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Michael Kagan

*The American University in Cairo AUC*

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Forced Migration and Refugee Studies Working Paper No. 1

**ASSESSMENT OF REFUGEE STATUS DETERMINATION  
PROCEDURE AT UNHCR'S CAIRO OFFICE  
2001-2002**

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THE AMERICAN UNIVERSITY IN CAIRO  
FORCED MIGRATION AND REFUGEE STUDIES (FMRS)  
DECEMBER 2002

The Forced Migration and Refugee Studies Program (FMRS) at the American University in Cairo (AUC) offers a multi-disciplinary graduate diploma. Central to the program is an effort to incorporate the experience of displacement and exile from the viewpoint of refugees and other forced migrants. FMRS supports teaching, research, and service activities that promote a growing appreciation of the social, economic, cultural and political relevance of forced migration to academics, the wide range of practitioners involved, and the general public. While maintaining a global and comparative perspective, FMRS focuses on the particular issues and circumstances facing African, Middle Eastern and Mediterranean peoples.

The Forced Migration Refugee Studies Working Paper Series is a forum for sharing information and research on refugee and forced migration issues in Egypt and the Middle East at large. The Working Papers are available in hard copies as well as in electronic version from FMRS website.

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## **ABSTRACT**

In Egypt, refugee status determination (RSD) by the United Nations refugee agency is frequently the single most important decision anyone will make affecting the life of an asylum-seeker. In 2001, the U.N. High Commissioner for Refugees (UNHCR) office in Cairo received the most individual RSD applications of all of the agency's offices worldwide. The Cairo office has taken some significant steps to improve the RSD process. At the same time, some important international standards of fair and effective RSD procedures have not been implemented. In recent years, the number of refugee applicants in Egypt has grown and UNHCR-Cairo's resources have declined. In order to prevent the deportation of people who should qualify for international protection as refugees, UNHCR should reassess its RSD activities in Egypt, and consider alternative means of providing protection that would be less burdensome and less risky for people fleeing violence and human rights violations.

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## EXECUTIVE SUMMARY

In Egypt, refugee status determination (RSD) by the United Nations refugee agency is frequently the single most important decision anyone will make affecting the life of an asylum-seeker. The number of asylum-seekers applying in Egypt has grown substantially in recent years, making Cairo the U.N. High Commissioner for Refugees' (UNHCR) largest office for RSD in the world in 2001.

In Egypt, RSD determines which asylum-seekers will receive protection and assistance from the United Nations as legal refugees. Without protection by UNHCR, Egyptian authorities may arrest and deport foreigners who lack residence permits. A person's protection from *refoulement* (return to a country where his or her life or freedom is in danger) from Egypt 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. In advice to governments, UNHCR has said, "The importance of these procedures cannot be overemphasized."

This report assesses implementation of specific internationally-recognized procedural standards in the RSD process in Egypt. The standards used in this report are drawn primarily from UNHCR guidelines, position papers, notes and precedents.

The UNHCR-Cairo office has improved the RSD process in recent years. New agreements with the Government of Egypt to provide identity cards to asylum-seekers with pending cases will offer improved protection as it becomes fully implemented. Appeals have recently become more independent. Interview quality appears to have improved, and there are systems in place to expedite the cases of the most vulnerable groups of refugees. Physical space for interviews is now more private and secure than in the past. The office took some steps in 2002 to improve the transparency of its RSD procedures.

However, as the RSD procedures currently stand, the U.N. refugee agency has not implemented many of its own standards of procedural fairness, nor some well-established principles of law at its office in Cairo. Of particular concern, applicants are rejected without being given specific reasons; evidence and assessments of applicants' cases are withheld from them; negative credibility decisions are reached with unclear criteria and without as much interviewing as called for by the UNHCR HANDBOOK; most appeals are rejected without an in-person interview; many RSD procedures and policies remain withheld from the public; and there is reason for concern that the UNHCR-Cairo decision-making process violates the principle of *res judicata* and may be structured to scrutinize positive decisions more thoroughly than rejections.

The non-implementation of procedural standards increases the risk of mistaken rejections and leaves *bona fide* refugees in danger of *de facto refoulement*. As the number of asylum-seekers in Egypt has increased, UNHCR-Cairo's financial resources have steadily declined. Much of the 2001 and 2002 funding for RSD at UNHCR-Cairo is due to expire in 2003. This makes full implementation of some procedural standards difficult. As a result, refugee status determination in Egypt needs reassessment.

The weight of the problems with the current system are likely to fall particularly on the most vulnerable refugees, many of whom are the least able to express their refugee claims on their own. Women, people lacking education, people intimidated by official processes, and trauma victims are particularly vulnerable to incorrect rejections. The current system should not continue as is; refugees in danger are bound to fall through the cracks. UNHCR has been negotiating for several years with the Government of Egypt to accomplish a transfer of RSD to Egyptian authorities, but there is still no concrete, agreed plan for it to happen.

In lieu of a commitment by the Government to take over RSD, UNHCR could follow one of two main paths to resolve the problems posed by the current system and prevent *de facto refoulement* from Egypt. 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. However, this may be a challenge for UNHCR given the resource strain imposed by individual refugee status determination. As a second, better option, UNHCR could use a system of *prima facie* or "manifestly well-founded" recognition for most refugees in Egypt, which follows UNHCR's usual practice when the number of asylum-seekers makes fair individual RSD impractical. This solution would allow UNHCR to concentrate its core resources on protecting those refugees in most need of its assistance.

## INTRODUCTION

In Egypt, refugee status determination (RSD) by the United Nations refugee agency (UNHCR) is frequently the single most important decision anyone will make affecting the life of an asylum-seeker. This process is possibly more central to refugee protection in Egypt and the Middle East than in any other region.<sup>1</sup> Globally, the UNHCR conducted refugee status determination in at least 60 countries in 2001, receiving more individual refugee status applications than France and Australia combined.<sup>2</sup> Protection applications in the Arab League states plus Cyprus, Israel and Turkey constituted more than half of these applications.<sup>3</sup>

The number of asylum-seekers applying in Egypt has grown substantially since 1999, making Cairo UNHCR's largest office for RSD in the world in 2001. The fairness and effectiveness of its RSD procedures are central to effective refugee protection in the Middle East.

This report begins with an overview of refugee status determination in Egypt. It then assesses implementation of specific internationally recognized procedural standards in the RSD process, including recommendations for improvements. The report then offers general conclusions about RSD in Egypt, suggesting that UNHCR's RSD system needs reassessment. Finally, the report assesses potential alternatives to the current system.

### **a) Sources of procedural standards in refugee status determination**

The standards used in this report are drawn primarily from UNHCR guidelines, position papers, notes and precedents. By focusing on UNHCR's own advice to governments as a benchmark, this report differs from previous evaluations of UNHCR's RSD activities, which primarily compared UNHCR procedures to general principles of administrative and human rights law.<sup>4</sup>

The UNHCR Executive Committee initially addressed the issue of fairness in RSD in Conclusions reached in 1977.<sup>5</sup> UNHCR issued a broader set of guidelines for use in Africa in 1980 with the OAU-UNHCR GUIDELINES FOR NATIONAL REFUGEE LEGISLATION AND COMMENTARY. In 1994, UNHCR published a note, FAIR AND EXPEDITIOUS ASYLUM PROCEDURES, which was its definitive statement on RSD procedural standards until 2001.

In May 2001, as part of the Global Consultations on International Protection, UNHCR issued its most comprehensive guidance to date, a background paper called FAIR AND EFFICIENT ASYLUM PROCEDURES. In this paper, UNHCR recognized that "state practice has evolved

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<sup>1</sup> Individual RSD by UNHCR is also quite prominent in refugee protection in Southeast Asia.

<sup>2</sup> UNHCR Statistical Overview 2001 (provisional). There were 66,000 worldwide applications to UNHCR for individual refugee status recognition in 2001.

<sup>3</sup> UNHCR Statistical Overview 2001 (provisional). UNHCR-Turkey received 5,041 applications, UNHCR-Cyprus 1,766, and UNHCR-Israel 456.

<sup>4</sup> See, e.g., Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT'L J. REFUGEE L. 251 (1999) (published before UNHCR's release of comprehensive RSD procedural guidelines in 2001 as part of the Global Consultations on International Protection).

<sup>5</sup> UNHCR Executive Committee Conclusions No. 8.



quite considerably since [the 1977 Executive Committee Conclusions],"<sup>6</sup> and identified the "core procedural safeguards necessary to preserve the integrity of the asylum regime as both fair and efficient."<sup>7</sup> UNHCR is urging governments to use this document as the basis for defining common standards for refugee status determination.<sup>8</sup>

UNHCR has made clear that its own RSD procedures should be held to the same standards as governments, saying: "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>9</sup> UNHCR-Cairo has stated that it aims to provide fair procedures for refugee applicants. In an information sheet provided to all applicants, UNHCR-Cairo announces: "Asylum seekers are entitled to due process, which includes a fair hearing of their claim to fear persecution."<sup>10</sup> The 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."

In light of the Cairo office's commitment to general principles of due process and the general guarantee of fair hearings in human rights law, some sections of this report supplement UNHCR's positions and precedents with precedents and standards issued by other U.N. agencies, as well as general principles of law applicable to RSD, jurisprudence and best practice examples from major asylum states. However, the focus remains on the implementation on UNHCR's own standards.

## **b) Sources of information about UNHCR-Cairo procedures**

Most of the data in this report about RSD procedures at UNHCR in Cairo comes from UNHCR documents. Much of the RSD procedure in Egypt is common knowledge among NGOs that work with refugees and asylum-seekers. UNHCR-Cairo uses a set of Standard Operating Procedures in RSD, some of which have been released to the public. Information sheets and papers provided to asylum-seekers also provide information about the procedures. In some cases, internal UNHCR operating procedures have been reviewed; they are summarized but not quoted directly in this report. Other information reported here comes from UNHCR statistical reports, and from analysis of UNHCR-Cairo's weekly public notices announcing the results of individual RSD applications.

Because this report focuses on the structure of UNHCR-Cairo's RSD procedures, very little of this report provides systematic empirical data about UNHCR-Cairo's RSD interviewing or decision-making. A complete, systematic study on RSD applicants' interview experiences was not conducted.

However, some data about interview experiences is available, which generally documents qualitative improvements in RSD interviewing at UNHCR-Cairo in 2001 and 2002. Such data is therefore included in some sections of this report in order to provide a more complete

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<sup>6</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 3 (May 2001)

<sup>7</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 6 (May 2001)

<sup>8</sup> See *Global Consultations on International Protection Update* (1 August 2002).

<sup>9</sup> DETERMINATION OF REFUGEE STATUS, RLD 2 (1989), chapter 2.

<sup>10</sup> UNHCR-Cairo, *Information Sheet for Asylum-Seekers, Refugees and Stateless Applicants*.

picture of UNHCR-Cairo's RSD procedure and practice. Data about RSD interviewing included an analysis of actual UNHCR-Cairo RSD cases from September 2001 through March 2002. During this period, 97 legal aid files from the Egyptian Organization for Human Rights Refugee Legal Aid Project were analyzed anonymously (names were not recorded). In these files, UNHCR applicants had provided detailed accounts of their UNHCR interviews; 77 were at the appeal stage, and 16 at first instance. Reports by legal aid personnel about UNHCR RSD interviews that they had attended through August 2002 were also reviewed in preparation of this report.

An advance draft of this report was forwarded to UNHCR offices in Cairo and Geneva in order to provide an opportunity for factual corrections or substantive comments before it was finalized for publication. UNHCR-Cairo provided a number of specific comments; in some cases factual clarifications or additional information provided by UNHCR have been incorporated into the final report. In some sections, UNHCR's comments presented views different from the analysis proposed by the report. In these cases, the UNHCR comment is set out in the body of the report in the interest of presenting a balanced picture of RSD in Cairo. However, the report as a whole expresses only the views of the author.

#### OVERVIEW OF REFUGEE STATUS DETERMINATION IN EGYPT

##### **c) Significance of UNHCR's refugee status determination**

In Egypt, RSD determines which asylum-seekers will receive protection and assistance from the United Nations as legal refugees. Without protection by UNHCR, Egyptian authorities may arrest and deport foreigners who lack residence permits (*see* chart, [Appendix B](#)). For asylum-seekers, refugee status can determine access to healthcare, some monetary assistance, and education for children. If a person cannot locally integrate to live in Egypt and cannot safely go home, 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 from Egypt.

Egypt is a party to the most important international treaties protecting the rights of refugees, the 1951 Geneva Convention relating to the Status of Refugees<sup>11</sup> (and its 1967 Protocol<sup>12</sup>) and the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>13</sup> These 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. Egypt has generally allowed asylum-seekers and recognized refugees to enter and remain in the country.

A person's protection from *refoulement* from Egypt depends on the fairness and effectiveness of UNHCR's refugee status determination. 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. UNHCR

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<sup>11</sup> 189 U.N.T.S. 150, *entered into force* April 22, 1954, ratified by Egypt 22 May 1981.

<sup>12</sup> 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967, ratified by Egypt 22 May 1981.

<sup>13</sup> Adopted at OAU Assembly of Heads of State and Government (Addis Ababa, 10 September 1969), ratified by Egypt 12 June 1980.

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.

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

The legal refugee definition applicable in Egypt derives from the 1951 Geneva Convention relating to the status of Refugees and the OAU African Refugee Convention. The OAU Convention incorporates the 1951 refugee definition, but extends it to more fully include victims of violence, war, and civil strife. Both conventions are applied by UNHCR as part of its mandate in Egypt.<sup>14</sup>

#### 1951 Geneva Convention Definition

[A refugee is a person who] 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.

#### African (OAU) "extended" definition

[A refugee is a 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.

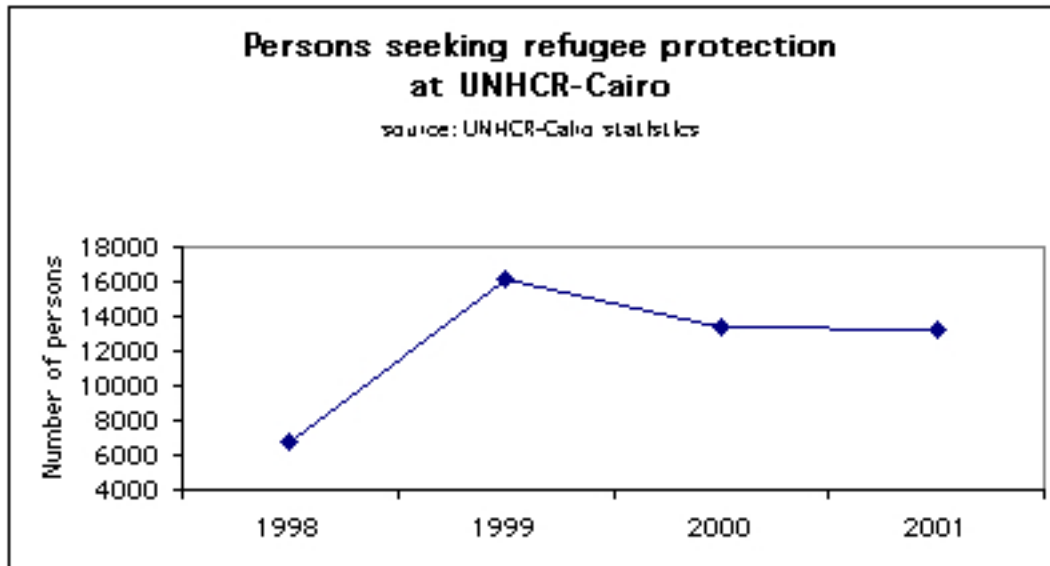
Refugee status determination is not a discretionary process for UNHCR. The UNHCR Statute from the General Assembly states: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office."<sup>15</sup> If someone meets the refugee definition, UNHCR must protect him or her as a refugee. Although resources and capacity are often strained, UNHCR is not permitted to refuse protection to anyone who meets the refugee definition.

<sup>14</sup> See G.A. 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>15</sup> G.A. Res 428 (V) § 8 (14 December 1950).

#### d) Number of refugee applications in Egypt

The number of persons seeking refugee protection at UNHCR-Cairo grew 96 percent from 1998 to 2001, including 13,176 applicants in 2001.<sup>16</sup>



The number of people seeking asylum in Egypt more than doubled from 1998 to 1999. In 2000 and 2001, the agency's office in Egypt received more individual RSD applications than any other UNHCR office in the world.<sup>17</sup> Full year statistics for 2002 are not yet available.

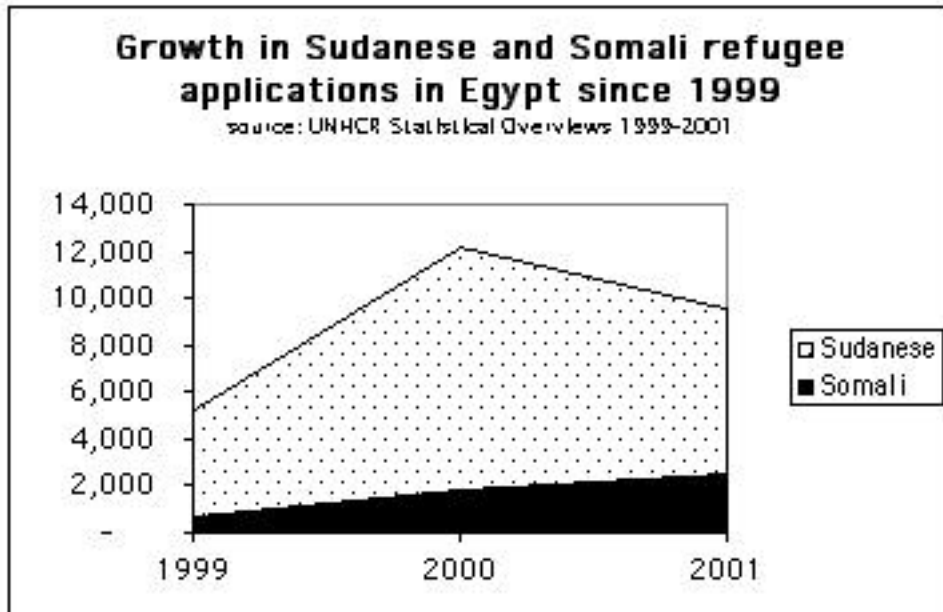
UNHCR attributed the large influx since 1998 to "continued instability in major countries of origin, coupled with relatively easy access to the country and what was perceived as a better protection environment than in neighbouring countries."<sup>18</sup> The two largest nationalities of asylum-seekers in Egypt are Sudanese and Somalis. Although the numbers of Sudanese asylum-seekers rose most dramatically, Sudanese applications actually fell in 2001, while Somali applications continued to increase.<sup>19</sup>

<sup>16</sup> UNHCR-Cairo statistical report (June 2002).

<sup>17</sup> In 2001, the number of applications in Egypt (13,176) was almost twice the number in the next largest office, Kenya, where 6,713 applications were lodged. See UNHCR Statistical Overview 2001 (provisional).

<sup>18</sup> UNHCR GLOBAL REPORT 2000 at 251.

<sup>19</sup> UNHCR Statistical Overviews 1999, 2000 and 2001 (provisional). UNHCR-Cairo's statistical report for the first half of 2002 does not break down the asylum-seeker population by nationality.



About 70 percent of the recognized refugees in Egypt have come from Sudan, and about 15 percent from Somalia.<sup>20</sup> Other nationality groups with more than 10 recognized refugees in Egypt include people from Afghanistan, Burundi, the Democratic Republic of Congo, Eritrea, Ethiopia, Iraq, Kuwait, Liberia, Palestine, Rwanda, Sierra Leone, the former Yugoslavia, and Yemen.<sup>21</sup>

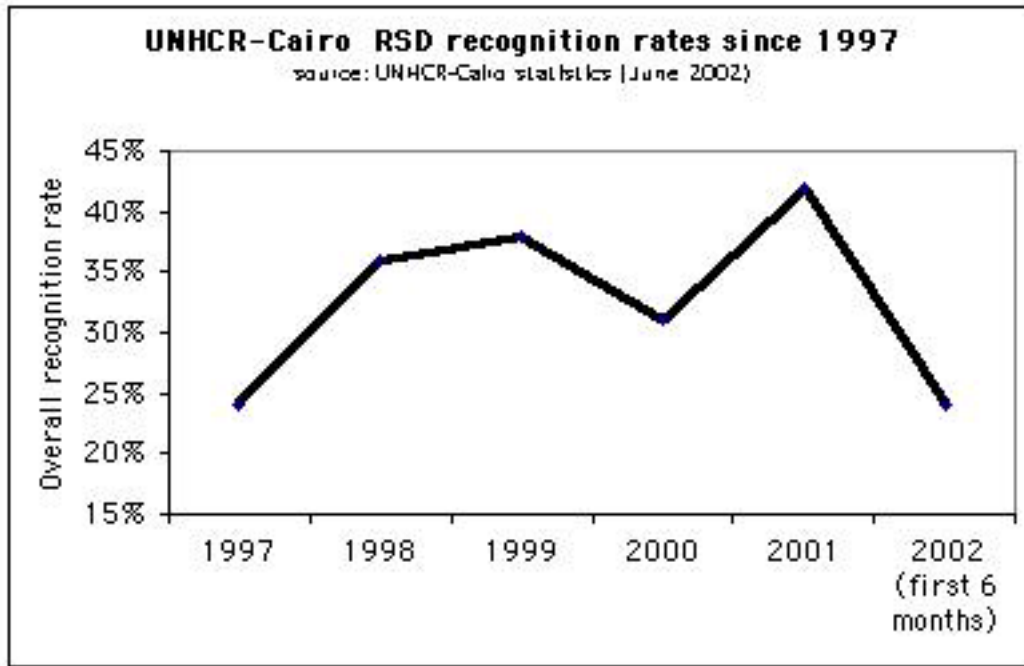
#### e) UNHCR-Cairo RSD recognition rates

Refugee applicants to UNHCR-Cairo have met with fluctuating success rates over the past four years. The recognition rate fell from 42 percent in 2001 to 24 percent in the first half of 2002, the lowest level in at least five years. The recognition rate in Cairo was 36 percent in 1998, 38 percent in 1999, and 31 percent in 2000.<sup>22</sup>

<sup>20</sup> UNHCR-Cairo statistical report (June 2002).

<sup>21</sup> UNHCR-Cairo statistical report (June 2002).

<sup>22</sup> UNHCR-Cairo statistical report (June 2002).



Recognition rates are a very rough indicator of a RSD system's performance when taken in isolation. Refugee recognition is dependent on the merits of cases presented by applicants as well as on the effectiveness of the RSD process itself. However, the phenomena of fluctuating (and recently dropping) recognition rates in Cairo deserve some attention because the changes have been dramatic and have no immediately obvious explanation. In combination with procedural gaps identified by this report, the fluctuating rates raise questions about whether some rejected applicants may in fact be refugees in need of protection.

The drop in recognition rate in 2002 and the fluctuation over the past few years should not be directly explainable by the growth in applications since numbers of applications received has no legal bearing on whether an individual meets the refugee definition. Moreover, the jump in applications in 2000 was followed by an increase in recognition rate in 2001.

The relative growth in the proportion of Somali asylum-seekers since 1999 does not appear to be an explanation for recognition rate fluctuations at UNHCR-Cairo. From 1999 to 2001, the recognition rate for Somalis steadily declined at the office.<sup>23</sup> Yet, the overall recognition rate climbed in the first half of 2001, and both Somalis and Sudanese in 2001 were recognized more frequently than the 24 percent rate posted in 2002.<sup>24</sup> Moreover, Sudanese remained the dominant group of asylum-seekers in 2001 (72 percent of all asylum-seekers).

In response to an advance copy of this report, UNHCR-Cairo states that RSD decisions are ultimately dependent on the quality of cases presented. UNHCR-Cairo notes that the drop in recognition rate may be linked to an increase in the waiting time from an asylum-seeker's arrival until actual RSD interview. This delay may make applicants more vulnerable to

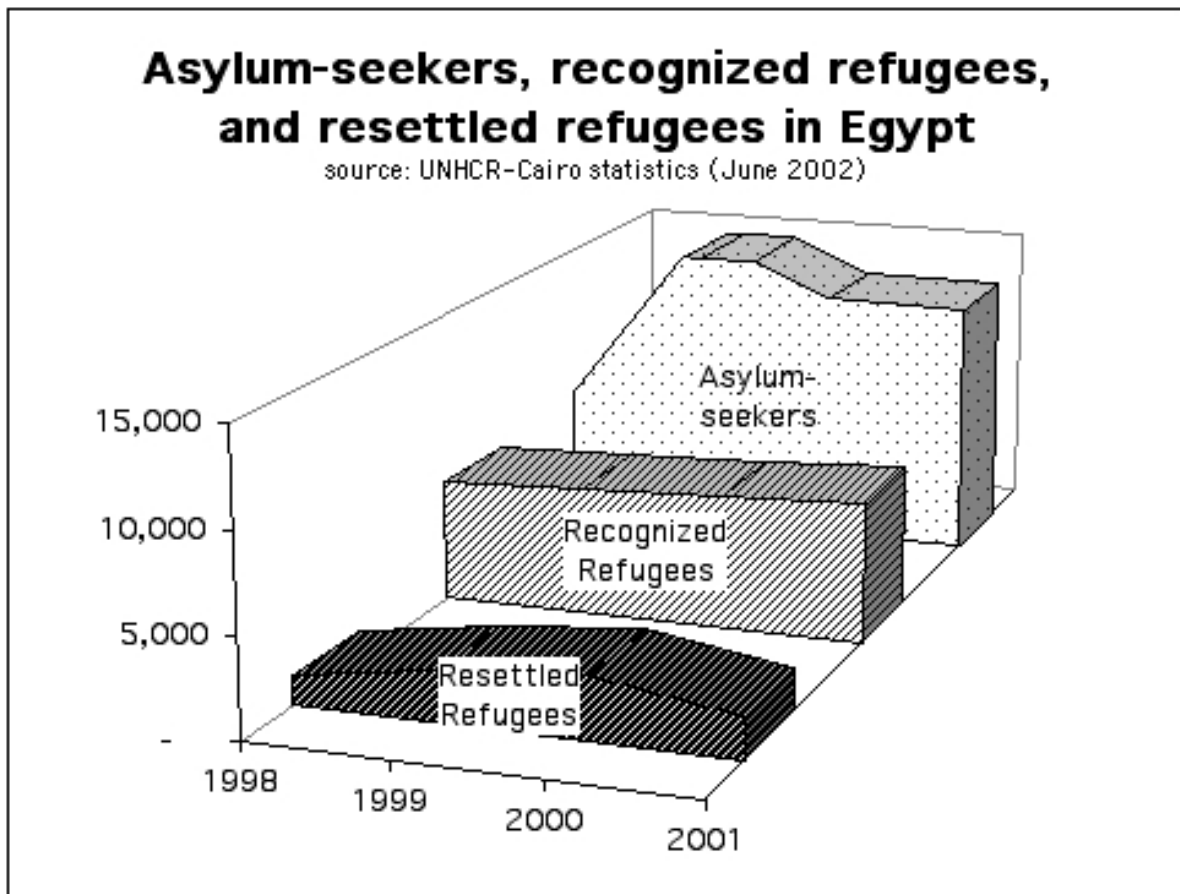
<sup>23</sup> Somali recognition rates at UNHCR-Cairo were 85.6 percent (1999), 56 percent (2000), and 45 percent (2001). See UNHCR Statistical Overviews 1999, 2000 and 2001 (provisional). UNHCR did not publicize a first half 2002 break down of recognition rates by nationality.

<sup>24</sup> UNHCR Statistical Overview 2001 (provisional). In 2001 Somalis had almost the same recognition rate as Sudanese applicants to UNHCR-Cairo (46 percent compared to 49 percent).

incorrect advice spread in the refugee community, some of which urges applicants to either hide information or falsify information in refugee applications. As UNHCR-Cairo notes, "With longer waiting times, the effects of this misinformation may be exemplified."

#### f) Relationship between refugee status determination and resettlement

Many refugees in Egypt are eventually resettled to third countries, although UNHCR protection does not automatically mean resettlement. Of the more than 8000 UNHCR-recognized refugees currently in Egypt, fewer than 3000 will be referred by UNHCR for resettlement in most years.<sup>25</sup> Resettlement is not an internationally recognized right and many refugees in Egypt are never resettled. The countries that provide resettlement opportunities do so voluntarily out of humanitarian concern.



The stakes in refugee status determination in Egypt are higher than in much of sub-Saharan Africa because UNHCR-Cairo does not currently provide *prima facie* protection to most asylum-seekers. Where UNHCR or a government uses *prima facie* recognition, an agency sometimes screens individuals to determine if they are eligible for resettlement to third

<sup>25</sup> UNHCR-Cairo statistical report (June 2002).

countries, but such screening does not impact a person's legal status in their country of residence.<sup>26</sup> But in Egypt, individual rejection by UNHCR means a person will have no legal status if they remain in the country. 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 in Egypt is ensuring that people who are in danger in their home countries can avoid being forced to return.

However, in practice, resettlement is linked to RSD in Egypt. Four countries, Australia, Canada, Finland, and the United States, regularly accept for resettlement refugees who have come first to Egypt. Although final decisions on resettlement cases are made by these governments, most of the refugees resettled from Egypt are first referred by UNHCR-Cairo. For the U.S. and Canada, UNHCR referral is usually the only means of being accepted for resettlement.<sup>27</sup> Only recognized refugees who have completed UNHCR's RSD process can be considered for a resettlement referral. Because a UNHCR referral is often necessary to access resettlement, the effectiveness of these countries' refugee programs depends on the fairness of UNHCR's refugee status determination.

In response to an advance copy of this report, UNHCR-Cairo notes that its RSD procedures are not ultimately geared to resettlement, stating: "If resettlement countries were going to stop their processing from Egypt, UNHCR will continue to determine the refugee status of applicants."

#### IMPORTANCE OF FAIR PROCEDURES FOR REFUGEES

If individual refugee status determination 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. Fair procedures accomplish three essential things. First, they eliminate any appearance of arbitrariness, and give applicants confidence that their cases will be considered impartially. Second, they ensure that all relevant facts come out before a final decision. Third, they establish safeguards against human errors in the decision-making process.

Fairness in RSD is extremely important because the stakes are high — people can end up detained, tortured or killed if a mistake is made — and because refugees (due to trauma, cultural misunderstanding, language, and lack of education) often have trouble articulating their cases. Often, the refugees who need protection most are most likely to fall through the cracks when correct procedural standards are not implemented. Lack of fair procedures can cause dangerous errors even if UNHCR staff are well-trained and committed to refugee welfare. An adjudicator may make a decision in good faith, and not realize that critical information has been left out or misunderstood. For instance, if an applicant does not know the reason for her rejection, or cannot see the evidence relied on, she may not be able to provide clarifying information that could put her case in an entirely different light during the appeal stage. A case that appears weak at first may appear strong after a fair and open process. Additionally, the refugee definition is a complicated legal area, and mistakes in

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<sup>26</sup> See UNHCR Resettlement Handbook § 3.5 (revised 2002)

<sup>27</sup> Some refugees are resettled from Egypt to Canada with private sponsorships, without UNHCR referral. However, UNHCR-referred cases are more numerous in Egypt. Australia provides resettlement to a larger number of refugees and "humanitarian" cases who have private sponsorship.



applying the law are normal and expected in any system. Fair procedures provide safeguards to correct such mistakes.

In advice to governments, UNHCR has said, "The importance of these procedures cannot be overemphasized. ... A wrong decision might cost the person's life or liberty."<sup>28</sup> The agency has called fair and efficient asylum procedures "essential" for full application of the 1951 Geneva Refugee Convention.<sup>29</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>30</sup>

#### IMPLEMENTATION OF SPECIFIC PROCEDURAL STANDARDS

### **g) Access to procedures and right to remain in Egypt**

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>31</sup>

This standard is recognized at UNHCR-Cairo and by the Egyptian Government, although it has not always been implemented adequately. Previously, people with pending applications at UNHCR had inadequate documentation or identification to prove that they had a temporary right to reside in Egypt, as required by internationally agreed standards.<sup>32</sup> Previously asylum-seekers were given slips showing file reference numbers, but the slips did not contain their names or explanations of their status as people with pending refugee claims. They have thus been at risk of arrest if stopped by authorities, and of deportation if UNHCR was not informed of their arrest in time to intervene.

Improvements in implementation have been agreed to in 2002. Under a new system announced in summer 2002 but which has not yet been fully implemented, the Egyptian Government and UNHCR will issue asylum-seekers waiting for first instance hearings renewable temporary identification cards and residence permits. As UNHCR described the new system to a forum of agencies that deal with refugees in Egypt:

UNHCR and the Government of Egypt have finalized a draft of a card to be given to asylum seekers. UNHCR will provide this card to all adults

<sup>28</sup> Determination of Refugee Status, RLD 2 (1989), chapter 2.

<sup>29</sup> UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures ¶ 5 (May 2001).

<sup>30</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.").

<sup>31</sup> UNHCR EXCOM Conclusion No. 8 (1977); UNHCR, Fair and Expeditious Asylum Procedures § 3 (1994).

<sup>32</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.").

registered on the file of the asylum seeker, including the principle applicant and adult dependants. The card has space for an initial residence permit stamp and 2 additional renewals, to be issued by the Ministry of Interior. As each residence permit stamp is generally valid for 6 months, this will allow the asylum seeker card to be valid for up to 18 months. The card will be in Arabic, allowing for ease of understanding by local police and other Egyptian authorities. The agreement to issue this card represents a major step in addressing the protection difficulties faced by some asylum seekers.<sup>33</sup>

As of December 2002, UNHCR had begun distributing these cards (known as "yellow cards" distinguished from the "blue cards" provided to recognized refugees) to some asylum-seekers. Currently, rejected applicants who file appeals receive a certificate (different from the yellow cards and not containing a residence permit) from UNHCR that explains that they are under the protection of the United Nations while their cases are pending. UNHCR has provided assurances that in time all first instance and appealing asylum-seekers will be provided identity cards.

These changes, once fully implemented, may prove to be the most substantial improvements in refugee protection in Egypt in several years because of their potential to cut down on the number of asylum-seekers detained and at risk of deportation.

While new identity papers should help reduce arrests, there is some concern regarding the adequacy of safeguards to prevent deportation of asylum-seekers who are detained while their cases are pending. In the current system, avoidance of deportation depends on intervention by UNHCR, but it is not clear whether there is a reliable system to ensure that UNHCR always knows when an asylum-seeker has been detained. The mechanics used to prevent *refoulement* may need reassessment, but a full exploration of these issues would be beyond the scope of this report.

### **Access for women**

A final concern relates to access for women. Legal aid files indicate that there have been cases in Cairo where married female applicants have been rejected by UNHCR-Cairo after they suppressed their own refugee claims from UNHCR because their husbands, communities, or in rarer cases UNHCR staff members told them that they could not explain their own problems if they apply with their husbands. This can result in an effective denial of the right to seek asylum for women refugees.

When married couples apply for refugee protection, UNHCR-Cairo designates one spouse the "principle applicant." Procedural rules about the practice are not explained in publicly available UNHCR-Cairo operating procedures.

In response to an advance copy of this report, UNHCR-Cairo stated: "Staff members are obliged to hear both the principle applicant and the spouse in a RSD interview. The spouse is given a chance in confidence to express any separate claim they have for refugee status. In the case that there are two claims, the spouse with the strongest claim – male or female – will

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<sup>33</sup> Minutes of Inter-Agency Meeting, September 24, 2002.

be the principle applicant. The report implies that the husband is always the principle applicant. This is not the case."

Although UNHCR-Cairo's policy is to provide equal access to both spouses, the "principle applicant" system may generate unnecessary confusion. Testimony by asylum-seekers in legal aid files indicates that some asylum-seekers believe that only the principle applicant may state a refugee claim. This may lead married couples to suppress one person's claim in the written testimony they submit with their applications. If this occurs, a UNHCR-Cairo staff member would not know that both spouses have claims before starting an interview. In one case, a woman whose husband had prepared the written submission reported that the interviewer asked her only to confirm details of her husband's claim. In another case, a legal representative observed an interviewer informing a married couple that the interview would concern only the husband's claim because he was the principle applicant. In a third case, a woman reported that when she tried to assert her own claim for refugee protection, an interviewer told her that her interview could only deal with her husband's claim because he was the principle applicant.

This confusion could be repaired by automatically establishing independent files for all adults included on an application, avoiding any suggestion that any person is more or less important in the RSD process. Establishing separate files and listing separate results would help to demonstrate to the refugee community that each individual should fully state his or her own claim. Where only one spouse has a valid claim, UNHCR can join the rejected spouse as a dependent family member after the RSD process is completed.

## **h) 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>34</sup> Recent UNHCR guidelines call for making a special effort to provide private counseling and advice to female refugee claimants because paternalistic values often prevent women from fully asserting their rights (*see* Section 5A).<sup>35</sup>

This standard is partially implemented at UNHCR in Cairo, and there have been some positive steps toward improving transparency of UNHCR procedures during 2002. However, much critical information is not given to asylum-seekers, and many key operating procedures remain closed from the public. While individual cases need to remain confidential, UNHCR's general operating procedures and policies should be disseminated.

### **Information given to asylum-seekers**

UNHCR-Cairo provides all asylum-seekers a two-page information sheet which describes in summary terms the refugee definition, registration, application, interview, and appeal process, and also provides information about how vulnerable applicants can seek special assistance. The information sheet notes that applicants have the right to legal representation,

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<sup>34</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 50(g) (May 2001).

<sup>35</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 50(n) (May 2001).

that files will be kept confidential by UNHCR, and explains some of the rights applicants enjoy during interviews at UNHCR. It also stresses that applicants are obligated to tell the truth to UNHCR, and to obey Egyptian laws.

While it provides a summary of the procedure, the information sheet does not provide extensive information to advise applicants how to prepare their cases.

Applicants to UNHCR-Cairo currently wait approximately nine months from their first visit to UNHCR to their actual RSD interview. Legal aid personnel observe that during this time, asylum-seekers hear a great deal of misguided and often damaging "advice" from other members of the exile community, which can generate substantial confusion and anxiety for uneducated and frightened newcomers. Noted misinformation includes advice to submit untrue claims to UNHCR, advice to submit short claims that leave out key facts, and spreading of baseless rumors that UNHCR staff discriminate against applicants or somehow conspire with the governments that people flee. With such misinformation circulating, it may be impossible to win an applicant's trust in a one-time interview months or a year after his or her arrival in Egypt.

Some NGOs have initiated programs to provide informational classes and workshops for asylum-seekers, including Joint Relief Ministries at All Saints Cathedral (through the Musa'adeen program) and the Egyptian Organization for Human Rights Refugee Legal Aid Project. In response to an advance copy of this report, UNHCR-Cairo notes: "UNHCR-Cairo has invested considerable time in training over the last three years NGO partners, Church groups, and refugee helpers (Musa'adeen [program, based at several churches]) about its RSD procedure and criteria."

Current programs at NGOs are a start in providing information, but are not currently large enough to serve more than a minority of the several thousand asylum-seekers arriving each year. If UNHCR-Cairo is correct that misinformation given to asylum-seekers may contribute to a lower recognition rate (*see* Section 3C), there is good reason for NGOs and UNHCR to expand their current efforts to provide asylum-seekers information, advice, and legal counsel.

An applicant's first visit to UNHCR-Cairo is an opportunity to provide accurate information early. In addition to informing applicants of their right to counsel, it may be helpful for UNHCR-Cairo to refer all applicants to legal counseling programs as early as possible, and to expand its efforts to directly inform asylum-seekers about the RSD process. UNHCR-Cairo could consider arranging short one-on-one or small group in-person information sessions with UNHCR staff for recently arrived asylum-seekers. It could consider developing a confidential advice and counseling service for female and other vulnerable asylum-seekers, perhaps through an NGO partner. The agency could also establish a general information kiosk at its office, or at the premises of an NGO. Such efforts, especially if offered early in the RSD process, would help combat misinformation and would help UNHCR gain the trust of asylum-seekers in advance of RSD interviews.

## **Procedural transparency**

Unlike other administrative decision-making bodies, UNHCR-Cairo until recently did not make its standard procedures available to the public. This was not unique to the Cairo office; UNHCR generally keeps many policies and procedural directives internal. UNHCR-Cairo has begun improving the transparency of its procedures and policies by releasing portions of them to the public, but much remains internal, leaving UNHCR out of step with the trend toward greater transparency in democratic government.<sup>36</sup>

UNHCR-Cairo has extensive Standard Operating Procedures (SOPs) which govern most aspects of refugee status determination. These are essential for applicants, NGOs, and legal aid staff to answer procedural questions beyond the 2-page information sheet given to all asylum-seekers. Applicants need to know UNHCR-Cairo's operating procedures in order to be able to know in full the case that they must meet in order to apply for refugee protection. Making procedures public is also an important means of establishing transparency and accountability.

In January 2002, UNHCR-Cairo began releasing edited external versions of SOPs. Two were released in January: RSD Interviews, and Fast Track Processing (for vulnerable applicants). UNHCR has also released a working note regarding marriage certificates in Egypt, which is important for allowing spouses to sponsor each other on their UNHCR applications. Nevertheless, much remains internal.

UNHCR has withheld several sections of the operating procedures it has released to the public. Responding to an advance copy of this report, UNHCR-Cairo explained: "Partial deletions were necessary to protect the identity of some of our staff who are assigned specific internal responsibilities in these SOPs. The deletions are also necessary to protect some information related to the data entry process in our database of individual cases and other anti fraud mechanisms."

Preparation of this report included a review of the January 2002 internal version of the RSD Interviews SOP, allowing an assessment of sections deleted from the public version. Though data entry and staff identities were implicated by some withheld sections, those explanations appear at best incomplete as justifications for withholding other sections. In particular, some deleted sections outline the UNHCR-Cairo case assessment, decision-making and review procedure (described in Section 5J below). This is one of the most critical parts of the office's RSD procedure. Describing it would require identifying staff only to the extent of acknowledging that senior staff supervise and review decisions by junior staff.

UNHCR-Cairo has not released to the public a number of policies that may be integral to understanding the procedures and criteria used by the office. The Standard Operating Procedure governing detention, a circumstance in which the stakes in RSD are most immediate and severe, has not been released. Although UNHCR has said it applies the OAU African refugee definition, it has not released a written explanation of how it interprets this definition.<sup>37</sup> UNHCR-Cairo has internal criteria governing credibility assessment, a process that accounts for about three-quarters of rejections at the office, but has not released its credibility standards to the public. Lack of transparency about such policies fosters an appearance of arbitrary decision-making, and can leave an applicant unable to know the criteria by which he or she will be judged.

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<sup>36</sup> See generally, Ann Florini, *The end of secrecy*, 111 FOREIGN POLICY 50 (1998).

<sup>37</sup> UNHCR handbooks, guidelines and positions on interpretation of the 1951 Convention are published by the agency's Geneva Headquarters.

Confusion exists about whether the Standard Operating Procedure governing appeals has been made available to the public. In response to an advance draft of this report, UNHCR-Cairo indicated that it "shared" a version of its appeals SOP in June 2002. However, it is not clear if this means that the document was released to the public, or if UNHCR-Cairo explained the procedure to selected NGOs. No appeals SOP was obtained or reviewed in preparation of this report. As this report went to press, UNHCR-Cairo had not responded to a request to clarify which SOPs had been released as public documents. It is important for UNHCR-Cairo to release the operating procedures governing appeals, including an explanation of the substantive standards by which the office decides appeal cases.

Operating procedures released to public	Sections of public operating procedures that have been withheld <sup>38</sup>	Known operating procedures not released to the public <sup>39</sup>
RSD Interviews (first instance and appeal interviews). Fast Track Processing Working Note: Some summary remarks on marriage certificates/documents issues in Egypt	Country of origin information research Standard review process Exceptional review process Procedural aspects (of fast-tracking) Refugee Status Application Form (RSAF) Written statement and secondary documentation Passports and other identification documents Importance of preparation Writing the assessment	Guidelines on credibility assessment Detention Family Unity Medical/psychiatric referrals <sup>40</sup>

In regard to UNHCR-Cairo's standard operation procedures, it is worth noting that the office has established most of its procedures and policies without first soliciting input from the public, including refugee communities. Unlike many governments, UNHCR-Cairo has not made proposals for revised procedures available for public comment before finalizing them. This was evident in early 2002, when UNHCR-Cairo entered internal discussions aimed at revising its appeals procedure. UNHCR-Cairo received and accepted NGO comment on appeal procedures, but did not circulate its proposed new procedures in advance of enacting them.

UNHCR-Cairo's Standard Operating Procedures are similar to administrative regulations issued by the executive branches of governments. Formulating such policies in an open process establishes checks and balances that are critical to good government. Publishing regulations once established is essential to guarantee due process and fairness, and to ensure accountability. UNHCR should operate under a presumption that its policies belong in the public domain, unless a compelling and specific justification exists for limiting access to a document or section of a document.

<sup>38</sup> Selected sections listed here; there are other sections which were also deleted.

<sup>39</sup> The appeals operating procedure was not available at writing, and confusion existed over whether it had in fact been released. It is therefore not included anywhere on this chart.

<sup>40</sup> UNHCR-Cairo notes that this procedure is shared with selected NGO partners involved in the referrals.

### **Access to information about an individual case**

Based on numerous reports by UNHCR applicants to legal aid programs, individual asylum-seekers frequently have difficulty obtaining routine information from UNHCR-Cairo about the status of their applications, and in resolving routine clerical or administrative problems. UNHCR-Cairo has set up a designated day for applicants to inquire about the status of their cases. Applicants report that they often are unable to speak to anyone to learn the status of their applications when decisions are delayed, and are sometimes told (occasionally in writing) that their files are lost even when they are not. Applicants report that they frequently are unable to ask simple questions of UNHCR about procedures, for instance about how to add family members to an application. When they are able to ask questions of personnel at the UNHCR-Cairo gate, applicants sometimes receive inaccurate or contradictory information. On some occasions, applicants and recognized refugees have been refused at the UNHCR-Cairo gate when trying to submit requests or inquiries in writing. Inability to access basic accurate information is a source of frustration and anxiety for applicants, and can feed rumors and misinformation in the refugee community about the UNHCR decision-making process.

Based on repeated observation of the reception area at UNHCR's Cairo office, applicants' inability to obtain routine accurate information about cases appears to result from inadequate administrative and clerical staffing at the Cairo office to sort submissions by applicants and answer routine procedural questions in an orderly way. This problem is worsened by severe overcrowding at the UNHCR office gate, where UNHCR personnel are under overwhelming pressure from a large number of applicants making a variety of petitions and inquiries.

UNHCR should consider allocating a larger group of staff members to answer simple inquiries during specified hours. It would be important to establish an orderly means for people to approach the gate, because the crowd and pressure at the gate currently makes successful interactions difficult both for refugees and UNHCR staff.

#### **i) Right to a hearing with a qualified official**

UNHCR guidelines establish that refugee applicants have the right to present their cases to a designated, qualified body.<sup>41</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>42</sup> Based on a review of reports by legal aid representatives who attend RSD interviews, training in interview techniques appear to be areas of improvement at the UNHCR-Cairo office from 2001 to 2002 (*see* section 5D, Right to an oral hearing, below).

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<sup>41</sup> UNHCR EXCOM Conclusion No. 8 (1977); UNHCR, Fair and Expedient Asylum Procedures § 4 (1994)..

<sup>42</sup> UNHCR-Cairo SOP RSD Interviews § 9.

## **j) Right to an oral hearing**

UNHCR recognizes that refugee applicants must have access to a personal interview at first instance.<sup>43</sup> The quality of the environment used in the interviews deserves attention as well. UNHCR guidelines have recognized the importance of interview environment and techniques. Among other things, UNHCR stresses the importance of establishing an "open and reassuring environment," taking time to establish trust and understanding between applicant and interviewer, remaining "neutral, compassionate and objective during the interview," allowing the applicant to present his or her claim without interruption, and mixing open-ended and specific questions.<sup>44</sup>

At UNHCR-Cairo, all applicants are given an oral interview at first instance. Legal aid files of applicants interviewed in late 2001 and 2002 generally include fewer reports from applicants of extremely short interviews, and fewer reports of abrasive questioning techniques than those who were interviewed earlier. Some gaps in interviewing remain, including occasional reported or observed abrasive questioning techniques, but such reports are less common than they were previously.

Legal aid personnel who have attended interviews with applicants in 2002 have generally reported that UNHCR-Cairo's interviewing staff are well-trained in basic interviewing techniques. Those who have observed interviews since the beginning of 2002 generally report that UNHCR-Cairo staff take time explaining the process to applicants. Some interviewers, especially those who worked in UNHCR-Cairo's temporary office in Maadi in the first half of 2002, often went beyond the minimum requirements in trying to make sure that applicants fully understand the RSD procedure and the purpose of the interview, and frequently showed sensitivity to applicants' stress and exhaustion.

Providing an adequate interview environment has been a problem in the past. Maintaining a reassuring environment free of interruptions was often been impossible for UNHCR staff because UNHCR had not provided adequate physical facilities. Two interviews were routinely conducted in a single office within hearing range of each other and without any divider between them. This jeopardized both confidentiality and the comfort and security necessary for an effective RSD interview. Interruptions in the form of people walking in and out of the room and occasional telephones ringing were unfortunately common, although less so in 2002 than in 2001. UNHCR-Cairo relocated to a new office in the second half of 2002. Although initially two interviews were conducted in a single room in some cases in the new office,<sup>45</sup> UNHCR-Cairo states that this is no longer the case. This increase in privacy is a significant improvement in RSD procedures.

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<sup>43</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 50(h) (May 2001)

<sup>44</sup> GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION ¶ 36, HCR/GIP/02/01 (7 May 2002)

<sup>45</sup> Based on personal observation and NGO reports.



## k) Right to a qualified interpreter

UNHCR standards require the availability of "qualified and impartial interpreters" for refugee applicants.<sup>46</sup> Its standards allow applicants to request an interpreter of the same gender, which should be provided "to the best extent possible."<sup>47</sup>

UNHCR-Cairo's procedures and practices have substantially implemented this standard. In the most common languages used by asylum-seekers in Cairo (i.e. Southern Sudanese Arabic, Dinka and some other ethnic languages from Sudan, Somali, Amharic, among others). UNHCR-Cairo provides interpreters from a pool of paid recognized refugees. It has made an effort to recruit interpreters of both genders so that women can speak with female interpreters. When a UNHCR-provided interpreter is not available, applicants may bring their own interpreter, so long as that person does not have a pending or denied application for refugee status at UNHCR-Cairo.

Quality interpretation is critical to ensure correct understanding of an applicants' testimony; poor interpretation can leave an applicant's testimony seeming incoherent. UNHCR-Cairo's interpreters are given a short training course before beginning work. They are not professional simultaneous interpreters.

Legal aid files indicate there have been reported cases where UNHCR-Cairo interviewers have asked Southern Sudanese applicants to speak without an interpreter in Egyptian Arabic after they requested to speak in their own dialect. The Egyptian dialect is often not well understood by many people from Southern Sudanese, especially those originally from rural areas. In response to an advance copy of this report, UNHCR-Cairo states that applicants are normally able to choose the language of their interviews, and that "the violation of this basic procedural safeguards – if established and reported – automatically leads to the granting of another hearing of the case in first instance or reviewing stage."

In response to an advance copy of this report, UNHCR-Cairo notes that it has an established monitoring process for the quality of interpretation.<sup>48</sup>

## l) Right to counsel

UNHCR's standards require: "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>49</sup>

UNHCR-Cairo's standard operating procedures and practice allow applicants to obtain legal representation, by licensed Egyptian lawyers, foreign lawyers, and paralegals. UNHCR

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<sup>46</sup> UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures ¶ 50(g) (May 2001).

<sup>47</sup> UNHCR-Cairo SOP RSD Interviews § 6.1; UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures ¶ 50(n) (May 2001).

<sup>48</sup> Details of this monitoring process were not provided, and a full examination of such monitoring procedures would be beyond the scope of this report.

<sup>49</sup> UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures ¶ 50(g) (May 2001).

accepts written submissions by legal representatives, and representatives provided by a small group of NGOs in Cairo regularly attend interviews with clients.

Although it allows applicants to obtain legal assistance on their own, UNHCR-Cairo does not provide or fund it. Most representation and counseling was provided by paralegals, usually under the supervision of lawyers. Full legal aid by members of a bar was more rare. However, it is common in many countries around the world for non-lawyers to assist and in some cases represent asylum-seekers in RSD proceedings.

A separate study of legal counseling services offered in Cairo has indicated that asylum-seekers receiving individual case preparation assistance in 2002 had approximately double the chance of obtaining refugee protection at UNHCR-Cairo.<sup>50</sup> However, the same study estimated that individual legal counseling was available to only one in seven asylum-seekers in Egypt in 2002.<sup>51</sup> These figures, combined with the necessity to provide information and advice to asylum-seekers early (described in Section 5B above), are good reason for NGOs to work to expand legal aid capacity for asylum-seekers.

#### m) **Right to written reasons for rejection**

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 declared inadmissible, the decision should be a reasoned one."<sup>52</sup>

This standard is currently not implemented at UNHCR-Cairo. 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>53</sup> However, the office withholds these assessments from the applicants concerned.

Currently, applicants to UNHCR-Cairo learn their results by looking at weekly tables on a public bulletin board that list results next to numerical case numbers. Through the end of 2001, UNHCR provided no reasons for decisions in most cases. Beginning in January 2002, UNHCR-Cairo began listing three-letter codes on its results notice sheets representing general categories of reasons. These categories include:

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<sup>50</sup> Michael Kagan, *Frontier Justice: Refugee Legal Aid and UNHCR in the Developing World*, paper presented to International Association for the Study of Forced Migration (IASFM) conference in Thailand (January 2003) (In first instance cases, a sample of 172 assisted applicants succeeded in 49 percent of cases compared to 27 percent overall. In appeals cases, a sample of 77 assisted applicants succeeded in 18 percent of cases, compared to 4 percent overall).

<sup>51</sup> *Id.* (based on an assumption of 10,000 asylum-seekers in 2002 and an estimated of combined legal aid capacity of 1350 cases per year).

<sup>52</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 50(o) (May 2001). *See also* DETERMINATION OF REFUGEE STATUS, RLD 2 (1989) at page 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, RLD 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>53</sup> Described in internal version of January 2002 SOP "RSD Interviews" at § 12.1.

- "LOC" (lack of credibility),
- "NWP" (no well-founded fear of persecution),
- "BPS" (burden of proof not satisfied),
- "NRC" (manifestly unfounded),
- "WFN" (well-founded fear not related to persecution), and
- "NFD" (no forced external displacement).

These coded categories of reasons are non-specific. Many of the codes simply restate the general criteria of the international refugee definition, such as "no well-founded fear of persecution" and "burden of proof not satisfied." Some have questionable legal meanings, such as "well-founded fear not related to persecution." Some seem to be distortions of the refugee definition, such as "no forced external displacement."<sup>54</sup>

This system fails to provide any meaningful specific information about individual cases that would allow applicants confidence that decisions are not arbitrary. It does not provide a reasoned decision from which applicants could build an appeal or accept that he or she is outside the legal definition of a refugee. Rejections based on "lack of credibility" require a particular level of specificity (*see* Section 5I below). The lack of specific reasons for rejection at first instance may increase the number of unnecessary appeals, since applicants cannot determine whether they have a sound ground for appeal.

The UNHCR-Cairo office can implement standards calling for specific written reasons for rejection by distributing its currently internal case assessments to rejected applicants.

## **n) Right to know the case to be met (right to review evidence)**

### **Principles of law requiring evidentiary disclosure**

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>55</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

<sup>54</sup> The 1951 Convention refugee definition does not consider reasons for displacement in the past; it focuses solely on reasons a person cannot return home in the future.

<sup>55</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.

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.

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>56</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>57</sup> If UNHCR believed that withholding such evidence was permissible, it would have had to defer to the government's decision. Commendably, in its role supervising implementation of the 1951 Refugee Convention, UNHCR considered evidence withheld from an asylum-seeker irrelevant in its refugee status determination.

### **UNHCR-Cairo RSD procedure and practice regarding withholding of evidence**

Whereas the U.S. practice uses withheld evidence only in "security" cases, UNHCR-Cairo withholds evidence from asylum-seekers in every case. Refugee applicants in Egypt are thus unable to establish or understand the case to be met because decisions are made on the basis of evidence they cannot see and assessments of their cases that they cannot read.

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<sup>56</sup> MICHAEL T. MORAN, *ADMINISTRATIVE LAW*, 2ND ED., at pages 136-7, London: Old Bailey Press (1999).

<sup>57</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).

Evidence routinely considered by UNHCR-Cairo 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. Criminal procedure in many countries allows witnesses and suspects in investigations to read and sign statements made to police. The opportunity to correct the transcript of one's own interview has greater importance at UNHCR-Cairo 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>58</sup>

The UNHCR-Cairo practice of withholding evidence appears to be based on an August 2001 memorandum about file confidentiality from its Geneva headquarters, called *GUIDELINES ON THE SHARING OF INFORMATION ON INDIVIDUAL CASES*. This memorandum is itself officially internal, although a copy has been obtained and reviewed. The memorandum purports to prohibit distribution of evidence to applicants or their legal representatives.<sup>59</sup> While the memorandum is intended to be a routine set of rules on confidentiality, normal confidentiality generally does not require that a person be prohibited from reviewing his or her own file.

The memorandum's justification for this unusual withholding of evidence is a cause for some concern. The memorandum explains the need for secrecy primarily by expressing a general fear for the safety of UNHCR staff.<sup>60</sup> By so doing, the memorandum by implication stigmatizes all asylum-seekers as potentially dangerous. Legally, the reference to staff safety distorts international human rights law, which guarantees fair procedures even when there is evidence that a person might be dangerous.<sup>61</sup> Most asylum-seekers and refugees in Egypt have committed no crimes and are themselves trying to escape violence. UNHCR can pursue the protection of its staff, for instance by removing staff member names from documents or by establishing security procedures and safeguards at its offices. But this should not be put in competition with fairness in RSD procedures. UNHCR should not pursue staff security by violating the rights of the people its staff are supposed to protect.

Based on observations of RSD interviews by legal aid personnel, it appears that UNHCR-Cairo's practice withholds more evidence than its internal rules actually require. UNHCR's August 2001 memorandum *GUIDELINES ON THE SHARING OF INFORMATION ON INDIVIDUAL CASES* allows interviewers to 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>62</sup> Likewise, the Cairo office's internal operating procedures allow for case assessments to be read with applicants after interviews to verify accuracy. Responding to an advance copy of

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<sup>58</sup> See UNHCR-Cairo SOP RSD Interviews § 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>59</sup> UNHCR Guidelines on the Sharing of Information on Individual Cases ¶ 27 (August 2001).

<sup>60</sup> UNHCR Guidelines on the Sharing of Information on Individual Cases ¶ 27 (August 2001).

<sup>61</sup> See International Covenant on Civil and Political Rights article 14 (guaranteeing fair procedures in criminal trials).

<sup>62</sup> UNHCR Guidelines on the Sharing of Information on Individual Cases ¶ 27 (August 2001).

this report, UNHCR-Cairo informs that this is done "normally only on some elements of an interview," and is not done routinely. 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 witness testimonies (including but not limited to their own interview transcripts), documents, country origin information, legal opinions, case assessments, and reasons for decision.

### **Withholding of medical information**

There is a particular concern regarding UNHCR-Cairo's policy of withholding forensic medical reports from the people whose bodies have been examined. Every year, UNHCR refers several hundred asylum-seekers who report being victims of torture to NGO medical clinics. Doctors perform these evaluations and make reports to UNHCR in hopes of helping refugees document their cases. The evaluations often involve fairly invasive interviewing and physical exams by physicians.

Withholding reports of this nature from people is a violation of normal medical ethics. Egyptian medical regulations require that doctors inform patients of their medical conditions and required treatment, as well as provide such information to other doctors treating the patients.<sup>63</sup> However, by request of UNHCR,<sup>64</sup> the clinics have agreed to withhold copies of its reports from the people who were examined. The reports are thus seen and usable only by UNHCR, even when people request to see their own medical report. Applicants are not able to know whether the reports support or damage their cases, and cannot clarify or dispute the findings.

Providing people information gleaned from medical exams is an important safeguard to respect basic human dignity and to allow marginalized people to access the medical care that they need. Informing patients about the results of invasive medical exams helps maintain a person's sense of control over his or her own body. For asylum-seekers who have little access to medical care on their own, withholding information can prevent a person from getting the treatment they need for physical or mental conditions.

The UNHCR-Cairo practice puts physicians and the medical clinics in the position of violating the rights (medical privacy rights as well as due process rights) of the people they seek to help. Medical clinics and medical or psychiatric personnel performing forensic evaluations for UNHCR should provide to the people they examine copies of all reports and medical records, in order to avoid any breach of due process rights or Egyptian law. UNHCR should not in anyway restrict the communication and counseling between physicians, psychologists and their patients.

In response to an advance copy of this report, UNHCR-Cairo argues that its procedures comply with Egyptian regulations because practitioners "always inform the patients of the

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<sup>63</sup> Ministry of Health regulation 234/1974 articles 16, 17, and 19.

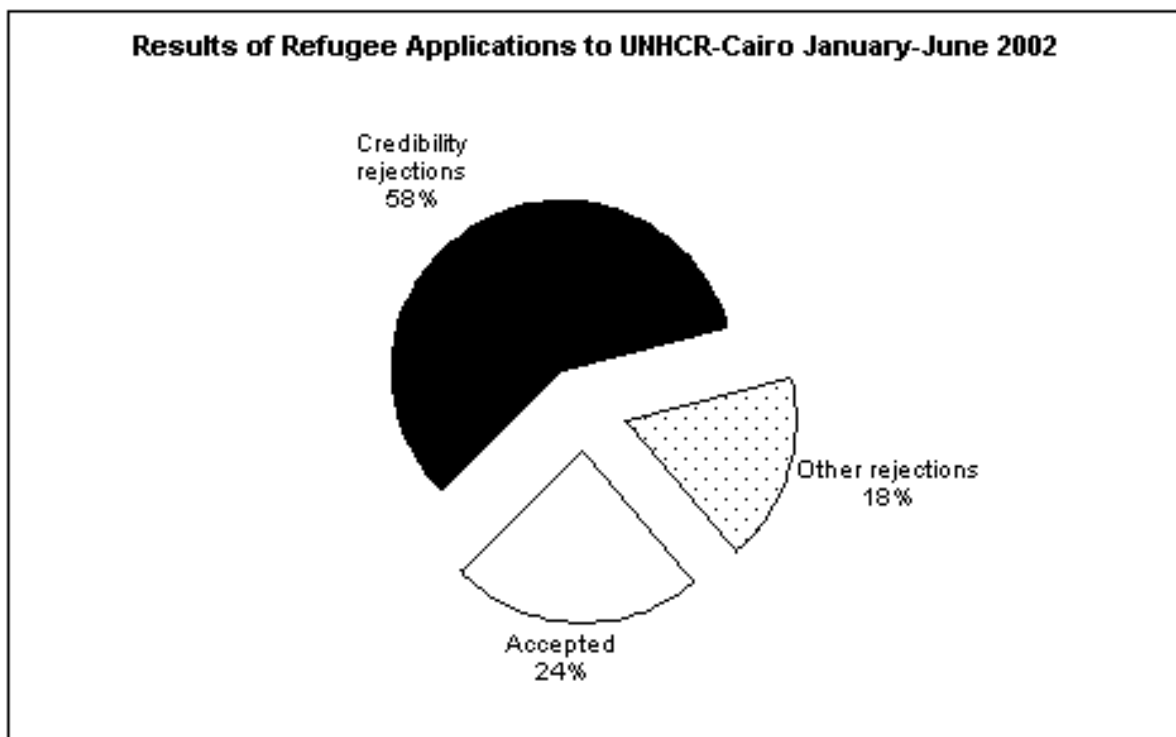
<sup>64</sup> Based on information received from and confirmed by UNHCR-Cairo officials and NGO personnel.

illness/medical problems they suffer from as they are required by the Egyptian laws, in particular contagious diseases." However, this only partly answers the demands of medical regulations. A patient should be able to request his or her entire file be transferred to other doctors. Moreover, in a refugee case, contagious diseases are only part of the concern. A forensic exam is likely to involve screening for post-traumatic stress and other conditions resulting from violence and torture. Full counseling on such conditions would require discussing information included in the UNHCR reports.

The UNHCR-Cairo practice of withholding medical reports is a deviation from normal medical practice and due process. It should be changed.

### **o) Fair credibility assessment**

More than 75 percent of rejected applicants at UNHCR-Cairo in the first half of 2002 were told they are rejected for reason of "lack of credibility."<sup>65</sup> Combined with the overall rate of rejection (76 percent), this means that UNHCR-Cairo considered the majority of its refugee applicants to lack credibility. UNHCR-Cairo has internal procedural rules governing credibility assessment, but has not released these to the public.



An applicant's credibility is often central to refugee status determination because refugees rarely have independent evidence with which to back up their claims. Credibility assessment is perhaps the most difficult part of refugee status determination, because it requires interpreting flaws in testimony provided by nervous people speaking to a foreign institution, often in a foreign language, and across a cultural divide. Often, the most vulnerable refugees

<sup>65</sup> A review of UNHCR-RO Cairo results posted over 11 sample weeks in 2002, February 14 through March 21 and May 2 through May 30, found 1,144 total rejections with 880 (76.9 percent) attributed to lack of credibility.

— trauma victims, women, people lacking education, and people who have learned to fear official institutions — have the most trouble giving complete, detailed and coherent testimony.<sup>66</sup> A wealth of research has shown that human beings have great difficulty detecting whether another person is telling the truth even without cross-cultural barriers to communication.<sup>67</sup>

Given the importance of credibility assessment, there are a number of aspects of the UNHCR-Cairo procedure which should be of concern.

First, standards endorsed by courts and governments require that negative credibility decisions be specifically explained to applicants, allowing them to effectively appeal the decision. The U.S. Board of Immigration Appeals has held that a refugee status decision-maker may not reject an applicant on credibility grounds without "specific and cogent reasons," such as inconsistencies, vagueness or material omissions in testimony or evidence.<sup>68</sup> The Canadian Immigration and Refugee Board Chairperson's guidelines note:

The Federal Court has frequently had occasion to remind the Refugee Division that if a claim is rejected because of lack of credibility, *clear reasons must be given. Those aspects of the testimony which appear not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated.* ... This generally includes an obligation to give examples or illustrations of the basis for not accepting the claimant's testimony. It is not enough to say that the evidence is not believed, otherwise there will be an appearance of arbitrariness.<sup>69</sup>

Requiring reasons for negative credibility assessments allows credibility decisions to be reviewed, shows that decisions are not arbitrary and not subjective, and makes concrete elements of a person's testimony more important than an adjudicator's personal judgment. As discussed above, UNHCR-Cairo writes detailed credibility assessments of all applicants, but withholds these from applicants.

Second, best practice standards call for adjudicators to tell applicants if there are contradictions or inconsistencies in their testimony and give them the opportunity to respond before reaching a decision on credibility.<sup>70</sup> Openly noting flaws in testimony facilitates reasoned discussion about how a person's credibility should be assessed, allows

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<sup>66</sup> See UNHCR, Note on Burden and Standard of Proof in Refugee Claims para. 9 (16 December 1998).

<sup>67</sup> See generally, Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001) (originally published in 69 MEDICO-LEGAL JOURNAL, Part 1, 2001) (In one study, people trained to pick up nonverbal cues to distinguish real from suggested memories were accurate only 60 percent of the time, compared to 50 percent normally); *What gives a liar away?* BBC Online (1 November 2001); Paul Ekman, Maureen O'Sullivan and Mark G. Frank, *Who can catch a liar?* 46 AMERICAN PSYCHOLOGIST 913-920 (1991); Aldert Vrij, *Detecting the liars*, 14 THE PSYCHOLOGIST 596-598 (2001); Mark G. Frank, *Assessing deception: Implications for the courtroom*. 2 THE JUDICIAL REVIEW 315-326 (1996); Gerald R. Miller and Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in THE PSYCHOLOGY OF THE COURTROOM 191 (Norbert L. Kerr and Robert M. Bray eds., 1982).

<sup>68</sup> Matter of A-S-, Interim Decision #3336, 21 I&N Dec. 1106, 1109 (U.S. B.I.A. 1998).

<sup>69</sup> ASSESSMENT OF CREDIBILITY IN THE CONTEXT OF CRDD HEARINGS, (October 1999), at 2.2 (emphasis added).

<sup>70</sup> See DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 3rd Ed. 167 (1999); ASSESSMENT OF CREDIBILITY IN THE CONTEXT OF CRDD HEARINGS at 2.5.2 (1999); Gracielome v. Canada (Minister of Employment and Immigration) (1989), 9 Imm. L.R. (2d) 237 (F.C.A.); Nkrumah v. Canada (Minister of Employment and Immigration) (1993) 20 Imm. L.R. (2d) 246 (F.C.T.D.) at 249.



misunderstandings to be clarified, and allows applicants to introduce rebuttal evidence or arguments where needed. In some cases UNHCR interviewers have refused to answer applicants who asked if there are any problems with their testimony that might raise credibility problems and thus need clarification.<sup>71</sup>

In response to an advance copy of this report, UNHCR-Cairo stated: "Misunderstandings and contradictions in statements may not be relied on in credibility assessments until the applicant has been given the opportunity to explain. If this does not occur in the first interview, a complimentary interview will be called in order to do so. This is systematic practice."

Third, because refugees' experience as victims of persecution may make them wary of revealing their circumstances to unknown authority figures, UNHCR's HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS advises that interviewing refugees more than once when credibility is in question.<sup>72</sup> This safeguard responds to the fear, distrust, and confusion which asylum-seekers often experience, and provides an opportunity for interviewers to gain their trust. However, it is not implemented at UNHCR-Cairo. The office often rejects people's credibility after only one interview. UNHCR-Cairo's internal procedures direct interviewers to minimize requests for second or complimentary interviews.<sup>73</sup>

In order to bring UNHCR-Cairo procedure into compliance with international standards on credibility assessment, the office should provide specific and cogent written reasons for any negative credibility decision. Best practice standards call for applicants to be given the opportunity to rebut or clarify any negative credibility factors that might lead to negative credibility decisions. Finally, to comply with its own long-standing guidelines, UNHCR-Cairo should provide complimentary interviews in any case where it considers there may be problems with an applicant's credibility.

## **p) 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>74</sup>

There is no evidence of systematic discrimination or partiality in status determination by staff at UNHCR-Cairo. While intentional prejudice for or against applicants is not a major concern, a review of UNHCR-Cairo's internal procedures gives reason for concern that the internal decision-making process in UNHCR-Cairo has been structurally skewed against applicants, so that the process as a whole may tend toward rejection.

A first concern is that UNHCR-Cairo's policy, at least in its January 2002 operating procedures, was to ask its interviewers to provide more thorough summaries of relevant facts

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<sup>71</sup> Based on reports by legal aid personnel attending interviews.

<sup>72</sup> (hereafter UNHCR HANDBOOK) ¶¶ 198, 199 ("While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts.").

<sup>73</sup> Internal version of January 2002 SOP "RSD Interviews" § 13.1.

<sup>74</sup> See, e.g., International Covenant on Civil and Political Rights art. 14; Council of Europe Recommendation No. R(81)16 ¶ 1 (1981) ("all asylum requests shall be dealt with objectively and impartially.").

in recognized cases than in cases where they recommended rejection.<sup>75</sup> If anything, rejected cases should require more detailed and specific assessments, given that rejections should require more safeguards and specificity about evidence. Whereas applicants should enjoy the "benefit of the doubt" in meeting their burden of proof in refugee claims,<sup>76</sup> this practice could be seen to demand that interviewers recommending acceptance of a claim find more facts and reasons than if they decide to reject the claim. In addition, it essentially asks interviewers who recommend acceptance to do more work (in writing longer assessments), which may have a negative influence on fair adjudication in an understaffed and overworked office.

UNHCR-Cairo may have resolved this problem. In response to an advance copy of this report, UNHCR-Cairo stated: "Interviewers provide the same level of detail in recognized cases as in denied cases. In fact, in denied cases more analysis is required to support a negative decision."

A second concern is that UNHCR-Cairo's internal review process in RSD decision-making displays caution about recognizing refugee status in borderline cases. In certain kinds of cases, UNHCR-Cairo uses a special review process, by which higher UNHCR officials must review certain types of decisions. This procedure is used in cases of exclusion from refugee status (i.e. people who have allegedly committed war crimes or serious non-political crimes), which is appropriate since exclusion cases are legally complex and require special safeguards. But the special review process is also used whenever a case is perceived to be borderline in legal terms or potentially precedent-setting. There is reason to be concerned that positive decisions will be more likely to be seen to set a precedent than negative decisions, and hence require more review. The establishment of a procedure to scrutinize potentially precedent-setting decisions may raise concerns that UNHCR-Cairo's review structure effectively limits the broad application of the refugee definition.

UNHCR-Cairo's position is that its procedures do not encourage a restrictive approach to RSD. In response to an advance copy of this report, UNHCR-Cairo stated: "[The review process] does not encourage a restrictive interpretation. In fact, this encourages a common approach to the refugee definition in borderline decisions as applied by UNHCR-Cairo." It may be helpful for UNHCR-Cairo to explain the precise definition of borderline cases.

A third concern is that UNHCR-Cairo's durable solutions staff review RSD decisions. Durable solutions (repatriation, local integration, or resettlement) are considered *after* a person has been recognized as a refugee. Durable solutions are a goal, not a legal right, and involve a wide range of criteria that are not part of the law of refugee status, including family composition, work history, and transit in third countries. In addition, resettlement countries may apply the refugee definition more narrowly than UNHCR guidelines call for. For these reasons, refugee status determination and durable solutions decision-making must be kept entirely separate.

In the procedure in place at UNHCR-Cairo,<sup>77</sup> the durable solutions unit at UNHCR-Cairo is expected to routinely scrutinize positive refugee status decisions. If it finds substantive or procedural problems with a claim, officials may refer the file back to the RSD unit for review or clarification, or consider cancellation of refugee status.

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<sup>75</sup> Internal version of the January 2002 SOP "RSD Interviews" at ¶ 12.1.

<sup>76</sup> UNHCR HANDBOOK ¶¶ 196, 203, 204 (reissued 1992).

<sup>77</sup> Set out in the January 2002 internal version of the SOP "RSD Interviews" at § 13.2.2.

This practice is a breach of general principles of law, a worrying intermingling of durable solutions and refugee status decision-making, and an endangerment to impartiality. While refugee status may be cancelled where strong evidence of fraud surfaces later, the principle of *res judicata* calls for positive decisions to be considered final and prohibits continual re-examination of cases that have already been decided. Unfortunately, the UNHCR-Cairo procedure calls for positive RSD decisions to be immediately re-examined at the durable solution stage, even without evidence of fraud. Durable solutions interviews at UNHCR-Cairo in fact often involve re-questioning refugees about the basis of their claims. This prevents recognized refugees from being able to feel secure that UNHCR's decision to provide protection to them is actually final. Furthermore, the practice of having durable solutions staff review RSD decisions raises the risk of internal pressure within UNHCR to not recognize refugees for whom a durable solution would be difficult to find. Finally, this practice endangers impartiality by ensuring that positive decisions will be scrutinized more immediately and possibly more thoroughly than negative decisions, including the possibility that the staff members who recognized a refugee will be asked to write clarifications for their supervisors.

In response to an advance copy of this report, UNHCR-Cairo argued that its durable solutions work does not place negative pressure on RSD, and that its review process is impartial. UNHCR-Cairo stated:

It is clearly not the case that positive decisions are scrutinized more than rejections. Whether the applicant is recognized or denied, the positive and negative aspects of each case are analyzed in the assessment. Furthermore, each case is subject to the review process. In practice, reviewers scrutinize denied cases more than positive decisions. ... Refugee status and assistance, [as well as] refugee status and durable solutions are delinked. The lack of automaticity has been widely criticized by refugees. ... Should serious evidence be raised in the course of the DURSOL [durable solutions] interview that the applicant is not a refugee or has intentionally misled the office, the case may be examined for cancellation. This procedure is outlined in the Handbook para 117.<sup>78</sup> It is applied restrictively and in very few cases. ... UNHCR-Cairo's success in the resettlement [of] disabled refugees, large families, heavy medical cases, [and] HIV cases speaks for itself. Resettlement criteria are guided by the protection needs of the refugees and their variable vulnerability.

This report does not dispute the propriety of canceling refugee status in certain cases of material fraud.<sup>79</sup> Rather, the concern here is about UNHCR-Cairo's practice of having durable solutions staff routinely examine positive RSD decisions, as explained in the office's January 2002 internal procedures. This practice erodes the finality of RSD decisions and

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<sup>78</sup> This paragraph states: "Article 1 C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled."

<sup>79</sup> In addition to paragraph 117 of the UNHCR HANDBOOK, criteria for cancellation are spelled out in an internal UNHCR memorandum, Cancellation of Refugee Status (4 July 1989), and in jurisprudence. See Refugee Appeal 522/92, Re ARR, New Zealand Refugee Status Appeals Authority (1995).

raises questions about whether RSD and durable solutions are effectively separated. Positive RSD decisions should not be subject to any re-examination (including re-interviewing refugees about the basis of their claims) unless evidence of fraud come to light independently.

## q) **Appeal procedure**

Analysis of a sample of appeal decisions from in 2002 indicates that less than 5 percent of RSD appeals are successful at UNHCR-Cairo. Of 1107 appeal decisions in the sample, 48 applicants were recognized on appeal.<sup>80</sup>

### **Right to an independent appeal**

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>81</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>82</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>83</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.

UNHCR-Cairo has recently taken a significant step toward implementing this standard by creating a unit within the office that deals solely with appeals.

Through October 2002, UNHCR-Cairo did not provide an independent appeal to rejected applicants. Appeals were considered by different staff members from those who were involved in the first instance decision on the same case. However, this minimal independence was inadequate to meet U.N. standards. Appeals at UNHCR-Cairo were considered by employees responsible for both first instance and appeals cases.<sup>84</sup> The officers supervising appeals also supervised first instance decision-making. In sum, in the previous system, an appealing asylum-seeker had to ask a small group of people to recognize that their

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<sup>80</sup> Sample of appeal decisions posted at UNHCR-Cairo over 27 weeks from January through October 2002.

<sup>81</sup> See OAU-UNHCR Guidelines for National Refugee Legislation and Commentary (1980); UNHCR, Fair and Expeditious Asylum Procedures (1994); UNHCR, Refugee Protection: A Guide to International Refugee Law (2001); UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures (May 2001).

<sup>82</sup> UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures ¶ 43 (May 2001).

<sup>83</sup> U.N. Human Rights Committee General Comment No. 13 at para. 3 (1984).

<sup>84</sup> Inter-Office Memorandum No. 112/88, Field Office Memorandum No. 105/88 (2 November 1988).

close colleagues or people they supervise made a mistake in law or fact . This denied asylum-seekers in Egypt access to a truly independent appeal decision-maker who could provide an effective check against mistaken rejections.

This system was changed significantly in November 2002, providing considerably more independence in the appeal process. As understood at the time this report was written,<sup>85</sup> UNHCR-Cairo set up a discrete unit of staff members devoted solely to reviewing appeals. This change is intended in part to allow appeals to be reviewed more efficiently and to address a perception that appeals had not received sufficient attention relative to first instance cases. It also takes a substantial step toward implementation of standards guaranteeing an independent appeal of rejections. The separation of appeal consideration from first instance decision-making can facilitate impartial consideration of possible errors in first instance decisions and should help establish a more balanced review process for rejected applicants.

It is important for UNHCR-Cairo to continue this progress by setting up a fully independent appeals unit with its own supervisory and personnel structure in order to comply with the criteria set out by the U.N. Human Rights Committee. The new appeals unit will not be administratively independent in terms of hiring, dismissals, and promotions. The new unit will still be accountable to the same supervisors as first instance decision-making. UNHCR-Cairo procedures call for higher supervisors to approve any first instance decision in a borderline or precedent-setting case. These are likely to be the cases where an independent appeal is most important, and it is not clear that the new system will bring real independence in these cases. Although the new system does not entirely conform to U.N. standards, it is a substantial step forward, and a basis for complete implementation of the standards in the future.

### **Fair opportunity to prepare an effective appeal**

UNHCR has stressed in advice to governments that a rejected asylum-seeker should be able to appeal on the facts as well as the law applicable in his or her case.<sup>86</sup> UNHCR standards require allowing applicants a reasonable opportunity to submit meaningful substantive petitions.<sup>87</sup> UNHCR's most recent guidance on fair RSD procedures explains:

Other safeguards of particular importance for expedited appeals for which a time limit has been imposed within which appeals must be made, include measures to ensure that an asylum-seeker has prompt access to legal advice, interpreters and information about procedures, so that s/he still have access to an effective remedy.<sup>88</sup>

Implementation of this standard in Cairo has been problematic because of the closed nature of the UNHCR decision-making process. Applicants at UNHCR-Cairo have one month after their first instance rejection to submit an appeal request. Since rejected applicants are not

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<sup>85</sup> Based on telephone conversation with Lotfi Beldjelti.

<sup>86</sup> UNHCR, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW at page 60 (2001).

<sup>87</sup> UNHCR Executive Committee Conclusion No. 8 (XXVIII) (1977); OAU/UNHCR Working Group Guidelines for National Refugee Legislation and Commentary ¶ 4 (December 1980); UNHCR, Fair and Expeditious Asylum Procedures § 4 (1994); UNHCR, Fair and Efficient Asylum Procedures ¶ 43 (2001).

<sup>88</sup> UNHCR, Fair and Efficient Asylum Procedures ¶ 43 (2001).

given reasons for rejection, nor access to the evidence UNHCR considered in their cases, filing an effective appeal can be guesswork even for people trained in refugee law.

A further problem is that appeal criteria at UNHCR-Cairo have not been adequately transparent. Although UNHCR-Cairo has discussed its appeal criteria with NGOs, as well as in comments made about this report, UNHCR-Cairo has not published any authoritative or complete guidance about the grounds on which it will recognize applicants on appeal, nor the criteria on which it will grant appeal interviews.

### **Need for in-person appeals interviews**

UNHCR advice to governments has stressed that rejected applicants who appeal their cases should have access to an oral re-hearing, except in rare cases of manifestly unfounded or abusive claims. UNHCR stated in May 2001: "The possibility for the appeal or review authority to gain a personal impression of the applicant is another important safeguard."<sup>89</sup>

In response to an advance copy of this report, UNHCR-Cairo maintained that, "There is no obligation on UNHCR or [a] Government to conduct a second hearing of the person," citing UNHCR Executive Committee (EXCOM) Conclusion No. 30, which was issued in 1983. However, these are not the applicable standards in the vast majority of cases in Egypt. The 1983 EXCOM conclusion applies only to claims rejected because they are "manifestly unfounded," which UNHCR-Cairo cites as a reason for rejection only in about five percent of claims.<sup>90</sup>

Available data for 2002 indicates that only about one in four appealing applicants at UNHCR-Cairo receives an appeal interview.<sup>91</sup> UNHCR-Cairo screens appeals on paper before deciding whether to grant a re-hearing. Successfully "screened" paper appeals lead to appeal interviews, after which a new decision is reached. Unsuccessfully screened appeals lead to rejections and file closures without a new hearing and with no written reasons.

Only a minority of applicants in Egypt have access to legal aid or paralegal advice or assistance. Since most asylum-seekers in Egypt are relatively uneducated and often not literate in Arabic or English, it is unlikely that an applicant acting without legal assistance will be able to understand why he or she may have been rejected and present all relevant facts and arguments in an appeal. In this context, an applicant's written submission will often not reveal all of the appeal grounds that should be considered. With no written reasons for rejection and little available legal aid, an oral re-hearing is important. This would allow officers at UNHCR to actually meet and interview applicants in order to try to elicit all possible grounds of appeal before making a final decision.

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<sup>89</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶ 43 (May 2001).

<sup>90</sup> A sample of 1007 rejections posted by UNHCR-Cairo in seven randomly chosen weeks from March through September 2002 found only 53 rejections attributed to the code "NRC ("manifestly unfounded").

<sup>91</sup> A sample of the UNHCR-Cairo results over 12 weeks from January through April 2002 found 155 applicants granted appeal interviews during a period when 605 final appeal decisions were reached.

## r) Attention to the needs of vulnerable persons

UNHCR has called on governments to take account of the needs of especially vulnerable refugees in their status determination procedures, particularly torture victims, vulnerable women, unaccompanied minors, the elderly, people in need of psychological treatment, and stateless persons.<sup>92</sup> UNHCR-Cairo has taken substantial steps to implement this in its refugee status determination.

UNHCR-Cairo has established a "fast-track" procedure to provide earlier first instance refugee status determination interviews to six categories of particularly vulnerable people:

- Victims of torture,
- Unaccompanied minors,
- Elderly applicants,
- Single women head of households,
- Disabled and medically at-risk,
- Applicants facing security threats in Egypt.

By reducing the frequently long delays before an initial interview, this system can reduce hardships, and in some cases serious harm, that confront vulnerable refugees living without assistance. The program has now been in place for several years, and its establishment is a credit to the UNHCR-Cairo office.

An empirical assessment of the day-to-day workings of the fast-track program would require separate field studies for each of the vulnerable categories, and is beyond the scope of this report. In order to fully implement the program, UNHCR should consider an evaluation of the way it identifies vulnerable applicants from the general asylum-seeker population.

UNHCR should address the current lack of fast-tracking at the appeal stage. Appeals at UNHCR-Cairo in the past have taken a year or more to resolve in some cases, and delay at this stage imposes similar hardships as delay at the first instance stage. UNHCR-Cairo should consider fast tracking the appeals of people who fit the vulnerable categories.

Delays in decision-making that occur after expedited interviews can undermine the goals of the fast-track program. Giving a vulnerable person an earlier interview would be more beneficial if this were guaranteed to lead to an early decision. Applicants often wait months (and sometimes a year or more) for decisions after interviews. UNHCR-Cairo should consider means of avoiding this problem. For instance, UNHCR-Cairo could set a deadline for decisions for fast-tracked applicants, or provide medical and other protection assistance on a provisional basis to vulnerable applicants waiting for delayed decisions.

### SUMMARY OF FINDINGS REGARDING PROCEDURAL FAIRNESS AND THE RISK OF *DE FACTO* REFOULEMENT

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#### Procedural standards implemented

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#### Procedural standards not implemented

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<sup>92</sup> UNHCR, *Asylum-Processes: Fair and Efficient Asylum Procedures* ¶¶ 44-47 (May 2001). See also UNHCR, *Fair and Expeditious Asylum Procedures* § 4 (November 1994).

Applicants have access to the refugee status determination procedure.

Applicants have the right to remain in the country while their cases are pending.

As of November 2002, appeals are screened by a partially independent unit (though independence meeting UN standards has not been achieved).

Special procedures are in place to expedite applications by especially vulnerable people.

Applicants have the right to legal representation.

Applicants are given some information about the procedure to be followed.

Interpreters are provided by UNHCR in the most common languages spoken by asylum-seekers.

Asylum-seekers have the right to an oral hearing at the first instance stage.

UNHCR-Cairo interviewing staff appear increasingly well-trained in proper interviewing techniques.

Specific written reasons for rejection are not provided; detailed case assessments are withheld from applicants and their legal representatives.

Evidence considered in cases is withheld from the applicants concerned; withholding reports from forensic medical exams appears to violate medical ethics and may violate Egyptian law.

There are reasons for concern that the decision-making process is structured so that positive decisions may receive more thorough and more immediate scrutiny than negative decisions. The practice of durable solutions staff reviewing positive RSD decisions violates the principle of *res judicata*.

Negative credibility decisions are reached without providing specific reasons, and often without follow-up interviews.

Most appeals are rejected without an in-person re-hearing.

Many critical parts of the standard operating procedures of the UNHCR-Cairo office are withheld from the public.

In many ways, the UNHCR-Cairo office deserves credit for improving the RSD process in recent years. Appeals have recently become more independent. Interview quality appears to have improved, and there are systems in place to expedite the cases of vulnerable populations, such as unaccompanied minors, single women with children, trauma victims and the elderly. Previous problems in providing a private space for RSD interviews have been resolved. The common perception among legal aid personnel is that UNHCR-Cairo's consideration of individual cases is generally more thorough than it was several years ago. UNHCR and the Egyptian government should be applauded for a recent agreement to issue identity cards to asylum-seekers, which once fully implemented should reduce the chances of wrongful detention and deportation.

Despite these recent improvements, this report highlights an overburdened system that remains unbalanced and unfair in a number of substantial ways. Although there have been significant recent improvements, the U.N. refugee agency has not implemented many of the United Nation's own standards and precedents of procedural fairness at its office in Cairo. The RSD procedures and policies at UNHCR-Cairo lack basic transparency, withhold evidence from applicants, do not provide for as extensive interviewing as called for by UNHCR guidelines, and fail to explain specific reasons for rejection. In some respects, the structure of UNHCR-Cairo's decision-making process raises concerns that potentially more immediate scrutiny is applied to positive decisions than to rejections of refugee applications and that the principle of *res judicata* is not adequately observed. With these procedural gaps, people fleeing persecution face a high risk of human errors by staff overburdened by a large number of applications.

The lack of implementation of some key fairness standards in UNHCR RSD procedures leaves rejected applicants in Egypt in danger of *de facto refoulement*. The principle of *non-refoulement* as spelled out in the 1951 Refugee Convention prohibits returning "in any manner whatsoever" any refugee to a country where his or her life or freedom would be in danger. Without full implementation of procedural safeguards at UNHCR, there is no fair



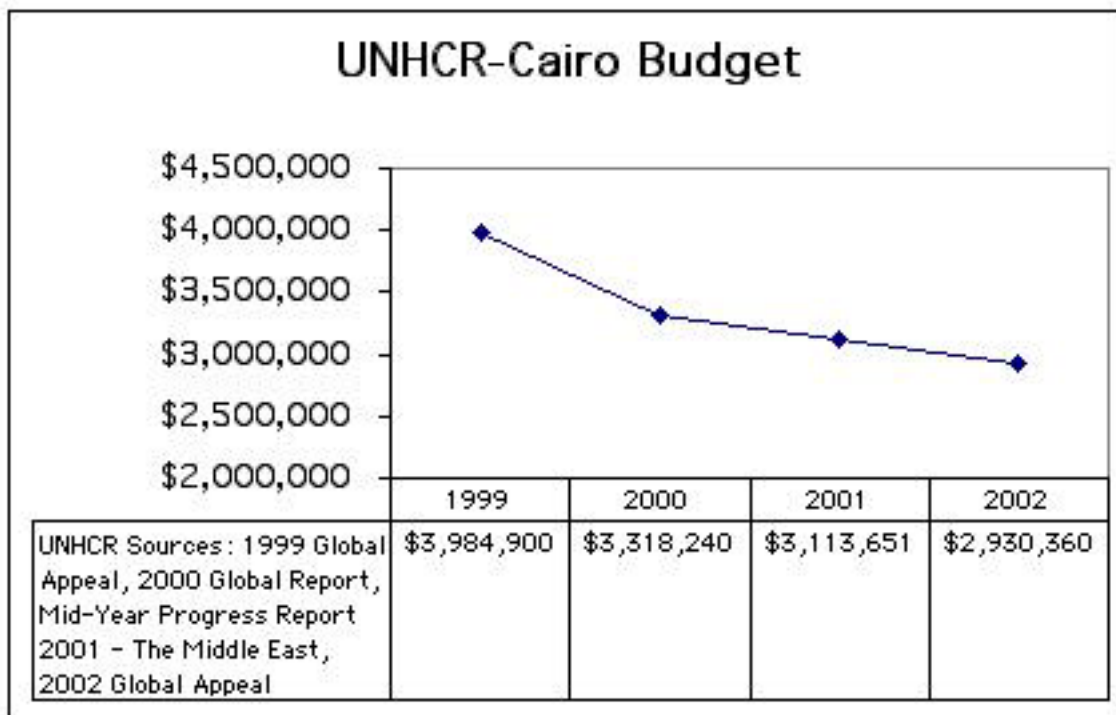
and effective means in Egypt to determine if an individual is a *bona fide* refugee. Rejected asylum-seekers may in fact be refugees who would be recognized in a system with minimal procedural protections. Deporting such people amounts to *refoulement* in fact if not *refoulement* in form.

In addition to problems of procedure, the present system of refugee status determination makes it difficult for the Government of Egypt and for NGOs to account for the forced migrant population in the country. Once a person's file is closed at UNHCR, no agency reliably keeps track of his or her presence in Egypt. A large but unknown number of rejected applicants have remained undocumented in the country over the past few years. This makes it difficult for either the Government or NGOs to organize assistance or solicit financial support for forced migrants in the country, since no one can reliably say how many remain.

Even with the improvements and commitment of the Cairo office in recent years, continuing the present RSD system would endanger human lives by risking wrongful rejections of refugee applications. If the U.N. refugee agency continues individual RSD, it should implement all of the fairness safeguards advised by its public positions and precedents, as well as those issued by other U.N. agencies or required by general principles of law. Procedural safeguards are checks against human errors, which are inevitable in a stressful, complicated process. No one should expect perfection in every case. A strong RSD process would prevent mistakes from becoming final decisions.

#### RESOURCE PROBLEMS ASSOCIATED WITH INDIVIDUAL RSD

As the number of asylum-seekers in Egypt has increased since 1999, UNHCR-Cairo's financial resources have steadily declined.



Individual refugee status determination requires significant staffing, time, and facilities when it is conducted fairly. Lack of adequate resources underpins some of the procedural problems highlighted by this report. In 2001, UNHCR advised government legislatures: "Parliamentarians can promote effectiveness [of RSD] by allocating sufficient resources for refugee status determination."<sup>93</sup> The agency should follow this advice by only conducting RSD if it can provide the resources necessary to implement its standards of procedural fairness.

UNHCR budgeted substantial funds since the middle of 2001 for a special "RSD project," which hired close to 10 new interviewers in mid-2001 and then close to 30 new staff in early 2002 to deal with a backlog of applications. This project reduced the delay from an asylum-seeker's first application until his or her first instance interview from about 24 months to about seven months. This reduced delay has relieved substantial hardship and anxiety experienced by refugees as they await the resolution of their cases. This project will expire in mid-2003 (it was previously scheduled to expire in mid-2002, and then at the end of 2002, but it has been extended each time). At the same time, UNHCR is facing a global funding crisis.<sup>94</sup>

With the number of annual applications in Egypt remaining much higher than their 1998 levels and with UNHCR-Cairo set to lose much of its funding for RSD staffing within months, the office may struggle to manage the individual RSD caseload and implement standards of procedural fairness without a major increase in resources. If the present RSD system is to continue, governments that support UNHCR's work, especially those that depend on UNHCR to make referrals for their refugee resettlement programs, can help the situation by contributing funds to UNHCR-Cairo to provide staff and resources for RSD. To be effective, such contributions should be tied to specific improvements in the implementation of procedural standards.

Resource limitations make procedural standards more difficult to implement, but they do not justify the operation of an RSD system that fails to meet standards of fairness. It is important to note that UNHCR-Cairo has improved interview quality, improved RSD interview environment and made appeals more independent even as its resources have declined. A person is entitled to a fair trial or fair hearing in the developing world the same as in wealthy countries. Human rights law does not provide for lower standards of fairness in economically poor countries. UNHCR's public statements on fair refugee status determination procedures do not propose a separate, lesser set of standards for governments with more strained budgets. To defend the principle of equal rights upon which refugee protection depends, UNHCR cannot use lack of resources as a justification for incomplete implementation of procedural standards in Cairo. To continue individual RSD without full implementation of procedural rights creates an unacceptable risk that people in danger of persecution will be mistakenly refused the protection they need.

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<sup>93</sup> UNHCR, *REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW* at page 50 (2001). *See also* UNHCR, *Fair and Expedient Asylum Procedures* § 4 (November 1994) ("UNHCR encourages states to allocate appropriate human and financial resources to process asylum claims in an expeditious way and within a reasonable time, both in the interest of the asylum-seeker and of the state.")

<sup>94</sup> *See* U.N. Integrated Regional Information Network, UNHCR facing shortfall of US \$80 million (24 October 2002).

## THE NEED TO REASSESS UNHCR'S RSD WORK IN EGYPT

Refugee status determination by UNHCR in Egypt needs reassessment for four main reasons:

- First, minimum standards of procedural fairness have not been implemented, creating a risk of mistaken rejections of refugees in danger.
- Second, UNHCR's funding has been becoming increasingly strained and UNHCR-Cairo is slated to lose much of its RSD staff over the coming months.
- Third, the number of applicants to UNHCR-Cairo has climbed in the past four years, straining the agency's capacity.<sup>95</sup>
- Fourth, UNHCR-Cairo's observation that longer waiting periods may make asylum-seekers more vulnerable to misinformation about the RSD process (*see* Section 3C) indicates that the risk of genuine refugees being rejected may grow in tandem with the gap between the number of applicants and the office's resources.

The weight of these problems is likely to fall particularly on the most vulnerable refugees — unaccompanied minors, single women with children, the elderly, disabled or seriously ill, victims of torture (including sexual assault), and people lacking education. Such people are often most at risk for incorrect decisions in an RSD process without adequate safeguards because many of these refugees are likely to have difficulty fully articulating their fears of persecution.

There is a particular need to find solutions because the rate of detention of asylum-seekers and other migrants in Egypt increased in late 2002.<sup>96</sup> As the number of detained migrants increases, fair and effective RSD procedures become more critical because the risk of deportation and *refoulement* rises.

UNHCR resources may be too strained by the RSD system to adequately address the urgent protection needs faced by many of the most vulnerable refugees. The fast-track system only addresses the speed of RSD. Other needs include material assistance, finding schools and foster families for children, providing healthcare, and psychological and social counseling. For many of the most vulnerable refugees, these needs are immediate and cannot wait for even an expedited RSD procedure.

With individual RSD requiring a large staff, only about half of UNHCR-Cairo's operating budget goes to actual assistance to refugees in Egypt.<sup>97</sup> A recent news bulletin by UNHCR highlighted the human costs in inadequate medical care, poor housing, and hunger caused by a growing refugee population and a shrinking assistance budget.<sup>98</sup> Illustrating the resource crisis, UNHCR's bulletin told the story of an Eritrian mother and her two-year-old son who became ill and died, apparently from inadequate medical care, while their RSD appeals were pending.

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<sup>95</sup> UNHCR acknowledged the resource problem in 2000, during a previous funding crisis: "The main constraints [in Egypt] were ongoing political instability in the region and the lack of funds, which prevented UNHCR from meeting all of the needs of the refugees and place the Office in a difficult position vis-à-vis the refugee community." UNHCR GLOBAL REPORT 2000 at 251.

<sup>96</sup> UNHCR informed NGOs in September that it had seen an increase in the rate of detention. *See* Minutes of Inter-Agency Meeting (September 24, 2002).

<sup>97</sup> UNHCR News Stories, "Hard Times for Cairo's Refugees" (25 November 2002) (noting that UNHCR-Cairo's current urban assistance budget is \$1.5 million, or \$171 per refugee).

<sup>98</sup> UNHCR News Stories, "Hard Times for Cairo's Refugees" (25 November 2002).

UNHCR's scarce resources are likely better used on other kinds of protection and assistance activities, rather than RSD. In addition to draining funds, individual RSD puts UNHCR in the awkward position of judge. Conducting RSD while failing to implement its own guidance to governments undermines the rule of law on which refugee rights depend, as well as UNHCR's moral authority as a protector of refugees. UNHCR has a duty to supervise the implementation of refugee law.<sup>99</sup> It is therefore important that UNHCR set a model of best practice for governments in its own protection work.

With the viability of the current RSD system in Egypt in doubt, it is important to look for alternative means to provide protection to refugees.

#### ALTERNATIVES TO THE CURRENT SYSTEM

##### **s) RSD by a private group**

One potential suggestion for resolving RSD strain on UNHCR would be having an NGO in Egypt perform refugee status determination, relieving UNHCR of all or part of the work. It may be very helpful for UNHCR to arrange with an NGO to help provide information to asylum-seekers or assist them in preparing applications. However, having an NGO carry out any role in making decisions in RSD carries risks for refugees and in many ways may be worse than the current system.

First, the resource burdens of individual status determination are not reduced by shifting the work from one organization to another. The same standards of procedural fairness would need to be implemented. Transferring this work to an NGO would clearly be harmful if it means reducing the net resources available for the work.

Second, while partnering with the private sector to provide medical care and other services to refugees makes logistical sense, legal decision-making about people's lives should not be delegated to the private sector. Shifting RSD to a private group would remove legal accountability from a critical procedure on which many people's human rights depend. RSD is a quasi-judicial function that needs an accountable, legally authorized institution. UNHCR has a mandate from the U.N. General Assembly to engage in this kind of activity; private organizations do not.

Third, UNHCR has in the past delegated RSD to the private sector in some countries, and the example is not necessarily one that should be followed in Egypt. In Kenya, UNHCR delegated RSD to a NGO, and then took the role back. Because it adds an additional institutional barrier to transparency and accountability, involvement of private NGOs in RSD can increase the dangers of corruption in the process.<sup>100</sup> It is also important to consider that the stakes in RSD are lower in countries like Kenya, where some (although not completely effective) protection is available to most refugees in camps, including people who are

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<sup>99</sup> 1951 Refugee Convention, art. 35.

<sup>100</sup> For instance, the investigation of a bribery scandal involving RSD and resettlement at UNHCR's Nairobi office resulted in the dismissal of 18 legal staff employed by an NGO partnered with UNHCR, compared with the suspension of five UNHCR staff. *See* Report from UNHCR's Inspector-General - ExCom (3 October 2001).

rejected individually in the RSD process in Nairobi. In Egypt, there is no such fallback protection available for rejected applicants.

### t) *Prima facie* or “manifestly well-founded” protection

The best option for UNHCR in Egypt would be to abandon individual RSD for most refugees by adopting a *prima facie* protection system, or a streamlined means of recognizing "manifestly well-founded" refugee claims.

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>101</sup> In such systems, all asylum-seekers from particular countries or territories are considered automatically to be refugees, and receive legal protection in the country of asylum without individual status determination.<sup>102</sup> Such systems are administratively simpler to manage than individual RSD. 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.

*Prima facie* protection is usually undertaken in cases of large-scale influx. For Egypt, the growth in applications since 1998 constitutes a mass influx. Indeed, the number of persons seeking protection in Egypt over the last five years — roughly 50,000 — is comparable to the number of arrivals in Uganda, where most Sudanese refugees receive *prima facie* status.<sup>103</sup>

Compared to the number of asylum-seekers arriving in some countries, the number of arrivals in Egypt is not especially large. However, as UNHCR explained in its Global Consultations, what would be a manageable number of applications in one country can be overwhelming in another:

[W]hat amounts to 'large-scale' or 'mass influx' will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. 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>104</sup>

UNHCR's Cairo office had not fully implemented standards of procedural fairness *before* 1998, suggesting that even previous numbers of asylum-seekers were more than the country could handle individually.

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<sup>101</sup> See UNHCR, PROTECTION OF REFUGEES IN MASS INFLUX SITUATIONS: OVERALL PROTECTION FRAMEWORK, EC/GC/01/4 (19 February 2001); UNHCR HANDBOOK ¶ 44; I. Jackson, THE REFUGEE CONCEPT IN GROUP SITUATIONS (1999).

<sup>102</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>103</sup> According to 2001 figures, there are 173,000 Sudanese refugees in Uganda, about 150,000 of those having arrived since 1988. Hence, the number of refugee arrivals in Egypt per annum is comparable — 50,000 over five years in Egypt, compared with 150,000 over 13 years in Uganda.

<sup>104</sup> UNHCR, PROTECTION OF REFUGEES IN MASS INFLUX SITUATIONS: OVERALL PROTECTION FRAMEWORK ¶ 14, EC/GC/01/4 (19 February 2001) (emphasis added).

With declining UNHCR resources and no agreement to transfer RSD to the Government, the number of asylum application in Egypt has overwhelmed the country's capacity to process individual applications fairly. If the Government of Egypt does not set up its own RSD system, and if UNHCR is not able to allocate 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*.

It may be possible to achieve many of the benefits of *prima facie* protection without determining that a mass influx has occurred. An option advocated by UNHCR in its Global Consultations is to set up a means of quickly recognizing "manifestly well-founded" cases without intensive RSD procedures, in the same way some states quickly reject "manifestly unfounded" cases.<sup>105</sup> For instance, for asylum-seekers from Sudan, members of religious or ethnic minorities that are known to face severe discrimination or persecution could be presumed to be well-founded claims. The Global Consultations have not specifically spelled out how such a system would work in practice, but it would likely offer many of the administrative advantages of a *prima facie* system. It may be an option worth exploring for the UNHCR-Cairo office.

In Egypt, the main benefit of a *prima facie* or similarly streamlined protection mechanism would be that it would free UNHCR resources to attend to individual cases where such attention is most important, such as cases of detention, unaccompanied children, and other vulnerable refugees with pressing protection needs. Although UNHCR would likely not have the resources to provide direct material assistance to all refugees, it could have the resources to effectively assist those in the most desperate situations.

*Prima facie* recognition could provide protection for most asylum-seekers, especially Sudanese and Somalis who make up more than 90 percent of the asylum-seeker population. 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 because it would no longer need to process such a large number of applications. UNHCR might also individually assess cases to determine eligibility for durable solutions such as resettlement. However, UNHCR would be under no obligation to do this, and the stakes of such assessments would be much lower than the present RSD system. Refugees denied resettlement would still have the benefit of legal protection on a *prima facie* basis.

This type of system would be consistent with Egypt's obligations under the OAU Refugee Convention. Most of the Sudanese and Somali refugees in Egypt 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.

*Prima facie* recognition would also allow UNHCR and the government to track the forced migrant population in the country. Rather than allowing a large population of rejected asylum-seekers to remain undocumented, a *prima facie* system would offer a measure of

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<sup>105</sup> See UNHCR, Executive Committee, Note on International Protection ¶ 88, A/AC.96/951 (13 September 2001).

control by having all refugees register with UNHCR or the Government, allowing for accurate data on the number and locations of refugees in Egypt. Should durable peace come to Sudan or Somalia, *prima facie* protection would facilitate repatriation programs, although either the Government or UNHCR would need to set up a fair system of determining individual applications before forcing anyone to return.

#### RSD IN EGYPT: LOOKING FORWARD

The viability of individual refugee status determination by UNHCR in Egypt is in doubt, with far more applications than the agency is currently equipped to handle fairly. Refugees in danger are bound to fall through the cracks, and resources are too strained to provide vulnerable refugees the assistance they need. Improving refugee status determination in Egypt would not be cost-free for UNHCR nor for the Government of Egypt (should it take over RSD responsibility). But the *status quo* places the most severe costs on the backs of people fearing persecution.

UNHCR's long-held official position is that refugee status determination should be conducted by the Egyptian Government, not by the United Nations.<sup>106</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. At the same time, thousands of asylum-seekers continue to apply to UNHCR-Cairo 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, especially in the Middle East. Where UNHCR conducts RSD, it should implement the standards it promotes for governments.

Refugee status determination should not continue in its present form in Egypt. UNHCR could make the necessary improvements to make RSD fully fair and effective. Indeed, many recent improvements suggest UNHCR is moving in this direction. Or, it could adopt an alternative *prima facie* protection system. However, the present system lacks basic fairness and puts people in danger of being denied protection they need.

Given the resource strain imposed by individual refugee status determination, UNHCR should reassess whether it should continue individual RSD. There are good reasons to think that it should not, especially given the jump in applications in Egypt in the past few years, UNHCR-Cairo's declining budget. The option of providing refugee status to refugees on a *prima facie* basis, without individual applications, would relieve many of the present problems in refugee protection in Egypt. This would allow for better tracking of the refugee population, reduce the risk of *de facto refoulement* and would allow UNHCR to focus its resources on the refugees who most need its protection.

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<sup>106</sup> See 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.").





## APPENDIX

**u) Terminology used in this report**

Asylum-seeker	A person who has left his or her country seeking refugee protection, but has not yet been processed through a refugee status determination procedure. In this report, this term is used for people who have pending applications at UNHCR, first instance or appeal.
Durable solution	UNHCR seeks to find a permanent or "durable" resolution to refugees' problems: voluntary repatriation, local integration, or resettlement.
<i>Prima facie</i> recognition or protection	In this process, UNHCR or a government avoids conducting intensive individual RSD by granting protection collectively to a group of refugees — for instance, all new arrivals from a particular country — without a complete individual evaluation of each case. <i>Prima facie</i> protection refers only to a mechanism of recognizing refugees' legal status. It is not the only means for protecting refugees who flee group-based persecution. The 1951 Refugee Convention and the OAU Refugee Convention both protect people who flee group-based violence or persecution, as well as people who are 'singled out' for persecution. Thus, even in an individual RSD process, a person can claim refugee status on the basis of membership in a large group, if that group is in danger of persecution or violence.
Principle of <i>non-refoulement</i>	A principle of customary international law and a central tenet of the 1951 Refugee Convention and the OAU Refugee Convention, this rule prohibits any state from expelling or returning a refugee to the frontiers of territories where his or her life or freedom would be threatened. This principle means that no asylum-seeker may be deported without having access to a fair and effective refugee status determination procedure.
Recognized refugee	A person who has been "accepted" by UNHCR or a government to meet the refugee definition. If the criteria of the refugee definition are met, a person becomes a refugee the moment he or she leaves his or her country. Refugee status determination therefore <i>recognizes</i> a person's refugee status; it does not make him or her a refugee.
Refugee status determination (RSD)	The adjudication process by which a government or UNHCR determines whether an asylum-seeker meets the legal definition of a refugee. This process is sometimes called "applying for asylum," although "asylum" may only be granted by governments, not by UNHCR. Individual refugee status determination usually involves written submissions and intensive interviewing of individual applicants.
Resettlement	A small number of countries allow refugees who have sought protection elsewhere to immigrate to find permanent protection in a third country. Four countries, Australia, Canada, Finland, and the United States, offer resettlement to refugees who have come to Egypt as a first country of asylum. For governments, resettlement is voluntary, and not a legal right for refugees. Most refugees worldwide are never resettled. UNHCR pursues resettlement as a "durable solution" for refugees who cannot repatriate when a person either has urgent security or welfare needs that cannot be resolved in the first country of asylum, or (as a lower priority) when a refugee cannot locally integrate in his or her first country of asylum.

v) Chart: Legal statuses for migrants, asylum-seekers and refugees in Egypt

