

# International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination

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## **A. Introduction: The Law of International Institutions and UNHCR's Refugee Status Determination**

### **I. International Humanitarian/Human Rights Institutions and their Perception**

In autumn 2005 a group of Sudanese asylum seekers and refugees discontented with the unbearable conditions in the United Nations High Commissioner for Refugees (UNHCR) office in Cairo started a sit-in protest near the office. The protesters were, besides venting their anger at the suspension of Refugee Status Determination procedures for Sudanese refugees due to the ceasefire between the Sudanese government and Sudan's People Liberation Army, also making their frustrations heard regarding UNHCR's lengthy procedures, its failure to provide them with proper assistance, the high numbers of rejected applications, improper interviews and their general treatment by UNHCR's personnel as well as their difficult social and health conditions which had been aggravated by the lack of proper assistance. They were demanding that this situation be remedied and calling for transparent and fair procedures. Shortly thereafter they were joined by many more protesters so that in the following three months a group of between 1,800 and 2,500 people stayed around UNHCR's premises. However, meetings and negotiations with UNCHR eventually failed. The crisis ended in a tragedy. On December 30, 2005 the Egyptian security forces proceeded with the forcible removal of the protesters from the venue in an action in which 28 refugees were killed, more than half of which were children and women, with several protesters missing after the events.<sup>1</sup> The Cairo incident illustrates what the cited report on the events has rightly called

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<sup>1</sup> A Tragedy of Failures and False Expectations, Report on the Events Surrounding the Three-month Sit-in and Forced Removal of Sudanese Refugees in Cairo, September-December 2005 (Azzam Fateh ed., 2006), available at: <http://www.aucegypt.edu/ResearchatAUC/rc/fmrs/reports/Pages/default.aspx>.

“a tragedy of failures and false expectations” regarding international humanitarian and human rights institutions.

The prevailing perception on those institutions is that of organizations responding to crises and providing support and help in all kinds of urgencies. Due to these urgencies, the legal framework for their work often seems to have a secondary meaning. At the same time the perception is also very common that there is no doubt that those institutions do follow certain rules and act according to human rights standards *per se* even if they are not explicitly bound by them. Interdependency, however, between the lack of proper legal framework and overburdening in cases where the institutions are obviously running out of capacities to perform their mandate as anticipated can lead to tragedies as the one in Cairo. As far as UNHCR’s refugee status determination is concerned this study tries to add shades of grey to this black-and-white perception of international institutions while bearing in mind the questions asked by the research project presented in this volume.<sup>2</sup>

## II. International Refugee Law and the Perspective of the Publicness of Public International Law

Although historically the recognition of persons who were forced to flee their homes as refugees was dependent on the initiative of single states,<sup>3</sup> today the protection of refugees is regarded as an important international issue.<sup>4</sup> The International Refugee Law, based in the 1951

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<sup>2</sup> See Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in this volume.

<sup>3</sup> For a comprehensive historical recapitulation of the international refugee regime, see Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INTERNATIONAL JOURNAL OF REFUGEE LAW (INTJREFL) 238 (2002); Guy S. Goodwin-Gil, *The Language of Protection*, 1 INTJREFL 6 (1989); WILTRUD VON GLAHN, DER KOMPETENZWANDEL INTERNATIONALER FLÜCHTLINGSORGANISATIONEN: VOM VÖLKERBUND BIS ZU DEN VEREINTEN NATIONEN (1992); Atle Grahl-Madsen, *The European Tradition of Asylum and the Development of Refugee Law*, in THE LAND BEYOND: COLLECTED ESSAYS ON REFUGEE LAW AND POLICY 34 (Peter Macalister-Smith & Gudmundur Alfredsson eds., 2001).

<sup>4</sup> Goodwin-Gil (note 3), at 8.

Convention Relating to the Status of Refugees (CSR51)<sup>5</sup> and its 1967 Protocol (CSRP67),<sup>6</sup> provides for an interesting setting to address questions on the (new) legal framework for global governance activities.<sup>7</sup>

According to the UNHCR the total number of people of its concern at the end of 2006 was more than 31 million, among them 9, 7 million refugees.<sup>8</sup> This article focuses on an aspect of administrative activity by this very prominent international organization in the field of Refugee Law, namely the issuing of decisions on refugee status by UNHCR's field offices in the process of Refugee Status Determination (RSD). Within this so-called Mandate RSD UNHCR's staff determines whether asylum seekers fall within the criteria for international refugee protection and thus conducts an activity that is primary within the responsibility of states.<sup>9</sup> In 2006 in some 80 countries UNHCR received and issued decisions on 12% of all refugee status applications.<sup>10</sup> In this respect the NGO RSDWatch.org calls attention to the fact that each year UNHCR's offices decide on the fate of more than 80,000 individuals, which makes UNHCR the biggest RSD decision-maker in the

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<sup>5</sup> Convention Relating to the Status of Refugees (CSR51), Geneva, 28 July 1951, UNTS, vol. 189, 150.

<sup>6</sup> Protocol Relating to the Status of Refugees (CSRP67), New York, 31 January 1967, UNTS, vol. 606, 267.

<sup>7</sup> von Bogdandy, Dann & Goldmann (note 2). See Benedict Kingsbury, Nico Krisch & Richard Stewart, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 1 (2006); Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006).

<sup>8</sup> UNHCR, Global Report 2007, 16, available at: <http://www.unhcr.org/publ/PUBL/484807202.pdf>. For five elements of refugee definition JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991).

<sup>9</sup> See UNHCR, Note on Determination of Refugee Status under International Instruments, EC/SCP/5 (24 August 1977), available at: <http://www.unhcr.org/excom/EXCOM/3ae68cc04.html>.

<sup>10</sup> About 95 per cent of these adjudications were concentrated in Cameroon, Egypt, Hong Kong SAR (China), Jordan, Kenya, India, the Islamic Republic of Iran, Lebanon, Malaysia, Morocco, Pakistan, the Syrian Arab Republic, Thailand, Turkey and Yemen. UNHCR, Global Report 2006, 26-27, available at: <http://www.unhcr.org/publ/PUBL/4666d25b0.pdf>.

world.<sup>11</sup> Furthermore, while the share of UNHCR's RSD decisions continuously grows the share of government RSD decisions declines. According to a statement by Assistant High Commissioner Erika Feller, addressing the Executive Committee on the High Commissioner's Programme at its fifty-eight session in October 2007, between 2003 and 2006 the number of all refugee applications world-wide has decreased by 38% while at the same time the number of applications submitted to UNHCR has increased by 48%.<sup>12</sup>

### III. UNHCR's Refugee Status Determination and Procedural Fairness Capacity of International Institutions

For the individual concerned the implications of an RSD decision are profound for his life and security. The issue of a Refugee Certificate, even though the Certificate as such is not formally binding, is determinative as to whether he or she is to be protected from a forcible return to his or her country of origin and is to receive special protection and assistance in rebuilding his or her life in the country other than his or her country of origin.<sup>13</sup> The capacity of UNHCR, its protection role and the standards it has been developing for the government-led RSD in the form of standard-setting materials, policy guidelines and training could indicate that the asylum seekers knocking on UNHCR's doors could not be better off. However, as this article tries to show, UNHCR's RSD raises significant concerns: compared to an individual national administrative act, which the decision taken within the RSD resembles, the procedural rights of the individual are everything else but satisfactory. The problems already occur in facilitating actual access to the procedure since no right exists on the part of the applicant and no legal duty on the part of UNHCR to enable him access to the procedure and to examine his application. Within the eligibility assessment procedure the applicant does not need to be provided with an interpreter or counsel, the decision can be taken on the basis of secret evi-

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<sup>11</sup> RSDWatch.org, UNHCR RSD continues to grow in 2006, while government RSD declines again (August 2007), available at: [http://www.rsdwatch.org/index\\_files/Page1747.htm](http://www.rsdwatch.org/index_files/Page1747.htm).

<sup>12</sup> Statement available at: <http://www.unhcr.org/doclist/admin/42a409182.html>.

<sup>13</sup> Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INTJREFL 2 (2005).

dence and the level of discretion in allowing third parties to be present and to participate in the individual procedure is very high. The field officers deciding on the cases are also not obliged to provide the applicant with reasons for the decision. And finally, there is no proper legal remedy in its classical meaning that would enable the applicant to invoke his substantial and procedural rights after the decision has been issued. Further critical points regarding this UNHCR activity highlighted in the literature and by practitioners include questions relating to the competence of UNHCR to decide individual applications, enforcement and effect of such decisions, accountability and questions of legitimacy with regard to the problem-solving potential of such decisions.<sup>14</sup> Doubts as to the fairness of the procedure were also confirmed by the European Court of Human Rights (ECourtHR)<sup>15</sup> and deficiencies have been recognized by the UNHCR itself.<sup>16</sup>

The other side of the coin to be considered is the role of the states, members of the United Nations, donors to the UNHCR and host states to UNHCR's field offices. Considering the growing importance of UNHCR's RSD activity, resulting in part also from the stagnation of the amount of protection afforded by the states,<sup>17</sup> it should not be absurd to ask oneself about the possible interests these could have in the procedure as such and in the way it has been handled.

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<sup>14</sup> For explicit criticism, see Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INTJREFL 251 (1999); Michael Kagan, *Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt*, 19 JOURNAL OF REFUGEE STUDIES 45 (2006); *Id.* (note 13); Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 869 (2005); B.S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 799 (2005); RSDWatch.org, *No Margin for Error: Implementation of UNHCR's Procedural Standards for Refugee Status Determination at Selected UNHCR Field Offices in 2006* (September 2006), available at: [http://www.rsdwatch.org/index\\_files/Page397.htm](http://www.rsdwatch.org/index_files/Page397.htm).

<sup>15</sup> Eur. Court H.R., *D. et autres c. Turquie*, Judgment of 22 June 2006, App. no. 24245/03.

<sup>16</sup> UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (September 2005), 1-2, available at: <http://www.unhcr.org/publ/PUBL/4316f0c02.html>.

<sup>17</sup> This aspect is critically reflected also in the recent article by James C. Hathaway, *Why Refugee Law Still Matters*, 8 (1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 89-103 (2007).

Based on the premise of the growing scope and relevance of the global governance activity by International Organizations,<sup>18</sup> not only with regard to national administrations but also concerning individuals,<sup>19</sup> it might not be that self-evident to what extent they are also capable of providing proper remedies to fairly and efficiently decide on status of individuals. Their resemblance to activities of national administrations might even lead to the assumption that no objections exist for them to not have the capacity to replace certain national administration procedures.<sup>20</sup> Using UNHCR as an example, the following analysis attempts to show the dangers of such an assumption.

For this purpose Part B. will proceed in 6 steps. Firstly (I.), the legal basis for UNHCR activity according to the Mandate and the level of formalization of relations towards host states will be examined. Secondly (II.), the relevance and effect of RSD decisions will be sketched out, together with the importance of fair procedure. Before addressing the procedure as such (V.), the institutional framework of the activity (III.) and substantive rules relevant for UNHCR RSD, including the question of human rights, (IV.) will be outlined. Lastly (VI.), review and oversight will be discussed. The main argument of the analysis will be the lack of procedural fairness in the conduct of RSD by UNHCR, suggesting that this failure is not coincidental but in a way backed politically by the states, since it gives them political leeway regarding the recognition of such decisions and disburdens them at the same time in preselecting persons applying for refugee protection.

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<sup>18</sup> Jan Klabbers, *The Changing Image of International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 221, 222 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); José E. Alvarez, *International Organizations: Then and Now*, 100 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 324 (2006), B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1 (2004).

<sup>19</sup> See also Clemens Feinäugle, in this volume.

<sup>20</sup> See Schmidt-Aßmann (note 7), at 322-323.

## B. Legal Analysis

### I. Legal Basis for Mandate RSD

The forerunner of modern RSD conducted by international institutions can be found in the era of the League of Nations' High Commissioner. At the 1928 conference convened by the Commissioner one of the concluded agreements provided for the legal basis for the representatives of the High Commissioner to determine eligibility for refugee status on behalf of governments and to participate in the national refugee offices.<sup>21</sup> Today, however, as this section will illustrate, the legal basis for Mandate RSD is even vaguer than in times of the League of Nations.

#### *1. UNHCR's Mandate and Lack of Explicit Legal Basis*

There is no explicit norm in the CSR51, CSRP67 or the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute)<sup>22</sup> which would provide UNHCR with the competence to conduct individual RSD. The function is explained as part of UNHCR's international refugee protection mandate (therefore the activity is also referred to as "Mandate" RSD).

In general, CSR51 Art. 35 and CSRP67 Art. II set the legal basis for the obligation of states to accept UNHCR's role of providing international protection to asylum seekers and refugees, the obligation of states to respond to information request by UNHCR and the authoritative character of certain UNHCR statements, like standard-setting materials, policy guidelines, etc. within the exercise of its supervisory role.<sup>23</sup> UNHCR Statute Para. 8 further lists UNHCR's protection activities.<sup>24</sup>

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<sup>21</sup> See Grahl-Madsen (note 3), at 129.

<sup>22</sup> UN GA Res. 428 (V) of 14 December 1950, Annex.

<sup>23</sup> Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL LAW 619 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

<sup>24</sup> These are: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation

However, the listed responsibilities are not of limiting or prescriptive nature, but are more to be regarded in the light of the main objectives. Such an all-embracing protection role of the UNHCR, also for dealing with individual cases, has also been recognized by state practice.<sup>25</sup> Furthermore, in difference to other human rights treaties where an international body needs approval by the state in order to intervene on behalf of an individual, CSR51 Art. 35 and CSRP67 Art. II are also interpreted in a manner that the UNHCR does not need an invitation by the state in order to exercise its protection function, including RSD.<sup>26</sup> Lacking any explicit legal basis, as rightly observed by Kagan, “UNHCR’s Mandate allows it to choose to do RSD, but it has no specific duty to conduct RSD.”<sup>27</sup>

## 2. *Deformalized Relations with Host States*

Although no formal approval of UNHCR’s RSD activity is needed, conclusion of some sort of legal agreements (either in the form of stan-

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within new national communities; (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of states; (e) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement; (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them; (g) Keeping in close touch with the Governments and inter-governmental organizations concerned; (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

<sup>25</sup> Kälin (note 23), at 623. For questions of general competence growth of UNHCR, see Geoff Gilbert, *Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order*, 10 INTJREFL 349 (1998).

<sup>26</sup> Kälin (note 23), at 623. For the Lebanon example of opposing and disrespecting UNHCR’s RSD, see Kagan (note 13), at 14. In 2003, however, UNHCR and the Lebanese General Security Office signed a Memorandum of Understanding providing for rights to one-year residence, freedom of movement and identity cards for registered refugees, thus affording UNHCR one year to organize resettlement possibilities for each refugee. UNCHR, Global Report 2003, at 301, available at: <http://www.unhcr.org/publ/PUBL/40c6d75e0.pdf>.

<sup>27</sup> Kagan, (note 13), at 16. See also UNHCR, Note on Determination of Refugee Status under International Instruments (note 9).

dard UNHCR Cooperation Agreement<sup>28</sup> or Memorandum of Understanding) has been one of the priorities of the Office of the High Commissioner. The legal basis for such agreements can be found in the general norms of CSR51 Art. 35, CSRP67 Art. II and Art. 8 of the Statute. But, according to Zieck, as of January 2006 there should still have been some 35 countries with UNHCR's presence on their territory where no such formal agreements exist.<sup>29</sup> Alternatively UNHCR's presence might be guided by other agreements to which UNHCR is either a party or not (in these cases UNHCR is regarded as a third party beneficiary) or agreements to which the UN is a party, or by national legislation of respective states.<sup>30</sup> Some countries had, for instance, agreed to ratify both international instruments only under the condition that RSD on their territory is being conducted solely by UNHCR.<sup>31</sup>

The above addressed the general nature of the basic norms that provide for the legal basis for UNHCR's RSD activity and that need to be further concretized. These questions gain even more pertinence considering the reports on the standards that UNHCR's offices have (not) followed in conducting their activities,<sup>32</sup> read together with the practical impact and relevance of RSD decisions.

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<sup>28</sup> For a Model Cooperation Agreement: MARJOLEINE ZIECK, UNHCR'S WORLDWIDE PRESENCE IN THE FIELD: A LEGAL ANALYSIS OF UNHCR'S COOPERATION AGREEMENTS 335 (2006).

<sup>29</sup> Among such countries are also Belgium, Greece, Netherlands, Turkey, UK, Australia, Canada and US; *id.* at 294.

<sup>30</sup> ZIECK (note 28), at 294. For an example of national legislation see Article 7 (Institutions with which co-operation is to be carried out) of the Regulation No. 1994/6169, Turkey, Official Gazette, 30 November 1994 (English translation available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>). This article is the only legislative norm that refers to UNHCR although in practice it is UNHCR that conducts RSD for non-European asylum seekers.

<sup>31</sup> Kagan (note 14), at 46.

<sup>32</sup> RSDWatch.org (note 14); Pallis (note 14); Kagan (note 13); Alexander (note 14); VERDIRAME GUGLIELMO & BARBARA E HARRELL-BOND, RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM 78 (2005); Edwin Odhiambo Abuya & George Mukundi Wachira, *Assesing Asylum Claims in Africa: Missing or Meeting Standards?*, 53 NETHERLANDS INTERNATIONAL LAW REVIEW 171 (2006).

## II. The Legal Effect and Actual Impact of RSD Decisions

The regulatory impact of UNHCR's RSD activity derives either from the UNHCR Refugee Certificate, if the refugee status has been confirmed or Notification of the Negative RSD Decision if UNHCR has determined that the applicant is not eligible for international refugee protection.<sup>33</sup> Neither of them refers to an explicit legal basis, but the latter can be derived from the refugee definition of Art. 1 CSR51 and Art. 33 CSR51, rights provided for in both treaties and the cooperation duties of the parties according to Art. 35 CSR51, Art. II CSRP67 and Art. 8 of the UNHCR Statute. These cooperation duties, however, do not oblige national administrations to recognize the Mandate Refugee Certificate as the legal basis for providing refugee protection and assistance.<sup>34</sup>

As observed in studies, some countries where Mandate RSD is conducted are not parties to CSR51 and CSRP67 and do not feel bound by the decisions.<sup>35</sup> Apart from CSR51 and CSRP67 promotion work in such cases UNHCR does not have any real enforcement mechanisms.<sup>36</sup> If countries are parties to both instruments the only soft enforcement mechanism would arguably be the obligation to report according to Art. 35 und 36 CSR51 and Art. II and Art. III CSRP67.

There are three groups of constellations for which the effect of RSD decisions can be observed, namely in the host country (*i.e.* the country where UNHCR has issued the decision), the country to which the refugee is to be resettled within UNHCR's resettlement program, and a third country (*i.e.* a country other than host or resettlement country), illustrating that actual impact of the decisions very often does exist, but not always to the benefit of affected individuals.

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<sup>33</sup> For standard Refugee Certificate and Notification of Negative RSD Decision *cf.* UNHCR, Standards (note 16), at Annex 6-1, 8-1.

<sup>34</sup> *See* ExCom's conclusions regarding states. Here, it considered that the "very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by the other Contracting States." UN GA ExCom, Extraterritorial Effect of the Determination of Refugee Status, GA Document No. 12 A (A/33/12/Add.1) (October 1978).

<sup>35</sup> *Supra*, note 26.

<sup>36</sup> Kagan (note 13), at 14-15.

In the host countries effects of RSD decisions vary significantly. For Lebanon, before signing the 2003 MOU, RSD decisions seemed to have no relevance for the national administration since they did not protect Mandate refugees from forcible return to their country of origin.<sup>37</sup> In Turkey the UNHCR has been conducting RSD for all non-European asylum seekers<sup>38</sup> because so far<sup>39</sup> Turkey has upheld the geographic limitation of the CSR51 and non-European refugees may only be awarded temporary residence permission. UNHCR's RSD therefore runs parallel to the national administration's procedure for obtaining temporary residence permission. During the course of the national procedure there is a separate RSD; but as practice has shown, the authorities have almost routinely been adopting UNHCR's decisions<sup>40</sup> and strong cooperation between the High Commissioner Office and competent authorities exists.<sup>41</sup> Formally UNHCR's decision has no legal value; but in practice it enables the refugee to extend his residence permit issued by the Turkish authorities and protects him from deportation or detention and thus enables the UNHCR to organize resettlement into a third country.<sup>42</sup> In Egypt UNHCR's decisions have had an even greater impact. Since the country does not provide for any kind of domestic asylum procedure, according to a 1954 agreement UNHCR itself assesses refugee status in Egypt. Refugees with a UNHCR identity card are allowed to stay in the country by Egyptian authorities without any further status assessment. A negative UNHCR decision, on the opposite, means that such a person is excluded from assistance and protection and has no legal status, unless he or she is able to obtain residence permits on other grounds.<sup>43</sup>

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<sup>37</sup> *Supra*, note 26.

<sup>38</sup> *Supra*, note 30.

<sup>39</sup> In the process of EU accession the country, however, has obliged itself to lift this limitation. UNHCR, Global Report 2006 (note 10), 446.

<sup>40</sup> Eur. Court H.R., *D. et autres* (note 15).

<sup>41</sup> Elizabeth Frantz, Report on the Situation of Refugees in Turkey: Findings of a Five-week Exploratory Study, December 2002-January 2003, 16 (2003), available at: <http://www.aucegypt.edu/ResearchatAUC/rc/fmrs/reports/Pages/default.aspx>.

<sup>42</sup> *Id.* at 18.

<sup>43</sup> Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002*, Forced Migration and Refugee Studies Working Paper No. 1, 7 (2002), available at: <http://www.aucegypt.edu/ResearchatAUC/rc/fmrs/reports/Pages/default.aspx>; KATARZYNA GRABSKA,

A significant number of Mandate refugees are eventually resettled into third countries, mostly to the United States, Canada, Australia and some Scandinavian countries. UNHCR referral is in these countries often necessary and the only means of accessing resettlement, meaning a positive UNHCR RSD decision is in the majority of cases the most important pre-condition for a successful resettlement.<sup>44</sup>

Finally, the effect of the Mandate RSD decision can be observed with regard to countries other than UNHCR RSD countries. For the United States one can conclude that again UNHCR's decision could be decisive in accessing their asylum procedure, especially if the person was declined to apply to or was rejected by the UNHCR. In practice, a negative UNHCR decision has regularly served as a basis for denying asylum. At the same time a positive decision by UNHCR does not necessarily suffice for obtaining asylum in the US. The meaning of UNHCR's RSD is also not to be overlooked since according to the REAL ID Act<sup>45</sup> passed in 2003 an asylum officer may at any time during the procedure examine the credibility of the claim by comparing statements made by the applicant in any other context, including during the UNHCR procedure. Shortcomings of the latter can thus have direct effect on asylum procedures in the US.<sup>46</sup> As confirmed in several decisions of German administrative courts, Mandate refugees are not automatically granted asylum or other protection, like protection from deportation.<sup>47</sup>

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WHO ASKED THEM ANYWAY? RIGHTS, POLICIES AND WELLBEING OF REFUGEES IN EGYPT 13, 25 (2006), available at: <http://www.ucegypt.edu/ResearchatAUC/rc/fmrs/reports/Pages/default.aspx>.

<sup>44</sup> Kagan (note 43), at 7; Emily E. Arnold-Fernandez & Michael Kagan, *UN Decision-Making for Refugee Status: Implications for American Asylum Policy*, 8 ABA SECTION OF INTERNATIONAL LAW IMMIGRATION AND NATURALIZATION COMMITTEE NEWSLETTER 5 (2005).

<sup>45</sup> P.L. 109-13.

<sup>46</sup> Arnold-Fernandez & Kagan (note 44), at 6.

<sup>47</sup> VG Freiburg, 07.05.2002, Decision No. 7 K 10114/00 (*cf.* also the opinion of UNHCR of 10.08.2000); OVG Lüneburg, 07.12.2005, Decision No. 11 LB 193/04; OVG Münster, 27.09.2006, Decision No. 8 A 1363/05. The cited decisions also summarize opinions issued by UNHCR on enquiries of the court. According to these opinions, Mandate refugees should enjoy international protection, however, recognition as Mandate refugee does not have any direct binding effect on German asylum procedure, but it does have strong indicative character.

In light of the preceding account, UNHCR's RSD decisions in many ways resemble an individual administrative status assessment decision. Given that their implications are of vital importance for the concerned individual, it has to be examined if the institutional framework, the procedure, including legal remedies and accountability mechanisms, correspond to those of a typical administration procedure in a rule of law state.<sup>48</sup>

### III. The Institutional Framework

The organizational setting of the examined administrative activity is the Office of the United Nations High Commissioner for Refugees and its field offices established in 116 countries.<sup>49</sup> The Office was established in December 1950 as a UN agency by the United Nations General Assembly (UN GA).<sup>50</sup> At first it was given a limited three-year mandate. Later its mandate was extended every five years until the UN GA decided in December 2003 to remove the time limitation of UNHCR's mandate until the refugee problem is solved.<sup>51</sup>

Regarding the question of the legal capacity of UNHCR as such, the majority opinion considers it a "subsidiary organ" that needs authorization by the UN General Assembly in order to enter into legal relations with states, other international organizations or privates. Since UNHCR was not established by a treaty but by a Resolution of the UN GA that lacks competence to establish new international organizations as subjects of international law it enjoys international personality but is at the same time not a subject of international law.<sup>52</sup> This also indicates that RSD activities of UNHCR's offices should be attributed directly to the legal entity of the UN. On the other hand, however, UNHCR does enjoy a certain autonomy and distance from the UN

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<sup>48</sup> Schmidt-Aßmann (note 7), at 322-323.

<sup>49</sup> UNHCR, *Helping Refugees: An Introduction into UNHCR* (2006 Edition), available at: <http://www.unhcr.org/basics/BASICS/420cc0432.html#emergency>.

<sup>50</sup> UN GA Res. 428 (V) of 14 December 1950.

<sup>51</sup> UN GA Res. 58/153 of 24 February 2004.

<sup>52</sup> For assessment of the scholarly opinions, see VOLKER TÜRK, *DER FLÜCHTLINGSHOCHKOMMISSARIAT DER VEREINTEN NATIONEN (UNHCR)* 115, 118 (1992); ZIECK (note 28), at 100.

GA, since according to Chapter I of the UNHCR's Statute<sup>53</sup> it is relatively free in providing international protection as a non-political entity that conducts its mandate under the auspices of UN GA. Apart from being obliged to consult the Advisory Committee on Refugees and to follow the policy directives given to it according to the Statute by the UN GA and the Economic and Social Council (ECOSOC), it is in no further dependence vis-à-vis the General Assembly. Furthermore there is a treaty power for co-operation with national authorities in CSR51 Art. 35 and CSRP67 Art. II.<sup>54</sup>

The Executive Committee of the High Commissioner's Programme (ExCom) as UNHCR's Advisory Committee, in addition to UN GA and ECOSOC, provides for the additional linkage of the mechanism to the states party to CSR51. It is a body foreseen by para 4 of the UNHCR Statute and though established at the request of the UN GA<sup>55</sup> by ECOSOC<sup>56</sup> (which also elects its members) ExCom functions as a subsidiary organ of the UN GA. It is not a substitute for the policy-making functions of the UN GA or ECOSOC but has its own executive and advisory functions. Currently it is made up of delegates from 70 Member States. It meets annually to review and approve UNHCR's programmes and budget, advise on international protection and discuss further issues with the UNHCR and its intergovernmental and non-governmental partners. ExCom's decisions are obligatory for the UNHCR but they cannot have any direct impact on RSD procedures.<sup>57</sup> At the same time though the potential impact of decisions regarding policy and budgeting for the RSD activity must not be overlooked. Furthermore, its Conclusions on International Protection of Refugees have as soft law an important standard setting function not only for the states but also for UNHCR.<sup>58</sup> Considering the fact that UNHCR has to rely almost exclusively on donations (mainly from states) since not

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<sup>53</sup> UN GA Res. 428 (V) of 14 December 1950, Annex.

<sup>54</sup> TÜRK (note 52), at 118. Such treaty power can also be found in OUA Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, Art. VIII, UNTS, vol. 1001, 45.

<sup>55</sup> UN GA Res. 1166 (XII) of 26 November 1957.

<sup>56</sup> UN ECOSOC Res. 672 (XXV) of 30 April 1958.

<sup>57</sup> TÜRK (note 52), at 105.

<sup>58</sup> Erika Feller & Anja Klug, *Refugees, United Nations High Commissioner for Refugees (UNHCR)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008), available at: [www.mpepil.com](http://www.mpepil.com).

more than 3% come from the UN regular budget,<sup>59</sup> the possible impact states can have on the work of the Agency grows even further.

#### IV. The Sources of Substantive Rules and Standards Guiding Mandate RSD

##### 1. *The Refugee Convention and Internal Soft Law*

The main body of substantive rules that binds UNHCR in assessing eligibility for refugee status comprises CSR51, CSRP67 and the Statute, most importantly the refugee definition.<sup>60</sup> Here, the Mandate refugee definition of the Statute (as a definition of persons to whom UNHCR's competence extends) is not completely identical with the definition of both treaties, which should consequently also mean that Mandate status is not identical with the CSR51 status. With regard to the protection territory and the addressee, the Mandate refugee enjoys *international protection* whereas CSR51/ CSRP67 refugees enjoy *protection by parties to the treaties*.<sup>61</sup>

Further interpretation aids to the Convention are ExCom's Conclusions on International Protection.<sup>62</sup> Although not formally binding and primarily addressed to parties of both treaties, arguments that they do not have a binding effect for UNHCR itself do not stand to reason.<sup>63</sup> The Conclusions' authority also derives from the fact that they are taken by consensus. The same should apply for further standards and manuals developed within UNHCR's Geneva Headquarters, for the purpose of additional assistance to national administrations in their

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<sup>59</sup> UNHCR, UNHCR 2007 Financial Overview, available at: <http://www.unhcr.org/partners/PARTNERS/45f027512.pdf>.

<sup>60</sup> See Hathaway (note 11).

<sup>61</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees HCR/IP/4/Eng/REV.1, 4 (Reedited, January 1992), available at: <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>. Italics added by the author.

<sup>62</sup> UNHCR, A Thematic Compilation of Executive Committee Conclusions (2nd Edition, June 2005), available at: <http://www.unhcr.org/excom/3bb1cb676.html>.

<sup>63</sup> Pallis (note 14), at 873; Chimni (note 14), at 820.

refugee protection activities,<sup>64</sup> and for the guidelines addressed to its own staff.<sup>65</sup> Both can be regarded as the internal law of the agency.<sup>66</sup>

## 2. *Human Rights Standards*

In his paper on the operation of UNHCR's accountability mechanisms *Pallis* further refers to human rights as the core standards for UNHCR and with respect to Mandate RSD to the due process standards of Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>67</sup> He thereby alludes to a contested topic of public international law that has also been occupying the International Law Commission (ILC) under the notion of responsibility of international organizations,<sup>68</sup> namely human rights obligations of international organizations. According to the Commentary to the Article 8 of the draft articles, international obligations that bind an international organization may be established by "customary rule of international law, a treaty or general principles applicable within international legal order" and by rules of

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<sup>64</sup> Available at: <http://www.unhcr.org/doclist/publ/3bc17bbc4.html>.

<sup>65</sup> UNHCR, Standards (note 16), further resources listed in Annex 1-1.

<sup>66</sup> *Pallis* (note 14), at 874.

<sup>67</sup> *Pallis* (note 14), at 872, 880, 881. On the concrete procedural standards Alexander (note 14), at 251. However, it must be noted that the authoritative ICCPR commentary does not answer the question whether asylum procedures ultimately fall under the scope of article 14 (1). But it does note that "most decisions of administrative authorities, which determine individual rights, need to be subject to full judicial review by an independent and impartial tribunal." MANFRED NOWAK, U.N. CONVENTION ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 317, marg. 20 (2nd revised edition, 2005). More positive, see Santhosh Persaud, *Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights*, NEW ISSUES IN REFUGEE RESEARCH, RESEARCH PAPER No. 132, 15 (2006), available at: <http://www.unhcr.org/doclist/research/3b8a11284.html>. The recent Human Rights Committee General Comment further lists asylum seekers and refugees explicitly among the groups to which the right of access to courts and tribunals and equality before them according to article 14 CCPR must be available. Human Rights Committee, Ninetieth Session. General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/c/GC/32, 3 (21 August 2007). On the applicability of article 14 CCPR for administrative procedures see Jochen von Bernstorff, in this volume.

<sup>68</sup> The latest report: ILC, Fifty-ninth session, Fifth report on responsibility of international organizations, A/CN.4/583 (2007).

that organization.<sup>69</sup> If it might be possible to argue for human rights obligations such as due process as part of customary international law,<sup>70</sup> it is almost impossible to derive these obligations out of treaties binding UNHCR as party to the treaty or as general principles of international law. The remaining option is thus to consider if human rights could form rules of the organization or if another reasoning would be possible for UNHCR to provide for a binding effect of international human rights norms.

The application of human rights vis-à-vis UNHCR as rules of the organization might be argued by a referral to the UN-Charter. According to Art. 1, one of the purposes of the UN is to “promote and encourage respect for human rights and for fundamental freedoms” indicating that the organization and also its agencies should be bound by human rights.<sup>71</sup> Furthermore, the UN’s own references to the universal human rights standards in various documents can serve as an indication of the commitment of the organization to adhere to human rights standards.<sup>72</sup> For the Mandate RSD one further argument is relevant, namely that by assessing eligibility for refugee status UNHCR is conducting an activity that is within the primary responsibility of states and should thus respectively be bound by the same human rights standards as national administrations.<sup>73</sup> It would exceed the scope of this article to analyze this question further.<sup>74</sup> However, if a legal obligation could not be derived from the Charter, one could assume a political responsibility of the UN to adhere to standards developed by the organization itself.<sup>75</sup>

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<sup>69</sup> UN GA, Official Records of the General Assembly, Sixtieth session Supplement No. 10, A/60/10, 87 (2005).

<sup>70</sup> Pallis (note 14), at 872, 880.

<sup>71</sup> *Id.* at 873.

<sup>72</sup> ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 137 (2006).

<sup>73</sup> *Id.* at 109; Ralph Wilde, *Quis Custodiet Ipso Custodes? Why and How UNHCR Governance of ‘Development’ Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 107 (1998).

<sup>74</sup> For a summary of the conceptions see Frederic Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUMAN RIGHTS QUARTERLY 314, 316 (2003).

<sup>75</sup> See ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 200 (2004).

## V. Due Process?

### 1. *The 2003 Procedural Standards and Their Principles*

In November 2003 UNHCR for the first time released a comprehensive set of action standards addressed to the field offices for the Mandate RSD procedures. The Procedural Standards for Refugee Status Determination under UNHCR's Mandate (the Standards) were developed by the Department of International Protection and were made public in September 2005.<sup>76</sup> The 175 pages long Standards are not directly binding but rather provide guidelines for UNHCR's field offices on how to develop and implement RSD procedures.

The non-binding document contains several core standards to be followed by all field offices and which therefore can be regarded as common procedural principles. These are: access to UNHCR staff and RSD procedures; identification and assistance of vulnerable asylum seekers; non-discriminatory, transparent and fair procedures; timely and efficient processing of the applications; qualified and supervised staff; access to individual RSD interview; access to review procedures for rejected claims by an officer, other than the officer who decided the first instance claim; organization-wide consistency on procedures that define substantive rights in the RSD process; consistency with established policies on confidentiality, treatment of vulnerable asylum seekers and gender and age sensitivity.<sup>77</sup>

Standards are only a procedural tool and do, as such, neither provide guidance on the interpretation of refugee criteria nor address other substantive issues relating to RSD.<sup>78</sup> Therefore the Annex lists additional resources, including those on substantive questions.<sup>79</sup> Many of those are, however, marked as "internal" and as such bring up the question of transparency of the legal sources guiding the decision-making process.<sup>80</sup>

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<sup>76</sup> UNHCR, Standards (note 16), 1-2.

<sup>77</sup> *Id.* at 1-2.

<sup>78</sup> *Id.* at 1-4.

<sup>79</sup> *Id.* at 12-1 - 12-5.

<sup>80</sup> Chimni (note 14), at 825.

## 2. *Course of the Procedure*

According to the Standards, the decision on eligibility for the status of a Mandate refugee is to be carried out in three phases: reception, eligibility assessment and issuing of the decision, and appeal procedure. In addition to the standard procedure, there are further special procedures foreseen for file closure/re-opening,<sup>81</sup> cancellation of refugee status<sup>82</sup> and cessation of refugee status.<sup>83</sup>

During the reception phase<sup>84</sup> asylum seekers should receive necessary information permitting them to understand and exercise their right to apply for refugee status, including counseling. The office should also be able to identify asylum seekers with special protection or assistance needs and refer them to appropriate support or available assistance. As a general standard, every applicant and each accompanying adult family member or dependant should have an individual and confidential registration interview.<sup>85</sup> The applicants are then to be provided with a uniform temporary UNHCR Asylum Seeker Certificate attesting their asylum seeker status and requesting that the authorities of the host country provide them the necessary protection and assistance until UNHCR has made the final determination of the claim.<sup>86</sup>

The second phase<sup>87</sup> begins with the internal assigning of RSD files, based upon the capacity of eligibility officers as determined by their RSD supervisor. The eligibility officers do not necessarily need a degree in law. Access to RSD interview is one of the basic procedural rights of the applicants. At the interview the applicant may, upon his written consent, be accompanied by his or her legal representative.<sup>88</sup> As a general rule only the legal representative or designated representative of an applicant who is suffering from mental illness or disability is allowed to attend the interview, whereas participation of other third parties is limited to observation status, unless invited to participate by the eligibility officer. It should be noted that there is no explicit right for the applicant

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<sup>81</sup> UNHCR, Standards (note 16), at 9-1.

<sup>82</sup> *Id.* at 10-1.

<sup>83</sup> *Id.* at 11-1.

<sup>84</sup> *Id.* at 3-1.

<sup>85</sup> *Id.* at 3-11.

<sup>86</sup> *Id.* at Annex 3-3.

<sup>87</sup> *Id.* at 4-1.

<sup>88</sup> Critically on this issue in practice Kagan (note 14), at 45.

to be provided with an interpreter. The applicants are permitted to bring witnesses to support their claim but the evidence of witnesses should not be given in the presence of the applicant. The written decision is then prepared by the eligibility officer using the standardized RSD Assessment form. The Procedural Standards recommend that offices should establish mechanisms for reviewing the quality of first instance RSD decisions before they are issued; as a minimum, at least for all negative decisions.

Generally, RSD decisions should be issued within one month after the interview. The applicants are to be notified of the decision in writing, and wherever possible in person. However, the written form, including the reasons for rejection of the application, is only strongly recommended and not compulsory.<sup>89</sup> Also, no obligation exists for the applicant to be informed at least orally of the reasons for rejection. On the other hand, limited disclosure of relevant information is prescribed if the disclosure could jeopardize the security of UNHCR's staff, its ability to carry out its Mandate or disclosure could endanger the source of information.

The applicants who have received a negative RSD decision<sup>90</sup> then have the right to appeal.<sup>91</sup> They are provided with the standardized Appeal Application Form<sup>92</sup> that they are to complete and submit to the office that decided the first instance claim. Generally, the deadline should not be less than 30 days after the notification of the decision. Appeals should be determined by a qualified protection staff member who was not involved in the adjudication or review of the RSD claim in the first instance. During the appeal procedure the appeal officer is to re-examine whether the first instance RSD decision was based on a reasonable finding of facts and correct application of the refugee criteria by reviewing the RSD file and if necessary by conducting an additional appeal interview. The latter should be the case if findings were not adequately addressed in the decision, relevant evidence was not adequately considered, if new relevant evidence is raised in the appeal, or if indications of a breach of procedural fairness exist. Reasons for the determination of the appeal are then documented in the Appeal Assessment

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<sup>89</sup> *Id.* at 6-2.

<sup>90</sup> *Id.* at Annex 6-1.

<sup>91</sup> *Id.* at 7-1 *et seq.*

<sup>92</sup> *Id.* at Annex 7-1.

form. Applicants should then be notified of the decision in writing. Again, it is not necessary to provide reasons for the appeal decision.<sup>93</sup>

The actual practice<sup>94</sup> further adds to the ambiguity of the RSD activity notable already on the abstract level. Comparing the main principles of the Standards with the issues the 2006 RSDWatch.org report on UNHCR's field offices addressed the lack of a right to an interpreter or right to counsel as well as avoidance of accelerated rejection are among the most appalling.<sup>95</sup> Further, the testimonies of witnesses in the absence of the applicant and limitations regarding the disclosure of relevant information, read together with the lack of a general obligation to provide the applicant with reasons for decision, raise additional doubts as to the transparency and procedural fairness. But with regard to core elements of an effective system for determination of refugee status that UNHCR has been advocating vis-à-vis the states,<sup>96</sup> the Mandate RSD procedure most notably lacks the element of an independent appeal and judicial review by an independent or impartial tribunal according to ICCPR Art. 14 (1).

The latter point brings us to the key problem of the examined activity, namely the lack of proper legal remedies that would enable the applicant to invoke his rights and the prescribed and advocated standards and to achieve their obedience. The lack of such remedies obviously shows that the RSD procedure, as conducted by the UNHCR and foreseen in the Standards, does not meet the rule of law requirements for administrative procedures as they are common to liberal states. At the same time, the impact of issued decisions and the course of the procedure as such, give the impression that this is (should be) the case.

Given the above analysis, the question needs to be addressed whether the deficiencies of the procedure can partly be mitigated by the existing

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<sup>93</sup> UNHCR, Standards (note 16) 7-5.

<sup>94</sup> *Supra*, note 14.

<sup>95</sup> RSDWatch.org (note 14).

<sup>96</sup> See Erika Feller, *Judicial or Administrative Protection – Legal Systems Within the Asylum Procedures*, in *THE ASYLUM PROCESS AND THE RULE OF LAW* (International Association of Refugee Law Judges) 39 (2006). See also UN GA ExCom, *Determination of Refugee Status* GA Document No. 12 A (A/32/12/Add.1) (October 1977).

review and oversight mechanisms as additional elements providing for accountability.<sup>97</sup>

## VI. Review and Oversight

### 1. *Internal Review of Individual Cases*

Internally on the lowest level the Standards provide for some review mechanisms in procedures regarding individual cases. According to the document, its essential feature is the designation of the role of RSD Supervisor who is to be designated by the Head of Office among the staff to “oversee the RSD operation and to ensure the quality and integrity of the UNHCR RSD procedures”. He is to report to the Representative or the Head of Office who is in the end accountable for the implementation of standards.<sup>98</sup> The RSD Supervisor is responsible for the hiring and training of the registration staff and eligibility officers, for supervising execution of the staff duties, including random monitoring of the interviews and counseling sessions. He also has to review all complaints about the procedure and should assure that at least all negative RSD decisions are reviewed by a member of protection staff other than the eligibility officer who was responsible for adjudicating the claim.<sup>99</sup>

A special procedure is provided for in cases where the decision is either to exclude an individual from refugee protection, to cancel or revoke refugee status, according to cancellation procedures or to terminate refugee status, pursuant to the cessation procedures.<sup>100</sup> Decisions in these cases have to be submitted for review and approval to the legal advisor of the appropriate bureau of the UNHCR’s Headquarters. In most sensitive cases (*i.e.* exclusion of children, complex doctrinal issues on interpretative standards, and all decisions in the cancellation procedure) the Geneva Department of International Protection has to receive a copy of the submitted decision.<sup>101</sup> Field offices also have the possibil-

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<sup>97</sup> On accountability of international institutions, see Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, in this volume.

<sup>98</sup> UNHCR, Standards (note 16), at 1-7, 4-5.

<sup>99</sup> *Id.* at 4-16.

<sup>100</sup> *Id.* at 4-18.

<sup>101</sup> *Id.* at 4-18.

ity to submit certain types of cases to the Headquarters if they have exhausted all possible resources but have not been able to either decide on the case or to provide information on the facts.<sup>102</sup>

The possibility of the recourse to the UNHCR Headquarters' experts can be regarded as a valuable help for the field officers to enhance the quality of their decisions, however, in practice difficulties might arise in the facilitation of submissions of such cases to the Geneva experts because of lack of time and resources of field offices to prepare such enquiries. Furthermore the question also arises on the implications of such submission regarding the length of the procedure.

## 2. *The Geneva Headquarters' Overview and Control*

On the Headquarters level three bodies conduct overview and control of the UNHCR's activity in the field with regard to effectiveness, performance, accountability to refugees and their participation: Policy Development and Evaluation Service (PDES); Inspector General's Office (IGO) and UN Office of Internal Oversight Services (OIOS).<sup>103</sup>

PDES was established in 2006 and has replaced the former Evaluation and Policy Analysis Unit (EPAU) established in 1999 with the task to conduct systematic analysis and assessment of UNHCR projects, programmes, practices and policies. In 2002 EPAU published UNHCR's evaluation policy, listing the evaluation principles and standards: transparency, independence of the evaluation function, consultation with UNHCR's stakeholders, including refugees, relevance and integrity.<sup>104</sup> The new PDES was tasked with strengthening the capacity and effectiveness of UNHCR's policy development and evaluation function and is to review the existing evaluation policy.<sup>105</sup> Despite reference to inclusion of refugees, work in participatory manner and a commitment to

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<sup>102</sup> *Id.* at 4-18.

<sup>103</sup> For more comprehensive analysis of all three mechanisms, see Pallis (note 14), at 887.

<sup>104</sup> UNHCR EPAU, UNHCR Evaluation Policy 3, 4 (September 2002), available at: <http://www.unhcr.org/research/RESEARCH/3d99a0f74.pdf>.

<sup>105</sup> UNHCR, Global Appeal 2007, 308, available at: <http://www.unhcr.org/static/publ/ga2007/ga2007toc.htm>.

transparency,<sup>106</sup> the evaluation process as such cannot facilitate evaluative accountability to also suffice as participatory accountability.<sup>107</sup>

Since 1994 UNHCR also relies on IGO as an in-house monitoring and oversight mechanism which can also follow-up on individual complaints brought to it. Beside assessing the quality of UNHCR's management and conducting inquiries into violent attacks on staff and other incidents, it also addresses allegations of misconduct by the personnel. According to UNHCR, investigations into misconduct which directly affect its beneficiaries, including corrupt practices and other misconduct related to RSD, are the Office's priority.<sup>108</sup> Although IGO can be regarded as UNHCR's only participatory accountability mechanism, in practice the percentage of complaints by the refugees is astonishingly low,<sup>109</sup> particularly considering the 50% share of the investigations into misconduct among 100-150 investigations launched per year.<sup>110</sup> Most probably the reasons for this are practical difficulties in accessing the mechanism and the lack of information among refugees on its existence and on their rights.<sup>111</sup> ExCom's and Headquarters' documents also indicate that there has been ongoing discussion about the transparency of the inspections since reports are mostly confidential and accessible only to ExCom members through a password protected web page.<sup>112</sup> Also addressed was the independence of the Inspector General towards the

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<sup>106</sup> *Id.* at 307.

<sup>107</sup> Pallis (note 14), at 902.

<sup>108</sup> UNHCR, Global Appeal 2007 (note 105), at 307.

<sup>109</sup> In the yearly reports to the ExCom IGO in the last years has not even included the statistical information on refugee complaints. In its 2004 Report it only stated: "The majority of complaints were received from UNHCR staff members. However, many of them were based on complaints made by refugees and asylum seekers." UN GA ExCom, Report on UNHCR's inspection and investigation activities A/AC.96/993, note 28, (July 2004). Pallis refers in his article to 1% (2003) - 7% (2004) of all complaints. Pallis (note 14), at 897.

<sup>110</sup> See UN GA, ExCom, Report on UNHCR's inspection and investigation activities, A/AC.96/993 (July 2004), UN GA, ExCom, Report on activities of the Inspector General's Office, A/AC.96/1028 (July 2006), UN GA, ExCom, Report on activities of the Inspector General's Office, A/AC.96/1042 (July 2007).

<sup>111</sup> Pallis (note 14), at 897.

<sup>112</sup> Executive Office, Enhancing Independence of the Office of the Inspector General, Note for Informal Consultative Meeting, note 6, (21 July 2005), available at: <http://www.unhcr.org/excom/EXCOM/42de51282.pdf>.

High Commissioner.<sup>113</sup> However, it needs to be stressed that even by addressing these considerations IGO can only investigate on misconduct and the most egregious violations by UNHCR's staff but cannot provide for any proper legal review of RSD decisions if these have not reached the misconduct level.

A central UN-wide mechanism that can also function as UNHCR's oversight is the OIOS, established by UN GA Resolution in 1994 as an operationally independent office entrusted with the responsibilities of monitoring, internal auditing, inspection and evaluation and conducting investigations which should ensure that UN organs are operating according to their mandate.<sup>114</sup> As its reports to the UN GA have shown, monitoring of the proper conduct in the field represents only a small part of its activities and its focus is more on systemic problems.<sup>115</sup> Also access to the OIOS as a standing investigatory body is limited and no individual complaints mechanism is foreseen. Given the nature of the mechanism and restraints regarding the capacity, the potential of OIOS is in identifying grave systemic problems but it cannot function as a tool for participative accountability.

The existing mechanisms hence do not provide satisfactory review of individual cases relating to the conduct of RSD. Several suggestions and comments have been made in the literature on how to overcome this deficiency. Among them are the "establishment of an independent and impartial body to decide on the appeals, outside the branch office structure" and publication of those appeals,<sup>116</sup> creation of an RSD ombudsman office, and, to increase transparency, publication of reports assessing RSD procedures.<sup>117</sup> Regardless of which of the recommendations would seem most appropriate, there is an urgent need to improve legal review, overview, transparency and accountability of the Mandate RSD.

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<sup>113</sup> *Id.* at note 3; UNHCR ExCom, Oversight: Report of the Joint Inspection Unit with Annexes, EC/54/SC/CRP.21, (23 August 2004), available at: <http://www.unhcr.org/excom/EXCOM/41348eff4.pdf>.

<sup>114</sup> UN GA Res. 48/218 B of 12 August 1994.

<sup>115</sup> Yearly reports available at: [http://www.un.org/Depts/oios/annual\\_reports.htm](http://www.un.org/Depts/oios/annual_reports.htm).

<sup>116</sup> Alexander (note 14), at 287.

<sup>117</sup> Kagan (note 13), at 27. For comments, see B.S. Chimni, *Global Administrative Law: Winners and Losers* 23 (2005), available at: <http://www.iilj.org/GAL/documents/ChimniPaper.pdf>. Pallis on the other hand also appraises the potential of IGO for individual complaints by placing its permanent representative in every office; Pallis (note 14), at 915.

## C. Conclusion

### I. Indispensability of UNHCR's Activity

The above remarks lead to the conclusion that Mandate RSD is a controversial activity. However, at the same time it must be acknowledged that it is basically a response by UNHCR to situations where UN Members are not willing or capable to afford protection to refugees. Its intervention therefore plays an important role in ensuring that the life and safety of many individuals are not endangered even more dramatically. As long as there are not more countries which would take on their share of international responsibility, UNHCR cannot cease to conduct RSD. On the other hand, the mere necessity of the work of UNHCR does not immunize the Office against criticism concerning the procedural shortcomings and lack of judicial review.

First and foremost, due process standards should be followed in a more thorough manner and a better legal review mechanism including more independent decision-makers should be developed. Ideally, this would mean an independent judicial-like review body. At least some improvement could already be achieved if the submission of cases to the Headquarters' experts was more formalized and was regarded as a legal remedy of the applicant and not just as a means of exercising oversight over the field officers. Secondly, review and oversight mechanisms over the conduct of the RSD in general should be improved and participation of individuals in these mechanisms should be further advocated and advanced. An ombudsman-like body which would be easily accessible to all applicants could do most in this respect. Last but not least, UNHCR should consider other means to achieve enforceability of refugee certificates vis-à-vis national administrations. An additional Protocol to the CSR51 obliging Member States to acknowledge such decisions without further substantive control admittedly sounds utopian, but there might be some room for advocating similar clauses in cooperation agreements with particular countries, especially those where currently Mandate RSD decisions are informally recognized or respected.

Altogether, the answer to the question posed at the beginning of this study, namely on the actual capacity of international institutions to decide on individual cases, seems to be ambiguous. It seems that international institutions are not able to provide for procedures like those of national administrations. At the same time in situations of humanitarian crises or human rights violations for which the international community of states has obliged itself to intervene or help but has been with-

drawing itself from this obligation, not much choice has been left for these international institutions to intervene.

## II. UNHCR – Handmaiden of the States

To conclude the appraisal above without asking oneself how come the lack of proper judicial review and the absence of binding force of Mandate Refugee Certificates towards national administrations have not (already) been at least partly mitigated would be very much naïve, in particular since recourse to UNHCR's RSD procedures is increasing. Overloaded field offices certainly further contribute to the deficiencies of the procedure. But, what is more important is that states are adding to this overload by disburdening themselves and are at the same time tolerating the discrepancies.

And why is this so? One answer might be that since the decisions are generally not binding they do not regard them as that relevant or that any procedural unfairness would pose a problem. However, if the positive decisions would have been taken in a more formalized procedure identical to their own they could not so easily reserve the right to further review them but would rather be expected to recognize and respect them. But at the same time, the negative decisions in particular have the practical effect of barring the applicants' access to national asylum or resettlement procedures, meaning UNHCR is in a way the agent of the states, conducting unpleasant factual pre-selection of the applicants and thereby reducing the numbers they would otherwise have to deal with. Noting the growing migration trends and inability of the international community to prevent further humanitarian crises, the motives of the states behind such attitudes are clear. It is in their interest that international institutions are doing (their) "unpleasant work" affecting rights and duties of individuals in some sort of gray area. International organizations are then characterized as not being able to provide for proper legal remedies; but in any event no appropriate solution to remedy the deficiencies could have been found so far. Despite the states being the actual stakeholders of international institutions, making use of such arguments provides them with an alibi for not being held responsible for the discrepancies of international institutions triggered by their own failure and unwillingness to fulfill international obligations.

Perhaps, in the light of such growing recourse of states to the activities of international institutions, “piercing the institutional veil”<sup>118</sup> should be the key metaphor for conducting future research on the legal framework for global governance activities. Although developed in a different constellation, reasoning of the European Court of Human Rights regarding Member States of the European Community<sup>119</sup> could pave an argument to establish responsibility of states for acts of international organizations if these had to act because of the failure of states to act, provided there was an interest of the states behind those acts, even if they did not directly approve them, or if they had not used their powers within the organizations to properly influence their activity.<sup>120</sup>

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<sup>118</sup> Metaphor used in CATHERINE BRÖLMANN, *THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANIZATIONS AND THE LAW OF TREATIES* (2005).

<sup>119</sup> Eur. Court H.R., *Matthews v. the United Kingdom*, Judgment of 18 February 1999, App. no. 24833/94, para 34.

<sup>120</sup> For a similar approach, see Jean d’Aspremont, *Abuse of the Legal Personality of International Organisations and the Responsibility of Member States*, 4 (1) INTERNATIONAL ORGANIZATIONS LAW REVIEW 91-119 (2007).