

Legal Refugee Recognition in the Urban South: Formal v. *de Facto* Refugee Status

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Abstract

The legal relevance of the “urban refugee” concept in the Middle East and Africa stems from the practice of practicing different forms of refugee status determination (RSD) in rural as opposed to urban areas. Urban refugees are usually subject to rigorous individual adjudication, while rural refugees are typically recognized on a *prima facie* basis. This difference in procedure has no basis in the substance of refugee law, and it marginalizes urban refugees in two key ways. First, in Africa and the Middle East, refugee status recognition is used by host governments to prevent refugee integration, to force refugees to live far from population centres, and to transfer responsibility for their welfare to international agencies. Second, individualized RSD procedures in wide use by the United Nations generally lack key fairness safeguards, increasing the risk that genuine refugees will be wrongfully rejected. This phenomenon means that urban refugee populations will often be systematically undercounted, and will include a significant number of *de facto* refugees who are in fact refugees in danger of refoulement, but whose applications were rejected and who thus have no access to the protection and resources otherwise targeted at refugees.

Résumé

La pertinence juridique du concept de « réfugié urbain » au Moyen-Orient et en Afrique provient de la pratique d'appliquer différentes approches à la détermination du statut de réfugié (DSR) pour ceux vivant en milieu rural par opposition à ceux vivant en milieu urbain. Les réfugiés en milieu urbain sont généralement sujets à un régime juridique individuel sévère, tandis que ceux en milieu rural sont typiquement admis sur une base *prima facie*. Cette différence de procédure n'a aucun fondement juridique dans la loi sur le statut des réfugiés, et mène à

l'exclusion des réfugiés urbains de deux manières fondamentales. D'abord, en Afrique et au Moyen-Orient, la procédure de détermination du statut de réfugié est utilisée par les gouvernements hôtes pour empêcher l'intégration des réfugiés, pour les forcer à vivre loin des agglomérations, et pour transférer la responsabilité de leur prise en charge sociale aux organismes internationaux. En second lieu, les procédures individualisées de DSR largement utilisées par les Nations Unies ne contiennent généralement pas toutes les sauvegardes essentielles aux principes d'équité, augmentant ainsi le risque que de vrais réfugiés soient rejetés à tort. Ce phénomène signifie que les populations de réfugiés en milieu urbain seront le plus souvent systématiquement sous dénombrées, et incluront un nombre important de réfugiés de fait qui sont en réalité des réfugiés en danger de refoulement dont les applications ont été rejetées, et qui n'ont ainsi aucun accès à la protection et aux ressources autrement destinées aux réfugiés.

Introduction

International refugee law guarantees refugee rights regardless of geography. Yet the law of refugee status is implemented differently in different places, particularly in terms of how a person obtains official recognition of refugee status. In Europe and North America, refugees usually obtain formal recognition of their legal status by making individual asylum applications to systems of administrative adjudication. In the geopolitical South, the presumed norm – at least in rural areas – has been for refugees to gain formal recognition on a group basis, without individual assessments.

Urban refugees in the South are subject to something more anomalous and problematic. They generally must make individual refugee claims, like their counterparts in the North, but these claims are decided through procedures that gener-

ally lack critical safeguards of fairness developed in administrative law and United Nations High Commissioner for Refugees (UNHCR) advice to governments. Whereas Northern states normally have unitary national systems that determine refugee status for anyone inside the country, African states often maintain dual systems of status determination within the same country, with different mechanisms in rural and urban areas. It is this *procedural* difference which makes the urban refugee category legally meaningful in the South, even as the substance of the law takes no notice of whether someone lives in a rural or urban area.

In this chapter I explore the background and impact of this anomaly, primarily through examples in Africa and the Middle East. The rural-urban dichotomy in refugee status determination (RSD) has no clear basis in international law, cannot be explained by common assumptions about international and regional refugee definitions, and likely violates the 1951 *Convention relating to the Status of Refugees* (*Refugee Convention*). Rather than in law, the rural-urban dichotomy has its origins in the different political uses of the formal label “refugee” in the North and the South. Whereas in Europe and North America, refugee recognition has been a means of granting asylum, in Africa it has often been a means of separating refugees from their host societies and transferring responsibility for their care onto the international community.

The determination of refugee status tends to marginalize urban refugees in the South in two related ways. First, it subjects them to an arduous individual application process in which many are refused protection, unlike their rural counterparts. Second, it subjects them to a high-stakes adjudication procedure that frequently lacks established safeguards and is hence prone to error. Although many urban refugees enjoy protection through formal status recognition, the risk of errant rejection of people in danger creates a class of *de facto* refugees, who should be of concern to refugee law and refugee policy, but in practice have no legal recognition or protection.

The *de facto* urban refugee poses a number of problems for refugee studies. It leads, first of all, to a systematic undercounting of the urban refugee population. It also points to a need for refugee studies to concern itself not just with the substance of refugee definitions,¹ but with policy choices about how to implement these definitions. Often, the mechanisms of implementation have done as much or more to exclude people than the definitions themselves.

For policy makers, and for anyone concerned with refugee protection, the *de facto* urban refugee raises immediate concerns. A *de facto* refugee is at risk of *de facto* *refoulement*, in which someone who should have been protected from deportation instead may be forcibly returned to a country

where his or her life or freedom is in danger. Beyond this, a *de facto* refugee will be denied the subsistence, integration, and resettlement assistance that policy makers direct toward recognized refugees. There is a need for governments and UNHCR to reduce the rural-urban RSD dichotomy and ensure that individual RSD is only conducted where sufficient procedural safeguards are in place.

The Rural-Urban Dichotomy in Refugee Status Determination

One Country, Two Procedures

In the substance of international refugee law, the category “urban refugees” does not exist. In law, refugees are protected no matter where they live within a country; in terms of a government’s obligations to respect refugee rights, refugees in a city are no different than refugees in any other area. The *Refugee Convention* actually prohibits any legal distinction between refugees depending on where they happen to live. Article 26 provides: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.” Recognition of refugee status should have effect even beyond a country’s borders.² UNHCR’s Policy on Refugees in Urban Areas states that “UNHCR’s obligations in respect of international protection are not affected by either the location of the refugees or the nature of the movement to that location.”³

That is the theory. In practice, in much of the geopolitical South, it makes a great deal of difference for someone’s legal situation whether a refugee lives in a rural or urban area. The difference is not so much in the legal status *per se*, but in the procedure by which a refugee gains recognition for his or her status.

There are two main types of RSD procedures, individual RSD and *prima facie* recognition. Individual RSD is where each asylum seeker has his or her refugee claim adjudicated through an intensive case-by-case process that usually includes interviewing, documentation, research, and decision making based on application of the refugee definition. It is through the individual adjudication of asylum claims, in administrative tribunals and courts, that the law of refugee status has developed in Western countries. Controversies about the boundaries of refugee law – Are people who flee genital mutilation refugees? Are people who flee militant groups or criminal gangs refugees? Are people who flee domestic violence refugees? – have been adjudicated through this process. It is also through this process that governments attempt to weed out asylum seekers they believe to be inventing refugee claims, through the process of credibility assessment. Individual RSD, at least when con-

ducted in keeping with international standards, is time consuming and resource demanding.

Prima facie protection is usually undertaken when lack of resources coupled with large numbers of asylum seekers from countries with known human rights problems makes it impractical and to a large extent redundant to undertake an intensive case-by-case process. UNHCR has explained that what would be a manageable number of applications in one country can be overwhelming in another:

[W]hat amounts to 'large-scale' or 'mass influx' will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. The analysis needs to take into account the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems.⁴

Where individuals within a group of asylum seekers are likely to be refugees but the number of refugee applicants makes it impractical to perform individual status determination, governments or UNHCR can opt to use *prima facie* recognition to formally label a group of people refugees.⁵ In such systems, all asylum seekers from particular countries or territories are considered automatically to be refugees, and receive legal protection in the country of asylum without individual status determination.⁶

In much of Africa and in other regions as well, rural refugees generally have their legal status recognized through *prima facie* refugee status determination. Urban refugees, on the other hand, generally have their status recognized through individualized refugee status determination. Often, two refugees of the same nationality, living in the same host country, will find themselves subject to two very different procedures. Both procedures are normal means of determining refugee status under international law. But there is little on paper in international law that would anticipate two parallel systems in different geographic regions within the same country for the same nationality of asylum seekers.

Although established standards for *prima facie* recognition focus on numbers and capacity, these factors do not explain the rural-urban dichotomy. For instance, Sudanese and Somali refugees in Kenyan camps have received *prima facie* recognition by UNHCR, which is responsible for RSD in the country. If *prima facie* recognition in Kenya is justified by lack of capacity to process individual claims, it is peculiar that UNHCR and the Kenyan government at the same time undertook the burden of individual RSD by UNHCR for Sudanese and Somali refugees in Nairobi while they avoided this burden elsewhere in the country.

Similarly, numbers fail to explain differences in UNHCR's RSD systems in different countries. In 2000, UNHCR reported that "some 4,500 Sudanese refugees arrived in Kenya during the first part of the year."⁷ These Sudanese in Kenya were recognized on a *prima facie* basis in Kakuma camp. But in the same year, Sudanese asylum seekers arrived in Egypt (where they lived in a primarily urban environment) at more than twice the Kenyan rate.⁸ If numbers and capacity were decisive, one would have expected UNHCR to use *prima facie* recognition in Egypt as well. Since UNHCR is responsible for RSD in both Egypt and Kenya, it would be difficult to conclude that Egypt has greater processing capacity than Kenya, where UNHCR is also responsible for RSD.

Do Different Refugee Definitions Require Different Procedures?

The prevalence of group-based status determination among rural refugees is often associated with the broader refugee definition established by the 1969 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa* (African Convention).⁹ By this convention, African states extended refugee protection to people fleeing generalized violence, a category not protected by the *Refugee Convention*. The *African Convention* incorporates the 1951 refugee definition, but extends it to more fully include victims of violence, war, and civil strife.

1951 Refugee Convention definition

[A refugee is a person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

African Convention "extended" definition

A refugee is a person who] owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Any person who falls under the 1951 definition also falls within the *African Convention* since the *African Convention* incorporates both definitions.

The fact that Africans adopted a broader refugee definition than the one crafted by the United Nations in 1951 and used in Western asylum systems is sometimes cited as an example of southern states opening their doors wider to refugees than their northern counterparts. After all, many African countries host far more refugees per capita than Europeans or North Americans, and under much more dire economic circumstances. It is often assumed that the extended definition in Africa was intended to compensate for the *Refugee Convention*'s exclusion of refugees from civil wars, which have been the main cause of refugee crises in Africa.¹⁰ This assumption is correct, but it is in some ways simplistic and not a convincing explanation for the differences in status determination procedure.

It is sometimes assumed that the *Refugee Convention* definition is meant to be applied individually, while the *African Convention* is intended for group situations.¹¹ If true, this would explain the widespread use of *prima facie* recognition, rather than individual RSD, in rural Africa. A related assumption is that urban refugees arrive individually, not in large groups, and hence are more like asylum seekers in Europe or North America, necessitating an individualized RSD process. Yet as an empirical matter, it is far from clear that urban refugees have claims more likely to fall under the *Refugee Convention* than the *African Convention*. Even if rural refugees tend to arrive in larger groups than urban refugees (an assumption that I will not seek to assess in this chapter), this would not necessarily mean that one group is more likely to flee "persecution" as defined in the *Refugee Convention*, while the other group is more likely to flee disturbances to public order. Certainly, people fleeing the Rwandan genocide fled persecution of the gravest kind, and they fled in very large numbers.

There is no basis in the texts of the *Refugee* and *African Conventions* from which to conclude that the *African Convention* is meant to be applied in group situations, while the *Refugee Convention* is not. Neither convention specifies a procedure by which its refugee definition should be applied. The *African Convention*'s definition is written in the singular tense, without any reference to groups, just like the *Refugee Convention*. Today, the *African Convention* is applied in individual status determination in some countries, for instance in South Africa and Egypt. UNHCR assisted refugees in Africa on a group basis before the *African Convention* existed, and continues to use *prima facie* recognition outside Africa.¹² For instance, in Yemen Somali refugees are recognized on a *prima facie* basis, although Yemen is party only to the *Refugee Convention*.¹³

Providing better protection specifically for civil war refugees was not the only motivation for the extended African definition. Civil war refugees are protected by the phrase "events seriously disturbing public order in either part or the whole of his country of origin." Though this certainly includes civil wars, it is much less specific terminology than the other categories in the extended definition, namely "external aggression, occupation, [and] foreign domination." Given that African states drafted the definition in the late 1960s, African states were likely at least as concerned with anti-colonial struggles ("foreign domination") than with the civil wars that predominate today. The original draft for the extended definition was submitted by Egypt,¹⁴ which at the time was coping with the Israeli occupation of the Sinai in the wake of the 1967 Middle East War ("external aggression, occupation").

Moreover, the *Refugee Convention* contains no exclusion for civil wars. The definition requires that a person fear "being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The harms people fear in war – namely death or bodily injury – are serious enough to be considered persecution. Fleeing from civil war alone is not enough to meet the *Refugee Convention* definition, but war-related violence that is linked to one of its five reasons can give rise to a valid claim to refugee status.¹⁵ Since much violence in civil wars is motivated by an intention to harm particular ethnic, religious, or political groups, many war refugees can find protection under the *Refugee Convention*.

It is true that some governments (for instance, the United Kingdom¹⁶) have often resisted applying the *Refugee Convention* in civil war cases, but others have not (for instance, Canada¹⁷). Most importantly, UNHCR – which determines refugee status in much of Africa – has stated:

there is nothing in the definition itself which would exclude its application to persons caught up in civil war. . . . Many conflicts take place against a political background which may involve serious violations of human rights, including the targeting of particular ethnic or religious groups.¹⁸

The UNHCR Executive Committee has expressed "deep concern about the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion."¹⁹

The *African Convention* is important because it protects random victims of war, while the *Refugee Convention* leaves out people who flee generalized violence and are merely in the wrong place at the wrong time. The *African Convention*, by being broad and inclusive, also removes the ambiguity

in the *Refugee Convention's* more specific terminology about persecution. But it is not correct to assume that the *Refugee Convention* could not protect many of the refugees in Africa, nor that the *African Convention* is necessarily more appropriate in group situations.

What, then, explains the differences in refugee status determination in Africa? The answer lies not in the legal refugee definitions, but in the political and policy objectives which have motivated governments in crafting and applying these definitions.

Why Recognize Refugee Status?

James Hathaway has argued that modern refugee law, as embodied by the *Refugee Convention*, grew more from state self-interest than from devotion to human rights or humanitarianism. He writes:

Current refugee law can be thought of as a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulated international migration in accordance with the interests of states.²⁰

Hathaway argues that the resulting refugee policy in the West under the *Refugee Convention* is a fragile system in which only a minority of those in need of protection get it. State self-interest is also critical to understanding how refugee status has been defined and used in Africa.

It is often assumed that formal refugee recognition is a means of granting someone asylum. In Europe and North America, refugee status recognition has generally been a doorway to inclusion in the host society, leading to permanent residence and often citizenship. But what if refugee recognition were not connected to granting long-term asylum? Neither the *Refugee Convention* nor the *African Convention* requires a state to grant permanent residence to refugees. What if the purpose of refugee recognition were to designate international responsibility for a person's protection and care, while minimizing the demands on the host country?

A brief examination of the history of RSD in Africa indicates that African states have used refugee status for different purposes than Northern states. In Africa, refugee status has often been used to depoliticize protection, prevent refugees' integration, and defer responsibility for their care to the international community. Whereas Northern state self-interest leads governments to want to keep the refugee definition narrow, so as to not lose control over immigration, African states may actually prefer a broad

refugee definition because it allows them to shift more burdens onto international agencies, and because it depoliticizes the movements of large numbers of people.

Narrow window to inclusion: Refugee status in the North

In international law, refugee status is an exception to the general rule that migrants can be forced to go back to their own countries. International law since the mid-nineteenth century has allowed states nearly unregulated authority to exclude foreigners from their territories. Although in a colloquial sense the term "refugee" has existed since ancient times, the need for a strict definition is a by-product of modern immigration law. Modern refugee law came to be after World War I as an exception to the general state power to exclude aliens,²¹ developing around the same time that countries like the U.S. were enacting their first comprehensive restrictions on immigration. The principle of *non-refoulement* – the operative core of refugee law – states that the authority to deport foreigners must be waived when it would put someone's life or freedom at risk. If governments were not so intent on restricting migration in general, it would not be nearly so important to strictly define refugee status.

This system in which refugee law is an exception to general migration law makes it quite advantageous (from a legal point of view) to be formally labelled a refugee. Having a recognized refugee status allows migrants who would otherwise be deported to stay where they are, work, enjoy social security, and send their children to school. More than this, Western governments have traditionally granted asylum to refugees, entitling them to long-term residence and often eventual citizenship.

During the Cold War, Western states saw political advantage in recognizing refugee status through the *Refugee Convention's* definition.²² The definition gave special weight to protecting people motivated by pro-Western political ideology to flee the Eastern Bloc. At this time, the West preferred to emphasize civil and political rights (which the East often violated), while the pro-Soviet states emphasized social and economic rights (on which it was easier to fault the West). The *Refugee Convention's* concept of persecution facilitated the West's condemnation of the Soviet system because it had been accepted in the past by the Soviet Union, and because the *Refugee Convention* for the most part does not include protection from social and economic violations.²³

Nevertheless, refugee law's existence as an exception to general restrictions on migration puts refugee protection under stress, and creates the need for refugee status determination. As the Cold War drew to a close, Western governments restricted access to asylum.²⁴ Refugee status determination became a particularly contested arena as focus

shifted to asylum claims from the geopolitical South. Governments began to grow concerned that migrants have a built-in incentive to exploit the refugee system, since they may not be able to avoid deportation any other way. Hence, much of individual refugee status determination is devoted to credibility assessment.²⁵ Moreover, even where fraud is not an issue, governments want to keep the refugee definition narrowly defined so that it remains an exceptional measure.²⁶ For this reason, a wide and rich jurisprudence has developed around the law of refugee status, settling disputes about who can enjoy refugee protection. Many categories of refugee claims that are now generally accepted as within the international refugee definition were initially resisted by Northern governments – gender-based persecution and persecution by rebel groups, for instance. Hence, in the North refugee status has traditionally been a ticket to inclusion and integration, while governments have used the status determination process to keep limits on these rewards.

An open door to marginalization: Refugee status in Africa

In Africa, formal refugee status has often not carried the advantages for governments that it offers in the North. Indeed, for a time African governments and UNHCR concluded that the formal label could actually be detrimental. The *Refugee Convention*'s stress on "persecution," which was appealing in the West during the Cold War, caused apprehension in Africa. Authorities instead favored vague humanitarian doctrines over the 1951 refugee definition.

In Africa in the 1960s, governments allowed forced migrants to remain in their territories and UNHCR provided them assistance without anyone ever formally recognizing most of them as refugees. Ivor Jackson has shown that in eleven large-scale African forced migrations in the 1960s, UNHCR avoided using the label "refugee," even though each group met the criteria of the legal definition and hence qualified for protection under the UNHCR mandate.²⁷ Instead, UNHCR opted to protect refugees through the doctrine of its "good offices," and host governments allowed the refugees to stay. Labelling the African migrants "refugees" would have required acknowledging that persecution was occurring in neighbouring states, a politically sensitive matter given that many of these refugees were fleeing European colonial regimes. Rather than confront this political minefield, UNHCR and host governments preferred to offer refugee assistance through a more vague form of humanitarian aid.²⁸ Although they lacked the formal label, these forced migrants received assistance in rural settlements in an analogous manner to rural African refugees today who are formally recognized.

Why did African governments and UNHCR abandon this approach and begin formally labelling people refugees?

First, UNHCR in the late 1960s became dissatisfied with providing assistance without legal protection. As Guy Loescher explains in his history of UNHCR:

In the best circumstances, protection in Africa meant obtaining access for refugees to local health care and education. The [UNHCR] Legal Protection Division did not agree with this viewpoint and was disappointed by the failure of some African governments receiving UNHCR assistance to observe the legal obligations they had incurred by ratifying the *Refugee Convention*. The Legal Division argued that legal status for refugees was as important for the integration in host societies as material assistance.²⁹

Prior to this time, most refugees had legal protection only through the UNHCR mandate because it was the only universal refugee definition in effect. Because the *Refugee Convention* initially included only refugees who fled before 1951, states themselves had not formally committed themselves to protect new refugees. Legal protection of refugees was substantially strengthened by the 1967 Protocol to the *Refugee Convention*, which removed this temporal restriction and established that states had legal obligations to all refugees. Hence, assisting refugees in Africa without formally recognizing their refugee status became less legally justifiable.

Second, the political apprehension in Africa about the 1951 *Refugee Convention*'s focus on persecution was resolved by the 1969 *African Convention*. Its extended refugee definition did not just broaden the refugee definition; it depoliticized it. Under the extended definition, a government can acknowledge that a foreigner is a refugee without implicitly accusing another government of being persecutory. A host government need only acknowledge that significant disorder is occurring, without specifying who is to blame. The *African Convention* includes several other depoliticizing provisions absent from the *Refugee Convention*. Article 2 provides that "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State." Article 3 prohibits refugees from engaging in "subversive activities against any Member State of the OAU."

Because of its depoliticized approach, some studies observe that African states often prefer the broader extended definition, although in law African states apply the narrower *Refugee Convention*'s definition as well. For instance, a recent study of individual status determination in South Africa found that South African authorities prefer to apply the *African Convention*'s extended definition, and resist individual refugee claims based solely on the *Refugee Convention* definition.³⁰ With these developments, African governments were encouraged to embrace the formal label

“refugee” for the same reasons they had originally shunned it: to depoliticize refugee situations and shift responsibility to a UN agency. Both definitions can be applied by UNHCR as part of its mandate in Africa.³¹

In his examination of refugee policy in Sudan, Gaim Kibreab demonstrates that the Sudanese government began using the formal label “refugee” because it wanted to marginalize their existence within the country and shift responsibility for their care onto UNHCR.³² The term “refugee” first appeared in the Sudanese legal system in the late 1960s, used in reference to a large group of Eritreans.³³ Kibreab argues that Sudan adopted this label to avoid the Eritreans becoming integrated into Sudanese society by shifting responsibility for their care to international organizations, especially UNHCR.³⁴

Had UNHCR and the Sudanese government applied the refugee label to all Eritreans in the country, no matter where they were found, the intended marginalization would not have occurred. Refugees could have moved out of the assigned settlements to other rural or urban areas, perhaps finding employment among Sudanese people, while keeping their legal status.³⁵ To both shift responsibility to the UN and prevent local integration, refugee legal status and UNHCR assistance were limited to Eritreans who stayed in rural settlements, away from Sudanese population centers.

As Kibreab describes, urban refugees in Sudan remained in limbo for two more decades, until the late 1980s.³⁶ Sudan then established an “Individual Cases Unit” to determine whether urban refugees could retain the right to live in Khartoum, and in effect prohibited most from doing so.³⁷ Refugees could obtain a permit to stay only if they had enrolled in a university, had a formal job offer, had family in Khartoum, were referred to the city for medical reasons, or were awaiting resettlement to a third country.³⁸ Meeting the legal refugee definition was not the determining factor. The Sudan example hence illustrates that the shift to individual status determination in urban settings often has little to do with international refugee law, and a great deal to do with a motivation to limit refugee integration. It should be noted that the Sudanese policy of marginalizing refugees in confined rural settlements largely failed to keep refugees out of the city, but it continued nonetheless, managing at least to ensure that most refugees in the city had no legal protection.³⁹

In the present day, preference for rural refugee settlement is reinforced by UNHCR policy. UNHCR’s Policy on Refugees in Urban Areas makes clear that international assistance to refugees will often be confined to rural settlements:

UNHCR may limit the location where UNHCR assistance is provided. Where refugees are assisted in settlements or camps

outside urban areas, UNHCR should provide assistance in urban areas to refugees from the same country of origin only with the agreement of the government and if there are compelling reasons to do so.⁴⁰

Rural settlements provide a basis for lucrative assistance operations, while urban refugees often raise more politically sensitive questions of legal protection, since urban refugees are (at least in terms of physical space and proximity to job markets) more integrated into host societies. Hence, as Zachary Lomo observed in a study of refugee policy in Uganda, UNHCR and humanitarian NGOs often share the dual objectives of transferring responsibility away from host governments, and marginalizing refugees from their host societies:

Generally, the UNHCR and international and local NGOs condition their intervention on governments agreeing to settle refugees in camps and settlements. Likewise, assistance to refugees is contingent upon refugees agreeing to live in the settlements. For example, in Kenya it was not initially the policy of the Kenyan Government to restrict refugees to camps. Although some refugees, for example, those from Uganda, were settled in camps, this was not the general policy. But when the refugee crisis increased and Kenya sought the intervention of the international community, the UNHCR conditioned its involvement on the Kenyan Government’s allocation of land for refugees. This signaled the opening of infamous camps like Kakuma and Dada. Now, only refugees described as “vulnerable” are allowed to remain in Kenya’s urban centers.⁴¹

Resettlement: The exception that proves the rule

Although refugee policy has in most respects marginalized urban refugees, there is one area in which urban refugees have a substantial advantage: resettlement. Throughout Africa and the Middle East, individual RSD, especially the procedures operated by UNHCR, is often tied directly or indirectly into processing for resettlement to third countries. Especially in the Middle East, resettlement is often the main durable solution promoted by UNHCR, since local integration is blocked by government policy. Since nearly all resettlement is to economically wealthy states (mainly the U.S., Canada, and Australia, and an assortment of European countries), this offers a major reward for the refugees able to make their way through the individual RSD system, and it offers an incentive for others to try.

The pros and cons of resettlement are beyond the scope of this article. From personal experience providing legal aid to refugees in two Middle Eastern countries, it is safe to say that many refugees want to be resettled, and often see it as their only hope for basic security and a viable future for

their families. Resettlement is not a legal right, and the few countries that offer resettlement do so by rigid quotas. The number of annual resettlement spaces (numbering in the tens of thousands) pales in comparison to the number of refugees in the world (numbering well over ten million). The U.S. resettlement program, the largest in the world, has an annual worldwide quota of seventy thousand, which in 2002 could have been more than filled by the Sudanese refugees in Uganda's Adjumani district alone. In this respect, refugees who found themselves in places like Cairo or Nairobi where there were realistic chances of being resettled can consider themselves relatively lucky.

As with refugee law in general, there is nothing in UNHCR or government resettlement policy that differentiates between rural and urban refugees. UNHCR's Resettlement Handbook prioritizes resettlement cases based on need, for instance in terms of personal security, medical needs, special vulnerabilities (*i.e.* women at risk), and local integration prospects. Rural refugees are in some cases resettled; some efforts have been made to open doors to rural refugees, for instance through group submissions to the U.S. resettlement program.

Yet much of resettlement processing is determined by bureaucratic convenience rather than objective criteria. Resettlement cases are resource intensive, normally requiring individual assessment by UNHCR, followed by individual assessment by the resettlement government, followed by security and medical checks. Refugees sometimes find themselves in a state of limbo between these stages, not knowing when, if ever, an initial approval will turn into an actual visa and airplane ticket.⁴² Since it requires so much administrative attention, resettlement processing tends to take place in capital cities because that is where relevant embassies and offices are located, regardless of where the intended beneficiaries actually reside. A report on refugee resettlement from Uganda illustrated the urban advantage in resettlement processing:

The procedure for identifying refugees who are eligible for resettlement relies heavily upon the involvement of UNHCR Protection Officers and the Resettlement Officer. The country office for UNHCR, located in Kampala, has one Senior Protection Officer, one Protection Officer, and one Resettlement Officer assigned to it, and an urban caseload of registered refugees numbered in the hundreds. The north-western district of Arua, for example, has one Protection Officer assigned to look over the protection needs of 37,000 refugees located in two settlements. Similarly, the UNHCR Field Offices located in the districts of Adjumani in the north and Mbarara to the west, which respectively serve 104,000 and 37,000 individuals, each have one Protection Officer assigned to them. . . . [T]he distribution

of these officials vis-à-vis the location of refugees in Uganda creates a *de facto* bias for refugees in Kampala.⁴³

In a similar vein, a 1999 study by the U.S. Committee for Refugees found that refugees eligible for resettlement in former Soviet central Asian states suffered substantial hardship accessing the U.S. resettlement program because the U.S. processed cases only from Moscow.⁴⁴

Even if many refugees seek it out, resettlement of urban refugees can be a form of marginalization. Heavy reliance on resettlement with urban refugees is consistent with government objectives of preventing integration and shifting responsibility onto the international community. Resettlement is in a sense the ultimate means of shifting responsibility. In the Middle East, where non-Palestinian refugee populations are primarily urban, using resettlement in lieu of local integration has long been the hallmark of refugee policy.

In Egypt, the most populous country in the Middle East, non-Palestinian refugees have received protection and assistance through a 1954 Memorandum of Understanding between the government and UNHCR. Egypt agreed to grant residence permits to "bona fide refugees, residing in Egypt, who fall within the High Commissioner's mandate,"⁴⁵ but only in exchange for UNHCR's agreement to determine their status and to seek resettlement in other countries "in every possible measure, in the countries of immigration, for the refugees residing in Egypt."⁴⁶ (This arrangement was put into doubt after 2004 when UNHCR began giving Sudanese refugees "temporary protection" on a group basis rather than using individual RSD, a shift in procedure that was linked to a tightening of standards for resettlement referrals.) UNHCR has agreements with the governments of Jordan, Syria, and Lebanon that require refugees to be resettled within a matter of months after their arrival (which in practice is nearly impossible to achieve in most cases). Refugee policy in these countries is a self-justifying cycle of shifting responsibility to the international community by preventing local integration. Governments refuse to allow refugees to work or obtain long-term residence, and often deny access to education or health care. Since these restrictions prevent self-sufficiency, refugees need to be resettled, and UNHCR promotes resettlement. Host governments hence achieve their objective of shifting responsibility for refugee protection to UNHCR and foreign governments, and have little incentive to improve conditions for refugees on their territory. Hence, transit countries in the geopolitical South become dependent on what Gervase Coles calls the "exile bias" in the refugee policy, in which refugee protection depends on Northern states granting long-term asylum to refugees.⁴⁷ There is

certainly no objection to making resettlement available for refugees who want or need it. But in the Middle East and in much of urban Africa, refugee policy is constructed so that resettlement is in practice the only available solution for most refugees.

In the long run, the urban bias in resettlement is likely counterproductive both for governments and for refugees' welfare. For governments trying to shift responsibility for refugees onto the international community, resettlement is a short-term measure because the promise of resettlement may actually attract more asylum seekers. It could be speculated that resettlement's power as a pull factor may produce a net increase in the size of urban refugee populations, especially as resettlement opportunities have shrunk since the September 11, 2001, attacks in the U.S. Although many urban refugees benefit from resettlement, it fails to compensate for their overall marginalization. Those who are successfully resettled will usually remain in the city, often destitute, for several years before travelling. Many if not most asylum seekers will never be resettled. UNHCR only considers resettlement for refugees whose claims it recognizes. In many countries, it rejects most of the refugee claims made.

Refugees recognized by UNHCR are sometimes deemed ineligible for resettlement by UNHCR or cannot be accepted by resettlement governments. In particular, UNHCR as a policy avoids promoting resettlement for most "irregular movers" who passed through third countries before registering refugee claims.⁴⁸ Western governments refuse to accept polygamous refugee families. Refugees recognized under the *African Convention* can have difficulty resettling to Western countries which only apply the *Refugee Convention*'s definition. Government policies against local integration hit these refugees, as well as rejected asylum seekers, especially hard.

The Ways and Means of Status Determination

Importance of Fair Procedures

Whatever the reasons for conducting individual RSD, the process can be fair and reliable so as to ensure that people in danger of violence and human rights violations get protection. But the process is inherently difficult and high risk, and it can be problematic if not conducted correctly. UNHCR has advised: "The importance of [refugee status determination] procedures cannot be overemphasized. . . . A wrong decision might cost the person's life or liberty."⁴⁹

RSD is rarely a simple exercise of applying a legal standard to a set of facts. Complete evidence is rarely available. Finding the facts often requires applying the "benefit of the doubt" to the testimony of the applicant. Assessing the

credibility of this testimony is shaded by language and cultural barriers, variable levels of education, trauma, the interviewing techniques used, the quality or lack of legal advice, and fear of authority.⁵⁰ Moreover, refugee status is one of the few areas of legal adjudication in which the decision maker must make an assessment of risks in the future rather than of events in the past. Even after the facts are determined, RSD often touches on areas of high political sensitivity – immigration and political opposition to asylum, gender relations, ethnicity, race, and religion, and the politics of foreign governments.

In individual RSD, the only remedy for these challenges is to apply standards of fair adjudication. UNHCR has called fair and efficient asylum procedures "essential" for full application of the *Refugee Convention*.⁵¹ Through UNHCR guidance and developments in international and administrative law, the applicable standards of fairness in RSD have been progressively developed over the past several decades. The main procedural rights promoted by UNHCR⁵² for asylum seekers include:

- Access to the RSD procedure
- Information about the RSD procedure
- An oral hearing with a qualified official (including an adequate interview environment and competent interviewing techniques)
- Access to qualified interpreters
- Access to legal counsel and advice
- Access to evidence considered (*i.e.* limited use of "secret" evidence)
- Fair credibility assessment (which involves its own set of standards)
- Fair and impartial decision making
- Written reasons for rejection
- Access to an independent appeal
- Special attention to the needs of especially vulnerable refugees (*i.e.* trauma victims, vulnerable women, and unaccompanied minors).

Such safeguards require substantial monetary, human, and physical resources. In 2001, UNHCR advised government legislatures: "Parliamentarians can promote effectiveness [of RSD] by allocating sufficient resources for refugee status determination."⁵³

Risks of RSD Errors and the Creation of de Facto Refugees

When forced migrants in Europe or North America have fallen outside the *Refugee Convention*'s refugee definition but nevertheless cannot return home, scholars have called them *de facto* refugees.⁵⁴ Especially in Europe, these refugees have often fled generalized violence. Despite being considered outside the criteria of the refugee definition, they have

often been allowed to remain in countries of asylum in various temporary or limbo statuses. These people are made *de facto* refugees by the substance of refugee law. But, as already established, the procedures of refugee law are just as important as legal substance in understanding urban refugee policy in the urban South. Just as the *substantive* limits of the refugee definition can create *de facto* refugees, inadequate *procedures* in applying the definition can have the same effect by errantly rejecting people who actually meet the legal criteria.

In international law, a person with a fear of persecution is a refugee as soon as he or she crosses an international border. Refugee status determination recognizes refugees as such, but it does not make people refugees.⁵⁵ A state's obligation to not forcibly return a refugee applies to any asylum seeker until his or her claim has been refused in a fair determination process.⁵⁶ If a RSD system lacks basic fairness and hence fails to positively recognize an asylum seeker with a genuine claim, he or she is nevertheless a refugee. In theory, a *de facto* procedural refugee should have rights under international refugee law. In practice, of course, a wrongly rejected refugee will be denied refugee protection. This is a concern wherever an asylum-seeker is in danger of suffering an errant RSD rejection.

When an RSD system operates without procedural safeguards, it increases the risk of errant rejections, defined here as any refusal of protection to a person who is in fact a refugee within the legal definition. Errant rejection is a greater concern to refugee policy than errant acceptance.⁵⁷ A single errant rejection has immediate severe costs for the individual concerned. Although widespread errant acceptance can erode public confidence in an asylum system, the costs in an individual case are diffuse. The law of refugee status hence provides applicants the benefit of the doubt in order to compensate for the difficulty obtaining definitive evidence.

There are no known studies systematically quantifying the risks of wrong decisions inherent in various types of RSD procedures, so the risk of errant rejections remains to some extent conceptual.⁵⁸ Different types of RSD error risks can nevertheless be identified. RSD errors fall into two broad categories: those resulting from decision-maker errors, and those resulting from applicant errors.⁵⁹ Decision-maker errors are those in which all evidence that should come to light has come to light, but the adjudicator nevertheless misinterprets the evidence (for instance, incorrectly issuing a negative credibility assessment) or misapplies the refugee definition (for instance, denying protection to someone fearing persecution for reason of sexual orientation).

Applicant errors are those in which the applicant is unable or unwilling to coherently produce all available facts and evidence in order to allow the decision maker to make the correct decision. This may occur because asylum seekers misunderstand the process, fear authority, or make costly decisions based on false advice. It may also occur when trauma, language, educational, or other difficulties prevent an asylum seeker from coherently explaining all of his or her experiences.

Both types of error result in the same basic harm: a person in danger of persecution is denied protection. One of the important aspects of a fair RSD procedure is that it seeks to combat applicant errors as well as decision-maker errors. Take as an example a woman genuinely in danger of domestic violence or genital mutilation in her country of origin who submits instead a false claim of having been targeted for political activities out of shame or because members of her community give her misleading advice about the RSD process. A decision maker would in a narrow sense be correct to reject her on credibility grounds. Yet, had she had access to legal counsel, she might have submitted her genuine reasons for fear and have obtained protection from the very same decision maker.

At a policy level, applicant errors are as much a failure of the system as decision-maker errors in that they are often preventable by adequate procedural safeguards. This is why the most recent UNHCR advice on RSD procedures places significant emphasis on providing advice and information to asylum seekers early in the process, with special attention to vulnerable groups, and requires the provision of competent interpreters.⁶⁰

Different procedural safeguards in RSD operate to prevent these different types of RSD errors. The charts on the opposite page illustrate.

Individual RSD in the Urban South

In dozens of countries, individual refugee status determination procedures lack complete implementation of established procedural rights, generating a corresponding risk of RSD error. This is true to some extent in the North, but it is a particularly acute problem for urban refugees in the South.

The predominant systems for RSD for urban refugees in the South are those operated by UNHCR. UNHCR performed RSD in at least sixty countries in 2001, receiving approximately 66,000 individual refugee claims.⁶¹ Until recently, UNHCR RSD was generally ignored as refugee law developed primarily through jurisprudence and scholarship in Western countries. But UNHCR RSD has grown, and in turn attracted more attention. The number of individual RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001.⁶² Studies

Decision-maker errors	
Error type	Related safeguards
Incorrect understanding or interpretation of the evidence	• Oral hearing
	• Impartial and competent decision maker
	• Right to applicant to review and respond to evidence
	• Allowing applicants to explain/rebut negative credibility factors
	• Providing reasons for rejection
	• Independent appeal
	• Legal representation
Incorrect application of the refugee definition	• Impartial and competent decision maker
	• Independent appeal
	• Providing reasons for rejection
	• Legal representation

Applicant errors	
Error type	Related safeguards
Failure to provide all information in the application process (<i>i.e.</i> for fear of authority, misunderstanding of the process, inarticulateness)	Competent interviewers and appropriate interviewing environment
	Access to information and advice about the process and legal assistance
	Sufficient interview and hearing time (<i>i.e.</i> opportunity for more than one interview/hearing)
Applicant providing false information despite a valid refugee claim (<i>i.e.</i> resulting from fear or misinformation spread in migrant communities).	Access to information and advice about the process and legal counsel

conducted in Southeast Asia, the Middle East, and East Africa, both in academic fora and by human rights organizations, have raised concerns about gaps between UNHCR's RSD procedures and established international standards of fairness.⁶³ From the beginning of the RSD

process, asylum seekers generally lack legal counsel and information about the process. In some offices, for instance in Beirut, UNHCR officials have challenged applicants' rights to seek professional counselling in the preparation of their refugee claims. UNHCR withholds from applicants most of the evidence considered in their cases, including transcripts of their interviews, medical reports based on examinations of their bodies, testimony of other witnesses, and country of origin information. Specific reasons for rejection are usually not provided, and although there is an opportunity to appeal, appeals are not decided by an institutionally independent body. Instead, appeals are considered by the same UNHCR offices that make first instance rejections.

A number of other countries use mixed RSD systems in which responsibility for interviewing, decision making, and appeals is split between UNHCR and the government. Concerns have been raised about procedures used in these countries as well.⁶⁴

It would be difficult on a systematic scale to actually quantify the error rate that results from gaps in UNHCR's RSD procedures. But the gaps themselves, combined with certain statistical anomalies, certainly provide reason for concern and further inquiry. In terms of statistics, cause for concern comes from the fact that some UNHCR field offices sometimes post variable recognition rates, while others post noticeably low recognition rates. In Cairo, the annual UNHCR recognition rate fluctuated between 30 and 40 per cent from 1998 through 2000, then jumped to 42 per cent in 2001, then fell to 24 per cent in the first half of 2002. There was no apparent change in the demographics of the asylum-seeker population to account for this, nor major changes in the human rights conditions in Sudan and Somalia, Egypt's main refugee producing countries.⁶⁵ A more worrying trend appears in statistics from UNHCR's Beirut office, which mainly handled refugee claims from Iraq and Sudan. From 1998 through 2002, the Beirut recognition rate dropped from 42 per cent to less than 8 per cent.⁶⁶ This was quite striking given the notorious human rights records in Iraq and Sudan at this time. In 2001, UNHCR-Beirut recognized 24 per cent of Iraqi asylum seekers, while the U.S. recognized 78 per cent and Australia 81 per cent.⁶⁷ In the same year, UNHCR-Beirut recognized 9 per cent of Sudanese asylum seekers, while the U.S. recognized 68 per cent.⁶⁸

Without questioning UNHCR's commitment to correctly apply the refugee definition, UNHCR's RSD procedures must be considered high risk for errors. UNHCR RSD decision makers are likely to make decisions from unnecessarily incomplete facts in a procedure in which mistakes are more likely to go uncaught. Without legal aid and information, the

risk increases that asylum seekers with valid refugee claims will conceal key facts, fail to compile and explain all relevant evidence, or be persuaded by ill-informed or disreputable members of the community to submit false claims. Such risks are likely to be highest for the least educated and most traumatized refugees. Without access to the evidence considered in their cases, applicants cannot correct misunderstandings, rebut negative inferences about the facts, or cross-examine adverse evidence. Without reasons for rejection and without an independent appeal, factual and legal mistakes are more difficult to correct. Gaps in UNHCR RSD systems hence heighten the risks of both decision-maker errors and applicant errors, with the end result that some rejected asylum seekers are likely to in fact be *bona fide* refugees. In general, UNHCR RSD procedures are likely to create via errant rejections an unknown but significant number of *de facto* refugees. This risk falls disproportionately on urban refugees because (owing to the rural-urban dichotomy in RSD) they are more likely than rural refugees to be put through the individual RSD process.

The Implications of de Facto Refugee Status

In this paper I have argued that choices about how to conduct refugee status determination in the geopolitical South have produced a rural-urban dichotomy that has no basis in international law and which generally marginalizes and disadvantages urban refugees. In order to obtain legal recognition, urban refugees face a more arduous individualized application process in which lack of procedural safeguards creates an unnecessary risk that they will be errantly denied legal protection, even if they in fact meet the legal criteria. As a result, urban refugee populations include formally recognized refugees as well as *de facto* refugees.

These conclusions have important implications for both scholars and policy makers.

Directions for Refugee Studies

If urban refugees are marginalized through status determination, what are the implications for refugee studies?

First, the mechanisms by which refugee definitions are applied should be a topic for study and analysis as much as the substance of the definitions. Any refugee definition will only be as good as the procedures by which it is applied.

Second, refugee studies should include examination of the lives of *de facto* refugees. A high RSD error rate will create a class of *de facto* refugees, predominantly urban rejected asylum seekers, who should be of concern to refugee studies. These people are not counted in official statistics, and in many cities no data is available about how many rejected asylum seekers remain after failing to obtain legal protection. This lack of data will lead to an undercounting

of the actual urban refugee population, and it will hinder development of policies and programs to assist them. There is hence a need for social science research to determine the composition and nature of rejected asylum-seeker populations in the urban South. How many of these people may actually be *bona fide* refugees? How do rejected urban asylum seekers respond to their failure to obtain legal recognition? Where do they go, how do they survive, and what role do they play in host societies?

Third, refugee studies should examine the impact of refugee status recognition as a social distinction, not just as a legal label. Formal refugee status ideally should be a recognition of pre-existing facts, but it also creates new social realities. The social impact of refugee status recognition/refusal might be different where the RSD system is fair and reliable than in cases where the RSD system has a high rate of error. In the first case, the status recognition will result from a pre-existing state of fearing persecution at home. But if the RSD system is not reliable, refugee status recognition may appear arbitrary and its social impact on the refugee community may appear more pernicious. Two asylum seekers who enter a host country in similar situations may suddenly find themselves in very different circumstances once their refugee claims are decided. A recognized refugee becomes a relatively privileged person, often eligible for UN assistance, residence permits, and resettlement. These advantages will likely affect their position in their own community, and may affect the social structure of the community itself.

Fourth, the rural-urban dichotomy should be studied more closely. Do urban asylum seekers fear different types of persecution or violence than rural asylum seekers? Do the differences in RSD and resettlement processing attract more refugees to cities, or deter them? How do refugees understand and make choices about these different procedures and relative risks and opportunities?

Refugee Policy and the de Facto Refugee

The concept of a *de facto* refugee who was errantly refused refugee status recognition owing to inadequate RSD procedures poses a serious challenge to international refugee protection policy. From legal protection to material assistance to durable solutions, refugee policy depends on correctly identifying those people who fit the refugee definition. To raise questions about the reliability of refugee status determination procedures is to question the mechanical foundation of the refugee protection regime. Yet, these are critical questions if refugee policy is to respond to the real challenges facing real refugees.

At worst, a *de facto* refugee can become subject to *de facto* *refoulement*. When a *de facto* refugee, denied formal refugee

status through a legal process, is deported, it will not appear on paper to be a violation of international law. But the human effect is the same: a person will be forced to go somewhere where his or her life or freedom is in danger.

There are a number of possible strategies to avoid this predicament.

Implementing procedural safeguards in all individual RSD procedures would reduce the risk of RSD error. UNHCR can take the lead in this by improving its own RSD procedures, which are widespread throughout Africa, the Middle East, and Asia.

More attention should be paid to using *prima facie* recognition systems in order to avoid reliance on high-risk individual procedures. International refugee conventions do not require refugees be recognized on an individual basis. International law requires only that no asylum seeker be deported without access to an individualized procedure. Individual RSD has been the presumed norm in Europe and North America mainly because these countries have been intent on excluding most migrants. Governments in fact have a wider range of options to avoid individual procedures by protecting groups of refugees without individual RSD. UNHCR guidelines allow for a country-by-country assessment of whether there is adequate capacity to process individual claims fairly. Individual RSD should never be conducted when procedural safeguards cannot be implemented. When this capacity is lacking, *prima facie* recognition is a better solution.

Eliminating the rural-urban dichotomy in status determination is essential to ensure that individual RSD is used only where truly necessary. Since refugee law applies to whole states, refugee status determination should be a nationwide affair. Conditions in the country of origin should be the primary factor in determining whether *prima facie* recognition is called for.⁶⁹ Decisions to engage in *prima facie* recognition for certain nationalities of asylum seekers should apply throughout a country. This does not preclude adjusting social and economic services to different social and economic needs in different regions. But dual systems to recognize a refugee's basic legal status have no basis in international law, and operate to advantage or disadvantage categories of people who should be treated equally. Eliminating the rural-urban dichotomy also requires that resettlement processing capacity expand in rural areas, so that resettlement candidates are chosen by objective criteria, rather than by access to administrative procedures. The rural-urban dichotomy can also be reduced by conducting individual RSD (where needed) in rural areas; just as there is no barrier to *prima facie* in cities, there is no bar against individual decision making in camps.

Could UNHCR avoid status determination dilemmas by minimizing the importance of formal refugee status? This

could be accomplished by extending protection to people in what UNHCR has referred to as "refugee-like situations." After the 2003 Iraq war, UNHCR issued a preliminary repatriation plan for Iraqis which included assistance to Iraqis in Middle Eastern countries who had been refused refugee protection (often by UNHCR offices) or who had never applied for formal refugee status.⁷⁰ By this plan, UNHCR would prevent *de facto* refugees from falling through the cracks. As of writing, the plan had yet to be implemented because of continuing violence in Iraq. One could ask, if people in "refugee-like situations" could be considered within UNHCR's mandate during a repatriation, why should they have ever been left out in the first place? Had UNHCR applied *prima facie* recognition to Iraqis in neighbouring countries, then most of these people would not be considered to have a "refugee-like" status; they would be recognized as refugees.

By casting a net wider than formal refugee status, the preliminary Iraq plan had much in common with the "good offices" doctrine used in Africa in the 1960s, and with the effective expansion of UNHCR's mandate in decades since. Indeed, for UNHCR, rigid individual RSD has long been an anomaly, since in many ways UNHCR's mandate and operation have expanded into humanitarian operations beyond the narrow legal criteria set in 1950s. As James Hathaway puts it: "The essential criterion of refugee status under UNHCR auspices has come to be simply the existence of human suffering consequent to forced migration."⁷¹ UNHCR's individual RSD work has been exceptional because the agency which elsewhere acts beyond its legal mandate refuses status recognition when it is not convinced that a person fits the narrow legal criteria.

Nevertheless, a certain amount of caution is required before rigid legal categories are abandoned. As governments increase migration restrictions and exclusion, legal rigidity may be refugees' only defense against forced return. It is not surprising that UNHCR could plan to expand its mandate in a repatriation program – which is consistent with government objectives of turning away asylum seekers and refugees – but in earlier years applied strict individual status determination when it was trying to protect Iraqis who could not return home.

None of these strategies addresses one of the core root causes of the rural-urban dichotomy: the understandable objective of governments in the developing world to share the burdens of refugee protection and assistance. As has been demonstrated, African governments began using refugee status determination in order to solicit international aid for refugee protection. Satisfying this government objective is essential, as well as a subject far beyond the scope of this article. But for the question of refugee status determination

for urban refugees, there is an answer. Only recognized refugees attract outside assistance. Unrecognized, uncounted refugees are a burden that cannot be shared with the international community. Host governments therefore have an incentive to reduce the rural-urban dichotomy, reducing the risk that an urban refugee will be a *de facto* refugee. Refugees are already living in cities; formally recognizing their status would be a first step to discussing who should take responsibility for them.

Notes

1. Vaughan Robinson, "Into the Next Millennium: An Agenda for Refugee Studies," (1990) 3 *J. Refugee Stud.* 3 at 6 (noting debates about whether common definitions of refugees or forced migrants are necessary).
2. See *Extraterritorial Effect on the Determination of Refugee Status*, UNHCR Executive Committee, Conclusion No. 12 (1978) ("Recognized ... that refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases.").
3. *Policy on Refugees in Urban Areas*, UNHCR (12 December 1997) para. 2.
4. *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, UNHCR, EC/GC/01/4 (19 February 2001) para. 14 (emphasis added).
5. *Ibid.*; *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 44 (reedited 1992); Ivor Jackson, *The Refugee Concept in Group Situations* (Berlin: Springer, 1999).
6. *Prima facie* recognition still allows UNHCR to individually reject people who are excluded from refugee status, such as war criminals and other people who have committed a serious non-political crime.
7. UNHCR, *Mid-Year Report 2000*, 68, online: <<http://www.unhcr.org/home/PUBL/3e6f1b7115.pdf>>.
8. 12,206 applications were submitted by Sudanese to UNHCR's Cairo office. See *2000 Statistical Overview*, UNHCR (June 2002).
9. See Rainer Hofmann, "Refugee Law in Africa" (1989) 39 *Law and State* 79 at 87.
10. See, e.g., *ibid.* at 83.
11. See, e.g., Anthony Ayok Chol, "The Legal Dimensions of the Refugee Problem in Africa" (1992) 14 *Migration* 5; Arne Piel Christensen, "Comparative Aspects of the Refugee Situation in Europe," (July 1995) *Int'l J. Refugee L.*, Special Issue, 102; Todd Howland, "Refoulement of Rwandan Refugees: The UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law," (1998) 4 *U.C. Davis J. Int'l L. & Pol'y* 73 at 82.
12. See Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection*, Working Paper No. 69, New Issues in Refugee Research (October 2002) at 2; online <<http://www.unhcr.ch>>.
13. See UNHCR, *Mid-Year Progress Report 2001* at 138.
14. See Jackson, *supra* note 5 at 188–191.
15. See generally Michael Kagan & William P. Johnson, "Persecution in the Fog of War: The House of Lords' Decision in *Adan*," (2002) 23 *Mich. J. Int'l L.* 247.
16. See *Adan v. Sec'y of State for the Home Dep't*, [1999] 1 A.C. 293, [1998] 2 W.L.R. 702, [1998] 2 All E.R. 453 (H.L. 1998).
17. See "Civilian Non-Combatants Fearing Persecution in Civil War Situations," Immigration and Refugee Board of Canada (March 7, 1996), online: <<http://www.ird.cn>>.
18. "Information Note on Article 1 of the *Refugee Convention*," UNHCR, para. 5.
19. *Conclusion on International Protection*, UNHCR Executive Committee, Conclusion No. 85 (XLIX), (1998), para. C.
20. James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harvard Int'l L. J.* 129 at 133.
21. See James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 231.
22. *Ibid.* at 6–8.
23. *Ibid.*
24. Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996) at 191–193.
25. See Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2003) 17, no. 3 *Georg. Immigr. L. J.* 367, at 368–371.
26. See Hathaway, *supra* note 20 at 166–172.
27. Jackson, *supra* note 5 at 143–176.
28. See Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001) at 105.
29. *Ibid.* at 118.
30. Anais Tuepker, "On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice" (2002) 15 *J. Refugee Stud.* 409.
31. See G.A. Res. 34/61 (29 November 1979) (fully endorsing the recommendations of the 1979 Arusha Conference on the Situation of Refugees in Africa, which called on all UN organs operating in Organization of African Unity states to apply the OAU refugee convention). See generally Jackson, *supra* note 5 at 193–194 (arguing for UNHCR to apply the OAU Convention when the agency works in Africa).
32. Gaim Kibreab, "Eritrean and Ethiopian Urban Refugees in Khartoum: What the Eye Refuses to See" (1996) 39 *African Studies Review* 131 at 138–139.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.* at 139.
36. *Ibid.* at 142.
37. *Ibid.* at 143.
38. *Ibid.* at 143–144.

39. Tom Kuhlman has shown that the majority of Eritran and Ethiopian refugees in Sudan lived outside the assigned settlements, often without any legal registration or protection. As a result, the policy of rural marginalization effectively hurt both refugees (who were left vulnerable to arrest, deportation, and exploitation) and Sudanese nationals (who had to compete for wages and housing with undocumented refugees). Tom Kuhlman, *Asylum or Aid? The Economic Integration of Ethiopian and Eritrean Refugees in the Sudan* (1994) at 288–289; Tom Kuhlman, *Burden or Boon? A Study of Eritrean Refugees in the Sudan* (1990) at 51, 71, 84, 131, 180 (1990).
40. *Policy on Refugees in Urban Areas*, UNHCR (12 December 1997) at para. 3.
41. Zachary Lomo, “The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work” (2000) 18 *Berkeley J. Int’l L.* 268 at 282. See also Human Rights Watch, *Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala* (New York: Human Rights Watch, 2002) (noting UNHCR acquiescence to the Kenyan government’s insistence that refugees in Kenya should be in camps).
42. See, e.g., Bashir Osmat, Michael Kagan, & Samira Trad, “Promises without Solutions: Iraqi Refugees Left in the Lurch in Lebanon” (September 2003) 18 *Forced Migration Review* 42.
43. Kirk Huff & Ronald Kalyango, *Refugees in the City: Status Determination, Resettlement, and the Changing Nature of Forced Migration in Uganda*, Working Paper No. 6, Refugee Law Project (2002) at 23.
44. U.S. Committee for Refugees, *Trouble-shooting U.S. Refugee Processing in the Former Soviet Union and Egypt* (1999) online: <http://www.refugees.org/world/articles/asylum_rr99_9.htm>.
45. Agreement between the Egyptian Government and UNHCR, article 6 (unpublished; on file with author).
46. *Ibid.*, article 2(b).
47. Gervase Coles, “Approaching the Refugee Problem Today” in G. Loescher & L. Monahan, eds., *Refugees and International Relations* (Oxford: Oxford University Press, 1989) 373 at 389–390.
48. UNHCR, *supra* note 3 at para. 12.
49. *Determination of Refugee Status*, UNHCR RLD 2 (1989) chapter 2.
50. See generally Kagan, *supra* note 25; Walter Kalin, “Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing” (1986) 20 *Int’l. Migration Rev.* 230.
51. *Asylum-Processes: Fair and Efficient Asylum Procedures*, UNHCR (May 2001), para. 5.
52. See UNHCR Executive Committee Conclusions No. 8 (1977); *Guidelines for National Refugee Legislation and Commentary*, OAU-UNHCR (1980); Note, *Fair and Expeditious Asylum Procedures*, UNHCR (1994); *Asylum-Processes: Fair and Efficient Asylum Procedures*, UNHCR (May 2001); *Comments to the Council of Europe*, UNHCR (2003).
53. *Refugee Protection: A Guide to International Refugee Law*, UNHCR (2001) 50; see also *Fair and Expeditious Asylum Procedures*, UNHCR (November 1994) § 4 (“UNHCR encourages states to allocate appropriate human and financial resources to process asylum claims in an expeditious way and within a reasonable time, both in the interest of the asylum-seeker and of the state.”).
54. See Christensen, *supra* note 11 at 106–107.
55. See UNHCR, *Handbook*, *supra* note 5 at para. 28 (“Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”); Goodwin-Gill, *supra* note 24 at 32.
56. See James C. Hathaway, “Refugee Law s Not Immigration Law” in United States Committee for Refugees, *World Refugee Survey* (2002) at 38.
57. See T. Alexander Aleinikoff, “Aliens, Due Process and ‘Community Ties’: A Response to Martin” (1983) 44 *U. Pitt. L. Rev.* 237 at 251 (“[I]t seems to me that the appropriate standard of accuracy [in RSD] should be the percentage of good claims denied, not the percentage of all claims properly decided.”).
58. There are, however, studies showing inconsistency in decision making. See, e.g., Susan Kneebone, “The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?” (1998) 5 *Austl. J. Admin. L.* 78 at 89–93.
59. In some cases, both types of error will occur in the same case.
60. See *Asylum-Processes: Fair and Efficient Asylum Procedures*, UNHCR (May 2001).
61. *Statistical Overview 2001 (provisional)*, UNHCR; *Statistical Yearbook 2001*, UNHCR (2002) at 49.
62. *Ibid.*
63. See, e.g., Amnesty International, *Selective protection: Discriminatory treatment of non-European refugees and asylum-seekers*, EUR 44/16/94 (March 1994); Iranian Refugees Alliance, *Evading Scrutiny: Does Refugee Status Determination Procedure Measure Up to International Standards?* (May 1995); Human Rights Watch, *50 Years On: What Future for Refugee Protection?* (2001); Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala* (2002); Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR’s Cairo Office 2001–2002*, Working Paper No. 1, Forced Migration and Refugee Studies, American University in Cairo (2002), online: <www.aucegypt.edu/academic/fmrs> (follow “Reports” link).
64. See Anat Ben-Dor & Rami Adut, *Israel: A Safe Haven? Problem in the Treatment Offered by the State of Israel to Refugees and Asylum-Seekers*, Report and position paper by Physicians for Human Rights and Tel Aviv University Public

Interest Law Resource Center (September 2003); Huff & Kalyango, *supra* note 43.

65. See Kagan, *supra* note 63 at 11.

66. *Statistical Overview 1998*, UNHCR; *2002 Population Statistics (Provisional)*, UNHCR.

67. *Statistical Overview 2001*, UNHCR (UNHCR did not report Iraqi recognition rates for Canada, the third main resettlement country from Lebanon).

68. *Statistical Overview 2001* UNHCR (Sudanese recognition rates for Australia and Canada were not reported).

69. See Rutinwa, *supra* note 12 at 1, 19.

70. *Preliminary Repatriation and Reintegration Plan for Iraq* UNHCR (April 2003).

71. Hathaway, *supra* note 21 at 13.

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