondents who had been re-interviewed had received positive decisions. None of those rejected had applied for a re-opening of their application and may have been unaware of the possibility to do so.

### *Limitations*

305. All interviews were arranged by UNHCR or HIAS staff and were largely carried out with the assistance of UNHCR interpreters, who are paid by UNHCR to assist in RSD and resettlement interviews. All interviews in Dadaab were conducted in UNHCR offices. A third of the interviews conducted in Nairobi were done in the HIAS offices of Eastleigh and Kawangware, with the remainder conducted in the UNHCR office, adding a significant bias to this research. Despite repeated emphasis of the independence of this evaluation to individual RSD processes, participants were sometimes confused by the context and asked how participation in the evaluation would support their cases.

306. All respondents were self-reporting, and the data provided was not crosschecked against UNHCR files for confidentiality and anonymity reasons. This small and non-representative sample does not claim to speak for the asylum seeker and refugee populations in Kenya. The following sections intend to draw out some analyses from the data that provide some individual expressions as background to the findings of the evaluation.

### *Knowledge of the RSD process*

307. The survey sought to identify knowledge gaps among individual asylum seekers and refugees regarding the RSD process, as well as to understand where they might seek help and advice on application procedures.

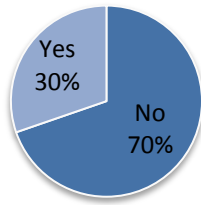
### *Accelerated Procedures*

308. Respondents were asked if they were aware that applications could be accelerated on specific (typically medical or protection related) grounds. In Nairobi, 69% of respondents were not aware of this possibility, while 58% in Dadaab were not aware. Of the total female population interviewed in Dadaab and Nairobi (*n*159), 62% were not aware of this possibility. Of the total minor population interviewed in Dadaab and Nairobi (*n*3 in Dadaab; *n*5 in Nairobi), only two individuals were aware that claim examination could be accelerated.

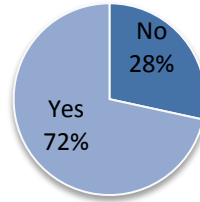
### *Re-opening applications*

309. Respondents were asked if they were aware of the option to re-open a closed application if there were new reasons to fear returning to their country of origin. The responses reported are almost the opposite between Nairobi and Dadaab.

## Nairobi



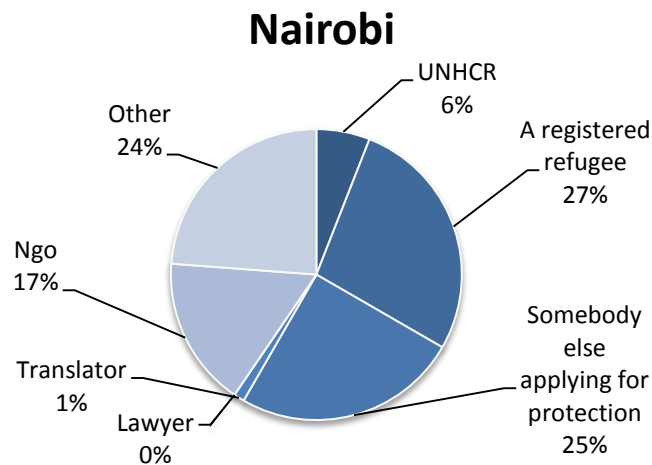
## Dadaab

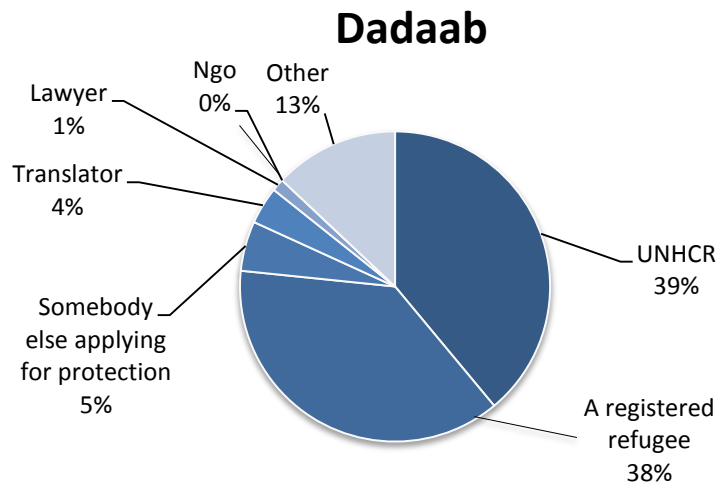


310. This reveals a significant information gap within the interviewed Nairobi population. For example, of the total Congolese population interviewed in Nairobi ( $n$  47), 35 individuals reported that they did not know about the option of re-opening applications.

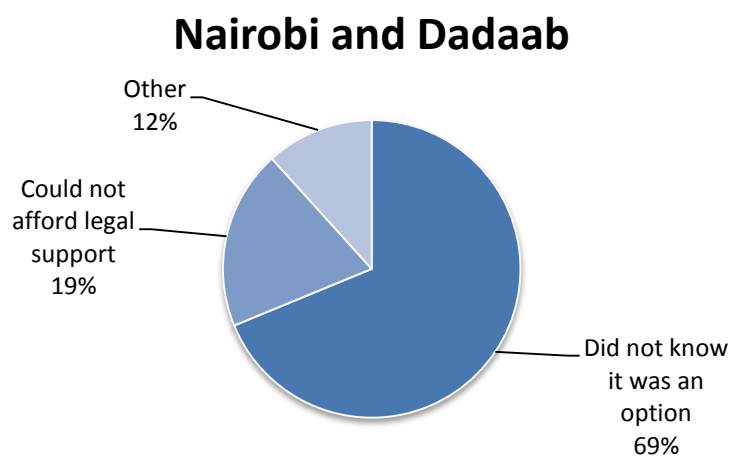
### *Access to information*

311. Respondents were asked if they had received advice during the application process. In Nairobi 49% reported receiving advice, while in Dadaab only 28% received advice. The following figures show the breakdown of sources of advice on RSD applications in Nairobi and Dadaab:





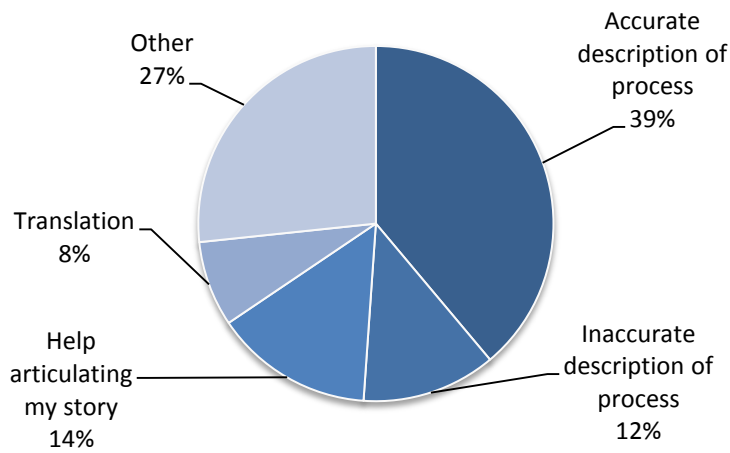
312. The majority of those interviewed in both Dadaab and Nairobi sought advice from registered refugees, or other individuals applying for protection. The most common response under ‘Other’ was a friend or family member. None of the respondents in Nairobi had sought legal advice (including from NGOs), and only 1% (*n*1) had sought legal advice in Dadaab. Of particular interest is that of those interviewed who were undergoing an appeal process (*n*13 in Nairobi and *n*33 in Dadaab), none were aware that they were entitled to free legal support with their appeal. Examining the interviewed population as a whole, the following responses were given as reasons for not accessing legal support:



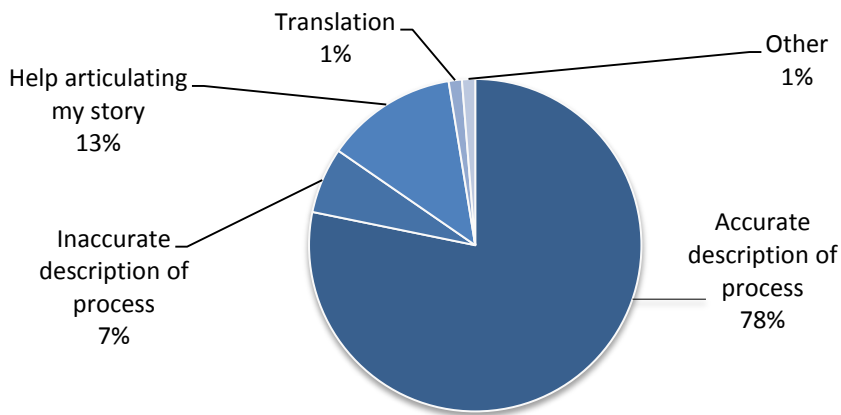
313. The majority of respondents were not aware that accessing free legal support was an option available to them. Some suggested they had sought legal advice but were not able to pay for it, while others assumed they would not be able to afford it and so did not seek it out. Other responses to this question included concerns and confusion over the relationship between lawyers or legal support NGOs and the Police force, with a pervading belief that anything they reported to a lawyer would end up being used against them by the police. The advice sought by a majority of respondents in both locations related to descriptions of the RSD process.



## Nairobi



## Dadaab



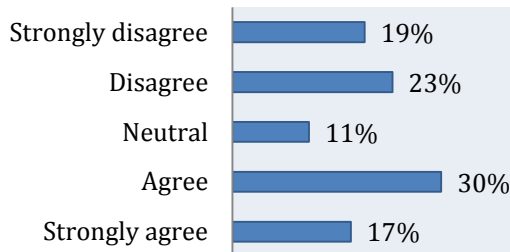
314. In Nairobi and Dadaab combined, a small number of respondents ( $n=10$ ) reported being asked to pay for the advice they received. This paid advice was sought from Registered refugees, others applying for protection, and in one case, an unnamed NGO. Half of those who paid for the advice reported that the advice they received was an inaccurate description of the RSD process.

### *Perceptions of the RSD Process*

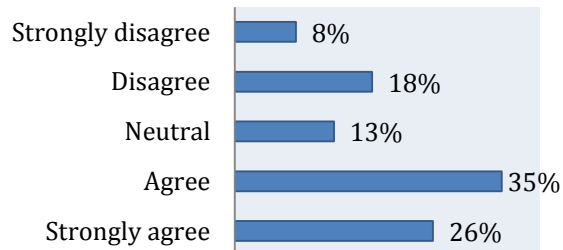
315. The survey sought to gather selected perceptions of a limited number of persons of concern regarding access to the RSD process, the competence and impartiality of UNHCR in conducting RSD, and the forthcoming transfer.

Participants responded to the following statement: 'Everyone has fair and equal access to RSD procedures in Kenya'.

### Nairobi



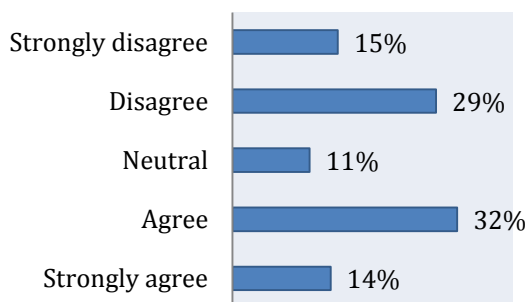
### Dadaab



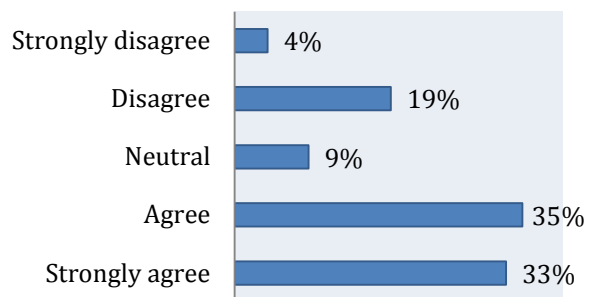
316. Of those who did not agree with this statement (n131), a frequent perception cited was that there was discrimination within the RSD process based on nationality bias. This perception was particularly prominent among Congolese, Rwandan and Burundian respondents in Nairobi, and Ethiopian respondents in Dadaab. While respondents were able to clearly articulate their own stage within the RSD process, they were not necessarily aware of the process as a whole, and in particular reasons why some would be granted prima facie status.

Participants responded to the following statement: 'UNHCR conducts RSD in a competent and impartial manner'.

### Nairobi



### Dadaab



317. Within the responses that disagree on the competence of UNHCR (n123), several key themes emerge. Firstly, the time it takes to go through the RSD process is seen as far too long and reasons for lengthy delays are not understood by persons of concern. When the waiting time between appointments was reported, in a majority of cases it was over eight months. One respondent taking part in the survey (December 2014) had just received an appointment slip for an interview in September 2015. Confusion over appointment times was also

frequently reported, with individuals travelling to UNHCR for an appointment only to discover that their appointment was rescheduled. The lengthy time taken to make a decision on some individual cases was reported as leaving individuals in a state of limbo, unable to move on with their lives. As one Congolese respondent put it, 'Reject me! Just give me an answer'.

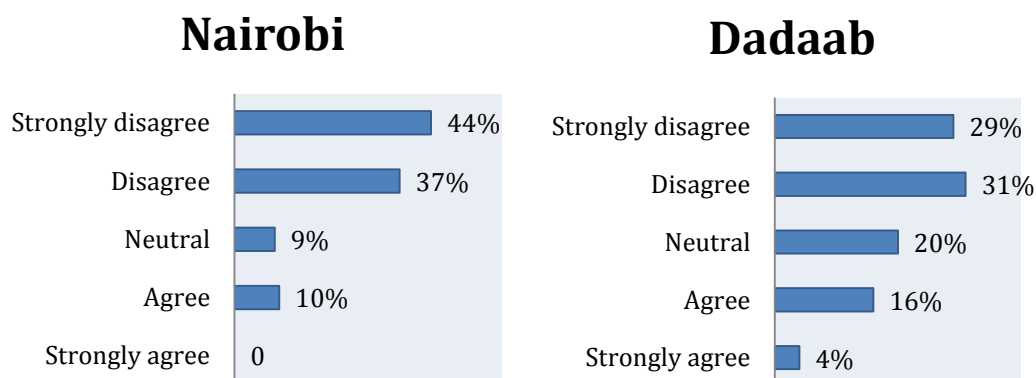
318. Secondly, this protracted limbo is perceived by asylum seekers as imposing practical constraints on their lives, specifically precluding them from being able to access services without refugee status. An inability to access medical services was mentioned most frequently. The survey asked questions to ascertain the primary and secondary desired outcomes of an RSD application. 55% of the total respondents reported gaining refugee status as the most important desire of the process. This was perceived as inextricably linked to the ability to access services, which was the second reported outcome (45%). Qualitative data gathered on this question points to a clear link between the need for refugee status to access services. One Rwandan woman stated, 'Women have no recourse against harassment without refugee status'. In Nairobi specifically, a high level of concern was prevalent among the interviewed population who were still awaiting a decision regarding their lack of access to services or redress against harassment without obtaining refugee status. Conversely, those who had received refugee status reported that having it made no difference in their ability to access services or improving their security. While observers could assume that remaining for extended periods in the RSD procedure may entail benefits for asylum seekers - in the form of continuing access to services, which could end if their claims were ultimately rejected - this response raises questions about whether lengthy waiting periods are in fact in line with asylum seekers' wishes.

319. Thirdly, respondents reported unclear communication from UNHCR about the RSD procedure, specifically regarding how long it was likely to take. Further, the role of NGOs in the RSD process is described by respondents as unclear, leading individuals to be required to re-state their claim repeatedly because their data is not shared effectively or efficiently. In Nairobi, participants also reported that they did not know how to contact UNHCR for questions or status updates or which NGOs they should talk to on specific issues. Those who had used a facility known as the Resettlement SMS service, designed to provide them information regarding their eligibility for resettlement, had never received a response. This lack of communication leads to unnecessary feelings of dependency among the population of concern who are kept devoid of information about the process controlling their lives. In the words of one respondent, 'applying for refugee status to UNHCR is just the same as applying for a job. You need to have enough information first before you apply'.

320. A fourth theme emerging from some responses is an apparent lack of confidence in the competence of some UNHCR staff. Respondents reported that staff at UNHCR are clearly stressed and under pressure, leading to instances of rudeness and abruptness in interviews. Specifically, participants reported that they are asked only to directly answer the questions they are asked in interviews, with no time to explain other circumstances they may face. It was also reported that UNHCR's definitions for those who qualify for accelerated procedures are rigidly applied, meaning that some vulnerable populations who are not seen unequivocally to fall within the necessary criteria are excluded. One 19 year old girl reported being turned down for an accelerated procedure after reporting sexual

harassment. Some respondents also attribute the lack of information communicated by UNHCR to a lack of empathy and attitudes among some staff members.

*Participants responded to the following statement: 'It is proposed that UNHCR will transfer responsibility for RSD to the Government of Kenya. Do you believe the DRA will conduct RSD in a competent and impartial manner?'*



321. Overwhelmingly the response to this question was one of fear. Many respondents in Nairobi stated this was the first time they had been informed of the transfer. In Dadaab, awareness of the transfer was much greater, and the responses are slightly more favourable. In light of the current security context in Nairobi, the 81% disagreement with this statement of confidence in the DRA may not be surprising. Yet it will be important to further understand and address the explanations behind some of these responses to enable DRA to continue to build trust within the asylum seeker and refugee population. As things stand, the response of one respondent surmised the views of many expressed in interviews: 'If you give them [the DRA] responsibility for RSD, it would be like killing all of the refugees'. In a graphic and oversimplified way, this articulates a lack of awareness and fear about the possible consequences of transition, which should be addressed through more effective communication and confidence-building.

322. The most recurrent critical view of the transfer pertained to a perceived risk of corruption within the DRA. In Nairobi, respondents made reference to experiences of having their documents confiscated or destroyed by police acting under the authority of the DRA, and being forced to pay to have them returned. When asked to elaborate one respondent said, 'Police? We are just their additional sources of income'. Those going through the application process for Refugee ID cards also spoke of the use of bribes to even enter the DRA office.

323. A second perception among the population interviewed in Nairobi is that the police intimidate and harass refugees and asylum seekers acting under the authority of the DRA. Multiple respondents stated fear of death at the hands of the authorities. In the words of one respondent in Nairobi speaking of the events during Usalama Watch, 'The Kenyan government thinks we are all members of al-Shabaab'. There is also an acute perception of anti-refugee sentiment within the Kenyan population at large: 'Kenyans hate refugees', and words to this effect were stated by multiple respondents. Many Ethiopian participants also expressed a fear that the Government of Kenya and Government of Ethiopia share

information, and suggested that this would make their situations worse if the DRA held all information on refugees.

*Concluding summary*

324. A lack of communication between UNHCR and their population of concern is arguably the structural cause of many of the answers given to this survey. While the importance of engagement with communities for information dissemination is clearly paramount, this has recently been significantly compromised by the current security context in Nairobi and the protection concerns of UNHCR about gathering community groups together in urban areas. Given the length of time many respondents have already been in the RSD process however, it would appear that this issue stretches back to before the current security context.

325. Asylum seekers surveyed feel unable to contact UNHCR, and confused by the relationship UNHCR has with the NGO offices they are encouraged to access. There is therefore a high level of frustration regarding the long waiting time to go through RSD, and a feeling that asylum seekers are patronised by UNHCR who do not honestly share information with them. The limited sharing of information also extends to a lack of understanding around why some applicants receive prima facie status and others do not, which could contribute to friction between communities.

326. This lack of communication also means that many asylum seekers who were consulted are unaware of the extent to which they can access services before they receive refugee status. An apparent lack of consistency across UNHCR staff behaviour is concerning and should warrant further follow up. Finally, the responses relating to the forthcoming transfer reveal an extremely high level of distrust of the Government of Kenya within the refugee and asylum seeker community. It is vital that concerns related to perceived risks of corruption within the DRA are addressed, and that work begins to start building trust in their operating capacity. Improved communication with asylum seekers and refugees in their communities is a vital first step in this process.

## 5. CONCLUSIONS AND RECOMMENDATIONS<sup>134</sup>

327. In Kenya, the ongoing transitional process has made important progress since 1 July 2014, when the Kenyan Commissioner for Refugees began exercising his legal function of recognising refugees pursuant to the Refugees Act 2006. There is still a great deal more that needs to be done, as foreseen in the Work Plan agreed between the DRA and UNHCR, before the transition process can be said to be complete and the Kenyan authorities can be said to have assumed full responsibility for a fair, effective and sustainable RSD process. In this context, it will be particularly important to ensure that the planning, strategizing and implementation of the remainder of the transition process continue to be undertaken on a joint basis, with DRA and UNHCR as close and equal partners.

328. This is critical, not only to reflect Kenyan law and the competence and authority it confers on DRA and other national entities, but also to continue to develop and build the sense of leadership and institutional 'ownership' of responsibility for refugee protection - of which RSD is a major part - on the part of the Kenyan authorities. RSD cannot be perceived as an activity that UNHCR has performed or should perform alone in Kenya, or that the international community wishes to impose upon Kenya. It is to be hoped that it is, and will continue to be, seen rather as a national priority, the assumption of full responsibility for which is directly in Kenya's interest, not least as a means to enhance oversight and control over who legally resides on Kenyan soil. This has become an even bigger priority today as Kenya is exposed to violent terrorist acts and the emergence of xenophobic rhetoric from some quarters. These factors combined are bound to have political ramifications for the interests of asylum-seekers and refugees in Kenya. Excessive politicisation of refugee issues in Kenya could undermine the RSD process and the institution of international protection more broadly. The establishment and ongoing operation of a well-functioning RSD process should thus be clearly separated from political discussions and processes, and be based purely on legal, technical and practical considerations.

329. Further steps in the transitional process, and planning for the subsequent phase, must accordingly continue on a joint basis. This should involve Kenyan actors progressively assuming a more active role and UNHCR acting in support, as it moves towards its post-transition role. This will require an ongoing commitment of sufficient resources on UNHCR's part during the remainder of the transitional process in particular. However, Kenya will also need to demonstrate the political will to assume its responsibilities by committing to invest the necessary resources at national level to make fair and effective RSD sustainable in the longer term.

330. UNHCR's engagements and activities as part of the transition process, as expressed in the progressively-updated transition Work Plans since 2013, seem to have been directly relevant to key areas in need of support, particularly in relation to establishment of fair and effective RSD processes and capacity development of DRA. Efforts to launch and operate the joint RSD procedure, which will continue throughout the transition, have been successful, with over 740 decisions made and issued by the Commissioner for Refugees in the six

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<sup>134</sup> This section contains the conclusions and recommendations from the evaluation in narrative form, set out on a thematic basis. See also the management response matrix as separate attachment, which lists the recommendations addressed to each responsible unit.

months from July to December 2014. While less efficient than the previous mandate process conducted by UNHCR, this result is probably to be expected in the challenging initial phase of the new process; but further efforts are needed to ensure that the decision-making output will progressively increase over the coming months, including through use of simplified procedures and other streamlining and efficiency measures, an outcome that should in principle be feasible if the transition process continues without major hindrance.

331. There are however three key areas where impact and efficiency have not been optimal to date, in efforts to achieve the goal of effective assumption of full responsibility for RSD by DRA by January 2016. These are, firstly, **establishment of the appeal process**. Until this occurs - a matter which appears to lie largely in the hands of the Kenyan Government, which must prioritise resources and political decision-making to this end - UNHCR will be unable to contribute substantially to the development of this key aspect of the process.

332. A second main area of priority relates to **registration of claims and data of asylum-seekers and other persons of concern**. With parallel registration processes now occurring both at UNHCR and DRA, in separate databases, there are unnecessary inefficiencies that should be resolved through data-sharing and joint registration arrangements in the interim, and the development of an effective registration process and database in DRA - potentially utilising data currently stored in ProGres - in the longer term.

333. Thirdly, the **building up of effective capacity on DRA's part** to assume a progressively greater share of tasks and workload in RSD remains as an overwhelming challenge. Significant problems with recruitment and retention of staff, evidently due to lack of perceived career prospects and adequate contract conditions, mean that UNHCR's positive and successful efforts to train a significant number of staff has only yielded a small cadre of DRA personnel with advanced training and expertise. UNHCR must, as a matter of practical reality and political principle, continue to invest in capacity building, ideally with strengthened staffing resources for training, which can ensure that backlog clearance can proceed effectively at the same time. However, efforts must also be devoted to encouraging and supporting DRA to strengthen its staffing policy and the conditions of key personnel, to ensure a sustainable institution with the necessary expertise and commitment.

334. Given delays and difficulties encountered in the implementation of the transition Work Plan to date, UNHCR should undertake a further assessment of the transition phase in mid-2015. Unless substantial progress is evident on each of the above areas, consideration should be given to extending the transition period for an initial period of six months, to mid-2016, accompanied by redoubled efforts to address these major gaps. The review should focus on three key hurdles that need to be overcome to advance the transition process in earnest: the establishment of a well-functioning appeal process in line with international standards, the setting-up of a harmonised data registration system and the engagement of sufficient well-trained staff and human resources with expertise in RSD in DRA, working under secure and improved contractual arrangements.

335. In this context, the following recommendations aim further to contribute to UNHCR's efforts to support the achievement of a successful transition.

**Recommendation 1: RSD as a route to comprehensive solutions.**

UNHCR BO Nairobi should develop an operational and advocacy strategy to ensure that refugees can exercise their rights under the international conventions to which Kenya is a party, and in accordance with Kenyan law. To this end, UNHCR Nairobi is encouraged to:

- Identify stakeholders, including within and beyond government, civil society and the donor community in Kenya, that could effectively support and champion the successful completion of the transition process and more effective observance of refugees' rights, including through the present recommendations. This strategy should detail how these stakeholders will be engaged and with what objectives.
- Define those accomplishments that can be most immediately associated with the completion of the RSD transition (including efficient operation of the RSD process, with fair and accurate decision-making and consistently high decision output; access to valid documentation; recognition of documentation by competent authorities and observance of refugees' rights in practice), to be recorded in a Memorandum of Understanding with the Kenyan authorities.
- Establish a time line and benchmarks by which to measure progress.
- Engage in a concerted way with donor and other international community actors to support and promote the development of the capacity of DRA as well as expanding and reinforcing the protection space in Kenya.

**Recommendation 2: Transitional Period**

UNHCR BO Nairobi and the DRA should review the progress of the Transition Work Plan in mid-2015 with a view to its possible extension. More specifically, this should involve:

- Prioritising assessment of progress on appeals, registration, and data sharing.
- Assessing the progress of institutional strengthening and capacity building against the anticipated results.
- Formulating measureable progress indicators for any proposed extension.
- Completing a Memorandum of Understanding between UNHCR and the Government of Kenya that should set out UNHCR's role and responsibilities for RSD in the post transition phase before the end of 2015.

**Recommendation 3: Legal and institutional framework for RSD**

UNHCR BO Nairobi should prioritise its operational engagement in support of the effective implementation of the Refugees Act 2006. The activities in support of this include the following:

- Continued advocacy for swift establishment of an appeal process, the clearest legal basis for which is found in section 9 of the current Refugees Act.
- Ongoing support to the RSD process, including all stages at first instance up to decision-making by the Commissioner, as well as subsequent issuance of documentation.
- Further advocacy and engagement with governmental, parliamentary and other state representatives, in close coordination with partners, to support maintenance of



legislation, as well as its effective implementation, in conformity with international law, fundamental rights, procedural fairness and natural justice.

#### **Recommendation 4: Refugee Status Determination process.**

UNHCR BO Nairobi, working together with DRA, should:

- Encourage the use of national legislation on the granting of status to refugees on a prima facie basis in appropriate cases, as the most efficient and swift means, through the exercise of sovereign power by the Kenyan state in a legal process, to provide protection to refugees who are entitled thereto, and to address pending backlogs.
- Prioritise finalisation of SOPs, as foreseen in the Work Plan, on all relevant aspects of RSD for country-wide use, in order to promote consistent approaches to RSD throughout Kenya.
- Invest continued efforts in the development and updating of guidance, strengthening of training and other steps as necessary to ensure consistency in assessment of claims from applicants with similar profiles across the country.
- Continue to develop and use streamlined procedural approaches, as referred to in the Work Plan, for asylum claims that can be dealt with swiftly and seek other ways to improve the efficiency of the RSD process without compromising procedural safeguards or consistency.
- Advocate for and take other steps as necessary to ensure that the status granted to refugees by UNHCR under its mandate prior to 1 July 2014 is recognised, and the entitled people granted status, under national law, as has occurred in other transitional contexts in the past.

UNHCR BO Nairobi should be assisted in these endeavours by:

- DIP, which should provide continued operational support to the rapid processing of all refugees eligible for protection on a prima facie basis and the swift issuance of documentation to them.
- DIP, which is encouraged to finalise and issue publicly as soon as practicable in 2015 the revised Guidelines on International Protection No. 11 on prima facie recognition of refugee status.
- DPSM, which should improve the technical functionality of RSD interview and decision template software to enable the automatic population of forms and templates.
- DPSM, which is urged to send on mission and otherwise make available staff with the relevant expertise to support UNHCR Kenya and DRA in this process.

#### **Recommendation 5: Capacity-building**

In accordance with the Work Plan, UNHCR BO Nairobi should continue to invest in capacity-building of DRA personnel, based on the current training plan agreed between the two organisations, which should be adjusted and updated periodically as necessary.

More specifically, UNHCR BO Nairobi:

- Should receive additional resources to reinforce its training capacity and free up current protection staff to concentrate on supporting RSD and backlog reduction.
- Should provide opportunities for experienced DRA representatives to progressively assume a greater role in the provision of training and more interactive learning, including through peer-to-peer or train-the-trainer activities during and after the completion of the transition phase.
- With DRA, should identify outside expertise available in Kenya – potentially from the academic community and legal practitioners – who could, subject to appropriate preparation and coordination, be invited to take part in training. Infrastructure needs associated with DRA’s RSD activities (including office space, accommodation where relevant, access to secure internet and establishment of confidential filing systems) should also be addressed as a priority.
- Should encourage the authorities to invest in staffing and resourcing of DRA as a political and budgetary priority, to achieve an effective outcome in the transition process and as part of the country’s wider refugee protection efforts, in line with legal obligations and in Kenya’s long-term interest.
- UNHCR BO Nairobi should continue to support non-governmental organisations in the provision of legal and other services, advice, information and other activities with asylum seeker and refugee communities, as well as developing further their research and advocacy work to monitor promote effective refugee protection in Kenya.

These tasks should be seen as priorities, in light of time and resources lost due to delays and staff turnover, which will also need to be addressed by investment on the part of the Kenyan authorities to ensure further timely progress under the Work Plan.

### **Recommendation 6: Quality Assurance**

Working with DRA, UNHCR BO Nairobi should implement plans for the conduct of joint quality audits of the RSD process, involving DRA and UNHCR Kenya as well as other external experts as both consider useful. Given non-compliance with the Work Plan deadlines, timeframes should be adjusted to ensure this objective can be met in early 2016. More particularly:

- UNHCR BO Nairobi is encouraged to invite other UNHCR or external experts who have contributed to quality activities in other countries and regions to contribute to the quality audit process, including potentially through missions or other input.
- Advice should be sought from these experts, from DIP and other UNHCR regional Bureaux as relevant, on the form and establishment of an internal DRA quality assurance mechanism for the longer term based on proposals that UNHCR and DRA should develop by November 2015.

### **Recommendation 7: Resources**

UNHCR BO Nairobi should review and prioritise resources for capacity building, registration and data management, quality assurance and RSD and link any increase to the implementation of the Work Plan for transition. In the longer term, UNHCR BO Nairobi is encouraged to:

- Consider reconfiguration of its protection staffing for the period after the transition process, to ensure that staff of appropriate profiles and levels are maintained in order to provide ongoing support to DRA, and perform other parts of its post-transition role.
- UNHCR BO Nairobi should also put in place more effective systems for monitoring use of resources in the RSD area, as well as measuring of the impact of expenditure.

### **Recommendation 9: Registration and data-sharing**

UNHCR BO Nairobi should implement plans for joint registration with DRA on a Kenya-wide basis, as soon as practicable, including finalisation of a proposed agreement on data-sharing. This should include a 'road map' towards assumption of full responsibility for registration and managing the data of persons of concern by DRA, subject to robust data-protection, confidentiality and purpose limitation safeguards. UNHCR should ensure its continued access to and involvement in the registration and data-management process to enable it to continue to carry out protection and assistance activities. Furthermore, UNHCR BO Nairobi:

- Should seek from UNHCR HQ (DIP, DPSM and other concerned units) the necessary technical advice and support to enable it to design and plan, with DRA, joint registration and data-sharing, with an ultimate view to transferring responsibility for registration of persons of concern to the Kenyan authorities.
- In the immediate future, and before end of 2015 at the latest, advice and/or relevant missions to Kenya from DPSM, DIP and/or other appropriate UNHCR experts should take place to support UNHCR Kenya and DRA in this process.
- A registration officer post should be created to ensure ongoing expertise and support to this activity.

### **Recommendation 10: Role of UNHCR post-transition**

UNHCR BO Nairobi should seek to negotiate and complete, before the end of 2015, a draft MoU with the GOK that should set out UNHCR's role and responsibilities for RSD in the post-transition phase.

- This should reflect UNHCR's supervisory role with respect to the Refugee Convention, as acknowledged in Kenyan legislation referring to the Convention.
- Specific activities should include ongoing cooperation with the national authorities and provision of necessary advice and support, monitoring and information-gathering about the processes and conditions relevant to refugees, and other protection-related tasks.
- A potential role for UNHCR as an observer in the RSD process post-transition, at least for an initial period, should be considered between DRA and UNHCR.
- As part of this activity, as in other countries and regions, UNHCR should seek and plan to remain engaged in policy and academic discussions, work with the Kenyan legislature and intervene strategically in relevant court processes.

### **Recommendation 11: Guidance on RSD transition processes in other national contexts**

DIP is encouraged to take account of the insights and lessons derived from the experience in Kenya and reflect them in guidance, advice and support provide to RSD transitions in other countries and regions worldwide. This should potentially include, among other elements:

- The importance of careful planning and setting and adhering to realistic timeframes.
- The need to commit and ensure deliver of sufficient resources, on the part of UNHCR and national authorities.
- The importance of a strong national legal framework, reflecting international refugee and human rights law, and ensuring that all of the processes and institutions envisaged thereunder are established and become operative in a timely way.
- Clarifying the role of UNHCR before, during and after transition, and enshrining it in clear agreements with national authorities.

## ANNEX I

### Terms of Reference

#### Formative<sup>135</sup> Evaluation of the Refugee Status Determination (RSD) Procedures in Kenya

#### Phase II

##### Background.

1. In March 2014, the UNHCR Policy Development and Evaluation Service (PDES) published a preliminary review entitled: Assisting States with the assumption of responsibility for refugee status determination. The Terms of Reference (ToR) anticipated that this review would be conducted in two phases. In the first phase, an independent consultant, supported by three PDES staff, prepared a report covering a global review of UNHCR's recent policy and practice in relation to the assumption of responsibility for refugee status determination by States.
2. The report *inter alia* reconfirmed that States are in the best position to ensure effective, comprehensive refugee protection and durable solutions. This observation was first recorded in Conclusion 81 (1977) to the Executive Committee which stated 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" .
3. The report further concluded that States should integrate RSD in a broader framework of rule of law, adequate reception conditions and durable solutions. States have technical and diplomatic possibilities to verify information, including as it relates to exclusion and security concerns, which UNHCR does not have. States are also better equipped to ensure independent appeals.
4. The objectives of the ToR for the review in phase I were fully achieved laying out a clear direction and expected output for a second phase. In particular, the phase I report proposed that the outcome of phase II should contribute towards the formulation of a strategy, policy and tools for responsible transitions to fair, efficient and sustainable RSD systems, including indicators for situations in which UNHCR should exceptionally refrain from transferring RSD functions to the Government.
5. Moreover the outcome of phase II could further develop models and benchmarks for the transfer of the RSD function and build in remedial action in case of less than desirable outcomes of RSD procedures, including efficient monitoring tools. Given the significant short- and long term resource implications of any transfer of RSD

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<sup>135</sup> A Formative evaluation generally takes place before or during a project's implementation with the aim of improving the project's design and performance. Formative evaluations complement summative evaluations and are essential to try to find out why a program works or does not.

functions, both in terms of human and financial resources, special consideration should be given in the Formative evaluation to these aspects.

6. To contribute to achieving the objectives of phase II, the report recommended that a series of country specific analyses of transfer situations will be undertaken preferably in each geographical region covered by UNHCR. In this respect and based on consultations with DIP and the Africa Bureau, a decision was made to conduct a formative evaluation of the transfer of the RSD function in Kenya.

## Context

7. Kenya has a population of 44 Million in an area of 582,446 sq. km. There are six principal ethnic groups in Kenya: The Kikuyu, Luo, Luhya, Kalenjin, Kamba, Somalis and the Maasai. Kenya's economy is based on a rapidly developing service sector that includes transport, finance, tourism, information and technology. In 2012, Gross National Product per capita stood at USD 1541.-
8. The Republic of Kenya has acceded to the 1951 Convention relating to the status of refugees (1966) and its protocol (1981) as well as the 1969 OAU Convention Governing Specific Aspects of Refugee Protection in Africa (1972). On 1 July 2014, the Government of Kenya had neither ratified the 1954 Convention relating to the Status of Stateless persons nor the 1961 Convention on the Reduction of Statelessness. Kenya is party to the "Great Lakes Pact" on guiding principles on internal displacement in the national spheres of state parties. The Government of Kenya was co-drafter of the 2009 African Union Convention for the protection and assistance of internally displaced persons in Africa. The Constitution of Kenya has given full recognition of human rights through the incorporation of a Bill of Rights.
9. In the 1980s and early 90s the Government of Kenya was responsible for the processing of individual applicants for refugee status. However, since 1992, following the large-scale arrivals of Somalis in the 1990s, this function has been discharged by UNHCR. The 2006 Refugee Act entered into force on 15 May 2007. In accordance with the 2006 Kenyan Refugee Act, the Department of Refugee Affairs (DRA), which falls under the Foreign Nationals Management Service of the Ministry of Interior) is responsible for RSD. UNHCR has been undertaking capacity-building activities with the DRA since 2007. The Kenyan authorities in 2013 expressed their intention to assume responsibility for RSD in practice, based on the 2006 legislation and implementing rules. In response, the UNHCR Representation developed and agreed with DRA in December 2013 on a 'special protection project' proposal foreseeing a transitional process, involving capacity building and phased steps towards transfer of responsibility for RSD. That proposal foresaw an 18 -month plan (January 2014-June 2015) for the phased transfer of the RSD function to DRA. A draft Bill of 2011 to formalize this has not yet been passed through Parliament.

Training and capacity-building has continued throughout 2014. DRA officials conduct personal interviews with applicants for protection in a number of cases, and preparations are advancing for their assumption of responsibility for more substantive steps in the RSD process. In the course of the transition process so far, however, staff retention challenges for qualified and high-performing DRA personnel has led UNHCR representatives to conclude that the current timeframe will need significant adjustment in order to build up the capacity of the DRA to enable to take over full or substantial responsibility for RSD in the immediate future.

10. In a change effected as part of the transition process, those granted status since July 2014, receive a 'notification of recognition' document from the DRA, which replaces the previous UNHCR mandate recognition certificate. Those granted refugee status are, according to the 2006 Refugee Act, entitled to the benefits of the 1951 Convention, including protection from *refoulement*. However, naturalization is not available in practice, and there are no facilities nor support to achieve local integration. Refugees are permitted to work without official authorization on a self-employed basis, but must apply for a work permit in order to take paid employment. There is no legal provision for health care under national legislation, although UNHCR provides health care for refugees in camps (which is foreseen for extension to urban refugees in Nairobi in the near future). The 2006 Refugee Act also provides that the Minister may designate certain locations as refugee camps and permits restrictions on the freedom of movement of refugees and their families. Thus it is not clear whether refugee status can really be seen to provide a firm basis for the durable solution of local integration.
11. Kenya accommodates one of the largest refugee populations in the world<sup>136</sup>. By August 2014, the total number of persons of concern was reported at just over 580,110. On 30 November 2013, the total number of pending RSD applications stood at 52,200. In 2012, the average waiting time for first instance decisions stood at 14 months. Kenya appears among the five largest UNHCR mandate operations. (Updated November 2014 data will be obtained for the final report).
12. Due to Kenya's military engagement in Somalia, the overall security environment has deteriorated markedly in recent months, which has generated a negative impact on attitudes towards persons of concern to UNHCR and other foreign nationals. The Kenyan authorities make clear their strong interest in UNHCR's efforts to facilitate voluntary repatriation, notably for Somali refugees.

## Objectives

13. The overall goal is to evaluate the scope for UNHCR's RSD proposal for transfer of responsibility for RSD to the Government of Kenya to achieve its objectives so that within a reasonable timeframe, the transfer can be effected in the most protection-sensitive manner, through a phased transfer process leading to the establishment of a fair and efficient as well as sustainable Government RSD system.

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<sup>136</sup> UNHCR Nairobi, Statistical summary of 30 November 2013.

The formative evaluation of the RSD function in Kenya will be characterized by a “learning and improvement” rather than an “accountability” purpose<sup>137</sup>.

## Scope

<u>Time frame covered:</u>	From 2006 (promulgation of the national Refugee Act) - to November 2014.
<u>Geographical coverage:</u>	The Formative evaluation team will conduct a field mission to all relevant locations in Kenya including to Kakuma and Dadaab refugee camps and conduct extensive interviews, travel and observations of RSD procedures.
<u>Sectors:</u>	National RSD Systems.
<u>Levels:</u>	Legislative, regulatory, practice and protection outcomes.

14. Reference will be made to all relevant material published in connection with current RSD activities including as they relate to the transition strategy of the UNHCR Representation in Kenya and the Government of Kenya.

## The Evaluation Team and the Steering Committee

15. A team comprising one full-time PDES Evaluation Officer and two part-time (50%) RSD Evaluation Experts are scheduled to conduct this evaluation from 1 October 2014 until 31 January 2015. Before this, the PDES Evaluation Officer will take charge of the data collection, compilation of reports and documents and the formulation of the draft Terms of Reference as well as the establishment of the Steering Committee. The role and functioning of the Steering Committee will be elaborated in separate ToRs (annexed).

## Methodology

16. The evaluation team will undertake desk research based on available documentation and material, available from public sources and provided by UNHCR Kenya and HQ. They will also undertake interview with Geneva-based representatives of relevant HQ units and services, including DIP, Africa Bureau, the Inspector-General’s office, DPSM and others.

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<sup>137</sup> According to OECD/DAC guidelines, this means that this evaluation attempts to systematize knowledge of results and performance, which can help this or similar activities. Evaluations carried out while a policy is still being applied or a program being implemented are useful for improvement. This type of purpose is most relevant to immediate stakeholders and those planning or implementing similar projects.



17. In Kenya, the team will make use of a Nairobi-based consultancy firm that will employ the latest mobile technology for surveying persons of concern to UNHCR. The firm will deploy a group of enumerators whose tasks include interviewing asylum-seekers awaiting their first RSD interviews, asylum-seekers in the RSD procedures, and recognized refugees. These interviews will be aimed at gathering information about the experience and perceptions of persons of concern in relation to the RSD process and the ongoing transition. The enumerators will be using an android based mobile device containing a standard set of questions to be used for interviews. All collected data will be transmitted via WIFI technology onto a main-frame computer. This will allow instant common data generation facilitating the analysis.
18. Meanwhile, the Evaluation team, including the expert consultant, will undertake further research in Kenya to complement findings based on quantitative interviews and data collected by enumerators. This will involve interviews conducted with UNHCR staff, Government counterparts, NGOs/INGOs, donors and refugees.

Evaluation criteria:

19. Guided by the OECD/DAC<sup>138</sup> criteria, the Formative evaluation will address the following areas:
  - 19.1 Relevance of the RSD transition process. An assessment will be made whether the objectives and rationale of all related RSD activities are or remain relevant or valid in relation to long-term gaps, needs and impediments, as well as objectives and activities, based inter alia on a review of the historical evolution of the RSD process in Kenya from 2006 to date.
  - 19.2 Effectiveness of UNHCR's interventions in the context of the transition process, in terms of achieving stated goals and objectives. An assessment will be made of:
    - a. The degree to which RSD activities undertaken are successful in achieving their objectives.
    - b. The extent of the existing backlog in RSD cases awaiting processing as well as the average processing time per case.
    - c. The eligibility criteria and guidelines to be applied for access to simplified versus regular RSD procedures, including registration procedures.
  - 19.3 Efficiency of UNHCR's intervention in the transition process in terms of the use of human and financial resources. An assessment will be made of:

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<sup>138</sup> Organization for Economic Cooperation and Development/Development Assistance Committee

- a. The overall and continued institutional capacity needs of the Government of Kenya to conduct the proper RSD processing. This includes staffing structures, office structures, IT needs and establishment of simplified procedures and appeal procedures.
  - b. The quality and relevance of training activities conducted to date in relation to the transition process.
  - c. The role and activities of the relevant Kenyan bodies in terms of their ability to efficiently discharge the future RSD function.
  - d. The sustainability of the outcomes of the transition process.
20. The OECD/DAC criteria form the basis of the methodological process. The evaluation team generates findings within the scope of the evaluation and uses the criteria to make assessments. The factual findings and assessments are interpreted to identify the broad conclusions from the evaluation and to draw recommendations for future action. A theory of change (ToC) approach will be used and developed by the evaluation team in consultation with the Representation, the Africa Bureau and DIP.
21. Assumptions about appropriate changes and causal linkages are expected to become clear and form a basis for data collection. All evaluation findings should be supported with evidence. A coherent and consistent analysis of the issues under evaluation will be conducted through the use of triangulation methods.
22. The Evaluation will be effected according to PDES existing evaluation policy. This means that a participatory approach will be pursued in the design, implementation and reporting of the Formative evaluation. The final report will be published in the public domain.

**There will be three steps providing a framework for conducting the evaluation:**

Step 1: Preparation

23. UNHCR's comprehensive budget for Kenya in 2014 stood at USD 229,021,600,-. Currently, the total number of posts stands at 479. In close cooperation with the Representation, detailed Data will be collected on staff, offices, infrastructure, procedures, training, productivity, cooperation arrangements with GoK, costs, and investments to date.
24. One PDES staff member and two part-time experts in RSD will analyze background documentation, including information provided by the Representation in Kenya, the Africa Bureau and the Division of International Protection (DIP). There will be a desk review of all relevant documents. Interviews with key stake holders will be conducted. Before that, a stakeholder's analysis will be produced to identify all relevant partners of UNHCR in the context of the RSD process in Kenya. An inception report, defining key areas of inquiry for the mission, as well as TORs for the Steering Committee will be finalized at the end of Step 1.

25. On 7-8 October, the evaluation team will conduct interviews with principal stakeholders at HQ whilst the Steering Committee members based in Europe and the Evaluation team will meet on 8 October to review all aspects related to the Formative evaluation. Steering Committee members from Africa will participate in the meeting via video conference link. In consultation with the Representation, an assessment will be undertaken to:

- Ensure that key stakeholders understand the evaluation's envisaged purpose, process and methodology.
- Obtain key stakeholder perspectives of any prominent issues to be covered in the evaluation.
- Determine the scope of the approaches, timeframe and the parameters of the evaluation.

### Step 2: Data collection and analysis

26. The objective of this second phase will be to collect and analyze qualitative data in accordance with the Terms of Reference. The part of the data collection/validation mission will focus on field-based data collection. The estimated duration of the mission is ten days. An important method of data collection will be to observe first instance registration practices, eligibility interviews as well as gathering information about the workings of the eligibility committee.

27. End-of-mission debriefing: The evaluation team will hold a debriefing with the Representation key team members and Government counterparts to present key preliminary findings. The team ensures that participants have an opportunity to present substantiated counter arguments and facts and that factual inaccuracies and misinterpretation can be corrected.

### Step 3: Synthesis, report writing and review

28. In this phase, the team is expected to synthesize all assessments and consult relevant stakeholders to formulate solid evidence-based evaluation findings, conclusions and recommendations. The draft and final report should closely follow the ToRs commensurate standards set by the United Nations Evaluation Group (UNEG). To achieve quality assurance, the draft report will be reviewed first by members of the Steering Committee. A revised draft will be shared with stakeholders: The Representation, the Africa Bureau and DIP as well as other HQ offices as appropriate. Following the revision of the draft report, reflecting any changes made, the report is shared again with the reference group. Once the report is finalized, a stakeholder's workshop in Geneva HQ will be organized to present the findings and examine ways to best achieve follow-up to recommendations made. The workshop participants include Senior Staff of DIP and the Africa Bureau as well as RSD staff and the Desk.

## **Evaluation follow-up**

29. In line with good evaluation practice, effective mechanisms are required to ensure that UNHCR's investment in this evaluation and the recommendations deriving from it will lead to improvements in the quality and impact of the organization's work. In consequence, a formal management response will be required to the evaluation recommendations. The procedures and details setting out the requirements for the management response will be detailed in the forthcoming revision of UNHCR's evaluation policy.

*MG/MS/PDES/5/12/2015*

## ANNEX II

### UNHCR KENYA

#### LIST OF REFUGEE CAMPS IN KENYA

##### 1. Currently Operating Camps

###### a. Dadaab complex

- Dagahaley (North of Dadaab town)
- Ifo (North of Dadaab town)
- Ifo 2 (North of Dadaab town)
- Hagadera (South-East of Dadaab town)
- Kambioos (South-East of Dadaab town)

###### b. Kakuma

##### 2. Previously Operating Camps

###### a. Coast Province (Mombasa region)

- **Hatimi** (closed down in 1997 – remaining population relocated to Kakuma).<sup>139</sup>
- **Mombasa** (closed down in 1999 – remaining population relocated to Dadaab and Kakuma).
- **Marafa**, near Mombasa (closed down in 1999 – remaining population relocated to Dadaab and Kakuma).
- **Jomvu**, near Mombasa (closed down in 1997 – remaining population was given the option to relocate to Kakuma or to the Bajuni islands).<sup>140</sup>
- **Utange**, near Mombasa (closed down in 1995).<sup>141</sup>

###### b. North-Eastern Province

- **Liboi** (closed down in mid-1994, although some people allegedly moved back in 1997 after a flood).<sup>142</sup>

###### c. Nairobi Region

- **Ruiru**, North-East of Nairobi (closed down in 1999 – remaining population relocated to Dadaab and Kakuma).
- **Swaleh Nguru** (closed down in 1999)

3 camps (Hatimi and 2 others – not specified) were closed down in 1997. As of 1999, the only recognised refugee camps in Kenya are Kakuma and Dadaab. Following the closure of all other camps, refugees were ordered to relocate there.<sup>143</sup>

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<sup>139</sup> Canada Immigration and Refugee Board (1999) 'Somalia: The "Benhadir" refugee camp including location and ethnic backgrounds of camp dwellers', 31 December 1999, SOM33457.E.

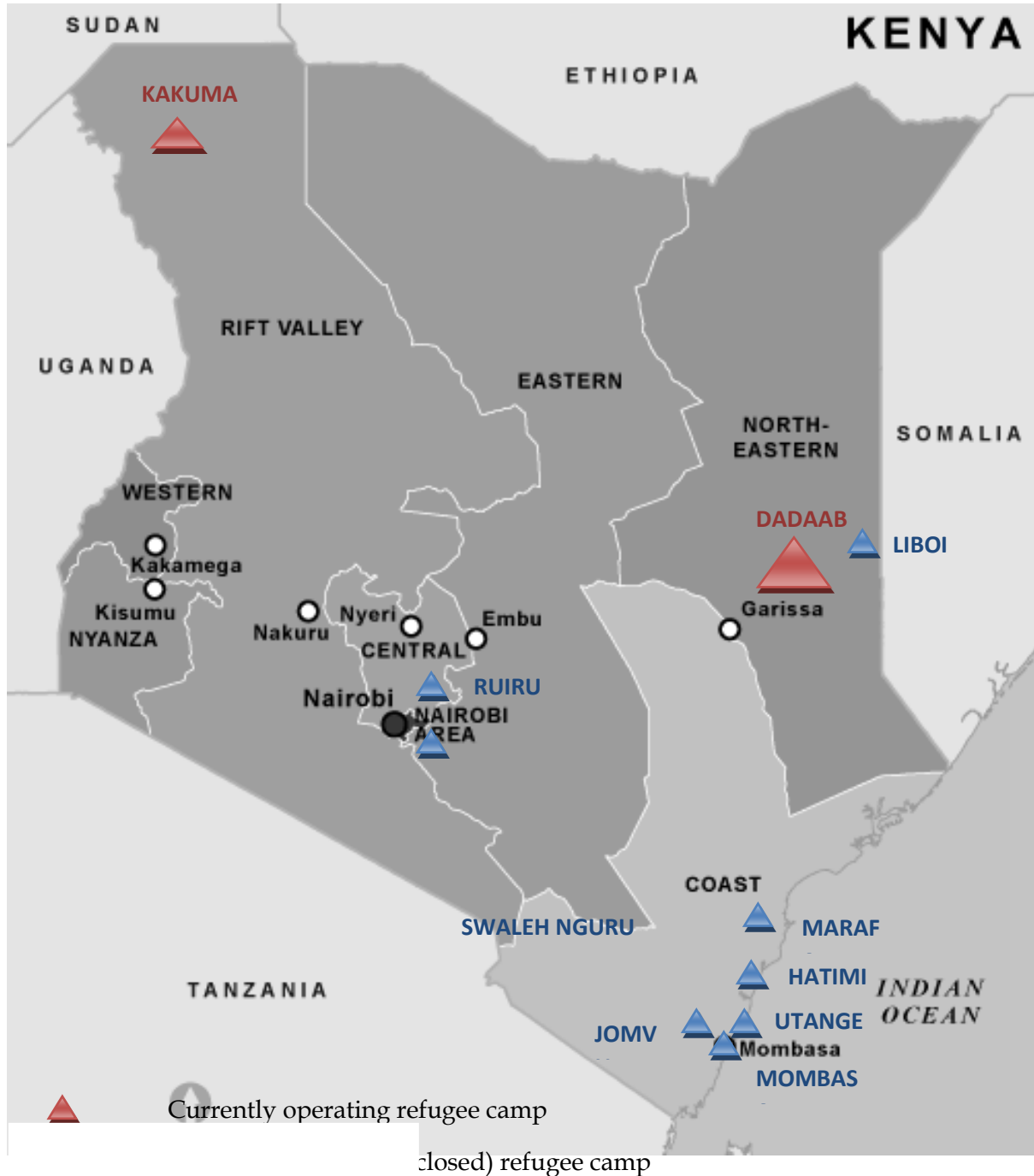
<sup>140</sup> UK Home Office (2010) 'Operational Guidance Note: Somalia'. Available from: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4c2d95e92&skip=0&query=jomvu>, 18.

<sup>141</sup> Canada Immigration and Refugee Board (1995) 'Somalia: Information on the location of Ifo, on the current and past UNHCR practices concerning the relocation of Somalis from Kenya to Ifo and on the route followed by Somali refugees being relocated from Utange to Ifo', 1 June 1995, SOM21182.E.

<sup>142</sup> Canada Immigration and Refugee Board (1998) 'Kenya: Current Situation in Liboi', 1 June 1998, KEN29592.E.

**Figure 1: Currently Operating and Closed Refugee Camps in Kenya**

Note: map locations (particularly regarding Swaleh Nguru and Hatimi) are approximate.



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<sup>143</sup> Canada Immigration and Refugee Board (1999) 'Somalia: The "Benhadir" refugee camp including location and ethnic backgrounds of camp dwellers', 31 December 1999, SOM33457.E.

ANNEX III Evaluation schedule<sup>144</sup>

Task	Sept	Oct	Nov	Dec	Jan	Feb
Preliminary literature review and scoping interviews	█					
Steering Committee established	█					
Consultants contract		█	█	█	█	█
Interviews Senior Staff HQ Geneva		█				
First meeting European SC members		█				
Training Enumerators in Paris		█				
Terms of Reference formative evaluation and SC finalized.			█			
Data collection tools developed		█	█			
Data collection in HQ and Kenya		█	█	█		
Inception report completed			█			
Oxford SC meeting report completed.			█			
Training Enumerators Nairobi			█			
Data collection in the field			█	█		
Second meeting Africa Based SC members			█			
Confidential survey issued and analysed				█		
Data analysis and results				█	█	
Report drafting					█	
Report review						
Report submission						
Management performance matrix completed and formal						

<sup>144</sup> PDES assumes responsibility for any activities that are still pending after end January 2015, as the other members of the evaluation team are contracted and available only until end January 2015.

presentation of the report.

## ANNEX IV

### UNHCR KENYA LIST OF INTERVIEWEES

ORGANISATION	DATE	LOCATION
UNHCR, Policy Development and Evaluation Service	7 October 2014	Geneva
UNHCR, Division of International Protection	7-8 October 2014	Geneva
<ul style="list-style-type: none"> <li>- Deputy Director's office</li> <li>- RSD Unit</li> <li>- Protection Policy and Legal Advice Unit</li> <li>- Resettlement Unit</li> </ul>		
UNHCR, Africa Bureau	8 October 2014	Geneva
UNHCR, Department of Emergency Support Services	7 October 2014	Geneva
UNHCR, Division of Programme Support and Management	7 October 2014 15 December 2014	Geneva
Danish Ministry of Foreign Affairs	19 November 2014	Telephone
Former Technical Advisors to DRA (DANIDA project)	19 November 2014 26 November 2014	Rome Nairobi
UNHCR, Branch Office Kenya	25-26 November 2014	Nairobi
DRA	26-27 November 2014	Nairobi
Refugee Consortium Kenya	26 November 2014	Nairobi
Cabinet Secretary	27 November 2014	Nairobi
Embassy of the Netherlands to Kenya	2 December 2014	Nairobi
Embassy of USA to Kenya	3 December 2014	Nairobi
European Commission (DG ECHO)	2 December 2014	Nairobi
Kituo Cha Sheria	3 December 2014	Nairobi



## ANNEX V    ACKNOWLEDGEMENT

The evaluation team wishes to express its gratitude for the excellent support it has received from the UNHCR Representative and his team in Nairobi, the Deputy Director of the Africa Bureau and her team, and the Deputy Director and various colleagues in the Division of International Protection. The evaluation was greatly assisted by the cooperation and input from the Kenyan DRA, as well as other partners in Kenya. The contribution of the asylum seekers, refugees and other people who had taken part in the RSD process merits particular acknowledgement. The team greatly appreciated the time devoted and efforts made by all other interlocutors interviewed in support of this formative evaluation. Finally, the evaluation team is very much indebted to the members of the Steering Committee, who were an invaluable source of advice.