



**THE MEMORANDUM OF
UNDERSTANDING BETWEEN
EGYPT AND THE OFFICE OF THE
UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES:
PROBLEMS AND RECOMMENDATIONS**

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CARIM Analytic and Synthetic Notes 2010/07

Legal Module



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Egypt and the Office of the United Nations High Commissioner
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Abstract

The Egyptian refugee and asylum system is based on an outdated Memorandum of Understanding (MOU) that the Egyptian government signed with UNHCR. This paper analyzes the relevant provisions of the MOU and argues that UNHCR's reliance on the MOU can lead to negative results. In addition to causing UNHCR to breach its own mandate, the reliance on the MOU spreads confusion among refugees in Egypt and forces UNHCR to engage in political compromises that undermine the organization's legitimacy. The author singles out some of the practices that result from the application of the MOU, explains why they should be changed and proposes a new MOU that reflects the reality of the asylum system in modern Egypt. The new MOU will also encourage the Egyptian government to get involved in the asylum process.

Résumé

Le système égyptien de refuge et d'asile est basé sur un Mémorandum d'accord daté, conclu entre le gouvernement égyptien et le HCR. La présente contribution analyse les dispositions les plus importantes du Mémorandum et défend l'idée selon laquelle son application par le HCR peut amener à des effets négatifs. Outre qu'elle entraîne le HCR à violer son propre mandat, la référence au Mémorandum suscite la confusion parmi les réfugiés en Egypte et contraint le HCR à s'engager dans des compromis politiques qui entament sa légitimité. L'auteur identifie certaines des pratiques résultant d'une application du Mémorandum, explique les raisons pour lesquelles elles devraient changer, et propose un nouveau Mémorandum qui reflèterait la réalité du système d'asile dans l'Egypte contemporaine. Ce nouveau Mémorandum contribuerait également à un engagement du gouvernement égyptien dans la procédure d'asile.

Introduction

Home to the fifth largest urban refugee population in the world,¹ Cairo has become one of the most attractive safe-havens for refugees from Africa and the Middle-East. Over the past decade, conflicts in Sudan, Somalia, Liberia, Sierra Leone, the Democratic Republic of Congo, and Iraq have triggered influxes of asylum-seekers to Egypt, a country known for its relative stability in an unstable region. Faced with increasing poverty, the Egyptian population is not always hospitable to refugees because they are wrongly perceived to be competing with Egyptians for limited employment opportunities offered by the state. Consequently, the government has attempted to protect its citizens' interests by making entry to the country difficult for nationals of states known to generate numerous refugees.²

I chose to write this paper for two reasons. First, having practiced refugee law in Egypt, I am familiar with the challenges faced by refugees and the legal practitioners assisting them. I am therefore well-positioned to comment on the legal problems facing refugees in Egypt. Second, and more importantly, ignorance about the different legal regimes governing refugees in Egypt is striking, even amongst practitioners. The gap between law in theory and in practice is significant, and can be bridged by raising awareness about refugees and the laws that cover them. This paper focuses then on the legal document that officialises the presence and governs the activities of the Office of the United Nations High Commissioner for Refugees ('UNHCR') in Cairo and its relationship with the Egyptian government, namely the Memorandum of Understanding ('the MOU'). The paper will reveal that the ambiguous wording of the MOU has driven UNHCR to act against the principles that underlie the MOU, and will suggest that the most appropriate response would be to rewrite it. In order to better argue the case for a new agreement, I will outline several problems that have resulted from the application of the MOU. Accordingly, the paper will be centered on the following premise; that the wording of the MOU, read in light of UNHCR's developing mandate, prevents UNHCR from discharging its duties under the MOU and undermines its statutory mandate. The argument will be examined mainly in light of the developments that have taken place in international law since the signature of the MOU. The paper will show how the problems caused by the MOU can be overcome by redrafting certain provisions in a way that better meets the conditions of modern-day asylum in Egypt.

The Refugee Convention and the mechanics of the refugee definition

As the third binding international human rights instrument enacted following the end of the Second World War,³ the Convention relating to the Status of Refugees ('Refugee Convention') was mainly inspired by a wish to protect victims of atrocities similar to those committed in Europe during the War.⁴ Much to the disdain of developing states,⁵ the definition of a refugee under the Refugee Convention was qualified by temporal and geographical limitations aimed at protecting the Europeans

¹ Africa and Middle East Refugee Assistance ('AMERA'), online: <http://www.amera-uk.org/egypt/index_eg.html>.

² Examples include citizens of Iraq, Ethiopia and Eritrea. In June 2008, an estimated four hundred undocumented Eritrean asylum-seekers were forcibly deported to their home country.

³ The first human rights treaty to come into force following the Second World War was the Convention on the Prevention and Punishment of the Crime of Genocide (12 January 1951), followed by the Four Geneva Conventions on the Laws and Customs of War (21 October 1950) and The Refugee Convention (22 April 1954).

⁴ Lorne Waldman, *The Definition of Convention Refugee*, (Butterworths: Canada, 2001) at paras 8.1-8.3. See also Guy S. Goodwin-Gill, *The Refugee in International Law*, 2d ed. (Oxford University Press: Oxford, 1998) at 18-20 [Goodwin-Gill, "The Refugee"].

⁵ See generally James C. Hathaway, "A reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harvard International Law Journal* 129 [Hathaway, "Reconsideration"].

who fled their countries of origin prior to 1 January 1951.⁶ In the 1960s, as the number of persons fleeing persecution was on the rise in Africa, Asia and the Americas, the definitional constraints were subsequently lifted by the broader refugee definition adopted by states parties to the Protocol relating to the Status of Refugees ('Protocol'). In other words, the coming into force of the Protocol created the first global refugee protection regime by extending the impact of the Refugee Convention beyond Europe. Given that most states party to the Refugee Convention are now party to the Protocol, it may reasonably be argued that both instruments constitute the core of international refugee law. For the sake of simplicity, reference to the Refugee Convention in this paper will include the updated refugee definition in the Protocol.⁷

The legal definition of a refugee:

According to the Refugee Convention, a refugee is a person who, owing to a well-founded fear of being persecuted, is outside his country of origin and is unable or unwilling to avail himself of its protection. Persecution must be based on one or more of the five grounds listed in the Refugee Convention: namely race, religion, political opinion, nationality and membership of a particular social group.⁸ Other grounds for persecution will not suffice to extend the benefits of the Refugee Convention to those seeking protection unless the host state enacts national legislation to broaden the definition of a refugee⁹ or adopts another refugee convention or declaration.¹⁰

Applying the legal definition of a refugee to the particular facts of an applicant's personal background is a complex process. First, decision-makers must establish that the danger an applicant

⁶ Article 1(B): "For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention", Convention Relating to the Status of Refugees, 28 July 1951, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/o_c_ref.htm>. Since most of the States that initially signed the Refugee Convention were European, the utility of Refugee Convention to non-European States was doubtful. See Goodwin-Gill, "The Refugee", *supra* note 4 at 19. See also James C. Hathaway, *The Law of Refugee Status* (Butterworths: Toronto, 1991) at 8-13 [Hathaway, "Refugee Status"].

⁷ This is due to the fact that both instruments provide the same rights to refugees. Article 1(1) of the Protocol states: "The State parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined."

⁸ According to Article 1A (2) of the Refugee Convention, a refugee is someone who "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". The definition is to be read in light of the developments in the Protocol, Article 1(2) of the Protocol reads as: "For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . ." and the words ". . . a result of such events", in Article 1 A (2) were omitted", Protocol relating to the Status of Refugees, 16 December 1966, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/o_p_ref.htm>.

⁹ Section 97 Canada's Immigration and Refugee Protection Act extends the definition of refugee (or its benefits) to those at risk of torture or cruel and inhumane treatment in their States of origin or habitual residence, see Immigration and Refugee Protection Act (2001, c. 27), online: Department of Justice <http://laws.justice.gc.ca/en/showdoc/cs/I-2.5/boga:l_2-gb:l_1/en#anchorbo-ga:l_2-gb:l_1>. Similarly, Article 53 of the Egyptian Constitution grants refugee status to those who are discriminated against in their homeland for "defending the people's interests, human rights, peace or justice." The Constitution of the Arab Republic of Egypt: online <http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm>.

¹⁰ Such as the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") or the Cartagena Declaration.

will face upon return to his country of origin is tantamount to persecution as opposed to mere discrimination¹¹ or hardship.¹² Moreover, the stipulation that the fear be necessarily 'well-founded' invites a lengthy debate among legal practitioners concerning how such fear should be evaluated. James C. Hathaway believes that fear is an objective criterion.¹³ This approach has the benefit of ignoring the applicant's mental condition. In other words, legally insane persons, minors, or mentally-challenged individuals, to name but a few examples, would not have to express their fear at the refugee status determination ('RSD') interview, and can be granted asylum according to the existence of objective evidence of events that could cause the average person to fear for his life or security. In practice, however, the method of evaluating whether an applicant's fear is well-founded varies across jurisdictions. For example, UNHCR guidelines stipulate that to establish well-founded fear, evidence of objective and subjective fear must co-exist.¹⁴ While this may have the benefit of extending protection to those who are particularly vulnerable, it excludes those who do not have a subjective fear of being persecuted, yet, in which cases, due to the conditions in their country of origin, any reasonable person can predict that they would be harmed upon return. There is no conclusion as to which approach is more correct, yet the latter one seems to find more support in practice.¹⁵

In addition to fulfilling the criteria explored above, obtaining refugee status is contingent upon one last requirement, that is, the asylum-seeker must not fall under the exclusion clause as stipulated by Article 1 F of the Refugee Convention.¹⁶ The insertion of the exclusion clause into the Refugee Convention confirms a host state's sovereign right to refuse to grant protection to those it seriously believes to have committed grave crimes. The exclusion clause serves as a reminder that refugee status is a right that must be earned, and which can be withdrawn for the sake of preserving public order in the host society.

¹¹ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("UNHCR Handbook"), HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 paras 51-55.

¹² Hathaway, "Refugee Status", *supra* note 5 at 117-119.

¹³ "In contrast to prevailing views, we take the position that there is no subjective element in the well-founded fear standard. The Convention definition's reference to "fear" was intended simply to mandate an individuated, forward-looking appraisal of actual risk, "not to require an examination of the emotional reaction of the claimant.'" James C. Hathaway & William S. Hicks, "Is there a Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear?" (Winter 2005) 26 Mich. J. Int'l L. 505 at 507.

¹⁴ UNHCR Handbook, *supra* note 11 paras 37-50.

¹⁵ For example, Canada adopts the subjective-objective approach. For a list of relevant cases see Pia Zambelli, *Annotated Refugee Convention 2005* (Thomson Carswell Limited: Toronto, 2006) at 13-58. The same approach is taken in all the States where UNHCR conducts RSD on behalf of governments. The OAU Convention, on the other hand, adopts an exclusively objective approach to refugee status. See Micah Bond Rankin, "Extending the Limits or Narrowing the Scope? Deconstructing the OAU refugee Definition thirty years on", *New Issues in Refugee Research*, Working Paper No. 113, April 2005 at 5-7.

¹⁶ Article 1 F "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

There are no strict rules concerning whether decision-makers should begin their assessment by looking into the exclusion clause before examining whether the applicant is in danger of being persecuted on the basis of a convention ground or vice versa. However, UNHCR is of the view that the exclusion clause should only be examined after it has been established that the applicant fulfills the requirements of refugee status. See UNHCR, *The Exclusion Clauses: Guidelines on their Application*, Geneva, December 1996 at para 8.

The Refugee Convention in practice

Prior to the coming into force of the Refugee Convention, Egypt signed a MOU with the Cairo office of UNHCR under which the international organization consented to conducting RSD on behalf of the Egyptian government.¹⁷ MOUs are a common tool for developing state parties to ease the burdens associated with their asylum systems by contracting out UNHCR to perform RSD on their behalf.¹⁸ It is reported that UNHCR carries out RSD functions in more than sixty states,¹⁹ which makes it the largest body dealing with asylum applications in the world.²⁰ Furthermore, UNHCR-RSD is an efficient tool for the international organization to deal with asylum in countries that have not signed or ratified the Refugee Convention.²¹ Such trade offs between UNHCR and states that are not party permits these states to allow refugees on their territories, absent any international obligation in conventional international law, provided that UNHCR provide these refugees with assistance.

There are two types of UNHCR systems in states bound by the Refugee Convention. Under the first model, two parallel asylum systems based on the Refugee Convention may be in place. This is the case of Turkey, which applies a territorial limitation to the Refugee Convention in a way that excludes non-Europeans from the benefits associated with refugee status.²² Accordingly, the government only examines applications from citizens of European states and UNHCR assesses claims by non-European asylum-seekers subject to automatic resettlement within six months of recognition. Given the positive human rights situation in Europe, the application of the Refugee Convention by the Turkish government is seldom tested.²³ Accordingly, most refugees in Turkey are dealt with by UNHCR.

The second model is particular to Egypt and most other developing states that are bound by the Refugee Convention. Following this system, UNHCR signs a MOU with the host government according to which the organization conducts RSD on behalf of the government. Such MOUs generally stipulate the rights and responsibilities of its signatories in loose terms so as not to generate lengthy legal debates between the parties. In fact, MOUs might be more accurately referred to as statements of cooperation rather than legal agreements *per se*; yet in practice, MOUs are deemed official agreements subject to judicial supervision. The subsequent section will outline the most important elements of the MOU signed between Egypt and UNHCR, and set the foundation for a critique of this instrument.

The MOU

The MOU came into force in 1954. Since the signature of the MOU, several events have taken place, including the decolonization of Africa, the coming into force of the Organization of African Unity's Convention Governing Specific Aspects of Refugee Problems in Africa ('OAU Convention'), Egypt's ratification of the Refugee Convention and the Protocol, the creation of an independent RSD Committee at the Egyptian Ministry of Foreign Affairs under Decree 188/1984, as well as the arrival

¹⁷ The MOU was published in the *Official Proceedings* and acquired the force of law in 1954. See Annex I for an informal translation of the MOU.

¹⁸ Egypt, Algeria, Morocco, Cambodia, Kenya, and Gambia are among such countries to delegate RSD functions to UNHCR.

¹⁹ Michael Kagan, "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination" (March 2006) 18 *IJRL* 1 at 3.

²⁰ In 2006, UNHCR assessed 91,500 individual asylum applications compared to 50,800 (USA), 53,500 (South Africa), 29,400 (France), 27,900 (UK), and 27,900 (Canada). See UNHCR *Statistical Overview 2007 (Provisional)*, online: UNHCR <<http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>>, at 13-14.

²¹ Examples of these States include Syria, Jordan, and Lebanon.

²² Convention Relating to the Status of Refugees, online: United Nations Treaty Collection <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm>.

²³ With the exception of refugee influxes during the war in the former Yugoslavia.

of thousands of refugees from the Palestinian territories that were occupied following the 1967 Six-Day War. I will argue in this paper that the combined effects of these events, coupled with the vague wording of the MOU, impeded UNHCR from performing all its obligations under the MOU and its own mandate. Thus, I submit that the MOU should be denounced or rewritten to reflect the reality of the refugee situation in modern Egypt.

The MOU comprises of eight operative Articles where the responsibilities of the government and UNHCR are clearly outlined. Moreover, the preamble sets the tone of the MOU by explicitly stating that it covers refugees ‘within the mandate of the United Nations High Commissioner for Refugees’, a statement duplicated in several Articles of the MOU.²⁴ Before examining the effects of the existing MOU, it is important to understand what is meant by ‘within the mandate’ of UNHCR, and how it affects the way refugees are, or should be dealt with in Egypt. As will be argued, with the passage of time, due to the evolving nature of UNHCR’s mandate, the choice of the words ‘within the mandate’ of UNHCR in the MOU led the parties to violate some of their obligations towards each other.²⁵

UNHCR mandate:

In order to understand the phrase ‘within the mandate of UNHCR’, one must look to the UNHCR Statute (‘the Statute’), which outlines the categories of refugees who fall under the organization’s mandate. In addition to the refugees who were recognized as such under previous orders,²⁶ the Statute defines a refugee as ‘[a]ny person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it’.²⁷ Two observations can therefore be made. First, unlike the Refugee Convention prior to the coming into force of the Protocol, the Statute does not impose any geographical limitations on those deemed to be refugees (although the temporal limitation was maintained). Second, again unlike the Refugee Convention, the Statute does not extend its protection to those persecuted for being members of a particular social group. Compared to the Refugee Convention, the Statute therefore has a wider range of application due to its lack of geographical limitation, yet a narrower scope because of its failure to include membership of a particular social group as a ground of persecution.

In addition, the gap between the Statute and the Refugee Convention may be remedied by the expansion of UNHCR’s mandate through United Nations General Assembly Resolutions and instructions from the Economic and Social Council.²⁸ In my opinion, the coming into force of the Refugee Convention extended the mandate of UNHCR insofar as state parties to the Refugee Convention are concerned to cover members of a particular social group. This conclusion can be reached by reading Article 35 of the 1951 Convention in conjunction with Paragraph 8 (a) of the UNHCR Statute, which as will be demonstrated below, entrusts UNHCR with the responsibility of

²⁴ See Annex I.

²⁵ Section entitled ‘Later practice and critique’.

²⁶ Paragraph 6 A. (i) of the Statute “Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization”. Statute of the United Nations Office of the High Commissioner for Refugees (‘the Statute’), online: University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts/instreet/v3sunhcr.htm>.

²⁷ Paragraph 6 A (ii) of Statute.

²⁸ Guy S. Goodwin-Gill, “*Nonrefoulement* and the New Asylum Seekers”, in David A. Martin, ed., *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff Publishers: the Netherlands, 1988) 103 at 105 [Goodwin-Gill, “Nonrefoulement”].

supervising the Convention's application by states. UNHCR would, as such, be responsible for ensuring that members of a particular social group are granted asylum provided they risk being persecuted upon return to their country of origin. Following the same logic, should UNHCR be asked to perform RSD on behalf of a state party, the organization's mandate would include extending its protection to members of a particular social group. The same argument cannot be made with regard to states that are not parties to the Refugee Convention unless the mandate of UNHCR is explicitly expanded according to the procedures enshrined in the Statute.

In 1954, when Egypt signed the MOU with UNHCR, it was not yet a party to the Refugee Convention, as its accession took place only in 1981. As such, UNHCR's mandate could not have included membership of a particular social group as valid grounds for granting refugee status. In addition, the OAU Convention, which expands the refugee definition to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality",²⁹ had not yet been drafted. It follows that the definition of a refugee at the time the MOU was signed was different from the definition that exists today in international law.

At a time when no operational Refugee Convention existed,³⁰ inserting the words 'UNHCR mandate' into the MOU was an appropriate choice by the drafters because it reflected their willingness to assist as many categories of refugees as possible, provided they fell under UNHCR's evolving mandate. The fact that Paragraphs 3, 9, and 13 of the Statute give the United Nations Secretary-General, the Economic and Social Council and the General Assembly the authority to expand UNHCR's mandate leaves the door open to an evolving interpretation of the MOU. Accordingly, all those who could not have qualified for mandate-refugee status at the time the MOU was signed, could find themselves recognized as refugees at a later stage. This process is well summarized by Volker Turk, who explains that "[w]hen acceding to the 1951 Convention, it is assumed that states would be aware of the fact that the UNHCR has a broader competence *ratione personae* and that its mandate is a living phenomenon evolving dynamically through subsequent General Assembly resolutions".³¹ In fact, General Assembly resolutions³² and Executive Committee ('Excom') conclusions³³ did expand the UNHCR mandate so that it provides assistance to, *inter alia*, those fleeing natural disasters and other emergency situations,³⁴ as well as those who are assisted by the Organization of African Unity³⁵ and to some internally displaced persons in various states.³⁶ It is unlikely that such a generous expansion of the mandate was predicted by UNHCR or the Egyptian government at the time the MOU was signed.

²⁹ Article I(2) of OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, online: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf.

³⁰ The MOU was signed on 10 February 1954, that is, two months before the coming into force of the Refugee Convention (22 April 1954).

³¹ Volker Turk, "UNHCR's Supervisory Responsibility", *New Issues in Refugee Research*, Working Paper No. 67, October 2002, at 6.

³² See for example, GA Res 1671 (XVI), 1672 (XVI) and 1673 (XVI) of 1961.

³³ On the development of UNHCR's mandate, Goodwin-Gill explained that "a similar influence has been exercised by the Executive Committee of the High Commissioner's Programme [whose]...terms of reference include advising the High Commissioner, on request, in the exercise of the statutory functions; and advising on the appropriateness of providing international assistance through UNHCR in order to solve such specific refugee problems as may arise" in Goodwin-Gill, "The Refugee", *supra* note 4 at 9.

³⁴ GA Res 2816 (XXVI) of 1971.

³⁵ GA Res 2863 (XXVI) of 1971. On the cooperation between UNHCR and the Organization of African Unity see Excom Conclusion No.76 (XLV) of 1994 'Recommendations of the OAU/UNHCR Commemorative Symposium on Refugees and Forced Population Displacements in Africa'.

³⁶ Excom Conclusion No. 75 (XLV) of 1994 'Internally Displaced Persons'; GA Res 48/116 of 1993.

The following section will explain why Article 2, which constitutes the core of the MOU, should be rewritten and how some of its provisions have been nullified by the expansion of UNHCR's mandate or by the government's subsequent actions. Article 2 states that:

The tasks entrusted to the High Commissioner's Delegation in Egypt will be in particular, the following:

- a) Cooperate with the governmental authorities in view of undertaking the census of and identifying the refugees eligible under the mandate of the High commissioner;
- b) Facilitate the voluntary repatriation of refugees;
- c) Encourage, in cooperation with the Egyptian Government, and the international organizations competent in immigration matters, the initiative leading to resettle, in every possible measure, in the countries of immigration, the refugees residing in Egypt;
- d) Help, within the limits of the funds received to this effect, the most destitute refugees within his mandate residing in Egypt;
- e) Insure the coordination of the activities undertaken in Egypt in favour of refugees under his mandate, by welfare societies duly authorized by the Government.³⁷

Reading this Article in conjunction with Article 6³⁸ of the MOU leads to the following conclusions: (i) that UNHCR is to conduct RSD on behalf of the government in exchange for the government's issuance of residence permits to recognized refugees; (ii) that, unlike what the UNHCR Statute stipulates,³⁹ local integration is not a recognized durable solution for refugees in Egypt;⁴⁰ and (iii) that the Egyptian government is not to be financially responsible for mandate refugees. Rather, the Egyptian government is restricted to granting mandate refugees temporary residence permits and authorizing welfare societies to provide assistance to refugees.⁴¹

³⁷ Article 2 MOU.

³⁸ Article 6 MOU: "The Egyptian Government will grant to 'bona fide' refugees, residing in Egypt, who fall within the High Commissioner's mandate, residence permits according to the regulations in force".

³⁹ According to Paragraph 1 of the Statute: "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, *or their assimilation within new national communities*" [emphasis added].

⁴⁰ Kagan, *supra* note 19 at 5. This point is clearly summarized in the statement of Egyptian Ambassador Menha Bakhom: "Our priority for refugees in Egypt is repatriation or resettlement. Until this happens, we are willing to help them and have them on our territory" in Katarzyna Grabska, "Who Asked them Anyway? Rights, Policies and Wellbeing of Refugees in Egypt", online: University of Sussex, http://www.migrationdrc.org/publications/research_reports/Kasia_Egypt_Research_ReportEDITED.pdf, July 2006, at 18 [Grabska, "Who Asked them"].

⁴¹ The remaining Articles of the MOU are of an administrative nature and govern the means of communication between UNHCR and the Egyptian government (Art. 3), the nomination of the High Commissioner's representative (Art. 4), UNHCR Staff immunity (Art. 5), refugee travel documents (Art. 7), and local implementation procedures (Art. 8). See Annex 1 for detail.

Later practice and critique:

The wording of the MOU, read in light of UNHCR's developing mandate, prevents UNHCR from discharging its duties under the MOU and undermines its statutory mandate:

The MOU should be redrafted to reflect the new political and legal context under which it presently operates. At the inception of the MOU, Egypt was going through a period of political turmoil and the refugee question was at the bottom of its national agenda. The Free Officers' Revolution that overthrew the monarchy took place in 1952, merely two years prior to the coming into force of the Refugee Convention. In addition, the country was still reeling from its 1948 War defeat. Further, the state was in the process of organizing itself internally and installing a new political system. Seeking UNHCR assistance was an indication of Egypt's positive intentions towards aliens in need of shelter on its territory because it was a way of ensuring that a mechanism was in place to assist foreign populations seeking protection. Moreover, the nature of refugee populations living in Egypt at the time of the signing of the MOU was different from the groups living in Egypt today. Reference to 'the large number of...refugees in Egypt' in the second clause of the MOU's preamble seems meaningless given that in 1954, no noticeable refugee community lived in Egypt other than some Armenian and Palestinian nationals.⁴² Half a century after the signature of the MOU, there are over 40,000 asylum-seekers and refugees living in Egypt from various nationalities excluding Palestinians⁴³ and failed asylum-seekers.⁴⁴ Were the MOU to be rewritten today, new terms would most likely be included. The following paragraphs explain why the MOU between Egypt and UNHCR is outdated and why it should be rewritten.

a) Egypt became a state party to the Refugee Convention:

By becoming a party to the Refugee Convention, Egypt accepted to be bound by the obligations imposed by the international treaty.⁴⁵ In addition to the role Egypt undertook by signing the MOU, that of accepting those granted asylum by UNHCR on its territory as a form of compliance with the United Nations' Charter-imposed duty to cooperate with the United Nations and its specialized agencies,⁴⁶

⁴² Grabska, "Who Asked them", *supra* note 40 at 13. Today, there are approximately seventy-seven Armenians alive (legally stateless) that arrived in Egypt between 1915 and 1926, UNHCR *Country Operation Plan, 2008, Egypt*, online: UNHCR <http://www.unhcr.org/home/PROTECTION/46fbc03d2.pdf>>, at 13. There are also more than 50,000 Palestinian refugees living in Egypt, see Oroub El Abed, "Palestinians in Egypt", online: <http://www.forcedmigration.org/guides/fmo028/fmo028.pdf>>, at 2.

⁴³ UNHCR *Fact Sheet-Egypt, May 2008* [on file with author].

⁴⁴ Unofficial estimates indicate that the number of refugees and failed asylum-seekers is higher than 500,000. AMERA, *supra* note 1.

⁴⁵ The Statute of the International Court of Justice (ICJ) lists the sources of international law, the first of which is found in international conventions. Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law", online: International Court of Justice <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II>.

⁴⁶ Some authors argued that non-party States to the Refugee Convention are obliged to allow UNHCR to fulfil its mandate. Such obligation emanates from Articles 55 and 56 of the United Nations Charter; see Atle Grahl-Madsen, *Commentary on the Refugee Convention* (UNHCR: Geneva, 1997) at 149-150. See also Walter Kalin, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond" in Erika Feller, Volker Turk, & Frances

accession to the Refugee Convention elevated such an obligation to a positive duty to shelter those refugees and uphold their rights and ensure that other state parties do the same, as opposed to tolerating their presence on its national territory. This argument is well summarized by Hathaway, who explains that:

UNHCR has a special responsibility under Article 35 to “supervise the implementation” of the Refugee Convention. But this provision does not create a monopoly on treaty oversight in favour of UNHCR. To the contrary, the Convention as an international pact *is the responsibility of states that signed it*. As the mechanisms for enforcement of the Convention itself make clear, it is states that have the fundamental right and duty to ensure that other states actually live up to their obligations under the Refugee Convention.⁴⁷

Article 2(a) of the MOU should be amended:

Egypt’s accession to the Refugee Convention should have led to the amendment of Article 2 of the MOU in a way that makes the government the first authority charged with protecting refugees in the country,⁴⁸ thereby leaving the supervision of the Convention to UNHCR and other state parties.⁴⁹ However, this was never done, and the Refugee Convention is ignored in favour of the MOU. For example, according to Article 35 of the Refugee Convention,⁵⁰ to guarantee effective supervision by UNHCR, the Egyptian government is under the obligation to provide UNHCR with information about refugees. Yet to this day, UNHCR continues to provide such data to the Egyptian government in accordance with Article 2(a) of the MOU. In practice, the ratification of the Refugee Convention has no impact on the pre-existing arrangement between the government and UNHCR insofar as the exchange of information is concerned.⁵¹ This part of the MOU should be repealed in order to ensure complimentary coexistence between the MOU and the Refugee Convention, in addition to Egypt’s involvement in the affairs of refugees living on its territory.

The responsibility to care for refugees on a state’s territory was confirmed by the European Court of Human Rights (‘ECtHR’) in a recent judgment involving Turkey.⁵² The case involved an Iranian couple that had been denied refugee status by the UNHCR office in Ankara. The applicants were fleeing persecution in the form of corporal punishment in Iran. Despite the territorial limitation that Turkey imposes on non-European asylum-seekers, which makes UNHCR the only authority able to grant the couple’s asylum applications, the ECtHR maintained that Turkey would violate the European Convention on Human Rights (“ECHR”) if the couple were deported to Iran. The judgment sent a

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Nicholson, eds., *Refugee Protection in International Law* (Cambridge University Press, 2003) 613 at 618-619. See also Turk, *supra* note 31 at 5.

⁴⁷ James C. Hathaway, “Who should watch over Refugee Law” 14 FMR 23 at 23-24. [Hathaway, “Watch”] [emphasis added].

⁴⁸ As opposed to giving such responsibility to UNHCR and welfare organizations as per Article 2 of the MOU.

⁴⁹ Article 35 Refugee Convention, II Protocol, and Paragraphs 1 and 8 Statute.

⁵⁰ Article 35, “1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) The condition of refugees,
- (b) The implementation of this Convention, and
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees”.

⁵¹ Kagan, *supra* note 19 at 15.

⁵² *D. and Others v. Turkey*, No. 24245/03, [2006]. Original judgment in French only, online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=11923684&skin=hudoc&action=similar&portal=hbkm&Item=1&similar=frenchjudgement>.

clear message that despite the fact that Turkey relied on information given to it by UNHCR when it denied the applicants residence permits, Turkey would still be held responsible for the human rights violations of the Iranian asylum-seekers if they were to be deported. This judgment has several implications for refugees and asylum-seekers in Egypt. First, though Turkey is not considered a party to the Refugee Convention as regards non-European asylum-seekers, it was still held responsible for the well-being of these asylum-seekers despite their ‘illegal’ presence on Turkish soil. Unlike Turkey, Egypt is a party to the Convention; accordingly, the obligation to protect refugees or asylum-seekers, irrespective of the legality of their status should, *a fortiori*, be established.⁵³

Second, although Egypt is not a party to ECHR, similar obligations not to deport asylum-seekers to a place where they risk persecution can be found in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’),⁵⁴ and by implication, Articles 4 and 5 of the African Charter on Human and Peoples’ Rights (‘Banjul Charter’).⁵⁵ Considering that deportation orders are only issued at the discretion of Egypt’s Minister of Interior,⁵⁶ the responsibility of the state as regards these international instruments will be invoked with every deportation of asylum-seekers or refugees if they face torture or persecution upon their return.

Articles 2(b) and (c) of the MOU should be amended:

The ratification of the Refugee Convention should also have amended Articles 2(b) and (c) of the MOU so as to add the option of local integration of refugees in Egypt as a valid durable solution. Although, as will be explored below, Egypt made reservations to some Articles in the Refugee Convention’s Welfare Chapter, local integration as implied in the Convention was accepted by the Egyptian government.⁵⁷ Therefore, by operating under the assumption that refugees have no right to locally integrate in Egypt, the Egyptian government clearly breaches its obligations under the Refugee Convention.

In sum, the Refugee Convention imposes a positive obligation on Egypt to uphold the rights stipulated in the international instrument over and above UNHCR’s mandate, a duty that stems from the UN Charter.⁵⁸ By ratifying the Refugee Convention, Egypt became a state responsible for implementing the Refugee Convention. Such an obligation under the Refugee Convention should automatically override the provisions of the MOU.

⁵³ Article 31(1) Refugee Convention: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

⁵⁴ Article 3(1) CAT: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, online: Office of the High Commissioner for Human Rights <http://www.unhcr.ch/html/menu3/b/h_cat39.htm>.

⁵⁵ Article 4 Banjul Charter: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”, African [Banjul] Charter on Human and Peoples’ Rights, 27 June 1981, online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>>. The Banjul Charter was published in the Official Gazette on 23 February 1992.

⁵⁶ Article 25 of Law 89/1960.

⁵⁷ This is exemplified by Egypt’s acceptance of Articles 34 [naturalization], 17-19 [general employment provisions], 15 [right of association], and 26 [freedom of movement].

⁵⁸ See Kalin; Turk; and Grahl-Madsen, *supra* note 46.

b) UNHCR's expanded mandate clashes with its obligation under MOU:

Since the MOU was signed in 1954, UNHCR's mandate has been expanded at different intervals starting in the late 1950s and early 1960s.⁵⁹ This section will demonstrate that the expansion of UNHCR's mandate, coupled with certain developments in Egyptian law, have led UNHCR to act in ways that prevent it from discharging its obligations towards Egypt under the MOU.

The OAU Convention obstructs the application of the MOU:

First, the relation between UNHCR's mandate and the MOU creates a clash of obligations for UNHCR. Since UNHCR is mandated to supervise all relevant refugee conventions, the coming into force of the OAU convention allowed UNHCR to fulfil its obligations under the Statute,⁶⁰ yet obstructed its duty under Article 2(c) of the MOU. While the OAU Convention came into force in Egypt in 1992, UNHCR only decided to implement this convention in 2003, following floods of refugees into Egypt from several African states where security was deteriorating. Those asylum-seekers fleeing civil wars and generalised violence who would not have met the requirement of the 1951 Convention or its Protocol found protection in Egypt under the OAU Convention. Consequently, UNHCR's introduction of the OAU Convention led to an increase in the number of refugees in Egypt, and in less than one year, their rate of recognition rose by sixty percent.⁶¹ However, the OAU also nullified the effects of Article 2(c) of the MOU, which called for the resettlement of recognized refugees in countries of immigration. Since none of the resettlement states that receive refugees from Egypt are party to the OAU Convention,⁶² resettlement countries reject the OAU Convention's expanded refugee definition. By increasingly accepting African refugees under the OAU Convention as opposed to the Refugee Convention,⁶³ any opportunity left for UNHCR to uphold its application of Article 2(c) of the MOU will disappear. Also, Article 2(d) requests UNHCR to assist destitute refugees in Egypt within the limits of the organization's budget. With the advent of the OAU Convention in 2003, the number of refugees in need of assistance skyrocketed yet UNHCR's financial resources remained constant. This resulted in the deterioration of the quantity and quality of essential services that UNHCR was able to offer refugees in a way that left many refugees unassisted. Under its expanded mandate, UNHCR is therefore no longer able to perform its duties under Article 2(d) in an efficient manner.

The abovementioned situation could have been avoided if UNHCR were not involved in refugee status determination on behalf of the Egyptian government. UNHCR's protection mandate includes

⁵⁹ Goodwin-Gill, "The Refugee", *supra* note 4, at 10-18. See also Nomita Halder, "The UNHCR and its mandate on refugee management: The case of Bangladeshi and Myanmar Refugees", Working Paper, online: The Australian National University <<http://dspace.anu.edu.au/bitstream/1885/40407/1/cem99-10.pdf>> at 4.

⁶⁰ Turk explained that "The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. The UNHCR is competent qua its Statute to supervise all conventions relevant to refugee protection, and has in fact done so in practice", *supra* note 31 at 7-8. See also Kalin "By establishing a duty of State parties to cooperate with UNHCR 'in the exercise of its functions', Article 35(1) of the 1951 Convention does not refer to a specific and limited set of functions but to all tasks that UNHCR has under its mandate or might be entrusted with at a given time", *supra* note 46 at 617.

⁶¹ Katarzyna Grabska, "Living on the Margins: The Analysis of the Livelihood Strategies of Sudanese Refugees with Closed Files in Egypt", FMRS Working Paper No. 6, online: The American University in Cairo <http://www.aucegypt.edu/ResearchatAUC/rc/cmrs/reports/Documents/Living_on_Margins_Final_July_2005_000.pdf>, June 2005 at 18 [Grabska, "Margins"].

⁶² Traditional resettlement countries that host refugees from Egypt on a yearly basis are Australia, Canada, and the United States. Scandinavian countries occasionally accept refugees from Egypt, yet their practice is inconsistent.

⁶³ Such as Refugees from Central and Southern Somalia. See UNHCR *Position on the Return of Rejected Asylum Seekers to Somalia*, 10 January 2004, online: UNHCR <<http://www.unhcr.org/refworld/docid/4020dc864.html>>. Other examples include those fleeing reoccurring conflicts between Ethiopia and Eritrea.

conducting RSD,⁶⁴ a process which also has its origins in Article 35 of the Refugee Convention.⁶⁵ However, as Michael Kagan explains, while the mandate allows UNHCR to carry out RSD functions on behalf of governments, it is not necessarily obliged to do so.⁶⁶ It follows that the assumption of RSD responsibilities by UNHCR should be reserved for situations where states are either not parties to the Refugee Convention or lack the necessary resources to set up their own national RSD units. Egypt does not fall into either of these categories. Following Egypt's ratification of the Refugee Convention, its additional protocol, and the OAU Convention, the President of the Republic passed a decree⁶⁷ ('the Decree') calling for the creation of a Permanent Refugee Committee,⁶⁸ entrusted with conducting RSD based on the Refugee Convention.⁶⁹ The decree was adopted on 15 May 1984, and on 29 May 1984 the Deputy Minister of Foreign Affairs issued an order calling for the establishment of the long-awaited Permanent Refugee Committee ('Committee').⁷⁰

UNHCR should have halted its RSD operations the day the above-mentioned decree was enforced. Historically, UNHCR's involvement in RSD is driven by an institutional urge to fill gaps in refugee protection, a process that came to be known as 'negative responsibility'.⁷¹ Since the Decree is implemented, there is no longer a need for UNHCR to carry out RSD functions in Egypt.⁷² However, there is a crucial gap in the decree, namely the failure to include OAU Convention refugees within the competence of the governmental Committee. Given that OAU Convention refugees fall under UNHCR's mandate, UNHCR should have demanded an amendment of the MOU to exclude resettlement as a durable solution for refugees recognized under the OAU Convention. Alternatively, a more politically feasible option would have been for UNHCR to request the government to add OAU Convention refugees to the competence of the Committee in accordance with the organization's supervisory mandate.⁷³ Instead, UNHCR failed to make such a request, thereby undermining its own responsibility to supervise the application of refugee conventions by governments as stipulated in the UNHCR Statute.⁷⁴ A third and more realistic solution would be for UNHCR to become involved in a

⁶⁴ Excom Conclusion No. 28 (XXXIII) of 1982, para (e).

⁶⁵ According to Turk: "obligations stemming from Article 35 of the 1951 Convention have primarily been implemented by involving the UNHCR in national refugee status determination procedures", *supra* note 31 at 14.

⁶⁶ Kagan, *supra* note 19 at 16.

⁶⁷ Presidential Decree No. 188/1984, issued on 15 May 1984 [on file with author].

⁶⁸ Article 1. Members of this Committee should include representatives from the Ministries of Foreign Affairs, Justice, Interior and the Presidential Office.

⁶⁹ Article 2 of the Decree.

⁷⁰ Order on file with author.

⁷¹ Kagan, *supra* note 19 at 15-17. This is implied in Michael Alexander, "The Refugee Status Determination Conducted by UNHCR" (1999) 11 IJRL 251 at 251-252. According to Dennis McNamara "Formally, UNHCR cannot –and should not– function when essential minimum standards of law and protection are not in place...The question then becomes what to do if the majority of people sheltered in [refugee] camps are women and children...the life-saving imperative often overwhelms more objective criteria provided in international refugee law...", Dennis McNamara, "The Protection of Refugees and the Responsibility of States: Engagement or Abdication?" (1998) Harvard Human Rights Journal 355 at 357. On this note, see the doctrine of negative as explained in Guy S. Goodwin Gill, "Refugee identity and protection's fading prospect" in Frances Nicholson and Patrick Twomey, eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999) 220 [Goodwin-Gill, "Refugee identity"].

⁷² The Committee was in fact established and is still functioning to this day. However, notwithstanding what is stipulated in the Decree, the Committee does not conduct RSD. According to Grabska, "Who Asked them", *supra* note 40 at 25-26, the government has been reluctant to conduct RSD due to the large presence of Sudanese refugees in Egypt. This is unjustified as Sudanese asylum seekers do not go through RSD interviews, being beneficiaries of temporary protection. As will be explained in this paper, the coming into force of the Four Freedoms Agreement should make a case for the application of Article 1 E of the Refugee Convention to the Sudanese.

⁷³ See statement by Turk, *supra* note 60.

⁷⁴ Paragraph 8 Statute: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees,

hybrid RSD system along with the government. This procedure is common in many countries⁷⁵ where UNHCR plays an active, yet not exclusive, role in RSD. For example, in Israel, while RSD is performed by UNHCR, once a positive decision is rendered, a governmental committee re-examines the case to determine whether refugee status should be retained. This leaves the ultimate decision of refugee status in the hands of the host government.⁷⁶

Considering the financial strain that might ensue from a sudden move towards exclusive state-conducted RSD operations, I submit that a hybrid system should be adopted in Egypt. For example, UNHCR can continue to conduct RSD on behalf of the government, whereas if a positive decision is rendered, the government can continue to issue residence permits to refugees. If, on the other hand, an application for asylum is turned-down, the applicant can submit his appeal, not to UNHCR as per current practice, but to the government's Committee. This would serve three main purposes. First, it would remedy one of the problems of UNHCR-RSD, that of the lack of an independent appeal system.⁷⁷ Second, it would gradually involve the government in refugee protection, which is what the Refugee Convention calls for.⁷⁸ Finally, a hybrid system will be in line with Article 2 of the Decree, which stipulates that the Committee's decisions are final and not subject to appeal. By raising the Committee to the status of an appeals authority, asylum-seekers will be given the opportunity to challenge UNHCR's rejection of their asylum application in a higher governmental body endowed with the responsibility of issuing final and binding decisions. The dual-levelled asylum system would be more in line with the principles of justice than the current RSD system where first instance and appeal applications are conducted by the same body.

The evolving nature of UNHCR's mandate has put the organization in a situation where obligations under two different legal instruments clash. Such a conflict can be overcome if the MOU between Egypt and UNHCR is rewritten in more specific terms. The following section will demonstrate why such a clash of obligations has led UNHCR to make political judgments or accommodations that undermine its mandate as well as its obligations under the MOU.

c) The MOU pushes UNHCR to resort to political compromises:

The lack of specificity concerning the role of UNHCR in the MOU has involved UNHCR in political value judgments in violation of its apolitical mandate.⁷⁹ Examples are most easily found in UNHCR's handling of the Sudanese and Iraqi asylum-seekers and refugees in Egypt, where UNHCR resorted to political accommodations in order to protect these groups of refugees. As will be demonstrated in the following paragraphs, UNHCR's political manoeuvres, in fact, aggravated the problems faced by Iraqi and Sudanese refugees in Egypt. Had UNHCR not deviated from its legal mandate, these problems could have been avoided.

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supervising their application and proposing amendments thereto;...". Kagan believes that by conducting RSD, UNHCR is compromising its moral authority, *supra* note 19 at 22.

⁷⁵ Albania, France, Poland, Romania, Spain, Ghana, Argentina. For a longer list, see Turk, *supra* note 31 at 14 footnote 50.

⁷⁶ This seems odd, as it reflects a philosophy of exclusion rather than inclusion and acceptance of refugees. However, involving UNHCR in governmental decisions is a commendable step.

⁷⁷ NGOs have been pushing for an independent appeal system at UNHCR for years. In 2006, eleven NGOs submitted a letter to the UN High Commissioner for Refugees in which they expressed their concern with UNHCR's Procedural Standards. For a copy of the letter see "Eleven groups call on Guterres to change RSD policies, warn that errors go undetected", online: RSDWatch <http://www.rsdwatch.org/index_files/Page4616.htm>.

⁷⁸ See statement by Hathaway, "Watch", *supra* note 47.

⁷⁹ Paragraph 2 of the Statute states that: "The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees".

Sudanese asylum-seekers and temporary protection:

At the signing of the peace agreement between the Sudanese government and the Sudan People's Liberation Movement ('SPLM'), those involved in refugee affairs believed that the root cause of the flight of the majority of refugees from Sudan was about to come to an end.⁸⁰ Hence, from a legal standpoint, the peace agreement would have denied most Sudanese asylum-seekers the right to be recognized as refugees, whether under the OAU Convention or the Refugee Convention and its Protocol. In June 2004, fearing a possible collapse of the peace agreement in Sudan, and eager to help a large group of people that might be in need of protection, UNHCR granted all Sudanese applicants temporary protection on a complimentary basis.⁸¹ Temporary protection is a tool that was formalized in Europe during the conflict in the Former Yugoslavia.⁸² Technically speaking, temporary protection is not tantamount to refugee status,⁸³ yet it offers its beneficiaries privileges that are similar to those associated with refugee status such as the prohibition against forced deportation (*refoulement*).⁸⁴ As UNHCR explains, this form of protection "is best conceptualised as a practical devise for meeting urgent protection needs in situations of mass influx".⁸⁵

In June 2004, when UNHCR granted temporary protection to Sudanese asylum-seekers, the Sudanese refugee community was the largest in Egypt after the Palestinian. Therefore, the requirement of mass influx or presence was fulfilled. The temporary nature of the measure was also appealing as it gave UNHCR the time to assess the situation in Sudan before making further decisions with regard to Sudanese asylum-seekers. However, the need to adopt such a measure came to an end in September 2004, following the signature of the Four Freedoms Agreement ("the Agreement") between Egypt and Sudan, which grants citizens of both countries the freedom to move, reside, work, and own property across national borders.⁸⁶ The Agreement gave privileges to Sudanese citizens that could have denied them refugee status altogether under Article 1 E of the Refugee Convention, for it enabled them to enjoy rights similar to those attached to Egyptian citizenship.⁸⁷ In order to respect its apolitical mandate, UNHCR should have stopped providing assistance to Sudanese asylum-seekers the day the Agreement came into force. Instead, in order not to pressure the government into regularizing the stay of thousands of undocumented Sudanese citizens, UNHCR continued to offer Sudanese asylum-seekers temporary protection as though they were still under its mandate.⁸⁸

Had UNHCR decided to suspend temporary protection to Sudanese asylum-seekers, the Egyptian government would have been compelled to accelerate its full implementation of the Four Freedoms

⁸⁰ The majority of Sudanese refugees in Egypt came from South Sudan, not Darfur.

⁸¹ Those originating from Darfur, however, were given full refugee status.

⁸² Karoline Kerber, "Temporary Protection in the European Union: A Chronology" (Fall 1999) 14 Geo. Immigr. L.J.35 at 35. The term has however, been used before outside Europe, yet was formally recognized as such during the conflict in Yugoslavia. For some examples see Goodwin-Gill, "The Refugee", *supra* note 4 at 199-202.

⁸³ See generally Kerber, *ibid*.

⁸⁴ On cessation of temporary protection, see Joan Fitzpatrick, "The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection" (1999) 13 Geo. Immigr. L.J. 343.

⁸⁵ UNHCR *note on Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, EC/GC/01/4, 2001, para 13, at 3.

⁸⁶ Agreement Between the Government of the Arab Republic of Egypt and the Government of the Republic of Sudan on Freedom of Movement, Residence, Work, and Property (9 September 2004) 37 Official Gazette 2041.

⁸⁷ Article 1 E Refugee Convention: "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country". These four rights, including property ownership are only enjoyed in an absolute form by Egyptian citizens. There are several restrictions imposed on foreign nationals who wish to own immovable (real) property. Moreover, the right to work constitutes an important condition for naturalization.

⁸⁸ Such decision could also have been due to the principle of negative responsibility, given that the government took some time before implementing the Four Freedoms Agreement.

Agreement.⁸⁹ Putting an end to temporary protection would also have allowed UNHCR to allocate the resources saved from not having to assist the Sudanese community to a more destitute community of Refugee Convention refugees, namely the Palestinians in Egypt.⁹⁰ Finally, UNHCR's credibility would have remained intact as rumours caused by granting temporary protection to Sudanese asylum-seekers would have been silenced. In practice, Sudanese asylum-seekers who enjoy temporary protection status in Egypt are given the same rights granted to refugees from other states with the exception of resettlement. This makes the difference between the status enjoyed by temporary protection holders and refugees a nuanced one, causing confusion among temporary protection holders who continue to believe that they should have access to resettlement. Accordingly, temporary protection holders dedicate most of their energy to thinking about resettlement instead of attempting to integrate into life in Egypt. This confusion reached its peak in September 2005 when hundreds of Sudanese refugees,⁹¹ temporary protection holders, and failed asylum-seekers ('closed files')⁹² demonstrated in front of the UNHCR office in Cairo to demand more rights, chief among which was resettlement.⁹³ The demonstration turned into a three-month-long sit-in that ended violently in December 2005 with the death of twenty-eight demonstrators. It was UNHCR that had asked the government to intervene.⁹⁴

Following the end of the sit-in, surviving demonstrators were taken to detention centres around the country. Those who held valid residence documents were set free, and about six-hundred and thirty five undocumented Sudanese were scheduled for deportation. However, UNHCR intervened on behalf of the detainees and resorted, *inter alia*, to the Four Freedoms Agreement to secure their release.⁹⁵ The government complied and no person was deported. Given that UNHCR was successful in releasing the Sudanese detainees through recourse to the Four Freedoms Agreement (since the Agreement regularizes the stay of all Sudanese citizens in Egypt) one wonders why UNHCR continues to offer temporary protection to Sudanese asylum-seekers instead of relying on Article 1 E of the Convention to exclude Sudanese applicants from UNHCR assistance.⁹⁶

⁸⁹ Failure to do so could have given UNHCR a valid reason for resuming temporary protection for Sudanese asylum-seekers.

⁹⁰ Unlike Palestinian persons that live in areas covered by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) mandate, Palestinian citizens in Egypt are considered refugees within the meaning of the Refugee Convention and its Protocol. Out of the 50,000 Palestinian residents of Egypt, less than 300 receive assistance from UNHCR. The remaining Palestinian refugees endure discriminatory measures on a daily basis including a *de facto* denial of Egyptian citizenship in violation of Egyptian law. Sudanese citizens, on the other hand, have access to more rights in practice, such as the right to access public schools (Minister of Education Decree 24/1992). For more information on Palestinian refugee in Egypt, see El Abed, *supra* note 42.

⁹¹ Those recognized before June 2004.

⁹² Those denied refugee status with no possibility of review prior to June 2004.

⁹³ "Only a portion of refugees are accepted for resettlement. Refugees view this as the most favorable option because local integration is fraught with difficulty and repatriation is viewed by most as dangerous. Both UNHCR and media coverage tended to focus almost entirely on this last point—the desire for resettlement—which undermined some of the legitimate complaints put forward by the protesters", Fateh Azzam, "A Tragedy of Failures and False Expectations; Report on the Events Surrounding The Three-month Sit-in and Forced Removal of Sudanese Refugees in Cairo, September-December 2005", the American University in Cairo, June 2006 at 65. The list of demands can be found on pages 62-65.

⁹⁴ "Egypt's Foreign Ministry said that "throughout the three months...the Egyptian authorities faced continued pressure from the regional office of the UNHCR [which] demanded in writing [three times] and verbally the need for the authorities to intervene and end the protest and held [Egypt] responsible for any possible harm on its staff and offices", Azzam, *ibid*, at 25.

⁹⁵ Information obtained through my interaction with UNHCR for the purpose of releasing the detainees in January 2006.

⁹⁶ The argument for putting an end to the temporary protection regime is made stronger by the fact that UNHCR continues to conduct voluntary repatriation missions to South Sudan. It is reported that, between January and 31 May 2008, UNHCR assisted 495 Sudanese citizens with voluntary repatriation, UNHCR *Fact Sheet-Egypt*, May 2008, *supra* note 43. If the situation in Sudan were objectively unstable, UNHCR would not have carried out such missions. The coexistence of temporary protection and voluntary repatriation is therefore a source of confusion.

The problems associated with temporary protection and the Sudanese asylum-seekers could have been avoided had UNHCR abided by the Refugee Convention's Article 1 E. However, the organization's fear of Egypt's unwillingness to fully implement the Four Freedoms Agreement, coupled with the vague wording of the MOU that allows UNHCR to protect anyone who falls under its mandate, including those who enjoy temporary protection, led UNHCR to make a political decision to extend its protection to a group of asylum seekers that did not particularly need it. This process backfired, causing dissatisfaction and confusion among the Sudanese community.

Iraqi influx and prima facie refugee status:

The second example of UNHCR's favouring political compromises over established legal principles is found in the case of Iraqi refugees. The fall of Baghdad in 2003 started the greatest flow of refugees in the Middle-East since 1948.⁹⁷ It is estimated that since 2003 more than one million Iraqis have fled their country of origin,⁹⁸ 100,000 of whom came to Egypt.⁹⁹ Upon their arrival during the first half of this decade, Iraqis faced few problems in Egypt and they were initially able to benefit from Egypt's extended tourist visas and lenient investment laws to obtain residence permits.¹⁰⁰ However, the protracted instability in Iraq increased the flow of Iraqi migrants who sought refuge in Egypt.

There is no doubt that these refugees fall under the mandate of UNHCR as stipulated by the MOU. However, since UNHCR is in charge of RSD in Egypt, the organisation is faced with a dilemma, that of identifying which refugee definition to apply to Iraqi asylum-seekers. Considering the difficulties associated with applying the Refugee Convention to situations of generalized violence without a specific link to one of the five Convention grounds for persecution, the OAU Convention was decidedly the most appropriate tool to implement. However, the government strongly objected to UNHCR's proposal to apply the OAU Convention, claiming that the OAU Convention does not cover non-African refugees,¹⁰¹ an argument that lacks any legal foundation because such an instrument deals with refugees *in* Africa and not *from* Africa.¹⁰² Nevertheless, from a political standpoint, the non-applicability of the OAU Convention is desirable for the government. Bearing in mind the OAU's position against colonialism and foreign occupation,¹⁰³ it would seem hypocritical if some Iraqi-militia members who had spent the last five years fighting Multinational Forces in Iraq were excluded, particularly if these asylum-seekers had respected the laws of war as stipulated in the relevant international instruments,¹⁰⁴ and hence, were not covered by the OAU Convention's exclusion

⁹⁷ Gleb Bazov and Barbara Harrell-Bond, "Irregularities in the Direct Access Program for Iraqi Refugees" (2008) [unpublished manuscript].

⁹⁸ UNHCR *Strategy for the Iraq Situation*, 1 January 2007 at 3, footnote 2 [on file with author].

⁹⁹ Egyptian Ministry of Foreign Affairs Report to the World Refugee Survey. World Refugee Survey 2008- Egypt, Section I, A, p. 0 [on file with author].

¹⁰⁰ Information gathered from interviews conducted in Cairo in May-June 2008.

¹⁰¹ Interview with UNHCR-Cairo staff on 3 June 2008.

¹⁰² Other arguments include the fact that the OAU Convention applies to "every person" as opposed to "every African", the fact that the drafting history of the OAU Convention does not indicate a policy of exclusion towards non-Africans, and the fact that an inclusive interpretation is in line with the object and purpose of the OAU Convention. For an elaboration of these arguments see Rankin, *supra* note 15 at 14-16.

¹⁰³ Eduardo Arboleda, "The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" (1991) 3 IJRL 185 at 196. See also M.R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa" (1989) 1 IJRL 557 at 559.

¹⁰⁴ Such as Article 4(2) of the Geneva Convention relative to the Treatment of Prisoners of War, and Article 44(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

clause.¹⁰⁵ However, the government may have been justified in not wanting trained fighters on its territory, particularly given their potential involvement in sectarian violence in Egypt.¹⁰⁶ Admittedly, it is hard to find support for this position under the OAU Convention.

In addition to possible political motives, the government's refusal to apply the OAU Convention could have been caused by a wish to avoid an unwanted legal obligation. Article 2(3) of the OAU Convention stipulates that potential refugees cannot be turned away at the border.¹⁰⁷ The Refugee Convention does not have a similar provision because the protection of refugees through the principle of *non-refoulement* takes place only once they enter the territory of the host state. As explained in the Commentaries on the 1951 Convention:

Even though "refoulement" may mean "non-admittance at the frontier" ("refusal of leave to land", "exclusion", "Abweisung", "Avvisning"), and that the term was understood in this sense by the Secretariat of the League of Nations when translating (unofficially) the text of the 1933 Convention it is quite clear that the prohibition against "refoulement" in Article 33 of the 1951 Convention does not cover this aspect of the term "refoulement".¹⁰⁸

The application of the Refugee Convention or any of its complimentary rules to Iraqi asylum-seekers is therefore more beneficial to the government than the OAU Convention.

Instead of standing up to the government and risking diplomatic tensions between Egypt and the United Nations,¹⁰⁹ UNHCR circumvented the obstacle imposed by the government regarding the alleged non-applicability of the OAU Convention¹¹⁰ to non-Africans. It did so by implementing its guidelines on dealing with refugees in situations of mass influx by granting Iraqi asylum-seekers refugee status on a *prima facie* basis under its developing mandate.¹¹¹ According to UNHCR, "*prima facie* basis means in essence the recognition ... of refugee status on the basis of the readily apparent,

¹⁰⁵ Article 1(5) OAU Convention: "The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
- (d) he has been guilty of acts contrary to the purposes and principles of the United Nations".

¹⁰⁶ The Egyptian government has been wary of the existence of members of the *Shii* branch of Islam on Egyptian soil. Egypt is a predominantly *Sunni* country and Egyptian *Shiis* have been subject to sanctions under Egypt's Emergency Law. The presence of trained *Shii* militiamen in Egypt might, in light of the current situation in the Middle-East, lead to sectarian violence in the country. During a trip to Egypt in May-June 2008, I was informed that there are rumours of the existence of *Shii* militiamen in Egypt. Such rumours have not been officially confirmed.

¹⁰⁷ Article 2(3) OAU Convention: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".

¹⁰⁸ Grahl-Madsen, *supra* note 46 at 136.

¹⁰⁹ Relations between UNHCR and Egypt soured after the sit-in incident. Both Egypt and UNHCR accused each other of being responsible for the death of asylum-seekers. For detail see Azzam, *supra* note 93 at 25-26. UNHCR may have found it politically risky to pressure the government for more rights for refugees.

¹¹⁰ Although there is no reference to mass influx or group situations in the OAU Convention, the regional context in which the OAU Convention was drafted does not make the convention's application to such situations impossible. The expansion of the refugee definition in Article 1(2) of the OAU Convention to include those fleeing generalized violence in the form of foreign aggression, occupation or domination, and events seriously disturbing public order implies the acceptance of groups of refugees due to the nature of the cause of flight. This is to be contrasted with the rather individualized requirement that characterizes the Refugee Convention criteria for refugee status. See Rankin, *supra* note 15 at 9-10.

¹¹¹ UNHCR *note on the Protection of Refugees in Mass Influx Situations*, *supra* note 85 para 7 at 2.

objective circumstances in the country of origin giving rise to the exodus”.¹¹² *Prima facie* status is a form of refugee protection that could be qualified as complimentary to the classical definition found in the Refugee Convention and its Protocol.¹¹³ Those given *prima facie* refugee status therefore do not always meet the classical definition of a refugee and, as such, are not always subject to the same rights enjoyed by refugees under the Convention or the Protocol including resettlement,¹¹⁴ employment, education and documentation.¹¹⁵ Fearing an influx of Iraqi refugees into its territory, Egypt retaliated by refusing to issue visas for Iraqis as of late 2006.¹¹⁶ While such an action may be against the spirit of the Refugee Convention and its Protocol, it does not necessarily constitute a breach of these instruments.

UNHCR should have stood by its initial position founded in law instead of appeasing the government by seeking alternatives to the application of the OAU Convention. A more appropriate response to the government’s refusal to apply the OAU Convention to Iraqi asylum-seekers would have been for UNHCR to ask the International Court of Justice (ICJ) for an advisory opinion on the applicability of such a convention to non-Africans.¹¹⁷ Egypt would have had to comply with this request for an advisory opinion, as the OAU Convention clearly stipulates that “[m]ember States shall co-operate with the Office of the United Nations High Commissioner for Refugees”.¹¹⁸ In 1981, Egypt was involved in an ICJ advisory opinion concerning the interpretation of its agreement with the World Health Organization (WHO) at the request of the latter.¹¹⁹ Before looking for a political solution, UNHCR should have relied on the precedent of Egypt’s positive cooperation with another UN Agency and submitted the question of the applicability of the OAU Convention to non-Africans to the ICJ.

Accepting Iraqi asylum-seekers under the OAU Convention would have served several purposes. First, it would have given them legal protection, as represented in a recognized treaty, as opposed to a principle based on a policy of pragmatism.¹²⁰ Founding an action in law guarantees its predictability and, most importantly, the state’s accountability for violations of any legal obligation. Moreover, contrary to *prima facie* refugees, OAU Convention refugees enjoy the same rights as those recognized under the Refugee Convention,¹²¹ as its role is to complement the Refugee Convention yet tailor it to

¹¹² *Ibid*, para 6 at 1-2.

¹¹³ As it does not follow the strict criteria stipulated in the Refugee Convention and the Protocol. UNHCR admits that this may constitute a problem, particularly with regard to resettlement, *ibid*, para 11 at 2-3.

¹¹⁴ *Ibid*.

¹¹⁵ Bonaventure Rutinwa, “Prima facie status and refugee protection”, New Issues in Refugee Research, Working Paper No. 69, October 2002, at 15. See also Excom Conclusion No. 22 (XXXII) of 1981 ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’.

¹¹⁶ Interview with UNHCR-Cairo staff on 3 June 2008.

¹¹⁷ Article 65(1): “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” UNHCR is a specialized UN agency that could have requested an advisory opinion in accordance with Article 96(2) of the UN Charter: “Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities”. Charter of the United Nations, 26 June 1945, online: United Nations <<http://www.un.org/aboutun/charter/>>. Considering that the OAU Convention was registered with the Secretary General of the United Nations (Art. 14 OAU Convention), it can be invoked before the ICJ (Art. 102 UN Charter).

¹¹⁸ Article 8(1) OAU Convention.

¹¹⁹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1981], online: International Court of Justice <<http://www.icj-cij.org/docket/files/65/9555.pdf>>.

¹²⁰ There is no agreement on the juridical nature of *prima facie* status to this day. See Rutinwa, *supra* note 115 at 3-6

¹²¹ Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers: The Hague/London/Boston, 1999) at 182; Rutinwa, *ibid* at 14.

the regional context.¹²² Third, it would have made the denial of their entry into Egypt a contravention of Article 2(3) of the OAU Convention.¹²³

The preceding paragraphs were written with the benefit of hindsight. It is not necessarily the case that practitioners could have guessed that UNHCR's political compromises, which were driven by the organization's best intentions towards those in need of protection, would have led to complicated legal situations that often seem at odds with UNHCR's obligation to ensure that states respect their duties under the different refugee conventions. However, the two examples given above are part of a longer list of UNHCR's political activities both in Egypt and internationally. These examples demonstrate that by getting involved in politics UNHCR undermines its Statute and the very people it is mandated to protect. The blame cannot be entirely placed on UNHCR. If categories of refugees and refugee conventions are specifically listed in a new agreement between Egypt and UNHCR, the chaos emanating from the loose wording of the current MOU would be avoided. The half-century old agreement should therefore be rewritten.

Recommendations and conclusion:

This paper scrutinized various problems that resulted from the wording of the MOU between Egypt and UNHCR. More specifically, the paper demonstrated that the coming into force of the Refugee Convention and its Protocol, Egypt's ratification of the OAU Convention, the passing of Decree 188/1984, and the increase in the numbers of refugees in Egypt due to regional and continental instability nullified the effects of Article 2 of the MOU. Given that Article 2 is the core of MOU, one must wonder what the utility of this agreement is other than that of preventing the integration of refugees in Egypt. Therefore, unless the government is willing to be in charge of all refugee-related matters, in which case the MOU should be set aside, the parties should actively seek for the rewriting of the MOU. The following paragraphs will provide some recommendations on how the MOU can be redrafted.

First, given that the words 'UNHCR's mandate' caused a clash within UNHCR, a more appropriate choice of words must be adopted. Accordingly, listing the relevant conventions to which Egypt is a party would be necessary in order to outline the rights and obligations of Egypt, UNHCR, and refugees. For example, if the Egyptian government insists on not including OAU Convention refugees under the competence of the Permanent Refugee Committee, then the MOU should stipulate that OAU Convention refugees will be assisted by UNHCR.

Second, since unexpected crises may take place in the future, causing a further expansion of UNHCR's mandate, an additional Article in the MOU outlining how to deal with crisis situations is required. The Article might read as follows:

If, for any reason, the mandate of UNHCR is expanded so as to include forms of protection other than the ones known at the time this Agreement is signed, or if the government of Egypt becomes a party to an international instrument that expands the definitions of a refugee beyond the criteria stipulated in the Refugee Convention, its Protocol, and the OAU Convention, the Parties to this Agreement undertake to enter into negotiations in view of facilitating the recognition of these refugees or peoples of concern, and of finding appropriate durable solutions for them.

In addition, considering that Egypt is now a party to the Refugee Convention, Article 2(a) should be rewritten so as to recommend that the government provide UNHCR with updates on the conditions of refugees and of any laws relevant to them. This will ensure Egypt's compliance with Article 35 of the Convention and uphold UNHCR's duty to supervise the government's implementation of the relevant refugee instruments in accordance with paragraph 8 of the Statute.

¹²² Article 8(2) OAU Convention: "The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees". See also Rankin, *supra* note 15 at 3.

¹²³ *Supra* note 107.

Furthermore, since Egypt's accession to the Refugee Convention must have an effect on the MOU, the option of local integration should be acknowledged. The present MOU excludes local integration of refugees as a durable solution by providing only for voluntary repatriation (Article 2(a)) and resettlement (Article 2(c)). Given that Egypt is a party to the Refugee Convention, local integration of refugees should be the first priority should voluntary repatriation not be possible to achieve. The proposal to add a paragraph on local integration is strengthened by the fact that, as explained above, refugees recognized under the OAU Convention cannot benefit from the resettlement program that is currently in place.

Fifth, bearing in mind Decree 188/1984, and considering the financial implications of a sudden move towards government-conducted RSD operations, it is recommended that a hybrid RSD system be introduced in Egypt. The MOU should set out the functioning of the new RSD mechanism in Egypt. As stated earlier, UNHCR might be in charge of assessing first instance applications, leaving appeals to the government's Committee. This will ensure a fairer system for asylum-seekers, who will benefit from the opportunity of having their asylum applications evaluated by two different authorities as opposed to one.

Sixth, the MOU should also provide for an explicit exclusion of the benefits of refugee status to those who enjoy the same rights attached to Egyptian citizenship in accordance with Article 1 E of the Refugee Convention. This paper demonstrated how the lack of such a stipulation caused confusion in the Sudanese community and has led to the denial of assistance to Palestinian refugees.

In addition, given that Egypt is a party to several refugee conventions, and considering that the criteria of refugee status differ depending on the treaty to be applied, a hierarchy of the different refugee instruments must be clearly outlined in a way that satisfies the enjoyment of the maximum number of rights by refugees. For instance, while assessing an asylum-application, UNHCR and the Committee should first look at the Refugee Convention and the Protocol given their global pre-eminence.¹²⁴ If an asylum-seeker does not fulfil the criteria of the Refugee Convention or the Protocol, his or her claim should be examined under the OAU Convention, and so on. In situations of mass influx where a thorough examination of claims under the Refugee Convention or the OAU Convention cannot be conducted, UNHCR and Egypt will enter into negotiations to specify which pragmatic regime to apply, be it temporary protection or the *prima facie* option.

Finally, it must be specifically mentioned in the MOU that refugees shall enjoy the rights enshrined in all refugee conventions to which Egypt is a party. The lack of such a stipulation in the current MOU has led to the denial of the refugees' right to work. By explicitly linking the MOU to the refugee instruments in force, a certain degree of harmony between all the different refugee regimes can be achieved.

Redrafting the MOU will have an important impact on the lives of refugees in Egypt: particularly in comparison to the impact of the relevant international treaties currently in force. None of the refugee conventions explains the mechanism of interaction between UNHCR and states party. This is a major lacuna in refugee protection that is most pronounced in states where UNHCR conducts RSD. An alternative would be to rely on a well-drafted MOU that reflects the reality of modern day refugees. In Egypt, the state and UNHCR rely on an outdated MOU, which has a negative impact on refugees and their lives. Accordingly, refugees in Egypt endure confusion surrounding their rights, denial of local integration and the rights associated with integration, and victimization due to political manoeuvres by UNHCR and the state.

Given that UNHCR conducts RSD in Egypt, in practice, the MOU is considered the most important instrument *par excellence*. The new MOU should therefore provide more details on the interactions between UNHCR and the government. The new MOU will, therefore, remedy the problems caused by

¹²⁴ As the OAU Convention explicitly recognizes that it shall complement the Refugee Convention, Article 8(2), *supra* note 122.

its older counterpart and lead to more stability in the lives of refugees in Egypt. Examples of these benefits are manifold and would include more procedural justice in asylum claims with the dual-structured asylum system, a confirmation of the right of refugees to locally integrate and, most importantly, a guarantee that the rights associated with integration are respected. Also, by confirming the exclusion of people who enjoy benefits similar to the ones associated with Egyptian citizenship, the MOU will guarantee a better distribution of resources as refugee communities that have traditionally been ignored by UNHCR and the government will be assisted.

On the political side, by clearly outlining the responsibility of its parties, the new MOU will restore UNHCR-Cairo's lost legitimacy and clean its tarnished image, which was primarily caused by its political compromises aiming at filling gaps in refugee protection. The new MOU will also increase the government's involvement in RSD and refugee protection. Furthermore, by acknowledging the local integration of refugees under the new MOU, Egypt will catch-up with other states party to the Refugee Convention and its Protocol and join other champions of refugee protection.

ANNEX I

TRANSLATION OF AGREEMENT BETWEEN THE EGYPTIAN GOVERNMENT AND THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS OBTAINED BY THE AUTHOR

PREAMBLE

CONSIDERING that the Egyptian Government is desirous to continue the international co-operation within the United Nations in favour of refugees who are within the mandate of the United Nations High Commissioner for Refugees;

CONSIDERING the large number of these refugees in Egypt;

The Egyptian Government and the High Commissioner agree on the following:

Article 1

Without prejudice to Egyptian legislation and, in general, of all sovereign prerogatives of the Egyptian Government, the High Commissioner for Refugees is authorized to establish a Branch Office in Cairo in view of assuring, in the interest of the refugees within his mandate, and in agreement with the Egyptian authorities, the closest possible cooperation with such authorities for the implementation of the tasks mentioned in article 2 below.

Article 2

The tasks entrusted to the High Commissioner Delegation in Egypt will be in particular, the following:

- a) Cooperate with the governmental authorities in view of undertaking the census of and identifying the refugees eligible under the mandate of the High commissioner;
- b) Facilitate the voluntary repatriation of refugees;
- c) Encourage, in cooperation with the Egyptian Government, and the international organizations competent in immigration matters, the initiative leading to resettle, in every possible measure, in the countries of immigration, the refugees residing in Egypt;
- d) Help, within the limits of the funds received to this effect, the most destitute refugees within his mandate residing in Egypt;
- e) Insure the coordination of the activities undertaken in Egypt in favour of refugees under his mandate, by welfare societies duly authorized by the Government.

Article 3

The contacts between the Branch Office of the UN High Commissioner in Egypt, the Government and the Egyptian administrations will be ensured, in a general way, by the intermediary of the Ministry of Interior.

Article 4

The nomination of the Representative of the High Commissioner will be submitted to the agreement of the Egyptian Government. The High Commissioner will consult the Egyptian Government concerning the nomination of the other eventual members of his Office.

Article 5

The Egyptian Government undertakes to give to the delegation of the High Commissioner all facilities necessary to the exercise of its functions. The Egyptian Government will give to the Delegate of the High Commissioner the same favourable treatments as those given to other United Nations Missions and Specialized Agencies. The list of the staff members of the Delegation of the High Commissioner in Cairo called to benefit from the same treatment given to staff member of the other Delegations of the United Nations and Specialized Agencies in Cairo will be established by common agreement between the Government and the High Commissioner.

Article 6

The Egyptian Government will grant to “bona fide” refugees, residing in Egypt, who fall within the High Commissioner’s mandate, residence permits according to the regulations in force.

Article 7

The Egyptian Government will grant to the said refugees, when they will have to travel abroad, travel documents with a return visa, of a limited, but sufficient, duration, except if reasons of public security prevent it.

Article 8

The present agreement will enter in force as soon as the Egyptian Government notifies the United Nations High Commissioner for Refugees of his approval of the agreement, in conformity to its constitutional procedure.

In witness whereof the Representative of both Contracting parties have signed the present Agreement.

Made in double copies in French language.

Cairo, 10 February 1954.

UNHCR Cairo, Unofficial translation , Date.

ANNEX II

PROPOSED AGREEMENT BETWEEN THE EGYPTIAN GOVERNMENT AND THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

PREAMBLE

CONSIDERING that the Egyptian Government is desirous to continue the international co-operation within the United Nations in favour of refugees;

CONSIDERING the *rising* number of refugees in Egypt;

The Egyptian Government and High Commissioner agree on the following:

Article 1

For the purposes of this Agreement, the following terms shall mean:

- a) The Parties: The Government of Egypt and the UNHCR Office in Cairo.
- b) UNHCR: Office of the United Nations High Commissioner for Refugees.
- c) The Governmental Committee: Permanent Refugee Committee, established by Presidential Decree 188/1984.
- d) Refugee: anyone who meets the criteria for such description in accordance with Egypt's international obligations and domestic law.
- e) RSD: Refugee status determination.
- f) Refugee Convention: 1951 Convention Relating to the Status of Refugees.
- g) Protocol: 1967 New York Protocol Relating to the Status of Refugees.
- h) OAU Convention: 1969 Organization of African Unity's Convention Governing Specific Aspects of Refugee Problems in Africa.

Article 2

Without prejudice to Egyptian legislation and, in general, of all sovereign prerogatives of the Egyptian Government, the High Commissioner for Refugees is authorized to establish a Branch Office in Cairo in view of assuring, in the interest of refugees, and in agreement with the Egyptian authorities, the closest possible cooperation with such authorities for the implementation of the tasks mentioned in article 3 below.

Article 3

The tasks entrusted to the **UNHCR** in Egypt will be in particular, the following:

- a) Conduct RSD functions of behalf of the Egyptian government. While performing RSD, UNHCR shall first look into the Refugee Convention and its Protocol. If the applicant fails the test provided by the said instruments, UNHCR shall consult the OAU Convention, followed by domestic law;
- b) Document the information provided by the government of Egypt on refugees, their conditions, the relevant international instruments that may affect them as far as Egypt is concerned, and all domestic legislations that might impact refugees in accordance with Article 35 of the 1951 Convention Relating to the Status of Refugees and Paragraph 8 of the Statue of UNHCR;
- c) Ensure that the government is complying with its obligations under the relevant international instruments, particularly with regard to the rights of refugees;
- d) Facilitate the voluntary repatriation of refugees in cooperation with the Egyptian government and the refugees' states of origin;
- e) Encourage, *should refugees fail to integrate*, in cooperation with the Egyptian Government, and the international organizations competent in immigration matters, *the resettlement of these refugees to* the countries of immigration.
- f) Help, *in cooperation with the Egyptian government*, within the limits of the funds received to this effect, the most destitute refugees residing in Egypt;
- a) Insure the coordination of the activities undertaken in Egypt in favour of refugees, by welfare societies duly authorized by the Government. *Such activities shall be conducted under the supervision of the Egyptian government to ensure their compliance with domestic legislations.*

Article 4

Appeals shall be submitted to the Governmental Committee, which shall issue reasoned decisions that shall be deemed final and not subject to challenge unless the asylum-seeker is able to demonstrate that the Governmental Committee made an error of law, in the case of which the application will be subject to review by the Supreme Administrative Court.

The asylum-seeker shall be bound by the laws of civil procedures and litigation as regards deadlines for submitting his challenge.

Article 5

The Egyptian Government will grant to "bona fide" refugees, residing in Egypt, residence permits according to the regulations in force.

Article 6

If, for any reason, the mandate of UNHCR is expanded so as to include forms of protection other than the ones known at the time this Agreement is signed, or if the government of Egypt becomes a party to an international instrument that expands the definitions of a refugee beyond the ones provided in the Refugee Convention, its Protocol, and the OAU Convention, the Parties to this Agreement undertake to enter into negotiations in view of facilitating the recognition of these refugees or peoples of concern, and of finding appropriate durable solutions for them.

Article 7

Refugee status shall not extend to those who enjoy rights similar to those attached to Egyptian citizenship. These benefits shall not include political rights.

Article 8

The contacts between the Branch Office of the UN High Commissioner in Egypt, the Government and the Egyptian administrations will be ensured, in a general way, by the intermediary of the Ministry of Interior.

Article 9

The nomination of the Representative of the High Commissioner will be submitted to the agreement of the Egyptian Government. The High Commissioner will consult the Egyptian Government concerning the nomination of the other eventual members of his Office.

Article 10

The Egyptian Government undertakes to *provide* the delegation of the High Commissioner *with all the* facilities necessary to the exercise of its functions. The Egyptian Government will give to the Delegates of the High Commissioner the same favourable treatment given to other United Nations Missions and Specialized Agencies. The list of the staff members of the Delegation of the High Commissioner in Cairo called to benefit from the same treatment given to staff members of the other Delegations of the United Nations and Specialized Agencies in Cairo will be established by common agreement between the Government and the High Commissioner.

Article 11

The Egyptian Government will grant to *the* said refugees, when they will have to travel abroad, travel documents with *a* return visa, of a limited, but sufficient, duration, except if reasons of public security prevent it.

Article 12

The present **A**greement will enter in force as soon as the Egyptian Government notifies **UNHCR** of its approval of the **A**greement, in conformity to its constitutional procedure.

Article 13

Should there be a conflict between the languages of this Agreement, the Arabic version shall have primacy.

In case of dispute regarding the interpretation or application of the provisions of this Agreement, the Parties shall resort to the relevant Administrative Tribunal at the Egyptian Council of State (Conseil d'Etat) for a binding opinion.¹²⁵

¹²⁵ Alternatively, parties can agree to have recourse to an ICJ advisory opinion in accordance with Article 65 of the ICJ Statute.

In witness whereof the Representative of both Contracting parties have signed the present Agreement.

Made in double copies in *Arabic and English*.

Cairo, *Date inserted*