

# **REFUGEE STATUS DETERMINATION IN KENYA AND EGYPT**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF  
PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE  
OF MASTERS OF LAW (LLM HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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## DECLARATION

I, **George Mukundi Wachira**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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## **DEDICATION**

This dissertation is dedicated to my parents Mr. and Mrs. Wachira. You inspire me to succeed in life and my pursuit for a human rights career has been through your encouragement. For moulding and selflessly supporting me I dedicate this work to you.

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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (African Charter)
ARA	Aliens Restriction Act
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
ECOSOC	Economic and Social Council
EXCOM	Executive Committee
FMRS	Forced Migration and Refugees Studies
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IJRL	International Journal of Refugee Law
OAU	Organisation of African Unity
RCK	Refugee Consortium of Kenya
RSD	Refugee Status Determination
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)
UNHCR	United Nations High Commissioner for Refugees

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## CHAPTER 1: INTRODUCTION

### 1.1 Background to the study

The 1951 Convention<sup>1</sup> and the 1967 Protocol<sup>2</sup> Relating to the Status of Refugees govern refugee<sup>3</sup> status, on the universal level. These two international legal instruments were adopted within the framework of the United Nations. Regionally the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>4</sup> incorporates the provisions of the 1951 Convention and applies to the African continent although, its drafters had much more ambitious objectives for this Convention since it describes perfectly the situations which give rise to refugee movements all over the world.<sup>5</sup>

According to the general definition in the 1951 Convention a refugee is a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unwilling to return to it.<sup>6</sup>

The 1969 Convention contains a definition of the term 'refugee' consisting of two parts: the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term 'refugee' to:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of or the whole of his country of origin or nationality, he is compelled to leave

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<sup>1</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 *U.S.T.* 6223, 189 *U.N.T.S.* 137 (Hereinafter the 1951 Convention.)

<sup>2</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 *U.S.T.* 6223, 606 *U.N.T.S.* 267. (Hereinafter the 1967 Protocol.)

<sup>3</sup> For the purposes of this paper, the term 'refugee(s)' is used to encompass recognised refugees, asylum seekers awaiting recognition of the status as refugees, asylum seekers appealing against the rejection of their asylum application, as well as those whose applications have been rejected by UNHCR. Although the distinction between asylum seeker and recognised refugee is an important one, the use of the word 'refugee' is used here in view of the right to 'presumption of innocence', as well as in the interests of an accessible text avoiding repetitive usage of the term 'refugee(s)/asylum-seeker(s)'.

<sup>4</sup> The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969 (*OAU Doc CAB/LEG/24.3*), adopted on 10 September 1969 and entered into force on 20 June 1974 (Hereinafter the 1969 Convention).

<sup>5</sup> Weis Paul, The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa, *Human Rights Journal* 111-3-70.

<sup>6</sup> 1951 Convention as note 1 above, art 1A (2).

his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The Preamble to the 1969 OAU Convention encourages a pan-African solution to dealing with the refugee problems of the continent. The Preamble also explicitly 'recognizes the need for an essentially humanitarian approach towards solving the problems of refugees'.

The existence of these conventions has not translated to protection of asylum seekers. The rule of law has not been strictly adhered in determining their status.<sup>7</sup> The protection of refugees' rights is done to provide remedies in situations where persons have been obliged to leave their home country to seek asylum in another country. Asylum seekers might leave their countries because of a variety of factors. These may include a disregard of human rights, including the right to life, liberty and security of the person. Refugee rights are premised on the precept that as free individuals all men and women have the right to belong to a society in which they are protected by the State.<sup>8</sup> The lack or denial of this protection is at the core of being a refugee.

Refugee status determination (RSD) is central to the protection of their rights. Until an asylum seeker has been granted refugee status they are prone to suffer either at the hands of security forces of the country of refuge, face imminent deportation and are not assisted by UNHCR materially unless they are obviously vulnerable and will be persons of concern to the UNHCR.<sup>9</sup> This leaves the asylum seeker under uncertainty since they are without legal status unless they are able to acquire residence status.

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<sup>7</sup> ICJ (Kenya Section), *Protecting Refugee Rights in Kenya* (1998) 11.

<sup>8</sup> Note on International Protection (Submitted by the High Commissioner)(A/AC 96/680), sourced at <<http://www.unhcr.ch/executivecommittee>> accessed on 3 May 2003.

<sup>9</sup> In Egypt, RSD determines which asylum seekers will receive protection and assistance from UNHCR as legal refugees. Without protection by UNHCR, Egyptian authorities may arrest and deport foreigners who lack residence permits. For asylum seekers, refugee status can determine access to health care, some monetary assistance, and education for their children. With local integration out of the question in Kenya and Egypt UNHCR's status determination is the first step in determining whether he or she will be able to immigrate to a small group of Western countries which operate resettlement programs. (Quoted in Kagan Mike, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002 Forced Migration and Refugees Studies (FMRS) Working Paper*, The American University in Cairo, December 2002 in Cairo 2003).

Majority of refugees in Kenya are determined on the so-called *prima facie* regime<sup>10</sup>. There is still a substantial number of refugees recognised under the individual status determination process usually non-Somalis and Sudanese. The *prima facie* regime is broadly defined as determination of eligibility based on first impressions, or in the absence of evidence to the contrary.<sup>11</sup>The refugees are not granted Convention status, but, since 1991 have been granted temporary asylum.<sup>12</sup>

In Egypt the United Nations High Commissioner for Refugees (UNHCR) carries out individual status determination. This is through formal interviews. The UNHCR assumed the responsibility of RSD given the gap that was not being filled by the government and entered into an agreement with the government to handle on its behalf status determination, repatriation, resettlement, and assist refugees within its jurisdiction.<sup>13</sup>However both governments apathetic and passive approach to refugees in their jurisdictions has resulted in arbitrary non-acknowledgement of the UNHCR documentation by security forces. The long delays in RSD procedures have had great adverse impacts on asylum seekers such as indefinite detentions.<sup>14</sup>

Kenya and Egypt have ratified Regional and International Refugee Conventions in addition to a number of human rights instruments.<sup>15</sup>However they remain without a legislative framework to manage their respective refugee situation.<sup>16</sup>Policies have been ad hoc; refugee protection has been unpredictable and dependent almost

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<sup>10</sup> Hyndman & Nylund, UNHCR and the Status of Prima Facie Refugees in Kenya, *IJRL* vol. 10 no 1/2 (1998) 2; UNHCR 2002 population statistics (provisional).

<sup>11</sup> Hyndman as above.

<sup>12</sup> Hyndman as above; See also General Conclusion on International Protection No 74(XLV) 1994, para (t).

<sup>13</sup> Art 2 of the 1954 Agreement between the Egyptian Government and the UNHCR.

<sup>14</sup> RSD interview waiting period in Cairo UNHCR could take a minimum of three months. Results take a similar period and in the event one is rejected he appeal could take a similar duration. This leaves asylum seekers vulnerable since they lack the means to fend for themselves and have no access to UNHCR assistance as they await the RSD process (experience of the author as an intern at UNHCR Cairo-Refugee Status Determination department from July to November 2003).

<sup>15</sup> Egypt ratified the 1951 Convention on 22 May 1981 and the 1969 Convention on 12 June 1980, while Kenya ratified the 1969 Convention on 23 June 1992. They have also ratified human rights instruments such as the ICCPR and African Charter on Human and Peoples' Rights.

<sup>16</sup> Kenya Draft Refugee Bill has been pending for the last 10 years. There have been several reviews and drafts of the Bill the most recent of which was done in 2003.

entirely on the good will of government officials.<sup>17</sup>Police officers have taken advantage of the situation to perpetuate harassment, extortion, and arbitrary arrests sexual violence against refugees.<sup>18</sup>Asylum seekers have born the brunt of this misadministration. The emergency laws prevailing in Egypt and the dictatorial regime that characterized the Moi era in Kenya magnified refugee problems. This was mainly in the form of arbitrary detentions and deportation in the so labeled 'interest of state security'.<sup>19</sup>

This paper compares the existing refugee status determination regimes in Kenya and Egypt. This is discussed in light of the basic principles of a sound refugee regime, which accord with the relevant international instruments, institutions and procedures for refugee status determination, the principle of *non-refoulement*,<sup>20</sup>and standards of treatment applicable to a particular country.

## 1.2 Problem statement

The governments of Kenya and Egypt have abdicated their responsibility for the refugee situation to the UNHCR.<sup>21</sup>The UN agency has played a pseudo-ministerial role, which has undermined its capacity to execute its mandate of protection.<sup>22</sup>This has been made worse by the general increase in the numbers of asylum seekers in Kenya and Egypt. Resources available are not enough to handle RSD efficiently and

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<sup>17</sup> In Kenya the new vice president and minister of Home Affairs Moody Awori has shown commitment to refugees' issues and is pushing the enactment of the Refugee Bill in RCK *Dawning of a New Refugee Era, NGO Consultative Forum* Fairview Hotel, Nairobi 4, February 2003, Workshop Report 4.

<sup>18</sup> Parker A, African Refugees Targeted in Cairo, *Human Rights Watch, Press Release*, New York, February 10, 2003 sourced at <<http://www.hrw.org/press/2003/02/egypt0206.htm>> accessed on 30 august 2003.

<sup>19</sup> *Human Rights Watch*, Report Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala (Nov 2002).

<sup>20</sup> *Non-refoulement* means that nobody shall be subjected to measures which would compel him to return to, or to remain in a territory where his life, physical integrity, or liberty would be threatened for the reasons for which he became a refugee, as set out in the definition in Guy S Goodwin-Gill, *The Refugee in International Law* (1996) 117.

<sup>21</sup> Ralph Wilde, Why and How UNHCR Governance of 'Development' Refugee Camps Should be Subject to International Human Rights Law, *Yale Human Rights & Development Law Journal*, vol. 1, 1998(Problems arise where states decline to determine refugee status or where different determinations are reached by states and by UNHCR); Kagan as note 9 above; Grahl-Madsen, *Status of Refugees*, vol. 1(1966); T A and Martin D A, *Immigration: Process and Policy* (2<sup>nd</sup> ed., 1991), 789-853; Hathaway J *The Law of Refugee Status*, 1991.

<sup>22</sup> RCK as note 17 above.

effectively.<sup>23</sup>The influx has been prompted by the general insecurity and instability in the region, especially in the Great Lakes region, Somalia, Sudan and the Middle East. Increasing restrictive asylum policies in the two countries and the lack of commitment by the respective governments to address the problem has also compounded the problem.

The process of seeking asylum in Cairo for example is fraught with delay and procedural deficiencies.<sup>24</sup>In Kenya, UNHCR support and passive acceptance of the governments forced encampment policy undermines refugee protection evidenced by increased insecurity at the camps.<sup>25</sup>The lack of specific refugee protection laws in the two countries has meant that they have treated matters relating to refugees as an integral part of immigration policy and law. They have thus tended to concern themselves mainly with entry and residence by refugees while remaining silent on other aspects of refugee protection.<sup>26</sup>Granting of refugee status is so crucial for an asylum seeker since with it comes the security of being a legal resident as opposed to being treated as an illegal alien and its attendant problems.

There are no proper means of determining as to who qualifies as a refugee, by what standards refugees are to be treated and how their plight is to be legally resolved. It is generally accepted that under conditions of temporary refuge the human rights of refugees may be compromised.<sup>27</sup>Secondly, the reliance on ordinary immigration laws in dealing with the refugee problem is problematic in the two countries because as Faris points out:

The problem of the refugee is totally unrelated to immigration law and to the law relating to ordinary aliens. [To] classify the refugee as an ordinary alien evades the problem. Immigration law is intended to cope with the admission of individual and not a mass influx [of people].<sup>28</sup>

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<sup>23</sup> In a situation where budgetary constraints brought on by inadequate donor support increasingly overshadow the very real humanitarian needs of refugees, UNHCR staff in Cairo say the declining budget is creating a precarious situation for the rising number of refugees coming under the agency's care. Quoted in UNHCR News Stories Feature: Hard times for Cairo's refugees sourced at <<http://www.unhcr.ch/cgi>> accessed on 30 September 2003.

<sup>24</sup> Parker as note 18 above.

<sup>25</sup> RCK as note 17 above; HRW Report as note 19 above.

<sup>26</sup> Rutinwa B, Refugee Laws and Policies in Southern Africa: A Historical Perspective, Paper Commissioned by SAMP for the Seminar on Regional Integration, Migration and Poverty, held in Pretoria, South Africa on 25<sup>th</sup> April 2002.

<sup>27</sup> In the temporary protection regime it is sometimes argued that in the initial stages only, of temporary protection, can the human rights be limited. UNHCR, Note on International Protection 1993: UN doc. A/AC. 96/815. para 46.

<sup>28</sup> Faris J A, The Angolan Refugees and South Africa, 2 *South African Yearbook of International Law* 176 (1976) 185.

One of the consequences of applying ordinary immigration laws to refugees is the tendency to label all potential refugees as illegal immigrants with the attendant consequences such as deportations.<sup>29</sup> For example hundreds of foreigners, including refugees and asylum seekers, were beaten and jailed during two nights of racially motivated arrests in Cairo. There are widespread reports of mass arrests, harassment and torture of people seeking refugee status in Egypt. The threat of arbitrary detention, ill treatment, and racially based harassment continues to hang over many asylum-seekers and refugees in Egypt.<sup>30</sup> Most refugees and asylum seekers in Egypt live in urban areas and do not live in restricted areas. They thus do not have the support of non governmental organisations that cater for refugees, for example, give them food and some basic shelter at least until their status is determined. However the acceptance of migrants from neighbouring countries in Kenya is qualified by its policy of isolating refugees in remote desert camps where their mobility and access to employment are restricted. Kenya has an estimated refugee population of about 230,000 refugees in Kakuma and Dadaab refugee camps.<sup>31</sup> These camps are congested and lack basic facilities to cater for the swelling refugee population.

This research paper investigates the process of status determination in Kenya and Egypt, the challenges and how it affects the refugees' rights. It investigates the compliance with regional and international standards.

### **1.3 Aims and objectives of the study**

This study investigates the refugee status determination regimes in Kenya and Egypt. The general objectives of the study are:

- a) To examine compliance with internationally recognised standards in the RSD process in Kenya and Egypt.
- b) To identify the rudiments of framework for policy and legal interventions in light of the changing dynamics in refugees conditions in the two countries.
- c) To examine the role of the UNHCR in status determination in both countries especially on how the process affects its protection mandate.

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<sup>29</sup> Maluwa T, *International Law in Post-Colonial Africa, Kluwer Law International*, 1999, 200.

<sup>30</sup> Parker as note 18 above.

<sup>31</sup> UNHCR 2002 provisional statistics sourced at <<http://www.unhcr.ch>> accessed on 2 May 2002.

- d) To make recommendations that would be useful not only for the two countries but for other countries in similar situations geared towards understanding why RSD has been conducted the way it has and what can be done.

#### **1.4 Significance of the study**

The plight of refugees is becoming more prevalent in Africa with the intensification of conflicts in most countries in Africa especially the Great Lakes region. This means that there are more people fleeing from the conflicts. How refugees are identified and accorded status is very crucial to the protection of their rights. There have been serious complaints and cries from refugees and human rights organizations on the treatment of refugees by the state in Kenya and the UNHCR in Egypt.

This study seeks to discuss the refugee status determination practice in Kenya and Egypt and how it affects the rights of refugees within their jurisdiction. This will give an insight in the protection of refugees' rights in both countries. There is need to research on the possibility of an effective regime on status determination. Asylum seekers are vulnerable and have continued to suffer for lack of a proper framework to seek protection. The lack of specific refugees policies and laws have also put the refugees at the risk of being mistreated and their rights infringed upon with impunity by security agents and agents who should otherwise protect them.

Protection of refugees' rights involves first of all legal protection, i.e. seeking to ensure that refugees are treated in accordance with internationally accepted standards including protection against *refoulement*, freedom from discrimination and the enjoyment of economic and social rights. Secondly, it entails action to promote the development of standards for the treatment of refugees through the adoption of appropriate legal provisions in national legislation and efficient and effective practices by the states.<sup>32</sup>

#### **1.5 Hypotheses**

This paper deals with the following contentious questions:

- a) Is there a universal standard for RSD process?

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<sup>32</sup> Report of the United Nations High Commissioner for Refugees to the Economic and Social Council (Document E/1986/55), sourced at <<http://www.unhcr.ch/documents>> accessed on 2 may 2003.

- b) Are the current practices on RSD in Kenya and Egypt effective and efficient and do they meet international human rights standards?
- c) Should governments delegate in *toto* their international obligations on refugees to UNHCR?

## 1.6 Limitations of the study

The study is undertaken in Egypt and therefore most of the information on Kenya is from literature reviews. There is a lot of reliance on information and first hand experience gained while doing an internship with UNHCR-Cairo during the entire period of writing this paper. This is seen mainly from lack of first hand information on the RSD process in UNHCR Nairobi and reliance was put on exchange of emails and studies undertaken by other experts in Kenya.

The scope of the paper was limited in terms of volume. This means that the paper only highlights the main areas of refugee status determination and does not elaborate in details the other aspects of asylum seekers rights.

## 1.7 Literature review

There are several studies on protection of refugees in both countries generally. In Egypt for example Kagan has done an assessment of Refugees Status Determination procedure at UNHCR's Cairo office.<sup>33</sup> He investigates the procedural deficiencies of the RSD process in Cairo. This paper compares the RSD regime in Egypt as carried out by UNHCR and the government's obligations. It makes a comparison with the prima-facie regime in Kenya and on the basis of the current trends in the refugee situation in the counties of origin and the host countries evaluates the compliance with international standards. In Kenya the International Commission of Jurists did a study titled 'Protecting Refugee Rights in Kenya'.<sup>34</sup> The study explored the broad spectrum of the refugee situation in Kenya. This study is specifically on the RSD regime in Kenya by the UNHCR and goes ahead to compare and draw lessons with the process in Egypt.

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<sup>33</sup> Kagan as note 9 above.  
<sup>34</sup> ICJ as note 7 above.

There are also a number of journals from various institutions on the issue of refugee status determination.<sup>35</sup> These articles explore the process of RSD in the developed world. This study will seek to draw possible lessons and areas where the RSD regimes in Kenya and Egypt can be relevant to the unique circumstances of the African refugee problems. A number of articles are also available on the Internet and newspapers with respect to these two countries although they are based more on facts than legal analysis.

This paper concentrates on the deficiencies in status determination in Kenya and Egypt. It discusses what's being done and the underlying reasons they are done that way and then explore what else could be done. This study is an analysis of the extent to which Kenya and Egypt have complied with international legal standards on status determination and by extension the protection of refugees' rights.

## **1.8 Overview of the chapters**

Chapter one will set out the content of the research, identify the problem and outline the methodology. Chapter two will discuss the international and regional refugees' standards on status determination. The chapter will also discuss the role of the UNHCR and obligations of host governments in granting refugee status.

Chapter three will discuss the case studies. It will compare the refugee status determination regimes in Kenya and Egypt. This chapter will discuss what UNHCR and the government are doing on RSD. It will explore the underlying reasons they are done that way. Chapter four will analyse the extent to which Kenya and Egypt have complied with international and regional refugees' standards on RSD and the way forward. Chapter five will draw a conclusion and recommendations.

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<sup>35</sup> See for example, Alexander Michael, Refugee Status Determination Conducted by UNHCR, *IJRL*, vol.11 (1999), Cooper B, Procedures For Expedited Removal And Asylum Screening Under The Illegal Immigration Reform And Immigrant Responsibility Act Of 1996, 29 *Conn L Rev* 1501; Hathaway \$ Neve, Making International Refugee Law Relevant Again: A Proposal For Collectivized And Solution-Oriented Protection, 10 *Harv Hum Rts J* 115; Mason E, UNHCR, Human Rights and Refugees Collection and Dissemination of Sources, 25 *Int'L J Legal Info* 35.

## CHAPTER 2: INTERNATIONAL AND REGIONAL REGIME GOVERNING REFUGEE STATUS DETERMINATION

### 2.1 International standards on refugee status determination

Refugee status determination is one of the fundamental components of refugee protection. This is because until asylum seekers have been determined refugees, they are classified as illegal aliens and do not get protection from UNHCR or the government.<sup>36</sup> Although no provision explicitly grants a right to obtain asylum, an explicit obligation prevents states from forcibly returning persons where their lives or freedom would be in danger for reasons related to the refugee definition contained in the 1951 Convention.<sup>37</sup> Hence, a right of *non-refoulement* for the persons concerned is provided.<sup>38</sup> In principle a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive.<sup>39</sup> Problems arise however, where states decline to determine refugee status, or where different determinations are reached by states and by UNHCR.<sup>40</sup> Some countries for example have gone to the extent of refusing to acknowledge refugee status documentation granted by the UNHCR on the basis of compromising state sovereignty of the host state.<sup>41</sup>

The 1951 Convention does not provide for the procedure for determining refugee status- a matter that is therefore left to the sovereignty of the state parties.<sup>42</sup> Protection of those persons who cannot turn to their own government for protection has become either a legal or moral obligation. This could be based on religious grounds or a political effort to fit within the community of states.<sup>43</sup> It is an obligation

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<sup>36</sup> Alexander as above.

<sup>37</sup> 1951 Convention as note 1 above, art 33.

<sup>38</sup> Bertrand P, An Operational Approach to International Refugee *Protection 26 Cornell Int. L. J* 495.

<sup>39</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, September 1979. Reedited 1992 para 28.

<sup>40</sup> Madsen as note 21 above, 340; Weis as note 5 above 1.

<sup>41</sup> Alexander as note 35 above 252.

<sup>42</sup> Goodwin-Gill as note 20 above 34.

<sup>43</sup> The Declaration on the Protection of Refugees and Displaced Persons in the Arab World guards against *refoulement* in art 2 and requires at article 5 that in situations which may not be covered by the 1951 Convention, the 1967 Protocol, or any other relevant instrument in force or United Nations general assembly resolutions, refugees, asylum seekers and displaced person shall nevertheless be protected by (a) the humanitarian principles of asylum in Islamic law and Arab values, (b) the basic human rights rules, established by international and regional organizations, (c) other relevant principles of international law. Although the declaration is not binding it is a persuasive document and having been drafted under the auspices of the Egyptian government as the seat of the Arab league its provisions are likely to be applied.

the international community has undertaken through the UNHCR, which is charged with supervision of the implementation of the 1951 Convention.<sup>44</sup> However it is apparent that state parties are viewing their obligations as increasingly burdensome. Due to lack of resources and recently the threat of terrorism, receiving countries are becoming more rigid in accepting and hosting refugees. In Kenya for example the government has blamed the Somali refugee population of smuggling small arms and terrorists into Kenya causing insecurity. There is a move to stop recognizing Somali refugees on a *prima-facie* basis mainly on this ground.<sup>45</sup> Growing manifestation of xenophobia and the increase in numbers of asylum seekers in Egypt for example has affected its policies towards refugees, which no longer coincide with its humanitarian and Convention obligations.<sup>46</sup>

The increasing numbers of people seeking protection encourage national authorities to test what they perceive as gaps and/or loopholes in international refugee law. This comes in the form of labeling asylum seekers as illegal aliens and hence deporting them. Another strain in refugee protection comes from the fact that the expanded definitions of refugee in regional instruments are yet to be accepted universally.<sup>47</sup>

This chapter seeks to establish that the basis for an international legal concept of the refugee and thus status determination are to be found in conventions, state and United Nations practice and in the Statute of the UNHCR.<sup>48</sup> This will give the basis upon which states have an obligation to conduct RSD and protect refugees.

### **2.1.1 The 1951 Convention relating to the status of refugees**

The preparation of the 1951 Refugee Convention was undertaken shortly after the end of World War II, when the horrors, which had taken place, were still fresh in people's memories.<sup>49</sup> There was a strong and genuine desire to 'create a better

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<sup>44</sup> 1951 Convention as note 1 above art 35; art 11 of the 1967 Protocol.

<sup>45</sup> Interview with Mr Otunga a senior official in the Ministry of Home Affairs in Kenya on 15 July 2003.

<sup>46</sup> UNHCR-Cairo Statistical Report (June 2002).

<sup>47</sup> The 1969 Convention expanded definition is yet to receive acceptance among countries that offer resettlement opportunities to recognised refugees. UNHCR Cairo office for example is challenged with a growing number of recognised refugees under the 1969 Convention but who at the moment are stuck in Egypt without any foreseeable durable solution. In Egypt local integration into the community is not an option as a matter of government policy and resettlement although not designed to be the only solution is the only hope for refugees.

<sup>48</sup> Rystad G (ed) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990) 15, 22-9.

<sup>49</sup> Jackson I, *The Refugee Concept in Group Situations* (1999) 81.

world' in which in particular, human rights would be developed and respected. The Universal Declaration of Human Rights article 14 paragraph 1 provides that everyone has the right to seek and enjoy in other countries asylum from persecution and its on this basis that the 1951 Convention was coined.<sup>50</sup>

The 1951 Convention is the most authoritative, comprehensive and universal legal instrument relating to refugees.<sup>51</sup>It deals extensively with the issue of protecting refugees and lays down standards of protection, treatment and rights of refugees. The Convention defines the term 'refugee' thereby ascertaining who qualifies for refugee status and, consequently protection and assistance. The Convention also makes provisions on the rights and obligations of refugees relating to movement, religion, education, housing, employment, identity papers and travel documents, personal security and other rights. It does not guarantee a right of asylum or right of entry, but obliges state parties not to impose penalties for illegal entry on a refugee provided they report to the authorities without delay and show good cause for the actions.<sup>52</sup>It specifically provides for the principle of *non-refoulement*, that is:

No contracting state shall expel or return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, and membership of a social group or political opinion<sup>53</sup>

The definition in the Convention focuses on the individual's subjective fear of being subjected to persecution on account of certain objective circumstances.<sup>54</sup> Persecution under the Refugee Convention results where certain measures affect or are directed against groups or individuals for any of the Convention grounds. Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under the prevailing international standards.<sup>55</sup>

International jurisprudence has developed to acknowledge that group persecution may fit within the 1951 refugee definition.<sup>56</sup>The fact of having fled from civil war for example without being an identifiable target is not incompatible with a well-founded

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<sup>50</sup> Jackson as above.

<sup>51</sup> Jackson as above 81.

<sup>52</sup> The 1951 Convention as note 1 above, art 31.

<sup>53</sup> As above art 33.

<sup>54</sup> Jackson as note 49 above 85.

<sup>55</sup> Goodwin-Gill as note 20 above 2.

<sup>56</sup> Goodwin-Gill as note 20 above 76; Jackson as note 49 above 85.

fear of persecution in the sense of the 1951 Convention.<sup>57</sup>This is the main reason for flight for most refugees in Africa and in this case hosted by Kenya and Egypt are predominantly a result of such conflicts.<sup>58</sup>

The Canadian Federal Court of Appeal stated that a situation of civil war ...is not an obstacle to a claim provided that the fear is not that felt indiscriminately by all citizens as a consequence...but, that felt by the applicant himself, by a group with which he is associated, or, even by all citizens on account of a risk of persecution based on one of the reasons stated...<sup>59</sup>It nevertheless remains for the applicant to show that he or she is unable to obtain the protection of the state, and to establish the requisite Convention link.<sup>60</sup>Provided refugee applicants in Kenya and Egypt show a 1951 Convention link, which for Somalis is race by, virtual of belonging to a minority clan hence persecuted they should be recognised. In Sudan it is usually imputed political opinion being that most southern Sudanese are persecuted for supporting rebel movements or are perceived to support them or oppose the minority controlled government.

Where large groups are seriously affected by an outbreak of uncontrolled communal violence it would appear unreasonable to limit the concept of persecution to measures immediately identifiable as direct and individual.<sup>61</sup>In *R V Secretary of State for Home affairs, ex P Jeyakumaran*<sup>62</sup>Taylor J. referred to the singling out requirement as a startling proposition:

It can be of little comfort to a Tamil family to know that they are being persecuted simply as Tamils rather than individuals. How can this dismal distinction bear upon whether the applicant has a well-founded fear of persecution?

The Court held that the evidence clearly shows the reason for oppression to have been simply membership of the Tamil minority. The 1990 US Asylum Regulations explicitly dispense with the 'singling out' requirement, if the applicant can show a

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<sup>57</sup> UNHCR Handbook as note 38 above paras 164-6, Hathaway as note 21 above 185-8:Kalin W, Refugees and Civil Wars: Only a matter of interpretation?' *IJRL* 435 (1991).

<sup>58</sup> The two largest nationalities of asylum-seekers in Kenya and Egypt are Sudanese and Somalis who have fled civil disorder in their countries of origin sourced from <<http://www.unhcr.ch/statistics>> accessed on 20 October 2003.

<sup>59</sup> *Salibian V Minister for Employment and Immigration* [1990] 3 FC 250, 258.

<sup>60</sup> See *Isa V Canada* (secretary of state)[1995] FCJ No. 254 (FC-TD); *Rizkallah V Minister of Employment and Immigration* [1992] FCJ No. 412 (FCA); *Zalzali V Canada (Minister of Employment and Immigration* [1991] 3 FC 605 (FCA); *Canada (Attorney General) V Ward* [1993] 2 SCR 689.

<sup>61</sup> Madsen as note 21 above 213.

<sup>62</sup> *R V Secretary of State for Home affairs, ex P Jeyakumaran* No. CO/290/84,QBD, 28 June 1985.

pattern or practice...of persecution similarly situated to the applicant,' and her own inclusion in or identification with such groups of persons such that...fear persecution upon return is reasonable.<sup>63</sup>This case raises close similarities with the Somali and Sudan situations. By virtue of the ethnicity of Southern Sudanese they could be enslaved or suffer from the civil disorder in the South thereby exposing members of the area under possible persecution. The Somali civil war and unrest places most minority clan members fleeing from persecution in Somalia under similar circumstances.

The 1951 Convention however does not expressly outline the procedures for determining refugee status and indeed leaves states the choice of means as to implementation at the national level. Given the nature of the definition, the assessment of claims to refugee status thus involves a complex of subjective and objective factors.<sup>64</sup>

### **2.1.2 The 1967 Protocol relating to the status of refugees**

The 1967 Protocol<sup>65</sup>was adopted to resolve the problem of the historical limitations of the 1951 Convention.<sup>66</sup>The participants recognized that the world had changed significantly in the intervening sixteen years and that the 1951 Convention was no longer sufficient to encompass the refugee situations that were arising at that time.<sup>67</sup> In addition the 1967 Protocol acknowledged that new refugee situations have arisen since the Convention was adopted and that refugees concerned may therefore not fall within the scope of the Convention.<sup>68</sup>This declared purpose of the 1967 Protocol

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<sup>63</sup> *Gonzalez V Minister of employment and Immigration* [1991] FCJ No. 408 (FCA): Where the applicant makes a refugee claim on the basis of being a member of a particular social group, evidence regarding the experience of other members of that group is material to the applicants' claim.

<sup>64</sup> Goodwin-Gill as note 20 above 34.

<sup>65</sup> 1967 Protocol as note 2 above.

<sup>66</sup> The drafters of the 1951 Convention purposely limited its protection to refugees who could point to pre-1951 events as the basis for the flight because certain governments did not want to assume obligations for future refugees who could not be foreseen in I Jackson, *The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection*, 3 *Int,L J.* 403, 406 (1991).

<sup>67</sup> Parrish Michael J, *Redefining the Refugee: the Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 *Cardozo L. Rev.* 223.

<sup>68</sup> The Preamble to the 1967 Protocol as note 2 above. The 1967 Protocol eliminated special treatment for the pre-1951 refugees, establishing equal status to persons who fall within the 1951 Convention definition, without regard to the January 1, 1951 deadline.

provided protection for refugees whose status resulted from events that transpired after the 1951 Convention's closing date of January 1951.<sup>69</sup>

Nevertheless the underlying reasons for the flow of refugees in 1967 were hardly different from those that had provided the impetus for the development of the 1951 Convention definition. Therefore the 1967 Protocol, while aimed at addressing the situation that had developed since 1951, simply applied the same definition of the term 'refugee' that had been adopted sixteen years earlier to the newly developing refugee problems.<sup>70</sup>

## **2.2 Regional standards on refugee status determination**

The 1951 Convention and the 1967 protocol remain the principal international instruments benefiting refugees. Their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees.<sup>71</sup> It forms the basis of article 1 of the 1969 Convention on refugees in Africa, although it has been realistically extended to cover those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or even events seriously disturbing public order.<sup>72</sup> Article 1(2) has made recognition of the particular circumstances when group persecution may amount to a well-founded fear of persecution.<sup>73</sup>

### **2.2.1 The 1969 Convention governing the specific aspects of refugee problems in Africa**

The organs of the Organization of African Unity (now the African Union), which was founded in 1963, are: the Assembly of Heads of State and Government, the Council

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<sup>69</sup> Notable events that occurred after the January 1, 1951, such as the Korean conflict, the 1956 Hungarian uprising and the Vietnam war, influenced the implementation of the 1967 protocol; SJ Ball, *The Cold War; An International History, 1947-1991* 49-59(1998) Events such as these sent vast numbers of refugees out of the country and is the same case currently happening in Africa for example in Somalia, South Sudan, DRC Congo, Burundi etc. see Peter H Koehn, *Refugees from Revolution: US Policy and Third World Migration* 60-63 (1991).

<sup>70</sup> 1967 Protocol as note 2 above art 1, para. 2.

<sup>71</sup> Goodwin-Gill as note 20 above 20.

<sup>72</sup> Weis as note 5 above. Arboleda E, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 *IJRL* 185 (1991); Rwelamira M, 1989- An Anniversary Year: The 1969 OAU Convention on the specific Aspects of refugee Problems in Africa, 1 *IJRL* 557 (1989); OAU/UNHCR, *The Addis Ababa Symposium 1994*, 7 *IJRL* Special Issue- Summer 1995, (1995).

of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration. The Council of Ministers of the Organization of African Unity established at its second session at Lagos in February 1964 a special commission on refugees.<sup>74</sup> This Commission was to deal with the problem of refugees from independent African countries. The need to adopt an African refugee convention was felt because of the very large number of refugees in Africa and the fact that the 1951 Convention due to the 1951 dateline did not cover these refugees. The Council of Ministers meeting in Cairo in July 1964 for its third ordinary session invited the Commission on African Refugees to draw up a Draft Convention covering all aspects of the problem of refugees in Africa.<sup>75</sup> The final text of the Draft Convention was adopted by the Council of Ministers at its 12<sup>th</sup> Ordinary Session in February 1969, with some amendments, and by the Assembly of Heads of State and Government at its 6<sup>th</sup> Ordinary Session at Addis Ababa on 10 September 1969.<sup>76</sup>

The 1969 Convention provides that the term refugee shall also apply to every person who owing to external aggression, foreign domination or internal disorder affecting either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. This latter definition is therefore based on objective criteria, i.e. the conditions in the country of origin.<sup>77</sup> Most of the refugee movements in Africa have been mass movements and in such cases would be difficult to apply the subjective test requiring individual screening.<sup>78</sup>

The Convention declares that the granting of asylum to refugees is a peaceful and humanitarian act and should not constitute political tension.<sup>79</sup> It adheres to the principle of *non-refoulement* and sets out the principle of voluntary repatriation for refugees for the first time.<sup>80</sup> This provision is very important since it emphasizes that

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<sup>73</sup> UNHCR Handbook as note 39 above paras 70,73,76,79.

<sup>74</sup> OAU Council of Ministers/ Resolution 19 (II) of 1964. Quoted in Weis as note 5 above.

<sup>75</sup> OAU Council of Ministers as above resolution 36 (III).

<sup>76</sup> Goundian O, Definition of a Refugee, *Migration News* March /April 1970 quoted in Weis as note 5 above.

<sup>77</sup> Goundian as above; Rwelamira as note 72 above; OAU/UNHCR, The Addis Ababa Symposium 1994, *7 IJRL Special Issue*- Summer 1995, (1995).

<sup>78</sup> Weis as note 5 above 111-3-70; El Faith El Rashid Rahman, International and African Perspectives on Refugee Treatment, Khartoum, 1983 cited in ICJ as note 7 above 15.

<sup>79</sup> 1969 Convention as note 4 above art 2 Para 2.

<sup>80</sup> As above art 5.

no refugee shall be repatriated/ *refouled* against his will.<sup>81</sup> It calls for the adoption of measures of amnesty and clemency, implementation of national reconciliation policies and peaceful settlement of disputes. It also sets out the principle of burden sharing of the refugee crisis in the spirit of African solidarity and international cooperation.<sup>82</sup>

The Convention emphasizes non-discrimination whereby no refugees may be refused recognition because of religious, racial, or political affiliations.<sup>83</sup> Those individuals fleeing from war or civil disturbance or escaping violence of any kind in Africa are therefore recognized as refugees. Thus while the 1951 Convention requires that fear of persecution is a necessary and sufficient condition for refugee status, the emphasis is on political persecution. By widening the concept of persecution from the essentially political persecution implied in the 1951 Convention, by including reference to asylum, and finally, by making explicit the mechanism of voluntary repatriation, the 1969 OAU Convention makes more liberal and innovative provisions for refugees in Africa.<sup>84</sup>

### **2.3 The role of the UNHCR in refugee status determination**

The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly.<sup>85</sup> The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country. The Office of the High Commissioner for Refugees is one of the subsidiary organs of the General Assembly established under article 22 of the United Nations Charter and receives policy directions from the General Assembly and the Economic and Social Council (ECOSOC). The UNHCR Statute and the 1951 Convention contain very similar definitions of the term 'refugee'.<sup>86</sup> UNHCR has competence over refugees covered by earlier treaties and refugees resulting from events occurring before 1 January 1951,

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<sup>81</sup> As above art 5(1).

<sup>82</sup> As above art 11(4).

<sup>83</sup> As above art 3(1).

<sup>84</sup> Weis as note 5 above 70.

<sup>85</sup> Basic Facts about UNHCR sourced at < <http://www.unhcr.ch/cgi-bin/texis/vtx/basics>> accessed on 10 September 2003.

who are outside their country of origin and who are unable or unwilling to avail themselves of its protection owing to well-founded fear of persecution or for reasons of other personal convenience.<sup>87</sup>The Statute applies to the same persons as the 1951 Convention without the dateline or geographical limitations.

UNHCR protection mandate focuses on ensuring that states parties to the Convention adhere to the principle of *non-refoulement*, ensuring that asylum seekers have access to an informed procedure and every refugee is recognized as such. The UNHCR is also involved directly and indirectly in refugee status determination where states request it to or when states decline to conduct RSD.<sup>88</sup>It is for the UNHCR to determine status under the Statute and any other relevant General Assembly resolutions and for the state parties to the Convention and the Protocol to determine status under those instruments.<sup>89</sup>Globally, the UNHCR conducted refugees' status determination in at least 60 countries in 2001, receiving more individual refugee status applications than France and Australia combined.<sup>90</sup>The UNHCR determines status as a condition precedent to providing international protection (for example, intervention with a government to prevent expulsion) or as a prerequisite to providing assistance to a government, which requests it in respect of certain groups within its territory.<sup>91</sup>Generally protection activity revolves around ensuring that refugees and others in need of international protection are recognized and granted asylum, and that their basic human rights are respected in accordance with international standards.<sup>92</sup>UNHCR grants either mandate<sup>93</sup> or Convention<sup>94</sup> status to refugees.

The UNHCR Statute however contains an apparent contradiction. On the one hand it affirms that the work of the office shall relate, as a rule, to groups and categories of refugees. On the other hand, it proposes a definition of the refugee, which is

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<sup>86</sup> UNHCR Statute adopted on 14 December 1950.

<sup>87</sup> 1951 Convention as note 1 above art 1, 5& 6.

<sup>88</sup> In Kenya for example the government stopped doing RSD and the UNHCR took over the process and over time it became an implied agreement to conduct RSD on behalf of the government while In Egypt the UNHCR assumed the responsibility of RSD given the gap that was not being filled by the government and entered into an agreement in 1954 with the government to handle on its behalf status determination, repatriation, resettlement, and assist refugees within its jurisdiction.

<sup>89</sup> UNHCR Statute as note 86 above para 6(a) 1 and the 1951 Convention as note 1 above art 1A(1); Madsen as note 21 above 108-41.

<sup>90</sup> UNHCR Statistical Overview 2002 (provisional).

<sup>91</sup> Goodwin-Gill as note 20 above 33.

<sup>92</sup> UNHCR's Protection Mandate, *UNHCR 2002 Global Appeal*, 21.

<sup>93</sup> A mandate refugee is one who falls within the competence of the UNHCR according to its Statute, or according to specific General Assembly resolutions.

essentially individualistic, seeming to require a case-by-case examination of subjective and objective elements.<sup>95</sup>This may limit most of the refugees in Africa who cannot identify an individualistic form of persecution. This is mainly because the majority of refugees are as a result of civil war and civil disorder and may not have been individually targeted but as a group.<sup>96</sup>Recently the UNHCR has acknowledged the peculiar circumstances in which refugee mass movements are necessitated and has recognised within its mandate the 1969 Convention extended definition.<sup>97</sup>The field of UNHCR competence has broadened considerably since the office was established. The beneficiaries have moved from those falling within the Statute definition through those assisted on a good offices basis<sup>98</sup>and those defined in relevant resolutions of the General Assembly<sup>99</sup>and directives of the Executive Committee<sup>100</sup>arriving finally at the generic class of refugees, displaced and other persons of concern to UNHCR.<sup>101</sup>

There is difficulty of determining status in the case of massive exodus that individual well-founded fear of future persecution on any of the statute grounds. The UNHCR and international agency practice seem to acknowledge that something more general such as lack of protection, should serve as the criterion for identifying persons of concern to the High Commissioner.<sup>102</sup>The lack of protection may occur as a matter of law, for example in the case of stateless persons; or as a matter of fact, where individual groups are unable or unwilling to avail themselves of the protection of the

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<sup>94</sup> Convention Status is where a refugee falls within the meaning of the 1951 Convention and/or 1967 Protocol.

<sup>95</sup> Goodwin-Gill as note 20 above 8.

<sup>96</sup> Madsen as note 21 above 25.

<sup>97</sup> G.A. Res. 34/61 (29 November 1979) (endorsed the recommendations of the 1979 Arusha Conference on the Situation of Refugees in Africa, which called on all U.N. organs operating in Organization of African Unity states to apply the 1969 Refugee Convention.); Jackson as note 48 above 193-4. The UNHCR Cairo office for example has been recognizing refugees under the 1969 Convention as mandate refugees since April 2003.

<sup>98</sup> The term is employed but not defined in UNGA res. 1499(XV), 5 Dec 1960; UNGA res. 1167(XII), 26 Nov. 1957; UNGA res. 1129(XI), 21 Nov 1956, approving UNHCR action taken already taken to assist Hungarian refugees. In UNGA res. 1784(XVII), 7 Dec 1962 the General Assembly again acknowledged that the situation of Chinese refugees was of concern to the international community, recognized the continuing need for emergency and long term assistance and requested UNHCR to use its good offices in the provision thereof. Quoted in Goodwin-Gill as above note 1 9.

<sup>99</sup> UNHCR Statute as note 86 above para 3.

<sup>100</sup> Established by UNGA res. 1166(XII), 26 Nov. 1957. The Executive Committee terms of reference include advising the High Commissioner, on request in the exercise of statutory functions; and advising on the appropriateness of providing international assistance through UNHCR in order to solve such specific problems as may arise.

<sup>101</sup> Goodwin-Gill as note 20 above 15.

government of their country. This may be due to any of the Convention grounds or to some man made disaster, such as conflict or violence resulting from a variety of sources.<sup>103</sup>

The class of persons within the mandate of, or of concern to UNHCR includes therefore those who have, having left their country, be determined to have a well founded fear of persecution on certain specified grounds and those often large groups or categories or persons who, likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of the protection of the government of either state of origin.<sup>104</sup>

### 2.3 Obligations of host governments

Host governments' responsibilities for functional aspects of refugee protection include *inter alia*: establishing fair and efficient status determinations to ensure refugees are identified and granted protection,<sup>105</sup> incorporating refugee rights and protections into national legislation,<sup>106</sup> issuing identity documents,<sup>107</sup> and abiding by international obligations to protect the physical security of refugees and asylum-seekers. The particular conventions they have ratified and international law provisions govern the obligations of states.

The 1951 Convention does not expressly deal with the admission of refugees and the question of asylum, but mainly with the status of persons granted asylum. The 1969 Convention regulates the question of asylum.<sup>108</sup> However the reception of refugees is

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<sup>102</sup> Goodwin-Gill as above gives the examples of this tendency in Rwanda, Zaire, Northern Iraq, Somalia and former Yugoslavia 15.

<sup>103</sup> The General Assembly established a Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, UNGA res. 36/148.16 Dec 1981. It produced a report, UN doc. A/41/324(May 1986) which separated man-made causes and factors, subdivided into political causes and social economic factors, from natural causes. Within the man made category were wars, colonialism, the treatment of minorities (for example under apartheid) discrimination and internal conflict, violation of human rights and fundamental freedoms and expulsions. Social economic factors were those that threatened the physical integrity and survival of individuals and groups, underdevelopment, particularly the legacy of colonialism. Wars and armed conflicts were stated as a major cause of refugee flows for flight was often the only way to escape danger to life or extensive restrictions of human rights. Quoted in Goodwin-Gill as above note 1 16.

<sup>104</sup> Goodwin-Gill as note 20 above 17.

<sup>105</sup> ExCom General Conclusion on International Protection No. 71, 1993, para. (i).

<sup>106</sup> ExCom General Conclusion on International Protection No. 81, 1997, para. (e).

<sup>107</sup> Identity Documents for Refugees ExCom Conclusion No. 35, 1984.

<sup>108</sup> 1969 Convention as above note 4 art II.

made subject to national legislation, which may constitute a serious limitation. This is because different countries have different national policies and depends on the political will of those in power. Paragraph 2, 3 and 5 of the article follow closely the United Nations Declaration on Territorial Asylum, which is explicitly recalled in the Preamble to the Convention.<sup>109</sup> While the Declaration is not legally binding, these provisions, by their incorporation in the 1969 Convention, become binding on contracting states. This is particularly important with regard to paragraph 3, which contains the principle of *non-refoulement*. The embodiment of this principle constitutes a most important step forward in the advancement of the human rights of refugees and the development of the law of asylum. This also creates an obligation on countries bordering the countries of origin of refugees, to provide for a sharing of this burden by other states.

The right of first asylum countries to appeal to other member states in such a situation and the duty of these states to take appropriate measures to lighten the burden of the member states granting asylum in a spirit of African solidarity and international cooperation, are also enshrined.<sup>110</sup> This article further provides, in paragraph 5, that where a refugee has not received the right of residence in any country of asylum in which he first presented himself, pending arrangements for his resettlement. The word may indicate that this is not an absolute duty but it follows from the principles of *non-refoulement* that a refugee must at least be temporarily admitted if in the case of non-admission he would be compelled to return to or remain in a country where he might be persecuted. Paragraph 6 of this article stipulates that for reasons of security, countries of asylum shall as far as possible settle refugees at the frontier of their country of origin. This provision was dictated by the concern to reduce the danger of incidents and of subversive activities by refugees against their country of origin.<sup>111</sup>

The UNHCR functional role and institutional responsibilities are dependent upon the resources and the political will of states to work out the practical problems of protection, assistance and solutions. The UN General Assembly resolutions may impose obligations on UNHCR but they do not thereby directly impose obligations on

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<sup>109</sup> General Assembly Resolution 1312 (XXII) in Weis P, *The United Nations Declaration on Territorial Asylum*, *Canadian Yearbook of International Law*, 1969, 92-149.

<sup>110</sup> 1969 Convention as above note 4 para 4 of art II.

<sup>111</sup> Weis as note 5 above 35.

states.<sup>112</sup>The ratified convention obligations thereby remain the main source of state adherence to their provisions.

## 2.5 Procedural standards in refugee status determination

The fact that the 1951 Convention does not provide for procedures for determining refugee status prompted member states of the Executive Committee of the High Commissioner's program to request the UNHCR to prepare a handbook for the guidance of the governments in RSD.<sup>113</sup>The Handbook is designed to ensure a fair and efficient RSD process. General administrative law and human rights standards also act as a guide on a fair and efficient RSD process.<sup>114</sup>The International Covenant on Civil and Political Rights (ICCPR) guarantees that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>115</sup>This provision has been reiterated in guidelines to governments by the UNHCR on conducting the RSD process.<sup>116</sup>

Individual RSD process usually begins with an asylum-seeker making an application for protection by registering at UNHCR or the determining authority. This leads to an application and interview, to determine whether the person is a legal refugee. Rejected applicants may file written appeals. The files of applicants rejected on appeal are closed.

A recognized refugee may receive an identity card and is eligible for a residence permit. A recognized refugee can receive some forms of health, financial or educational assistance, depending on personal need and available resources. The UNHCR or the government may find a "durable solution" for most recognized refugees, which most often includes either resettlement to a third country or local

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<sup>112</sup> Goodwin-Gill, *The Language of Protection*, 1 *IJRL* 6(1989); Goodwin-Gill, *Refugees: The Function and Limits of the Existing Protection System* in Nash A, *Human Rights and the Protection of Refugees under International Law*, (1988), 149-82.

<sup>113</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was prepared at the request of state members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments: UNHCR Executive Committee, report of the 28<sup>th</sup> session: un Doc A/Ac.96/549 (1977), para 53.6g. First published in 1979. The handbook has been widely circulated and approved by governments is frequently referred to in refugee status proceedings throughout the world and has been cited with approval by a variety of courts in many jurisdictions. In Goodwin-Gill as note 20 above 34.

<sup>114</sup> Alexander as note 35 above 251.

<sup>115</sup> The International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200(XXI) of 16 December 1966 (UN 1966) art 14.

integration. Rejected applicants receive no assistance or protection from the receiving state or UNHCR. Unless they can obtain valid passports and residence permits through some other means, they have no legal status or protection and may be arrested, detained, and deported.

This calls for proper interpretation of the refugee definitions in the Conventions and fair and efficient RSD process.<sup>117</sup> Fair procedures in RSD eliminate arbitrariness, and give applicants confidence that their cases will be considered impartially. They also ensure that all relevant facts come out before a final decision and establish safeguards against human errors in the decision-making process.<sup>118</sup> Effective RSD requires that asylum-seekers have access to the procedures to apply for protection, and be allowed to remain in the country while their cases are pending at both the first instance and appeal stages.<sup>119</sup> A person's protection from *refoulement* depends on the fairness and effectiveness of refugee status determination.<sup>120</sup>

*Prima facie* or group determination is generally applied in situations of mass movements where individual determination is impractical.<sup>121</sup> Although the 1951 Convention was drawn up to cover individual claims, there is nothing in the instrument which contradicts the use of group determination or determination on a *prima facie* basis.<sup>122</sup> Normally group or *prima-facie* determination is used where the refugee status of a person is evident on objective grounds.<sup>123</sup> Under the 1951 Convention the subjective fear can be presumed,<sup>124</sup> when the situation in the country of origin is such that any person of a particular social group, political opinion, and so forth, would fear persecution.<sup>125</sup>

In *prima facie* recognition all asylum-seekers from particular countries or territories are considered automatically to be refugees or accorded temporary protection and receive legal protection in the country of asylum without individual status

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<sup>116</sup> UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures (6 May 2001).

<sup>117</sup> UNHCR Asylum-Processes as note 116 above.

<sup>118</sup> Determination of Refugee Status, RLD 2 (1989), Chapter 2 (The importance of these procedures cannot be overemphasized. ... A wrong decision might cost the person's life or liberty).

<sup>119</sup> UNHCR Excom Conclusion No. 8 (1977); UNHCR, Fair and Expeditious Asylum Procedures 3 (1994).

<sup>120</sup> Alexander as note 35 above 283.

<sup>121</sup> Hyndman as note 10 above 30.

<sup>122</sup> Hyndman as above.

<sup>123</sup> UNHCR Note on International Protection 1993: UN doc. A/AC 96/815, para 27.

<sup>124</sup> UNHCR Handbook as note 39 above para 7.

<sup>125</sup> UNHCR Note on International Protection as note 123 above.

determination.<sup>126</sup> UNHCR or the government would register and track the refugee population, but would not need to take the time to thoroughly interview all applicants and research and assess thousands of individual claims.<sup>127</sup> Most developed countries have enough resources and capacity to process individual status determination while the developing countries may not afford to conduct individual RSD in mass influx situations. *Prima facie* recognition comes in handy in such a situation. The analysis needs to take into account the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems.<sup>128</sup>

Where UNHCR or a government uses *prima facie* recognition, an agency sometimes screens individuals to determine if they are eligible for resettlement to third countries, but such screening does not impact a person's legal status in their country of residence.<sup>129</sup> Resettlement criteria, which are often more narrow than the legal refugee definition, play no legal role in RSD. The primary concern in refugee status determination is ensuring that people who are in danger in their home countries can avoid being forced to return.

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<sup>126</sup> UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework 14, EC/GC/01/4 (9 February 2001; UNHCR Handbook as note 39 above 44; Jackson as note 49 above.

<sup>127</sup> Jackson as above.

<sup>128</sup> UNHCR, Protection of Refugees in Mass Influx Situations as note 126 above.

<sup>129</sup> UNHCR Resettlement Handbook 35 (Revised 2002).

## CHAPTER 3: REFUGEE STATUS DETERMINATION IN KENYA AND EGYPT

### 3.1 Introduction

Refugee status determination is an obligation by state parties to apply the definitions of a refugee and the provisions of the conventions they have ratified governing refugees. In Kenya and Egypt this obligation has been delegated to the UNHCR. Refugee law accords full responsibility to whichever state refugees flee to irrespective of both the state's ability to offer them any meaningful protection, and the development and security implications of having to attempt this.<sup>130</sup>

### 3.2 Refugee status determination regime in Kenya

#### 3.2.1 Legislative and policy framework

There is no legislation applicable to refugees that fully implement Kenya's treaty obligations on refugees.<sup>131</sup> There exist other laws that touch on refugees for example the Immigration Act, which applies to all non-citizens, including refugees.<sup>132</sup> The Act provides that all non-citizens who enter Kenya without a valid entry permit or pass are unlawfully present and subject to arrest and detention by immigration officers.<sup>133</sup> The Act describes a class of entry permit for individuals generally fulfilling the 1951 Refugee Convention definition of a refugee:

#### CLASS M

A person who is a refugee, that is to say, is, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, unwilling to avail himself of the protection of the country of his nationality or who, not having a nationality and being outside the country of his former habitual residence for any particular reason, is unable or, owing to such fear, is unwilling to return to such country, and any wife or child over the age of thirteen years of such a refugee.<sup>134</sup>

This provision, if administrative procedures were in place to implement it, would allow asylum seekers to apply for Class M entry permits from Kenyan immigration officers at entry points. However, there are no Kenyan immigration officers available to hear such applications either at the border or after an individual enters the country until one reports to UNHCR in order to apply for refugee status.<sup>135</sup> Consequently, asylum

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<sup>130</sup> Wilde as note 21 above.

<sup>131</sup> Hyndman as note 10 above 29.

<sup>132</sup> ICJ as note 7 above.

<sup>133</sup> Laws of Kenya, Kenya Immigration Act, Cap 172, Section 8 (12).

<sup>134</sup> As above schedule to section 6(3).

<sup>135</sup> Interview with Mr Otunga as note 45 above.

seekers simply enter the country—at which point they are “unlawfully present” under the Immigration Act, and subject to arrest and detention.<sup>136</sup>

As aliens, asylum seekers and refugees are also subject to the provisions of the Aliens Restriction Act (ARA).<sup>137</sup>The ARA restricts the presence and rights of aliens in Kenya. The Act gives “the Minister,” during “times of war or imminent danger” the power to impose several types of restrictions on aliens.<sup>138</sup>These include prohibitions on the entry of aliens to Kenya and requirements that aliens reside in designated areas.<sup>139</sup> Aliens who violate such orders are subject to a fine of Ksh.3, 000 [U.S.\$38] and imprisonment not exceeding six months.<sup>140</sup>

Although the ARA was passed after Kenya became party to the 1951 Refugee Convention, there are no specific provisions for the status and rights of asylum seekers and refugees.<sup>141</sup>Kenya’s parliament has been debating a Draft Refugee Bill since 1990 whose latest version is from 2003. The Draft Bill falls short of international standards since it affords unfettered discretion to a single “Minister” in charge of refugee matters to receive recommendations for refugee status from an eligibility committee, to make the final decision on refugee status, and to hear appeals. The Bill requires asylum seekers to apply for status within seven days of their arrival, a limitation that is unreasonable. UNHCR has stated that failure to submit an asylum request within a specified period should not lead to the exclusion of the request from consideration.<sup>142</sup>The Draft Bill also requires refugees to live in refugee camps, without enacting exceptions to that policy in law. Other provisions of the Draft Bill, such as the definitional sections, are unobjectionable and would implement Kenya’s obligations under international law. Finally, the Draft Bill does envisage establishing “transit centers” for asylum seekers while their applications are being considered.<sup>143</sup>

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<sup>136</sup> HRW Report as note 19 above.

<sup>137</sup> Laws of Kenya, Aliens Restrictions Act cap 173.

<sup>138</sup> As above section 3 (1).

<sup>139</sup> As above section 3(1) (a), (c), (d).

<sup>140</sup> As above section 3 (3).

<sup>141</sup> Some of Kenya’s obligations under the Refugee Convention have been enacted into Kenya’s extradition law. According to this law, if requests for extradition are made by the requesting country in order to prosecute or punish an individual on grounds other than his alleged criminal offence, the request can be rejected after an assessment of the case by an adjudicator. See The Extradition (Commonwealth Countries) Act, 1968, art 6.

<sup>142</sup> See UNHCR, Sub-Committee on International Protection, Note on Asylum, August 30, 1979, para. 16.

<sup>143</sup> The Refugee Bill 2003, section 15(2).

The adoption of a new Constitution could usher in a new era for refugee rights in Kenya: Section 52 of the Draft Constitutional Bill 2002 recognises the right of asylum, enshrines the principle of non *refoulement*, and requires the enactment of a law in compliance with international law and practice, governing persons who seek refuge or asylum in Kenya.<sup>144</sup> Moreover a new bill of rights might inject some vigour in the judiciary and pave the way for an extensive use of courts in promoting respect for human rights in Kenya.<sup>145</sup>

### 3.2.2 The history of refugee status determination in Kenya

Before 1991, the Kenyan government used an ad hoc administrative refugee status determination (RSD) system to recognize refugees, despite the fact that it lacked domestic laws providing for their rights and status.<sup>146</sup> Asylum seekers were interviewed by an Eligibility Committee, made up of representatives from the Ministry of Home Affairs, the Immigration Department, and UNHCR observers. The Committee usually heard individual cases and applied the Refugee Convention definition, as provided for in the Class M Entry Permit category, but the Committee did not apply the OAU definition.<sup>147</sup> Most newly arriving refugees were processed through a reception center established in October 1981 at Thika,<sup>148</sup> a town near Nairobi.<sup>149</sup> Conflict in Uganda, Somalia and Sudan brought large numbers of refugees to Kenya in the early 1990s. Kenya hosted 14,400 refugees in 1990, but as a result of the increase in regional conflicts, the number had risen to 120,000 by 1991.<sup>150</sup> Just one year later, in 1992, 401,000 refugees were living in Kenya.<sup>151</sup> The large numbers

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<sup>144</sup> Section 52(3) Draft Constitution Bill 2002 (currently being debated upon at the National Constitutional Conference by national delegates to the Constitution Review Process).

<sup>145</sup> Verdirame G and B. E Harrell Bond, *Rights in Exile: Janus-Faced Humanitarianism*, (unpubl.mss).

<sup>146</sup> Interview with Mr Otunga as note 45 above.

<sup>147</sup> O'Neill W, Rutinwa B & Verdirame, G, *The Great Lakes: A Survey of the Application of the Exclusion Clauses in the Central African Republic, Kenya and Tanzania*, *IJRL* vol 12(2000) Special supplementary issue 153-154; Mulei C, *Refugee Framework: Kenya Experience*, Paper Presented to the East African School on Forced Migration, Dar es Salaam, January 2000, 3-4.

<sup>148</sup> The Kenya government from 1981 used the reception centre until April 1995. Afterwards in 1996, it was briefly re-opened to screen refugees and asylum seekers arrested during an immigration swoop in Nairobi quoted in HRW report as note 19 above.

<sup>149</sup> See *Report of the United Nations High Commissioner for Refugees*, General Assembly Official Records: Thirty-seventh Session Supplement No. 12 (A/37/12), United Nations, New York, 1982, para. 114.

<sup>150</sup> See UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, Oxford University Press, 2000 311-313.

<sup>151</sup> UNHCR as above.

overburdened the Eligibility Committee, causing Kenya to ask UNHCR to set up refugee camps. UNHCR and international NGOs were needed at the time since the large numbers of arrivals far outstripped the government's ability to ensure their well being. While there was an obvious need for an emergency response from the international community, the agencies involved usurped Kenya's refugee administration almost completely. This all-or- nothing approach scrapped the positive aspects of Kenya's pre-1991 refugee policy, including, for example, the laissez-faire approach by which refugees were allowed to locally integrate, and enjoy rights to work, education and freedom of movement.<sup>152</sup> Most fundamentally, the Kenyan government's pre-1991 role in refugee status determination was surrendered to UNHCR and quickly forgotten.<sup>153</sup>

### 3.2.3 Post-1991 refugee status determination in Kenya

Once UNHCR took over status determinations in Kenya in 1991, the entire system changed. UNHCR contracted with its then implementing partner, Jesuit Refugee Service (JRS), to create a status determination centre at Wood Avenue in Nairobi.<sup>154</sup> After the status determination interview, each asylum seeker would either receive refugee status and be directed to a camp, or in exceptional cases receive permission to remain in Nairobi. In Kenya, refugees are required by an unwritten executive policy, which started in 1991, to reside in Dadaab or in Kakuma refugee camps.<sup>155</sup> Alternatively, the asylum seeker would be rejected and instructed to depart from the country. The status determinations run by JRS were a problematic delegation of the responsibilities of Kenya and UNHCR to an NGO. The Kenyan government ceased to be actively involved in recognizing and protecting refugees in its own territory. The government's acknowledgement of its duties towards refugees was eroded to the point that in 1998 it refused to recognize the UNHCR protection

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<sup>152</sup> Guglielmo Verdirame, "Human Rights and Refugees: The Case of Kenya," *Journal of Refugee Studies*, Vol. 12, No. 1, 1999 57.

<sup>153</sup> HRW Report as above note 8.

<sup>154</sup> Verdirame as note 152 above.

<sup>155</sup> Arthur C. Helton, *The Price of Indifference*, 2002 at 156 (noting that the camps for Somali refugees in Kenya "were established in the early 1990s: Ifo in September 1991, Dagahaley in March 1992 and Hagdera in June 1992."); Lutheran World Federation, "Kakuma Refugee Camp," 2002, sourced at: <<http://www.lwfkenyasudan.org>> accessed on 10 October 2003 explaining that LWF/DWS was invited by UNHCR in mid-1992 to help establish a refugee camp at Kakuma (north west Kenya) in response to an influx of an estimated 30,000 Sudanese refugees fleeing fighting in Southern Sudan and entering Northern Kenya through the border town of Lokichoggio).

letters issued by JRS.<sup>156</sup> Thereafter, the government has engaged in an alternating policy of benign neglect and open hostility towards refugees and the documents recognizing their status, granted under the authority of UNHCR. In December 1998, JRS determined that it was unable to follow its mission statement while running status determinations. The NGO also decided that it would no longer perform a function that was, in fact, the responsibility of the Kenyan government and of UNHCR. In the absence of governmental willingness to take over, UNHCR began running the determinations in January 1999.<sup>157</sup>

### 3.2.4 UNHCR-run refugee status determination in Kenya

Kenya has two methods for recognizing the status of refugees. First, refugees who are fleeing events disturbing security in their countries of origin are recognized as refugees under the OAU Refugee Convention. The OAU Refugee Convention expands the definition of refugees to include persons compelled to seek refuge from “external aggression, occupation, foreign domination, or events seriously disturbing internal order in either part or the whole of [the] country of origin.” Kenya has implemented its obligations under the OAU Refugee Convention thus by affording *prima facie* status to most refugees fleeing Sudan and Somalia, as well as to some fleeing Ethiopia.<sup>158</sup> The government in Kenya has requested UNHCR to conduct individual determinations on its behalf and the government has officially recognized that Somalis and Southern Sudanese are *prima facie* refugees. Hence refugees recognized as such either on a *prima facie* basis or through UNHCR individual determinations are lawfully present in Kenya.

In Kenya therefore there is no legal obstacles to including *prima facie* refugees under the refugee definition, as both the 1951 Convention and the 1969 Convention are applicable. The refugees however are not granted Convention status, but rather temporary asylum under the *prima facie* regime.<sup>159</sup>

Second, refugees are recognized through UNHCR-run individualized determinations in Nairobi or in the camps.<sup>160</sup> Since 1999, refugee status determinations in Nairobi

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<sup>156</sup> Verdirame as note 152 above 58 (citing *The East African* September 7, 1998).

<sup>157</sup> Verdirame as above .

<sup>158</sup> Hyndman as note 10 above 29. Given political changes in Ethiopia asylum seekers from that country are no longer considered for *prima-facie* status.

<sup>159</sup> As above 33.

<sup>160</sup> Interview with Mr Otunga as note 45 above.

have been conducted entirely out of UNHCR's Westlands offices in Nairobi. Unfortunately, UNHCR's attempt to fill the gap created by the Kenyan government has fallen short of its own standards applicable to status determinations.<sup>161</sup> In Kenya asylum seekers are issued with UNHCR appointment slips and once recognized refugees they get UNHCR-issued protection letters also referred to by refugees as their "mandates" some of which refer them to camps.<sup>162</sup> Since asylum seekers must hold on to the slip for such a long time, the papers become very tattered and dirty. Once assigned a slip, asylum seekers must wait for their interview date. Most often, that date is three to four months away. Given the extremely difficult conditions of life for asylum seekers in Nairobi, waiting three to four months for any detailed attention from UNHCR is risky and even life threatening. The procedure of determination by the UNHCR is fraught with lengthy delays, during which asylum seekers are vulnerable to ongoing abuse. The system is also marred by an overwhelming sense of futility, since the outcome of the process – a document (blue card or yellow card) recognizing a particular individual's status – is routinely ignored and even destroyed by security officers during arrests and roundups of foreigners that occur on a daily basis.<sup>163</sup>

During the status determination interviews, a member of UNHCR's eligibility staff interviews asylum seekers. The officer who conducts the interview reviews the facts after the interview, sometimes doing additional research or cross-checking information, and either recommends that UNHCR grant or deny refugee status. Next, the recommendation is received by senior protection staff who review the file and make the final decision on an individual's status. In 2001, UNHCR in Nairobi considered the eligibility of 400 to 500 individual cases each month. In the beginning of 2001, there was a 50 percent rejection rate. By year's end, the rejection rate was 40 percent. Claims take up to six months to process.<sup>164</sup>

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<sup>161</sup> Verdirame as note 152 above.

<sup>162</sup> This colloquial use of the term "mandate letter" by refugees is often inaccurate. In any refugee situation, including in Kenya and Uganda, UNHCR has the power to recognize refugees under the agency's "mandate" to protect refugees. In Kenya, the UNHCR protection letters (erroneously referred to as "mandates") are not issued by the agency under its "mandate," but are instead documents recognizing the individuals as refugees in accordance with Kenya's obligations under the Refugee Convention and the OAU Refugee Convention. Quoted in HRW Report as note 19 above 74.

<sup>163</sup> HRW as note 19 above.

<sup>164</sup> HRW as above 73.

Asylum seekers are not given information about the standards against which their cases will be measured, nor are they given a sense of how long the process will take, including how much time it should take to assess their file if they have to appeal or if they are in need of resettlement.<sup>165</sup> Resources to hire more staff are clearly a major part of the problem. The UNHCR Nairobi eligibility officers who interview asylum seekers are a team of mostly Kenyan lawyers, who have been trained in refugee law. Each lawyer can see about four cases each day. The lawyers do not receive the files of the asylum seekers they are interviewing until the morning of the appointment. As a result, each officer only has a few hours to prepare for the interview, at most. Asylum-seekers who are recognized as refugees receive a letter from UNHCR. Many of the letters require the holder of the letter to travel to one of Kenya's refugee camps. A few allow the individual to remain in Nairobi for one of the exceptional reasons.<sup>166</sup> However, rejected asylum seekers do not receive written information about the reasons for their rejection, apart from *pro forma* letters indicating that their case has been rejected for failure to fulfil eligibility criteria. Information about appeals procedures was gleaned from other refugees and from the only local refugee rights NGO in Nairobi such as the Refugee Consortium of Kenya (RCK). A different protection officer in the UNHCR eligibility department, not by the officer who made the original decision, hears appeals. Appointments for appeals are often rescheduled and delayed because preparing and reviewing the files takes a great deal of time.<sup>167</sup>

### **3.3 Refugee status determination in Egypt**

#### **3.3.1 Legislative and policy framework**

Egypt has not established its own procedures for granting asylum. Instead, under a system established by a 1954 agreement between UNHCR and Egypt, asylum-seekers apply to the UNHCR to be recognized as refugees.<sup>168</sup> UNHCR decides whether the person meets the legal definition of a refugee, and Egypt agrees to allow those recognized by UNHCR (as well as people with pending UNHCR applications) to stay in the country. Without protection by UNHCR, Egyptian authorities may arrest indefinitely detain and deport foreigners who lack residence permits.<sup>169</sup>

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<sup>165</sup> As above.

<sup>166</sup> As above.

<sup>167</sup> As above.

<sup>168</sup> 1954 Agreement as note 13 above.

<sup>169</sup> Author's experience as note 14 above.

By virtue of article 151 of the Egyptian Constitution, International treaties that Egypt has ratified have the force of law in Egypt.<sup>170</sup>The refugee conventions require Egypt to follow the principle of *non-refoulement*, which prohibits returning a refugee to a territory where his or her life or freedom would be in danger.<sup>171</sup>Both conventions are applied by UNHCR as part of its mandate in Egypt.<sup>172</sup>Egypt has generally allowed asylum-seekers and recognized refugees to enter and remain in the country. This has in part been attributed to the underlying Islamic traditions of sanctuary and hospitality towards those fleeing persecution.<sup>173</sup>

Egypt has been under a 'state of emergency' since 1982 and currently has no domestic legislation on asylum beyond Article 53 of the Constitution, which states:

Egypt is obliged to grant the right of political asylum to any foreigner who has been persecuted for his defence of the interests of people, or of human rights, peace or justice.<sup>174</sup>

Unfortunately, refugees apprehended by the Egyptian authorities are legally categorized as aliens, defined under Article 1 of Presidential Decree No.89 of 1960<sup>175</sup> as 'whoever is not enjoying the nationality of the United Arab Republic'. Refugees often suffer on account of the fact that their passports expire, or the visa or residency permit expires, whilst they await recognition of their status as refugees from

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<sup>170</sup> Article 151 of the Egyptian Constitution (promulgated 11 September 1971): The president of the republic shall conclude treaties and communicate them to the peoples Assembly accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure. However peace treaties, alliance pacts, commercial and maritime treaties and all other involving modifications in the territory of the state or having connection with the rights of sovereignty, or which lay upon the treasury of the state certain charges not included in the budget must acquire the approval of the Peoples Assembly; In the Egyptian government periodic report on its level of adherence to the enforcement of the rights stated in the ICCPR it is stated...following their ratification and publication all international instruments concerned with human rights and freedom including the ICCPR are regarded as being equivalent to laws enacted by the legislative Authority. Their provisions are equivalent to those of applicable Egyptian law and may be invoked before all legislative, executive and judicial authorities of the state,CCPR/C/EGY/2001/3[13 Nov 2001].

<sup>171</sup> Art 33 1951 Convention.

<sup>172</sup> UNGA res. 34/61 (29 November 1979) (fully endorsing the recommendations of the 1979 Arusha Conference on the Situation of Refugees in Africa, which called on all U.N. organs operating in Organization of African Unity states to apply the OAU Refugee Convention.). See *generally*, I. Jackson, The Refugee Concept in Group Situations at 193-4 (1999) (arguing for UNHCR to apply the OAU Convention when the agency works in Africa).

<sup>173</sup> Forced Migration and Refugees Studies (FMRS) Working Paper, The American University in Cairo, December 2002 in Cairo 2003.

<sup>174</sup> Constitution of the Arab Republic of Egypt as note 170 above art 53.

<sup>175</sup> Presidential Decree No.89/1960 concerning Entry and residence of Aliens in the Territories of the United Arab Republic and their departure there from. As Amended by Laws nos.49/1968, 124/1980, 100/1983 and 99/1996.

UNHCR.<sup>176</sup>The situation of refugees differs from that of other aliens because circumstances often require them to find ways to enter/remain in a country illegally in order to escape persecution. The lengthy nature of the UNHCR procedures necessary for the recognition of refugee status, and the delays in the issuance of residence permits by the Ministry of Foreign Affairs and the Ministry of Interior; result in refugees' 'illegal presence' in Egypt.<sup>177</sup>In view of the circumstances under which many refugees flee their countries of origin, Presidential Decree No.89/1960<sup>178</sup>(the 'foreigners law') raises concerns for those asylum seekers attempting to enter Egypt in search of refuge and for those present as refugees/asylum seekers within Egyptian territory. Refugees in Egypt, when apprehended by the authorities without valid residence permits or valid passports, may be arrested, detained and deported as illegal aliens.

Egyptian domestic law, in particular Article 26 of Law No. 89 of 1960, stipulates that it is not permissible to deport a foreigner who is legally residing in the country in a private capacity (e.g. a refugee with a residence permit stamped in his/her yellow/blue card) *except* under the terms of a decree of the Minister of the Interior and where the foreigner's presence 'poses a threat to the country's internal security or to public health, morals or peace'. Pursuant to this law it would be legal for the Minister of the Interior to deport/expel/*refouler* refugees who are under the protection of UNHCR who carry forged passports (often necessary due to the circumstances of refugees flight); those allegedly associated with criminal elements in society (threatening internal security), AIDs victims (public health), homosexuals<sup>179</sup>and evangelical Christians (public morals).

### 3.3.2 Refugee status determination by UNHCR-Cairo

The stakes in refugee status determination in Egypt are higher than in Kenya because UNHCR-Cairo does not currently provide *prima facie* protection to asylum-seekers. This is despite the fact that most of the refugees granted *prima-facie* status in Kenya (Sudanese, Somalis) are also the majority refugee applicants and have undergone similar circumstances prior to their arrival. Individual RSD is therefore the only means of being recognised as a refugee in Egypt. UNHCR –Cairo in April 2003

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<sup>176</sup> Kagan as note 9 above.

<sup>177</sup> Author as note 14 above.

<sup>178</sup> As above.

<sup>179</sup> CAT (2002) Concluding Observations: Egypt 20/11/2002 CAT/C/XXXIX/Misc.4. Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Egypt. Paragraph D.5.e.

started applying the OAU Convention but is yet to accord refugees group status by virtue of the 1969 Conventions clear basis for application of this regime.<sup>180</sup>

An asylum-seeker begins an application for protection by registering at UNHCR. This leads to an application and interview, currently around seven months after registration, to determine whether the person is a legal refugee. Rejected applicants may file written appeals; some appealing applicants are interviewed again, while others are rejected on the basis of their written submissions. The files of applicants rejected on appeal are closed.

A recognized refugee receives a UNHCR identity card and is eligible for a residence permit. A recognized refugee can receive some forms of health, financial or educational assistance, depending on personal need and UNHCR resources. UNHCR attempts to find a "durable solution" for most recognized refugees, which most often includes either resettlement to a third country or local integration in Egypt.<sup>181</sup>

Once refugees are present within Egypt's territory and register with UNHCR (claim asylum) they wait for varying periods before obtaining officially recognised documents proving their status first as an 'asylum seeker' (yellow card) and later as a 'recognised refugee' (blue card).<sup>182</sup> These cards represent UNHCR's protection of the individual asylum claimant. The Ministry of Foreign Affairs can stamp the cards with residence permits after an administrative waiting period. During the periods when the individual is waiting for the issuance of such cards/permits, in the eyes of the authorities, s/he is 'present' in the country 'illegally' and thus vulnerable to arrest, detention and deportation under Egypt's 'foreigners law'.<sup>183</sup> UNHCR-Cairo also states that RSD decisions are ultimately dependent on the quality of cases presented. The lengthy waiting time from an asylum-seeker's arrival until actual RSD interview may make applicants more vulnerable to incorrect advice spread in the refugee

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<sup>180</sup> Art 1(2) 1969 Convention.

<sup>181</sup> Currently there are no prospects of local integration in Egypt and refugees have to fend for themselves illegally since Egypt upon ratification of the 1951 Convention made reservations to articles 20 and 22-24 which grant the same rights to refugees as to nationals with regard to elementary education, public relief, terms of labour and social security as well as article 12(1) relating to personal status.

<sup>182</sup> Author's experience as note 14 above.

<sup>183</sup> Sudanese nationals who entered Egypt before 1995 do not need residence permits but are still in danger of detention, they are often taken to the Sudanese Embassy, if their passports have expired, or have been lost.

community, some of which urges applicants to either hide information or falsify information in refugee applications.<sup>184</sup>

The yellow card for asylum seekers was developed by UNHCR in cooperation with the Egyptian Ministry of Foreign Affairs this card was first introduced in November 2002 and is issued after the Refugee Status Determination (RSD) interview. The card does not apply to those in the system prior to this date and therefore there are a number of refugees outside this protection. The yellow card is an improvement since it clearly explains that the asylum seeker is the concern of UNHCR and the applicant is able to go to the Ministry of Foreign Affairs (MFA) and have his/her yellow card stamped with a residence permit, thereby regularizing his/her status in Egypt whilst awaiting the results of the RSD interview.<sup>185</sup>

Extended delays are experienced by holders of both yellow and blue cards in obtaining residence permit stamps on their cards from the MFA, contributing further to the illegal presence of refugees in Egypt and their consequent vulnerability to detention. There are thousands of refugees who registered with UNHCR before the yellow card was introduced and only have small slips of paper as proof of their status as 'under the protection of UNHCR'.<sup>186</sup> Those refused asylum at the first instance are given the right to appeal within one month.

### **3.4 Protection failures in the refugee status determination in Kenya and Egypt**

#### **3.4.1 *Prima facie* status determination**

Kenya applies *prima facie* determination to Somalis and southern Sudanese but confine them to refugee camps.<sup>187</sup> Under this regime refugees in Kenya are not

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<sup>184</sup> Kagan as note 9 above.

<sup>185</sup> Kagan as above.

<sup>186</sup> Before the current system of issuing yellow cards to asylum seekers Refugees in Cairo were issued with a series of documents by UNHCR as they pass through the RSD process. When an asylum seeker first approaches UNHCR for protection, s/he is given a small slip of paper upon which is written his passport number and a date when s/he can come and pick up a UNHCR application form (often in 6 months time). This slip is not stamped, nor does it have a photograph or any Arabic writing on it. As this stage the applicant has no UNHCR number but is to be regarded as 'under the protection of UNHCR'. After the first period of waiting, the asylum seeker picks up his/her application form and is given another slip on which the date of the UNHCR interview will be written. In Kagan as above.

<sup>187</sup> Hyndman as note 10 above 30.

granted Convention status, but rather temporary asylum.<sup>188</sup>The *prima facie* recognition in Kenya is a case of the state choosing not to determine status, preferring instead to allow refugees to stay without establishing their legal personality in municipal law.<sup>189</sup>UNHCR often adopts its own determination process in order to establish who merits its assistance, and it runs the camps according to its own guidelines. These actions are solely a matter of internal UNHCR organization, and do not engage with municipal law.<sup>190</sup>Therefore, the refugees have been given what might be called temporary refuge or temporary protection, determined and implemented by UNHCR, rather than the host state.<sup>191</sup>

The application of the *prima facie* recognition in Kenya to only grant refugees' temporary asylum has compromised the human rights of refugees.<sup>192</sup>Refugees living in Kenyan camps have ceased being temporary since there is no short-term possibility of their return to their home countries after a certain period of temporary asylum.<sup>193</sup>In Kenya it is apparent that the granting of *prima facie* status is a means of avoiding recognition under the Conventions, which would trigger other obligations from which recognized refugee may benefit under.<sup>194</sup>Temporary refugee in Kenya as opposed to full Convention refugee status is sometimes explained by the lack of resources, options and facilities of the host state.<sup>195</sup>But some kind of temporary asylum is an evolving concept in customary international law, providing that the situation in the country of origin is objectively considered to warrant the definition of a

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<sup>188</sup> Hyndman as above 33.

<sup>189</sup> Wilde as note 21 above.

<sup>190</sup> Wilde as above.

<sup>191</sup> Donatella Luca, Questioning Temporary Protection 6 *IJRL* 535 (1994). The temporary protection systems of many states could more accurately be called indefinite protection regimes. Refugee protection frequently amounts to a system of prolonged 'warehousing' in which refugees are denied the right to integrate in the asylum state yet are unlikely to be restored to a meaningful membership in their home community; James Hathaway & R. Alexander Neve, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection 10 *Harv Hum Rts J* 115, 130-31, 158-59.

<sup>192</sup> In the temporary protection regime it is sometime argued that in the initial stages only, of temporary protection, can the human rights be limited. UNHCR, Note on International protection 1993: UN Doc. A/AC.96/815 para. 46.

<sup>193</sup> Joan Fitzpatrick, Flight from Asylum: Trends Toward temporary 'Refuge' and Local responses to forced Migration', 35 *Virg J, Int' Law* 161994).

<sup>194</sup> Hyndman as note 10 above 35.

<sup>195</sup> Joan Fitzpatrick as note 193 above 57.

refugee, which is the case for Somalia and Southern Sudan.<sup>196</sup> There is therefore need to grant refugees recognized under *prima facie* regime convention status.

### 3.4.2 Procedural deficiencies in the refugee status determination process

UNHCR eligibility officers conducting status determinations face heavy responsibilities. There is little time to do thorough investigations into the facts of a refugee's circumstances, and the opportunity for monitoring and evaluation of their work is rare. However, contrary to its own training manual, UNHCR staff members regularly fail to provide information about the status determination process or to review the asylum seeker's rights with them prior to the interview.<sup>197</sup> The interviews last, on average, for forty minutes.<sup>198</sup> In many cases of rejection, UNHCR is unable or unwilling to provide reasons to the asylum seekers.

Many of the asylum seekers have suffered years of torture or other personally traumatic events, such as rape. Interviewing these types of victims takes time and skill. The intensity of the issues can lead to burnout in protection staff responsible for doing the interviews, and can re-traumatize the asylum seeker.<sup>199</sup> The result is that asylum seekers may be prevented from communicating all the necessary details in their cases, and some may be wrongfully rejected or will not be referred to services they need. Some asylum seekers claim that the UNHCR interviewer did not spend enough time to fully understand the facts of the case. Others feel that they were unable to communicate all the details of their stories because they could not fully understand the dialect of the interviewer despite being given an opportunity to have an interpreter<sup>200</sup> or cut short by a UNHCR protection officers a common avoidance

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<sup>196</sup> Executive Committee Conclusions 19 (XXXI) on Temporary Refuge and 22(XXXII) on Protection of Asylum Seekers in Situation of Large-Scale Influx. Although temporary protection regime is acceptable as a link to the principle of *non refoulement*, it limits the rights to be exercised by the refugees. Executive Committee Conclusion No. 22, para. II (B0 on the treatment of asylum seekers who have been temporarily admitted to a country pending arrangements for a durable solution; Deborah Perlus and Joana F. Hartman, Temporary refuge: Emergency of a customary Norm, 26 *Virg. J. Int'l. L.* 551(1986) quoted in Hyndman as note 10 above.

<sup>197</sup> UNHCR RLD as above note 118, 14 (explaining, "before commencing the interview the applicant must be provided with certain information... [Including] the applicable refugee definition; the procedures followed with respect to the determination of refugee status.").

<sup>198</sup> Author's experience as note 14 above.

<sup>199</sup> Kagan as note 9 above.

<sup>200</sup> As above.

reaction among overly stressed humanitarian workers.<sup>201</sup> However, such incidents are in violation of the standard established in the Refugee Status Determination Handbook that the examiner should “ensure that the applicant presents his case as fully as possible and with all available evidence.”<sup>202</sup> UNHCR examiners who do not allow asylum seekers to fully explain themselves or refuse to examine whatever evidence is available, including physical evidence, are shirking their duties to fully consider the applicant’s case. The doubts that these interviewees had are only exacerbated by the fact that there is often no way of determining the accuracy of the transcript as prepared by the protection officer. UNHCR’s training manual recommends that the person conducting the interview read back notes to the asylum seeker in order to ensure accuracy.<sup>203</sup> However this is hardly the case in most interviews.<sup>204</sup>

Finally, the same UNHCR office often reconsiders an applicant’s appeal. Thus, in countries like Kenya where the government does not conduct its own status determinations, UNHCR is both the judge of refugee status and the protector/provider for refugees at every stage of the process.<sup>205</sup> The agency’s conflicting roles as service provider and status adjudicator cause refugees to lack confidence in the system. Entrusting RSD entirely to UNHCR under an express agreement in the case of Egypt and an implied one in Kenya has had certain adverse implications for refugees. For example under the 1954 agreement between UNHCR and Egypt there are provisions regarding the privileges and immunities which are bestowed on the staff of UNHCR which are in line with the same favourable treatment afforded to other United Nations Missions and special agencies in Egypt.<sup>206</sup> This makes for an awkward situation for asylum seekers since the governments of Egypt and Kenya delegated entirely the refugee determination

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<sup>201</sup> Danieli, Rodley, Weisaeth Ed, *International Responses to Traumatic Stress*, 1996 at 410 (“when working with victims of disasters, helpers often experience an array of stress (counter transference) reactions [including]1) avoidance reactions, characterized by distancing, denial, detachment, and withdrawal.”).

<sup>202</sup> UNHCR Handbook as note 39 above para 205 (i).

<sup>203</sup> UNHCR RLD as note 118 above 55 (noting that “a useful technique is to read back or go over those parts of the claim which remain unclear.”)

<sup>204</sup> Author’s experience as note 14 above.

<sup>205</sup> Verdirame as note 152 above.

<sup>206</sup> Convention on Privileges and Immunities of the United Nations, United Nations Treaty Series, 13 February 1946, United Nations Treaty series, vol.1, 15 and vol, 90, 137(corrigendum to vol. 1) which came in force on September 1946 and to which Egypt acceded to on 17 September 1948. The Convention notes in section 18(b) of article 5 that officials of the UN shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

process to an entity, which is immune from local jurisdiction.<sup>207</sup> As seen above UNHCR has systematically denied refugee status to many who have the legal right to such determination, violated the due process rights of refugee applicants at the expense of the states statutory obligations to provide international protection to refugees.

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<sup>207</sup> Jean Allain, Re-Capitulation in Egypt: UNHCR and the Abuse of Immunity, paper presented on 8 January 2003 at the 8<sup>th</sup> IASFM Conference Chiang Mai, Thailand.

## CHAPTER 4: TOWARDS AN EFFECTIVE REFUGEE STATUS DETERMINATION PROCESS IN KENYA AND EGYPT

### 4.1 Introduction

Kenya and Egypt are parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and are thereby obligated to recognize refugees<sup>208</sup> under the Convention's definition, and to ensure a series of rights for refugees meeting that definition. Their most important obligation is not to return refugees to a place where their lives or freedom are under threat.<sup>209</sup> Article 33 of the 1951 Convention states this obligation, which is a fundamental principle of international refugee law and is now an accepted principle of customary international law.<sup>210</sup> Host governments, such as Kenya and Egypt,<sup>211</sup> are responsible for preventing and punishing human rights abuses committed against all people within their territory – including asylum seekers and refugees.<sup>212</sup> Under Article 35 of the 1951 Convention, governments are required to cooperate with UNHCR, particularly in its supervisory function.

Kenya and Egypt are also parties to the 1969 Convention Governing the Specific Aspects of Refugee Protection in Africa, which enlarges the refugee definition to include people, compelled to seek refuge owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin. Kenya through UNHCR has implemented its

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<sup>208</sup> ExCom General Conclusion on International Protection No. 85, 1998, para (d).

<sup>209</sup> 1951 Convention as note 1 above art 33.

<sup>210</sup> The customary international law norm of *non-refoulement* protects refugees from being returned to a place where their lives or freedom are under threat. International customary law is defined as the general and consistent practice of states followed by them out of a sense of legal obligation. That *non-refoulement* is a norm of international customary law is well established. See e.g. UNHCR Global Consultations on International Law, Cambridge Roundtable 9-10 July 2001; "Problems of Extradition Affecting Refugees," ExCom Conclusion No. 17, 1980; ExCom General Conclusion on International Protection, 1982; *Encyclopedia of Public International Law*, vol. 8, p. 456. UNHCR's ExCom stated that *non-refoulement* was acquiring the character of a peremptory norm of international law, that is, a legal standard from which states are not permitted to derogate and which can only be modified by a subsequent norm of general international law having the same character. See ExCom General Conclusion on International Protection No. 25, 1982.

<sup>211</sup> State responsibility under international law is linked to each state's sovereign right to exercise its jurisdiction. See e.g. *The Case of the S.S. Lotus*, P.C.I.J. Ser. A. No. 10,927.

<sup>212</sup> See e.g. *Mavrommatis Palestine Concessions*, P.C.I.J. Ser. A. No. 2, 1924.

obligations under the OAU Refugee Convention by affording *prima facie*<sup>213</sup> status to refugees fleeing Sudan and Somalia although only according them temporary protection.<sup>214</sup> In Egypt individual RSD by UNHCR is the only means of granting status. The office's recent application of the 1969 Convention is hoped to allow recognition on the *prima facie* regime for refugees from Somali and Southern Sudan.

UNHCR's involvement in status determinations for asylum seekers is governed by the standards it sets in the Handbook on Procedures and Criteria for Determining Refugee Status, which is founded in international law since it is based on the conclusions of UNHCR's Executive Committee.<sup>215</sup> According to the Refugee Status Determination Handbook, applicants for refugee status should receive the necessary guidance as to the procedure to be followed.<sup>216</sup> A person's protection from *refoulement*<sup>217</sup> from the host country depends on the fairness and effectiveness of UNHCR's RSD procedures. If individual RSD procedures are not designed to give a fair hearing to applicants' claims, people in danger of persecution at home are likely to be rejected incorrectly, putting them in danger of deportation.<sup>218</sup> The non-implementation of procedural standards increases the risk of mistaken rejections and leaves *bona fide* refugees in danger of *de facto refoulement*.<sup>219</sup>

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<sup>213</sup> Throughout the world, there are many situations in which refugees have fled conditions of generalized insecurity and conflict. When refugees flee in large numbers to neighbouring countries, particularly in less developed regions of the world, it is not usually possible to ascertain whether every person involved in the influx actually meets the criteria for refugee status. Low-income countries frequently do not have the logistical, administrative, or financial capacity to undertake individual status determinations. Instead, there is a general assumption that when conditions are objectively dangerous in a country of origin, refugees are recognized on a *prima facie* basis (i.e. without the need for further proof), and are afforded protection accordingly. See e.g. "Protection of Asylum-Seekers in Situations of Large-Scale Influx," ExCom Conclusion No. 22, 1981 (noting that persons who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country" are asylum-seekers who must be "fully protected," and "the fundamental principle of *non-refoulement* including non-rejection at the frontier—must be scrupulously observed."). Quoted in HRW Report as note 19 above.

<sup>214</sup> Hyndman as note 10 above 33.

<sup>215</sup> UNHCR Handbook as note 39 above is an authoritative interpretative guide and is treated as such by governments. For example, the U.S. Supreme Court has found the Handbook's guidance "significant." See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that the Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform.... and has been widely considered useful in giving content to the obligations that the Protocol establishes.").

<sup>216</sup> As above para 192(i).

<sup>217</sup> Goodwin-Gill as note 20 above.

<sup>218</sup> As above 117.

<sup>219</sup> Kagan as note 9 above.

UNHCR has been negotiating for several years with the Government of Kenya and Egypt to accomplish a transfer of RSD to state authorities, but there is still no concrete, agreed plan for it to happen. In lieu of a commitment to take over RSD in by the respective governments, UNHCR could follow one of two main paths to resolve the problems posed by the current system and prevent *de facto refoulement*. First, UNHCR could implement changes to make its RSD procedures fully fair and effective in accordance with general principles of law and the advice it issues to governments.<sup>220</sup> However, this may be a challenge for UNHCR given the resource strain imposed by individual refugee status determination. Secondly, UNHCR could use the *prima facie* or "manifestly well-founded" recognition for most refugees, which follows UNHCR's usual practice when the number of asylum-seekers makes fair individual RSD impractical.<sup>221</sup> This solution would allow UNHCR to concentrate its core resources on protecting those refugees in most need of its assistance.

#### **4.2 Fair and efficient individual refugee status determination practice**

The UNHCR Executive Committee initially addressed the issue of fairness in RSD in Conclusions reached in 1977.<sup>222</sup> UNHCR has recognized and identified the core procedural safeguards necessary to preserve the integrity of the asylum regime as both fair and efficient.<sup>223</sup> In advice to governments, UNHCR has said that the importance of these procedures cannot be overemphasized. A wrong decision might cost the person's life or liberty.<sup>224</sup> The agency has called fair and efficient asylum procedures essential for full application of the 1951 Geneva Refugee Convention.<sup>225</sup> The U.N. General Assembly, to which UNHCR is accountable, has urged access, consistent with relevant international and regional instruments, for all asylum-seekers to fair and efficient procedures for the determination of refugee status and the granting of asylum to eligible persons.<sup>226</sup>

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<sup>220</sup> Alexander as note 35 above 286.

<sup>221</sup> As is done in Kenya but without restricting them to live in camps and granting them Convention status.

<sup>222</sup> UNHCR Executive Committee Conclusions No. 8.

<sup>223</sup> UNHCR, Asylum-Processes as note 116 above.

<sup>224</sup> RLD as note 118 above cap 2.

<sup>225</sup> UNHCR Asylum-Processes as note 116 above.

<sup>226</sup> G.A. res. 51/75 4, 51 U.N. GAOR Supp. (No. 49) at 208, U.N. Doc. A/51/49 (vol. I) (1996). See also G.A. res. 50/152 5, U.N. Doc. A/RES/50/152 (1995) ("Reiterates the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status or, as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted such protection.").

UNHCR has also made clear that its own RSD procedures should be held to the same standards as governments, saying that the main elements of due process applicable to governments must also apply to UNHCR if we are to ensure fair and proper examination of applications.<sup>227</sup> UNHCR-Cairo office's January 2002 Standard Operating Procedures on RSD Interviews directs UNHCR officers to apply Article 14 of the International Covenant on Civil and Political Rights, which guarantees that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>228</sup>

#### 4.2.1 Access to procedures and right to remain in the host country

Effective RSD requires that asylum-seekers have access to the procedures to apply for protection, and be allowed to remain in the host country while their cases are pending at both the first instance and appeal stages.<sup>229</sup> This calls for proper identification to prove that asylum seekers have a temporary right to remain in the host country as required by internationally agreed standards.<sup>230</sup> The current procedures in Kenya and Egypt are flawed with no guarantee that an asylum seeker will be accorded an opportunity to remain. Refugees who have been rejected without fair RSD process in Cairo are in thousands and risk of being deported.<sup>231</sup> The lack of proper documentation for refugees in Kenya for example make them vulnerable at the hands of security forces who will arrest them and deport them as illegal aliens.<sup>232</sup> The temporary protection accorded to prima-facie refugees without Convention status denies such refugees basic rights of a Convention refugee.<sup>233</sup>

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<sup>227</sup> RLD as note 118 above.

<sup>228</sup> ICCPR as note 115 above art 14.

<sup>229</sup> UNHCR EXCOM Conclusion No. 8 (1977); UNHCR, Fair and Expeditious Asylum Procedures 3 (1994).

<sup>230</sup> See UNHCR Executive Committee Conclusions No. 35(d) (1984) ("Recommended that asylum applicants whose applications cannot be decided without delay be provided with provisional documentation sufficient to ensure that they are protected against expulsion or *refoulement* until a decision has been taken by the competent authorities with regard to their application.").

<sup>231</sup> Kagan as note 9 above.

<sup>232</sup> Hyndman as note 10 above 39.

<sup>233</sup> The 1994 Note on International Protection recognized that there may be some persons unwilling or unable to return when temporary protection is lifted; as the situation in Bosnia and Herzegovina shows, hopes for an early safe return are not always realized, and at certain point the refugee's need for stability and greater certainty may call for standards of treatment more appropriate for a prolonged stay, and even eventual conversion to a more definitive status...temporary protection, like refugee status, should last as long as there remains a need for international protection(or until conversion to a more permanent status). See also General Conclusion on International Protection No. 74 (XLV) 1994, para. (t).

#### **4.2.2 Right to information about the procedure to be followed**

UNHCR guidelines establish that it is essential for UNHCR to provide asylum-seekers full and accurate advice and information about the refugee status determination procedure.<sup>234</sup> Many key operating procedures remain closed from the public in UNHCR Kenya and Egypt. While individual cases need to remain confidential, UNHCR's General Operating procedures and policies should be disseminated.<sup>235</sup> A system, which openly submits itself to scrutiny, is more likely to maintain its integrity.<sup>236</sup> There should be provision to all asylum seekers of standardized clear written information- in their own languages- on the criteria for refugee status and the procedure used by UNHCR field offices.<sup>237</sup>

#### **4.2.3 Right to a hearing before a competent official**

UNHCR guidelines establish that refugee applicants have the right to present their cases to a designated, qualified body.<sup>238</sup> Implied in this standard is the need to provide competent, well-trained interviewers for RSD cases. UNHCR-Cairo's Standard Operating Procedures require interviewers to explain the RSD procedure to applicants, including the format for questioning, the importance of telling the truth, and the right to ask for a break.<sup>239</sup> UNHCR's standards require: that at all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel.<sup>240</sup> UNHCR should therefore promote free access to independent legal advice and representation in relation to refugee status determination. This could be in the form of encouraging and facilitating the presence of legal representatives or other advisers at all interviews and appeal hearings and permitting the asylum seekers to have access to their files, materials and information relied upon to make their decisions.

#### **4.2.4 Right to written reasons for rejection and evidence adduced**

UNHCR's standards require that all applicants should receive a written decision automatically, whether on admissibility or the claim itself. If the claim is rejected or

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<sup>234</sup> UNHCR, Asylum-Processes as note 116 above.

<sup>235</sup> Alexander as note 35 above 287.

<sup>236</sup> As above 286.

<sup>237</sup> As above 286.

<sup>238</sup> UNHCR ExCom as note 222 above.

<sup>239</sup> UNHCR-Cairo SOP RSD Interviews 9.

<sup>240</sup> UNHCR Asylum-Processes as note 116 above.

declared inadmissible, the decision should be a reasoned one.<sup>241</sup>This standard is currently not implemented at UNHCR in Kenya.<sup>242</sup>In Egypt the office's internal procedure calls for interviewers to write assessments of applicants' cases and make recommendations about the cases to their supervisors. These assessments include a summary of basic facts of the claim, a credibility assessment, and legal reasoning about the application of the refugee definition.<sup>243</sup>However, the office withholds these assessments from the applicants concerned.<sup>244</sup> Refugees should be given full written decisions including reasons for any decisions, particularly where claims are rejected.

The basic concepts of fairness and due process require that people have notice of the case they must meet, especially the evidence considered in their cases. The right to examine all evidence is recognized as a general principle of administrative law. United Nations guidelines have emphasized:

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest possible time.<sup>245</sup>

Decisions based on withheld evidence and reasons appear arbitrary and cannot be subject to the usual checks against incorrect decisions. They prevent applicants from being able to provide explanations, clarifications, or simple corrections that might clear up misunderstandings from incomplete facts. Other procedural protections depend on allowing the applicant to review all the evidence considered in his or her case. The right to be heard is limited if a person cannot know what evidence or allegations he or she confronts. The right to counsel is undermined if a person or his lawyer cannot analyze the evidence and reasoning in a case. Likewise, appeals have less utility if a person cannot understand the evidence that supported the original rejection.<sup>246</sup>

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<sup>241</sup> As above; RLD as note 118 above 17 ("If the applicant is not recognised, the reasons on which the negative decision is based should be made available to him."); Council of Europe, Committee of Ministers Recommendation No. R (81) 16 iii (7) (1981) (endorsed by UNHCR in 1989 in Determination of Refugee Status 2, at page 16); OAU-UNHCR Guidelines for National refugee Legislation and Commentary (1980) (Where the standing refugee body rejects an application for recognition of refugee status, it shall so notify the applicant and, where appropriate, shall inform him of the grounds for rejection).

<sup>242</sup> HRW Report as note 19 above.

<sup>243</sup> Described in internal version of January 2002 SOP RSD Interviews as note 233 above 12.1.

<sup>244</sup> Author's experience as note 14 above.

<sup>245</sup> Basic Principles on the Role of Lawyers (Principle 21), Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>246</sup> Alexander as note 35 above 287.

General principles of administrative law require that the higher the stakes in a procedure, the more people should have access to all evidence considered.

[C]ompliance with a fair procedure should require that [a person] is informed of the case against him, to the extent that there is one, so that he can tailor his submissions accordingly and, where appropriate, refute some of the allegations, correct mistakes, or explain away otherwise damaging evidence. ...Clearly the more that is at stake for the applicant, the greater the obligation to give notice of the case to be met.<sup>247</sup>

The stakes in refugee cases are extremely high, with people's lives or physical well being potentially in jeopardy. UNHCR is hence under an obligation to give applicants full notice of the case to be met. In the United States, the government has attempted to withhold evidence in deportation and asylum hearings in special "security" cases (often referred to as the use of "secret evidence"). UNHCR has acted against the withholding of evidence in asylum proceedings in the United States. In the 1998 case of *Anwar Haddam*, an Algerian man, the U.S. Government attempted to withhold evidence used to exclude him from refugee protection. UNHCR issued an opinion to the U.S. Government supporting his asylum application, and dismissing evidence that was withheld. UNHCR wrote in its opinion:

As certain facts are in dispute in Mr. Haddam's case, and some evidence has been withheld from review as classified, we have limited our analysis to the findings of the Immigration Court's opinion.<sup>248</sup>

If UNHCR believed that withholding such evidence was permissible, it would have had to defer to the government's decision. In its supervisory role on the implementation of the 1951 Refugee Convention, UNHCR considered evidence withheld from an asylum-seeker irrelevant in its refugee status determination.

Evidence routinely considered by UNHCR in both countries and withheld from applicants includes information about their countries of origin (including some information that is not in the public domain), medical evaluations of their bodies and mental health, and testimony by other UNHCR applicants, including members of their own families. Applicants are not provided transcripts of their own interviews at UNHCR. In other countries, asylum hearings are recorded and applicants are provided transcriptions and are sometimes given the opportunity to read, correct, and sign them.<sup>249</sup> Criminal procedure in many countries allows witnesses and suspects in

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<sup>247</sup> Michael T. Moran, *Administrative law*, 2<sup>nd</sup> Ed. at pages 136-7, London: Old Bailey Press (1999).

<sup>248</sup> Advisory Opinion by Acting Regional Representative Bemma Donkoh (June 12, 1998). The U.S. Board of Immigration Appeals eventually blocked Mr. Haddam's deportation, deciding that he fell within the protections of the U.N. Convention against Torture. See *In Re Anwar Haddam*, File: A22 751 813, 2000 WL 1901995 (BIA 2000).

<sup>249</sup> HRW Report as note 19 above; Mike Kagan as note 9 above.

investigations to read and sign statements made to police. The opportunity to correct the transcript of one's own interview has greater importance because the risk of errant transcription is particularly high. At UNHCR-Cairo, professional transcription is not available and interviewers do not take a verbatim record of the interview.<sup>250</sup>

Interviewers should read back the transcript of an applicant's testimony to the applicant to ensure its accuracy, and to ask applicants to clarify or explain any inconsistencies. The memorandum permits sharing case summaries with applicants.<sup>251</sup> The procedure would be further improved by having applicants read the transcripts of their interviews, make corrections, and sign them to ensure their accuracy.

UNHCR should reform its procedures so that applicants are routinely provided copies of all evidence and analysis relied on in decisions on their RSD applications including but not limited to their own interview transcripts, documents, country origin information, legal opinions, case assessments, and reasons for decision.

#### **4.2.5 Right to an impartial decision-making process**

Inherent in any fair RSD system is the principle that decision-making must be fair and impartial.<sup>252</sup> There is no evidence of systematic discrimination or partiality in status determination by UNHCR staff but while intentional prejudice for or against applicants is not a major concern, a review of UNHCR decision-making by different interviewers gives reason for concern that the internal decision-making process could be subjective.<sup>253</sup> There are obvious examples of inconsistency in decision making ranging from recognizing for example one brother to rejecting the other who have gone through the same experiences, fled at the same time narrate their experiences to different interviewers and get different verdicts even at appeal stage.<sup>254</sup>

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<sup>250</sup> See UNHCR-Cairo SOP RSD Interviews as note 239 above 10.3 ("The interviewer ... will take detailed notes on the most relevant aspects of the claim (both questions and answers). She/he will take summary notes on potentially relevant aspects of the claim. She/he will not necessarily take notes on the clearly irrelevant statements unless they highlight a significant credibility issue. The interview transcript in the RSD [file] should preferably be typed by can also be handwritten, if legible.")

<sup>251</sup> UNHCR Guidelines on the Sharing of Information on Individual Cases 27 (August 2001).

<sup>252</sup> ICCPR as note 115 above art 14; Council of Europe Recommendation No. R(81)16 1 (1981) ("all asylum requests shall be dealt with objectively and impartially.")

<sup>253</sup> Author's experience as note 14 above.

<sup>254</sup> As above (a number of such examples in file with the author).

#### 4.2.6 Appeals

Since 1980, UNHCR has called on governments to provide rejected asylum-seekers access to an independent administrative appeal, and has reiterated this standard several times since.<sup>255</sup>In 2001, UNHCR explained international legal standards regarding RSD appeals:

A key procedural safeguard deriving from general administrative law and essential to the concept of effective remedy has become that the appeal be considered by an authority different from and independent of that making the initial decision.<sup>256</sup>

The United Nations Human Rights Committee has emphasized that the means by which adjudicators are appointed, compensated, dismissed, and promoted are critical factors in ensuring the competence, impartiality, and independence of any judge or tribunal.<sup>257</sup> These criteria protect against conscious bias. More fundamentally, they protect against unconscious partiality by ensuring that an appeal provides a fresh, disinterested review by an adjudicator with no stake in the first instance decision. There should be an establishment of an independent and impartial body to decide appeals, outside the branch office structure and allow domestic courts to review such decisions.<sup>258</sup>

#### 4.3 *Prima facie* or group protection

The second option for UNHCR in Egypt like in Kenya would be to abandon individual RSD for most refugees<sup>259</sup>by adopting a *prima facie* protection system, or a streamlined means of recognizing manifestly well-founded refugee claims.<sup>260</sup>Where individuals within a group of asylum-seekers are likely to be refugees but the number of refugee applicants makes it impractical to perform individual status determination, UNHCR normally opts to use *prima facie* recognition.<sup>261</sup>In such systems, all asylum-seekers from particular countries or territories are considered automatically to be

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<sup>255</sup> See OAU-UNHCR Guidelines for National Refugee Legislation and Commentary (1980); UNHCR, Fair and Expedient Asylum Procedures (1994); UNHCR, Refugee Protection: A Guide to International Refugee Law (2001); UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures (May 2001).

<sup>256</sup> UNHCR Asylum-Processes as note 116 above.

<sup>257</sup> U.N. Human Rights Committee General Comment No. 13 at para. 3 (1984).

<sup>258</sup> Currently decisions made by UNHCR are immune from the court process due to the Immunities clause in the Convention on the privileges and Immunities of the United Nations. As above United Nations Treaty series.

<sup>259</sup> In this case Somalis and Southern Sudanese.

<sup>260</sup> Jackson as note 49 above 3.

<sup>261</sup> UNHCR Handbook as note 39 above 44:Jackson as note 49 above.

refugees, and receive legal protection in the country of asylum without individual status determination.<sup>262</sup>

*Prima facie* protection is usually undertaken in cases of large-scale influx.<sup>263</sup> The need for a group approach as distinct from an individual approach is based on two factors. Firstly group determination normally relates to circumstances of a fundamental and disruptive nature, resulting in a large scale, and often simultaneous, exodus of persons. If such situations involve what may be termed a persecutory element they may justify a determination of group refugee character according to the convention definitions.<sup>264</sup> Most of the refugees in Kenya and Egypt are from Southern Sudan and Somalia where they are fleeing from persecution either on the basis of the 1951 Convention<sup>265</sup> grounds or due to events seriously disturbing public peace thereby falling within the 1969 extended definition<sup>266</sup>. Secondly, in situations of the type mentioned, an individual screening of every member of the group is normally impracticable, in view of the large numbers involved. Thirdly the technique of individual screening may itself be of little relevance. This is because the reasons for departure are referable to a specific event or events- often involving threats to life or personal safety- that have led to the departure of the entire group. These factors make it necessary to place the emphasis on the objective situation in the country of origin, and to have recourse to what has come to be known as *prima-facie* determination of group refugee character.<sup>267</sup> This is usually the case for Southern Sudanese and Somali refugees.<sup>268</sup>

With declining UNHCR resources and no agreement to transfer RSD to the Government, the number of asylum application in Kenya and Egypt has overwhelmed the country's capacity to process individual applications fairly. If the

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<sup>262</sup> *Prima facie* recognition still allows UNHCR to individually reject people who are excluded from refugee status, such as war criminals and other people who have committed a serious non-political crime.

<sup>263</sup> Rutinwa Bonaventure, *Prima Facie Status and Refugee Protection*, New Issues in Refugee Research *Working Paper No 69, UNHCR October 2002*; Hyndman as note 1 10 above.

<sup>264</sup> Jackson as note 49 above 2.

<sup>265</sup> 1951 Convention as note 1 above art 1.

<sup>266</sup> 1969 Convention as note 4 above art 1(2) definition.

<sup>267</sup> Jackson as note 49 above.

<sup>268</sup> Virtually all Somalis from minority clans are recognised as refugees currently but through individual screening at UNHCR Cairo. At the time of writing (September 2003) new refugee applicants interview appointments had been put on hold till March 2004 to try reduce the backlog of pending cases. This is an indication of the overwhelming number of refugee applicants at UNHCR Cairo, which could be reduced by using the *prima-facie* regime.

Governments do not set up their own RSD system, and if UNHCR is not able to locate enough resources to determine refugee status with complete standards of procedural fairness, then *prima facie* protection is the best means of preventing *de facto refoulement*.

The UNHCR in its Global Consultations advocates setting up of a means of quickly recognizing manifestly well-founded cases without intensive RSD procedures.<sup>269</sup> For instance, for asylum-seekers from Sudan and Somalia, members of religious or ethnic/clan minorities that are known to face severe discrimination or persecution could be presumed to be well-founded claims. *Prima facie* recognition could provide protection for most asylum-seekers, especially Sudanese and Somalis who make up the majority of the asylum-seeker population in both countries. UNHCR could opt to continue individual RSD for other nationalities, but it would be more likely to have the resources to implement standards of procedural fairness as discussed above because it would no longer need to process such a large number of applications.

This type of system would be consistent with both countries obligations under the OAU Refugee Convention. Most of the Sudanese and Somali refugees are directly or indirectly displaced by war and mass violence. They hence fall within the African extended refugee definition, which protects people forced to flee by events seriously disturbing public order in either part or the whole of his country. Given the continuing violence and displacement in both countries, it is unrealistic to expect that many Sudanese and Somali asylum-seekers can return home without a fundamental, effective and durable change in circumstances.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

Refugee status determination is the linchpin of refugee protection because it is the means by which those who need protection are identified.<sup>270</sup> UNHCR's long-held official position is that the Government, not by the United Nations, should conduct refugee status determination.<sup>271</sup> If RSD were transferred to the Government, the same standards of fairness would have to be implemented, and fair procedures would still require significant resources. UNHCR has been negotiating with the Government to accomplish a transfer for several years, and there is still no concrete, agreed plan for it to happen in Kenya and Egypt. At the same time, thousands of asylum-seekers continue to apply to UNHCR each year.

Refugee status determination has been part of UNHCR's work since its founding half a century ago, and it will continue to be an important activity for the foreseeable future.<sup>272</sup> UNHCR should therefore implement the standards it promotes for governments. Refugee status determination should not continue in its present form in Kenya and Egypt. UNHCR could make the necessary improvements to make RSD fully fair and effective. It could also adopt an alternative *prima facie* protection system but streamline the system to ensure refugees are granted Convention status and they are not confined to camps in the name of temporary protection. However, the present system in both countries of individual RSD lacks basic fairness and puts people in danger of being denied protection they need.

### 5.2 Recommendations

Adopt *Prima facie* recognition, which could provide protection for most asylum-seekers, especially Sudanese and Somalis who make the majority of the asylum-seeker population in both countries. UNHCR could opt to continue individual RSD for other nationalities, but it would be more likely to have the resources to implement

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<sup>269</sup> See UNHCR, Executive Committee Note on International Protection 88, A/AC.96/951 (13 September 2001).

<sup>270</sup> Alexander as note 35 above 285.

<sup>271</sup> UNHCR Executive Committee Conclusion No. 8(d) (1977) (expressing "the hope that all Governments party to the 1951 Convention and the 1967 Protocol which had not yet done so would take steps to establish such procedures in the near future.").

<sup>272</sup> UNHCR Statistical Yearbook 2001, 2001, 46.

standards of procedural fairness because it would no longer need to process such a large number of applications

The governments of Kenya and Egypt should adopt legislation that fully implements the government responsibilities under the 1951 Refugee Convention and the OAU Refugee Convention. Until comprehensive legislation is adopted, refugees living in camps or urban environments in Kenya should be afforded in law or administrative practice the rights granted to them under the Refugee Convention, primarily the rights to be protected against *refoulement*, to have equal access to the courts, and address the problem of camp confinement without legal status.

Provide asylum seekers, refugees, and their family members with identity documentation during each stage of the status determination process that acknowledges their permission to reside in the country, and jointly signed by the governments and UNHCR. To address the problem of *refoulement* the Judiciary in Kenya and Egypt should institute training for magistrates on international refugee law, particularly *non-refoulement*, and develop a standard inquiry during deportation proceedings for determining fear of persecution upon return.

Security agents in both countries should be trained to inquire into the *prima facie* or individualized refugee status of those in custody, and to contact UNHCR where appropriate. The police should allow asylum seekers or refugees to the opportunity to apply for refugee status without prejudice.

UNHCR should provide all asylum seekers with written information in their own language on: i) the legal standards to be applied; ii) a realistic indicative timetable for each stage of the determination process; and iii) when applicable, detailed reasons for rejection. For purposes of accountability, both the asylum seeker and the officer conducting the interview should sign this written information indicating that it was transmitted and received.

UNHCR offices should have adequate personnel and resources so that status determinations are fair and efficient, keeping in mind the particular difficulties and needs of applicants.

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