

# FORCED MIGRATION

review

Issue 65  
November 2020

## Recognising refugees

*challenges and  
innovations in  
refugee status  
determination*



REFUGEE  
STUDIES  
CENTRE

*Plus special feature on:*  
**GP20: lessons and good practice  
on internal displacement**

## Forced Migration Review

(FMR) provides a forum for the regular exchange of practical experience, information and ideas between researchers, refugees and internally displaced people, and those who work with them. It is published in English, Arabic, Spanish and French by the Refugee Studies Centre of the Oxford Department of International Development, University of Oxford.

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## From the editors

The standards of accessibility, fairness, adaptability and efficiency in Refugee Status Determination (RSD) systems around the world have immense implications for the protection and assistance of people of concern, and therefore merit close examination. The 21 articles in the **Recognising refugees** feature (published in collaboration with the RefMig project at Hertie School/Refugee Studies Centre) debate some of the shortcomings in RSD systems, as well as the challenges faced by different actors and the consequences for asylum seekers and refugees. Authors also explore new developments and approaches.

The second feature in this issue offers reflections on lessons and good practice emerging from the 2018–20 **GP20 Plan of Action** for Advancing Prevention, Protection and Solutions for IDPs. This complements previous issues of FMR on the Guiding Principles of Internal Displacement marking their launch in 1998 and their 10th and 20th anniversaries. The Foreword is contributed by Cecilia Jimenez-Damary, UN Special Rapporteur on the Human Rights of IDPs.

**We would like to thank** Cathryn Costello, Caroline Nalule and Derya Ozkul (RefMig), Lucy Kiama (HIAS Kenya) and Periklis Kortsaris (UNHCR) for their assistance on the Recognising refugees feature, and Nadine Walicki and Samuel Cheung (UNHCR) for their assistance on the GP20 feature. We would also like to thank the RefMig project (European Research Council Horizon 2020 award, grant number 716968), the Swiss Federal Department of Foreign Affairs and UNHCR for their funding support for this issue.

This magazine and the accompanying Editors' briefing will be **available online and in print** in English, Arabic, Spanish and French at [www.fmreview.org/recognising-refugees](http://www.fmreview.org/recognising-refugees).

**Forthcoming issues** (details at [www.fmreview.org/forthcoming](http://www.fmreview.org/forthcoming))

FMR 66: Mental health and psychosocial support, plus mini-features on Missing migrants and Data

FMR 67: Public health and WASH (including pandemics), plus mini-feature on Non-signatory States and the international refugee regime

### Impact of COVID-19 on FMR

We have finally been able to post out print copies of FMRs 63 and 64 to almost all countries. However, given the fluidity of the situation, we would encourage you where possible to switch from print to our email notifications. These provide user-friendly links to the full issue and all articles, and are useful for sharing. Sign up at [www.fmreview.org/request/alerts](http://www.fmreview.org/request/alerts) and remember to email us at [fmr@qeh.ox.ac.uk](mailto:fmr@qeh.ox.ac.uk) so that we can cancel your print copy. Thank you!

With best wishes

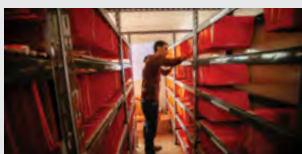
Marion Coudrey and Jenny Peebles  
Editors, Forced Migration Review

### Farewell

Jenny Peebles, who has been Co-Editor of FMR since 2017, is leaving FMR. The FMR team thanks her warmly for her invaluable contribution to FMR and wishes her well.

### Front cover image:

A UNHCR staff member works in the filing room at the Khalda refugee registration centre, Amman, Jordan.  
UNHCR/Jared Kohler



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Warm thanks also to our readers for their support. All donations help. **If you read and value FMR, please make a donation at [www.fmreview.org/online-giving](http://www.fmreview.org/online-giving). Help keep this resource going!**

# Recognising refugees: understanding the real routes to recognition

Cathryn Costello, Caroline Nalule and Derya Ozkul

**Refugee status determination procedures are the gateway to refugeehood and as such are profoundly important. Various challenges arise, however, in studying these practices.**

Our research project ‘Recognising Refugees’ aims to understand the factors that determine who is recognised as a refugee (and who is rejected) globally.<sup>1</sup> In practice, recognition depends not only on the legal definition of ‘refugee’ but also, and most significantly, on the institutional processes used to recognise refugees. These processes may variously be called an ‘asylum procedure’ or ‘refugee status determination’ (RSD). They may be conducted by State authorities (border guards, police, migration officials or dedicated asylum decision-makers and judges); by UNHCR; or by a combination of State and UNHCR officials. The processes may be group-based or individualised.

It is vital to study these processes, as they are the gateway to refugeehood. Recognition as a refugee brings different benefits in different contexts (from a secure rights-protective status in some States to mere protection from *refoulement* and arbitrary detention in others) but it is generally transformative. However, it is not only the outcome of refugee recognition that is important. The processes themselves shape lives profoundly. In the course of our fieldwork, many asylum seekers recounted the indignities of waiting, prolonged uncertainty, and indeed the degradations of asylum interviews. The recognition processes, while they ought to be a gateway to protection, often entail obstacles for applicants, with a profound and long-lasting negative impact on well-being and rights.

The aim of this article is to introduce FMR readers to some of the recent academic research on refugee recognition, and to share some of the challenges we have faced in our own research. Overall, we have sought to broaden out the range of practices studied, in order to reflect the diversity of approaches

worldwide. In so doing, we also aimed to understand the three key aspects of refugee recognition globally: group-based processes; the role of UNHCR in status determination; and refugee recognition processes in States that have not ratified (or do not apply) the 1951 Refugee Convention. We chose four States on which to focus which bring together these features in diverse constellations, namely Kenya, Lebanon, South Africa and Turkey, but we also engaged with local researchers and institutions in other key States in North Africa, South America and Asia. However, we confronted one challenge in particular in our research: lack of transparency. We hope that this piece may trigger reflection on the part of the many practitioners involved in refugee recognition, including within UNHCR and government bodies.

## Scholarship on RSD: variation and its causes

In terms of the outcomes of RSD, there is now a large body of scholarship (mainly in political science) problematising variation in the ‘recognition rates’ of different groups of asylum seekers. This scholarship clearly illustrates that whether an applicant is recognised as a refugee depends not only (or sometimes not at all) on the strength of her claim but on the design of the recognition regime or even the particular decision-maker’s identity (a sure sign of an arbitrary process). This variation is seen across States (particularly across the EU despite legal harmonisation of its asylum system), and also within them. The leading US study, *Refugee Roulette*, showed that the chances of recognition varied wildly even between judges in the same office.<sup>2</sup>

Much of the empirical scholarship illustrates the problem of variation and

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demonstrates that factors other than the strength of the claim explain the outcome. For example, Linna Martén's Swedish study demonstrated the link between the judges' political affiliation and recognition.<sup>3</sup> Rebecca Hamlin's exemplary book *Let Me Be a Refugee* compares the RSD regimes in Canada, the US and Australia. These are States with similar legal systems applying the same refugee definition but with dramatically different outcomes in terms of who is recognised; she finds that the more insulated decision-makers are from political influence, the greater their ability both to develop refugee law in progressive ways and to recognise strong claim.<sup>4</sup>

Scholars studying the processes of recognising refugees in the Global North analyse published decisions and recognition rates, and in many instances have secured access to records which document decision-making. Scholars have not only observed proceedings held in public but have also been granted institutional access to decision-making usually held in private. New technologies enable the study of mass decision-making but this too relies on the accessibility of source material. With access, scholars can provide powerful insights into the quality of decision-making.

## Key aspects of refugee recognition

### 1. Group recognition

Group recognition is a key aspect of recognising refugees, and one that is often underappreciated. For instance, Turkey – which hosts more refugees than any other country – has adopted group-based protection<sup>5</sup> for almost 3.7 million Syrians (although it maintains a highly



UNHCR team registers Rohingya refugees in Bangladesh.

individualised process for other nationalities). While recognition on a '*prima facie*' basis is mostly applied in Africa, other forms of group recognition, including use of strong presumptions of inclusion, are found in many contexts, including in UNHCR's own practice. In the Middle East, both Iraqi and Syrian refugees tended to be recognised as a group. Moreover, some EU States responded to the 2015 refugee arrivals with *de facto* forms of group recognition for Syrians, in the sense that they were treated presumptively as refugees. For example, for some time in Germany asylum interviews were no longer required as long as Syrians' nationality was not in doubt.

One of the main challenges we have confronted is the difficulty in gathering data on the legal basis and processes underlying group recognition. *Prima facie* practices are widespread in Africa but there is no centralised source of information on these decisions, and in some instances records are difficult to locate, even though they effectively determine the status of millions of refugees. Notwithstanding deficits in official sources and transparency, it does seem that *prima facie* status is effective in terms of providing

security of status for refugees. For instance, in Kenya, Sudanese refugees who are recognised *prima facie* were one of the few cohorts of refugees we interviewed who expressed satisfaction with the recognition process in terms of its accessibility and fairness.

## 2. The role of UNHCR

The great understudied decision-maker is UNHCR. UNHCR undertakes RSD in States that are not party to the 1951 Convention, and in many States that do not have a national asylum procedure in place. The scholarship on UNHCR mandate RSD (as it is called) is now out of date, dating from the late 1990s and early 2000s,<sup>6</sup> but what was written was overwhelmingly critical, commenting on the lack of fair procedures and accountability within UNHCR processes. It would appear that in the intervening years, UNHCR has reformed its RSD operations. It has elaborated on its own procedural guidelines. In 2014 and 2015, it published guidelines on *prima facie* recognition of refugee status and temporary protection. In tandem, it sought to both explain and improve its mandate RSD by promoting group recognition. In May 2016, UNHCR formalised a new approach to its 'strategic engagement' on RSD, consolidating some of its pre-existing practices.<sup>7</sup> This new approach states that "diversified case processing strategies – such as group processing based on a *prima facie* recognition of refugee status or simplified procedures for nationalities manifestly in need of protection – need to be considered to safeguard the quality, integrity and efficiency of the process."

As yet, however, we cannot assess the impact of these reforms. The main challenge in studying UNHCR's role in RSD is its opacity. UNHCR's decisions are not published, unlike appellate decisions in national systems. Indeed, there are still no independent appeal mechanisms for UNHCR RSD decisions. Moreover, despite UNHCR's procedural guidelines on RSD, information on how UNHCR itself is taking its RSD decisions is not available. In contrast to the remarkable openness of some State authorities – mostly in the Global North – UNHCR lacks transparency and its practices are not open to scrutiny.

## 3. Refugee recognition in non-signatory States

We are just beginning to understand the diverse purposes of RSD, in particular in States that host refugees reluctantly, including those that have not ratified the Refugee Convention. Often, the role of UNHCR mandate RSD in non-signatory States is ostensibly to enable resettlement. However, for the vast majority of refugees, resettlement places are simply not available. When we examine the links between RSD and resettlement, resettlement emerges as an even less transparent process.

UNHCR conducts a particular form of RSD for resettlement as it must pick refugees who fit resettlement States' priorities. In this process, there is an intertwining of the refugee definition, vague vulnerability criteria and the knowledge that refugees must be acceptable to both the spoken and unspoken preferences of States. The lack of transparency in this process leaves scholars, practitioners and – most importantly – refugees often in the dark about the basis for choices.

UNHCR's role in recognising refugees may be hampered by the host State and RSD may not necessarily generate any clear benefits for refugees. For example, in Lebanon in 2015 the government required UNHCR to stop recognition of Syrian applicants – which led to a population of refugees merely recorded rather than registered; this prevented refugees from having a refugee certificate, potentially reducing their access to certain rights and assistance. Indeed, the lack of 'protection' ensuing from recognition is evident in many States. Echoing findings of Maja Janmyr in Lebanon, and as Derya Ozkul further explores in this issue of FMR, for many (potential) refugees, seeking recognition as a refugee in non-signatory States may diminish rather than increase their rights. The Lebanese authorities' requirement for refugees recognised by UNHCR to sign a pledge not to work in Lebanon is one such example.

## Conclusion

At this preliminary stage in our research, we continue to struggle to come to an evidence-based assessment of refugee status determination procedures. If processes

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are opaque and not open to public or scholarly scrutiny, we have to rely on the accounts of refugees, legal aid providers, and others who support refugees in their engagement with recognition processes. For our research, we depend on the goodwill of decision-makers and officials, both in UNHCR and government bodies, to allow access to records documenting refugee recognition processes. The current lack of transparency not only renders the processes of refugee recognition somewhat impenetrable for researchers but also raises questions on the fairness of the process.

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1. This project is part of the Refugees are Migrants: Refugee Mobility, Recognition and Rights (RefMig) Project, a Horizon 2020 award funded by the European Research Council (grant number 716968).
2. Schoenholtz A I, Ramji-Nogales J and Schrag P G (2007) 'Refugee Roulette: Disparities in Asylum Adjudication', *Stanford Law Review* 60 (2): 295 bit.ly/SLR-Refugee-roulette
3. Martén L (2015) 'Political Bias in Court? Lay Judges and Asylum Appeals', Uppsala University, Department of Economics Working Paper Series 2/2015
4. Hamlin R (2014) *Let Me Be a Refugee*, Oxford University Press
5. Where there is automatic recognition for most if not all members in the particular group that is recognised.
6. Alexander M (1999) 'Refugee Status Determination Conducted by UNHCR', *International Journal of Refugee Law* 251; Kagan M (2006) 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law* 1. The blog 'RSD Watch', founded by Michael Kagan, also published many pieces on the challenges involved in UNHCR RSD.
7. UNHCR, Executive Committee of the High Commissioner's Programme, Standing Committee 66th meeting, 'Refugee Status Determination', 31 May 2016, EC/67/SC/CRP.12  
[www.refworld.org/pdfid/57c83a724.pdf](http://www.refworld.org/pdfid/57c83a724.pdf)

## Refugees are Migrants: Refugee Mobility, Recognition and Rights (RefMig)

This FMR feature has been produced in collaboration with colleagues in the RefMig research project. In order to achieve a deeper understanding of the laws, norms, institutions and practices that govern refugeehood and the migration and mobility of refugees, the RefMig project examines the division between refugees and (other) migrants in several contexts.

Current RefMig research is organised in two distinct but interrelated strands. 'Recognising Refugees' examines Refugee Status Determination and related processes comparatively, and 'Organisations of Protection' focuses on international organisations in the refugee/migration regime, in particular the International Organization for Migration, and how these organisations understand, shape and determine the distinction between refugees and other migrants. An overarching RefMig theme is the accountability (both legal and political) of international organisations, which runs through both strands of research.

The project is led by Professor Cathryn Costello, Andrew C Mellon Professor of Refugee and Migration Law, Refugee Studies Centre (on special leave) and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, working with Dr Derya Ozkul, Dr Caroline Nalule and Dr Angela Sherwood at the Refugee Studies Centre, University of Oxford. The project is a Horizon 2020 award funded by the European Research Council (grant number 716968).

## RefMig needs you!

The RefMig team is currently conducting interviews and other data gathering, and is particularly interested to discuss your experiences if you are:

- a current or former UNHCR RSD officer or reviewer
- working for a legal aid organisation representing applicants in UNHCR mandate RSD proceedings

Please email us [refmig@qeh.ox.ac.uk](mailto:refmig@qeh.ox.ac.uk) if you are interested in sharing your experiences. Find out more by visiting [www.refmig.org/weneedyou](http://www.refmig.org/weneedyou)

**Online surveys for both UNHCR RSD officers and legal aid organisations will be available at [www.refmig.org/weneedyou](http://www.refmig.org/weneedyou) in early 2021.**

## The failures of a 'model' system: RSD in Canada

Hilary Evans Cameron

**The Canadian refugee system is often regarded as a model for refugee status determination. While there is much to learn from what it does well, there is just as much to learn from what it does badly.**

The drafters of the 1951 Refugee Convention must have been exhausted after negotiating the details of the refugee protection doctrine. They seem to have had no energy left to sort out how the refugee status determination (RSD) process should operate, declaring simply that signatories should design it according to their own legal traditions.

Canada's answer to this challenge is routinely held up as a model for the world. Indeed, the Canadian refugee system has many noteworthy strengths. Claimants tell their stories at a full oral hearing to a professional adjudicator, not to a bureaucrat or a border officer. The adjudicator is not answerable to the government and has no competing priorities such as protecting the country's political alliances or conserving its resources. Canadian adjudicators develop a good familiarity with the country of origin information and are instructed to be sensitive to claimants' vulnerabilities. Legal representatives play an important role in most Canadian refugee hearings and the system

provides trained interpreters. When claimants lose their cases, the majority have the right to appeal. Because of these and other progressive aspects of its design, the Canadian system recognises many refugees and mistakenly rejects many fewer than it otherwise would.

Yet this 'model' system regularly produces rejections that are as unreasonable as they are unfair, and its output is inconsistent to the point of arbitrariness. The reasons for this include: the architects of the Canadian system long ago lost sight of its fundamental purpose; they have never been committed to evidence-based reasoning; and they cannot agree on how to answer the key question that lies at the heart of this kind of legal decision-making.

### Assessing risk

RSD is a risk assessment. The decision-maker has one job: to evaluate the danger that the claimant faces if sent home. This is where the Canadian model runs into its first major difficulty. In Canada's common law legal tradition, as in many similar



Trung Pham works on a sculpture of Vietnamese fleeing in a small boat. Trung Pham and his younger brother escaped Vietnam by boat some 40 years ago, eventually arriving in Canada where they were recognised as refugees. Trung has used his skills to convey the dreams and losses of those who made the journey across the sea. His award-winning paintings and sculptures have been exhibited throughout Canada.



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jurisdictions, administrative decision-making is a two-step process. First, adjudicators judge each allegation and accept as ‘fact’ all those – and only those – that they decide on a balance of probabilities are ‘probably’ true. Then they make a legal ruling based on these accepted ‘facts’.

Imagine if you were to use this kind of approach in deciding whether to eat a wild mushroom. You think that it is probably a chanterelle, so it is a chanterelle. That is now a fact. And since you are quite certain that chanterelles are edible, eating it would pose very little risk. In real life, your level of confidence in the proposition that the mushroom is ‘probably’ a chanterelle – and any remaining doubts that you might have about this – would be crucial to how safe you would feel eating it. ‘Probably’ covers a wide spectrum from ‘as likely as not’ to ‘almost definitely’. It makes a world of difference where within that range your ‘probably’ lies. When we assess risk, we must weigh up uncertainty. But in a Canadian refugee hearing, uncertainty disappears. Anything that the adjudicator thinks is probably true is certainly true, even if there is still a good chance that it is false. And anything that they think is probably false is certainly false, even if there is still a good chance that it is true. What is more, the chance that Canadian adjudicators are mistaken in their assumptions – that, for instance, the mushroom is not a chanterelle but is actually poisonous – is exacerbated by the system’s utter failure to promote evidence-based reasoning.

### Evidence and plausibility

Canadian adjudicators consider evidence, of course: they consider the claimant’s statements and documents, the country of origin information, and sometimes a government dossier or the testimony of third parties. But in deciding what conclusions to draw from this evidence, the adjudicators are guided entirely by their own common sense, which is often at odds with the best available social scientific research.

Canadian adjudicators’ common sense regularly tells them, for example, that we

form clear, stable and consistent memories of our experiences that we can play back in our minds like a video recording. According to this theory, if a claimant cannot remember clearly the dates or times or frequency or order of the events that they are describing, or if their testimony contains other kinds of minor errors, gaps or inconsistencies, it is fair to infer that they must have invented their story. Yet for many decades a major thrust of the study of cognitive psychology has been to document extensively how incomplete, how fallible and how changeable our memories are, even our everyday autobiographical memories – to say nothing of traumatic memories and the memories of those who have been affected by trauma.<sup>1</sup>

Similarly, Canadian adjudicators routinely assume that when danger arises, people will quickly take effective measures to protect themselves. If the claimant persevered for a while before deciding to flee, if they hesitated to claim asylum when they finally reached safety, if they ever dared to return home, then surely their story must be a lie. They would have acted otherwise – ‘more sensibly’ – if the danger were real. I recently analysed 300 rejections written by Canadian adjudicators. In nearly two thirds of the decisions in which the adjudicator concluded that the claimant was lying, this finding rested at least in part on the adjudicator’s impression that the claimant’s response to an alleged danger was too unreasonable to be believed.<sup>2</sup>

The Canadian refugee system provides its adjudicators with hundreds of thousands of pages of country of origin information to help them to do their job well, yet it provides not one single page of social scientific evidence about how people think and act. There is no excuse for this failure. Adjudicators need this kind of evidence to make fair decisions about where to draw the line between plausible and implausible memory failures, for example, or between plausible and implausible responses to risk.

### Which mistake is worse?

Perhaps most fundamentally, Canadian refugee law – and indeed international refugee law – has failed to answer the most

important question at the core of this kind of legal decision-making: that is, which is the wrong kind of mistake in an RSD decision. Two potential errors hang in the balance any time a decision-maker has to decide whether to accept an allegation under conditions of uncertainty. They might reject a true allegation, or they might accept a false one. Which kind of mistake would be worse?

Blackstone's ratio is one of the most famous maxims in Anglo-American common law: "it is better that ten guilty persons escape, than that one innocent suffer."<sup>3</sup> Throughout the ages, the architects of this body of law have felt strongly that convicting the innocent is the wrong kind of mistake, and as a consequence Anglo-American common law is uniquely hard on the prosecution: the State bears the burden of proof and it must meet a very high standard of proof. As a result, in theory and in keeping with Blackstone's ratio, the prosecution should pay the price for judges' and jurors' uncertainty.

International refugee law should recognise an imperative under the Convention to resolve doubt in the claimant's favour for a variety of legal and ethical reasons.<sup>4</sup> It should loudly proclaim that it is a worse mistake to deny protection to someone who needs it than to give it to someone who does not. But in the absence of a sufficiently clear statement in the Convention to this effect, the creators of refugee law in Canada – the judges of the Canadian Federal Courts – are divided on this question. Some are more worried about sending refugees home to persecution. Others are more worried about giving people a benefit that they do not deserve. As a result,

over time their judgments have constructed two parallel legal landscapes, one that resolves doubt in the claimant's favour and the other at the claimant's expense. Canadian adjudicators are free to choose, in any case and for any reason, which of these bodies of law to use. Under such circumstances, it not surprising that there are "vast disparities" in the grant rates of Canadian adjudicators.<sup>5</sup> And when a legal system's decision-makers have the discretion to make whichever decision they want for whatever reason they want, the human beings who depend on it will be vulnerable to abuse.

Canada has a world-leading refugee system and its decision-making model is a very good place to start the conversation about what good RSD looks like. It gets many things right and grants protection to very many people who need it. Yet the Canadian system too often denies claims for the wrong reasons. Anyone looking to emulate it should think hard about why this is and should do better.

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2. 'Credibility assessment in refugee hearings: A quantitative study and a way forward': author's research project, funded by the Social Sciences and Humanities Research Council of Canada, results forthcoming.
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## Shedding light on RSD in China

Lili Song

**Although UNHCR processes all individual refugee status claims in China, public information about this mandate RSD has been sparse. Shedding light on the current procedure helps to identify the current challenges and opportunities relating to refugee protection in China.**

The People's Republic of China acceded to the 1951 Refugee Convention and its 1967 Protocol in 1982.<sup>1</sup> Two years before, UNHCR had opened a Task Office in Beijing in response to the Indochinese refugee crisis,<sup>2</sup> in the course of which China admitted and locally settled over 280,000 refugees. In 1995, this Task Office became a Branch Office, and then in 1997 was further upgraded to a Regional Office, covering China, Hong Kong Special Administrative Region (SAR) and Macau SAR. The accompanying agreement between China and UNHCR<sup>3</sup> established that the UNHCR Beijing Office would, in consultation and cooperation with the Chinese government, have unimpeded access to refugees, and thus provided a legal foundation for UNHCR to conduct RSD in China. UNHCR continues to carry out all mandate RSD in China, and the Chinese government acknowledges the refugee status that UNHCR awards.

### The mandate RSD process

Asylum seekers are required to register themselves in person at the Beijing Office, whereupon UNHCR issues them with an asylum seeker certificate. This enables the asylum seeker to apply for a temporary resident permit from the local Chinese police authority – and thus remain legally in China while waiting for their RSD interview to take place.

There is very little publicly available information about the way in which UNHCR mandate RSD is conducted in China. Asylum applicants are required to attend in-person interviews at the Beijing Office and accounts suggest that these are usually conducted by one UNHCR officer, accompanied by a translator where needed, and focus on the reasons for which the applicant has left their country. Applicants who receive negative decisions in the first instance have a right

to have the decision reviewed by UNHCR according to UNHCR's Procedural Standards for mandate RSD and, as a general rule, should be given the opportunity to present their appeal in person. RSD decisions made by UNHCR are, however, not subject to judicial review in China; applicants whose appeals are unsuccessful have no further recourse and are considered to be residing in the country illegally. Asylum seekers also do not generally have legal representation in the RSD procedure; this may possibly be attributed to the lack of practising refugee lawyers in China and the absence of publicly funded legal aid for asylum seekers.

Those asylum seekers who are recognised as refugees receive a refugee certificate issued by UNHCR.<sup>4</sup> They are allowed to stay temporarily in China until UNHCR finds a durable solution for them, usually resettlement in a third country as China does not allow them to settle locally. They have no right to work, and rely on UNHCR to provide assistance in terms of food, accommodation, health care and education.<sup>5</sup> Those who are found not to have a legitimate ground to stay in China are considered to be illegal immigrants.

### Challenges to access

Despite the provisions of the 1995 Agreement with the Chinese government, in practice UNHCR's Beijing Office does not always have access to refugees and asylum seekers. The office is by no means close to China's borders, which is where many refugees and asylum seekers, such as North Koreans, and ethnic Kokangs and Kachins displaced by armed conflict in Myanmar, enter the country. In addition to the fact that China is a large country, as many refugees and asylum seekers arrive without proper entry documents and with limited financial

resources it is difficult for them to make their way to Beijing because of the identity document checks that they would encounter on trains, at airports and at hotels.

According to the 2003 version of UNHCR's Procedural Standards for mandate RSD, interviews must not be conducted by its own implementing partners and UNHCR should "take all feasible steps" to register applicants for RSD outside UNHCR offices when conditions in the host country make it difficult for asylum seekers to reach a UNHCR office.<sup>6</sup> Officials from the Beijing Office have been reported on occasion to have travelled to areas outside Beijing, such as to the southwestern province of Yunnan and to the southern city of Guangzhou, in order to conduct RSD, but this does not appear to be standard practice. On the contrary, the Chinese government has declined UNHCR's repeated requests to access border areas so that they can assist those in north-east China who have fled North Korea, and displaced ethnic Kokangs and Kachins in Yunnan Province. As a result, refugees and asylum seekers who could not travel to Beijing (notably those who arrived in mass influx situations) have generally not been able to access RSD in China because they cannot register and attend interviews in person.<sup>7</sup>

Under its 2003 Procedural Standards for mandate RSD, UNHCR allowed the registration and application submission procedures to be conducted by approved implementing partners. Such implementing partners are often NGOs, and the 1995 Agreement between UNHCR and the Chinese government explicitly permits UNHCR (with the agreement of the government) to establish relationships with relevant NGOs that are legally registered in the country. In theory, then, it has been possible for UNHCR to partner with NGOs located outside Beijing to allow refugees to register and submit their asylum applications locally. However, refugees remain a sensitive topic in China. I am not aware of any NGOs based in China currently openly providing assistance to refugees and asylum seekers in China. No implementing partner relationships appear to have been established by UNHCR's Beijing Office.

The recent 2020 revision to UNHCR's Procedural Standards for mandate RSD now allows, in exceptional circumstances, remote registration of applicants, and their participation via telephone or videoconference where an in-person interview cannot be conducted for reasons of safety and security, availability of resources or significant costs and/or other obstacles relating to travel or access to the applicant, or public health imperatives.<sup>8</sup> It remains to be seen how these new provisions will be implemented by UNHCR's Beijing Office.

### Future handover?

In 2019, UNHCR's representative in China, Sivanka Dhanapala, said that UNHCR expected to gradually transfer responsibility for RSD to the new Chinese National Immigration Administration, which had been established in 2018.<sup>9</sup> It is worth noting that UNHCR terminated its RSD procedure in Macau and Hong Kong after the local authorities of these two SARs established relevant mechanisms in 2004 and 2013 respectively. Since the 1990s, the Chinese government has been working on drafting a national refugee law with the assistance of UNHCR. A draft refugee regulation was submitted to the State Council for deliberation in 2008 but the draft was not adopted.<sup>10</sup> At the time of writing, no public information is available as to the progress, or lack thereof, in the making of China's national refugee regulation – but it seems unlikely that the Chinese government will take on the responsibility of RSD unless and until such a national refugee regulation is passed. While RSD in China continues to be carried out under UNHCR's mandate, more research is required in relation to these processes and associated protection challenges.

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5. For more discussion about UNHCR mandate refugees in China, see L Song (2020) *Chinese Refugee Law and Policy*, Cambridge: Cambridge University Press, chapter 4.1.

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7. When arrivals have taken place at a large scale, as with arrivals of Indochinese refugees, North Korean escapees, and ethnic Kokangs and Kachins, the Chinese government has approached

these itself, with little involvement of UNHCR. See Song L (2020), chs 4.2-4.5.

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## Age assessment for unaccompanied asylum-seeking children in Egypt

Clara Zavala Folache and Beth Ritchie

**Incorrectly processing a child's asylum claim as an adult's as a result of an age assessment fails to give due weight to child-specific vulnerabilities and may affect the integrity and outcome of the RSD process.**

In Egypt, UNHCR has operational responsibility for conducting refugee status determination (RSD) as part of its mandate established by a 1954 Memorandum of Understanding with the government. In early 2020 UNHCR reported that 38% of all refugees and asylum seekers in Egypt are children, of whom 4,589 are unaccompanied and separated children.<sup>1</sup> In mandate RSD settings, UNHCR may be responsible for conducting age assessments; however, the lack of publicly available international guidelines on UNHCR's age assessment practice and procedures means field offices have considerable autonomy in how age assessments are conducted, which may compromise the fairness of the procedure and its adherence with international standards. As procedurally flawed age assessments undermine the fairness and accuracy of the RSD process and decision, it is crucial to tackle this issue.

Age assessment is the formal procedure of assessing an individual in order to establish their age – or range of age – in order to determine if the person is or should be considered a child. The UN Convention

on the Rights of the Child (CRC) states that in the absence of evidence of age, children should not be punished by having their rights as children denied.<sup>2</sup> However, in many countries age assessments are carried out in a way that may ultimately limit children's rights, including their access to social welfare, when conducted without the relevant procedural safeguards and expertise.<sup>3</sup>

UNHCR Egypt started conducting age assessments of unaccompanied children in 2015. Between 2015 and 2019 the age assessment interview took place at any stage of the asylum application process. In early 2019, UNHCR Egypt stopped explicitly conducting age assessment interviews, and introduced a Multifunctional Protection Assessment interview. While UNHCR Egypt states that the Multifunctional Protection Assessment is meant to assess a range of vulnerabilities, many children who participate in these assessments are ultimately age assessed and processed as adults. UNHCR Egypt has not publicly shared the procedural details of these new protection assessments, other than to state they are in keeping



UNHCR/Scott Nelson

Syrian refugee children in Masaken Osman neighbourhood on the outskirts of Cairo, Egypt.

with relevant international guidelines; however, observations by stakeholders (including staff of Saint Andrew's Refugee Services, StARS, who subsequently assist children whose age has not been accepted by UNHCR) suggest otherwise.

### Procedural concerns

As stated in the CRC, it is paramount that informed consent is sought before any age assessment takes place. Children in Egypt are not consistently informed that their age will be or has been assessed, nor warned about the implications of the decision – in contradiction of the recommendations of UNHCR's guidelines published in 2009. The shift from a distinct, explicit age assessment interview to age assessment de facto taking place during a broader multifunctional protection assessment arguably further confuses the nature of the assessment and its potential outcomes.

The fundamental principles that uphold the protection of children are the best interest of the child and the benefit of the doubt. Because children in Egypt are often assessed (by UNHCR) as adults prior to registration, many never reach the point of accessing a Best Interest Assessment (BIA), leaving any

children who have wrongfully been assessed as adults at heightened risk. Further, asylum-seeking children in Egypt do not have direct access to complaint or appeal mechanisms since age assessment decisions can only be disputed by partner agencies during child protection case conferences – thus limiting access to appeal mechanisms to those children who already have access to support.

A UNHCR UK report indicates that age assessment should only be carried out as a measure of last resort and only when there are serious doubts as to the individual's age.<sup>4</sup> Given the absence of written reasons for decisions and the lack of data on the number of age-assessed children in Egypt, it is difficult to judge whether this is the case. Additionally, age assessments do not appear to be conducted in a way that considers both the physical appearance and the psychological maturity of the child, as UNHCR's 1997 guidelines<sup>5</sup> recommend; children are often told that their appearance does not match their age. Moreover, children in Cairo also frequently report difficulty communicating with the decision-maker during age assessments, often as a result of the lack of an appropriate interpreter; this can undermine the accuracy of the

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assessment as well as the child's ability to engage with and understand the process.

### Effects on unaccompanied children and outcomes

When unaccompanied asylum-seeking children first arrive in Egypt, they make their way to UNHCR's Cairo office to request registration. Unaccompanied children are not appointed guardians but instead, if they are identified as children by UNHCR, are referred for case management to one of UNHCR's implementing partners, who is then responsible for conducting a BIA.

In Egypt, when an asylum seeker first registers their asylum claim, if they possess an identity document they will be given an asylum seeker registration card; otherwise, they will be given an asylum seeker certificate. Registration cards provide access to residency permits, while certificates do not. UNHCR Egypt does not issue certificates to unaccompanied children. Therefore, concerns arise when children are incorrectly processed as adults and are given a certificate, which denies them access to a residency permit and therefore exposes them to a higher risk of detention and harassment from authorities.

Moreover, a child applicant who is incorrectly processed as an adult cannot access a BIA or a Best Interest Determination (BID) and is thus denied access to services allocated to children, such as educational grants, as well as to financial assistance. Many are therefore obliged to accept jobs where they are at high risk of exploitation and abuse by employers. Additionally, because a BID is a pre-requisite for an unaccompanied child to access resettlement opportunities, children who have been incorrectly assessed as adults are unable to be referred for resettlement.

The CRC declares that States should respect the right of the child to preserve his or her identity. Interviews and feedback indicate that children feel that any dispute regarding their age is something that questions their identity. This denial of a core part of a child's identity has negative implications for their emotional and psychological well-being.

UNHCR states that the process of examining an unaccompanied asylum-

seeking child's claim should be expedited and child-appropriate, and a liberal application of the benefit of the doubt is recommended in RSD procedures that involve unaccompanied children. Disregarding child-sensitive interviewing techniques and questioning credibility in age assessments may influence the trust (and willingness to disclose information) of the asylum seeker in their RSD interview, and indeed the perception of the Eligibility Officer, leaving the child at heightened risk of rejection.

In Egypt, if a child is incorrectly processed as an adult, they are also denied access to automatic priority processing of their claim. Instead, for those belonging to particular nationalities they then proceed to a Merged Registration-RSD interview, which UNHCR does not consider appropriate for children, while others continue to a regular RSD interview. In both interviews, the expected burden of proof is higher for adults than for children.

### Drawing on the UK example

The European Asylum Support Office age assessment guidance cites the UK's policy guidance as setting out a commendable age assessment framework (although evidence indicates some gaps in implementation).<sup>6</sup> The UK, like Egypt, is a country with a large number of unaccompanied asylum-seeking children. However, unlike Egypt, the UK has specific guidelines and instructions on conducting age assessments and these are available publicly.<sup>7</sup> In the UK, child applicants are informed about the reasons, method, consequences and results of the assessment. Only applicants whose physical appearance and demeanour strongly suggest them to be 25 years or older are considered adults; at least two trained officers have to determine that this is clearly indicated, and in the absence of this two trained social workers must conduct a full Merton-compliant age assessment.<sup>8</sup> Under the Merton age assessment, children have the opportunity to have an independent, appropriate adult present. Importantly, in the UK children also have access to complaint mechanisms and appeal reviews.

In order to ensure that age assessments in mandate RSD contexts are conducted in a way that does not increase the vulnerability of asylum-seeking children nor affect the fairness and accuracy of their RSD process, the following safeguards should be implemented:

- Develop and publish international procedural guidelines for age assessments, reflecting holistic and child rights-based guidelines, such as upholding the benefit of the doubt, seeking informed consent of children, and providing children with an effective and accessible appeal mechanism.
- Increase transparency of age assessment practices and decisions, including sharing written reasons for decisions with actors in the field and the children themselves.
- Conduct age assessment interviews as standalone interviews, rather than as part of protection, registration or other interviews, in order to ensure that the purpose of the interview is clear and transparent, and so that children are informed of the interview ahead of time and understand the process and possible outcomes.
- Allow appropriate adults, such as legal representatives, to attend age assessment interviews.
- Conduct age assessments only as a matter of last resort, rather than routine practice.
- Implement an accessible and transparent appeals mechanism, upholding the key principle of the CRC for the right of the child to be heard and to participate in processes that affect them.

Funding and associated capacity constraints are indeed a challenge for UNHCR Egypt's response to the number of unaccompanied children in the country. However, some of the key age assessment guidelines could be implemented without requiring significant additional resources. For instance, informing children about the assessment and its implications, assuring the benefit of the doubt, having two officers attend age assessment sessions, notifying children

about the decisions made in their cases and the reasons supporting them, and allowing adults or legal representatives to attend age assessments are all fundamental elements of fairer international models that do not require significant additional resources but are nonetheless essential to ensuring a fair, thorough and transparent process.

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StARS [www.stars-egypt.org](http://www.stars-egypt.org)

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# Conducting RSD for resettlement: the need for procedural protections

Betsy L Fisher

**Procedural protections are vital in all aspects of refugee status determination (RSD). Shortcomings in operations conducting RSD for purposes of access to resettlement and complementary pathways call for greater clarity and transparency.**

Resettlement and complementary pathways (such as community sponsorship, scholarships, humanitarian visas and family reunification<sup>1</sup>) are important tools for refugee protection. They provide durable solutions, even though they benefit only a small number of refugees. For many refugees, access to UNHCR refugee status determination (RSD) and procedural integrity within that RSD are vital to access resettlement or complementary pathways.

In 2016, UNHCR published a Note on the strategic direction of UNHCR's activities under its mandate to determine refugee status. The Note acknowledged that historically "UNHCR has advocated for an individual [RSD] procedure to be conducted, wherever possible, following an in-depth examination of the individual circumstances of the applicant's case."<sup>2</sup> (UNHCR refers to this standard practice of determining refugee status on an individual basis as 'Regular RSD'.<sup>3</sup>) The Note announced a new strategy: that UNHCR would only conduct RSD on an individual basis if doing so would have a significant impact on the individual's access to protection. In particular, UNHCR would no longer strive to conduct Regular (individual) RSD where alternatives like group-based (*prima facie*) recognition could secure the same benefits.

UNHCR should champion access to complementary pathways for individuals who have group-based recognition. Further, UNHCR should also ensure that individuals who can only access refugee resettlement and/or complementary pathways if they have a positive RSD decision can actually access these pathways to protection. Lastly, where UNHCR does determine individuals' refugee status, it should ensure that it provides basic procedural safeguards.

## Access to RSD for complementary pathways

Some complementary pathways require proof of refugee status with UNHCR. For example, Canada's 'Group of Five' private sponsorship scheme requires proof of formal recognition as a refugee by UNHCR or the country of asylum.<sup>4</sup> In that situation, a sponsorship group can only sponsor individuals who have been awarded individualised recognition. If the individual only has group-based recognition, they cannot be sponsored under this scheme for resettlement in Canada. In countries where UNHCR does not generally conduct Regular RSD, it should ensure that individuals who could access a complementary pathway if recognised as refugees can do so. UNHCR should establish a process by which potential sponsors who wish to sponsor an individual with group-based recognition can request individualised RSD. It should also advocate with governments for individuals with group-based status to have access to complementary pathways.

## Access to RSD for resettlement

UNHCR requires a positive RSD decision before it will refer an individual for resettlement.<sup>5</sup> However, in many countries where UNHCR determines refugee status, Regular RSD is the exception – and group-based recognition the norm. In those situations, UNHCR simultaneously conducts RSD and assesses eligibility for resettlement in a process known as 'merged refugee status and resettlement determination' (RSD/RST). Thus, even where Regular RSD is not considered by UNHCR to be essential for refugee protection in a country of asylum, UNHCR will conduct individualised RSD

when a person's protection needs are deemed to warrant consideration for resettlement.

### Procedural protections for RSD in merged proceedings

It is true that, in operations with merged RSD/RST proceedings, UNHCR has determined that Regular RSD is not essential to refugee protection. It is also true that resettlement, unlike refugee recognition, is not a right. However, this merged process is a prerequisite to accessing the durable solution of resettlement, and thus transparency and procedural safeguards are vital.

UNHCR's *Procedural Standards for RSD under UNHCR's Mandate* – first published in 2003 and revised in 2020 – set out core standards and best practices.<sup>6</sup> The 2020 Procedural Standards state that the right to appeal a negative decision and the right to a legal representative do not apply in merged RSD/RST procedures because an asylum seeker “should not be rejected through merged” procedures. However, UNHCR should continue to bear in mind that safeguards such as transparent procedures and standards, notifying an applicant of the basis for a rejection, and giving the opportunity to respond are fundamental to ensuring the clarity and fairness of a process.

The 2020 Procedural Standards instruct UNHCR offices implementing merged RSD/RST procedures to adopt “appropriate procedural safeguards, including procedures for review...”. While the Standards go into great detail on appeal processes for Regular RSD, they do not outline what “procedures of review” mean in a merged RSD/RST proceeding, or whether this means review by a supervisor or an informal appeal for an applicant. In any case, the 2020 Standards do not require that an applicant be informed of the reason for the decision – and this diminishes the value of any review.

Further, the 2020 Procedural Standards also note that if an asylum seeker's claim is not appropriate for merged RSD/RST procedures, then that individual should be referred to Regular RSD.<sup>7</sup> However, it is unclear whether this means that every person who is deprioritised through merged

procedures should be referred to Regular RSD or only some, or how UNHCR will decide which people to refer to Regular RSD.

The 2020 Standards allow that “wherever possible and in the interest of the integrity and fairness of procedures, UNHCR Offices may accommodate the participation of appointed legal representatives in the merged RSD-Resettlement process” but they do not require or recommend this. This stands in contrast to another section of the Standards, which notes that asylum seekers should have access to counsel in “any Interview in which UNHCR gathers information that is relevant to the determination of the Applicant's refugee status or the cancellation, revocation or cessation of his/her refugee status.”<sup>8</sup> It is unclear why an RSD/RST interview is not included within that criteria.

Finally, UNHCR guidance on RSD/RST proceedings also states that there should be clear procedures and criteria, and requires UNHCR staff to consider the consequences for the individual before deprioritising them for resettlement. However, UNHCR has not published the criteria determining whom it will deprioritise or the protocols regarding how it makes these decisions. As such, it is unclear how UNHCR decides whom to recognise as refugees based on RSD/RST and who is deprioritised.

UNHCR needs to ensure that RSD serves as an effective protection tool and that there is integrity of process. Regular RSD may not be essential to accessing protection in some countries of asylum; however, RSD/RST is essential to accessing resettlement – and resettlement has an immense impact on an individual's access to protection. The current situation is ripe for arbitrary decision-making. UNHCR should provide basic procedural safeguards such as clear criteria and protocols, and access to counsel wherever possible, and ensure that individuals are informed of the grounds for denial and provided with an opportunity to respond. UNHCR must also undertake careful monitoring to ensure that its operations are implementing these vital safeguards.

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Procedural protections are vital to ensure trust in the system on the part of the individuals whose fates are being determined, to promote accurate decision-making, and to set a positive example to States in their asylum and immigration processes. UNHCR should ensure that its procedures for conducting RSD, including in merged RSD/RST, are transparent and safeguarded by basic procedural protections.

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## Limitations to accessing legal representation in Kenya's RSD processes

Eileen Imbosa and Andrew Maina

**Opportunities for asylum seekers in Kenya to appeal refugee status determination (RSD) decisions are restricted by limited access to legal representation.**

Under the Kenyan Refugees Act of 2006, asylum seekers in Kenya have to apply to the Commissioner for Refugee Affairs (the Commissioner) for first-instance consideration of their asylum claim. If they are dissatisfied with the decision of the Commissioner, they can appeal to the Refugee Appeals Board (the Board) which is a statutory body established by the Refugees Act to review the decisions of the Commissioner. Should they be dissatisfied by the decision of the Board they then have access to the High Court of Kenya. In theory, there should be a smooth progression from one institution to the next, with the High Court at the apex. However, no refugee recognition case has reached the High Court since UNHCR handed over the RSD process to the Refugee Affairs Secretariat (the Secretariat) – headed by the Commissioner – in July 2014.<sup>1</sup>

Judicial influence – that is, the involvement of courts of law – on RSD processes in Kenya is limited, and the most significant reason for this is Kenya's application of *prima facie* status to certain groups of asylum seekers. Those from South Sudan and Somalia comprise up to 78% of

Kenya's asylum seekers, and this group-based recognition has for some years been applied to both groups (although it was revoked for Somalis in 2016). As a result, a significant proportion of asylum seekers are granted recognition on this basis and therefore do not need to access the appeal process.

Kenyan courts are predominantly engaged in resolving access to territory and freedom of movement issues. Such cases involving asylum seekers in Kenya focus exclusively on charges of residing outside a designated area without lawful authority. Seeking asylum *per se* is not a crime but asylum seekers are required to reside in a designated area – often refugee camps in Dadaab and Kakuma – and are only permitted to move in and out of the camps with express authorisation from the Secretariat.

### Access to legal representation

The Kenyan judicial system is adversarial, meaning that the courts only become involved either when an asylum seeker or the Commissioner files an appeal against a decision made by the Board. Courts in Kenya very rarely allow for self-representation –

which in any case is not permitted in cases of appeal against decisions of statutory bodies such as the Board. Asylum seekers who are dissatisfied with the Board's decision must therefore engage the services of a registered lawyer to represent them in court. Legal services in Kenya, however, are expensive and out of reach for most asylum seekers.

Although in theory asylum seekers have recourse to the Legal Aid Fund and can apply for support through the National Legal Aid Service, in practice the Fund does not have sufficient financial resources to meet the legal bills either of asylum seekers or indeed of Kenyans unable to obtain effective legal representation in other matters. This leaves services provided by legal aid NGOs as the only alternative for rejected asylum seekers who are unable to pay legal fees. However, there are fewer than ten legal aid NGOs in Kenya offering court representation generally, and only a few of them specialise in asylum law. Furthermore, funding for these organisations to enable them to offer these services for free has been reduced significantly in recent years.

Lack of access to effective legal representation also affects asylum seekers' ability to launch appeals. Although they are permitted to instigate appeals to the Board without legal representation, asylum seekers who do so may lack the legal knowledge to first interpret the legal reasoning provided by the Commissioner in support of its decision. For instance, some level of legal knowledge is often required in order for an asylum seeker to decipher the meaning of refugee law concepts such as a well-founded fear of persecution or the reasonable possibility of suffering serious harm. Without this legal knowledge, it is difficult for asylum seekers to draft the points of appeal that are required to successfully instigate a review, and they may either present less effective, non-legal points of appeal, or be deterred from launching an appeal in the first place.<sup>2</sup> The lack of access to legal representation in Kenya therefore limits the ability of asylum seekers who wish to appeal against RSD decisions both to put forward an effective point or points of appeal, and to enable those appeals to proceed through the court process.



Newly arrived South Sudanese refugees being provided with non-food items, Kakuma camp, Kenya.

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In light of these challenges, we suggest a number of ways to improve access to legal representation for asylum seekers in Kenya:

**Boosting the Legal Aid Fund:** The Fund needs to be better financially resourced by the Attorney General, the State officer responsible for its administration. Additional financial resourcing would enable funds to begin to be disbursed to lawyers that provide legal representation to Kenyans and asylum seekers who would otherwise be unable to afford these services.

**Raising awareness:** The National Legal Aid Service needs to take steps to raise awareness among registered lawyers about the Fund's existence and the rules for application. There needs to be a large-scale sensitisation and training of registered lawyers in Kenya to raise their awareness of refugee issues and to encourage them to take up these matters. Many registered lawyers with whom the Refugee Consortium of Kenya (RCK) has engaged had no knowledge of the Fund or that it can be used to provide asylum seekers with legal services. Awareness-raising sessions conducted by RCK have produced some early positive results, such as increasing the number of advocates who are willing to provide free legal representation at the Board. Steps also need to be taken

to raise awareness among asylum seekers of the existence of the Fund by providing and publicising information in languages that asylum seekers can understand.

**Supporting legal aid NGOs:** The Government of Kenya through the Office of the Attorney General should also ensure that sufficient funding is provided for legal aid NGOs so that they are able to continue to provide legal support to asylum seekers who require it. Such support can also include related efforts to improve legal protection of asylum seekers, such as through providing Protection Monitors – refugees who are trained to offer legal knowledge on documentation and asylum-related issues. Following these steps will increase asylum seekers' ability to access free, effective legal advice and representation, which should in turn ensure fairer access to the appeal process.

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2. For appeals in the High Court against decisions made by the Board, an advocate is required both to lodge the appeal and then to navigate the rigorous appeal process in court.

## RSD by UNHCR: difficulties and dilemmas

Lamis Abdelaaty

**The arrangements established between governments and UNHCR in relation to conducting RSD reflect the varying motivations of, and challenges for, both parties.**

Refugee status determination (RSD) is normally assumed to be the primary responsibility of States. However, as part of its mandate, UNHCR may conduct RSD when a State is unable or unwilling to perform this task, for example, if that State is not a party to the 1951 Refugee Convention. This is referred to as 'mandate RSD'.<sup>1</sup>

Governments which involve UNHCR staff in their RSD processes usually formalise this arrangement in a

Cooperation Agreement or Memorandum of Understanding (MoU). UNHCR's involvement can take one of three forms. UNHCR may be involved in one or more stages (registration, interviews, decisions or appeals) of an otherwise government-run RSD procedure. Alternatively, UNHCR may conduct an independent process that operates in parallel to government-run RSD. Or UNHCR may be placed in charge of all RSD procedures on a country's territory.

In 2018, UNHCR had sole responsibility for RSD in 47 countries or territories, and shared some responsibility for RSD with the national government in 14 others.<sup>2</sup>

This article draws on archival research relating to Egypt, Kenya and Turkey to explore the potential consequences of UNHCR's involvement in RSD procedures in a country's territory. UNHCR has long conducted RSD for all non-Palestinian asylum seekers in Egypt under a 1954 MoU. UNHCR's RSD operations in Turkey, dating back to 1960, were fully handed over to the government in 2018. And the Kenyan government transferred RSD to UNHCR in 1991, and then assumed full responsibility again in 2017.<sup>3</sup>

### Deflection and limiting leverage

Claiming that a neutral third party, like UNHCR, is responsible for refugee policy eases pressure on governments. In effect, delegating RSD allows governments to lay responsibility for decisions at UNHCR's door. For example, the Egyptian government's reluctance to take control of RSD may appear puzzling in light of the relatively small number of refugees in that country prior to the Syrian crisis. Indeed, in a 2010 interview, a Foreign Ministry official indicated that setting up a national asylum system for "40,000 [non-Palestinian refugees] is not a resource problem" but that RSD conducted by UNHCR "ensure[s] objectivity and integrity."<sup>4</sup> Some observers, however, have attributed the Egyptian government's reluctance to conduct RSD itself to the large number of Sudanese in the country. By recognising Sudanese refugees, the Egyptian government would be indirectly criticising the Sudanese government for its role in atrocities in Sudan.<sup>5</sup> By contrast, UNHCR's independence gives it the appearance of neutrality, enabling governments to assert that decisions were not theirs to make. Delegating responsibility for RSD also gives a government a degree of flexibility; it can detain or expel individuals under the pretext that it did not grant them refugee status itself in the first place.

Refugee-producing countries and domestic audiences often fail to recognise that UNHCR may be highly constrained.

For example, with the influx of Iraqi Kurds into Turkey in 1988, UNHCR requested, but was denied, access to the areas in which the refugees were encamped. It is worth noting that Turkey maintains a geographical limitation to the 1951 Refugee Convention (whereby only Europeans are eligible for refugee status).

Though UNHCR at times attempted to influence government policy, its efforts were often met with limited success. For example, Kenya rebuffed UNHCR's repeated requests to establish an official RSD process during the 1970s. Even when UNHCR was put nominally in charge of RSD in the 1990s, the Kenyan government never officially conceded that it would recognise UNHCR's decisions. Thus, after the bombing of the US embassy in Nairobi in August 1998 and Kenya's subsequent claim that radical Islamist organisations were using refugee camps as recruiting and training grounds, the Minister of Home Affairs announced that UNHCR had no authority to grant refugee status and its protection letters would not be recognised by the government.

Even as its activities were limited by governments, UNHCR was further constrained by its limited funds. With regard to an estimated four million Sudanese in Egypt, a UNHCR Senior Legal Adviser queried UNHCR's capacity, commenting in April 1993 that "UNHCR should consider seriously the consequences of any decision to become involved whether from a legal or material point of view."<sup>6</sup> UNHCR was keenly aware of its own limitations. In general, today as then, UNHCR is perpetually under-resourced. Logistically, this limits the number of applications the organisation can process and the number of refugees it can assist. Since UNHCR must also try to protect the individuals it recognises as refugees, it may have incentives to recognise fewer refugees.<sup>7</sup>

### Self-censorship and deference

Maintaining a good relationship with authorities is essential to UNHCR's continued operation in any country. Even with an agreement in place for UNHCR to conduct all or part of the RSD in a

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given country, policymakers retain the ability to expel UNHCR staff, refuse to honour refugee status decisions, end UNHCR's RSD functions or simply prevent asylum seekers from accessing UNHCR's offices. UNHCR may worry about being denied access to persons of concern and about the 'protection space' for refugees shrinking; as such, it knows not to threaten governments and to tread carefully when it thinks that the awarding of asylum in particular instances will cause political tensions. In 1994, for example, UNHCR staff in Turkey deliberately avoided using the terms 'mandate' and 'refugee' in their correspondence with Turkish officials because these terms had provoked "a negative reaction". Moreover, they expressed the view that some refugee groups had to be dealt with on a case-by-case basis rather than discussed in general conversation because of the "extreme sensitivity of the Turkish authorities to them".<sup>8</sup>

There are also examples of UNHCR bowing to government pressure. In 1986, Turkish authorities asked UNHCR to report the names of all individuals who approached them, plus information about whom UNHCR recognised or rejected. UNHCR's representative saw this issue as "increasingly delicate" and did not want to look "uncooperative". UNHCR in Geneva subsequently confirmed that pending asylum cases and accepted refugees could be named.<sup>9</sup>

## Conclusion

From UNHCR's perspective, a request to take over RSD is difficult, if not impossible, to decline. Performing these tasks when the government is unable or unwilling to undertake them lies firmly within the organisation's protection mandate. My recommendation is not that UNHCR stop conducting RSD. After all, it issues a large number of decisions worldwide – one out of every eleven decisions in 2018<sup>10</sup> – and undoubtedly upholds refugee rights in doing so. RSD systems run by governments are not always preferable, particularly in cases where the government's intent is wholesale rejection of asylum seekers.

Rather, increased transparency on the part of UNHCR regarding its activities and limitations could help mitigate some of the negative consequences discussed above. Increased openness would make it difficult for governments to deflect blame while constraining UNHCR activities. In this way, more responsibility for addressing capacity constraints, access restrictions and other limitations could be clearly laid at the door of host governments (where it belongs). UNHCR is often forced to strike a difficult balance between pushing governments to better respect refugee rights and maintaining a good relationship with authorities to ensure it can continue to operate. But in some cases trading protection principles for access to refugees may lead to the gradual erosion of both.

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## Refugee recognition challenges in India

Roshni Shanker and Hamsa Vijayaraghavan

**India has repeatedly signalled its continued commitment to refugee protection and yet its dual system of refugee recognition presents a complex protection picture.**

In a rare dual system, refugee status determination (RSD) in India is divided between the government and UNHCR. Asylum seekers arriving from non-neighbouring countries, plus Myanmar, are required to approach UNHCR for the determination of their status and for documentation. UNHCR in India conducts RSD for them in line with the 1951 Refugee Convention (to which India is not a signatory) and its own internal guidelines, sharing the list of asylum seekers and refugees it has recognised with the Ministry of Home Affairs (MHA). However, the fact that UNHCR is not permitted to set up registration centres at the borders places the onus on arriving asylum seekers to find out about the asylum process and travel to New Delhi – the location of UNHCR India's only office that conducts RSD and provides protection services – to make a claim.

Those from neighbouring South Asian countries, with whom the State has sensitive relations, are required to approach the MHA directly. The procedure for doing so and the decision criteria adopted by the MHA in such cases are not publicly available. In the past, refugees arriving in significant numbers, such as Tibetans and Sri Lankans (from 1955 and 1984, respectively), were offered temporary protection by the government in camps and settlements, and India has been internationally lauded for its treatment of these refugees. However, for more recent arrivals there are no clear policy guidelines from the government, other than sporadic internal directives for MHA officials.

### Legislative framework

In the absence of a defined legal framework, refugee protection in India has traditionally been based on arbitrary executive policies, complementary legislation and judicial pronouncements. Until very recently, the

only legislation relevant to international migration was the Foreigners Act of 1946 and the Passports Act of 1967, which govern the entry, stay and exit of foreigners (defined as non-citizens). Unfortunately, these laws give wide powers to detain and deport foreigners for illegal entry and stay, and accord no differential treatment for refugees, thereby making them, too, vulnerable to detention and deportation.

In the absence of dedicated legislation, Indian courts have in certain instances allowed detainees with a *prima facie* asylum claim to approach UNHCR for RSD. This, however, is the exception rather than the rule, and such interventions are not governed by any set criteria but made on a case-by-case basis. Moreover, this process is further complicated when the asylum seeker is from one of the countries where asylum claims fall under the mandate of the Indian government, since UNHCR has no designated authority to adjudicate on such asylum claims. As a result, asylum seekers from this group of countries may be even more likely to remain in detention, given the lack of avenues for them to make an asylum claim.

Those who are recognised as refugees by UNHCR are issued with an identity card, but these are not widely recognised by State authorities (in contrast with the widely recognised documentation issued by the government to refugees who fall under its mandate). Having UNHCR-awarded refugee status therefore does not provide refugees with sufficient protection because a lack of recognition of their documentation means they cannot always access health care, education or other basic rights. Because of widespread lack of awareness of UNHCR or its role in India, those with UNHCR-issued documentation are often still seen by authorities as illegal residents.



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Notably, Indian courts have over the years stepped in and recognised refugees as a distinct class of ‘foreigners’, and have extended basic constitutional protection to them. For example, in a landmark case the Supreme Court of India extended the right to life and equality to refugees, albeit to a limited extent.<sup>1</sup> Courts have also instructed immigration authorities to strictly adhere to due process principles in deportation cases and have sought intervention from UNHCR to conduct RSD and determine the detainee’s asylum claim.<sup>2</sup> And, by invoking complementary legislations such as the Right to Education Act, which allows all children (regardless of legal status) to be enrolled in government schools, refugees have been allowed access to essential socio-economic rights.<sup>3</sup> However, most judicial pronouncements of this kind have come from lower courts and do not have the same value as a precedent set by a Supreme Court ruling; furthermore, most are case-specific and cannot be applied as a general principle. A law on refugee management would go further than a court judgement in meaningfully extending legal protection to refugees, particularly the most vulnerable.<sup>4</sup>

### India and the GCR

India’s fairly uninhibited endorsement of the 2018 Global Compact on Refugees (GCR) was, against this background, a welcome commitment. Although not a legally binding instrument (which may of course have played a considerable role in its being accepted by many countries, including India), the GCR does provide some kind of ‘wish list’ for refugee protection, against which governments may be called

to account. While it does not contain any specific provision for RSD, the GCR does explicitly mention the need to have mechanisms in place for identification and registration of refugees and for the fair and efficient determination of individual asylum claims. More concretely, it led to UNHCR



Refugee children from Myanmar learning English and Hindi at a UNHCR daycare centre, New Delhi, India. Why are their eyes pixellated? See FMR photo policy [www.fmreview.org/photo-policy](http://www.fmreview.org/photo-policy)

establishing an Asylum Capacity Support Group to provide technical expertise to those States that request it, in order to help their asylum system to achieve fairness, efficiency, adaptability and integrity. This is a clear statement of UNHCR’s oft-repeated position that RSD is part of the State’s exercise of its sovereign power and that UNHCR’s objective is to facilitate national asylum determination systems wherever possible.

So far, however, the Indian government has expressed no known intention of taking over those RSD functions that are currently undertaken by UNHCR, and allows UNHCR to conduct its processes under the terms of the Memorandum of Understanding that exists between the two parties. In fact, given the general neglect of refugee issues at a political level and among

the general public, the Deportation Order issued in August 2017 – which called for the mass deportation of all Rohingyas within India – came without warning.<sup>5</sup> It made no mention of their access, as people coming from Myanmar, to UNHCR refugee status, nor did it distinguish between refugees who had already been recognised and those who had not yet been issued documentation by UNHCR. It also demonstrated that the Indian government attaches little legal value to the refugee status awarded by UNHCR.

Refugee issues recently came to the fore in the realm of public discourse in the wake of amendments made in December 2019 to India's citizenship laws, which sparked nationwide citizen-led protests.<sup>6</sup> The new law allows all religious minority groups except Muslims from Afghanistan, Bangladesh and Pakistan to apply for citizenship, affecting both government-mandate and UNHCR-mandate refugees. Ironically, this is India's first legislation seeking to extend protection to refugees. However, the amendments did not also clarify the criteria for the granting of refugee status and, as a result, asylum management and RSD processes remain shrouded in ambiguity.

The erosion of the legitimacy accorded by the government to the UNHCR-mandate RSD process is also in evidence in the general deterioration in protection conditions. Where previously UNHCR-mandate refugees could find employment in India's vast informal economy, in recent years this has become increasingly difficult due to the restrictions placed by the government on employing persons without government-issued documentation; similarly, even simple economic activities like renting a house or buying a SIM card have become virtually impossible. While in 2012 the government allowed UNHCR-mandate refugees to apply for a special category visa called the Long Term Visa,<sup>7</sup> which allows the holder to access tertiary education and be employed in the private sector, its issuance is arbitrary and severely restricted, and there has been no move by the government to allow refugees to access other forms of documentation that would simplify their day-to-day lives.

These events, which have played out over the last three years or so, have also coincided with what, according to our experience and analysis of RSD trends, seems to be a more cautious approach to RSD on the part of the New Delhi UNHCR office whose recognition rates have steadily decreased and case-processing timelines become far longer, without any proportionate increase in refugee arrivals.

Against this backdrop, the COVID-19 pandemic has brought RSD to a grinding halt in India. With infections rising at an alarming rate at time of writing, there currently seems to be little possibility of resuming registration and RSD activities at pre-pandemic levels any time soon. This will leave many refugees without access to even the basic protection against detention and deportation that is offered by UNHCR-mandate documentation. In the interim, the real need is for both domestic and international advocacy with the Indian government to ensure that it lives up to its GCR commitments and humanitarian obligations.

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3. *Gulsher v Govt of NCT of Delhi and Anr*, 17 October 2019 W.P.(C) 10833/2019 & CM No.44817/2019

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## Exploring RSD handover from UNHCR to States

Caroline Nalule and Derya Ozkul

**Handing over responsibility for refugee status determination from UNHCR to States is a complicated process that is rarely speedy or smooth. A successful handover – and the ability to meet the overarching goal of providing adequate protection for refugees – depends on many factors.**

The primary responsibility for refugees – and therefore for refugee status determination (RSD) – lies with States but UNHCR conducts RSD where States are unwilling or less able to do so. Over a 20-year period (1998–2018), there has been some form of handover of RSD from UNHCR in at least 30 countries.<sup>1</sup> Furthermore, under the framework of the Global Compact on Refugees, UNHCR has established an Asylum Capacity Support Group to help more States create or develop their national RSD systems in the coming years.

Despite this significant trend, there has been no systematic examination of handovers in order to assess and compare the quality of decision-making and the quality of protection before and after. Most of the available literature on the subject is UNHCR's own evaluation reports,<sup>2</sup> which tend not to assess the implications for decision-making and refugee protection more generally, nor do they take into account the views of all relevant actors including governments, NGOs and civil society organisations (CSOs), and – most importantly – asylum seekers and refugees. There is very little independent scholarship on the subject.

Our 'Recognising Refugees' research project<sup>3</sup> has examined practices in Kenya and Turkey, two States where UNHCR has recently 'handed over' RSD. While this brief article cannot provide a comprehensive overview and the distinct elements involved in different handovers may vary, it discusses some of the questions about handovers, considering these in light of the unfolding transitional processes in both countries.

### **Question 1: Will handover of RSD reduce the financial burden on UNHCR?**

Even though governments may be willing to take over RSD, they may not be quite as

ready to take on all the associated costs. For example, since 2014 when the transition in Kenya began in earnest, UNHCR has been funding most of the operations of the Refugee Affairs Secretariat (RAS), including paying and training staff, installing necessary infrastructure, and transferring the RSD database. To date, the government has not incorporated the majority of the RAS operational staff into its payroll; they are categorised as project staff whose salaries are paid by UNHCR. Some staff said that this uncertainty and job insecurity affected their commitment to the job and that they were always looking for better opportunities elsewhere. The knock-on effect of this is that the government may fail to retain well-trained staff, which creates a continuing need for staff training.

In Turkey, despite an official handover of RSD in September 2018, UNHCR's budget for status determination has kept increasing. According to UNHCR statistics, in 2018 its status determination-related expenditure was US\$341,808; after the official declaration of the handover of RSD, this figure exceeded \$1 million in 2019, and in 2020 its budget for RSD was over \$5 million. This is because in 2018 UNHCR still needed to work on reviewing 3,470 case files already under assessment, and took on 2,640 additional applicants to be processed under merged RSD and resettlement procedures.<sup>4</sup>

### **Question 2: How quickly and completely can RSD be handed over?**

Despite the fact that 'handover' suggests a specific instance of assuming full responsibility for RSD, in practice it is often a gradual process and rarely has defined start and finish dates. Even in Kenya and Turkey, where State authorities

have taken over RSD, the handover is still a work in progress, often with blurred lines in the division of labour.

By July 2019 UNHCR was no longer conducting RSD in Kenya's Kakuma camp, save to provide technical assistance to RAS staff. In Nairobi, however, both institutions were handling pending and new applications. While this may have been a practical administrative strategy aimed at sharing responsibility equally, it created confusion for asylum seekers and refugees regarding who was processing their cases. A division based on designated cut-off dates would have enabled UNHCR to focus on clearing its backlog, and the government to handle newer cases, creating certainty for asylum seekers as to which institution was handling their application.

In Turkey, the handover has been planned since the adoption of Turkey's new asylum law, Law no. 6458 on Foreigners and International Protection, in 2013. UNHCR started "a phased handover of registration and refugee status determination" for non-Syrian refugees in 2015,<sup>5</sup> and a government directive of 23 June 2018 established the working procedures for its international protection bureaux, called Decision Centres. However, after the official handover in September 2018, it appeared that the required infrastructure was not ready; for example, there were not enough adequately trained RSD caseworkers.

UNHCR has continued to work with the Directorate General of Migration Management (DGMM) to establish and strengthen the Decision Centres in Ankara and Istanbul and mobile teams and is working to open a new Regional Decision Centre in Van. UNHCR has also continued to provide training on RSD procedures, assessment of evidence, the use of country of origin information, and interviewing techniques. One major obstacle is that staff at Decision Centres change frequently and, consequently, there is a continuous need for training of new staff. The handover process is likely to continue over the next few years unless the government decides it no longer requires UNHCR's training assistance.

### **Question 3: Will handover of RSD to State authorities enable better access to rights and protection?**

UNHCR argues that "as only States are able to ensure comprehensive refugee protection and durable solutions, the assumption of State responsibility for RSD in a sustainable manner is essential".<sup>6</sup> It could be argued that governments are more likely to respect decisions made by their own agencies, and thus may be more likely to extend rights and benefits to refugees recognised in a government RSD system. This, however, will of course largely depend on how seriously the State department in charge of refugee matters takes its refugee protection mandate. Furthermore, government-conducted RSD usually builds in independent appeal or review mechanisms; UNHCR's RSD appeal process, on the other hand, lacks independent oversight and cannot be challenged before courts of law. A handover could therefore enhance refugee protection – but only in States where there is a relatively high degree of judicial independence and rule of law.

Handovers usually occur when the host State has its own political reasons to want to be seen to be in charge of RSD, including being seen to assert greater authority or control over a security agenda. Once the Kenyan government assumed RSD, for instance, it put a halt to the formal recognition of new Somali asylum seekers in Dadaab and instead started 'profiling' them – that is, manually recording them. As such, rarely is refugee protection alone the motive to take over RSD. UNHCR has little leverage in the face of a State's demand to take over RSD, even if it has protection-related reservations as to the State's intentions.

In some cases, NGOs and CSOs may step in to lobby and advocate for refugee rights. In Kenya they have, for example, lobbied for recognition of refugees' documents to allow access to finance and the national health insurance scheme. Yet some rights, such as the freedom of movement and right to work, continue to be restricted. Nonetheless, NGOs and CSOs are at the forefront of advocating for a new refugee law that would expand upon the substantive protection accorded to

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refugees in Kenya. Similarly, in Turkey, NGOs have actively lobbied for refugees' rights, but restrictions continue, most notably in terms of access to the right to work. In addition, international NGOs are reported to face pressure and surveillance by State authorities. The handover negotiations in both countries largely excluded local NGOs and CSOs, although in Kenya some were later consulted by UNHCR in its evaluation of the transition.<sup>7</sup>

As the cases of Kenya and Turkey show, handing over RSD to States does not necessarily or immediately reduce the financial burden on UNHCR, nor is it necessarily a speedy process nor one that automatically ensures adequate protection of refugees. In both Kenya and Turkey, handover is still very much a work in progress and a process that warrants close monitoring.

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1. Based on UNHCR's annual statistics, there has been a transfer of RSD from UNHCR to governments in Angola, Bosnia and Herzegovina, Burundi, Cambodia, Colombia, Cyprus, Democratic Republic of Congo, East Timor (Timor-Leste), Ecuador, El Salvador, Gabon, Guatemala, Guinea, Guinea-Bissau, Kenya, Malta, Mexico, Nicaragua, Niger, Peru, Republic of Korea, Republic of Moldova, Rwanda, Serbia and Montenegro/Kosovo, Sierra Leone, South Sudan, Togo, Uruguay, Vanuatu and Venezuela. Although not yet reflected in the existing statistics, a handover has also officially taken place in Turkey.
2. For instance, UNHCR (2015) *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya* [bit.ly/UNHCR-Building-on-foundation](http://bit.ly/UNHCR-Building-on-foundation)
3. This project is part of the Refugees are Migrants: Refugee Mobility, Recognition and Rights (RefMig) Project, a Horizon 2020 award funded by the European Research Council (grant number 716968).
4. <https://reporting.unhcr.org/turkey>
5. UNHCR (2015) *Global Appeal 2015 Update: Turkey* [www.unhcr.org/5461e60c52.pdf](http://www.unhcr.org/5461e60c52.pdf)
6. UNHCR, Executive Committee of the High Commissioner's Programme, Standing Committee 66th Meeting, 'Refugee Status Determination', 31 May 2016, EC/67/SC/CRP.12. [www.refworld.org/pdfid/57c83a724.pdf](http://www.refworld.org/pdfid/57c83a724.pdf)
7. UNHCR (2015) *Building on the foundation*, supra note 2, paras 183–187.

## Refugee recognition in the EU: EASO's shifting role

Evangelia (Lilian) Tsourdi

**EASO has recently seen an expansion of the scope of its activities and – as a consequence – its potential to influence national refugee status determination.**

One of the most notable recent shifts in the European Union's asylum policy is the increasing role of the EU's European Asylum Support Office (EASO)<sup>1</sup> in refugee status determination (RSD). Initially EASO's mandate was heavily focused on activities such as information exchange and training but over time its mandate has expanded and so have its human and financial resources.<sup>2</sup> This article focuses on the evolving role of EASO, which has both an indirect and direct impact on RSD in Europe.

### EASO's indirect impact on RSD

Several EASO activities have an indirect impact on RSD. Training is one of them. EASO has developed a training curriculum for national administrators consisting of several modules including credibility assessment and

interviewing techniques.<sup>3</sup> Also of relevance are its quality initiatives whereby EASO maps national practice (of EU Member States) and organises thematic meetings where good practice and implementation challenges are discussed; it also provides practical tools, such as how to conduct a personal interview.<sup>4</sup>

EASO is also involved in the gathering and exchange of country of origin information (COI) and the adoption of a common COI methodology. It jointly produces reports with Member State experts; these reports are publicly available, open to scrutiny by other actors such as asylum applicants and their advocates (in contrast to other less transparent aspects of refugee recognition in some jurisdictions).

What is the impact of these activities? Member States are not bound legally by

the analysis included in the material EASO produces but – despite their non-binding character – EASO COI reports are potentially influential, given the authoritative role of the agency and the importance of COI in credibility assessments. Hence, it is crucial that they integrate information from a variety of actors, including from civil society, that they adhere to the standards of objectivity and impartiality, and that they remain up to date.

If the current influence on decision-making through COI could be described as indirect, the 2016 European Commission proposal for a revamped European Union Agency on Asylum foresees a more robust role for the agency's products and several processes that would grant them a type of 'enforceability'.<sup>5</sup> One such example is the adoption of a 'common analysis' on the situation in specific countries of origin and the production on this basis of guidance notes to assist Member States in the assessment of relevant applications. The same proposal also envisages a monitoring role for the agency. Depending on its design and operationalisation, such a mechanism could also have an impact on RSD. However, negotiations on this proposal were still pending in October 2020 and thus it is premature to draw any conclusions as to the future role of the agency in these areas.

### **Direct impact: from expert advice to joint implementation**

The involvement of EASO in processing asylum applications is new. Operational support was always part of EASO's legal mandate, with EASO deploying 'asylum support teams' to EU Member States at their request. Initially, though, these teams did not interact directly with individual asylum seekers; rather, their work consisted of providing expert advice or training and so on. However, in the aftermath of increased arrivals of asylum seekers to the EU in 2015–16, EASO staff and deployed national experts began to undertake more hands-on tasks, such as directly providing information to arriving individuals. As pressures increased, forms of joint processing emerged in Greece, whereby EASO and

the Greek Asylum Service shared the task of processing asylum requests in order to reduce the host country's workload. In Greece, experts deployed by EASO are independently conducting asylum admissibility interviews on behalf of the Greek Asylum Service. They then submit their findings, based on which the Greek Asylum Service issues the final admissibility decision. (The admissibility phase aims to weed out applicants who could be returned to safe third countries.) And since 2018, Greek-speaking EASO staff have also been involved in examining the merits of asylum claims in Greece. These developments affecting first instance decision-making have not yet been coupled with a formal review of EASO's legal mandate.

EASO is also involved in a support function at second instance decision-making in Greece, whereby it provides 'rapporteurs' to the national Appeals Committees, a function that is expressly stipulated by national law. Rapporteur tasks are limited to initial preparation of case files and to conducting COI research upon request by the Committee members. They are therefore not providing members of the Appeals Committees with a concrete legal opinion, or even an advisory opinion, regarding the grant of international protection. This function means that their involvement in status determination at appeals stage is only indirect.

And, in turn, what is the impact of these particular activities?<sup>6</sup> Although the asylum decision-maker at first instance – according to both EU and national law – is the Greek Asylum Service, in practice this decision is based on a recommendation from, and facts ascertained during an interview conducted by, experts deployed by an EU agency, whose advisory opinions influence the outcome. The Greek Asylum Service does not merely rubberstamp the non-binding EASO advisory opinions; it has the power to adopt a decision that goes against the proposal of the deployed experts and has often done so. Nonetheless, EASO's evolving role means it has a growing impact on RSD at national level.

Asylum applicants should enjoy the full array of rights provided for by EU and international law no matter who is conducting

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the interview. On the ground, however, civil society organisations report shortcomings relating, for example, to the manner of assessing vulnerability and conducting admissibility interviews, and to the fact that advisory opinions on admissibility are issued in English and not translated into Greek, and the fact that interviews are conducted in English, undermining the quality of legal representation by Greek lawyers.<sup>7</sup>

### Future perspectives

EASO's evolving role brings into sharp relief the challenges of accountability and fundamental rights protection. EASO has sought to enhance the procedural quality of its decision-making by establishing an internal quality audit process. Based on recommendations by the European Ombudsman,<sup>8</sup> it has developed further concrete procedural standards, such as obligations on EASO to report to national authorities any errors identified by the agency relating to its own part of the processing. The next big step forward would be the establishment by EASO of an internal complaints mechanism that would be accessible to individuals. This is envisaged as part of its new legal mandate which is under negotiation.

EASO's role has shifted significantly. This has incrementally led to the emergence of patterns of joint implementation through the joint processing of asylum applications. Joint implementation patterns and the augmentation of the financial and human resources available to EASO could act as precursors to deeper forms of integration between the EU and national administrations

in RSD. This should be viewed as a pragmatic approach to enhance solidarity and the sharing of responsibilities for assessing claims. Initial experiences with joint processing in Greece illustrate, however, that enhanced administrative integration should not be met with unqualified acclamation. Administrative integration brings its own challenges and, in this case, calls for a rethink of accountability processes and EU procedural law so that it does not lead to a watering down of procedural guarantees in practice.

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1. For EASO's legal mandate see: Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010
2. For a snapshot of EASO's overall activities see its latest Annual Activity Report for 2019 [bit.ly/EASO-ActivityReport2019](http://bit.ly/EASO-ActivityReport2019)
3. <https://training.easo.europa.eu/lms/>
4. [bit.ly/EASO-QualityInitiatives](http://bit.ly/EASO-QualityInitiatives)
5. For the EC 2016 proposal see: Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation (EU) 439/2010, COM (2016) 271 final (May 4, 2016).
6. For a more complete analysis see Tsourdi E (L) (2020) 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?', *German Law Journal* 21, 506–531 <https://doi.org/10.1017/glj.2020.21>
7. See, among others, Greece Refugee Rights Initiative (2018) *EASO's Operation on the Greek Hotspots: An overlooked consequence of the EU-Turkey Deal*, HIAS-Islamic Relief USA [bit.ly/HIAS-Greece-2018](http://bit.ly/HIAS-Greece-2018); European Center for Constitutional and Human Rights (2019) 'Case Report: EASO's Involvement In Greek Hotspots Exceeds The Agency's Competence And Disregards Fundamental Rights' [bit.ly/ECCHR-EASO-case-report-2019](http://bit.ly/ECCHR-EASO-case-report-2019)
8. See Decision of the European Ombudsman in Case 1139/2018/ MDC on the Conduct of Experts in Interviews with Asylum Seekers Organised by the European Asylum Support Office (Sept. 30, 2019) [www.ombudsman.europa.eu/en/decision/en/119726](http://www.ombudsman.europa.eu/en/decision/en/119726)

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## The use of country guidance case law in refugee recognition outside the UK

Makeish D Joshi

The use of country guidance case law is now a well-established tool in refugee recognition in the UK, with lawyers, State decision-makers and independent judges using these determinations. There now exist over 300 country guidance cases relating to asylum seekers from more than 60 countries. These are in the public domain, located on the Courts and Tribunals website,<sup>1</sup> and are sorted by country with links to a full copy of the determination for each case.

They were introduced in the refugee status determination process in the UK in 2002 to help provide consistency in decision-making when considering the same or similar issues and evidence for individual applicants relating to their country of origin. When applied in the UK, they go beyond being solely a source of country of origin information, additionally providing guidance that is treated as authoritative in the refugee status determination process (unless there are good reasons not to rely on them).<sup>2</sup>

As an open-access resource, these decisions can and are being used by some decision-makers in the refugee recognition process outside the UK. If relying on them, it is important to ensure that the

most recent determination on the issue is being considered and that the decision-maker properly takes account of other and any new country of origin evidence that has emerged since the country guidance case was determined and that may be relevant to the case in question. It is also critical that the specific facts of the individual application are considered. The *Best Practice Guide to Asylum and Human Rights Appeals*<sup>3</sup> provides useful guidance on how a country guidance case may apply to an individual claim.

Although clearly not authoritative in refugee recognition processes outside the UK, country guidance determinations should be perceived as one source of open-access information.

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1. The most recent list, published in September 2020, is at [bit.ly/UK-country-guidance-Sept2020](https://bit.ly/UK-country-guidance-Sept2020)

2. See the Upper Tribunal (Immigration and Asylum Chamber) Guidance Note 2011 No 2 [bit.ly/guidance-note-2](https://bit.ly/guidance-note-2)

3. Henderson M, Moffatt R and Pickup A (2020) *Best Practice Guide to Asylum and Human Rights Appeals* [www.ein.org.uk/bpg/contents](https://www.ein.org.uk/bpg/contents)

## Using multi-member panels to tackle RSD complexities

Jessica Hambly, Nick Gill and Lorenzo Vianelli

**Research across a range of European jurisdictions suggests that the use of multi-member judicial panels at appeal stage improves the quality and fairness of RSD.**

Appeals against negative refugee status determination (RSD) decisions are an essential component of fair asylum procedures and provide crucial oversight of the quality and accuracy of initial decisions. And yet, a worrying trend among signatories of the 1951 Refugee Convention sees States grappling with how to make appeals as quick and cheap as possible. One key tactic has been the reform and re-configuration of appeal bodies, notably in relation to the identity and number of participating judges.

Our findings, based on observational and interview data from the ASYFAIR Project,<sup>1</sup> indicate that appellants, their legal representatives and judges appreciate

multi-lateral teamwork in this complex area of law – an area which a) often depends on credibility assessment, b) is dependent on high levels of discretion and c) is infiltrated by cultures of denial and disbelief. While many States are retreating to single-judge procedures as a way of cutting costs and achieving efficiency, collaborative elements help promote accurate, high-quality decision-making, and future policy should reflect this.

### A mediating effect

Democratic legal systems around the world recognise that matters of great importance should be deliberated and decided by a panel of adjudicators, rather than by a single judge.



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The ‘higher up’ a legal system you go, and the greater the significance of the legal issue, the greater the number of judges that are usually assigned to the case. In asylum appeals, the stakes are such that only the highest degree of fair and just decision-making will suffice. Yet when it comes to the construction and composition of asylum appeal adjudicatory structures we observe a troubling shift towards streamlining. This reduces what we see as necessary checks on the high levels of discretion involved in credibility assessment and the determination of asylum claims.

Quantitative academic studies have consistently demonstrated that some judges are much less likely than the majority to grant refugee protection.<sup>2</sup> Our own qualitative work, furthermore, has revealed judges’ occasional lack of knowledge and vicarious traumatisation, as well as instances of poor professional practice during appeals, including shouting, sneering and laughing at appellants, not paying attention to them, and not giving them an opportunity to share their evidence. In these situations, the involvement of other judges can have an indispensable mediating effect.

Three of the European asylum jurisdictions studied by ASYFAIR – France, Greece and Italy – currently regularly use some form of judicial panel at the first appeal stage. In **France**, at the National Asylum Court, under the ‘regular procedure’ a legally qualified President sits alongside two Assessors, one nominated by the Vice-President of the highest French Administrative Court (Conseil d’Etat) and the other (often an academic with legal or geopolitical expertise) nominated by UNHCR. Until 2015, all first-instance hearings were heard by a panel. Reforms introduced in 2015 now mean that of those appeals that progress to oral hearing, only around two thirds are heard by a panel, with those appeals which are deemed to be less well-founded (via a triage process which is itself problematic) being funnelled into an accelerated single-judge procedure. In a June 2020 decision, the Conseil d’Etat recognised the procedural significance of judicial panels in providing a higher level of justice, and suspended a

measure (taken purportedly as a response to COVID-19) that would have meant that all appeals heard by the National Asylum Court would take place using the accelerated single-judge procedure. This decision by the Conseil d’Etat confirmed that derogation from hearings by judicial panels must be the exception, rather than the norm.

Our fieldwork exploring judicial panels in France showed that judges followed up on each other’s lines of questioning where they saw gaps, or where something was not sufficiently clear. Judges with different specialisms often complemented each other, and applied different perspectives and approaches in dealing with claims through their interactions during hearings.

In **Greece**, Appeals Committees are now formed of two administrative judges plus one independent member who has experience in the field of international protection, human rights or international law and is appointed by UNHCR or by the National Commissioner for Human Rights. Our interview data suggests the independent member (who may also be a social scientist) uses their experience to sensitise the other judges, who, in the words of one respondent, as administrative law judges “don’t necessarily know about asylum”. One of our Greek interviewees (a former independent Appeals Committee member) explained how this interdisciplinary approach had helped, noting that social scientists could offer insights, especially relating to credibility assessments, and that their more flexible view could bring in cultural dimensions that someone with only legal training may lack.

Data from **Italy** further corroborated the view that collegiality provided some level of safeguard in a jurisdiction where facts and law are often open to interpretation in many different ways. Judges told us that they valued the opportunity to discuss and debate with other judges and that panels provide a safeguard against gaps in knowledge or individual preferences.

### Avoiding politicisation

Experiences in both Greece and Italy show how vulnerable panels are to politicisation.

In Greece, prior to 2016 the three-member Appeals Committees comprised two independent members and one government-appointed official. In response to Appeals Committee decisions stating that Turkey was not a safe third country (contradicting the presumption that underpins the EU–Turkey agreement), the Greek parliament reformed the Committees, reducing the number of independent human rights experts.<sup>3</sup> One such expert and research respondent characterised this as “a serious blow to the independence of the Committee”. Following this reform, in the second half of 2016 success rates on appeal in Greece fell from a rate of 15.9% in the previous year to just over 1%.<sup>4</sup>

In Italy, judicial panels were introduced to the asylum appeal process in 2017. Appellants are still heard by a single judge but decisions are now taken by a panel of three professional judges. What might be considered at first impression to be an improvement on single judge procedures, however, actually came at a cost, as this was part of a controversial reform intended to speed up asylum procedures and increase deportations. The reform also abolished a second level of appeal, and established that in-person hearings are no longer the rule.<sup>5</sup>

### Making panels work effectively

Various practical concerns also need to be considered in order to make panels work effectively. First, Italian judges observed that deliberation through panels took longer than working on their own, implying that the panels need to be properly resourced. In general, panels can only work if sufficient judicial time can be set aside. This is a question of resources and, ultimately, of the political will to safely meet international obligations.

Second, panels are likely to work best when they are set within a dynamic professional culture of exchange and openness. Without this, there is a possibility that – paradoxically – panels may actually contribute to homogenisation and the continuation of less desirable decision-making cultures. What is more, at smaller or more remote hearing centres with a smaller overall

pool of judges, there is limited opportunity for in-person judicial panels. Roving judges or rotating panels could offer solutions or, even if it proves impossible to include multiple judges at the hearing itself, it may be beneficial to develop judges’ consciousness of how other judges reason, by encouraging group work during training activities.

Third, close attention should be paid to how communication is conducted between a panel’s members, and between the members and the appellant. Appearing before a panel can dilute the personal interactions between adjudicators and appellants. The appellant may only spend a couple of minutes interacting with each judge, and questioning may seem disjointed or contradictory. There is also a temptation for the members of the panel to talk to each other, often in a language not spoken by the appellant, leaving them feeling excluded or unsure what was discussed. Issuing clear guidance to panel judges about how to communicate with each other and with the appellant would limit these practices.

Evidence suggests that asylum appeals improve quality, accuracy and fairness of decisions when multiple voices are heard in the deliberations. Judicial panels provide one formal method for ensuring this, but there are other opportunities for diverse perspectives to play a part. For instance, independent rapporteurs can assist judges to distil facts and apply law. Ongoing professional training, peer observation and feedback, and opportunities for exchange through national and international judicial networks can also go some way towards moderating the risks of single-judge decision making. We should also not overlook the significance of informal meetings and discussions between judges. Larger hearing centres and centres with facilities like libraries and other common spaces can help to nurture this sort of interaction, as can a culture of breaking for lunch.

These measures require considerable thought. However, bearing in mind the high stakes involved in RSD, the evidence of variability in outcomes, and both the complexity and discretionary burden that refugee law often places on judges,

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working in panels can help to safeguard justice and, ultimately, save lives.

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1. Hosted by University of Exeter (PI Professor Nick Gill), funded by European Research Council Horizon 2020 research and innovation programme: grant No. StG-2015\_677917. Fieldwork was conducted in France, Germany, Italy, UK, Belgium, Austria and Greece. <https://asyfair.com/>

2. See for example Rehaag S (2012) 'Judicial review of refugee determinations: The luck of the draw', *Queen's Law Journal*, 38, 1; Ramji-Nogales J, Schoenholtz A I and Schrag P G (2007) 'Refugee roulette: Disparities in asylum adjudication', *Stanford Law Review*, 60, 295.

3. 'Greece: Appeal rules amended after rebuttal of Turkey's safety', Asylum Information Database, 16 June 2016 [bit.ly/AIDA-Greece-160616](http://bit.ly/AIDA-Greece-160616)

4. Greek Council for Refugees 'Regular Procedure: Greece' [bit.ly/Greece-RegularProcedure](http://bit.ly/Greece-RegularProcedure)

5. Decree Law 13/2017 converted into law by Law 46/2017 does, however, set out a list of cases in which in-person hearings are mandatory.

## Recognising refugees in Greece: policies under scrutiny

Angeliki Nikolopoulou

**Reforms to Greece's asylum system initially improved the fairness and independence of RSD but subsequent reforms are raising questions once again.**

Prior to 2013, responsibility for refugee status determination (RSD) in Greece, a major entry point to Europe for undocumented migrants and asylum seekers, traditionally lay with its police and the ministry responsible for public order. The country's asylum system was widely criticised for ineffectiveness, lack of guarantees, mass prolonged detention under substandard conditions, and pushbacks, generating fear and mistrust among persons in need of international protection. These deficiencies led the European Court of Human Rights to condemn the country for *refoulement* and inhuman or degrading treatment of asylum seekers; the systemic deficiencies of its asylum procedures were confirmed by the Court of Justice of the European Union.<sup>1</sup>

Under pressure from the EU and internationally, in 2010 Greece set up a National Plan on Asylum and Migration and committed to reforming its asylum system by establishing independent civilian asylum authorities to conduct RSD: the Asylum Service at first instance and the Appeals' Authority at second instance. The Plan was

supported by, among others, the European Commission, UNHCR and the European Asylum Support Office (EASO). The need for independent RSD was at the heart of the Plan's strategy, and EASO and UNHCR provided considerable support, largely through training and knowledge sharing, and also financially. Through partnerships with NGOs UNHCR has also provided capacity building to staff, and information to newcomers at entry points and to those being held in detention facilities.

The complexities of the legislative and administrative changes required, however, coupled with financial constraints caused by the severe recession, meant that the transition to the new regime was slow. During an initial transitional phase, which lasted until June 2013, the police retained competence for registration and first-instance RSD. UNHCR representatives were permitted to be present at interviews and to ask applicants questions, which improved the quality of interviews.<sup>2</sup> However, the number of those being recognised in first-instance decisions remained close to zero. UNHCR's opinions



UNHCR/Gordon Welters

Asylum seekers in overcrowded conditions in Moria reception/registration centre, Lesbos, prior to the fire in September 2020.

on cases were advisory only; the Greek authorities retained authority for making decisions and were largely unwilling to grant international protection. As a case in point, in 2012 only two out of 152 Syrian applicants were granted refugee status or subsidiary protection at first instance.<sup>3</sup> On the other hand, the establishment of independent Appeals Committees led to a 32% recognition rate within a year.<sup>4</sup>

The new Appeals Committees consisted of three members: one civil servant, one jurist specialising in refugee/human rights law (chosen from a pool of experts prepared by the National Commission for Human Rights – NCHR),<sup>5</sup> and a second jurist nominated by UNHCR. The independence and impartiality of the Committees were safeguarded through establishing specific recruitment criteria and a robust selection process. The Director of each Committee, for instance, was recruited by a group of experts with the involvement of the independent Greek Ombudsman, academics and UNHCR. In addition, members of the Committees enjoy full independence in their duties.

This scheme brought improvements in the quality and fairness of RSD and raised recognition rates. As an example, during the first months that such Committees were

in place, almost all Syrians, Somalis and Eritreans whose claims had been rejected at first instance were granted international protection at second instance. While many refugees continued to avoid the Greek asylum system due to problems with access, inadequate reception and integration policies, these reforms nevertheless contributed to restoring refugees' trust in the system to some extent.

### The hotspot approach

The reforms to the Greek asylum system must be

seen in the context of the so-called refugee crisis of 2015 when almost one million people from Syria and other countries arrived in Greece via Turkey, mostly through the Eastern Aegean islands, and moved on through the mainland and Western Balkans to other EU States. This situation increased political pressure within the EU for a more restrictive asylum and immigration policy, which resulted in the 2016 EU–Turkey agreement. Under this agreement, all new irregular migrants arriving on Greece's islands – who would then be transferred to the 'hotspots' that operate on the major Eastern Aegean islands – would be returned to Turkey. Although the General Court of the European Union subsequently ruled the agreement not binding,<sup>6</sup> Greek law and practice changed overnight in order to comply with the agreement's commitments.

RSD claims made on Greece's mainland are carried out on a merit-based, individualised basis, irrespective of an applicant's nationality. However, applications that are lodged on the Eastern Aegean islands by Syrians arriving from Turkey by sea after the entry into force of the agreement are examined on admissibility on the basis (set forth in the EU–Turkey agreement) that Turkey is a

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safe third country to which they can be returned. Until the end of 2019 applications by persons of non-Syrian nationalities (which have a recognition rate of higher than 25%) were rejected on inadmissibility grounds based on the above practice, although this began to change slightly in 2020. This practice is discriminatory and unfair, since the admissibility criterion is applied with respect to the applicant's nationality and date and point of entry.

Rejections of claims made by Syrians arriving from Turkey under the above scheme are made on the basis of a standard template decision which applies identical reasoning to each case and is based on a general, vague perception of safety. This runs counter to the requirements placed on States that applicants be treated equally, are not discriminated against, and have their personal fear of persecution or serious harm given appropriate consideration. Moreover, risk of *refoulement* is not seriously assessed and, as my own experience and others' findings show, many decisions are based on country of origin information (COI) that does not reflect the current political situation nor the actual treatment of refugees in Turkey. In addition, transit in Turkey that lasts merely a few weeks or months, without access to effective protection, is considered sufficient to establish an adequate link between the person and the transit country, resulting in rejection of the claim. This concept further distorts the true meaning of the 1951 Convention – which does not require that refugees arrive directly from their country of origin to the host country.<sup>7</sup>

In overturning some of these negative decisions, the independent Appeals Committees rebutted the presumption of safety in the light of the individual facts and circumstances of each case, and through a more careful assessment of available COI.

However, soon after the launch of the new asylum system, questions were raised about the fair and independent character of the authorities. A further reform in June 2016 introduced, among other aspects, restrictions on the right to a personal hearing on appeal, transfer of the competency for granting humanitarian status from the Appeals

Committees to the Minister of the Interior, and undue pressure being placed on NCHR for very rapid recruitment of experts (and, where they were unable to comply within the timeframe required, appointments being made directly by the Minister). It also altered the composition of the independent Appeals Committees, whereby the two members of each Committee were to be administrative judges, with only one UNHCR/NCHR expert member remaining. Furthermore, expertise in asylum/immigration/human rights was downgraded from being a necessity for appointees to being an asset only. Committees are also now exempt from the obligation to submit periodic reports to the Greek Ombudsman, which raises concerns as to the effective control of the administration.

Eighteen members of the Committees – almost a third of total members – publicly complained about these reforms, calling into question the independence and impartiality of the new scheme and criticising the non-conformity of the EU–Turkey agreement with established European and international human rights legislation and decisions.<sup>8</sup> The replacement of experts with members of the judiciary who lack the required experience and expertise remains controversial. At the time of writing, the remaining expert member of the Appeals Committee has been replaced by a further administrative judge, meaning the composition is now fully judicial. The Greek Council of State has ruled the reforms to be in conformity with the Constitution and human rights. In so doing, it has accepted the legality of decisions based on an acceptance of Turkey as a safe country, which has generated considerable controversy among legal practitioners and academics.

### Questions about EASO's role

After the EU–Turkey agreement, teams from the European Asylum Support Office (EASO) were deployed in the Greek hotspots to provide assistance and expertise to the Greek Asylum Service in the management of asylum applications. However, their competencies have been significantly extended beyond their original remit. They now carry out admissibility interviews; conduct interviews

as part of the regular procedure (examining the merits of claims); act as rapporteur within the Appeals Committees; issue opinions based on applicants' personal files; and carry out other application processing duties. Their role in the procedure creates fundamental rights challenges.

Based on the above, the European Ombudsman has expressed concerns about the extent of EASO staff involvement in assessing asylum applications in the hotspots and about the quality and procedural fairness of admissibility interviews. It has also found that, because of the de facto influence that EASO's involvement has on the decisions taken by EU Member States' asylum authorities (forbidden under EASO's founding Regulation), the organisation is being "encouraged politically to act in a way which is, arguably, not in line with its existing statutory role".<sup>9</sup> Moreover, the fact that EASO staff do not have the same level of independence as do members of the Appeals Committees further undermines the procedural guarantees.

### COVID-19 and other threats

The COVID-19 pandemic has led to the suspension of RSD registration and interviews in Greece and created additional obstacles to effective legal aid and representation which have further affected the right to an effective remedy. The examination of pending appeals has continued despite the practical inability for applicants to meet with lawyers, and for asylum files to be obtained in good time and preparations made before the examination of the appeal. Despite this, lawyers report pressure being placed on them by caseworkers not to participate in interviews because of social distancing requirements, meaning some interviews may have taken place without applicants having legal representation. In the meantime, hundreds of applicants in the hotspots have had their claims rejected.

The restrictive approach to protection, as seen in the current RSD procedure and hotspot policy, goes hand-in-hand with Greece's ongoing construction of new closed camps – now as a response to the pandemic,

and following the fires which destroyed Moria camp – its abolition of humanitarian status, and the further degradation in the quality and independence of the country's system. Recent press coverage hints at potential changes, including the asylum service becoming involved in the return of those whose asylum claims have been rejected. The Greek Vice-Minister of Immigration and Asylum has requested that the EU introduce a *refoulement* clause which can be applied by over-burdened frontline EU States at their own discretion.<sup>10</sup> For the time being, the EU turns a blind eye to the widespread reports of pushbacks in Greece and elsewhere in the EU. This demands reflection on how the need for a National Plan on Asylum and Migration for Greece emerged in the first place, and what steps need to be taken to assure the fairness and independence of its RSD now.

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## Refugee recognition: not always sought

Derya Ozkul

**Some Syrian refugees in Lebanon have chosen not to register with UNHCR, believing – often with good reason – that refugee recognition will hinder their freedom and their family's access to humanitarian assistance.**

The road to refugee status determination is often strewn with obstacles, involving multiple interviews and long waiting periods. When refugees are recognised on a group determination basis, the process becomes relatively more straightforward, and can be more efficient for all parties. However, when the recognising authority is UNHCR, disagreements may occur between the organisation and the government over such recognition, including in relation to specific refugee groups.

In Lebanon, for instance, UNHCR provided all asylum seekers from Syria (except Palestinians from Syria and those to whom exclusions may apply) with a refugee certificate after a short screening interview. As the number of Syrian refugees increased, however, tensions between the Lebanese government and UNHCR escalated, and in 2015 the government ordered UNHCR to stop recognising all Syrian nationals. As a result, those who had not arrived or registered with UNHCR in Lebanon before January 2015 were unable to obtain a refugee certificate. UNHCR started issuing appointment slips plus a barcode (*shifra*) to Syrians who approached them after this date. This *shifra* provided access to financial aid and other forms of assistance offered by UNHCR to recognised refugees, but not the UNHCR refugee certificate.

As part of our research project on the legal and political aspects of refugee recognition regimes, we also explored how asylum seekers and refugees perceived the recognition process and made their decisions vis-à-vis registering with the authorities.<sup>1</sup> Interestingly, we found that some Syrians (including those who had had the option of being recognised before 2015) chose not to approach UNHCR.<sup>2</sup> This article explores the three main reasons for this choice:

concerns over how refugee recognition relates to access to humanitarian assistance; fears about data sharing; and fear of being unable to visit Syria. We acknowledge that these findings are based only on asylum seekers' and refugees' own perceptions.

### The effect of recognition on access to humanitarian assistance

In the face of growing numbers of Syrian refugees arriving after 2012, UNHCR introduced 'vulnerability assessments', providing refugees with financial assistance based on specific vulnerability criteria. Refugees in Lebanon told us that UNHCR field officers asked many questions about their access to food, living conditions, employment, health issues and other matters, and that it was unclear to them which criteria mattered more than others. Furthermore, because the precise details of how these assessments are calculated are not published, refugees had to make their own interpretations and to develop strategies aimed at maximising their access to assistance. In interviews, UNHCR representatives told us that assessment for vulnerability is different for each protection mechanism. In the absence of concrete information, however, many refugees drew their own conclusions: that UNHCR provided financial assistance mostly for female-headed households, for families where there was no man of working age and for families with multiple children or children with disabilities.

This had the unintended consequence of some refugee men not registering at all. In our fieldwork, we found many refugee families had chosen not to register the male members of working age with UNHCR because they perceived that doing so would reduce their family's chance of receiving financial assistance. For instance, a Syrian couple explained to us that they had decided

to tell UNHCR that they were separated, although they continued to live together.

Often these decisions were taken based on information that refugees received from their relatives and friends. As a Syrian family explained, they did not register because, after consulting with their friends, they had concluded that eligibility for registration with UNHCR depended on qualifying for humanitarian assistance:

*"We came to Lebanon in 2012 but did not register until 2014. We thought that they [UNHCR] would not register us because we were not in need. When we first came, I met many people here who said that families with one or two children were not accepted, so we thought we would not be able to qualify."*

Another Syrian refugee in Bar Elias recounted:

*"My parents registered with UNHCR. My brothers and I did not register, because we started to hear people saying if we do register, UNHCR will suspend [the aid for] my parents. My parents were in dire need of assistance, so we did not want to put them at risk."*

Indeed, when the interviewee's brother tried to register as an additional family member eight months later (because he hoped he and his wife could access resettlement opportunities), his father received a message the following day saying the family's access to food aid was being suspended. A direct link between these events cannot be confirmed but it is clear that concerns about how access to humanitarian assistance might be influenced by refugee recognition have led some refugees not to register at all.

### Fears about data sharing

Some of our interviewees chose not to register because they thought UNHCR or the Lebanese authorities might be sharing their data with Syria. As one recounted:

*"We did not register as soon as we arrived [because we heard] UNHCR will share your name with the Syrian regime, and you would not be allowed to go back to Syria... the Syrian regime will automatically think of a refugee as someone supporting the opposition."*

According to the agreement between UNHCR and the Lebanese government, UNHCR does share registered refugees' names, addresses and other personal information (but not their reasons for arrival in Lebanon) with the Lebanese Ministry of Social Affairs, stating that this helps the authorities to plan and devise better policies for refugees. UNHCR states that data sharing can only happen with refugees' consent, for which there is a protocol advising asylum seekers about data sharing and a consent form they need to sign at the time of registration.<sup>3</sup>

Despite the Lebanese government's agreement with UNHCR not to share personal data with third parties, including Syria, some refugees in our sample were concerned about the possibility of their personal information being shared, for monetary or other reasons. As another Syrian, who was not registered with UNHCR, added, "I think the Lebanese state is still part of the Syrian government anyway. So, it's all risky." Such concerns about data security are justifiable given the notoriously low degree of the rule of law in Lebanon.

### Fear of not being able to visit Syria

A number of our interviewees stated that they chose not to register, or to register only some members of the family, because they had heard that if they registered with UNHCR they would not be able to visit Syria. However, neither in law nor in practice do brief visits to a home country bring refugee status to an end.

The confusion may have been caused because of UNHCR's particular practice of 'deregistering' refugees in Lebanon. From the early days of displacement in 2011, UNHCR, for instance in Northern Lebanon, has periodically deregistered Syrian refugees who were found to have returned to Syria.<sup>4</sup> UNHCR used data about refugees' exit from Lebanon that were provided by the General Security (the authority responsible for monitoring the entry of foreigners to Lebanon, their stay, residence and departure). Identified individuals were interviewed to find out the reasons for their travel to Syria. Those whose return visits were judged to



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demonstrate that they were not in need of international protection or assistance, including those “who failed to keep in contact with the agency”, were deregistered.<sup>5</sup> However, it is unclear how many meetings one has to miss or how many trips to Syria (or their duration) can lead to this practice. Decisions are potentially therefore made at the discretion of individual caseworkers.

Many families we interviewed had to go to Syria occasionally to arrange their paperwork, or continue their trade between Lebanon and Syria, or to look after elderly and remaining relatives. For example, one family we spoke to had to take the risk of visiting Syria in order to arrange the paperwork for their newly born son. Another family chose their 25-year-old daughter to travel back and forth on a tourist visa to take care of all family-related tasks in Syria. In other words, being able to visit Syria was a necessity for many. UNHCR's lack of publicly available information on the bearing that making short return visits has on refugee status has resulted in some refugees misinterpreting UNHCR's practices and has, in turn, influenced their decisions not to apply for refugee status.

### Registration and residency

In Lebanon, the main apparent benefit of registering with UNHCR is the degree of protection it offers from *refoulement*, and access to limited health care. Registered refugees still need to apply separately to General Security to obtain a residency permit. Residents (especially men) are often stopped at checkpoints scattered around the country and can be interrogated at any time by security forces. If they fail to show their residency permits, they are at immediate risk of being arrested. Additionally, there are widespread reports of fines being levied of up to US\$200 for each year refugees have lived in the country without a permit. There are no official statistics but it is known that most refugees registered with UNHCR do not have residency permits.<sup>6</sup>

If refugees have a UNHCR registration certificate alone, in practice it appears that it is at the discretion of the security officer

to decide the legitimacy of their residence. This reveals the fragility at the heart of refugee recognition in a State like Lebanon, which has not ratified the 1951 Refugee Convention and does not have a domestic refugee law. UNHCR documents do not create a valid legal right to reside or settle permanently in Lebanon. Lebanon only allows UNHCR to operate in the country on the understanding that it works to resettle refugees to third countries (despite the high number of refugees and the small number of available resettlement places).

Registration with UNHCR has become even more critical since the General Security decision on 13 May 2019 to deport all Syrians who had entered Lebanon irregularly after 24 April 2019. Since then, refugees have been required to show that they were recognised, were registered or held other official documents indicating that they were living in Lebanon prior to April 2019. If they fail to show proof, this is taken to be an indication that they entered the country irregularly after April 2019, and places them at risk of immediate deportation. This decision was widely known among the refugees we interviewed, who indicated they had subsequently further limited their mobility within the country to reduce the risk of being caught by security forces.

### Steps towards greater protection

Our research shows that even though registering with UNHCR does bring some practical benefits refugees may nonetheless choose not to register because they consider the disadvantages of registration to outweigh the benefits for them and their families.

The first issue – access to assistance – relates directly to the need for sustainable livelihoods. Refugees who have better access to employment and work permits are likely to have fewer concerns about registering with UNHCR because the perceived consequences of registration for their access to assistance are less significant. Addressing this problem is not an easy task, however, considering that informal employment is widespread in Lebanon; as some refugees attested, for example, the additional financial

costs of work permits often fall on refugees themselves rather than their employers.

The second issue – fears around data sharing – requires profound transformations in both UNHCR and States' approach to personal data in order to build refugees' trust. UNHCR must assess its data-sharing practices, especially in States where the rule of law is consistently low. Even the possibility of data sharing with host governments creates distress for refugees, and any actual data breaches may put their lives at risk.

Finally, UNHCR can address the problems associated with return visits by providing refugees with more details about their entitlements, especially in States where the legal status afforded by being recognised as a refugee is vague and precarious. Given that deregistration requires a full range of procedural standards UNHCR should make

its position on this clearer for refugees so that they may choose their actions accordingly.

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## Group recognition of Venezuelans in Brazil: an adequate new model?

Liliana Lyra Jubilut and João Carlos Jarochinski Silva

**Brazil has used group recognition to grant refugee status to over 45,700 Venezuelans. The practices and technologies involved may well represent a landmark in refugee protection but there remain concerns over limitations and inattention to vulnerabilities.**

Brazil has offered two legal pathways for displaced Venezuelans who have entered the country since 2015. The first avenue entails residency permits and the second is through refugee status.

Regularisation of Venezuelans' legal status through the provision of residency permits is based on Brazil's federal regulations for nationals of border-sharing countries, mirroring the MERCOSUR residency agreement which allows nationals from member States to live in other countries of the South American regional trade bloc. Brazil applies the border-sharing residency permit for countries that are not MERCOSUR members or which – like Venezuela – did not accept the residency agreement element of MERCOSUR membership.<sup>1</sup> The residency permit that applies for Venezuelans is

initially valid for two years, after which it can be renewed. If renewal is approved (contingent on proof of livelihood and lack of a criminal record), the residency permit can become valid indefinitely. With this residency permit Venezuelans have instant documentation and may travel back and forth to Venezuela if they so wish.

Venezuelans fleeing to Brazil can also access refugee status. Based on Law 9474/97, the same rules and refugee status determination (RSD) procedure are followed for Venezuelans as for refugees of other nationalities. Asylum claims are assessed by the National Committee for Refugees (Comitê Nacional para os Refugiados, CONARE). Applying for refugee status also grants documentation which is renewable for as long as the RSD process lasts – or is indefinite

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if refugee status is granted. However, unlike for those with residency permits, if someone applying for or with refugee status returns to the country they fled from they might be regarded as forfeiting refugee protection.

It is up to Venezuelans to weigh up their options and choose between the two legal avenues. However, they often have to make this choice shortly after arrival in Brazil (mostly in the border state of Roraima) and this can lead to making hurried and not fully informed decisions.

### Group recognition as refugees

In June 2019 CONARE recognised the existence of gross and generalised violations of human rights in Venezuela, thus allowing for the application of the regional Latin American concept of refugee.<sup>2</sup> This, in turn, led to the application (for the first time since Brazil's Refugee Law of 1997 came into force) of group recognition of refugee status. Group recognition – also known as *prima facie* recognition – means that if an asylum seeker belongs to the group being recognised, his/her request is simply subsumed into the general recognition of all members in that particular group. In Brazil, however, group recognition is being determined by using technology that allows for more detailed assessment.

According to CONARE,<sup>3</sup> a business intelligence tool has been used to collect asylum seekers' fingerprints and then to map asylum claims. The technology has compared the information on Venezuelan asylum claims with over one million migratory movements, thousands of records of Venezuelans who are already resident in the country, and 350,000 claims relating to migration with the Ministry



More than 1,000 Venezuelan refugees and migrants sleep in tents in Boa Vista's bus station, Brazil.

of Justice (under which umbrella CONARE resides). To identify eligible individuals, the tool also – according to CONARE – searched for cases of persons who were over 18 years old, nationals of Venezuela, without a residency permit in Brazil, had not left Brazil, and were not subjected to exclusion clauses.

This RSD procedure was first undertaken in December 2019 when it led to the recognition of 21,000 Venezuelans as refugees, was repeated in January 2020 with 17,000 further recognitions, and was then used again in August 2020 with over 7,700 additional recognitions. With over 45,700 Venezuelans recognised in this way, they are by far the largest group of refugees in Brazil, and the country now has the highest number of recognised Venezuelan refugees in Latin America.

### Questions and concerns

Questions have been raised, however, regarding the technology used in the process, with civil society and those in academia requesting information on whether any telematics<sup>4</sup> equipment has been used. Information has also been sought on the filtering criteria being used – such as, for instance, whether there are prioritising

criteria in play within the group recognition filters, including criteria for vulnerabilities, or if the date of arrival in Brazil is taken into consideration (as the longer the wait, the greater the accumulated vulnerabilities might be). So far, there has been no further clarification by the government on this RSD procedure, which in turn raises issues of transparency. In terms of personal privacy, no explanation has been given as to whether the asylum seekers' personal information is being used (or may be used) for anything other than RSD.

In April 2020, CONARE recognised 772 children from Venezuela as refugees but the process and the criteria used were not divulged, except for the fact that the CONARE meeting was held online due to the COVID-19 pandemic and that the children were all relatives of Venezuelans already recognised as refugees in Brazil. It is unclear if this was another instance of group recognition (which would mean a change in the filters CONARE had said they were using, as there had been an 'over 18 years' requirement) or if the relatives of the children were among the 38,000 previously recognised using the business intelligence tool. It is also not clear if the children were merely recognised as an extension of refugee status for a family member (as permitted by Law 9474/97) or if new and independent processes were created and new claims assessed.

Although, as CONARE claims, the group recognition practice has shortened the RSD process by two years, there were over 193,000 claims (of which close to 54% were made by Venezuelans) yet to be examined as of May 2020<sup>5</sup> and there is still no indication if the group recognition process (and the use of the same business intelligence tool and/or the same criteria) will be the standard from now on for Venezuelans. It is also relevant to observe that it took Brazil over four years (through a succession of politically diverse governments) from the beginning of the influx of a total of 500,000 Venezuelans into Brazil to apply not only group recognition but also the regional concept of refugee to this displacement context. Moreover, regarding the criteria used, it is telling that – according

to what has been divulged – specific vulnerabilities such as gender, disability, social characteristics or other enhanced need of international protection seem not to have been taken into consideration. Another concern relates to indigenous people from Venezuela requesting refugee status in Brazil. There is no information as to their inclusion or potential eligibility for inclusion in the group recognition; this potentially reflects a lack of consideration of one of the most vulnerable populations in the Venezuelan displacement flow.

These issues create a lack of clarity over whether this process can really be considered group recognition – or whether instead it might actually be considered a mass or 'en bloc' determination of individual RSD decisions. If it is indeed group recognition, this is a landmark in terms of Brazil's widely-praised history of refugee protection<sup>6</sup> and may also lead to greater protection for displaced Venezuelans. In either case, greater transparency about how this technology is applied and a comprehensive commitment to protection are required for the model to be considered adequate.

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## Recognising stateless refugees

Thomas McGee

**The experiences of stateless Kurdish refugees from Syria in Iraq highlight the importance of identifying statelessness during RSD, and the benefits this can offer for refugee protection.**

In recent decades, the protection of refugees and the protection of stateless persons have largely been considered independently of each other. This is reflected in the development of separate legal instruments: the 1951 Refugee Convention and the 1954 Statelessness Convention.<sup>1</sup> While it is true that being a refugee and being stateless are distinct phenomena, for an estimated 1.5 million 'stateless refugees' worldwide they overlap. Indeed, the 1951 Convention explicitly acknowledges that a refugee may simultaneously be a stateless person. However, limited structures currently exist for the identification and recognition of stateless refugees within refugee status determination (RSD) procedures, despite the likelihood that such individuals may face heightened vulnerability and obstacles due to their unique legal status.

Article 1 of the 1951 Convention states that a refugee must be outside the country of their nationality. It adds, however, that in the case of a stateless person, the refugee should be outside the country of their 'former habitual residence'. Thus it is clear that according to international law a stateless person may also be a refugee, if the other necessary conditions of the refugee definition apply.<sup>2</sup> The 1951 Convention does not, however, outline any specificities relating to the identification or recognition of stateless refugees.

A number of countries have developed statelessness determination procedures (SDP) that operate in parallel to, and largely independently of, RSD procedures. Many other countries lack any such mechanism, nor do they have any corresponding status for stateless persons within their national legal framework. The refugee protection regime typically offers a higher level of protection than does the statelessness framework (the former notably protecting refugees from *refoulement*). In practice,

therefore, many stateless refugees seek recognition as refugees, and would consider protection as a stateless person to be a less favourable solution. In such cases, their statelessness and associated vulnerabilities may remain unacknowledged.

In addition to having responsibility for refugee protection, UNHCR holds a global mandate for statelessness, which includes responsibility for identifying stateless persons. In situations where UNHCR is conducting RSD, there might therefore be unharnessed opportunities for UNHCR to engage in more active identification of statelessness among the refugee population it is in the process of registering.

### Recording refugee statelessness

Recognising the statelessness of affected refugees during the RSD procedure could provide greater protection to such individuals. However, reservations about creating a differentiated protection status need to be addressed, as do certain operational practicalities. The primary reservation relates to concerns that this could lead to differentiated treatment of refugees and, at worst, perpetuate discrimination within the country of asylum against those who are stateless, a concern expressed by registration staff from UNHCR and partner organisations working with stateless Kurds from Syria in the Kurdistan Region of Iraq (KRI).<sup>3</sup> In Iraq, where UNHCR is responsible for RSD, there is no SDP, and yet there are refugees in the country who are affected by statelessness.<sup>4</sup> Registering these refugees differently from other Syrian refugees could, the registration staff fear, render them 'second-class refugees'.

Another concern is that recording the statelessness of refugees could produce statistical incompatibilities in the agency's figures for Persons of Concern. Indeed, UNHCR has sought to avoid double counting

individuals (once as a refugee and again as a stateless person).<sup>5</sup> However, it is unclear why, if for statistical purposes stateless refugees are to be solely included in the category of refugees, their statelessness could not still be recorded internally, enabling UNHCR staff to see the extent and dynamics of statelessness within the refugee population. This would eliminate misleading statistics caused by double counting while also allowing the agency to determine what percentage of a given refugee population is affected by statelessness.

Finally, staff responsible for RSD conducted by UNHCR report that the present proGres database system does not facilitate the capturing of a statelessness status while registering refugees. Many are unsure whether they should record statelessness within the RSD process and, if so, how this can technically be accomplished. As such, technical review of the system and/or capacity building training are needed.

Institutional resistance to recognising statelessness within the RSD procedure, then, appears to be based on a combination of operational limitations and perceived protection concerns. Certainly, these concerns must be accommodated in order to ensure an operationally appropriate mechanism that would not expose stateless refugees to stigmatisation or discrimination. A technically well-designed approach, however, would have significant benefits for refugee protection.<sup>6</sup>

### Missed opportunities

The vulnerabilities that refugees face are often identified during RSD. Many refugees have little sustained contact with protection actors following RSD, sometimes attending only short appointments to renew their documents and receive aid distributions. The recording of special needs and vulnerabilities, as required by UNHCR procedural standards,<sup>7</sup> may facilitate referral to specific services and assistance. Statelessness could operate as another such vulnerability, whereby the recording of such a status on the RSD Application Form could, in a similar manner, trigger referral to

targeted services. Often, for instance, specific vocational and educational services can respond to the obstacles stateless refugees have faced in acquiring formal qualifications for their skills in their country of origin.

Shivan Ali, a lawyer working closely with stateless Kurds from Syria who have sought asylum in the KRI, considers that it is “positive that the authorities do not distinguish between citizens and stateless persons among the refugees. All are considered the same, with the same rights”. However, his work has revealed that stateless refugees nonetheless experience underlying vulnerability and may face particular challenges. For instance, they might take risks to return to Syria in order to try to obtain documentation or to reclaim property that is often not registered in their names. Many of those who have later left the KRI also incurred significant risks in transit, and had their status misunderstood within European asylum contexts. Recognising statelessness early is important in order to anticipate problems that might arise later, including in return and onward movements. Greater visibility of statelessness within a refugee community may also help actors to identify issues for advocacy. For example, children born in Iraq to stateless Kurds who fled Syria after an uprising in 2004 have themselves become stateless. Were the statelessness of the children and their parents to be more visible in data, it would be easier to advocate for a solution since Iraqi law permits naturalisation following a period of ten years’ legal residency.

The policy implications of the failure to record statelessness among refugee populations can be far-reaching. Were UNHCR to have internal data on statelessness, it would be in a better position to support and advocate for stateless refugees, wherever they are located. Individuals, such as lawyers working closely with the refugee community, are presently identifying statelessness. Institutionally embedding these good practices while ensuring non-discrimination on the basis of nationality status (and statelessness) would serve the best interests of refugees, and the organisations

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who are mandated to protect them. It is, therefore, time for serious policy solutions to be implemented in order to establish an effective operating procedure for recognising statelessness during the RSD process.

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## The registration of refugees in eastern Cameroon

Ghislain B Tiadjou

***Prima facie* recognition of refugees claiming to be from the Central African Republic depends on establishing their link to the Central African Republic. This is a difficult task, and one that also highlights the vulnerabilities of those who are at risk of statelessness.**

From 2002 onwards, populations facing recurrent socio-political unrest in the Central African Republic (CAR) have sought refuge in neighbouring countries, including Cameroon. This peaked in 2014, with the registration of almost 120,000 Central African refugees in the eastern part of Cameroon (East, Adamawa and North administrative regions).<sup>1</sup> In this part of the country, recognition of refugee status and registration is the sole responsibility of UNHCR since, apart from in the capital city of Yaoundé, the State is yet to set up the required mechanisms to carry out refugee status determination.

Faced with these very large numbers of arrivals, it was necessary to take a *prima facie* approach (implying group recognition of refugee status) to Central African refugees, on the basis of the 1969 OAU Convention.<sup>2</sup> Before registering refugees UNHCR officers must first make sure that the applicants are indeed of Central African nationality or, if it is not possible to do so, must gather evidence that they were habitually resident in CAR. The difficulties that staff encounter in establishing and evidencing this link highlight the

fact that among these populations are people who are at risk of statelessness.<sup>3</sup>

### The *prima facie* approach

Group recognition under the *prima facie* approach is generally done in "situations ... in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees".<sup>4</sup> There are two principal elements to note here. Firstly, it must be established that there are objective circumstances that justify flight, such as conflict, occupation, massive human rights violations, widespread violence or events seriously disturbing public order. And secondly, there must be a massive influx of people, making it almost impossible to conduct a thorough analysis of individual cases.

The situation of generalised conflict and violence in CAR was widely known, providing objective reasons for flight. Given the large number of arrivals, plus the urgent need to provide international protection and UNHCR's shortfall in resources, it was



UNHCR/Xavier Bougois

Refugee women from the Central African Republic in Ngarissingo refugee site in eastern Cameroon.

not possible to apply formal refugee status determination procedures. UNHCR staff in the field were therefore called upon to conduct concise, semi-structured interviews with applicants, the objective being to establish that they belong to the identified group, namely nationals or residents of CAR who had fled as a result of the prevailing circumstances.

The task was all the more complex because the border is relatively porous; communities which belong to the same tribes and which share cultures and religion live on both sides. The work of identifying newly arrived people was therefore done in collaboration with border law enforcement authorities, with village chiefs and with leaders of already-settled refugee communities; monitoring of these identification mechanisms took place to limit the risks of abuse or fraud.

### Establishing Central African nationality

The first element in establishing nationality is verifying possession of CAR identity documents (such as birth certificate, national identity card or passport). If the claimant has such a document and the document appears to be genuine, the officer has only to establish that the claimant has left his country or cannot return because of known circumstances. There has to be an alternative, however, to having to present documents

because most often the circumstances in which people have left their country mean they do not have these documents in their possession.

In the absence of identity documents, the officer must rely on the applicant's testimony. Such a testimony must have a reasonable degree of coherence and must make it possible to establish the person's history, knowledge of their country (history, geography, culture and so on) and the circumstances behind their flight. In

the context of registering Central African refugees in Cameroon this is not easy because many applicants come from rural regions and are illiterate, often arrive traumatised, and sometimes have little general knowledge of their country. The officer is therefore called upon to create an environment of trust that can enable sufficient information to be gathered, and to be sensitive to comprehension problems that may be linked to literacy levels or cultural differences. Moreover, he must bear in mind that refugee law derogates somewhat from the general principle of law that the burden of proof rests with the claimant; this is instead a process that should be conducted jointly by the applicant and the examiner.

### Establishing residence, avoiding statelessness

In many cases, it is difficult to establish the nationality of the applicants accurately because most of the rural population of the Central African subregion lack the culture of civil documentation, birth registration and identity cards. They are unaware of the importance of civil registration, and civil registration services are also often limited and inaccessible. Moreover, the vast majority of applicants are nomadic people of the Peuhl ethnic group who are in search of pastures,



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travelling with their herds across several countries of the subregion – Cameroon, CAR and Chad. In addition, CAR has over decades received large numbers of migrants from neighbouring countries, most of them keeping little or no contact with their country of origin.

Where an applicant does not have identity documents and when their story indicates time spent in several countries or that they originate from a neighbouring country, the officer must check whether the applicant has the nationality of one of these other countries, thus making him eligible for that country's protection. This is always done by listening carefully to the applicant to better understand their links with each of the countries and the possibility of claiming the nationality of one of these countries – above all, to make it possible for the applicant to claim the rights conferred by that nationality. Those who are entitled to claim a different nationality can no longer claim international protection. However, for a population with little education, the procedures for claiming a nationality can appear complex and costly and therefore in practice inaccessible. If it is not possible to establish that the applicant actually has or can claim another nationality, they will find themselves in a situation of *de facto* statelessness and it will therefore be necessary to explore the possibility of granting them status based on usual residence in CAR.

Statelessness seems to be a problem affecting girls and women in particular. Many children are given birth certificates when these are needed in order to continue their education. However, because the schooling of girls is less prioritised, girls are more frequently deprived of their only chance of having a birth certificate and, later, a National Identity Card. In addition, the social status of most rural Peulh women is such that they are not always permitted to register a birth without the agreement and presence of their husband, father or brother.

For claimants who appear to be *de facto* stateless persons, and who are recognised as refugees on the basis of their usual residence in CAR, the Tripartite Agreement for the Voluntary Repatriation of Central African

Refugees Living in Cameroon undertakes to ensure that these people upon their return can have access to naturalisation procedures.<sup>5</sup> Furthermore, in cases where nationality is disputed, the Central African government, in consultation with the Cameroonian government and UNHCR, will presume that the individual has the nationality declared at the time of their registration as a refugee, unless there is tangible proof to the contrary. These Tripartite Agreement provisions appear to be positive steps in the fight against statelessness, although their implementation should be closely followed since implementing them will require significant resources.

Addressing this problem of the population at risk of statelessness goes beyond the management of the current refugee crisis by UNHCR. This is a problem that requires a concerted and flexible approach between several countries in the subregion, such as Cameroon, Chad, CAR and even Nigeria. One such step could be for these countries to create a joint commission that would work to develop their birth registration and nationality laws so that they take the experiences and needs of nomadic people fully into consideration. This same entity could also have the function of settling complex cases of nationality determination with the aim of avoiding people falling into statelessness.

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The views expressed in this article are those of the author and do not necessarily reflect the views of UNHCR.

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## Seeking asylum in Italy: assessing risks and options

Eleanor Paynter

**In Italy, uncertainties inherent in the asylum system affect asylum seekers' motivation, decisions and well-being.**

Beginning in 2014, Italian authorities established 'centres of extraordinary reception' (CAS) across the country as an emergency measure to house asylum seekers. Intended as a temporary solution to a nearly fourfold increase in arrivals by sea between

demonstrate their commitment to integration. Although they knew that their asylum claims depended on their account of having to flee their home countries rather than on how well they adopted Italian customs, they assumed that demonstrating good citizenship

could only help their chances. At one centre in the southern region of Molise, staff – who mediated asylum seekers' communications with lawyers and other officials – praised those who regularly attended language classes or who helped out around the centre, praise that asylum seekers often interpreted as an added reason to hope for a positive decision.

Residents also

often attempted to identify patterns in decisions about who was granted protection, for instance in terms of nationality, age and month of arrival. This was to try to make sense of an opaque system and changing regulations. Moreover, recognising patterns reassured those who fitted the perceived profile for a positive outcome, and it enabled others to adjust the decisions they made about the options available to them while they waited.

By mid-2018, however, following national elections, the general sense among the CAS residents was that asylum officials were increasingly denying claims, regardless of nationality.<sup>2</sup> Multiple CAS residents whose applications had been rejected described feeling that these denials were also a rejection of the commitment they had made to integrating.



A CAS classroom, after an Italian language lesson. Italy, 2017.

2013 and 2014, these centres, which are often situated in repurposed buildings (former hotels, gyms or schools), have since housed a majority of asylum seekers, often for periods longer than the few months intended by the State and expected by the asylum seekers.

Language lessons are an important component of Italy's reception system, though modes of instruction and rates of attendance vary widely. The decision to participate reflects asylum seekers' varying views of how best to invest energy during the reception period. In interviews that I conducted at CAS between 2017 and 2019,<sup>1</sup> residents – primarily young men from Sub-Saharan African countries, reflecting trends in Mediterranean migration – described their hope that learning Italian would prepare them for post-reception life, for example by enabling them to find work, and that attending classes would

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To the asylum seekers, the asylum system seemed increasingly arbitrary, with decisions more clearly linked to political will than to the merits of their individual cases. They were also well aware of the anti-immigrant sentiment that shaped media coverage of their presence in Italy and their interactions with some local residents, both of which they felt had worsened since the elections.

One interviewee explained that he did not realise when his appeal was rejected that this decision was final. When he had entered Italy, multiple appeals were possible. While he was awaiting status determination, however, the law had changed. For him, like many others in his position, it seemed absurd that his chances for a successful claim could change so radically while he awaited a decision. To several other residents, the number of denials and their seemingly unfounded nature made waiting seem pointless. Some decided not to

wait for their appeals to be heard and opted instead to leave the CAS while it seemed possible to do so. Without resources, and unable to return to their home countries, many of them made their way to larger cities with more established migrant networks and communities. Becoming undocumented was a decision none of the men took lightly but one they felt became necessary when left without other realistic options.

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1. The doctoral research on which this article is based was supported by funding through the Ohio State University's Academic Enrichment Grant, the Alumni Grant for Graduate Research and Scholarship, the Global Mobility Project and the Mershon Center for International Security Studies. See <http://eleanorpaynter.net/research/>.

2. Data show denials increased from about 55% in 2018 to about 80% in 2019. See (Italian only) [bit.ly/Villa-2020](https://bit.ly/Villa-2020)

## Adaptable asylum systems in Portugal in the context of COVID-19

Angela Moore and Periklis Kortsaris

**COVID-19 has provided a new entry point for conversations about the adaptability of asylum systems. The swift, constructive approach taken by Portugal to ensure the rights of asylum seekers during the pandemic offers a protection model for others to consider.**

COVID-19 poses a number of challenges to asylum systems. What happens when asylum systems are unable to operate in accordance with accepted processes and modalities? What if interviewers and decision-makers cannot meet asylum seekers or come to the office? How can asylum systems cope if compliance with established timelines is impossible, and there is no clear indication of when the situation will be 'back to normal', or how long the transition to a 'new normal' might last? What solutions can States identify and prioritise in order to safeguard the rights of asylum seekers and ensure that they are not penalised for a situation that is entirely beyond their (or anyone's) control while also ensuring that public health is protected? How can interim measures contribute to avoiding the

accumulation of backlogs at all stages of the refugee status determination (RSD) process?

The question of adaptability in the face of challenges such as these is raised in the Global Compact on Refugees and is an integral part of the vision for its Asylum Capacity Support Group<sup>1</sup>. In the context of the COVID-19 pandemic, Portugal very quickly identified a novel approach to the challenges it faced. In late March 2020, the country's Council of Ministers issued Order No 3683-B/2020 to temporarily regularise the residency status of all foreign citizens who had filed a request of residence or asylum as of 18th March 2020, the day a national state of emergency was declared in Portugal.<sup>2</sup> The validity of this legal residency was initially until the end of June, and subsequently extended to the end of October

2020. The explanation given by the Ministry of Internal Affairs for this decision was that people should not be deprived of their rights to health and public services because their application could not be processed.<sup>3</sup>

### Protection-oriented adaptation and challenges

While the Order does not grant residence permits to asylum seekers, they are treated as if they have a valid residence permit. This effectively avoids asylum seekers being negatively affected by reduced registration processing capacity during COVID-19. One week after the entry into force of the text, and following calls from civil society for greater clarity on beneficiaries' entitlements, it was announced that benefits would include social services and benefits linked to employment such as family allowances, child support and protection against unemployment. The Order also covered many issues within the asylum/RSD procedure, from the (re)scheduling of appointments to the suspension of deadlines.

Furthermore, ensuring access to health care for everyone during a pandemic, irrespective of legal status, is consistent with a rights-based approach and is also logical from a public health perspective. In human rights terms, individuals should be able to access potentially life-saving health care on an equal basis, particularly if the delay in their acquisition of legal status is caused by factors outside their control. At the same time, restricting access to health care not only puts individuals at risk but also threatens the health and safety of members of their community.

Persons with a claim of international protection needs who had entered the country but did not present an application before the cut-off date of 18th March could not benefit from the measure.<sup>4</sup> Civil society organisations advocated for their inclusion but to no avail. Given the uncertainty surrounding the state of emergency, it would seem difficult – and unhelpful – to apply strict cut-off dates. Asylum seekers who presented their application within a reasonable amount of time following their arrival should not be penalised by the onset of the crisis in terms

of their access to the full set of rights due to asylum seekers under Portuguese law.

The country's decision to strengthen the status of asylum seekers and facilitate their access to services speaks to public health concerns but also resonates with the need for managing resources during these uncertain times. By ensuring access to legal employment, the State would allow some asylum seekers to become self-sufficient and would also be able to start taxing those who were working – a clear win-win situation.

### A model for future adaptation

The steps taken by Portugal yielded concrete, measurable protection dividends. In a digital world and in the context of discussions about remote arrangements for conducting registration and RSD, Portugal's measures (and those undertaken by other countries, such as Ecuador, Peru, Sweden and Lithuania, to name but a few) contribute to the discussion on adapting the RSD and broader protection response from a grounded, non-technical perspective that emphasises the rights of asylum seekers and does not require significant up-front investment by States. Other States seeking to adapt their asylum procedures to meet the demands of a pressing crisis may wish to take note of some of the key aspects of Portugal's Order. In particular:

**Prompt action:** Passed just nine days after the declaration of the state of emergency relating to COVID-19, the Order swiftly clarified the residency status of asylum seekers and migrants who had applications in process. (Less clear details were later sorted out in the implementation phase.) Swift action ensured that confusion and uncertainty were minimised, while asylum seekers and migrants had access to medical and other services from the early stages of the crisis.

**Emphasis on rights:** Notwithstanding the cut-off date, the Order seems to have been designed to ensure that the fairness of the asylum system was preserved. Asylum seekers were effectively given the benefit of the doubt, regardless of the status of their claims or appeals.

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**Group approach:** The activation and scope of the Order were designed on the basis of an identified group of similarly situated persons, thereby allowing for a flexible and immediate response to a situation in which individual processing was impractical and ultimately impossible given the unusual circumstances. Beyond the application of the cut-off date to define the group, no further distinctions were made in terms of status.

**Reinforcing the asylum procedure:** Rather than create a new status or parallel structure, the Order leveraged existing systems to benefit a broader cross-section of the asylum-seeking population. This had the advantage of reducing the extent to which new definitions and rights had to be established, while promising to permit seamless transition back to the pre-existing system upon the eventual relaxation of emergency measures.

While this solution does not necessarily speak to all situations in which adaptability is required in processing asylum applications, it does offer a model for addressing certain types of challenges. It does so, moreover, in a manner that is accessible even to States that may not have the resources to dramatically increase staffing or deploy technology

to facilitate processing of cases. Finally, the Portuguese model demonstrates that solutions can be found within the existing asylum system, rather than requiring the development of new procedures or statuses.

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1. Global Compact on Refugees, para 62  
[www.unhcr.org/5c658aed4.pdf](http://www.unhcr.org/5c658aed4.pdf)

2. Order No 3683-B/2020, 27 March 2020 [bit.ly/2UtBPxB](https://bit.ly/2UtBPxB)

3. Schengenvisa.info news 'Portugal Grants Migrants and Asylum Seekers Full Citizenship Rights During COVID-19 Outbreak', 2 April 2020 [bit.ly/Portugal-grants-asylum-rights-2April2020](https://bit.ly/Portugal-grants-asylum-rights-2April2020)

4. It should be noted, however, that non-citizens who are irregularly present in the country may access national health services if they can prove (with documentation issued by their local authorities) that they have been present in the area for 90 days. Order No. 25360/2001 (2nd series).

## Asylum under pressure in Peru: the impact of the Venezuelan crisis and COVID-19

Paula Camino and Uber López Montreuil

**The continuing crisis in Venezuela has generated a significant increase in applications for asylum in neighbouring Peru. This has exceeded the government's capacity to respond adequately and in a timely manner – difficulties that are exacerbated by the COVID-19 pandemic.**

At the beginning of the Venezuelan migration crisis, Peru was one of the few States that implemented policies to facilitate legal entry and stay. With the introduction in 2018 of the Temporary Residency Permit (Permiso Temporal de Permanencia, PTP), thousands of Venezuelans were allowed to regularise their immigration status. This permit offered a

complementary form of protection and helped to streamline the legal migration process.

However, with the rapid increase in arrivals – 482,571 asylum claims lodged in 2019, compared with 192,000 in 2018 and 34,167 in 2017 – and with the structural problems being experienced in Peru, the general feeling of solidarity with Venezuelans

soon turned to rejection. A 2019 analysis by Oxfam found that around 70% of people in Peru, Ecuador and Colombia would support stricter migration control, while 64.3% of Peruvians believe that migrants “take much more than they put in”.<sup>1</sup>

This growing rejection of the Venezuelan population was echoed by the government through the implementation of a series of measures designed to curb their entry into the country. The measures adopted were: a) calling a halt to issuing Temporary Residency Permits; b) introducing the requirement for a passport to anyone entering Peru; and c) introducing a tightly controlled humanitarian visa. Access to this visa is very limited, since it requires applicants to present documents that are difficult to obtain under current conditions – such as a notarised record of any criminal convictions or a passport itself. These barriers led to a sudden increase in requests for asylum since for many refugees this became the only way of entering Peru in a regular manner.

### Difficulties in the RSD procedure

Peru’s General Refugee Law – Law 27891 – provides for a rapid recognition process, which should take just 60 days. This comprises presentation of an application for asylum; an interview; evaluation by the government’s Special Commission for Refugees (Comisión Especial para los Refugiados, CEPR); and then approval or rejection of the request for asylum.

Presentation of an asylum claim was initially sufficient to enter Peru. However, more stages and criteria have been established, aimed at limiting the entry of Venezuelan migrants. One of these is the pre-screening undertaken at Peru’s border with Ecuador. According to Peruvian officials, once the request for asylum has been submitted, applicants are interviewed by CEPR personnel at the border. Their files are then sent via WhatsApp<sup>2</sup> to the CEPR office in Lima, where the decision is taken on whether or not to allow the applicant to enter the country to continue the recognition procedure. This prior evaluation takes 30 to 70 days, during which

time the applicant must wait at the border – without any access to basic services.

The RSD procedure has become an effective barrier to the entry of Venezuelan migrants to Peru. Between June and December 2019, only 13% of asylum seekers were allowed entry into the country. This leaves the remaining 87% in a vulnerable state, unable to enter Peru and, in most cases, unable to legally return to Ecuador since re-entry to Ecuador – without documentation – after more than 48 hours is not allowed. Creating this type of bureaucratic barrier is incompatible with international human rights law and international refugee law. Under both legal frameworks, all immigration procedures must comply with guarantees of due process; by using an ad hoc mechanism, there is no way to ensure that the prior evaluation complies with international legal standards, since there is no procedure to appeal the decision to allow or deny entry to the country. Furthermore, prior evaluation ignores the international principle of *non-refoulement* whereby an asylum seeker cannot be rejected at the border or expelled from a State without adequate analysis of their request for asylum. Along the same lines, UNHCR established in its Conclusion No. 8 that States must allow asylum seekers to remain in the territory throughout the determination procedure. It is clear to us that this prior evaluation process, which lacks clear standards and takes up to 70 days, during which time the applicant is denied entry to the State and to the services it offers, is openly contrary to this principle.

After passing the prior evaluation, applicants face a further long wait for assessment. Because of the numbers involved and CEPR’s lack of resources, the 60-day assessment period may actually last up to a couple of years (according to anonymous CEPR employees, in mid-2019 CEPR’s plans included interviews scheduled to take place in 2021 – that is, two years hence).

The slowdown in the RSD procedure also has an extremely negative impact on access to basic services for survival. As part of the RSD procedure, applicants are entitled to receive a refugee applicant card (Carnet de Solicitante de Refugio), which allows them to work and

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access public services in the interim period. However, since the card can only be obtained after going through the official interview with CEPR in Lima, most applicants cannot get one.

### The impact of COVID-19

Difficulties in accessing basic services have been dangerously exacerbated by COVID-19. As of March 2020, 60% of people interviewed by UNHCR in Peru reported difficulties in meeting their basic needs, and since May the Working Group on Refugee and Migration (Grupo de Trabajo sobre Refugio y Migración, GTRM) – in charge of implementing the R4V Coordination Platform for Refugees and Migrants from Venezuela in Peru – has continually reported an increased risk of eviction, food insecurity and economic vulnerability among refugees.<sup>3</sup>

To combat the spread of COVID-19, the Peruvian government shut down most economic activities in the country. To compensate people for the impact of these restrictions, the government established measures to ensure continuity of salaries and employment contracts, and introduced emergency payments for families living in poverty. However, the first measure only benefits those people who are formally employed, while the second only benefits those who are registered in particular government records regarding income. Eighty-eight per cent of asylum applicants do not have an employment contract, precisely because they cannot access the identity documents necessary to secure formal employment. Thus, in practice, the shutting down of economic activities meant eliminating any income generation for refugees and asylum seekers, without them having the possibility of accessing employment-related support payments.

Meanwhile, to access emergency payments, a family must be registered in SISFOH.<sup>4</sup> Registration is a bureaucratic and laborious process, which requires having a National Identity Document or Immigration Card, as well as going through a home inspection. The vast majority of refugee families are not registered with SISFOH, either because they have not been able to

access the registration process or because they do not have the necessary documentation. In March 2020, UNHCR protection monitoring showed that fewer than 1% of migrants had their own home – which evidently makes the house inspection process an impossibility in the vast majority of cases.

The Peruvian government ordered that anyone with symptoms or a confirmed case of COVID-19 should have access to medical care regardless of their nationality, immigration status or documentation status. However, it appears that some hospitals have required that patients present a National Identity Document in order to access care.

### Opportunities for improvement

With the support of the UN and the private sector, by late May 2020 the government had distributed food to 5,000 refugee and migrant families.<sup>5</sup> In parallel, through the GTRM US\$2.5 million has been distributed to more than 53,000 refugees and migrants in Peru, with a total distribution of \$5.7 million planned.<sup>6</sup> However, these short-term relief measures do not solve the systemic problem faced by asylum seekers in Peru: an improvised and inefficient response system that does not ensure access to minimum guarantees.

Firstly, Peru needs to invest in a fast and efficient mechanism for issuing documentation to recognise asylum seekers as such. Refugee applicant cards should be provided the moment the applicant enters the country, rather than being conditional on the official CEPR interview.

Secondly, the State must guarantee that the RSD process complies with Peruvian regulations and international standards, and that no ad hoc measures are introduced.

Thirdly, faced with the pressures on the country's asylum system, it would be ideal – although potentially politically costly – if the government could apply group-based or *prima facie* recognition for asylum seekers from Venezuela. Both UNHCR, on repeated occasions, and the Inter-American Court of Human Rights, in their Advisory Opinion 21, have endorsed this possibility. Doing so would speed up

the integration of refugees into society, with CEPR assessing claims relating to different situations. During this process, people with the required documentation would be able to access employment and the public services that they currently lack.

Fourthly, and finally, in the face of the current pandemic, the State should establish protection measures that include refugees and asylum seekers. A constructive move would be to issue a specific system of relief payments to be delivered by public institutions, rather than leaving NGOs to shoulder the burden of providing assistance. This could also provide an opportunity for the State to compile an up-to-date, accurate record of its refugee population. These measures cannot be adopted overnight but it is time to initiate effective action to end Venezuelans' long wait for recognition and for access to their rights.

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## Institutional adaptability in the time of COVID-19

Elise Currie-Roberts and Sarah-Jane Savage

**The ability of an asylum system to adapt its processes is important and plays a key role in ensuring sustainability over time. Adaptation, however, must never come at the expense of other vital elements of a strong and just asylum system.**

The 2018 Global Compact on Refugees highlighted the identification of international protection needs as an “area in need of support” and subsequently established an Asylum Capacity Support Group.<sup>1</sup> The aim of this mechanism is to strengthen aspects of national asylum systems to ensure their fairness, efficiency, adaptability and integrity.<sup>2</sup> While the concepts of ‘fair’ and ‘efficient’ are often referred to in discussions regarding an optimal refugee status determination (RSD) procedure, ‘adaptability’ is less clearly and comprehensively defined.

In an adaptable institution, preparations are made to adapt to anticipated changes in external and internal environments rather than introducing ad hoc changes in reaction to external factors. To ensure that the adaptation is sustainable, an adaptable institution has systems in place to evaluate the positive and negative impacts of any change

while ensuring continuous improvements are made. Applying this approach to the RSD context, an adaptable RSD institution is one that values innovation (and therefore invests in innovation when planning for future scenarios) and seeks continuous improvements to existing processes by ensuring that any change enhances the fairness, efficiency or integrity of the system.

### Pre-pandemic adaptations

The measures that governments around the world have introduced to protect public health in response to the COVID-19 pandemic have forced the authorities charged with managing RSD systems to make a stark choice: change their way of doing business or stop doing business entirely.

Prior to recent challenges posed by COVID-19, a common scenario in which RSD systems have needed to adapt was in



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response to rising numbers of applications. A common resulting adaptation has been to introduce different ways of processing varying types of cases. For example, in the face of increasing or mass arrivals, several African countries – such as Kenya, Uganda and Ethiopia – have frequently applied group (*prima facie*) refugee recognition instead of conducting individualised RSD. The ability to do this at short notice is facilitated by existing legislation that specifically provides for this dual modality of recognising refugees.

In 2015–16, when Europe experienced a dramatic increase in the number of asylum seekers, many States began introducing or expanding their use of varied case-processing modalities. For example, Italy, Greece and Germany all introduced templates and other tools to process certain case profiles while many other countries triaged different types of claims into simplified or other types of processing modalities. Germany went one step further and, for a time, abolished individual face-to-face interviews for certain Syrian and Iraqi applicants. Such triaging of cases would not have been possible without pre-existing robust registration procedures and sophisticated case-management systems along with rapid training of staff who were recruited to assist with the surge in applications.<sup>3</sup> In parallel, to ensure that these adaptations did not have a detrimental impact on the fairness or integrity of the RSD process, many European States maintained or improved their quality control or assurance procedures.

A more recent example is the decision in 2019 by Brazil's National Committee for Refugees (CONARE) to recognise over 21,000 Venezuelans – who fulfilled certain conditions – based solely on the registration of their claims without requiring, as they normally would, an RSD interview. This decision was facilitated by the significant recent investments that Brazil has made

in its registration platform SISCONARE, which allows for self-registration of claims.

While many of these adaptations were 'forced' in response to a relatively abrupt external change, most were only possible because of existing adaptable institutional structures. Moreover, as differentiated procedures have developed, guidance and policy relating to these procedures have been issued with the objective of striking the appropriate balance between the efficiency gains of these adaptations and the other required characteristics of an optimal procedure. Indeed, there are now many good practice examples to guide authorities as to how to implement differentiated modalities while maintaining the fairness, efficiency and integrity of RSD case processing.<sup>4</sup>

For example, it is widely accepted that group (*prima facie*) recognition should only be used to **recognise** refugee status, whereas due



UNHCR staff explain the consent form for cash-based assistance for vulnerable asylum seekers during the COVID-19 crisis, San Jose, Costa Rica, March 2020.

process (fairness) requires that decisions to **reject** require an individual RSD assessment. Even where an individual assessment takes place, there is a growing acceptance that, where the intention is to recognise the claim, the written application can be considered as the applicant having been afforded the right to be heard as long as the applicant is informed of this intention and offered the opportunity for interview should s/he so

desire. Canada's Immigration and Refugee Board (IRB) has robust and detailed guidance on the different processing streams that it implements, including claims that can be positively decided without a hearing, claims that can be decided in a short hearing, and those that require a regular, longer hearing.<sup>5</sup>

### Essential factors enabling adaptation

Observing these and other adaptations brings an increasing appreciation of the common institutional factors in which authorities should invest so that they can adapt their RSD systems effectively and sustainably.

Almost all of the above examples highlight the importance of strong data collection at the registration stage of the RSD process and of a database that allows this information to be effectively managed and analysed in order to triage appropriate cases into relevant modalities. Involvement of legal aid professionals early and throughout the RSD process (as takes place in Switzerland) can lead to processes that are fairer and more efficient and have more integrity by ensuring that problems arising in a new or changed procedure can be quickly identified and remedied. The existence of dedicated capacity to conduct the necessary country of origin research, such as exists at the UK Home Office, helps identify which applicants may fall into particular risk profiles and for whom a particular case-processing modality may therefore be appropriate. Quality Assurance Initiatives, embarked on by several States (such as Ireland and Sweden) and in some instances by entire regions (such as in South and Central America), allow RSD systems to be continuously evaluated and enable adaptations to be made.

In contrast, countries that have RSD systems with weaker institutional adaptability (and therefore less investment in innovation, assessment and continuous improvement) are typically less able to react and are slower to change, even when change is necessary. For example, such systems might have an outdated, obsolete or inflexible electronic case-management system or their file management may be manual. Other countries have rigid laws and/or regulations governing

processing that require amendment through a parliamentary process. Some systems do not have dedicated country of origin research capacity or do not have expert RSD decision-makers, making it difficult to develop and fairly implement differentiated case processing. Such institutions are also less likely to be able to implement effective systems for quality assurance and evaluation.

### COVID-19: pressures and adaptations

The public health measures introduced as a result of the COVID-19 pandemic give rise to a new set of challenges which necessitate rapid adaptation, perhaps more rapid than ever before. Social distancing requirements and limitations on freedom of movement for all parts of society effectively appeared overnight and have made the processing of even one individual's claim more challenging.

Some RSD systems, at least for the initial period, have not been able to adapt and have temporarily ceased operations. Even in such situations, however, many governments (such as those of Argentina, Israel and South Africa) have extended the validity of asylum seekers' documentation/visas and/or have ceased to enforce penalties for expired documentation. Depending on their level of preparedness and institutional adaptability, other States and UNHCR have quickly implemented changes, primarily by moving in-person interactions and functions online. The Federal Office for Migration and Refugees in Germany, for example, is now accepting asylum applications in writing, while Ecuador has used remote systems to – among other things – allow for registration of asylum applications.

States are also finding ways to ensure that the staff who work for their asylum authorities can continue to carry out their duties. For instance, Kenya's Technical Affairs Committee, the body that vets decisions on asylum recommendations, moved a deliberation session online. Meanwhile, Canada's IRB issued a new Practice Note on the use of electronic signatures by its Members, noting that the change will not just increase efficiency during the pandemic but also contribute to longer-term modernisation efforts.

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For its part, UNHCR has been focusing on the relevant procedural considerations applicable in the context of the pandemic, such as those relating to the remote participation of applicants and interpreters in RSD interviews.<sup>6</sup> Where technological infrastructure allows, UNHCR is also piloting remote RSD processing for asylum seekers with appropriate profiles, and has updated its guidance on remote communication with persons of concern, which now includes thorough assessments of whether mobile messaging applications and software meet appropriate data protection standards.

While changes induced by COVID-19 may be necessary to allow RSD to continue in the context of a pandemic, and while they could lead to gains in efficiency over the longer term, it is important to ensure they do not come at the expense of fairness. This is where the two elements of institutional adaptability must be kept in mind: both preparing for change and continuous improvement, and monitoring of change against other indicators.

For example, it is useful to consider that, prior to the pandemic, moves towards conducting remote processing did not always meet with desirable outcomes, and concerns were raised about the impact of remote processing on applicants. Some years ago, for example, Canada implemented videoconferencing for asylum interviews. A few years after its introduction, an evaluation highlighted clear concerns with various aspects of the procedure, including the possible detrimental impact on refugee claimants' ability to communicate effectively, and the absence of support provision when applicants arrived at the teleconference facilities. The inadvisability of conducting remote interviews for claimants with PTSD and/or who had suffered sexual violence or torture was also stressed.<sup>7</sup> While the IRB has continued to use videoconferencing in certain cases, its guidance specifically explains that continuous monitoring and training are conducted to improve the procedure.<sup>8</sup> More recently, in 2019, attempts by the French National Asylum Court (the French RSD appeal body) to introduce videoconferencing for certain hearings

provoked protests from lawyers who felt that it would prejudice their clients' claims.

It is too soon to predict what impact the rapid period of adaptation brought on by the pandemic will have on RSD systems in the longer term. What is clear, however, is that it is vital that any adaptations be assessed to ascertain whether they enhance (or, at a minimum, do not have a negative impact on) the fairness, efficiency or integrity of the RSD system. It is also an opportune moment for authorities to take stock and recognise that institutional adaptability should be a key goal, allowing systems to respond quickly to change while ensuring continuous improvement of procedures.

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The views expressed here are the authors' own and do not necessarily represent those of UNHCR.

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## Foreword: Prevent, protect, resolve – reflecting on the GP20 Plan of Action

Cecilia Jimenez-Damary

**At the end of the three-year GP20 Plan of Action, I applaud the significant achievements made by States and other actors, and look forward to our continued, shared engagement on enhancing protection for IDP rights.**

Launched in 1998, the Guiding Principles on Internal Displacement represent a major landmark in international standards for the protection of the human rights of internally displaced persons (IDPs). To mark the 20th anniversary of the Guiding Principles, in 2018 I launched the GP20 Plan of Action for Advancing Prevention, Protection and Solutions for IDPs (to run for three years) with other major stakeholders and with the invaluable support of the governments of Austria, Honduras and Uganda.

This year, 2020, the GP20 Plan of Action draws to a close, with the past three years providing a treasure trove of experience, lessons learned, and new and strengthened relationships. I thank Forced Migration Review for this opportunity to showcase the results. The articles included here analyse some of the initiatives undertaken during this period and offer recommendations on ways forward – essential both for underpinning successes and for confronting current and future challenges. We are grateful to the authors for highlighting their work and knowledge in this manner.

The GP20 initiative aims to raise awareness of the Guiding Principles and enhance the work being undertaken in the field. It also aims to spotlight those IDP protection issues that require enhanced engagement from the international community, namely to:

- strengthen the participation of IDPs in decisions that affect them
- provide impetus to strengthening IDP law and policy worldwide, including through domestication of the Guiding Principles
- enhance the capacity of States and other actors to gather, analyse and utilise data for IDP protection

- focus more closely on finding solutions, especially for protracted internal displacement situations.

The GP20 Plan of Action emphasises multi-stakeholder collaboration at international, regional and national levels with a focus on the national and local implementation that is necessary to support States in their responsibilities to protect IDPs. UN Member States, UN agencies and civil society have participated in the Plan of Action, which was endorsed by the Inter-Agency Standing Committee.

The GP20 Plan of Action was launched with the slogan ‘prevent, protect, resolve’. Those words encapsulate the spirit of the Guiding Principles on Internal Displacement – Principles that continue to resonate and be relevant in the day-to-day lives of IDPs and affected communities. ‘Prevent, protect, resolve’ likewise emphasises the responsibility of States to protect the human rights of IDPs, in peace, in violence and in war, as part of the international obligations they are required to meet in exercising their sovereignty.

Indeed, with the continuing increase in numbers of IDPs and internal displacement situations in many different countries and contexts around the world, ‘prevent, protect, resolve’ will continue to be relevant in our shared work to uphold the human rights of IDPs. The GP20 Plan of Action has demonstrated that, with political will, we can achieve more. Let us continue to do so, wiser and with heightened commitment.

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# Internal displacement: reflections on prevention, protection and solutions

Samuel Cheung and Sebastian von Einsiedel

**With record numbers of people internally displaced, the urgency of the situation has triggered greater international attention and a stronger imperative for States and the international community to act. The GP20 initiative has highlighted a number of opportunities to allow much-needed progress to be made in finding bold, concrete solutions.**

In recent years, internal displacement has reached levels unprecedented in the post-Cold War era, with a record 45.7 million people internally displaced as a result of conflict and violence at the end of 2019, and 5.1 million as a result of disasters.<sup>1</sup> This represents an almost two-fold increase since 1998 when the Guiding Principles on Internal Displacement were adopted.

This rise in internal displacement can be attributed to an increase in the number, length and lethality of armed conflicts around the world over the past decade, the fact that the number of climate-related disasters has doubled over the past 20 years compared with the two previous decades, and the reality that displacement is becoming increasingly protracted. Worryingly, the number of internally displaced persons (IDPs) is projected to rise further due to the adverse effects of climate change, among other things, with people's needs and vulnerabilities compounded now by the global COVID-19 pandemic.

## New opportunities

While the numbers might seem discouraging, new opportunities have emerged for a collective effort to make progress. First, Member States committed in the 2030 Agenda for Sustainable Development to leave no one behind, including IDPs who are often among those left furthest behind. And the number of displacement-affected States developing laws and policies on internal displacement has significantly increased in recent years, particularly those ratifying or domesticating the Kampala Convention. Second, UN agencies, too, have demonstrated renewed

commitment to addressing internal displacement, including UNHCR with its 2019 IDP policy<sup>2</sup> that reaffirms its commitments toward IDPs. At the system-wide level, the UN Secretary-General's establishment of a High-Level Panel on Internal Displacement,<sup>3</sup> with its strong representation of displacement-affected States, has injected new momentum and optimism into the debate around the issue.

And third, we see promising innovative practices and approaches on the ground – by displacement-affected governments, local authorities, UN agencies and others, often working together – to advance durable solutions to internal displacement. The GP20 Plan of Action for Advancing Prevention, Protection and Solutions for IDPs<sup>4</sup> has demonstrated that joining forces enables more effective identification and fostering of good practices and promotes more inclusive and strategic action. If scaled up, these practices and new approaches have the potential to significantly reduce the number of those in protracted displacement.

## Prevention

These practices and approaches, many of which are featured in this special FMR feature, can be helpfully categorised into the three elements of the GP20 slogan: 'prevent, protect, resolve'. With regard to the first element, robust conflict prevention and climate change mitigation would of course constitute the most effective and sustainable measures to prevent internal displacement. Even though such measures may seem out of reach – at least in the short term – in light of the state of global politics, we possess the tools and knowledge to reduce



UNHCR/Gloria Ramazan

Internally displaced woman works with her host family who are helping to build her new home, as part of UNHCR's shelter project in North Kivu Province, DRC.

future internal displacement, in particular with respect to disaster displacement.

In this regard, priority must be given to investing in our capacity to further enable displacement-sensitive emergency preparedness, climate adaptation and disaster risk reduction, with a particular eye to strengthening the resilience of vulnerable communities. Unfortunately, these areas remain woefully underfunded and inadequately targeted at the countries and populations at greatest risk. As of 2020, the 15 countries most vulnerable to the effects of climate change, of which 11 were the subject of an interagency humanitarian appeal, received only 5.8% of the global funding allocated by multilateral adaptation funds.<sup>5</sup>

Anticipatory action, and forecast-based financing in particular, has been shown to strengthen resilience among vulnerable populations, preventing the conditions that give rise to displacement, for instance by giving vulnerable people the means to adapt to an impending drought.<sup>6</sup> Prevention also involves analysis of root causes, such as how climate change can simultaneously drive displacement, contribute to conflict resulting in displacement, and exacerbate existing displacement conditions.<sup>7</sup>

## Protection

Concrete action that falls under the second element of the GP20's slogan – protect – remains acutely important since each year there continue to be millions of people newly displaced, joining those already living in situations of protracted displacement and facing acute protection challenges. Burkina Faso is a case in point, where conflict has led to the fastest growing displacement crisis in Africa; Syria is another, where war is still being waged nine years on; and then there are places such as Colombia, DRC and Yemen, and numerous others, where

protecting IDPs cannot wait for tomorrow.

Key factors for protection can include commitments to reinforce respect for international humanitarian law in conflict and disasters, and collaboration that takes into account the heightened vulnerability of displaced persons, including intersectional vulnerabilities – for example, for women and girls, men and boys, persons with disabilities, older persons or marginalised communities. With the Guiding Principles as the foundation, protection also works best when it is integrated from prevention through to emergency response; where the 'centrality of protection' (that is, the placing of protection at the centre of all humanitarian action<sup>8</sup>) is applied to the local context and is practically implemented through establishing concrete and achievable priorities for the entire humanitarian community; and where the participation of displaced communities is an integral part of decision-making. With global displacement today more urban than rural, protecting IDPs must increasingly take account of the various demographic, historical, environmental, economic, social and political dimensions of urban contexts, not to mention the collateral effects of urban warfare in cities, the long-term impacts of

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natural disasters on neighbourhoods, and local housing and land tenure systems.

### Advancing durable solutions

To advance solutions – the third element in the GP20 slogan – there are two fundamental ingredients for progress. The first, of particular interest to the High-Level Panel, is to strengthen the commitment by displacement-affected States to live up to their primary responsibility to address internal displacement within their territory. While such a commitment has to emerge from among States themselves, the international community can incentivise political will in a number of ways by emphasising the development and economic benefits of addressing internal displacement; by encouraging the adoption of IDP laws and policies; by helping affected countries generate the necessary data and evidence on IDPs' location, demographics and needs; and by helping build national capacities to lead such interventions.

The second key factor for advancing durable solutions lies in strengthening effective partnerships and collaboration across the humanitarian and development sectors in order to help IDPs return to normality, maintain their dignity and ensure their self-reliance. Commitments at the 2016 World Humanitarian Summit towards strengthened humanitarian–development collaboration and the recent UN Development System reform (with its reinvigoration of the Resident Coordinator system with independent, more empowered Resident Coordinators) have created a conducive infrastructure for work across the humanitarian–development divide. Durable Solutions Initiatives in Somalia and Ethiopia, anchored within the Resident Coordinators' Offices, provide helpful templates for 'One UN' approaches to international displacement elsewhere. Meanwhile, donors will need to follow suit by introducing greater coherence into their bifurcated funding streams that make it difficult to finance interventions – such as durable solutions – that fall in between the humanitarian–development divide.

Humanitarian–development collaboration is equally required at the national level.

Encouragingly, a number of displacement-affected governments, too, have developed 'whole-of-government' approaches that reflect the multidisciplinary challenge of addressing internal displacement. Most importantly, they will need to ensure IDPs' access to social security schemes and their inclusion in national development plans.

### The way forward

How do we build on these opportunities and maintain momentum? Clearly, governments and States remain front and centre, supported by the international community, in the need to reinforce and implement their commitment to address internal displacement from preparedness to emergencies to solutions. Initiatives such as GP20 have a role to play in fostering collaboration across regions and continents and in identifying good practices. Both the collaboration and the good practices have immense potential to be scaled up, and to engender and support solid commitments that will help further prevention, protection and solutions for internally displaced people.

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## The potential of South Sudan's national law on protection and assistance to IDPs

Chaloka Beyani, Gatwech Peter Kulang and Rose Mwebi

**South Sudan faces significant and complex humanitarian challenges but the recent drafting of a national IDP law reflects a renewed commitment to and vision for protecting its citizens.**

As of June 2020, there were more than 1.67 million internally displaced persons (IDPs) in South Sudan, while 2.2 million South Sudanese were refugees in neighbouring countries. Over 200,000 IDPs are hosted in UNMISS Protection of Civilian Sites. In 2013 the former UN Special Rapporteur on the human rights of IDPs, Chaloka Beyani, undertook a mission to South Sudan, and reported on the absence of adequate capacity and institutional preparedness to prevent and respond to internal displacement in the short, medium and longer term. In particular, the mission recommended a comprehensive policy framework for South Sudan.

Further reports highlighted the dire need for prevention and indicated that protection challenges for IDPs in South Sudan result from complex and overlapping drivers of conflict; many IDPs have been repeatedly displaced due to a variety of compounding causes such as inter-communal violence, security concerns and natural disasters. The human cost of this conflict is immense, characterised by human rights violations, the targeting of civilians by armed groups, and the forced displacement of civilians.

### 2018: a pivotal year

In what turned out to be a remarkably significant year for the protection of IDPs, in 2018 South Sudan embarked on the development of a national IDP law entitled the Protection and Assistance to Internally Displaced Persons Act 2019. The draft national legislation, an initiative of the Government of South Sudan through its Ministry of Humanitarian Affairs and Disaster Management (MHADM) and parliamentary committees, sought to domesticate the 2009 Kampala Convention as well as the 1998 Guiding Principles on Internal Displacement

to make them applicable in South Sudan. This process of formulating a national IDP law – galvanised and supported by the GP20 initiative – has led to the ratification of the Kampala Convention by the Government of South Sudan. And at the global level, the adoption of the Global Compact on Refugees (GCR) and South Sudan's commitment to implementation of the GCR provide an opportunity to achieve comprehensive solutions for displaced South Sudanese. These developments signalled the commitment of the government to enhance protection for IDPs and to redouble efforts towards ending the current displacement situation. The former Minister for Humanitarian Affairs and Disaster Management, Hussein Mar Nyuot, on forwarding the draft legislation to the Ministry of Justice, noted that the national legislation would also reinforce the ongoing implementation of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) signed in 2018. The R-ARCSS provides for return and reintegration of refugees and IDPs as an integral element in the process of achieving durable peace in South Sudan.

### Reflections on developing the national law

Those drafting the national law took a participatory approach in order to better identify the needs of IDPs and the challenges faced by the government to respond adequately to internal displacement. The GP20 Plan of Action provided the necessary coordination mechanisms for stakeholders and for the participation of IDPs (and assessment of their needs). The South Sudan GP20 partners, led by MHADM and UNHCR, galvanised a number of stakeholders including government line ministries and departments, humanitarian and development



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actors, academia, civil society, IDPs, the African Union, donors and other stakeholders, thereby ensuring a whole-of-society approach. It is important in such a process that those leading consultations with senior policymakers in government have expertise in law-making on internal displacement.

In terms of the actual process, a workshop on law and policy was first convened jointly by UNHCR and MHADM in July 2018, to which IDPs were invited. The workshop marked the starting point for consultations with IDPs and senior government officials, helping to build their understanding of IDP law making and boost their knowledge base to ensure their informed and effective participation. Following this, there was a 'validation' event for government officials to affirm the importance of the process; this was important in order to cultivate political will around the legislation. Furthermore, the participation of line ministries both at technical and ministerial levels enabled an exchange on practical issues on coordination of protection and assistance to IDPs that in turn supported the development of the institutional arrangements as framed in the national law.

IDP participation in the process was then widened out through UNHCR-led countrywide consultations with IDPs and host communities. This was critical to informing the draft law. For example, it became evident during the consultations that women are likely to face challenges in reclaiming property left behind during displacement due to their lack of documentation and due to discriminatory cultural practices; as a result, appropriate protection for women's property rights was included in the draft law. However, effective access to and consultation with IDPs and host communities – vital if their perspectives and priorities are to influence the development and implementation of the law – proved extremely challenging in some areas due to conflict, while limited infrastructure and internet access made it difficult to carry out data collection.

Following this, consultations with stakeholders at a high-level event in September 2018 led to validation of a zero

draft of the national law. Discussions revolved around issues of State responsibility, coordination of protection and assistance, and durable solutions. Discussions on State responsibility led to a recommendation for the government to play a stronger role in providing protection and assistance, linking this with the need to a) enable IDPs to have a free choice of durable solution, namely voluntary return, local integration or resettlement, and b) improve security and strengthen rule of law to enable returns to happen in safety and with dignity. On the question of coordination, it was noted that provision of protection and assistance to IDPs requires a multi-tiered approach. In this regard, the consultations recommended an inter-ministerial coordination mechanism complemented by lower-level operational and technical inter-sectoral forums dedicated to addressing the situation of IDPs. The monitoring role of human rights institutions was particularly noted as being key to establishing checks and balances.

Finally, building further on the participatory process, a seminar was co-hosted by UNHCR, MHADM and the University of Juba to sensitise members of public on the IDP law and seek their insights on issues of protection and assistance for IDPs. The seminar was attended by over 70 participants drawn from line ministries, the Transitional National Legislative Assembly (TNLA), the African Union and regional organisations, UN agencies, national and international NGOs, community/faith-based organisations, academia, national media, and South Sudan's law society. It is envisaged that public awareness campaigns will be undertaken once the law is presented by the Ministry of Justice to the TNLA for enactment as a draft bill.

### **Addressing the protection and solutions gap**

South Sudan had adopted a National Framework on Return, Resettlement and Reintegration in 2017 to provide a framework for humanitarian assistance and reconstruction in South Sudan. The government revised this Framework in October 2019 but although it represents an

important step towards the search for durable solutions, it lacks the comprehensiveness of a legal framework as envisaged by the Guiding Principles and the Kampala Convention. The development of a piece of national legislation on internal displacement was thus timely, in view also of the country's accession to the Kampala Convention which calls on national governments to enact or amend relevant legislation to protect and assist IDPs (Article III, 2). Since the Kampala Convention incorporates the 1998 Guiding Principles on Internal Displacement, domesticating it provides a legal normative basis for application of the Guiding Principles in addressing the situation of IDPs in South Sudan. The national legislation thus presents a unique opportunity to deal coherently with the need for IDP protection, based on both a whole-of-government and a whole-of-society approach.

Innovatively, the draft law adapts international protection benchmarks to suit local conditions; for example, it establishes special protection measures to safeguard housing, land and property rights for women and children. Recognising the challenges of achieving durable solutions in the current context, the law provides for pragmatic approaches such as area-based programming, transitional solutions, and the use of cash assistance to strengthen the resilience of communities. In parallel with the Guiding Principles, the legislation specifically focuses on solutions to internal displacement by providing options for return, integration in the location of displacement, or resettlement to another part of the country.

Another way in which the draft law profoundly focuses on solutions is by incorporating the guidance of the IASC Framework on Durable Solutions, hence making it applicable in the country. The law also establishes a fund to support its implementation (provided through the allocation of 30% of national oil revenues), an approach that is new to the region and one that will ensure that humanitarian responses and strategies for long-term solutions are funded from the country's own resources rather than being dependent on external funding. The national legislation thus aligns

with the spirit of the GCR and has potential to strengthen implementation of the R-ARCSS towards a lasting peace in South Sudan.

### Creating and maintaining momentum

Looking back at the process of developing the law, it is worth noting that the GP20 Action Plan was key to galvanising a multi-stakeholder commitment to developing the national law, and remains an important forum to support the enactment of the draft legislation by the TNLA and the implementation of the law once enacted. The strong partnership created by GP20 with the Government of South Sudan is likely to aid its implementation further.

Importantly, having a national legal framework for IDPs also builds awareness of the government's primary responsibility in law, obliging it to a large extent to allocate the requisite resources for the protection and assistance of IDPs, including durable solutions. Harnessing opportunities created at the regional and global level through the implementation of the Kampala Convention and the GCR will also be important in creating the necessary momentum to implement the law. Finally, however, while the development of the draft national law represents an important step, continued commitment and momentum in enacting and implementing the law are vital if IDPs are to be adequately protected and assisted, and if they are to achieve durable solutions.

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## Using collaborative approaches to improve internal displacement data

Devora Levakova, Adrián Calvo Valderrama, Jacques Ajaruvwa Wathum and Damien Jusselme

**The magnitude, severity and diversity of internal displacement situations cannot be understood – and much less be adequately responded to – without comprehensive and accurate data. Initiatives such as the GP20 Plan of Action offer examples of good practice for the way forward in this complex area.**

Governments and international actors need access to comprehensive, reliable evidence to inform responses, policies and programming, especially when seeking durable solutions to internal displacement. Despite various challenges, such as the use of differing standards and definitions, there are many examples of good practice in the collection, dissemination and use of displacement data.

The GP20 Plan of Action initiative has enabled governments and a broad range of global stakeholders to share valuable expertise and good practice, as well as support with capacity development. This article offers three concrete examples of good practice at the global level, from the Central African Republic and Somalia, both in meeting challenges specific to internal displacement data and in helping governments and other actors to make use of the resulting data. These three examples show the importance of working collaboratively and setting standards at the global and national levels to ensure that internal displacement data are relevant and of good quality in order to inform work on addressing the causes and impacts of displacement and securing durable solutions.

### Conceptualising measures and indicators

Internal displacement situations are varied and multi-layered in nature and it remains difficult to translate internationally established frameworks such as the Guiding Principles on Internal Displacement and the IASC Framework on Durable Solutions for IDPs into practice. Measuring the achievement of durable solutions is particularly complex, with many challenges at both technical and practical levels. This has

contributed to the development of different approaches and diverging practices.

One of the strongest initiatives to fill this gap is the Expert Group on Refugee and IDP Statistics (EGRIS).<sup>1</sup> Since 2016, EGRIS has worked collaboratively on developing recommendations (aimed at national statistical systems) for the implementation of harmonised measurements of forced displacement across the entire spectrum of human mobility. The International Recommendations on IDP Statistics (IRIS),<sup>2</sup> developed by EGRIS' IDP sub-group<sup>3</sup> and endorsed by the UN Statistical Commission in March 2020, provide an internationally agreed framework for IDP statistics. These recommendations also include guidance – that builds on the IASC Framework – on how to measure the achievement of durable solutions for statistical purposes.<sup>4</sup>

The recommendations recognise that developing a statistical measure for a complex issue such as durable solutions is extremely challenging. Such a measure needs to balance the inclusion of relevant substantive elements with being globally relevant for a wide range of displacement contexts and realistic in terms of implementation. Therefore, among the major points of discussion in developing the measure was how to identify the more crucial aspects linked to displacement, focusing on the displacement-related vulnerabilities captured by the eight IASC criteria,<sup>5</sup> while still accounting for the physical location of IDPs (that is, location of displacement, location of return, or other settlement location). The physical location matters when making comparisons with the non-displaced community, in particular to identify the IDPs' needs and vulnerabilities specifically related



UNHCR/Mustafa Saeed

Families displaced by drought in Somalia.

to their displacement and those shared by both the displaced and non-displaced.

In light of this and taking into consideration the varying levels of resources and statistical capacities available in IDP contexts, IRIS proposes a composite measure that focuses on assessing whether key displacement-related vulnerabilities have been overcome based on five of the eight IASC criteria. However, measuring overall progress towards durable solutions for IDPs is crucial for informing programming and response, and IRIS therefore also includes recommendations for a progress measure that takes into account all eight IASC criteria.

A global set of indicators has not yet been developed. Moving forwards, this means that there is an opportunity to refine the methodology through further testing and continued collaboration between governments and international organisations.

### Collaborative workshop on data collection methods in CAR

The need for good, reliable data on people affected by displacement was unanimously recognised during the 2019 humanitarian planning process in the Central African Republic (CAR). However, there appeared to be differences in the understanding of some of the basic concepts of internal displacement. The complex humanitarian crisis in CAR, where several types of displacement coexist

in the same areas at the same time, underlined the need for a common understanding of definitions and concepts among all stakeholders.

In January 2019, in CAR, a workshop was organised by the GP20 initiative that brought together representatives of affected communities, national and local authorities, humanitarian and development organisations, and civil society organisations to discuss the improvement of the quality of internal displacement data. Participants were able to develop a common understanding of the basic concepts of internal displacement and the need to track

the total number of persons in a situation of displacement at a specific moment in time and the change in that number over a defined period of time in order to better understand the dynamics of displacement and thereby to enable appropriate protection response and assistance.

They also agreed on an action plan to improve the quality of data on internal displacement in CAR. As part of this plan, they developed a Standing Operating Procedure (SOP) which introduced, among other things, criteria for arbitration to help resolve actual/potential conflicts between providers of information during data compilation, and a methodology for disaggregating data by age and sex both for IDPs living in camp settings and for IDPs living with host families. In addition, the SOP presents a data validation and publication scheme, with clearly assigned responsibilities, and underlines the importance of continued collaboration between the relevant stakeholders to ensure comprehensive, reliable data in CAR.

### Planning for durable solutions: profiling in Mogadishu, Somalia

The profiling of informal settlements in Mogadishu, conducted in 2015–16, provides an example of the use of collaborative data collection to inform durable solutions in a protracted displacement context. The

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combination of armed conflict and severe and recurrent drought and floods has driven displacement in Somalia for decades. Settling in the informal urban settlements around the capital city of Mogadishu, IDPs seem to face different challenges from those faced by the non-displaced populations in the same settlements. However, given the limited evidence available on the experience of displaced populations, in 2014–2015 federal and city-level government partners and humanitarian actors carried out a profiling exercise to gain a thorough understanding of the displacement situation in the city and to inform planning for durable solutions policies and programmes.<sup>6</sup> The purpose of the profiling was to provide disaggregated estimates of the number of IDPs living in the informal settlements, analyse their displacement history, and examine the families' skills, capacities, specific needs and coping mechanisms that affect their decision-making about their own future.

The results of the profiling fed directly into local- and national-level development plans and durable solutions strategies. They informed the establishment of the Somali IDP Durable Solutions Initiative and the inclusion, for the first time, of internal displacement in the country's National Development Plan (2017). The profiling furthermore informed the creation of a taskforce led by the Mayor of Mogadishu and provided the baseline data for the city's five-year Durable Solutions Strategy (2020).<sup>7</sup> The profiling process also prompted dialogue with development stakeholders, who came to recognise displacement as an impoverishment factor and to understand the importance of the role of municipalities in implementing durable solutions; it thus opened the door for fundraising across the humanitarian and development sector.

## Conclusion

The examples presented in this article are only a few of many initiatives to bridge the gaps surrounding internal displacement data in order to ensure common understanding, prevention and resolution of this phenomenon. These initiatives and others should now be expanded and/or

capitalised on for maximum effect. The high level of complexity of internal displacement often deters dialogue and action. However, these examples demonstrate that, although not all issues can be addressed at once, tackling the most pertinent challenges collaboratively can create a solid base for the identification of tangible, effective, lasting solutions to internal displacement.

Building on this momentum, governments and international actors should now strive for enhanced collaboration on the refinement and implementation of standardised methodologies and approaches. They should furthermore engage affected communities throughout the data collection and analysis processes, and dedicate the necessary resources to develop capacity to produce comprehensive, good quality IDP data that are both suitable for use by various stakeholders and relevant for decision-making.

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1. bit.ly/EGRIS

2. bit.ly/IDPstatistics-IRIS

3. As part of EGRIS, the IDP subgroup was led by JIPS, with support from UNSD, Statistics Norway and IDMC, and consisted of representatives from National Statistical Offices of 15 Member States and experts from regional and international organisations.

4. IASC (2010) *Framework : Durable Solutions for Internally Displaced Persons* [bit.ly/IASC-Durable-Solutions](http://bit.ly/IASC-Durable-Solutions)

5. See endnote 4, p27.

6. With technical support from JIPS, the exercise was led by the Somalia Disaster Management Agency of the Ministry of Interior and Federal Affairs, the Banadir Regional Administration, and the Protection Cluster's profiling working group, which included UNHCR, DRC, IOM, OCHA, NRC, IRC, SSWC, ORDO, HINNA, ELMAN, Mercy Corps, DBG, Save the Children, REACH and the Shelter Cluster.

7. The Durable Solutions Strategy is developed for the Banaadir Regional Authority / Municipality of Mogadishu.

## Uganda: mitigation of displacement in landslide-prone areas

Uganda conducted a hazard risk profile of the entire country, compiling a database (under the aegis of the Office of the Prime Minister) which includes biometric registration details of persons in landslide-prone areas. These data are being used to implement a ten-year programme to relocate households on a voluntary basis from high-risk areas in the Mount Elgon area to safer areas in Bulambuli District. As part of this programme, the government buys and develops land for settlement and encourages residents at high risk of displacement to relocate. The project is based on a whole-of-government approach, involving all relevant ministries, and all contracts for construction and service provision stay within the government. The government provides housing, infrastructure, services and income-generating activities, and initially ploughs the land for the community. Around 240 households had been resettled by October 2019.<sup>1</sup>

1. [bit.ly/GPC-IGAD-Oct2019](https://bit.ly/GPC-IGAD-Oct2019)

## Colombia: disaggregating data to show progress towards durable solutions

Colombia's Victims' Registry is a State registry that includes details of over nine million people whose rights have been violated as a consequence of armed conflict and violence since 1985, including over eight million people displaced internally. The Registry is a technical and administrative tool designed to help victims to access assistance and reparations. Capturing and differentiating the needs of IDPs and victims of other crimes, the Registry is additionally used to create public policies and support durable solutions for IDPs. Nearly 6,000 land restitution judgements have been issued and, according to the Victims' Unit, 1,156,401 monetary compensations have been paid to victims, half of whom are IDPs. The Registry also allows for assistance and reparations to communities that suffered collective damage or violations due to violence or conflict.



UNHCR/Ruben Salgado Escudero

Alba Pinto lost her husband and three children to the armed conflict in Colombia. She now lives in Nueva Esperanza, the first informal settlement to be legalised in the Putumayo region.

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UNHCR/Ibrahim Al-Ja'adi

A site for internally displaced families in the Abs district of Hajjah governorate, Yemen.

## Yemen: allocation of land by local authorities for IDPs in informal settlements

After informally hosting 109 internally displaced families on her land in Aden governorate for around one year, a private owner informed the IDPs of her wish to regain use of her land. The Executive Unit for IDPs (the government agency responsible for IDP protection and assistance) negotiated with the owner to allow the IDPs to remain until an alternative could be provided. Within six months, the IDPs were relocated to a newly serviced urban site with improved security of tenure in another district of Aden governorate. This case highlighted the challenges for IDPs living in informal settlements; the need for identification of land and housing solutions for IDPs at risk of eviction; the critical role of local authorities in finding solutions together with international actors; and the importance of relocation planning and including the local host community in the plan. International technical guidance and financial support were essential in informing and facilitating the steps that were taken to transform the allocated land into a serviced and viable settlement.

## El Salvador: a new law on protection of IDPs

In 2020, El Salvador adopted a new law on internal displacement in line with the Guiding Principles on Internal Displacement with support from UNHCR and civil society organisations.<sup>1</sup> The main catalyst for this process was a Constitutional Court ruling in 2018 which ordered Parliament to issue special regulations within six months pertaining to the protection of IDPs.<sup>2</sup> The deadline and follow-up mechanisms established by the Constitutional Court put pressure on the Parliament and the Executive. Other essential factors that contributed to the adoption of the law included: an exchange of good practices with Colombia and Honduras; mobilising of political will through a large forum; lobbying and media events by public institutions, civil society and others; formation of a bill-drafting technical team that included international experts; and participation of IDPs and civil society in meetings with the Executive and through written testimonies sent to the Committee on Legislation and Constitutional Matters.

1. El Salvador: Ley especial para la atención y protección integral de personas en condición de desplazamiento forzado interno, 23 January 2020 [www.refworld.org/es/docid/5e691b974.html](http://www.refworld.org/es/docid/5e691b974.html)

2. El Salvador: Sentencia sobre desplazamiento forzado (Amparo 411-2017), 13 July 2018 [www.refworld.org/es/docid/5b4f72e54.html](http://www.refworld.org/es/docid/5b4f72e54.html)

## Prioritising the participation of IDPs in driving solutions

GP20 Colombia

**Participatory spaces – like those organised as part of the GP20 initiative in Colombia – must be maintained and expanded so that IDPs can work directly with local and national decision-makers in order to identify and take up opportunities to achieve durable solutions.**

As Colombia continues to implement its peace process, violence and conflict persist along the Pacific Coast and in border regions with Ecuador and Venezuela. As a result, about 100,000 new displacements have occurred each year since the signing of the Peace Agreement in 2016. According to Colombia's Victims' Unit, established in 2011 with the authority to register victims of the armed conflict, more than eight million people have been displaced internally since 1985.

Colombia has a highly sophisticated legal and institutional framework to assist and protect people displaced by conflict, including Law 387 of 1997 for displaced persons, Law 1448 of 2011 for victims of armed conflict and the land restitution process, and Ruling T 025 of 2004 of the Constitutional Court, which – still in force today – urges the appropriate institutions to guarantee the rights of IDPs. Currently, an important component of Colombia's National Development Plan<sup>1</sup> is the legalisation of informal settlements, a process that benefits not only vulnerable communities in urban areas but also IDPs, refugees and migrants living in those settlements. Despite these important advances, however, much more can be done to enable the majority of Colombia's IDPs to secure a durable solution.

To mark the 20th anniversary in 2018 of the UN Guiding Principles on Internal Displacement, a GP20 Plan of Action was launched in order to mobilise and support global efforts to reduce and assist internal displacement. A group of international agencies and organisations in Colombia developed their own country-level GP20 action plan.<sup>2</sup> Throughout 2018 and 2019, high-level events were organised within the framework of this action plan to refocus attention on internal displacement

in the country. A direct dialogue with IDPs and leaders in conflict-affected areas was used to give more visibility to their day-to-day struggles, and to reinvalidate the drive for solutions.

### Dialogue and advocacy

GP20 partners in Colombia have made it their priority to offer IDPs a platform to raise concerns and propose ways forward to the national government. A series of events was organised in 2018 and 2019, including:

- two meetings for dialogue between GP20 members in Colombia and human rights leaders, IDPs and government human rights officials in Bogotá.
- a national public forum on displacement in collaboration with the national newspaper *El Espectador* and with participation from representatives of those most affected by armed conflict, national authorities, NGOs, UN agencies and civil society.
- a local forum in the department of Nariño, which, in the midst of the electoral process for governors and mayors, successfully brought together five candidates to debate with leaders, civil society and local institutions; the event aimed to facilitate direct discussion between the candidates and IDPs' leaders, and advocate for inclusion of IDP-relevant public policy in their plans once in office.

Through these events, and by having a strong voice, IDPs were able to raise awareness of their persistent protection risks and to discuss what steps should be taken to address these risks. IDPs were outspoken in these events, offering their own ideas on how to advance solutions to internal displacement. In particular, their messages presented a firm



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and determined call: “Do not leave us on our own.” IDPs were able to contribute concretely to local development plans, while advocating for the incorporation of the agreed public policy on IDPs within these plans. In the case of Nariño, IDPs were effective in putting their issues on the agenda for the elections.

The conclusions of the series of GP20 events highlight the need to:

- promote and strengthen inter-agency coordination for a comprehensive response to displacement and, particularly, support the drive towards solutions
- reinforce the presence of government institutions in areas difficult to access and with recurrent emergencies
- prioritise and strengthen the delivery of goods and services in territories hosting IDPs and Venezuelan refugees and migrants since these populations are exposed to the same risks and consequences of conflict and violence.

Partners engaged in GP20 in Colombia share the same objective to enhance visibility for and participation of communities and individuals affected by conflict. This in turn will help provide more effective support to the government in its efforts to guarantee adequate and successful responses to internal displacement – from prevention through to protection and solutions.

Participatory spaces, such as those organised under the auspices of GP20 in Colombia, need to continue and be expanded. In line with the Guiding Principles on Internal Displacement and in support of Colombia’s normative and institutional framework on internal displacement, IDPs must be facilitated to work directly with local and national decision-makers in defining and taking up opportunities to achieve solutions.

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1. *Plan Nacional de Desarrollo 2018–2022 Pacto por Colombia, pacto por la equidad* [bit.ly/Colombia-PND](http://bit.ly/Colombia-PND)

2. GP20 Colombia is composed of the Resident Coordinator’s Office, UNHCR, IOM, UNDP, NRC, JRS COL, OCHA and RET International.

## Reflections on State experiences in the IGAD region

Charles Obila and Ariadna Pop

**State-to-State exchanges in 2019 focused attention on what more is needed if governments in the IGAD region are to respond more effectively to high levels of internal displacement.**

Internal displacement is a major concern in the IGAD region. The population of internally displaced persons (IDPs) across this eight-country trading bloc<sup>1</sup> has risen significantly since 2014, mainly due to conflicts in South Sudan and Ethiopia. At the end of 2019, an estimated nearly eight million people were internally displaced in the region as a result of conflict and violence. In addition, an estimated 1,753,000 people were displaced by disasters, mostly in Somalia, Kenya and Ethiopia.<sup>2</sup>

Disasters caused by drought, floods and landslides are currently the main drivers of displacement in Djibouti, Kenya and Uganda. While disasters also displace people in Ethiopia, Somalia, South Sudan and Sudan, conflicts are the main drivers in

those countries and the resulting internal displacement is largely protracted.

The African Union had declared 2019 to be the Year of Refugees, Returnees and Internally Displaced Persons. It was also the 50th anniversary of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention on Refugees) and the 10th anniversary of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

It was fitting, therefore, that in October 2019 IGAD – in collaboration with the GP20 initiative and with the support of the Global Protection Cluster, the Government of Switzerland and the African Union Commission (AUC) – convened an exchange

of experiences in supporting resilience and durable solutions to internal displacement. The exchange was held under the framework of IGAD's Regional Consultative Process on Migration – an open platform to discuss and advance migration issues – and brought together over 100 government officials, representatives of national human rights institutions, experts, humanitarian practitioners, development actors and donors. This article reflects on some of the outcomes and lessons emerging from these discussions.

### Importance of normative frameworks

IGAD convenes joint annual seminars on the Kampala Convention in collaboration with the International Committee of the Red Cross, AUC and UN agencies. These serve as platforms to advocate for the ratification and implementation of the convention by IGAD Member States and for discussion of the tools and support systems available to help them achieve this goal. At the 2019 annual regional exchange, discussions were extended beyond the Kampala Convention to include early warning systems, peacebuilding, data collection, funding and approaches to durable solutions at both national and sub-national levels. The annual seminars and exchanges, in which Member States are encouraged to showcase their progress in addressing IDPs' protection and assistance needs, create an element of competition that works to exert a positive influence on Member States.

One of the most encouraging outcomes of the 2019 regional exchange was the general acceptance of the importance of adopting and implementing laws, policies and decrees addressing internal displacement. Normative frameworks help clarify government responsibilities, define responders' roles and increase the predictability of humanitarian and development action by institutionalising collaborative arrangements. They also define IDPs' rights and the measures to be taken to ensure they are fully protected. Accordingly, there was a dedicated session on law and policy at the exchange that facilitated the sharing of experiences on development and implementation of laws and policies on internal displacement.

IGAD Member States have adopted various approaches and are in different phases of developing frameworks to address the needs of IDPs in their countries. At the regional level, the Kampala Convention is the only legally binding regional instrument on internal displacement, and all IGAD Member States expressed their political commitment to advancing its aims. As of October 2019, Djibouti, South Sudan, Somalia and Uganda had ratified the Kampala Convention. Ethiopia, which had signed the Convention, has since ratified it. Kenya and Sudan are yet to sign.

Kenya, South Sudan, Sudan and Uganda are also party to the Pact on Security, Stability and Development in the Great Lakes Region; this includes a Protocol on the Protection and Assistance to Internally Displaced Persons as well as a Protocol on the Property Rights of Returning Persons. In addition, most IGAD Member States have national laws, policies or frameworks on internal displacement.

Besides the need to have appropriate policies and laws addressing internal displacement in place, however, members of the workshop agreed that ensuring their implementation is key. Challenges to implementation that were highlighted by IGAD Member States include security concerns, limited institutional capacity, lack of resources and land for allocation, donor fatigue, inadequate data on IDP and returnee profiles, limited commitment of government stakeholders, and limited access to technology which may assist in the prevention of displacement (for example for hazard risk assessment).

Efforts that have been made to address these implementation challenges include the 2017 Harare Plan of Action – the first action plan for the implementation of the Kampala Convention. In addition to establishing frameworks, its objectives are to promote and strengthen regional and national measures to prevent and eliminate the root causes of internal displacement and provide for durable solutions; to promote the obligations and responsibilities of States Parties; and to identify specific obligations, roles and responsibilities of armed groups,

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non-State actors and other relevant actors including civil society organisations. Key progress on implementing the Harare Plan of Action includes the adoption of the 2018 AU Model Law on Internal Displacement<sup>3</sup> and the establishment of a Conference of States Parties to monitor and foster compliance among AU Member States.

At country level, Somalia and Ethiopia have established Durable Solutions Initiatives (DSIs) which aim to facilitate collective action and cooperation between the government authorities at national, regional and local levels and the international community (UN, international and national NGOs and donors). DSIs support political ownership and leadership at the highest level, ensure community engagement and connect the necessary humanitarian, development and peace actors to support durable solutions for IDPs at policy, legislative, institutional, planning and operational levels. The DSIs in Somalia and Ethiopia have facilitated the ratification of the Kampala Convention and the drafting of national and sub-national IDP policies. They have also promoted shared understanding and use of common methodological tools among different stakeholders.

### Centrality of government and multi-stakeholder coordination

There was a general consensus that government leadership – essential in identifying, coordinating and implementing durable solutions to internal displacement – requires the designation of a government focal point. Designating a government focal point is important for clarifying institutional responsibilities and for increasing government accountability.<sup>4</sup> Government leadership is essential if coordination is to be effective both vertically (between national, sub-national and local levels) and horizontally (across relevant ministries and other institutions). All IGAD Member States undertake such coordination, though in different ways.

An example of particularly effective multi-stakeholder coordination can be found in Sudan, where national and local

government, national and local civil society, the private sector and the international community (including the UN, development banks, donors and international NGOs) engage in joint planning, programming and implementation through what are known as State Liaison Functions.

Joint activities encourage all parties to invest energy in conflict prevention and peacebuilding, including continued humanitarian assistance as well as multi-year investments in resilience. However, as the discussions revealed, the short-term nature of funding and the challenging fundraising context threaten the sustainability of the impact.

### Sustainability of funding

The extent to which a government gives priority to funding for IDPs is an indication both of its level of awareness and of its commitment to IDPs. Stakeholders at the regional exchange stressed that governments need to allocate sufficient funding to support programmes to safeguard civilians against displacement, to assist and protect IDPs during displacement, and to create conditions that enable durable solutions.

The meeting established two key recommendations: first, ensure that adequate resources are made available through national and sub-national budgets and national development plans; and second, advocate for and mobilise additional flexible and multi-year funding for programmes across the continuum of internal displacement from prevention to durable solutions.

### Availability of reliable data

Gathering good-quality data on IDPs and displacement-affected communities for durable solutions planning remains a challenge in the IGAD region. The data that are available are inadequate for several reasons.

First, the data currently collected on displacement are mainly tailored to informing humanitarian responses – and data systems are shaped accordingly. It was generally agreed that displacement data systems need to better address the

humanitarian–development–peace/statebuilding nexus to help prevent and address protracted displacement and support sustainable (re)integration. Participants stressed that it was critical to transition to data systems that provide for longitudinal and longer-term information needs in order to better understand IDPs' profiles and issues by using a multi-stakeholder data system rather than the current humanitarian driven, organisation-based systems. This may for instance require the integration of displacement data into the national statistical system.

Second, at the operational level, organisations conduct assessments for their own rather than joint purposes, using different methodologies and producing data of varying quality.

Third, there is also a lack of joint tools and harmonised processes to assess the contribution of durable solutions programmes and other broader collective outcomes.

Fourth, insofar as IDP data are largely collected by NGOs and UN agencies, it was pointed out that, since comparatively few existing data are produced by governments, the credibility of IDP statistics is sometimes called into question and the existing statistics rarely used or quoted.

Finally, data are rarely collected in remote areas. The result is a fragmented and incomplete understanding of internal displacement, including of the protection and assistance needs of IDPs.

Efforts are being undertaken in the region to improve data availability and usefulness. Ethiopia and Sudan, for example, are coordinating with IOM's Displacement Tracking Matrix to share and jointly compile displacement data including multi-sectoral seasonal assessments. Meanwhile, Somalia is developing registration data for IDPs in partnership with stakeholders, and has included displacement indicators in its National Development Plan III in line with the UN Sustainable Development Goals.

## Conclusion

While the IGAD exchange in October 2019 provided a platform to share experiences

and expertise in supporting resilience and durable solutions to internal displacement, more effort is required to follow up with each Member State on areas of implementation. In particular, efforts need to focus on the importance of adopting and implementing laws, policies and decrees addressing internal displacement; on establishing government leadership and effective multi-stakeholder coordination; on ensuring the availability of adequate and flexible funding resources; and on improving data availability and usefulness. In addition, stakeholders agreed to embrace a long-term approach in addressing and resolving internal displacement by integrating it into national development plans and policies. Their goals in doing so include helping IDPs regain their productivity, establishing peace dialogues to facilitate social cohesion, curbing conflict by the introduction of improved early warning mechanisms, anticipating and mitigating the impact of natural hazards, developing IDP integration mechanisms, ensuring a focus on tenure security, and supporting communities hosting IDPs.

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1. The eight members of IGAD (Intergovernmental Authority on Development) are Djibouti, Ethiopia, Eritrea, Kenya, Somalia, South Sudan, Sudan and Uganda.

2. IDMC (2020) Global Report on Internal Displacement 2020 [www.internal-displacement.org/global-report/grid2020](http://www.internal-displacement.org/global-report/grid2020)

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## Whose voices are heard through FMR?

We strive to include a wide variety of voices in FMR to help ensure that policymaking and programming – and global agendas – reflect the experiences and insights of displaced people.

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## Preventing and preparing for disaster displacement

Barbara Essig, Sebastien Moretti and Platform on Disaster Displacement Secretariat

**Examples of good practice relating to preventing, mitigating and preparing for disaster displacement, discussed as part of the GP20 initiative, have revealed valuable lessons on early action, data, laws and policies, and community engagement.**

In 2019, there were three times more internal displacements caused by disasters than by conflict and violence. According to estimates by the Internal Displacement Monitoring Centre (IDMC), there were 24.9 million new displacements due to disasters, most of which were the result of weather-related events such as cyclones, storms and monsoon rains. By comparison, 8.5 million new displacements were caused by conflict and violence.<sup>1</sup>

Disasters, or the threat of a disaster, can trigger displacement in many ways: pre-emptive evacuations or planned relocations from high-risk hazard areas; escape from life-threatening sudden-onset disasters; or a gradual shift of populations away from areas of slow-onset disasters (such as drought or coastal erosion) due to the loss of livelihoods, decreasing access to food and increasing poverty. And climate change is exacerbating the risk of disaster displacement. In 2018, an estimated 108 million people needed the international humanitarian system to provide life-saving assistance because of floods, storms, droughts and wildfires – a number that, it is estimated, could double by 2050.<sup>2</sup>

The humanitarian consequences of displacement are devastating. The people who suffer the most are – and will continue to be – the world's poorest: those who do not have the resilience to protect themselves from disasters and who, more often than not, live in disaster-prone areas.<sup>3</sup> Examples of how to prevent or mitigate disaster displacement were discussed at several events convened by the GP20 initiative from 2018 to 2020.<sup>4</sup> The examples put forward showed that the conditions giving rise to disaster displacement can be prevented or mitigated with reliable data collection, early humanitarian action, integrated policy approaches and engagement of communities at risk of displacement. These examples introduce some key themes and

approaches on how to prevent and reduce disaster displacement, and merit sharing.

### Prevention and preparation

While there has been a strong focus on achieving durable solutions to internal displacement, it would clearly be even better to prevent and address the conditions that lead to disaster displacement. This is one of the reasons why 'anticipatory' humanitarian action, such as forecast-based financing (FbF), has gained increasing attention in recent years. FbF works by automatically releasing pre-approved funds for pre-agreed humanitarian actions once a specific threshold is reached. Based on scientific forecasts and risk analysis, it allows for better disaster preparedness, reducing the impact of hazards and contributing to preventing or reducing displacement.

A good example of FbF is the response taken by the International Federation of Red Cross and Red Crescent Societies (IFRC)<sup>5</sup> to *dzud*, a Mongolian climatic phenomenon of severe drought followed by extreme cold which has become more frequent in Mongolia recently. Half of the country is at risk, especially herding communities and their livestock. To support the herders before they lose their livestock and thus might feel compelled to move to cities and/or informal settlements, a *dzud* risk map was developed, which includes 14 indicators based on weather forecast data. Once these indicators reach the trigger point, funding is automatically allocated. In 2020, some 4,050 people from 1,000 vulnerable herder households received unconditional cash assistance and animal care kits. This reduced the number of animal deaths, thereby preserving the herders' sole source of income and food.

While it is not always possible to prevent displacement as natural hazards remain

largely unpredictable, the *dzud* case shows that it is possible in certain circumstances.

### The importance of data

Preventing disaster displacement is no easy endeavour as it presupposes understanding and identification of its underlying, complex and interrelated causes. As evidenced by the development of the *dzud* risk map in the previous example, effective prevention and preparedness require timely, accurate data on the phenomenon as well as on communities at risk of displacement – and require those data then to be used to mitigate human suffering.

The main challenges range from a lack of a) inter-operability of data, b) coordination among collecting entities and c) consensus on key metrics and definitions to establishing when displacement starts and ends, who is displaced and for how long. Slow-onset events are particularly difficult to monitor since they occur over a longer period of time and are triggered by a wide range of inter-connected drivers; as a result, it is often difficult to distinguish displacement from migration. More effort is also needed to capture small-scale events, which are often less visible. Reliable data are needed to generate an appropriate response for the displaced and to learn from these events on how to reduce displacement.

In the Philippines, the Disaster Response Operations Monitoring and Information Center (DROMIC) acts as a repository for disaster data. DROMIC gathers disaggregated data (for example, age, gender and disability) and information from different sources (including meteorological and volcanic institutes and local networks of social workers) on displaced and other affected populations, evacuation sites, damaged houses and humanitarian relief aid, arranged by geographical location and type of disaster. It then uses predictive analytics for potential disaster events to prepare humanitarian responses using mathematical theories and spatial technologies, including drones. Baseline data and information are also used for planning durable solutions, helping communities to become more resilient and to recover from disasters.

### An integrated policy approach

Another important aspect is the development of appropriate normative and policy frameworks. Disaster displacement is a cross-cutting issue, and therefore requires a coordinated policy approach integrating disaster risk reduction, climate change adaptation and human mobility, in addition to human rights, development and humanitarian action. This means incorporating human mobility challenges – including planned relocations – into disaster risk management laws and policies, National Adaptation Plans and other relevant development processes at local, sub-national and national levels.

A good example of an integrated policy approach at the national level is Vanuatu's 2018 National Policy on Climate Change and Disaster-Induced Displacement.<sup>6</sup> The policy identifies twelve strategic areas and gives time-bound institutional and operational actions for each. System- and sector-level interventions cover a range of areas including governance, data, protection and capacity building, and meticulously integrate consultation and participation mechanisms for local communities. This is a more holistic type of approach, bringing together policy areas such as land and housing, health, education, livelihoods, indigenous knowledge, security and access to justice; consideration is also given to the effective practical application of the policy, through provision of guidance on implementation, financing and monitoring. The Platform on Disaster Displacement works closely with governments to establish similar policies at regional and national levels.

### Engaging affected communities

There is an intrinsic link between preventing or mitigating displacement risks and the resilience of affected communities. It is important to understand how communities can themselves better anticipate, prepare for and reduce the impact of disasters; it is also vital to ensure that affected communities are included in discussions that affect them and are empowered to respond.

The Sister Village programme in the Indonesian Mount Merapi region is a good example of how a community-initiated

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project can help the community prepare for disaster displacement.<sup>7</sup> The programme pairs villages located in areas with high risk of volcanic eruptions with other, culturally related villages in safer areas. It was initiated by communities at risk of displacement, with the government facilitating the twinning process. An essential component is the Village Information System, a database of individuals (and their assets)

to be evacuated to enable faster assistance during a crisis. Evacuees can then access land, shelter, schooling and health care and receive identification cards. In addition, a government fund is available for community-based development and disaster risk reduction measures.

These are inspiring examples of how governments, local communities and civil society can each do their part and work together to address disaster displacement. However, a lot more needs to be done. The Sendai Framework for Disaster Risk Reduction 2015–2030, the Global Compact for Migration, the UNFCCC Task Force on Displacement and the UN Secretary-General's High-Level Panel on Internal Displacement are evidence of increasing international attention to displacement in the context of sudden- and slow-onset disasters. At the regional level, it is important to ensure that these frameworks and commitments are implemented alongside existing regional frameworks such as the Kampala Convention. However, the focus still often remains on displacement due to conflict and violence. Recognising the multiplicity and interrelated nature of



Joel Lacaba working on the construction site for his future permanent home in Tacloban, part of a recovery programme after Typhoon Haiyan, the Philippines.

drivers of displacement, the aim should not be to prioritise one over the other but to strive for prevention, mitigation and durable solutions for all internally displaced people.

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# The application of the IASC Framework in Somalia and Sudan

Durable Solutions Working Group Somalia (DSWG), DSWG Sudan, Margharita Lundkvist-Houndoumadi and Jasmine Ketabchi

**Analysing how the IASC Framework has been used over the decade since its launch in 2010 provides some useful reflections for those working to achieve durable solutions to internal displacement.**

This contribution explores the Inter-Agency Standing Committee Framework on Durable Solutions for Internally Displaced Persons<sup>1</sup> (hereafter IASC Framework) as a compass for progressing towards durable solutions in contexts where displacement is linked to discrimination, power imbalances and unequal opportunities in accessing rights. The Framework articulates key principles, defines criteria for measuring durable solutions, and prioritises engagement with displacement-affected communities and multi-stakeholder partnerships between governments and humanitarian, peace, human rights and development actors.

Since its launch in 2010, the IASC Framework has become an authoritative reference on durable solutions. At the national level, numerous laws and policies reflect its components, as in Niger, Afghanistan, Kenya, Sri Lanka, Somalia and South Sudan. At the global level, the Framework's criteria were operationalised into the Interagency Durable Solutions Indicator Library<sup>2</sup> in 2018, and in 2020 the UN Statistical Commission endorsed the International Recommendations on IDP Statistics<sup>3</sup> (IRIS) which include approaches to measuring durable solutions based on the IASC Framework. At the regional level, several contextualised approaches have been developed, such as the ReDSS<sup>4</sup> Framework in East and Horn of Africa.

To mark the 10th anniversary since the launch of the Framework, this article reviews learning from the application of the IASC Framework provisions in Somalia and Sudan where there has been a focus on durable solutions for numerous years. The following sections discuss the operationalisation of the Framework's criteria and principles

in both countries. Concluding reflections on the application of the IASC Framework highlight a) the need for partnerships to ensure both bottom-up and top-down approaches; b) the overarching importance of the voluntary and non-discriminatory nature of solutions; and, finally, c) the need for continued capacity-sharing and engagement on principles and definitions to enhance coherence of response and collective action.

## Case-study: Somalia

Resolving displacement through partnerships with humanitarian, development and peace actors has been a priority for the Federal Government of Somalia and the international community since 2016.<sup>5</sup> Initially, the IASC Framework guided the roll-out of the Mogadishu and Hargeisa profiling exercises, which created an evidence base for prioritising durable solutions in the eighth National Development Plan. Subsequently, a selection of durable solutions indicators, taken directly from the Interagency Durable Solutions Indicator Library and the ReDSS Framework, was used by ReDSS and NGO consortia to implement three durable solutions projects. These aimed to generate evidence to inform area-based planning and reintegration of IDPs and returnees in Mogadishu, Kismayo and Baidoa.

The operationalisation of the IASC Framework in these locations has shed light on the importance of focusing on social cohesion and non-discrimination as crucial elements in the success of durable solutions interventions. However, a top-down approach to measuring progress on durable solutions is a necessary complement to the on-the-ground, bottom-up analysis –



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particularly in order to avoid a projectised approach to durable solutions. The use of IASC Framework definitions, principles and criteria-based indicators helped inform government strategic documents, and the inclusion of IASC Framework provisions in national policies in Somalia was a significant development emerging from this approach.

Somalia's forthcoming National Durable Solutions Strategy is expected to expand the operationalisation of IASC Framework provisions across the country, thereby strengthening linkages with rule of law, stabilisation, justice, security and economic development. This more systematic consideration of the IASC Framework is a result of four years of engagement, a progressive shift towards government-led processes at both the local and national level, and the expansion of capacity building to international partners, government and civil society.

### Case-study: Sudan

Finding durable solutions to Sudan's internal displacement is one of the ten priorities of the transitional government. Between 2017 and 2019 the government and the international community embarked on a joint endeavour to support durable solutions in El Fasher (in North Darfur) and Um Dukhun (Central Darfur) in order to shift from the provision of humanitarian assistance to more long-term, sustainable programming for internally displaced and host communities. This resulted in two pilot projects, which adopted an area-based approach to durable solutions and a five-step process that prioritises comprehensive evidence-gathering, as well as consultations and joint planning with displacement-affected communities, as the basis for durable solutions programming. The IASC Framework informed the analysis, methodology and joint programming design.

At the local level, in the rural pilot in Um Dukhun area-based action plans were developed to address obstacles to durable solutions. These plans were based on consultations with displacement-affected communities and with buy-in from relevant stakeholders, including the local authorities.

The urban pilot in El Fasher<sup>6</sup> was a collaborative multi-sectoral profiling exercise undertaken jointly by the government, the World Bank, the UN, donors and INGOs (represented through the Durable Solutions Working Group) and IDPs residing in Abu Shouk and El Salam camps. For the first time, humanitarian and development actors worked with the local authorities to generate high-quality data, combining a socio-economic analysis of the situation of IDPs and their neighbours with an analysis of the wider city-planning requirements.

In these cases, as in Somalia, it was evident that local, bottom-up analysis and planning need to be complemented by a top-down, national-level strategy to ensure that all stakeholders agree on concepts, principles and criteria for durable solutions. Based on the lessons learned from the pilots in Darfur, a scaling-up of the efforts to support durable solutions planning is now underway in seven states in Sudan. This approach will subsequently ensure that in-country actors and the authorities will have results that can be compared and jointly analysed in order to design policy to support durable solutions.

### Challenges and lessons

Ten years after its publication, the IASC Framework is widely known among, and provides a solid foundation for, organisations working on durable solutions. However, there are several challenges to be addressed and lessons to be taken on board when operationalising the IASC Framework.

An external evaluation<sup>7</sup> of the profiling analysis undertaken in El Fasher highlighted that there was a lack of common understanding among stakeholders of the internationally accepted definition of durable solutions. In Somalia, by contrast, work had been carried out on contextualising the IASC definitions and principles and agreeing them with the government, which effectively underpinned the solutions-focused work described above. Work at settlement level has also underscored the importance of incorporating local understandings of these principles. Having a common understanding of definitions and principles

when embarking on durable solutions processes is key in order to mitigate differing expectations and inform coordination.

Often, actors focus on the geographic solutions outlined in the IASC Framework (return, stay, settle elsewhere), rather than on the principles of non-discrimination and the voluntary nature of reaching durable solutions described in the Framework, thus often overlooking the fact that reaching durable solutions is typically a long and complicated process over and beyond the physical settlement. As per the IASC Framework, “a durable solution is achieved when IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement.”

It is of central importance to focus on the non-discriminatory and voluntary nature of solutions, and to measure local integration – whether in the place where people have found themselves after being displaced or where they have returned to – as a process towards overcoming displacement-linked vulnerabilities.

In both Somalia and Sudan, a combined bottom-up, top-down approach has proven important. Ideally, durable solutions need to be addressed conceptually and operationally, at both national and local level, as well as in official statistics and in operational data, in order to ensure inter-operability and greater effectiveness. These processes hinge on complex government dynamics whereby alignment of national- and local-level action may not happen simultaneously and may require sequencing. Key to these

efforts is the alignment of definitions and indicators, and in this area IRIS is making a very significant contribution.

Measuring progress towards solutions in both Sudan and Somalia was based on the comparison of the situation of the displaced population with that of the non-displaced population (rather than against minimum standards). This approach has proved an effective foundation when measuring solutions and has also underpinned the area-based approaches seen in both case-studies. Through these area-based approaches, social cohesion, which is not a criteria of the IASC Framework, has been identified as an additional key factor in local integration processes beyond the eight criteria in the IASC Framework – and one that needs to be included in analysis and response.

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## GP20 Compilation of Practices on Preventing, Addressing and Resolving Internal Displacement

Aiming to strengthen collaboration on internal displacement and catalyse further action for internally displaced people at the country level, the GP20 initiative has supported achievements in several ways. This includes establishing a platform for sharing experiences and lessons learned on internal displacement. The GP20 Compilation of Practices to Prevent, Address and Resolve Internal Displacement gathers the best wisdom on internal displacement shared and generated over the three-year lifespan of the GP20 initiative, presenting over 20 country examples of policy and operational practice with lessons learned and recommendations.

This GP20 report will be published in late November 2020 and can be accessed at [www.gp20.org](http://www.gp20.org), on Twitter at @GP2064215284 or by writing to [gp20@unhcr.org](mailto:gp20@unhcr.org).

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### RSC Annual Report 2019-2020: articles and news

The latest RSC Annual Report provides details of all of the RSC's research and activities over the past year. This year the report includes a tribute to Professor Gil Loescher, who died in April, plus a new section on RSC alumni retrospectives and the following feature articles:

- Food and forced migration
- The private sector and refugee economies
- 'Stateless' alternatives to humanitarianism
- Refugee-led initiatives at the time of COVID-19
- Borders and colonial legacies: the refugee regime in the Global South
- Practising what you preach: sustainable energy access research in refugee settings

Read online at [www.rsc.ox.ac.uk/about/annual-reports](http://www.rsc.ox.ac.uk/about/annual-reports)

### New and forthcoming research briefs

The RSC has several new research briefs just out or forthcoming. The first three listed are from the Refugee Economies Programme; the fourth is from the Responses to Crisis Migration in Uganda and Ethiopia research project.

Recently published:

- 'Cash transfer models and debt in the Kalobeyei settlement', published in October 2020, written by Olivier Sterck, Cory Rodgers, Jade Siu, Maria Stierna and Alexander Betts

Forthcoming:

- 'The IKEA Foundation and livelihoods in Dollo Ado: lessons from the cooperatives model' by Alexander Betts, Raphael Bradenbrink and Andonis Marden
- 'Building economies in refugee-hosting regions: lessons from Dollo Ado' (authors as above)
- 'IDPs in secondary cities: good practices and ongoing challenges from Ethiopia' by Evan Easton-Calabria, Delina Abadi and Gezahegn Gebremedhin

Read them online at [www.rsc.ox.ac.uk/publications/search?keywords=&type=Research+in+Brief](http://www.rsc.ox.ac.uk/publications/search?keywords=&type=Research+in+Brief)

### Public Seminar Series

The Michaelmas term (October–December) online seminar series, convened by Matthew Gibney and Tom Scott-Smith, takes place on Wednesdays at 17:00 (GMT) via Zoom. Topics include: life in refugee camps; Refugia; refugees and racial capitalism; and ordinary disasters and the atmosphere of crisis in Haiti. Watch at [www.youtube.com/user/RefugeeStudiesCentre/videos](http://www.youtube.com/user/RefugeeStudiesCentre/videos). The **Annual Harrell-Bond Lecture 2020**, on 18th November, will be given by Jan-Werner Müller (Roger Williams Straus Professor of Social Sciences at Princeton University), who will speak on Democracy after Right-Wing Populism. Details/registration link at [www.rsc.ox.ac.uk](http://www.rsc.ox.ac.uk).

### International Summer School in Forced Migration 2021

Despite the 2020 Summer School having to be cancelled because of COVID-19, plans are underway for the return of the Summer School in July 2021. We are working on a new format that involves an innovative mix of online and in-Oxford participation and teaching. Information about previous Summer Schools, and updates about our plans for 2021, can be found at [www.rsc.ox.ac.uk/study/international-summer-school](http://www.rsc.ox.ac.uk/study/international-summer-school).

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Displaced people who have lost their land to the sea live in temporary shelters on the government-owned beaches. The government, however, wants them to leave, to make way for an airport and hotel development. Cox's Bazar, Bangladesh.



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