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THE AMERICAN UNIVERSITY IN CAIRO
الجامعة الأمريكية بالقاهرة

School of Global Affairs and Public Policy
Center for Migration and Refugee Studies

Shared responsibility in a new Egypt
A strategy for refugee protection

Michael Kagan

September 2011

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1. Executive summary

Refugees in Egypt have endured roughly five years of protection crisis. But as the High Commissioner for Refugees recently said, there is today an opportunity for “a new beginning for refugee protection in Egypt.” Taking advantage of this opportunity requires a bold strategy that addresses both the rights of refugees under law and the interests of Egypt as a country.

The best way forward is for UNHCR to ask the Government of Egypt to re-negotiate the 1954 Memorandum of Understanding with the stated purpose of implementing Egypt’s obligations under international law, based on the principle of shared responsibility. The shared responsibility principle would be embodied by several pillars:

- Egypt would re-commit itself to the principle of non-*refoulement* and to implementing the rights guaranteed to refugees in international law, including the right to work. However, Egypt would not be asked to permanently integrate refugees in most cases.
- UNHCR would agree to continue to conduct registration and refugee status determination (RSD), consistent with principles of due process, and the Government of Egypt will agree to respect UNHCR’s decisions on refugee status.
- UNHCR would continue to support social services for refugees, signaling that refugees should not be a drain on limited Egyptian state resources. However, Egypt would recognize refugees’ right to work consistent with its obligations under international law.
- Voluntary repatriation would be promoted when possible. Resettlement would be used for refugees who cannot repatriate, in order to limit the long term hosting burden for Egypt, and to provide access to a durable solution for refugees.
- Egypt would grant permanent residency to refugees who cannot repatriate or be resettled, but Egypt may limit the number of permanent residency grants to a quota linked to the number resettled to third countries.

2. Introduction: Time for a “new beginning”

On 1 April 2011, UN High Commissioner for Refugees (UNHCR) Antonio Guterres expressed hope for “a new beginning for refugee protection in Egypt.”¹ Today, for the first time in many years, it is possible to be optimistic about the prospects for refugee rights in Egypt. The January 25 revolution has upended decades of assumptions about how government relates to the governed. At the time of writing, the process of implementing democratic principles after years of autocracy is only just beginning, and during this transitional period it is difficult to anticipate the nature of the coming government. But it is clear that we are in a dramatic and dynamic time when progress on many fronts is possible.

Even if there had been no January 25 movement in Egypt, this would still be a pivotal time for refugee policy in the country. The wave of protest against authoritarianism in the Arab world is continuing, and has produced a large forced migration into Egypt from Libya. While this imposes substantial burdens on Egypt, it also focuses the world’s attention. South Sudan has become a fully independent state. This raises questions about the future of one of the largest groups of refugees in Egypt, who may now have improved prospects for repatriation.

Five years of protection crisis

The opportunities that present themselves now come not a moment too soon. Refugees in Egypt have endured roughly five years of protection crisis. Before 2005, Egypt had built a reliable record of not deporting refugees and asylum-seekers who were of concern to UNHCR. This is no longer the case. *Refoulement* and prolonged arbitrary detention have become substantial dangers. Over the same period, UNHCR’s relationship with refugees in Egypt has been strained, marked by repeated incidents of protests and occasional violence, with much refugee frustration stemming

¹ M. Fleming, “UNHCR chief applauds Egypt, calls for humanitarian access to Libya,” UNHCR News Stories (1 April 2011), available at <http://www.unhcr.org/4d95c3239.html> (last checked 24 April 2011).

from UNHCR's decision after 2004 to reduce its use of third country resettlement.

At the beginning of 2011, a person of concern to UNHCR who was detained by Egyptian authorities could not be confident that she would be able to meet with UNHCR, nor that UNHCR's pleas on her behalf would be heeded. A large scale human smuggling route has developed through Egypt, ferrying migrants (many of them presumably refugees) from the Horn of Africa toward Israel.² This produced high level concern for Egyptian foreign relations on the country's most sensitive border, and has sparked violence against migrants both by Egyptian border forces and by private criminals. In Cairo, criminal gangs have developed among refugee youths, creating a source of insecurity from within refugee communities.³ As recently as 17 August, two Sudanese men were shot dead by Egyptian border guards while trying to enter Israel.⁴

Even for those refugees who have avoided the worst calamities of the last five years, refugee protection in Egypt is limited. Refugees can stay (and still do stay in Egypt) essentially indefinitely, and can access government-issued residence permits. But local integration is nearly always impossible. Refugees do not have legal authorizations to work unless they gain sponsorship by an employer and meet stringent labor requirements, which is rare. Their access to social and economic services depends heavily on what has been called the "UNHCR surrogate state."⁵

Toward shared responsibility

Despite the tragedies of recent years, today we can begin to imagine a situation in which refugees who flee to Egypt might enjoy all of the rights guaranteed to them under international law. But to make this vision a reality, it is essential to conceive of refugees as individuals with autonomy

² See generally Cynthia Johnson, "Violence at Egypt border points to migration shifts," Reuters (30 July 2009).

³ For general background and recent security threats to refugees, see U.S. Department of State, *Country Reports on Human Rights Practices 2010, Egypt* (April 8 2011).

⁴ Associated Press, "Egypt kills to Sudanese men trying to cross into Israel" (18 August 2011).

⁵ A. Slaughter and J. Crisp, "A surrogate state? The role of UNHCR in protracted refugee situations," in G. Loescher, J. Milner, E. Newman, and G. Troeller (eds.), *Protracted Refugee Situations* (2008), pp.123-140.

and rights rather than as a problem to be managed and contained.⁶ It is necessary to develop to take advantage of flexibility built into international law. An effective strategy needs to address both the rights of refugees under law, their legitimate aspirations for a durable solution, and the interests of Egypt as a country. We need to think creatively about the roles to be played by the government of Egypt, the United Nations and the international community.

My purpose in this paper is to attempt to chart a strategy for moving beyond the status quo. Particular attention is paid to social and economic rights. In an effort to keep this analysis manageable, I focus on a central trinity of rights: Health, Education, and Work.

I conclude that in the social/economic sphere the most substantial gap that exists between refugee rights and recent Egyptian practice relates to the right to work, and that this should be a high priority in any future refugee protection strategy in Egypt. At the same time, social and economic rights cannot be dealt with when refugees cannot be confident in their basic physical security and liberty. Likewise, to address the interests of the Egyptian state it is artificial to examine any particular refugee right in isolation because the state must be concerned about the overall burden it will bear.

To address the reasonable aspirations of refugees it is essential to renew focus on access to durable solutions. Durable solutions, especially resettlement and local integration, are not rights *per se*, but they are critical concerns for both refugees and for Egypt. It is difficult to develop a politically sustainable strategy for achieving refugee rights without addressing the ultimate question of how a refugee situation will be brought to an end.

This paper makes a comprehensive proposal for renewing the relationship between Egypt, refugees, UNHCR, major resettlement governments, and donor states, based on the principle of shared responsibility. Effort is made here to clearly define issues and propose some ideas about how to address them, rather than use constructive ambiguity to avoid difficult problems.

⁶See J. C. Hathaway (2007) "Forced Migration Studies: Could We Agree to Just 'Date'?" *Journal of Refugee Studies* 20:3, pp. 349-369, 350.

While I have tried to offer specific suggestions and arguments, the issues dealt with here are profoundly challenging. I have been engaged in the promotion of refugee protection in Egypt since 1998, and my own thinking about the way forward has evolved during this time. This paper represents a best effort to use this experience to tackle the challenges head on. It is my hope that proposals here will encourage constructive and frank debate. At this pivotal time, it is essential that actors concerned with refugee rights in Egypt ask searching questions about the best way forward.

3. A note regarding recent events

This paper was originally written in late February and early March, and revised in August 2011. Just during this brief span of time, major events have occurred that may have substantial impacts on refugee policy in Egypt.

As of 21 June 2011, 176,133 Libyans had entered Egypt since the beginning of violence there in February.⁷ The vast majority of these Libyans are thought to have returned to their country, and few have applied for asylum. In principle they would likely have had a legal claim to refugee status at least so long as Libya remained in the grip of widespread violence and until political stability returns.⁸ In addition, 77,580 third country nationals who had been resident in Libya had entered Egypt as of 21 June.⁹ It is not clear how many of these are asylum-seekers or refugees, nor how many might remain in Egypt for extended periods.

In Cairo, escalating refugee protests forced the closure of UNHCR's office from 29 March to 3 April. The protesters demanded a substantial increase in the use of resettlement from Egypt.¹⁰ UNHCR had dramatically reduced

⁷ International Organization for Migration (IOM), Daily Statistical Report (Migration Crisis from Libya), 22 June 2011.

⁸ UNHCR has advised that Libyans are likely to qualify for refugee status, at least, under the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. UNHCR, Protection considerations with regard to people fleeing from Libya – UNHCR's recommendations (as at 29 March 2011) Update No. 1, at p. 2 (available at <http://www.unhcr.org/4d67fab26.html>, last checked 24 April 2011).

⁹ IOM, above n.7.

¹⁰ Mohamed Dayri, Regional Representative, "A message to all refugees and asylum-seekers" (17 February 2011) (on file with author).

resettlement referrals in recent years, an issue that I examine in this paper. On 4 April, UNHCR announced in an open letter that it would increase its 2011 resettlement target in Egypt to 2000.¹¹ That is roughly double the previously announced target, and four times the number of refugees resettled from Egypt in 2007.¹²

In remarks carried in the Egyptian press, High Commissioner Guterres appeared to link the “new beginning” with the resettlement increase, as well as continued international support for refugee welfare in Egypt. He said:

This is a new beginning in our relations and for refugee protection in Egypt. I hope the UNHCR will be able to enhance its assistance program, in cooperation with the Egyptian government, and increase the number of resettlement places for refugees staying in Egypt.¹³

This statement appears to describe a strategy of burden sharing and strategic use of resettlement that in very broad outlines may have some similarities to the proposal that I will put forward here.

Because of time constraints, I have generally not considered in this paper any development in refugee policy in Egypt since March 2011, except where explicitly noted. Neither the Libyan influx nor the recent changes in UNHCR resettlement policy will be examined in depth in this paper. This paper contains critiques of recent (pre-2011) UNHCR resettlement policy. It should be made clear that these critiques may not apply to current UNHCR practice, and should not be taken as such. One of the hallmarks of refugee protection strategy is the need for continuous flexibility. It is hoped that even as circumstances change the general approach offered here may help to frame a forward-looking response.

¹¹ Mohamed Dayri, Regional Representative, “Open letter to refugees and asylum seekers in Egypt,” (4 April 2011) (on file with author).

¹² See discussion of resettlement, below.

¹³ Steven Viney, “Sudanese protests force UNHR to close Cairo office,” *Al Masry Al Youm, English Edition* (2 April 2011).

4. The current practice of refugee protection in Egypt

Scale of refugee migration

UNHCR reports that there were 109,419 refugees and asylum-seekers in Egypt at the end of 2010.¹⁴ With the current influx of Libyans, this figure may have grown, but there is insufficient information today with which predict how long they might stay or how they might be categorized in the refugee system.

By far the largest group of refugees in Egypt is Palestinians, reported by UNHCR to number 70,024.¹⁵ They are primarily descendents of people forced to flee Palestine/Israel in 1948, or who fled subsequent hostilities in the Gaza Strip. They do not receive assistance from the United Nations Relief and Works Agency (UNRWA). They fall under the criteria of the 1951 Refugee Convention and the African Refugee Convention, though the Egyptian Government has resisted extending such protection to them.

The refugee population that receives assistance from UNHCR in Egypt officially numbered 39,359 at the end of 2010.¹⁶ It is conceivable that the real number of refugees in the country is smaller, since some may leave Egypt without notifying UNHCR. On the other hand, refugee advocates sometimes argue that UNHCR has errantly rejected *bona fide* refugees through faulty refugee status determination procedures, and some of these unrecognized “closed file” refugees may remain in the country.¹⁷ Also, UNHCR is currently denied access to some asylum-seekers who are detained while trying to enter Israel, also creating an undercount. The official UNHCR registry may thus not be a precise count of the relevant population, but it is likely the most reliable figure available.

To fully capture the scale of refugee migration in Egypt today, it is critical to take into account that migration patterns of asylum-seekers have changed substantially over the past five years. In recent years, the majority of asylum-seekers who enter Egypt pass through on their way to Israel using smuggling routes, without intending to seek protection in Egypt. For

¹⁴ UNHCR Global Trends 2010, Annex: Table 1.

¹⁵ *Ibid.*, Table 5.

¹⁶ *Ibid.*, Table 1 (asylum-seekers + refugees).

¹⁷ See Pascale Ghazaleh, “In ‘closed file’ limbo: Displaced Sudanese in a Cairo slum,” *Forced Migration Review* 16:24 (2003)

example, in 2008, 8373 people applied for asylum in Israel, nearly all of them arriving via Egypt.¹⁸ But only 2546 people applied for refugee protection in Egypt that year.¹⁹ In 2010, 2605 applied for refugee protection in Egypt, while 1448 applied in Israel.²⁰ It is critical to remember that some asylum-seekers pass through Egypt on their way to Europe as well and their numbers are even harder to pin down. Thus, it might be fair to estimate that several thousand people who want to seek asylum enter Egypt per year, but only some actually apply in Egypt.²¹

Given these patterns – and ignoring for present purposes the recent influx of Libyans -- it would seem that 35,000 to 40,000 is a fair rough estimate of the non-Palestinian refugee population *that is resident in Egypt*. In addition, 2000 or more other asylum-seekers are likely to pass through Egypt annually. The total number of people who are affected by Egyptian refugee policy in any given year could thus be estimated at over 40,000.

International legal framework

Egypt has no national refugee legislation, but has ratified several international treaties that confer rights on refugees, including (among others) the 1951 Convention relating to the status of refugees (“1951 Refugee Convention”), the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“African Refugee Convention”), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), the Covenant on Economic, Social, and Cultural Rights (“CESCR”) and the Convention on the Rights of the Child (“CRC”).

¹⁸ UNHCR Statistical Yearbook 2008, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 11 April 2011), Annex: Table 9.

¹⁹ Ibid. A decade ago, far more asylum-seekers who entered Egypt applied for refugee protection in Egypt. In 2000, more than 15,000 people applied for refugee protection in Egypt. That year only 134 people applied for asylum in Israel. UNHCR Statistical Yearbook 2000, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 11 April 2011), Table IV.1.

²⁰ UNHCR Global Trends 2010, Annex: Table 10.

²¹ There are reported estimates that around 2000 migrants, mostly from Sudan, Eritrea and Ethiopia, enter Egypt monthly, but that few seek refugee protection before attempting to make their way to Europe or Israel. “UNHCR Cairo discusses refugee challenges,” Egypt WikiLeaks Cables (Published in The Daily Telegraph), Ref: 09Cairo1993 (20 October 2009).

Some of these treaties contain definitions describing the class of foreigners who can be protected from forced return to places where their fundamental human rights would be violated. This is known as the principle of *non-refoulement*. Also, some treaties prescribe that refugees should enjoy certain rights in their host country.

The resulting legal framework is regrettably confusing, but Egypt's legal obligations toward refugees have been further obscured by three additional factors. First, Egypt entered several important reservations to the 1951 Refugee Convention. Second, in 1954 Egypt and UNHCR signed a Memorandum of Understanding²² ("MOU") which is more limited than the Convention in terms of the rights granted to refugees. It has never been officially renounced by either party and has operated as a parallel foundation for refugee policy. The Refugee Convention arguably expands on the MOU without contradicting it. But the parallel existence of the two instruments created an ambiguity, especially since the MOU speaks more directly to how refugee policy will be implemented. Third, the Government of Egypt has sometimes chosen to allow some groups of refugees to remain on its soil through discretionary acts rather than by application of binding law.

Refugee definitions

The 1951 Refugee Convention applies to people who are outside their countries of origin owing to a well-founded fear of persecution for reason of race, religion, political opinion, membership in a particular social group or nationality, and who are unable or unwilling to access the protection of their countries because of this fear. The Refugee Convention also contains important protections of refugees' civil, political, economic and social rights.

The CAT contains a strong expression of *non-refoulement* in its article 3: "No State Party shall expel, return ("refouler") or extradite a person to

²² *Accord entre le Haut Commissariat des Nations Unies pour les Réfugiés et le Gouvernement Egyptien*, (10 February 1954) online: <http://www.unhcr.org/refworld/docid/3edf49814.html> [accessed 30 September 2009].

another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This expands the 1951 Convention definition somewhat because it does not require that the torture be for reason of the refugee’s race, religion, political opinion, nationality or membership in a particular social group (often known as “nexus grounds”). But other than prohibiting forced return the CAT is silent about the rights that a protected person should enjoy in exile.

The African Refugee Convention expands the refugee definition to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in 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 allows victims of generalized violence to find protection, which they might not under the 1951 Refugee Convention. But other than repeating the principle of *non-refoulement*, the African Convention contains very few civil and political rights, and no social or economic rights. The African Convention’s definition is also not used, generally speaking, as a criterion for resettlement to third countries.

Refugee status in Egypt

In Egypt, asylum-seekers register with UNHCR, which also adjudicates their status (or lack thereof) under the 1951 Refugee Convention, African Refugee Convention, and UNHCR own “extended mandate.” In general asylum-seekers and refugees obtain documentation from UNHCR (known as yellow or blue cards), then report to the Ministry of Foreign Affairs, which asks the Ministry of Interior to grant them 6-month residence permits.

Although the bureaucratic particulars have changed through time, this basic framework can be traced back to UNHCR’s 1954 MOU with the Egyptian Government. The MOU provided that UNHCR would “cooperate with the governmental authorities in view of undertaking the census of and identifying the refugees eligible under the mandate of the High Commissioner.”²³ For its part, the Egyptian government agreed to grant

²³ MOU, above n. 22, article 2(a).

residence permits to “bona fide refugees ... who fall within the High Commissioner’s mandate.”²⁴

A decade ago, asylum-seekers with pending refugee status determination cases at first instance or appeal received “yellow cards.” Recognized refugees received “blue cards.” This remains the system today for most nationalities, in particular Eritreans, Ethiopians, Somalis and other nationalities.

But for two of the largest groups of refugees in Egypt, Sudanese and Iraqis, the yellow-blue distinction has lost its original meaning. In 2004, after the beginning of the southern Sudanese peace process, UNHCR suspended refugee status determination for Sudanese applicants and gave them temporary protection instead. Initially the suspension and temporary protection was officially only six months long, but it has been extended until today. Asylum-seekers with pending cases and new applicants were given yellow cards and are still regarded officially as asylum-seekers, even though some of them have now been in Egypt more than five years. Until recently, UNHCR conducted individual RSD in a minority of Sudanese cases, and now conducts RSD regularly for Darfurians and Northern Sudanese.

At the end of 2010, there were 10,035 Sudanese registered with UNHCR as recognized refugees,²⁵ most of whom were recognized before the suspension of RSD in 2004. But there were 12,269 Sudanese registered as asylum-seekers with pending cases,²⁶ most of whom were subject to the temporary protection system.

The RSD suspension policy may have extended protection to some Sudanese who were not strictly eligible under the legal criteria. The majority of Sudanese refugees in Egypt are presumed to be from South Sudan. Before 2004, the prototypical Southern Sudanese refugee claim in Egypt involved fear that the Khartoum government would target them because of perceived associations with the Sudanese People’s Liberation Movement (SPLM). But with the SPLM’s entry into the Sudanese government, and now with the independence of South Sudan, these fears of persecution may no longer be well founded. Many if not most of the

²⁴Ibid., article 6.

²⁵ UNHCR Statistical Yearbook 2010, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 31 August 2011), Annex: Table 5.

²⁶Ibid., Annex: Table 12.

southern Sudanese asylum-seekers might have been legitimately turned away were it not for the RSD suspension and temporary protection policy employed by UNHCR-Cairo.

However, the RSD suspension-temporary protection policy likely worked to the detriment of refugees from Darfur and other Sudanese with individual claims of persecution, who likely could have met the legal criteria and have not been able to have their claims heard as easily. It is unclear how much longer the suspension policy will continue in the wake of South Sudan's independence.

Iraqis who arrived in Egypt after the US-led invasion in 2003 have also been provided yellow cards and generally do not go through individual refugee status determination. However, unlike the Sudanese UNHCR has considered them to be refugees on a *prima facie* basis, which essentially acts as a favorable presumption that they do have legally valid claims. In 2009, the Iraqi refugee population in Egypt declined from over 10,000 at the beginning of the year to 6572 on December 31.²⁷ During that year, 1900 returned to Iraq, while 680 were resettled to third countries.²⁸ But this decline halted in 2010, when the Iraqi population grew slightly to 6,772.²⁹

Refugee rights under international law

Egypt is a party to the CESC, which guarantees social rights to "everyone." In 2009 the Committee on Economic Social and Cultural Rights said in General Comment No. 20: "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."³⁰ Article 12 binds Egypt to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

²⁷ UNHCR Statistical Yearbook 2009, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 11 April 2011), Annex: Table 5.

²⁸ Ibid.

²⁹ UNHCR, above n. 15.

³⁰ Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, para. 30, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

Education is also protected for all refugees by virtue of Egypt's obligations under CESCR, as well as the Convention on the Rights of the Child. Article 13 of the CESCR provides:

The States Parties to the present Covenant recognize the right of everyone to education. ... (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.

However, for economic rightsrefugees need to rely on the 1951 Refugee Convention. As a developing nation, the CESCR normally permits Egypt to limit economic rights for non-nationals. According to Prof. James C. Hathaway: "[E]xcept in fairly extreme cases bordering on exploitation, treaty supervisory bodies, including the Committee on Economic, Social and Cultural Rights, have generally been slow to critique exclusions from employment based on citizenship."³¹

Egypt is bound by the 1951 Refugee Convention's articles 17 and 18, which protect refugees' rights to employment. Article 17 protects the right to wage-earning employment. It contains two sections, the first of which grants the right to work to refugees "lawfully staying" to the same extent as "the most favourable treatment accorded to nationals of a foreign country." This applies typically when a refugee's status is recognized and she moves from a temporary to a long term residency status; it does not apply to asylum-seekers who have merely lodged an application.³² Recognized refugees in Egypt may be eligible for the "most favourable treatment" standard in article 17 (see argument in following section).

However, even if the most favourable treatment provision does not apply, the second part of article 17 states that "restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee ... who fulfills one of the following conditions." There are three conditions, two of which concern family

³¹J.C.Hathaway (2005) *The Rights of Refugees Under International Law* (Cambridge University Press), 740.

³²*Ibid.*, 754-755.

connections to the host government (marriage to a citizen or parenting a citizen child). The most widely applicable condition is “completed three years residence.”

Since protection of the national labor market is usually the main purpose of banning employment of foreigners, this exemption applies to most forms of wage labor. It should be noted that if a government has another valid justification, then a ban on foreign labor might still apply. This might be the case, for example, for work in sensitive security industries that some governments restrict for citizens only. In other words, any refugee who resides in Egypt for three years should be exempt from most restrictions on the employment of aliens.

The 1951 Refugee Conventions’ article 18 protects the right to self-employment, including a wide range of entrepreneurial activities, including starting new businesses (“the right to engage on his own account in agricultural, industry, handicrafts and commerce and to establish commercial and industrial companies.”). This right applies to any refugee “lawfully in their territory,” which means it applies to refugees who have only a temporary status (i.e. temporary protection or asylum-seekers with pending cases). The phrase “lawfully in” contrasts with the language used concerning wage-earning employment (“lawfully staying”), and requires less of a long-term status. However, it grants opportunities only to the same extent that “aliens generally in the same circumstances” have the right to self-employment. Refugees thus must fill the same requirements as any other foreigner to start their own businesses.

Egypt did enter a reservation to the 1951 Convention’s article 24, concerning labor legislation and social security. This does not affect refugees’ right to work under the Convention, but it does create ambiguity about whether refugees are protected by Egyptian law regarding

remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining (article 24 (1)a).

However, it is not clear that Egypt would have any reason to exclude refugees from its labor legislation, which would make refugees vulnerable

to exploitation and undermine Egyptian workers by allowing employers to hire refugees for less compensation. Egypt's reservation to this article appears more logically related to other provisions, such as providing social security to refugees.³³

Education, health and employment in practice

The 1954 UNHCR-Egypt MOU states that UNHCR would “help ... the most destitute refugees”³⁴ and would coordinate the activities of “welfare societies” for the benefit of refugees.³⁵ Other than residence permits, Egypt promised no other rights to refugees.

Today, Egyptian authorities play a somewhat greater role in the social and economic welfare of refugees, but only somewhat. In the field of education, Sudanese refugee families are generally able to register their children for Egyptian government schools. But other nationalities are generally unable to do so. UNHCR defrays the costs of education by providing tuition grants through its partner Catholic Relief Services. UNHCR allows refugees to obtain grants to send their children to community “refugee schools” mainly operated by church-based organizations. This provides an outlet for families that cannot obtain matriculation documentation, and especially for non-Sudanese families, but with the considerable limitation that the refugee schools are not accredited by the Ministry of Education.

UNHCR has been able to expand education efforts into early childhood education, offering school grants to children as young as three. The costs involved in this assistance are limited by the fact that the majority of the refugee population in Egypt is unmarried and without children. Yet there have been reported concerns that many refugee families do not apply for education grants to which they are eligible.³⁶ The number of refugee school

³³ Some sources suggest that these reservation exclude refugees in Egypt from right to work protections in the Refugee Convention. *See, e.g.*, Elizabeth Umlas, *Cash in hand: Urban refugees, the right to work and UNHCR's advocacy activities*, at para. 15, UNHCR PDES/2011/05 (May 2011). This is not correct. Egypt entered no reservations to article 17 and article 18, and is bound to recognize refugees right to work to the full extent of the Convention.

³⁴ MOU, above n. 22., article 2(d).

³⁵ *Ibid.*, article 2(e).

³⁶ “UNHCR Cairo discusses refugee challenges,” Egypt WikiLeaks Cables (Published in The Daily Telegraph), Ref: 09Cairo1993 (20 October 2009).

age children who receive UNHCR grants is around a third lower than the number registered with UNHCR. However, as we have seen it is possible that the number of refugee children actually in Egypt is lower than the number in UNHCR's registry.

Egyptian authorities prohibited Iraqi refugee children from attending government schools. UNHCR fills this gap with grants for private school fees. Also, Egyptian institutions of high education normally charge refugees foreigner rates for tuition.

Beyond education, refugee welfare depends nearly exclusively on UNHCR, charitable organizations and the efforts of refugees themselves. UNHCR supports two primary medical care systems to serve refugees. Caritas serves Sudanese, Iraqis and recognized (blue card) refugees. Refuge Egypt serves non-Sudanese asylum-seekers with pending RSD applications. UNHCR partially covers more expensive treatment for serious and chronic conditions, but there are usually costs for which refugees must find their own funds.³⁷ While this is not necessarily a satisfactory system, it should be noted that it is not necessarily worse than the predicament facing Egyptian citizens who need medical care.

However, the Egyptian Government places severe constraints on refugees' ability to support themselves economically through legal means. The residence permits provided to refugees by the Ministry of Interior contain neither the key phrase "Work is Permitted," nor the alternative "Work is not Permitted," which are standards for other visas and residence permits issued to foreigners in Egypt. This has meant that refugees can get work permits, in theory, but only if they find an employer to sponsor them (including the payment of fees), which includes the requirement that no Egyptian be available to fill the same job. This effectively limits legal employment to an extremely small, educated elite.

In effect, refugees are allowed to work in Egypt only if they meet the criteria required of other foreigners. This has led some to conclude that refugees "have the right to work."³⁸ This is true only in the sense that they are not barred by their refugee status from seeking a permit if they can fill the rigorous extra conditions. But refugees in general are not allowed to

³⁷ "UNHCR Updates on Refugee Situation in Cairo," Egypt WikiLeaks Cables (Published in The Daily Telegraph), Ref ID: 09CAIRO267 (12 Feb 2009).

³⁸ Umlas, above n. 33, paras.15, 18.

work legally in Egypt. A person in Egypt solely as a refugee cannot work legally, which deviates from the special protection for refugees envisioned by article 17 of the Refugee Convention.

Refugees survive economically in Egypt in part because Egyptian authorities have tolerated widespread unauthorized labor by migrants, especially in the sphere of domestic work.³⁹ A survey of 252 refugees in Egypt in 2003 found that 56 percent “stated that the main problem they encounter when looking for a job is the impossibility for them to obtain a work permit,” more than double the number citing lack of skills, cultural or language obstacles, or even general shortage of jobs.⁴⁰ UNHCR provides cash assistance to especially vulnerable refugees, including refugees with chronic illnesses, large families, single parents, and unaccompanied minors. However, Egypt reportedly objected to UNHCR’s efforts to initiate vocational training programs for refugees in Egypt unless there were assurances that the participants would leave via voluntary repatriation.⁴¹

Egyptian practice in light of international law

It should be queried whether Egypt can be considered to be fulfilling its obligations when services are provided by UNHCR instead of Egyptian authorities. International human rights law tends to set benchmarks – actual access to rights – while leaving it to states to decide how best to meet the standards. This flexibility is hardly surprising given the wide variety of roles that governments play in social and economic matters around the world, and it coincides with the flexibility that has evolved in UNHCR’s mandate,⁴² since UNHCR plays very different roles in different countries. It may be desirable for Egypt to develop its own systems for delivering services to refugees, but as a legal matter Egypt does not *per se* breach its obligations by depending on UNHCR to help it deliver medical

³⁹ R. Jureidini (2009) ‘Irregular Workers in Egypt: Migrant and Refugee Domestic Workers,’ 11 *International Journal on Multicultural Societies* 75-90, 78.

⁴⁰ UNHCR Regional Office (Cairo) (2003) *Refugee Self-Reliance in Cairo: Obstacles and Prospects*, 50.

⁴¹ “UNHCR Updates on Refugee Situation in Cairo,” Egypt WikiLeaks Cables (Published in The Daily Telegraph), Ref ID: 09CAIRO267 (12 Feb 2009).

⁴² See V. Turk (May 2010) “UNHCR’s Role in Supervising International Protection Standards in the Context of its Mandate,” Keynote Address, International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto, 3-4, 8.

and educational services to refugees, so long as it remains clear that final responsibility for providing access to rights rests with the sovereign state.

For instance, on health services, CESC Article 12(d) requires of Egypt “the creation of conditions which would assure to all medical service and medical attention in the event of sickness.” The plain language of this provision suggests that while the Egyptian state bears final responsibility for health access, it need not provide all required medical services directly. Since the state must only “create conditions,” it could adopt measures that make services available through the private sector, non-government organizations or international organizations.

Yet, while Egypt has flexibility about how it will comply with its obligations to refugees it cannot marginalize refugees to such an extent that they lose actual access to social and economic rights. The inability of non-Sudanese refugee children to attend government schools is especially problematic since refugee community schools are not accredited, making the education they can offer far less valuable. Egypt appears to be in breach of its international law obligations to refugee children.

As a country with a developing economy, Egypt is not bound to recognize the right to work of all migrants. However, Egypt is bound to protect the right to work of refugees protected under the 1951 Refugee Convention. It would be plausible to argue that all recognized refugees should enjoy the same treatment as Sudanese under the Four Freedoms Agreement, which gives Sudanese the right to reside and work in Egypt,⁴³ since this may be the “most favourable treatment” afforded any foreign nationals in Egyptian law. At a minimum, Egypt should be providing work authorizations to 1951 Convention refugees as soon as they complete three years of residency in the country. The only exceptions to this rule would be for narrow labor categories where Egypt has compelling reasons to exclude foreigners, other than a general desire to protect Egyptian workers from competition.

⁴³ T. Badaway (2010) “Report on Highly Skilled Migration in Egypt,” CARIM Analytical and Synthetic Notes, CARIM-AS 2010/49, 7.

5. Egyptian state interests

Egyptian refugee policy follows a pattern common to the Middle East and Africa of shifting responsibility for refugee matters to UNHCR,⁴⁴ relying on a phenomenon some writers have called the “UNHCR surrogate state.”⁴⁵ As Egypt moves toward a more open and democratic political system, it is tempting to hope that it may soon be possible to persuade the Egyptian government to enact refugee legislation and to establish the infrastructure for granting asylum to refugees. If achieved, this would begin a process of reversing the process of responsibility shift. The government would take the lead to protecting refugees on its territories. UNHCR would likely remain very important, but rather than play the lead role in implementing refugee policy at the front lines it would be able to play a supportive role, handing over functions to state ministries and providing capacity-building assistance. This is the state-UNHCR relationship envisioned by conventional understandings of international law.

If this vision can be achieved in a manner consistent with refugee rights, I would wholeheartedly applaud it. There are countries where new governments have made human rights a central pillar of their governing mandates, and then take important steps to build a genuine system of asylum; Ecuador and South Africa both illustrate this potential, at least to some extent. But I wish to sound a note of caution about what can realistically be expected of the Government of Egypt in the coming period.

One should not assume that democracy will automatically lead to better refugee protection policy. In the immediate region, Greece, Turkey, Israel and (arguably) Lebanon have had more freedom of the press and freer elections than pre-January 25th Egypt. Yet none of these states has established an effective system of refugee rights protection that could be considered worthy of emulation. The phenomenon of state-to-UN

⁴⁴M. Kagan (2011) *We live in a country of UNHCR: The UN surrogate state and refugee policy in the Middle East*, New Issues in Refugee Research Paper No. 201, UN High Commissioner for Refugees Policy Development and Evaluation Section, available at <http://www.unhcr.org/4d5a8cde9.html>.

⁴⁵A. Slaughter and J. Crisp, (2008) “A surrogate state? The role of UNHCR in protracted refugee situations,” in G. Loescher, J. Milner, E. Newman, and G. Troeller (eds.), *Protracted Refugee Situations* (Tokyo: United Nations University Press), 123-140.

responsibility shift occurs because it serves several important state interests.⁴⁶

First, it functions as a form of *de facto* burden sharing. Countries in the global south tend to bear a disproportionate burden of hosting refugees and have reason to resent the efforts of economically prosperous states to keep asylum-seekers from arriving at their shores. By marginalizing refugees and effectively forcing UNHCR (which is aided by donations from the global north) to fill gaps, states in the global south manage to defray some of the material costs that might otherwise be associated with hosting refugees.

Second, in Egypt as in most Arab states, the six-decade-old Palestinian refugee problem is a matter of extraordinary political sensitivity. Longstanding opposition to the permanent integration of Palestinian refugees indirectly complicates efforts to integrate non-Palestinians. It might be seen as difficult for the government to treat non-Palestinians considerably better, while also politically difficult to upgrade the status of Palestinians themselves.⁴⁷

Finally, Egypt receives refugees primarily from countries with which it has delicate bilateral relationships. Regardless of legal norms safeguarding the non-political nature of asylum, Egypt may fear that decisions on refugee applications would become irritants in its foreign policy. Leaving such decisions in the hands of UNHCR may make it politically easier for Egypt to grant protection in some cases.⁴⁸

While not an ideal, the existence of the UNHCR surrogate state provides a political foundation for hosting refugees where otherwise their presence might be intolerable for host governments. Absent a dramatic shift in the strategic interests of Egypt, attempting to reverse state-to-UN responsibility shift may be futile or even damaging.⁴⁹ However, it is essential that clear and explicit limits be placed on what can be expected of UNHCR. In particular, UNHCR cannot protect refugees from detention, violence, or deportation; only the state may perform these roles. Likewise, while UNHCR can build a parallel system for delivering medical care, only

⁴⁶ For a development of this analysis, see Kagan, above n. 44.

⁴⁷ Kagan, above n. 44, 11-12.

⁴⁸ *Ibid.*, 12.

⁴⁹ *Ibid.*, 21-22.

the state may permit refugees to seek employment as required by the 1951 Refugee Convention.⁵⁰

Challenges for refugees

There are several important reasons for skepticism about whether Egyptian democracy will benefit refugees as much as some might hope.

First, a freely elected Egyptian government will have a very crowded agenda, and will be under tremendous pressure to deliver on the economic and political aspirations of a newly empowered Egyptian citizenry. At a minimum, this will make it difficult for any proposals related to refugees to get substantial attention. Suggestions for more government resources to be spent on foreign refugees may be perceived as conflicting with the interests of Egyptians, as might proposals to extend the right to work to refugees.

Second, democratic governments are susceptible to popular xenophobia, creating a hostile environment in which to promote the rights of migrants. This danger can be seen in Europe, Australia, the United States, Israel, and South Africa, among other countries. Unfortunately, popular xenophobia against migrants, especially Africans, has been in evidence in Egypt. As noted earlier, migrant workers in Egypt have benefited to some extent from a peculiar policy of non-enforcement of existing Egyptian laws, allowing them to reside and work without official authorization. This kind of arbitrary non-enforcement is an unsteady foundation for refugee protection. While one must hope for progressive and tolerant law reform, it is possible that a new Egyptian government may come to enforce restrictive laws strictly, which could be detrimental to the interests of refugees and other migrants.

Expanded opportunities for advocacy

⁵⁰Ibid., 23-24.

Government openness and accountability would offer very substantial opportunities for refugee advocacy in Egypt, even without new refugee legislation or a genuine national system of asylum. I will list here just a few.

First, if Egyptian authorities relax restrictions on freedom of association, organizations devoted to refugee rights would be able to grow with greater ease, along with the rest of the Egyptian human rights movement. Refugees would be able to organize themselves more freely as well. Organizations interested in refugee protection have been able to organize, but the restrictive and somewhat Byzantine nature of NGO registration and regulation in Egypt has forced unnatural organizational structures and banking arrangements, and limit fundraising potential. This has likely slowed, though not prevented, the growth of private refugee advocacy in Egypt.

Second, if powers of the executive come to be more effectively regulated by civilian law, litigation in Egyptian courts will become a more effective means of defending refugee rights. Egyptian human rights organizations have engaged in impact litigation for many years, and some have begun to attempt to litigate stronger protections for refugees as well. But practical results have been limited both because Egypt's emergency law undermined the authority of civilian courts, and because security agencies tended to operate outside the law in any case. Stronger rule of law may make it possible to use courts to implement Egypt's international legal obligations to refugees, including the right to education and the right to work. Experience in other democracies, from Europe to South Africa, indicates that judicial involvement is often necessary to give governments an interest building a better refugee system.

Third, if government officials become accessible to the general public, new avenues for dialogue and practical problem solving will become available. This will help UNHCR, which has often been limited by restrictive protocols about how it must communicate with the government. But it also will open doors for non-government organizations to establish regular channels of communication with ministerial and parliamentary policy makers. In the past, UNHCR was effectively the only refugee advocacy institution with regular dialogue with the government.

These opportunities, should they become reality, reinforce each other. The ability to go to court can give advocates more leverage in dialogue with

government ministries. Stronger civil society can increase resources to defend refugees legally, and to build a broader political constituency interested in refugee welfare.

6. Durable solutions

Of all the issues involved in refugee policy in Egypt, perhaps the most controversial is the question of how to secure a durable solution for refugees. A durable solution might be defined as a way of permanently ending a refugee situation that is consistent with human rights. Durable solutions are positive alternatives to three other potential outcomes: long-term detention, *refoulement*, and “protracted refugee situations,” defined by UNHCR as cases where refugees remain in limbo for long periods of time. UNHCR has used five years as a rough benchmark.⁵¹

Usually, the most intense controversy has about resettlement policy, which has been the main cause of recent refugee protests outside UNHCR’s Cairo office, as well as Egyptian government complaints. UNHCR is often stuck in the middle because it is widely perceived as the decisive policy-maker on resettlement matters, a perception that is exaggerated though not entirely untrue. There should be more discussion of permanent residency in Egypt for at least some refugees, because it is difficult to foresee any realistic scenario where resettlement would be available for the majority of refugees in the country. This report makes proposals to establish this within the rubric of shared responsibility.

The following section of this report engages in a critique of the way resettlement policy has been used (or not used) by UNHCR in Egypt until 2011. It should be understood that what is presented here is primarily a discussion of UNHCR resettlement policy before 2011. This year, UNHCR has indicated important changes to resettlement policy which appear in general terms very much in line with the strategies. The issues that generated difficulties before this year are unlikely to go away. But the critique presented is not a criticism of current UNHCR policy.

⁵¹A. Guterres, “Enduring Exile,” in *Protracted Refugee Situations: High Commissioner’s Initiative* (December 2008), 2.

It should be said that clear discussion of resettlement policy is a challenge for several reasons. First, responsibility for resettlement policy is diffuse, since UNHCR can only refer refugees to resettlement countries, which make their own decision about individual cases, as well as overall quotas and priorities. Second, resettlement is not a right, although it is designed to facilitate access to rights. Thus, when refugees demand resettlement human rights advocates find it more difficult to support them than in the case of deportation or detention. Finally, there is clearly much less international capacity to resettle refugees than there are refugees who could benefit. This gap can create a pressure to manage unsatisfactory outcomes by artificially defining the need for resettlement narrowly to match the limited supply, and to attempt to lower refugees' expectations in the process.

It would be an error to translate the proportional page length of this discussion in this report into an assertion of the importance of resettlement relative to other matters. Yet in the experience of the author, resettlement policy is often the elephant in the room when almost any refugee protection question is discussed in Egypt. The pull factor thesis, which is discussed in detail below, often looms especially large. Because it is a central goal of this paper to stimulate frank debate, an extensive effort to bring these issues to light seems appropriate.

The resettlement question in Egypt

The Egyptian government, like most Arab governments, has generally resisted local integration. The 1954 Egypt-UNHCR MOU indicates that only repatriation or resettlement would be considered as durable solutions in Egypt. UNHCR agreed to facilitate voluntary repatriation,⁵² and to promote resettlement "in every possible measure, to the countries of immigration, the refugees residing in Egypt."⁵³ Voluntary repatriation has become more relevant in Egypt in recent years, especially for Iraqis, and is likely to be a substantial possibility for Southern Sudanese, but it does not appear to be a viable possibility for Eritreans, Somalis and Darfuris. Also, individual

⁵² MOU, above n. 22, article 2(b).

⁵³ *Ibid.*, article 2(c).

southern Sudanese and Iraqis may have unique reason to fear return which may prevent their repatriation.

Over the last two decades, UNHCR's use of resettlement from Egypt has not been consistent. For much of the 1990s, UNHCR resettled very few refugees from Egypt, often fewer than 300 annually.⁵⁴ In 1998 it began to resettle far more – 1364, up from 196 the year before⁵⁵ – reaching an eventual peak of 4110 in 2004.⁵⁶ But in 2004, UNHCR suspended RSD for Sudanese, effectively blocking access to resettlement for most new Sudanese arrivals. For the next two years, UNHCR resettled between 1000 and 2000 refugees per year.⁵⁷

Then, in 2007 the number of refugees resettled by UNHCR dropped to 443,⁵⁸ and fell below 200 in 2008.⁵⁹ In 2009 UNHCR resettled 712 (mostly Iraqis),⁶⁰ and 671 in 2010.⁶¹ It appears that UNHCR now intends to begin increasing its use of resettlement again. In March 2011, UNHCR's online 2011 Country Operations Profile for Egypt⁶² listed an objective of repatriating 2,000 Iraqis and Sudanese, and identifying 950 refugees for resettlement. The profile was silent about whether local integration would be available for the remaining refugees in Egypt, and it not why

⁵⁴ UNHCR Statistical Yearbooks going back to 1994 are available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 18 April 2011). In 1994, UNHCR reported only 100 Somalis resettled from Egypt, though there may have been smaller groups of other nationalities also resettled from Egypt. In 1995, UNHCR resettled 57 refugees from Egypt, 238 in 1996, and 196 in 1997. See UNHCR Statistical Yearbook 2004, Egypt Datasheet, available at <http://www.unhcr.org/44e96c842.html> (last checked 18 April 2011).

⁵⁵ UNHCR Statistical Yearbook 2004, Egypt Datasheet, available at <http://www.unhcr.org/44e96c842.html> (last checked 18 April 2011). See also UNHCR Statistical Yearbook 1998, available at <http://www.unhcr.org/3bfa31ac1.html> (last checked 18 April 2011), Annex: Table II.5. The 1998 Yearbook indicated that, counting Somalis only, UNHCR resettled 430 in 1998, compared to 30 in 1997 and 70 in 1996, and for Sudanese UNHCR resettled 890 in 1998, compared to 220 and 140 in 1997 and 1996 respectively.

⁵⁶ See UNHCR Statistical Yearbook 2004, Egypt Datasheet, available at <http://www.unhcr.org/44e96c842.html> (last checked 18 April 2011).

⁵⁷ See UNHCR Statistical Yearbook 2005, Egypt Datasheet, available at <http://www.unhcr.org/44e96c842.html> (last checked 18 April 2011); UNHCR Statistical Yearbook 2006, available at <http://www.unhcr.org/478ce34a2.html> (last checked 18 April 2011), Annex: Table 3.

⁵⁸ UNHCR Statistical Yearbook 2007, available at <http://www.unhcr.org/4981c3dc2.html> (last checked 18 April 2011), Annex: Table 3.

⁵⁹ UNHCR Statistical Yearbook 2008, available at <http://www.unhcr.org/4bcc5c9f9.html> (last checked 18 April 2011), Annex: Table 3.

⁶⁰ UNHCR Statistical Yearbook 2009, available at <http://www.unhcr.org/4ce5327f9.html> (last checked 18 April 2011), Annex: Table 3.

⁶¹ UNHCR, above n. 15, Table 3.

⁶² Available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486356> (last checked 14 March 2011).

resettlement would not be pursued for them as well.⁶³ However, UNHCR has since announced that it will more than double its 2011 resettlement target to 2000.

In general, UNHCR prioritizes for resettlement “those refugees with acute legal and physical protection needs and, in particular to the most vulnerable such as women-at-risk and unaccompanied children for whom resettlement has been found to be in their best interests.”⁶⁴ According to its global policy, UNHCR also makes eligible:

- Survivors of violence and torture.
- Refugees with medical needs that cannot be met in the first country of asylum.
- Family re-unification.
- Children and adolescents.
- Older refugees.
- Refugees lacking local integration prospects.

While there are sometimes debates about the application of all resettlement criteria in certain cases, I will concentrate on the one with the widest impact: *Lack of local integration prospects*.

The wide numerical fluctuations in resettlement from Egypt reflect critical changes by UNHCR in the application of the lack of local integration criteria, which was the primary basis for resettling refugees between 1998 and 2004. A factsheet about Egypt published by UNHCR in Australia in October 2004 said:

Current resettlement processing capacity is approximately 4000 refugees per year. With more reliance upon group submissions – and consistency with HQ and regional policy – it is hoped that UNHCR can sustain this number. ... The most common criterion for resettlement referral is lack of local integration prospects.⁶⁵

⁶³ The profile states “Opportunities for self-reliance, both as a precursor to durable solutions and to support community self-management, will be enhanced.” However, the services described are only in the health and education field. Neither economic rights nor the phrase “local integration” are mentioned.

⁶⁴ Ibid., Section 4.1.

⁶⁵ UNHCR RO Canberra, Fact Sheet – 2004 “Questions and Answers on Resettlement from Egypt” (Rev. Oct 2004).

More recently, UNHCR largely stopped using this criteria for resettlement referrals. However, UNHCR gave no public explanation for this change of policy. UNHCR has also not stated specifically how the recent increase in resettlement quota for 2011 will be translated into criteria that can be used in individual cases.

It should be acknowledged that global lack of resettlement slots will limit the availability of resettlement from Egypt. From 2006 to 2007, UNHCR resettlement submissions globally climbed 80 percent.⁶⁶ It is not necessarily a coincidence that resettlement from Egypt was curtailed at the same time, since in effect UNHCR globally was making more use of the limited slots available, creating more competition for refugees in Egypt. But this would suggest only that many cases in Cairo are a lower priority for limited spaces, not that refugees in Egypt no longer need resettlement to find a durable solution.

The pull factor thesis

Perhaps the most common reservation about frequent use of resettlement in Egypt is concern that it acts as a pull factor to asylum-seekers, since resettlement is primarily to economically developed states of the global north. The thesis is that resettlement of refugees can do more harm than good overall because it will motivate large numbers of new asylum-seekers to come to Egypt.

Before critiquing the pull factor thesis it is important to acknowledge that UNHCR has not publicly cited this idea to explain its durable solutions policy over the past decade in Egypt. The basic idea of the pull factor appears in UNHCR's *Resettlement Handbook*, which states:

In a number of situations around the world, where refugees lack local integration prospects, host countries expect UNHCR to facilitate resettlement of these refugees. When resettlement is undertaken in such contexts, there is an evident risk that additional asylum seekers and refugees will be attracted to the country or city concerned, leading to the

⁶⁶UNHCR, "Protracted Refugee Situations," UNHCR/DPC/2008/Doc. 02 (20 November 2008) at para. 82.

growth of an unmanageable (urban) caseload. In its discussions with authorities, UNHCR should point out that an approach exclusively promoting resettlement may increase rather than diminish the numbers of refugees residing in the country.⁶⁷

The thrust of this warning is not to rely exclusively on resettlement to provide durable solutions. But from 2007 until 2010, UNHCR in Egypt was tending toward the opposite extreme, referring refugees for resettlement only in fairly exceptional circumstances, and nearly removing resettlement entirely as a possibility for most refugees. In private meeting during this period and earlier in the decade the central hesitation expressed about resettlement was the fear of attracting more arrivals.⁶⁸

Pull factor concerns are distinct from questions of how to prioritize scarce resettlement slots. Scarcity would make resettlement based on lack of local integration impossible, regardless of whether UNHCR believes it to be desirable. By contrast, the essence of the pull factor thesis is that resettlement should be avoided *even if it would be feasible*. This is a utilitarian argument, positing that something that might be highly beneficial to individual refugees would be against the greater good. Like all forms of utilitarianism, the pull factor thesis is subject to important objections in moral philosophy and may be antithetical to the protection of individual human rights. However, I will focus on more concrete concerns.

Having provided legal aid to refugees in Egypt dating back to 1998, I do not question in any way that refugees in Egypt desperately desire resettlement, and often perceive it as their only viable hope for the future. When I met with Sudanese arriving in Israel from Egypt in 2006, they cited limitations on resettlement in Egypt as a motivation for taking the journey across the Sinai. I also do not question that resettlement can impact migration decisions by refugees and asylum-seekers. My assertion is that the pull factor thesis inexplicably discounts a wide range of other so-called push and pull factors.⁶⁹

⁶⁷Section 5.3.

⁶⁸For an illustration that is now accessible to the public, see FN 69.

⁶⁹One can see this tendency in a leaked American diplomatic cable from 2009, reporting that UNHCR's representative did not want to expand resettlement for refugees in Egypt because "he is concerned that an emphasis on resettlement will create a 'pull factor' encouraging more refugees to come to Egypt." Yet in the same meeting, UNHCR's representative predicted that irregular migration to Israel would continue even though Israel had limited employment rights "because of the terrible human rights situation in the Horn of Africa, especially in Eritrea." It is not clear why these classic "push factors" could not also explain refugee migration to Egypt, especially since Eritreans must cross Egypt to reach Israel. "UNHCR Updates

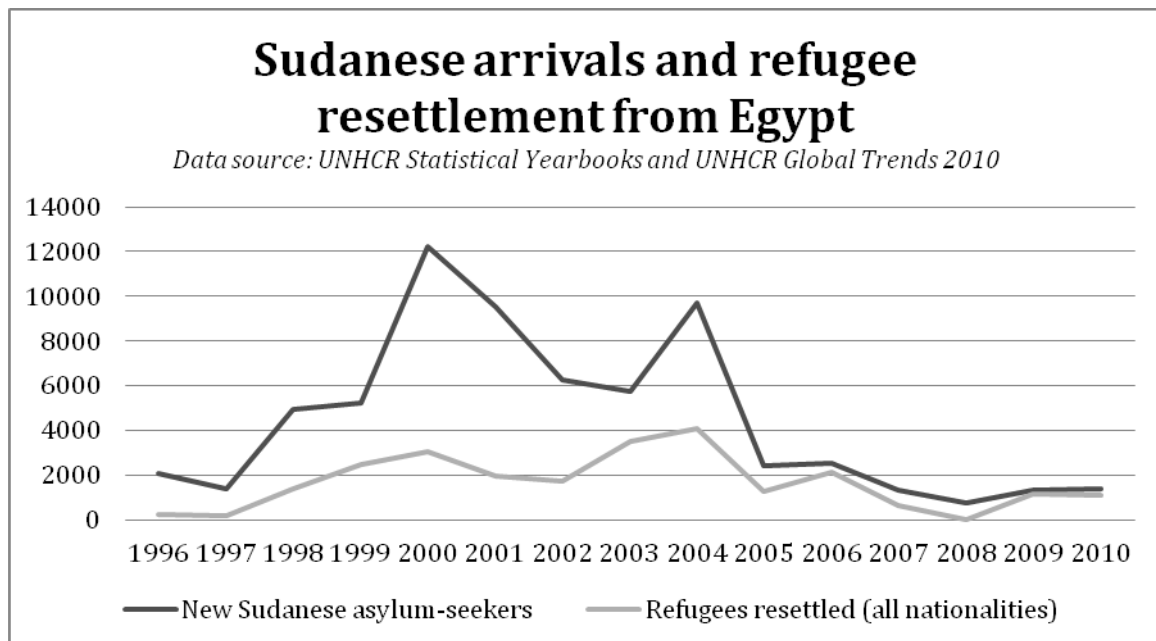
My contention is that in the Egyptian context basing policy extensively on the pull factor thesis is a logical trap that will handcuff efforts to promote refugee rights. I make this contention for several reasons. First, the pull factor thesis over-simplifies migration patterns. Second, even if true, the thesis is incoherent on its own terms as an argument against resettlement in the Egyptian context. Third, the pull factor thesis ultimately encourages anti-refugee policies, since it discourages expanding social and economic services to refugees for fear of attracting more refugees.

One of many factors

The best evidence for the pull factor thesis in Egypt is a rough correlation over the last 15 years between the number of refugees resettled by UNHCR and the number of *Sudanese* asylum-seekers arriving in Egypt. In 1998, the number of Sudanese applications to UNHCR nearly tripled, while at the same time UNHCR increased the use of resettlement. Increases and decreases in the number of Sudanese applications and the number of resettled refugees in Egypt continued to be roughly (but not exactly) correlated through 2010.⁷⁰

on Refugee Situation in Cairo," Egypt WikiLeaks Cables (Published in The Daily Telegraph), Ref ID: 09CAIRO267 (12 Feb 2009).

⁷⁰ Based on analysis of UNHCR Statistical Yearbooks, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 31 August 2011)



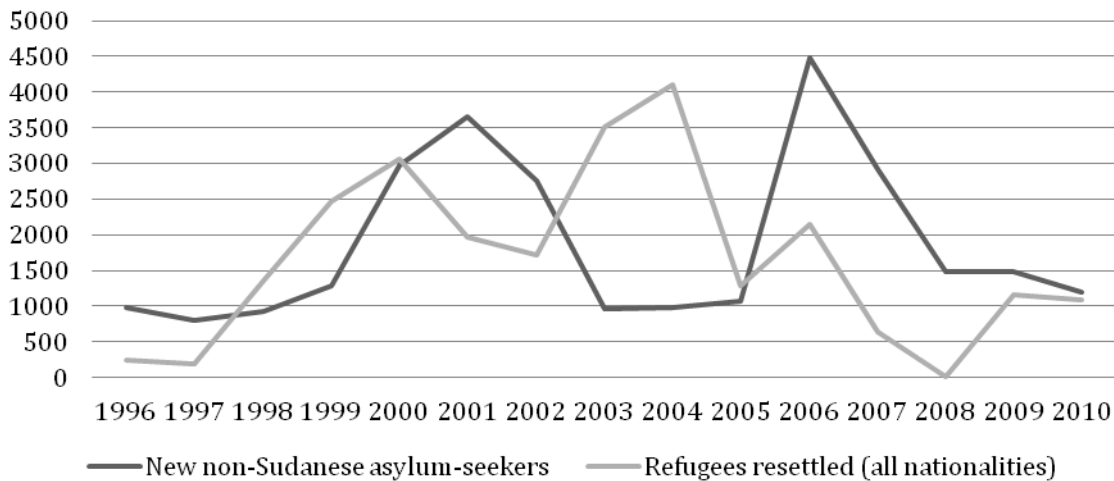
Like all correlations, this one does not necessarily prove cause because there are other factors in play. Both resettlement decisions and refugee migrations are supposed to be influenced by conditions in the country of origin. Resettlement from Egypt and Sudanese refugee claims in Egypt both increased and peaked during the period when the Sudanese People’s Liberation Movement (SPLM) split, and when the Khartoum government increased its use of armed militias to prosecute the civil war. Both resettlement and Sudanese arrivals dropped off after 2004, which is not surprising. That was the beginning of the South Sudanese peace process, which brought the SPLM into the Sudanese government and improved the situation of Southern Sudanese in the Khartoum region, which is the main point of origin for refugees fleeing to Egypt. This would be expected to both reduce the “push” of Sudanese to Egypt, and weaken the case for Sudanese resettlement.

In fact, the Sudanese trend is just one piece of data, and other trends tend not to support the pull factor thesis. For instance, Somali and Eritrean applications to UNHCR in Egypt increased from 2004 to 2006 when UNHCR’s use of resettlement was in decline.⁷¹

⁷¹ UNHCR Statistical Yearbooks 2004-2006, available at <http://www.unhcr.org/pages/4a02afce6.html> (last checked 11 April 2011).

Non-Sudanese arrivals and refugee resettlement from Egypt

Data source: UNHCR Statistical Yearbooks and UNHCR Global Trends 2010



If resettlement attracts asylum-seekers, then one should expect an increase in resettlement to come *before* an increase in applications to UNHCR. But it is not clear that this is actually what happened in the 1990s, when it appears that the refugee population more than tripled without any substantial use of resettlement. In 1989, the refugee population receiving assistance from UNHCR in Egypt was just 1700.⁷² By 1997 it had grown to over 6000,⁷³ even though UNHCR resettled only small numbers from Egypt until 1998. Sudanese began to apply to UNHCR in significant numbers after Egypt limited Sudanese residency rights in 1995. In 1996, 2057 Sudanese submitted applications – a major increase from the year before, while UNHCR resettled only 238 of all nationalities that year.⁷⁴ UNHCR did not increase its use of resettlement for another two years.

In order to justify not utilizing a protection tool that would dramatically help refugees, one should expect very compelling evidence that some greater harm would result. This evidence does not appear to exist. It is hypothetically possible, maybe even to be expected, that resettlement prospects had some impact on the arrival of asylum-seekers in Egypt, perhaps magnifying an increase in arrivals that also had other causes. But the impact would appear to be marginal and complicated by other factors.

⁷² UNHCR Statistical Yearbook 1998, available at <http://www.unhcr.org/3bfa31ac1.html> (last checked 18 April 2011), Annex: Table I.4.

⁷³ Ibid.

⁷⁴ UNHCR Statistical Yearbook 2004, available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?docid=44e5c7430> (last checked 18 April 2011), Egypt Datasheet.

An incoherent logic for limiting resettlement from Egypt

Despite empirical doubts, let us assume for the sake of argument that increased resettlement leads to an increase in the number of asylum-seekers arriving to Egypt. Does this mean UNHCR should limit the use of resettlement? I will suggest that the logical answer may actually be “no.”

At its core, the pull factor thesis is about a correlation between resettlement and migration patterns, especially irregular migration. But entry to Egypt is only half of the equation. If we are to examine correlations between resettlement and irregular migration in Egypt, it is difficult to not observe this fact: *Smuggling of asylum-seekers to Israel exploded only after UNHCR in Egypt began limiting its use of resettlement in 2004*. Because I doubt whether resettlement is always the dominant cause of migration, I do not actually mean to argue that UNHCR directly caused the smuggling explosion. But I do wish to illustrate the logical application of the pull factor thesis in order to illustrate why even on its own terms it was an incoherent basis for reducing the use of resettlement from Egypt.

The Sinai smuggling route has been perhaps the greatest challenge to refugee protection in Egypt and Israel for the past five years, sparking wide use of detention on both sides of the border, *refoulement* of hundreds, and the violent deaths of dozens of migrants. Logically, if the availability of resettlement can act as an attraction to asylum-seekers, it is equally plausible that withholding resettlement may be a push factor that encourages asylum-seekers to move on from Egypt. The pull factor thesis would suggest that by reducing its use of resettlement, UNHCR removed an incentive for asylum-seekers who arrive in Egypt to stay in Egypt, which would conceivably have saved lives. Even if today many asylum-seekers reaching Israel do not intend to spend any lengthy period in Egypt, to the degree the pull factor thesis is true it stands to reason that they might be more attracted to stopping in Egypt if resettlement prospects were better.

To be clear, as we have already seen, resettlement policy is at best one factor in migration decisions by asylum-seekers. But to the degree there is truth to the pull factor thesis, it may actually be a reason to expand the use

of resettlement strategically in Egypt, so as to provide asylum-seekers an incentive to not engage smugglers en route to other countries.

A rationale for anti-refugee policies

Withholding a potential benefit from refugees in order to dis-incentivize migration might have a less worrying logic in a region where every country upholds refugee rights. But this is not the situation in the Middle East and North Africa, where limiting resettlement means withholding many refugees' only foreseeable access to a durable solution.

Egypt is in the center of a region where essentially no countries are fully living up to their minimum obligations under international refugee law, and only a few have ratified the 1951 Refugee Convention. In this region, anything offered to refugees that is relatively better than what is available in another country can be labeled a pull factor, no matter how modest. Put bluntly, the pull factor thesis could be applied to anything that makes refugee life in Cairo relatively better than conditions in a refugee camp in Eastern Sudan. Under this way of thinking, governments should not only avoid giving refugees the right to work, but should actually seek out ways to make refugee lives more untenable in order to deter their arrival. The pull factor thesis supports a general orientation aimed at lowering refugee expectations, rather than legitimizing refugees' legitimate aspirations for a durable solution.

Resettlement and Egyptian willingness to host refugees

The pull factor thesis is built on the assumption that increased arrivals of asylum-seekers does harm to refugees generally by straining resources. But what if *not* resettling refugees does harm to refugees by straining a host government's political will to tolerate their presence?

In 2008, when Egypt faced criticism for mass deportation of Eritreans, Egypt's ambassador in Brussels wrote to a European Parliamentarian:

The international community has to impress upon the UNHCR ... to undertake its responsibilities in securing agreements from refugee receiving countries including European states to receive these refugees after screening and processing their claims.⁷⁵

According to leaked diplomatic cables, Egypt's Foreign Minister reportedly made the same point in more emphatic terms to American officials.⁷⁶

These Egyptian complaints undermine a major premise of the pull factor thesis. When UNHCR declines to use resettlement based on lack of local integration, it is implicitly asking Egypt to host more refugees for longer periods of time, which Egypt generally opposes. These Egyptian complaints suggest that reducing the use of resettlement made Egyptian authorities more hostile to refugees generally, thus making the situation worse for refugees generally while directly harming those refugees who otherwise might have had access to a durable solution in a third country.

Balancing resettlement and local integration

UNHCR policy calls for examining possibilities for repatriation and local integration before considering resettlement.⁷⁷ But in Egypt, prospects for local integration and resettlement are closely linked. As we have seen, Egypt has generally resisted local integration and in recent years has complained that UNHCR is not resettling or repatriating enough refugees. For its part, UNHCR has in some years resisted resettling refugees based solely on lack of local integration prospects. This stalemate leaves refugees in limbo unless they have a foreseeable prospect of repatriation.

In order to find a new way out of this situation, several steps need to be taken.

First, UNHCR should bring more **transparency** to the resettlement question, by reporting a real estimated number of refugees in Egypt who would likely need resettlement to achieve a durable solution, in addition to the number

⁷⁵ Mahmoud Karem, Ambassador, Letter to Helene Flautre, European Parliament (25 June 2008) (on file with author).

⁷⁶ "Meetings with Mubarak, Suleiman and AboulGheit," Wikileaks cable published by Aftenposten.no, Ref: A.Cairo 1193 (7 July 2008).

⁷⁷ Section 4.1

UNHCR actually plans to refer for resettlement. There are reasonable concerns about resettling large numbers of refugees who lack urgent vulnerabilities, including the obvious need to prioritize cases given limitations of resettlement capacity. But this does not change the simple fact that, at present, most refugees in Egypt who cannot repatriate will have no access to a durable solution unless resettlement is available.

It is important to not suggest that the only refugees in need of resettlement are those that UNHCR is currently referring. If UNHCR chooses not to refer some because of limited spaces or some other reason, it should say so and say why. If the problem is lack of spaces, it is essential that UNHCR show clearly the gap between resettlement needs and the quotas set by resettlement governments, so that allies in these countries can advocate accordingly. But it is important to acknowledge that these refugees do meet the criteria, and to validate refugees' legitimate aspirations for a durable solution.

Second, there is **no need for an all-or-nothing approach**. Over the last decade, resettlement policy in Egypt has vacillated between extremes, from near-automatic resettlement referrals for recognized refugees to a strong reluctance to resettle any refugees based solely on lack of local integration prospects. The current UNHCR plan to increase resettlement to 2000 per year is a positive step toward a more balanced approach.

There is still a persistent question of what refugees in Egypt should expect regarding resettlement. UNHCR can refer for resettlement 1951 Convention refugees who lack local integration, but it still will need to make them a lower priority than those with urgent protection needs. It may be useful to have a waiting period before assessing whether repatriation is possible, or whether resettlement should be considered instead. In practice, the timeline would be defined by available resettlement spaces, though five years might be a logical target given that UNHCR has defined protracted refugee situations by this marker. Regardless of the interval, waiting a period of time increases the chances that repatriation might become possible. It also should reduce some concerns about pull factors without abandoning the search for durable solutions.

Third, **avoid conceiving of resettlement and local integration as opposites**. If availability of local integration rules out resettlement, the Egyptian government will have little reason to want to open doors to

integration. But if resettlement is the only durable solution used, refugee protection becomes highly distorted, pull factor concerns become most acute, and opportunities to expand refugee rights in Egypt are likely to be ignored.

UNHCR's global strategy is to achieve "strategic use of resettlement" by which limited resettlement spaces are utilized to improve protection conditions generally.

In practical terms, this means that resettlement should be employed not only as a means of providing protection and a durable solution for individuals and groups of refugees, but should also be used to maintain and expand the asylum space in refugee-hosting countries, to enhance the quality of that space in terms of the protection and living conditions experienced by refugees, and to support the search for other strategies and solutions such as voluntary repatriation, self-reliance, local settlement and integration.⁷⁸

It would appear that there is an opportunity to do this in Egypt given that the Egyptian government has complained about lack of resettlement and repatriation from Egypt, and more generally about lack of burden sharing from the international community.

In this paper, I suggest a new way to make both resettlement and local integration viable parts of refugee protection by proposing that Egypt establish a quota for granting permanent residency to a limited number of refugees each year. In order to address Egypt's reluctance to host unlimited numbers of refugees indefinitely, the quota could be tied to the number who are resettled out of Egypt, as an expression of the principle of shared Egyptian and international responsibility. This would be a substantial step toward Egypt's fulfillment of its commitment to asylum, but would also limit Egypt's long term obligations and maintain repatriation and resettlement as the numerically dominant solutions. Even with the quota, however, Egypt would need to maintain its commitment to respect the rights of all refugees in Egypt. The quota would apply only to a more extensive grant of permanent residency that goes beyond the requirements of the Refugee Convention.

⁷⁸UNHCR, "Protracted Refugee Situations," UNHCR/DPC/2008/Doc. 02 (20 November 2008) at para. 80.

7. Proposal for shared responsibility

General approach

Based on the analysis to this point, I will attempt to outline a *rights-based* and *refugee-focused* proposal for refugee policy in Egypt. It is rights-based in that the objectives are defined by those rights guaranteed by international law, plus a goal of identifying a durable solution to refugee problems. It is refugee-focused in that the benchmark is whether individual refugees will have functional access to their rights in practice. The division of labor between Egypt and UNHCR should be a secondary concern.

A conventional approach would be for Egypt to enact refugee legislation that guarantees access to genuine asylum, transferring responsibility back to the state and allowing UNHCR to play a secondary, supportive role. However, my assessment is that this is not politically attainable, and pursuing it involves risks of making the situation worse. Egypt has strong strategic interests that mitigate against offering local integration and lead it to desire a prominent role for UNHCR in handling refugee matters. At the same time, it should be recalled that Egypt is already bound by several international treaties governing refugee rights, and that these are enforceable in Egyptian courts. This may open up important new legal opportunities if rule of law and the role of the judiciary are enhanced generally, even without any new legislation.

I propose pursuing an approach that would be built on the principle of shared responsibility between Egypt and the international community, a goal which the Egyptian government has expressed repeatedly in recent years. Much of what I propose could be accomplished through *ad hoc* arrangements between UNHCR, Egyptian ministries and other governments where needed. However, I propose negotiating a new UNHCR-Egypt Memorandum of Understanding, in order to signal a break from the past, to give the new system added international legitimacy and to make key commitments more durable.

The shared responsibility principle would be embodied by several pillars:

- Egypt would re-commit itself to the principle of non-refoulement and to implementing the rights guaranteed to refugees in international law, including the right to work. However, Egypt would not be asked to locally integrate refugees in most cases.
- UNHCR would continue to support social services for refugees, signaling that refugees should not be a drain on limited Egyptian state resources.
- Voluntary repatriation would be promoted when possible.
- Resettlement would be used strategically for refugees who cannot repatriate, in order address Egyptian concerns about local integration, to provide access to durable solutions, and to provide refugees a legitimate alternative to irregular migration.
- Egypt would grant permanent residency to refugee who cannot repatriate or be resettled, but Egypt may limit the number of permanent residency grants to a quota linked to the number resettled to third countries.

Specifics

- **UNHCR should ask the Government of Egypt to re-negotiate the 1954 Memorandum of Understanding with the stated purpose of implementing Egypt's obligations under international law,** recognizing the 1951 and African refugee conventions as the new foundation for refugee policy. Major donor/resettlement governments, should issue separate statementswelcoming the agreement, but they would not be parties to it.

Basic principles

- **Egypt should re-commit itself to fundamental principles of refugee law, especially the principle of non-refoulement.**

- Egypt should recognize that *non-refoulement* applies to both refugees and asylum-seekers, and should guarantee access to UNHCR and refugee status determination for any detained migrant expressing a desire for refugee protection.
- Egypt should commit to detaining migrants and refugees only when authorized by law and subject to judicial review.
- Egypt should agree to release from detention any refugee recognized by UNHCR held solely because of his/her migration status, and should minimize detention of asylum-seekers with pending refugee claims.

Refugee status

- **UNHCR would agree to continue to conduct registration and refugee status determination (RSD), consistent with principles of due process, and the Government of Egypt will agree to respect UNHCR's decisions on refugee status.**

Social and economic rights

- **Refugees' social welfare is an Egyptian responsibility but the international community through support for UNHCR should assist Egypt to ensure refugees access to social rights.**
 - UNHCR would agree to continue to provide for refugees' access to primary medical care.
 - Egypt would agree to provide refugees access to emergency and intensive care on the same basis as citizens.
 - Egypt would agree to allow all refugee children to enroll in school regardless of nationality, and UNHCR would agree to continue to provide refugees tuition grants to supplement costs.

- **Egypt would provide work permits to all refugees.** However, UNHCR would agree that enjoyment of the right to work would not be considered indicative of permanent local integration and would not be considered as a factor against pursuing repatriation or resettlement.

Durable solutions

- **UNHCR would agree that access to durable solutions is a shared Egyptian and international responsibility, and that a durable solution should be sought for all refugees.**
 - UNHCR would agree that Egypt should not at this time be considered ripe for permanent local integration of refugees in most cases.
 - UNHCR would promote voluntary repatriation in accordance with its guidelines.
 - UNHCR would seek to identify and resettle as quickly as possible especially vulnerable refugees as defined by its applicable guidelines.
 - UNHCR will promote resettlement for recognized 1951 Refugee Convention refugees who after five years in Egypt cannot be expected to repatriate in the foreseeable future, based on lack of local integration prospects (section 4.9 of the November 2004 *Resettlement Handbook*).
 - Major resettlement countries will be asked to view favorably resettlement cases based on lack of local integration prospects in order to prevent protracted refugee situations, as a strategic measure in support of Egypt's commitment to refugee protection and as a positive counter-measure against irregular migration, trafficking and smuggling. Similar efforts would be made to expand resettlement in Sudan to address the origins of the main smuggling route to Egypt and Israel.
 - Egypt will agree to grant permanent residency or nationality to 1951 Convention Refugees who cannot meet the criteria of

major resettlement states and who after five years of residency cannot be expected to repatriate in the foreseeable future. Egypt may place a quota to limit the number of permanent residency permits to be granted and may link the quota to the number resettled out of Egypt. For example, if 2000 are resettled then 2000 may be eligible for permanent residency.

8. Notes

About the author

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Mr. Kagan began providing legal aid to refugees in Egypt in 1998. From 2001 to 2002 he was part of the early group of lawyers that built the Refugee Legal Aid Project, then housed at the Egyptian Organization for Human Rights, which later evolved into Africa Middle East Refugee Assistance (AMERA). He served as Programmes Director and then Acting Country Director of AMERA in 2007 and 2008, and was Senior Fellow in International Human Rights Law at the American University in Cairo from 2007 to 2009. He was most recently Policy Director of Asylum Access, a US-based refugee rights organization.

Note on sources and attribution

Much information about refugee policy in Egypt can be found in publicly available sources, and is cited in this report accordingly. This report also contains information and opinions drawn on the author's experience, including dozens of private conversations with frontline officials in various relevant institutions dating back to 1998, as well as practical knowledge of refugee cases over the same period.

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