

Refugee Status Determination

Conducted by UNHCR

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Abstract

This article examines the practice of refugee status determination as conducted by UNHCR, looking particularly at UNHCR's practice in a number of Asian countries. Although the practice differs from one office to another, the practice is found to be generally deficient when assessed in the light of international human rights law, and by comparison with the practices of many governments. In some respects, the standards which UNHCR lays down for governments are not complied with in the practices of UNHCR itself. The author argues that international human rights law now prescribes standards for refugee status determination, and that UNHCR is bound to comply with these standards. The article further points out that there have been considerable advances in administrative law systems in many countries in recent years, based on the need for governments to be open and accountable to the people they serve. These advances have had considerable impact on refugee status determination processes in many countries, but appear to have made little impact on UNHCR. The article argues that UNHCR's own refugee status determination process needs a major overhaul. In line with its responsibility (and current priority) of promoting refugee law to governments, UNHCR should, in its own practice, be providing a model for all governments to aspire to.

1. The Issues and the Legal Context

1.1 Introduction

In most of the countries of Asia, and in other parts of the world, refugee status determination is conducted not by governments but by UNHCR. For the most part asylum seekers have no choice but to approach UNHCR, because very few governments in the region are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Even some countries which are parties, such as Cambodia, do not have their own refugee status determination processes, so refugees cannot apply directly to those governments for recognition. UNHCR steps in to fill the gap.

UNHCR carries out this process pursuant to the mandate given in its

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statute to provide international protection to refugees, and refugee status determination forms a major part of UNHCR's work in many Asian countries. However, this very important and resource-intensive work is not given much prominence by UNHCR. Indeed, it is played down in official reports, for which there are a number of possible reasons. Firstly, it may be a delicate issue between UNHCR and host governments, which could see the process of refugee status determination on their soil as compromising their sovereignty. In some instances, UNHCR undertakes refugee status determination without the explicit approval of governments, and sometimes even against their wishes. This may be a political embarrassment to some governments which seek to deny or 'paper over' the existence of refugees within their borders. Another possible reason for downplaying this role is that UNHCR (quite properly) sees refugee status determination as a responsibility that should be undertaken primarily by governments. In its operations in the Asian region, UNHCR puts considerable emphasis on the 'promotion of refugee law', advocating to governments that they should sign the Refugee Convention and institute their own refugee status determination processes. These efforts have met with precious little success in Asia. UNHCR would not want governments to have a perception that 'if UNHCR is doing it for us, we don't need to do it for ourselves'.

Even though undertaken reluctantly, refugee status determination is presently a major role of UNHCR, and it will continue to be so for the foreseeable future. It is somewhat surprising then to find that so little scholarly (or activist) attention has been given to UNHCR's policies and practice in this area. A literature search reveals very little.

The practice of refugee status determination by UNHCR varies to some extent from one place to another, and some of these variations are detailed in this article. The process in Phnom Penh, for example, is particularly unusual, and is described in Appendix A. However, with the exception in some respects of Phnom Penh, there are certain constant features of the process in all locations, namely:

- written applications are required, using a standard UNHCR Basic Data/Registration Form,
- personal interviews are carried out with the asylum seeker,
- a free interpreter is provided (if required),
- there is no legal aid for the provision of independent legal advice and assistance, and in most places this is not available in practice,
- advisers or legal representatives are not permitted to be present at interview,
- asylum seekers (and their representatives) are not permitted to have access to their files,
- transcripts or summaries of interviews are not provided to asylum seekers or their representatives,

- particular questions arising with an application may be referred to UNHCR headquarters for advice, but the decision whether or not to recognise the applicant is normally made within the field office,
- rejected asylum seekers are not given written reasons for rejection — reasons are given orally in some situations,
- there is no independent appeal mechanism — decisions on appeal are normally made within the field office; and
- there is no ‘appeal hearing’; appeals are considered on the basis of written materials, often without further interview, and if there is an interview on appeal, advisers or legal representatives are not permitted to be present.

1.2 Outline of article

This introductory section provides a general review of the sources of information about UNHCR procedures for refugee status determination (section 1.3) and a summary of the arguments as to why UNHCR has been ‘left behind’ in this regard (section 1.4). This is followed by an examination of international standards relating to fair hearing, and whether these standards apply to refugee status determination (section 1.5). The relevant provisions of the International Covenant on Civil and Political Rights (section 1.5.2) and the European Convention on Human Rights (section 1.5.3) are closely examined in this context. Following the conclusion that fair hearing standards are applicable refugee status determination, a further question arises: is international human rights law binding on UNHCR? This question is dealt with in section 1.5.4.

Part 2 contains the core of this article, and describes particular aspects of UNHCR’s practice of refugee status determination in various Asian countries. Each aspect of practice is compared with published UNHCR policies and statements, and with international standards, as represented by international human rights law and by the practices of various governments.

Part 3 concludes with an argument that UNHCR should incorporate fair hearing standards in its own procedures (section 3.1). Some of the complex questions of resources and priorities are discussed (section 3.2), as well as institutional culture (section 3.3). Finally, the article proposes the elements of a fair and open process which, it is suggested, UNHCR might adopt (section 3.4).

1.3 Sources of information

The information about UNHCR practices in this paper has been gathered from the experiences of the Jesuit Refugee Service (JRS) working with

refugees and asylum seekers in Bangkok over a number of years,¹ as well as information from a limited number of other Asian countries. There has been no comprehensive survey. A proposal was made to UNHCR to collaborate in the preparation of this paper, in particular by allowing observation of interviews and perusal of files. This proposal was, however, rejected.

One problem in addressing this topic is that UNHCR itself has not produced a definitive manual or set of guidelines on how refugee status determination is to be carried out by its own officers. The procedures vary from place to place, and UNHCR concedes that these variations can cause problems. In 1997, UNHCR's Comprehensive Policy on Urban Refugees identified 'inconsistent refugee status determination' as a pull factor in the irregular movement of asylum seekers.² The same document recommended 'further elaboration of a system to monitor refugee status determination by UNHCR to ensure regional and sub-regional consistency.' It also talks about the need for 'guidelines on specific caseloads', and suggested that 'Representatives and Regional Legal Advisers should annually draw up plans to ensure consistency among countries under their supervision'.³ If any of these systems, guidelines or plans have been put in place, they are not publicly available.

The 1951 Convention does not prescribe any mechanism for determining whether or not someone is a refugee, leaving it up to governments to formulate appropriate processes. In 1977, the UNHCR Executive Committee recommended to governments that procedures should satisfy certain basic requirements, and requested UNHCR to prepare a handbook for the guidance of governments.

The *Handbook*,⁴ although prepared for governments, also provides some guidance on the practices of UNHCR, as it is expected that UNHCR would follow the basic procedures laid down there. Other sources of guidance on UNHCR processes are contained in documents prepared for other purposes. Training modules produced by UNHCR provide some clues, in particular those on *Determination of Refugee Status*⁵ (RLD2) and *Interviewing Applicants for Refugee Status* (RLD4).⁶ These manuals are aimed at UNHCR staff as well as government personnel, NGOs, and so forth. For the most part, they do not specifically describe the process

¹ I particularly want to acknowledge the pioneering work of Roque Raymundo, my predecessor as Regional Legal Officer with Jesuit Refugee Service Asia Pacific, in unearthing and documenting the policies and practices of UNHCR Bangkok.

² *UNHCR Comprehensive Policy on Urban Refugees*, Geneva, 25 Mar. 1997, para. 27; this policy has been superseded by *UNHCR Policy on Refugees in Urban Areas*, Geneva, 12 Dec. 1997.

³ *Ibid.*, para. 36.

⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 2nd edn., 1992; the basic text remains unchanged since the first edition was published in 1979.

⁵ UNHCR Training Module, *Determination of Refugee Status*, (RLD2) Geneva, 1989.

⁶ UNHCR Training Module, *Interviewing Applicants for Refugee Status* (RLD4), Geneva, 1995.

used by UNHCR. They are drafted with a greater degree of generality because of the need to include people working in the very varied refugee status determination processes conducted by governments. Nevertheless UNHCR classifies them as 'operational guidance manuals'.⁷

UNHCR usually provides some form of written information for asylum seekers in the various places where it carries out refugee status determination, and this would be expected to provide some guidance. However, as will be seen, in practice very little can generally be gleaned from this source.

It might be expected that information relating to the implementation of refugee status determination processes could be obtained from UNHCR statistics. However, UNHCR does not publish comprehensive or detailed statistics on its own determinations, covering such things as rates of recognition and rejection, rates of success on appeal, and the like, despite the fact that it acknowledges their importance and usefulness; UNHCR thus compiles and disseminates detailed statistics on determinations by governments, but not on determinations by itself.

Other vestiges of information about RSD processes can be gleaned from various documents emanating from UNHCR and its officers, such as reports, submissions and journal articles. It is said that a process is currently underway in UNHCR's Geneva Headquarters to produce comprehensive guidelines for UNHCR staff, but it is not clear if these guidelines will be publicly available for the benefit of asylum seekers and their advisers, or if they will be internal documents. Clear public guidelines are, however, much needed.

1.4 UNHCR has been left behind

UNHCR has a duty to supervise the application of the 1951 Convention/1967 Protocol in contracting states, and the contracting states have undertaken to cooperate with it in the exercise of this duty.⁸ It might therefore be expected that states could look to UNHCR for guidance and inspiration on the optimum model for carrying out refugee status determination. UNHCR is expected to be, and still presents itself as, the possessor of objective expertise in the area of refugee status determination. However, in its own practice, UNHCR is lagging far behind the practices in many Convention States. UNHCR practice is far from 'best practice', and it does not provide a good model.

There are a number of reasons for this state of affairs. Far-reaching developments in administrative law in many countries over recent decades have flowed over into the field of refugee status determination. Whilst there are considerable variations, modern systems of administrative law

⁷ UNHCR, *RefWorld*: <http://www.unhcr.ch/Refworld>.

⁸ Art. 35(1) CSR51.

have the general aims of ensuring fair, transparent, and lawful decision-making by government, ensuring that decision-makers are accountable, and recognising the rights and interests of people who are affected by government decisions. These improvements have occurred in the context of the development and increasing prominence of international human rights law, which lays down standards for governments about the processes for determining the rights and obligations of people. Thus, the mechanisms in many countries include:

- administrative tribunals, which carry out external review of the merits of a decision,
- judicial review of decisions by the courts,
- ombudsmen, who can investigate administrative processes,
- freedom of information laws, enabling people to have access to information held on government files, both in relation to themselves individually and in relation to general government policies.

These developments appear to have had little impact on the administrative systems of UNHCR or the United Nations system in general. Admittedly, UNHCR is a relatively unusual part of the UN system, for most UN bodies do not have individual clients. They operate on a macro-level, working at high level with governments, other international bodies and NGOs, dealing with issues of policy development, funding, technical assistance, training, and international law. UNHCR likewise does a lot of work at the macro-level, but it is also directly responsible for the protection and assistance of individuals, dealing directly with individuals as clients, and as applicants for refugee status.

The lack of openness and accountability in the current system fosters a level of suspicion, resentment, and anger towards UNHCR by asylum seekers and refugees.⁹ Because of its special responsibilities to individuals, UNHCR, more than any other UN agency, has a need to update its administrative systems to bring it up to the standards of enlightened governments, and to ensure that it is accountable to its individual refugee clients.

1.5 International standards on 'fair hearings'

1.5.1 Numerous sources

The importance of fair hearings, and of the independence of courts and tribunals, is emphasised in a number of human rights conventions, and in many resolutions, reports, decisions, and programmes emanating from

⁹ A 1997 survey of Burmese refugees in New Delhi found that the vast majority see UNHCR as 'unresponsive, arbitrary and inefficient': South Asia Human Rights Documentation Centre, *Survival, Dignity and Democracy: Burmese Refugees in India, 1997*, New Delhi, 1997, at 22. In relation to UNHCR Bangkok, see J. Frederico, 'A Well-Founded Fear of Being Persecuted?', 4 *JRS* 82 (1991).

various organs of the United Nations and other international human rights bodies. They include: the International Covenant on Civil and Political Rights (ICCPR66), particularly article 14(1); regional human rights instruments; the numerous resolutions on the administration of justice by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, and the General Assembly of the United Nations; the programme of technical cooperation of the Office of the High Commissioner for Human Rights and projects funded by the World Bank, dealing with the administration of justice; the UN's Basic Principles on the Role of Lawyers; the UN's Basic Principles on the Independence of the Judiciary; and the reports of the Special Rapporteur on the Independence of the Judiciary.

1.5.2 *International Covenant on Civil and Political Rights*

Article 14(1) ICCPR66 provides that:

In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Nowak observes that article 14(1):

contains an *institutional guarantee* that obligates States Parties to take extensive, positive measures to ensure this guarantee. They must *set up* by law independent, impartial *tribunals* and provide them with the competence to hear and decide on . . . *rights and obligations in suits at law*.¹⁰

According to the Human Rights Committee, 'the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.¹¹ However, the Human Rights Committee has never made a specific determination as to whether the process of refugee status determination is covered by the 'fair trial' provisions of article 14(1).

Does refugee status determination come within the term 'suit at law'? According to Nowak, the Committee tends to interpret the term broadly.¹² In *YL v. Canada*, for example, the Committee found that a claim by a former Army member for a disability pension was a suit at law. It said that 'the concept of a "suit at law" . . . is based on the nature of the right in question rather than on the status of one of the parties (governmental; parastatal or autonomous statutory entities) or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon . . .'¹³ In *Pinkney v. Canada*, a claim by

¹⁰ Manfred Nowak, *CCPR Commentary*, Engel, Kehl am Rhein, 1993, 241; emphasis in original.

¹¹ Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant', UN doc. HRI/GEN/1/Rev.1 at 18 (1994), para. 1.

¹² Nowak, n. 10 above, at 242.

¹³ No 112/1981, para. 9.2.

a US citizen that he had been denied a fair hearing and review of his case in regard to a deportation order was declared inadmissible by the Committee on the grounds that he had failed to exhaust his domestic remedies; however, there was no suggestion that the appeal was not a 'suit at law'.¹⁴ In *VRMB v. Canada*, where it was argued that article 14 covers immigration hearings and deportation proceedings, the Committee found that the communication was inadmissible as the facts did not disclose a violation of article 14, but did not dispute that the proceedings were a suit at law.¹⁵

The question was squarely raised in the recent case of *A v. Australia*, which related to the detention of asylum seekers. At the admissibility stage, the Human Rights Committee ruled that:

the issue whether the proceedings relating to the determination of the author's status under the Migration Amendment Act nevertheless fall within the scope of article 14, paragraph 1, is a question which should be considered on its merits.¹⁶

However, the Human Rights Committee did not ultimately find it necessary to make a decision on the applicability of article 14(1), as they found against Australia under article 9, which deals specifically with detention.¹⁷

In its submission to the Human Rights Committee,¹⁸ Australia claimed that article 14(1) does not apply to refugee status determination. Three main arguments were put forward; first, that proceedings relating to the determination of refugee status do not deal with civil rights or obligations, and that the decision to allow entry into its territory is a matter for the State concerned, and not a determination of a civil right. 'A right of entry into a State of which one is not a national does not exist under either Australian national law or under international law. Even if a person is found to be a refugee, international law prevents refoulement to the country in which persecution is feared, but does not give that person a right of permanent entry into the country of refuge.' Secondly, it argued that the provisions of article 13 ICCPR66, which deals specifically with the expulsion of aliens, are more appropriate to determination of refugee status than those in article 14(1). Australia asserted that article 13, while requiring procedural fairness, envisages something less than the full public judicial proceedings contemplated by article 14(1). Article 13 requires that an opportunity be given to present a case, to have adverse decisions reviewed and to be represented for that purpose before a competent

¹⁴ UN doc. A/37/40.

¹⁵ UN doc. A/43/40.

¹⁶ UN doc. CCPR/C/53/D/560/1993 (26 Apr. 1995).

¹⁷ UN doc. CCPR/C/59/D/560/1993 (30 Apr. 1997).

¹⁸ *A v. Australia*, Australian Government Submission on the Merits, 39.

authority. Finally, Australia referred in argument to some old decisions of the European Commission on Human Rights ruling that article 6(1) of the European Convention does not apply to entry or deportation of aliens (see section 1.5.3 below).

Since these submissions were not ruled on by the Committee, some observations on their soundness are nevertheless called for. All three arguments (deliberately) confuse the process of refugee status determination with determination of entry and deportation. Although these two processes may be intertwined in practice, there is a clear conceptual distinction, and many states are careful to distinguish between the two processes. This distinction, for example, was at the heart of the argument in the US Supreme Court in the leading case of *INS v. Cardoza-Fonseca*.¹⁹ Australia exposed the flaw in its own argument when it claimed that recognition as a refugee does not give a right of permanent entry, for Australia too makes this distinction. However, it conceded that, as a matter of international law, the right of *non-refoulement* flows from recognition as a refugee. It might be added that, under the 1951 Convention, other rights also follow.

This distinction between refugee status determination and ‘right of entry’ is particularly evident when UNHCR is the body making the determination. UNHCR is not a state, and recognition by UNHCR clearly gives no right of entry anywhere, as many UNHCR-recognised refugees can sadly attest. Moreover, even the less onerous procedural provisions of article 13, which Australia asserted to be applicable to refugee status determination, are not complied with by UNHCR.

There are strong arguments that the fair hearing provisions of article 14 are applicable to refugee status determination. Although a definitive ruling from the Human Rights Committee is yet to come, the Committee gave a strong indication of its likely attitude in General Comment 15:

It is in principle a matter for the State to decide who it will admit into its territory. However in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.²⁰

From its reference to ‘prohibition of inhuman treatment’, it may be surmised that the Committee is talking about admission of refugees.

1.5.3 *European Convention on Human Rights*

A more conservative approach has been taken to the interpretation of article 6(1) of the European Convention on Human Rights. Article 6 is very similar to article 14 of the Covenant, and was based on a draft of

¹⁹ 480 US 421 (1987).

²⁰ Human Rights Committee, General Comment 15, n. 11 above, para. 5.

article 14. The English text of article 6 refers explicitly to 'civil rights and obligations', the equivalent French text being identical to that of the Covenant ('ses droits et obligations de caractère civil').

In their early jurisprudence on article 6(1) in relation to non-criminal cases, the European Commission of Human Rights and the European Court of Human Rights focused on the traditional civil law distinction between private law and public law. They interpreted 'civil rights and obligations' as rights and obligations in private law, that is, the law on relations between private persons.

In a number of old cases, the Commission found that immigration decisions did not fall within the description of a 'civil right': *XYZV & W v. United Kingdom*, No 3325/67, 15 December 1967; *Agee v. United Kingdom*, No 7729/76, 17 December 1976; *P v. United Kingdom* No 13162/87, 9 November 1987. In the last case, which related to asylum, the Commission said:

The Commission has constantly held that procedures followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled are of a discretionary, administrative nature, and do not involve the determination of civil rights within the meaning of article 6(1) . . . The Commission finds that political asylum applications fall within this category of procedures . . .

This is consistent with the early jurisprudence described above. However, the recent jurisprudence of the Court has brought more and more rights and obligations within article 6. These have included many cases concerning the individual's relations with the state, which are classified in civil law systems as public law. For example, article 6 has been found to apply to cases concerning property, planning laws, bankruptcy, patent rights, licensing of commercial activity, the right to practise a profession, adoption, social security benefits, and so forth.²¹ The authors of one of the leading texts on the Convention argue that:

Should, as is very likely, the Court continue with its present inductive approach, its jurisprudence already contains the seeds of further expansive decisions . . . The satisfactory end result would be guaranteed a 'right to a court' in the sense of Article 6: (i) to assert or question any arguable legal 'right or obligation' that he has under national law; or (ii) to challenge by means of judicial review a discretionary decision that is taken by the state that directly affects him. While it may not have been intended that the right to a fair trial in Article 6 should have such a wide application, an extensive reading along these lines would not be inconsistent with European law generally.²²

It may take some time for the Strasbourg authorities to move towards

²¹ D.J. Harris, M.O'Boyle, C.Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, 177–86.

²² *Ibid.*, 185–6.

this position, but in recent years the Court has developed an alternative mechanism by which to supervise refugee type decisions, using article 3 of the European Convention ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment'), in conjunction with article 13 (the right to an effective remedy for breaches of rights).

According to the Court's decision in *Chahal v. United Kingdom*,²³ the concept of 'effective remedy' carries with it a number of rights akin, if not identical to the rights of fair hearing in article 6(1). This case involved the deportation of a Sikh from the UK to India for 'national security reasons'. The UK government believed him to be involved in terrorist activities, but he was not informed of the evidence for this conclusion, or the sources of any evidence. He was entitled to judicial review, and he took his case to the Court of Appeal; however the court did not have access to the national security information, and so could not make any ruling on the merits. A special advisory panel for national security matters considered the case, and made recommendations to the responsible minister. Mr Chahal appeared before the panel in person and was allowed to call witnesses on his behalf, but he was not allowed to be represented by a lawyer, or to be informed of the advice which the panel gave to the minister.

The European Court of Human Rights found a breach of article 3 of the European Convention because of the risk of torture on return to India. In relation to the existence of an effective remedy under article 13, they found that the judicial review and advisory panel procedures were inadequate. The Court said that 'the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 . . . Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective.'²⁴ The Court went on to note that:

in the proceeding before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed . . . In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.²⁵

1.5.4 UNHCR's obligations to follow international human rights law

The United Nations is not a party to conventions, and is thus not legally bound by them in the ordinary way. An applicant aggrieved by the

²³ No 70/1995/576/662.

²⁴ Paras. 151–2.

²⁵ Para. 154.

inadequacies of the UNHCR refugee status determination process cannot complain to the Human Rights Committee, or the European Court of Human Rights, or other treaty bodies. However, the United Nations is clearly bound to abide by international law. The Preamble to the UN Charter makes clear that one of the fundamental reasons for establishment of the UN is to ‘establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. And according to article 1 of the Charter, one of the purposes of the United Nations, is ‘promoting and encouraging respect for human rights and for fundamental freedoms for all’. Article 55 commits the UN to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all . . .’

The UN Secretary-General has recently said that:

Throughout the United Nations system, the principles embodied in the United Nations Charter are morally and legally binding, including its preambular statement to ‘reaffirm faith in human rights . . .’. [T]he United Nations system is obliged to be guided by the norms and requirements of the Charter, the Universal Declaration of Human Rights, and the related resolutions of the General Assembly . . . It is thus incumbent upon all parts of the United Nations system to design and deliver their activities within this internationally accepted legal framework . . .²⁶

That UN officers are bound by human rights standards is confirmed by the Convention on the Safety of United Nations and Associated Personnel, which provides (at Article 20):

Nothing in this Convention shall affect . . . the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or *the responsibility of such personnel to respect such law and standards*.²⁷ (emphasis added)

The preamble to the 1951 Convention itself starts with these words:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . .

UNHCR has a wealth of well-trained lawyers with a great deal of expertise in human rights law. UNHCR increasingly sees refugee law as a part of the broader field of human rights law,²⁸ and sees itself as ‘an operational

²⁶ ‘Statement on the status of women and girls in Afghanistan’, SG/SM/6072, AFG/70, 7 Oct. 1996.

²⁷ UN doc. A/RES/49/59.

²⁸ ‘. . . the system of refugee protection fits into, supports and is indeed an indispensable part of the global human rights regime.’ Statement of Sadako Ogata, UN High Commissioner for Refugees, to the 53rd Session of the United Nations Commission for Human Rights, Geneva, 1 Apr. 1997.

UN human rights agency'.²⁹ There is increasing cooperation between the offices of UNHCR and the Office of the High Commissioner for Human Rights, both of which have their headquarters in Geneva. In recent years, the High Commissioner for Human Rights has spoken at the annual meetings of the Executive Committee of UNHCR (ExCom), and the High Commissioner for Refugees has spoken at the annual meetings of the Commission for Human Rights.

UNHCR acknowledges its obligation to observe human rights law. It has produced a training manual for its staff on 'Human Rights and Refugee Protection' in which it is said that:

As a UN agency, UNHCR has a duty to promote the purposes of the UN, including the protection of human rights . . . Greater reliance by UNHCR on international human rights law will contribute to greater respect for and more effective implementation of this law.³⁰

It would be a distraction from the purposes of this article to get entangled in the broader arguments over whether UN bodies are *legally* bound by the international obligations undertaken primarily by States. These arguments have been most fully expounded in relation to the question of applicability of international humanitarian law to UN peacekeeping forces. On the one hand, the International Committee of the Red Cross (ICRC) has argued that what is universally binding upon all States must also be considered binding upon the universal organisation established by States and recognised by them as an independent subject of international law. In response, the UN has argued that it is not a State and that as an international organisation it is not in a position to become a party to conventions; it does not possess the juridical and administrative powers to discharge many of the obligations laid down in Conventions.³¹

At the very least, UNHCR is under a *moral* obligation to comply with human rights standards. However the obligation is more than moral, it is legal in the sense that UNHCR has a *legal* duty to promote observance of human rights. In this instance, UNHCR is carrying out a function which is usually carried out by governments. How can UNHCR be said to comply with its legal obligation to promote observance of human rights if it does not observe those standards in its own practice?

²⁹ UNHCR Training Module, *Human Rights and Refugee Protection*, (RLD 5), Geneva, Oct. 1995, Chapter 1, C.

³⁰ *Ibid.*

³¹ See for example, Daphne Shraga and Ralph Zacklin, 'The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues', *Report of Symposium on Humanitarian Action and Peace-keeping Operations*, International Committee of the Red Cross, Geneva, 1994.

2. Particular Aspects of UNHCR Practice

2.1 Publication of substantive criteria applied by UNHCR

2.1.1 UNHCR practice

As already noted, UNHCR has not made available publicly its own guidelines or procedural rules for the conduct of refugee status determination, and in many areas the substantive criteria applied by UNHCR are unclear. There is thus no equivalent of the national legislation, regulations, rules, guidelines and case-law which are publicly available in most countries and which provide important guidance to asylum seekers and their advisers. What, for example, is the standard of proof used by UNHCR to determine whether there is a well-founded fear of persecution? How does UNHCR interpret the term 'particular social group'? How does UNHCR interpret the exclusion clauses of the Convention?

The issue of standard of proof, which is at the heart of the refugee status determination process, provides a good example of the uncertainties. The *Handbook* says that a well-founded fear of persecution must be established 'to a reasonable degree'.³² Another section says that 'it is . . . frequently necessary to give the applicant the benefit of the doubt.'³³ But talking about benefit of the doubt avoids the real question: how much doubt does there have to be before you give the benefit?

A reading of the relevant UNHCR training manuals leaves a lawyer (and non-lawyers, one suspects) in a state of some confusion. RLD 2 is rather ambiguous and unclear in its discussion of the standard of proof. It says that a decision-maker does not need to be a legal expert to determine eligibility, and that: 'Your best guides are common sense, and a clear understanding of the definitions . . . the credibility of the case before you will be a matter of personal judgment. Always remember that, in the final analysis, it is wisest to give the benefit of the doubt.' One has to go to the discussion of a case study deep in the text to find more specific guidance. There, it is made clear that a balance of probabilities test is not appropriate, and that well-founded means 'reasonably likely,' or a 'serious or reasonable possibility.'³⁴ Yet, this message is contradicted in RLD 4, which says that an applicant should demonstrate a 'reasonable likelihood or reasonable probability of persecution.'³⁵ Probability is the very test which is said in RLD2 to be not appropriate.

Another place where some guidance might be gained is in UNHCR's amicus curiae brief submitted to the US Supreme Court in 1987:

³² UNHCR *Handbook*, para. 42.

³³ *Ibid.*, para. 203.

³⁴ UNHCR RLD 2, n. 5 above, Discussion of Case Study A.

³⁵ UNHCR RLD 4, n. 6 above, at 57.

No statistical definition is . . . appropriate to determine the reasonableness of an applicant's fear, given the inherently speculative nature of the exercise. The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.³⁶

At the end of the day, there remains a disturbing lack of clarity about what test is applied by UNHCR. Because there are no written decisions, because there is no independent review, and because there are no publicly available guidelines, we cannot know exactly what test is used.

2.1.2 *International standards*

In seeking to harmonise their refugee status determination procedures, the member states of the European Union adopted a 'Resolution on minimum guarantees for asylum procedures' in 1995. One such guarantee is that 'asylum seekers must be informed of the procedure to be followed and of their rights and obligations during the procedure, in a language that they can understand'.³⁷ European academic commentators have interpreted this provision to include a requirement that the relevant national regulations and policies determining the grant of asylum be made accessible and available.³⁸

Looking again at the question of standard of proof, one finds that in many asylum countries significant litigation has clarified the question, often at the level of the highest courts. In the United States, the test is whether there is a 'reasonable possibility' of persecution;³⁹ in Canada, whether there is a 'reasonable chance';⁴⁰ in the UK, whether there is a 'reasonable degree of likelihood' of persecution;⁴¹ in Australia, whether there is a 'real chance' of being persecuted.⁴²

UNHCR asserts in RLD 4 that its interpretation of the relevant standard of proof is supported by practice and legal developments in a number of national jurisdictions. However none of the tests mentioned by UNHCR precisely matches these formulations. It would be very useful for UNHCR decision-makers, and those formulating applications and making submissions, for the standard of proof used by UNHCR decision-makers to be clearly articulated. The High Court of Australia has said:

³⁶ Brief submitted in *INS v. Cardoza-Fonseca*, 480 US 421 (1987). Cited in G.S. Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 2nd edn., 1996, 38.

³⁷ European Union, 'Resolution on minimum guarantees for asylum procedures', Justice and Home Affairs Council, Brussels, 21 Jun. 1995, para. 13.

³⁸ Pieter Boeles & Ashley Terlouw, 'Minimum Guarantees for Asylum-seekers', 9 *IJRL* 472, 481 (1997).

³⁹ *INS v. Cardoza-Fonseca*, n. 36 above.

⁴⁰ *Adjei v. Minister of Employment and Immigration*, [1989] 2 FC 680, 683.

⁴¹ *R v. Secretary of State for the Home Department, ex parte Sivakumaran et al.*, [1988] 1 All ER 193.

⁴² *Chan v. Minister for Immigration and Ethnic Affairs*, (1989) CLR 379.

While the differences in some of the tests . . . may be semantic only, it is clearly important that a determination of refugee status be made by the application of a test that is readily capable of comprehension and application. A plethora of tests, indeed what may amount to the same test though expressed in a variety of ways, can only lead to uncertainty and, all too likely, confusion in an area where the future of individuals is at stake.⁴³

This observation is very pertinent to UNHCR, and applies equally to other areas of interpretation of the 1951 Convention. Detailed and clearly articulated 'legal guidelines' must be drafted and made publicly available, as an equivalent to the national laws, regulations and case-law which are available to people seeking asylum in a government process. These guidelines should be accessible to all asylum seekers who want to see them, as well as to their advisers.

2.2 Provision of information to asylum seekers

2.2.1 UNHCR practice

In Bangkok, asylum seekers are given a one page document in English and several other languages, which is written in legalistic language and provides little information. It does not set out the criteria for the grant of refugee status. The document places emphasis on consultation with UNHCR as the first step: 'an officer will give specific information and advice according to the situation of each asylum seeker'. JRS Bangkok finds that most asylum seekers have little understanding of the criteria or process, even after they have been through the 'consultation' and interview processes.

UNHCR Kuala Lumpur has produced a series of five information sheets entitled 'Information for Asylum seekers'. They give very comprehensive and clear written information on the refugee criteria, including explanations of 'well-founded fear' and 'persecution'. They give a breakdown of the five reasons for persecution mentioned in the refugee definition, and explain the role of UNHCR in the Malaysian context, including (importantly) what UNHCR can do and what UNHCR cannot do. These information sheets are only available in English.

In Phnom Penh, no written information is given to asylum seekers. UNHCR staff explain to people what the process is and what is required. This was also the situation in New Delhi until recent times, and a 1997 report found that refugee groups in India 'are unclear as to UNHCR's criteria and procedures to bestow or deny refugee status'.⁴⁴ UNHCR New Delhi now has an information leaflet for refugees and asylum seekers. It is quite a lengthy document, the bulk of which explains the support provided to UNHCR to those recognised as refugees. It recites the 1951

⁴³ (1989) CLR 379, 407.

⁴⁴ South Asia Human Rights Documentation Centre, n. 9 above, at 9.

Convention definition, but, unlike the Malaysian document, is written in legalistic language and does not attempt to explain the terms used.

2.2.2 *UNHCR policies*

The *Handbook* says that ‘The applicant should receive the necessary guidance as to the procedure to be followed’.⁴⁵

2.2.3 *International standards*

As noted in section 2.1 above, the European Union’s ‘Resolution on minimum guarantees for asylum procedures’ guarantees that ‘asylum seekers must be informed of the procedure to be followed and of their rights and obligations during the procedure, in a language that they can understand’.⁴⁶ In addition to publication of regulations and policies, this means that written information concerning the procedure must be accessible and available to asylum seekers and their counsellors.⁴⁷

The standards of written information provided by UNHCR to asylum seekers vary from excellent to non-existent. The standards of the oral counselling provided are also likely to vary, depending on the competence, training and attitudes of staff in the different locations, and the conditions in which they work; for example, it is said that the reception staff at UNHCR New Delhi deal with 2,000 people every week. There is no reason why the excellent information sheets made available by UNHCR Kuala Lumpur should not be used (with any necessary adaptations) by other UNHCR offices. It is important that they be translated into the languages of the major client groups approaching those offices. This represents a minimum standard.

2.3 Availability and access to independent legal advice and assistance for asylum seekers

2.3.1 *UNHCR practice*

Generally speaking UNHCR does not provide funding for or encourage, legal or other external advocacy assistance for asylum seekers applying to it.⁴⁸ In most parts of Asia there are no specialised legal or advocacy organisations assisting asylum seekers to negotiate the refugee status determination process.

In New Delhi, a number of legal and human rights organisations are involved with some aspects of refugee work, but none is involved in the

⁴⁵ UNHCR *Handbook*, para. 192.

⁴⁶ European Union, ‘Resolution on minimum guarantees for asylum procedures’, para. 13.

⁴⁷ Boeles & Terlouw, n. 38 above, at 481.

⁴⁸ According to UNHCR Ankara, ‘It is not a policy of UNHCR Headquarters to provide pre-interview counselling in any countries where refugee status determination under the UNHCR mandate is conducted.’ ‘Comments by UNHCR Ankara on Asylum Issues raised by NGOs’, April 1997.

refugee status determination process. PILSARC (the Public Interest Legal Support and Research Centre) receives support from UNHCR as an implementing partner to provide legal services to refugees, but does not represent individuals applying for refugee status. The South Asia Human Rights Documentation Centre has also been involved in advocacy to UNHCR for particular refugee clients, but usually only in relation to issues arising after they have been recognised as refugees.

Similarly, in Kuala Lumpur, no NGOs provide legal assistance to individuals seeking recognition by UNHCR.

In Bangkok, JRS provides information and advice to people going through the UNHCR process, and in some cases more concrete legal assistance in helping to assemble evidence and formulate appeals. UNHCR recognises JRS's welfare-related activities in relation to asylum seekers, such as financial assistance, housing assistance, and often refers asylum seekers to JRS for these purposes. However, at a formal level there is a 'lack of recognition' of JRS's advocacy work in relation to refugee status determination. There is often good cooperation at the informal level, but letters written by JRS in relation to particular clients are almost never answered. This seems to come partly from UNHCR's reluctance to put anything on paper in relation to individual cases (see section 2.7 below, 'Reasons for rejection'). It is notable that UNHCR chooses to continue dealing directly with the applicant, rather than through his or her lawyer or representative.

In Phnom Penh, as outlined in Appendix A, a JRS lawyer funded by UNHCR has the role of advising and representing asylum seekers. This is a quite unusual situation. There are some important limitations, however, on the lawyer's independence. The agreement provides that the lawyer's primary duty is to the asylum seeker. However, the lawyer is required to prepare a well-balanced file, and to include country information which may 'challenge' the claim put forward by the asylum seeker. The agreement records that it is not the role of the lawyer to offer any 'personal opinion' on the credibility of the asylum seeker, but that the lawyer is obliged to inform UNHCR of any fundamental and material inconsistency in the asylum seeker's claim. Whilst this is quite different from the traditional lawyer's role of independent advocacy, the arrangement provides for the JRS lawyer effectively to compile UNHCR's file. This gives significant opportunities which are not available elsewhere.

2.3.2 UNHCR policies and statements

UNHCR recognises the importance of independent legal advice and assistance to people applying to governments, but does not treat it as a priority when people are applying to UNHCR.

In relation to European governments UNHCR said in 1994: 'Basic

minimum standards to be met in assisting asylum seekers to present their claims include . . . availability of legal counsel and interpretation.⁴⁹

In relation to Hong Kong, UNHCR has said (in the context of the Comprehensive Plan of Action):

Given the vulnerable situation of an asylum seeker in an alien environment, it is important that s/he should on arrival receive appropriate information on how to submit his/her application. Such advice is most effective on an individual basis and is provided in many countries by legal counselling services, funded by governments, the UNHCR or non-governmental sources.⁵⁰

In the same document, UNHCR said that the possibility of obtaining legal advice and representation about appeals was included in what UNHCR saw as 'the basic principles of fairness applicable equally to judicial or administrative reviews'.

In practice, within the framework of the Comprehensive Plan of Action, UNHCR recognised the importance of independent legal advice. It created and financed an agency, the Agency for Volunteer Service (AVS), to provide appeals counsellors in the Hong Kong camps. UNHCR also supported the role of the JRS legal projects in Hong Kong and Palawan; the first project provided pre-interview legal counselling, the second provided legal assistance with appeals. A UNHCR staffer has acknowledged that UNHCR could not fulfil these roles under the CPA because of its involvement, with governments, in the RSD process.⁵¹

Whilst it is outside the region under examination, it is interesting to see the response of UNHCR Ankara (in 1997) to the suggestion that legal counselling should be provided:

UNHCR also considers it a priority to direct resources to the provision of health and food assistance to refugees. These assistance programs could suffer if UNHCR were to arrange for the expensive legal costs of providing more comprehensive pre-interview counselling . . . In some countries, such pre-interview counselling is provided by NGOs. To our knowledge, no NGO has been able to organise or fund such a program. UNHCR Ankara welcomes the initiative of any NGOs interested in offering this service in Turkey, and would cooperate with the efforts of NGOs to provide such counselling . . .⁵²

⁴⁹ UNHCR, 'Fair and expeditious asylum procedures', Nov. 1994.

⁵⁰ UNHCR, 'Note on the subject of the role of UNHCR in the Hong Kong Procedure for refugee status determination' (1990). See Arthur C. Helton, 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment', 5 *IJRL* 544 (1993).

⁵¹ Shamsul Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment', 4 *IJRL* 487 (1992).

⁵² UNHCR Ankara, n. 48 above.

2.3.3 International standards

The UN's *Basic Principles on the Role of Lawyers*⁵³ state in their preamble that:

... adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.

The Principles go on to provide that (Principle 2):

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind ...

and also that:

Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organisation and provision of services, facilities and other resources.

Article 14 of the International Covenant on Civil and Political Rights, and article 6 of the European Convention on Human Rights, specifically recognise the right to legal representation in criminal cases, and legal aid where the interests of justice so require. Although not explicitly mentioned in relation to non-criminal cases, the European Court of Human Rights has found that a fair hearing requires legal representation and, in some instances, legal aid.⁵⁴

Specifically in relation to refugee status determination, the European Consultation on Refugees and Exiles argued as follows in 1990:

Before any hearing the applicant should be offered the opportunity and time to contact a lawyer, a UNHCR representative and/or a representative of a voluntary agency providing assistance to asylum seekers. Such a counsellor should have the right to participate in all subsequent stages of the procedure.

and further that 'legal advice should be available before the hearing and at all other stages'.⁵⁵

The European Union appears to have accepted ECRE's recommendation in its 1995 resolution, which explicitly states that the asylum seeker has the right to legal counsel during the procedure, with the rider that this be in accordance with the rules of the member state

⁵³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, August-September 1990, and welcomed by the 45th General Assembly of the United Nations in resolution 45/121, 14 Dec. 1990.

⁵⁴ Harris et al, n. 21 above, 197-8.

⁵⁵ European Consultation on Refugees and Exiles (ECRE), 'Fair and Efficient Procedures for Determining Refugee Status', 3 *IJRL* 112 (1991) at A.3 and A.6.2.

concerned.⁵⁶ European observers have observed that, 'Unfortunately this provision lacks the addition that also this legal counsel is offered and paid for by the State.'⁵⁷

In Canada, legal aid is available for asylum seekers, and lawyers are usually involved at all stages of the process, including the hearing. However, funding cuts in recent years have led to some concerns about quality.⁵⁸

In Australia, funding cuts have also substantially reduced access of asylum seekers to government-funded legal assistance. The immigration department gives block contracts to private lawyers and community legal services to provide legal services to asylum seekers. This legal aid covers all detainees who request it, and some non-detainees who have suffered torture, trauma or have reasonable prospects of a successful claim. Legal Aid Commissions provide specialist representation, as does the community-based Refugee Advice and Casework Service.

In the Netherlands there is publicly funded legal advice and representation for asylum seekers, comprising a mixture of salaried legal advisers and lawyers in private practice employed part time by legal aid. In 1997 it was reported that at Schiphol airport there are 55 salaried staff backed by around 100 independent lawyers.⁵⁹

In the UK, legal aid is available for initial advice, but not for representation at appeal. However, there is legal aid for judicial review in the courts. There are two respected specialist community based organisations, the Refugee Legal Centre and the Immigration Advisory Service.

In the US, asylum seekers are given, at least, a listing of local attorneys and representatives who offer free or low-cost representation.

Interestingly, in Japan UNHCR itself provides direct legal advice and counselling to asylum seekers, and also organises advice and representation through the Japan Legal Aid Association.⁶⁰

To summarise, it would appear that UNHCR's practice in Asia is not consistent with international practice on the issue of representation. UNHCR should promote free access to independent legal advice and representation at all stages of the refugee status determination process. It is not expected that it would be necessary for UNHCR to provide funding for legal assistance in most cases: it is likely that non-government organisations would be able to find their own funding for such purposes

⁵⁶ European Union, n. 37 above, para. 13.

⁵⁷ Boeles and Terlouw, n. 38 above, at 481.

⁵⁸ See *Providing protection: Towards fair and effective asylum procedures*, Justice, Immigration Law Practitioners' Association, Asylum Rights Campaign, London, Jul. 1997, 30.

⁵⁹ *Ibid.*, at 31.

⁶⁰ 'Update on Regional Developments in Asia and the Pacific', Report to the 9th Meeting of the Standing Committee of the Executive Committee of UNHCR, 15 Aug. 1997, UN doc. EC/47/SC/CRP.44.

if UNHCR encouraged and facilitated the involvement of lawyers in the process.

2.4 Allowing advisers or representatives to be present at interview

2.4.1 UNHCR practice

UNHCR does not permit advisers or representatives to be present at interview.⁶¹

2.4.2 UNHCR policies and statements

There is a wide and inexplicable gap here between UNHCR's rhetoric in relation to refugee status determination generally, and its own practice. This is most explicit in one of UNHCR's training manuals, under the heading 'Reminding the applicant of his or her rights and obligations':

The right to counsel. For refugee determination interviews conducted exclusively by UNHCR personnel in the field, legal or other counsel would not normally be allowed to attend the interview. Nevertheless, UNHCR often receives written or other communications from a representative of the applicant or some other body such as a refugee support group. This sort of information can often be of assistance to the interviewer. Where national legislation provides for the participation of legal or other counsel to assist an applicant in presenting his or her claim, it is essential to allow such counsel to participate in the interview. The presence of a legal representative or other counsel who is familiar with the refugee criteria and local jurisprudence and the applicant's claim, is helpful not only to the applicant but also to the interviewer.⁶²

This extract is breathtaking. On the one hand it acknowledges the usefulness of the presence of a legal or other representative. Logically, their presence would be helpful whether the determination is being made by UNHCR or by a government. But whereas their presence is said to be 'essential' when a government is making the decision, their presence can be dispensed with if UNHCR is the determining body. The manual gives no explanation of this obvious contradiction.

One attempt at explanation was made by UNHCR Ankara in 1997, in response to concerns expressed by NGOs about the exclusion of legal advisers from interviews:

The purpose of the interview by UNHCR legal staff is not to discuss the legal issues relating to the cases, but rather to collect information on the specific circumstances which led the applicant to leave his/her country of origin. Only the applicant can provide that information. The presence during the interview

⁶¹ The special arrangements in Cambodia constitute an exception to this general rule. See 2.1 above.

⁶² UNHCR Training Module RLD4, n. 6 above at 15.

of representatives who have not personally directly experienced the events leading to the flight of the applicant, cannot usefully add to his/her statements.⁶³

Contrast this with UNHCR speaking about the process under the Comprehensive Plan of Action in Hong Kong:

The reference to 'necessary facilities' could in UNHCR's view, also include legal advice and representation, if the applicant requires these in order to present his case properly.⁶⁴

2.4.3 International standards

The European Consultation on Refugees and Exiles (ECRE), in recommendations formulated in 1990, argued that 'the counsellor/representative shall be given access to the hearing with right to intervene'.⁶⁵ Practice varies among States party to the 1951 Convention/1967 Protocol. In the UK, for example, representatives (and their independent interpreters) are permitted to attend interviews with their clients, but only as observers. They may not make comments during the interview but may do so at the end.

It is suggested that if UNHCR were to allow representatives to attend at interviews, they would find that their presence is, to use UNHCR's own words, helpful not only to the applicant but also to the interviewer.

2.5 Access to information on the asylum seeker's file, and all information used in making a decision

2.5.1 UNHCR practice

In general, UNHCR does not allow asylum seekers, or their representatives, to have access to their files, either to inspect them or to have copies of material on file. In Bangkok, for example, asylum seekers are required to submit a written statement in their own language upon registration. This is a key document, but asylum seekers often do not keep a copy for themselves. Once submitted, UNHCR will not provide asylum seekers with a copy.

In defence of the policy of non-access, UNHCR Ankara has said: 'Confidentiality rules provide protection to asylum seekers by ensuring that information given by them is not divulged to third parties. However the files not only contain the information provided by and concerning the individual applicant but also other information which may be of a confidential nature.'

One problem here is that UNHCR often uses information from confidential sources, such as reports from protection officers in the asylum seeker's country of origin. These are internal reports, and UNHCR will

⁶³ UNHCR Ankara, n. 48 above.

⁶⁴ UNHCR, 'Note', n. 50 above; Helton, 'Refugee Determination', n. 50 above.

⁶⁵ ECRE, n. 55 above, para. 6.4.

not allow any outsiders to have access to them. UNHCR considers that direct access to such information is one of the strengths of its refugee status determination process. However, it sometimes happens that asylum claims are rejected because of internal UNHCR material which is inconsistent with the publicly available conclusions of human rights organisations and governments. This has been observed, for example, in relation to some Sri Lankan asylum seekers. It seems that UNHCR personnel making decisions on refugee status prefer to (or are obliged to?) rely on the UNHCR reports. How can these reports or their conclusions be challenged if they are not made available?

A positive information-sharing initiative is the excellent RefWorld database produced by UNHCR's Centre for Documentation and Research. RefWorld contains an enormous range of information useful for refugee status determination, including current country reports, national legislation and case-law, UN resolutions and reports, and so forth. UNHCR makes it publicly available, both on CD-ROM and on its Internet web-site. In fact, however, there are two versions of RefWorld, one for internal use, presumably containing protection reports and internal UNHCR policy documents, and one which is available to the general public.

2.5.2 *International standards*

The UN's *Basic Principles on the Role of Lawyers* provide that (Principle 21):

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

The European Court of Human Rights has ruled that a fair hearing requires that a party be permitted to consult relevant evidence at the disposal of the authorities.⁶⁶

In its 1990 report, ECRE recommended that sophisticated information on country of origin and on the situation in first country of asylum/transit countries should be available to the interviewing officer and the decision-maker; the counsellor should also have access to such information. ECRE also recommended that files concerning the asylum application should be open to the asylum seeker and the counsellor.⁶⁷ This issue is not referred to in the European Union's 1995 resolution, but it may be presumed that the laws in most if not all of these countries allow all people, including asylum seekers, to have access to material on personal files held by government.

⁶⁶ *Feldbrugge v. Netherlands*, A99 (1986), Harris et al, n. 21 above, at 213.

⁶⁷ ECRE, n. 55 above, at A.6.6 and A.6.7.

A survey of the practices of various countries in 1997 concluded that:

In many other countries all evidence relied on must be sourced and available to applicants and their representatives. In Canada, Australia and the US, all information on which the decision-maker relies must be publicly available, and placed before any review body. In Sweden, Norway and Finland, asylum seekers have unlimited access to their departmental files throughout the determination process, including reasons for final decisions and documents on which they were based.⁶⁸

The introduction of freedom of information laws has been a relatively recent phenomenon in most countries. An Australian judge writing on that country's 1982 Freedom of Information Act noted that at the time of its introduction it was 'novel and reasonably controversial'. The objectives of the legislation were to enhance openness, accountability and public participation in government.⁶⁹ Despite the initial fears and controversy, and despite the continuing reservations of some bureaucrats, the law is now broadly accepted as an important part of the mechanism of open government.

One issue in all freedom of information laws is that of material contained in personal files which it is deemed inappropriate to give to the person who is the subject of the file. Examples may be confidential personal information relating to another person or persons, information such as the identity of informants, and information relating to national security. Freedom of information laws usually provide for such material to be deleted from information provided to the person seeking access to a file, with appropriate mechanisms available to challenge the withholding of such information.

However, it is now a generally accepted principle of administrative law, and a basic principle of fairness, that a person is entitled to be aware of all information upon which a decision is based. If such information is suspect for one reason or another, if it is inconsistent with other information, or if it is susceptible to varying interpretations, the person can challenge the information or its interpretation. This is difficult or impossible to do if the person does not have access to the information, or if they are unaware that the information has been relied on in the first place.

It is essential that UNHCR revise its administrative practices to incorporate freedom of information principles, at least in relation to client files. It is unfair for UNHCR to continue using confidential reports as the basis of decisions on refugee status. If it is important for protection

⁶⁸ *Providing protection*, n. 58 above, 26.

⁶⁹ Jane Mathews, 'The Australian System of Administrative Review', in Creyke, Disney, McMillan, eds., *Aspects of Administrative Review in Australia and Indonesia*, Australian National University, Canberra 1996, 71.

reports to remain confidential, they should not be used in refugee status determination. If they continue to be used in refugee status determination, they must be made publicly available so that any information or assessments can be looked at in the light of other information and other assessments, and so that they can be challenged, if appropriate.

2.6 Accuracy and availability of transcripts of interviews

2.6.1 UNHCR practice

Asylum seekers in Bangkok report that transcripts of interviews are not read back to them to check their accuracy. Interviews are not recorded on tape; the interviewer makes his or her own notes of the interview. Interviewees are permitted to make their own notes, but are not permitted to use tape recorders. It is understood that this is the practice in all UNHCR offices where refugee status determination is carried out.

Under the current UNHCR system, where lawyers and advisers are not permitted to be present at interviews, and there is no access to files, there is no way for an asylum seeker to check the accuracy of what is recorded.

2.6.2 UNHCR policies and statements

The operational guidance manual on Interviewing Applicants for Refugee Status (RLD4) gives detailed guidance about documentation of interviews:

An essential process in conducting interviews for determination of refugee status is to prepare accurate and detailed notes of the proceedings. Although note taking is an essential part of the interviewing process, it should not interfere with the flow of the interview. Moreover, in some cultures it may be inappropriate to take notes while you are communicating with someone. As well, you may find that in some interview settings, such as a detention centre or a police station, you are unable to take notes during the interview. In such a case, you will have to take time immediately after the interview in order to prepare your written report.

It should also be recalled that preparing notes while interviewing someone can be disruptive as you will momentarily lose eye-contact and could thus miss important non-verbal communication indicators such as facial expressions and body language. To avoid this problem, a useful technique is to write down the main points of the claim during the interview, and prepare more detailed notes at the end of the interview. You should try to review what you have written down with the applicant at the end of the interview. By doing so, this will allow you to confirm that the story has been documented accurately and to the satisfaction of the applicant. It will also show the applicant that you are trying to document his or her claim with utmost care.

This is good and practical advice. However it makes clear that in practice, full and detailed notes can only be prepared after the interview has been completed. This means that it is impossible for the interviewee to check the accuracy of the final notes.

2.6.3 International standards

In most countries asylum seekers have access to the material on their files, and thus have access to any transcript or written notes. This enables them to correct or add observations if they feel the transcript is inaccurate. Also, the presence of a legal adviser or other representative helps to ensure that there are no inaccuracies, and to clarify any possible points of misunderstanding. ECRE's 1990 recommendations included one that a copy of the written report of the hearing should be available to the counsellor or representative.⁷⁰

2.7 Reasons for rejection

2.7.1 UNHCR practice

UNHCR generally does not give written reasons when a refugee claim is rejected.

In New Delhi and in Kuala Lumpur, no reasons are given at any stage, whether written or oral. In Bangkok, it was also the practice not to give reasons until a couple of years ago. However, after representations by an NGO, reasons for rejection will now be given to asylum seekers orally, if they request this. However, asylum seekers are not told that they have the right to request oral reasons for rejection. The experience of JRS is that reasons are often very unclear. They are sometimes quite imprecise and woolly, and thus difficult to respond to in a meaningful way.

In Phnom Penh, the agreement between UNHCR and JRS says that a written statement of the decision will be provided by UNHCR to the JRS lawyer, and a brief statement of the reasons for the decision is placed on the UNHCR file. Although not completely clear, this implies that the 'written statement of decision' may not include reasons. However, the agreement obliges UNHCR to discuss the reasons for the decision with JRS.

2.7.2 UNHCR policies and statements

The *Handbook* has nothing to say about the need to give reasons for rejection, and there is nothing in ExCom conclusions 8, 28 or 30.

However, the training module on the Determination of Refugee Status proves a determination procedures checklist which includes the requirement that 'if the applicant is not recognised, the reasons on which the negative decision is based should be made available to him'.⁷¹ Nothing in the module says whether the reasons should be in writing.

UNHCR officers in India have said that reasons are not given because

⁷⁰ ECRE, n. 55 above, at 6.5.

⁷¹ UNHCR Training Manual RLD 2, n. 5 above, at point 9.

'it sparks debate'.⁷² Officers in UNHCR Bangkok, when asked why reasons are not given in writing, have cited the possible manufacturing of fraudulent claims, and that if reasons are provided then asylum seekers would know what types of claims are more likely to get rejected. This appears to be an institutional rationale, as the same response has been reported from UNHCR Ankara. An additional argument of Ankara staff is that a written reason would imply a judgment on the government of origin, and that this could cause problems for UNHCR's operations in the country of origin.⁷³ UNHCR Ankara has also given the following more detailed justification of its practice:

More than a question of the written or oral nature of the procedure, the issue at stake is that asylum seekers are entitled to know the reasons for the decision. That purpose may be achieved also through an oral procedure which, indeed, has been accepted in many legal areas in a number of countries as providing sufficient legal safeguards. UNHCR, for a number of reasons including resource constraints, would prefer to provide such reasons orally . . . it has been said that asylum seekers' cases are disadvantaged because UNHCR Ankara does not provide reasons for its decisions. In fact asylum seekers who have been rejected are given, verbally, the reasons for their rejection at the time of their appeal interviews. They are invited to explain any major contradictions or inconsistencies that might have led to the rejection of their claim.⁷⁴

2.7.3 *International standards*

ECRE's 1990 submission contains no mention of the need to give reasons, perhaps because, in the context of European systems of administrative law and human rights, it may be presumed that reasons are always required for any administrative decision.

The European Union resolution of 1995 appears to bear out this presumption:

The decision on the asylum application must be communicated to the asylum seeker in writing. If the application is rejected, the asylum seeker must be informed of the reasons and of any possibility of having the decision reviewed. The asylum seeker must have the opportunity, inasmuch as national law so provides, to acquaint himself with or be informed of the main purport of the decision and any possibility of appeal, in a language which he understands.⁷⁵

Goodwin-Gill observes that reasons for decisions are recognised as an essential prerequisite for fundamental justice.⁷⁶ How can a decision be meaningfully challenged if the reasons are not clearly stated?

⁷² South Asia Human Rights Documentation Centre, n. 9 above at 10.

⁷³ *Evading Scrutiny: Does UNHCR's Refugee Determination Procedure Measure up to International Standards?* (an assessment of the practice of the UNHCR Branch Office in Turkey), Iranian Refugees' Alliance Inc, New York, May 1995, 25, n. 57.

⁷⁴ UNHCR Ankara, n. 48 above.

⁷⁵ European Union, n. 37 above, para. 15.

⁷⁶ Goodwin-Gill, G. S., Editorial, 'Who to Protect, How . . . , and the Future?', 9 *IJRL* 1, 5 (1997).

The European Court of Human Rights considered this question in *Hadjianastassiou v. Greece*. In that case, concerning a military court martial, the appellant had only five days to lodge his appeal, but did not receive written reasons for the first instance decision until two months later. Therefore in his written appeal he was only able to rely on what he had been able to hear or gather during the hearing. The European Court found that Greece was in breach of article 6 of the European Convention. Courts have to indicate with sufficient clarity the grounds on which they base their decisions, and it is this which ‘makes it possible for a person to “exercise usefully the rights of appeal available to him”’.⁷⁷ Although this ruling was made in a criminal case, the requirement also applies to civil cases.⁷⁸

Goodwin-Gill points out that:

Reasons alone are meaningless, however, unless the decision-maker identifies the material facts, weighs relevant country-of-origin evidence; assesses credibility; identifies and interprets the relevant law; applies the law to the facts in a reasoned way; and determines whether the claimant is a refugee.⁷⁹

This is what UNHCR is required to provide to rejected applicants if it is to comply with international standards.

2.8 Right of appeal

2.8.1 UNHCR practice

Like other aspects of the refugee status determination process, UNHCR appeal mechanisms vary to some extent from one place to another. In almost all instances, appeals are decided by staff of the field office where the original decision was made.

In Bangkok, appeals are usually decided by the protection officer, or, where the original decision was made by the protection officer, by one of the other officers in the legal/protection team. According to the ‘pro-forma’ letter of rejection: ‘you may seek a review of this decision within 30 days of receipt of the same, if you have any materially new or additional information. The appeal will be made on the basis of your second *written* claim’. Until 1995 appellants were usually re-interviewed by the officer conducting the appeal, however since that time there has been a change of policy/practice which means that appellants are re-interviewed only on a ‘needs’ basis. In practice, the majority of applicants are not re-interviewed.

In New Delhi, appeal cases are reviewed by two officers other than the officer who made the original decision. In Kuala Lumpur, there are

⁷⁷ *Hadjianastassiou v. Greece*, (69/1991/321/393), 16 Dec. 1992.

⁷⁸ *H v. Belgium*, A127-B, para. 53 (1987); Harris et al, n. 21 above, 215–6.

⁷⁹ Goodwin-Gill, Editorial, n. 76 above, 5.

only two officers sharing the work of status determination. Each is responsible for dealing with appeals against decisions of the other. An appeal interview is normally conducted for this purpose. In Phnom Penh there is said to be no right of appeal, however the case may be ‘reopened’ if there is any new evidence or new elements.

In some of the UNHCR field offices in Asia, there is only one staff member engaged in refugee status determination. This makes it difficult for appeals to be decided by a person other than the original decision-maker.

2.8.2 UNHCR policies and statements

ExCom’s minimum requirements for refugee status determination, as set out in the *Handbook*, state that:

If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.⁸⁰

This is indeed a very minimal requirement. In the training manual RLD2 there is a slight advance on this, in the assertion that: ‘An appeal should always be reviewed by a person or persons other than the original decision-maker(s).’⁸¹

In the same training manual there is a ‘Determination Procedures Checklist’ which addresses itself to the desirability of an oral hearing: ‘Permit the applicant to present his or her case in *person* to the decision-maker wherever possible, at the level of first instance and/or appeal decision.’

UNHCR became rather more expansive in their views in their note on procedures in Hong Kong:

... in UNHCR’s view the notion of ‘appeal for a formal reconsideration’ includes some basic principles of fairness applicable equally to judicial or administrative reviews, such as the possibility for the applicant to be heard by the review body and to be able to obtain legal advice and representation in order to make his submission ... UNHCR believes that the notion of fairness also requires the review body to provide the grounds for its decision, so that the applicant can be reassured that he has had a fair hearing and the criteria have been applied properly.⁸²

2.8.3 International standards

The standards in most Convention countries are considerably higher than the minimal standards promulgated by UNHCR, or the less-than-minimal standards followed by UNHCR in its own practice.

⁸⁰ UNHCR *Handbook*, para. 192.

⁸¹ UNHCR Training Module RLD2, n. 5 above, Discussion of Case F.

⁸² UNHCR, Note, n. 50 above.

Article 14 of the International Covenant on Civil and Political Rights and article 6 of the European Convention on Human Rights require a right of appeal from administrative decisions to 'a fair and public hearing . . . by an independent and impartial tribunal'. Whilst, as noted above, there has not yet been a definitive ruling that this provision applies to refugee status determination, many governments effectively apply it.

The European Union's 1995 resolution appears to accept that these human rights standards are applicable: 'In the case of a negative decision, provision must be made for an appeal to a court or a review authority which gives an independent ruling on individual cases'.⁸³ This is also the practice in many other countries which are parties to the Refugee Convention.

In Australia, for example, independent Refugee Review Tribunal conducts reviews on the merits of adverse refugee status determinations by the Department of Immigration and Multicultural Affairs. It is required to take into account all the available evidence including any new submissions or evidence. Hearings are conducted by single members of the Tribunal on inquisitorial lines. The appellant has the right to an oral hearing, unless the Tribunal member decides to reach a positive decision on the basis of the documentation and written submissions. There is no right of legal representation before the Tribunal, but in practice legal representation is invariably allowed. The government is not normally present or represented in the proceedings. The Tribunal makes detailed written decisions which are published and available on the Internet (excluding any information which might identify the applicant). Judicial review is also available to ensure that decisions of the minister, the department, and the Refugee Review Tribunal are made in accordance with legal requirements.⁸⁴

Of all the necessary reforms in UNHCR, the creation of an independent appeals mechanism would involve perhaps the greatest changes and difficulties. A number of different models might be contemplated, but a full discussion of the various possibilities is beyond the scope of this article. One model might be synthesised with the suggestion already made in several quarters that an international judicial body be set up with the purpose of giving binding interpretations of the 1951 Convention, along the same lines as the treaty bodies set up under the various human rights conventions.⁸⁵ A more immediate step might be to set up local or regional mechanisms using local lawyers or NGOs.

A proper appeal system would provide the benefits not only of

⁸³ European Union, n. 37 above, para. 8.

⁸⁴ See, for example, Jean-Pierre L. Fonteyne, 'Overview of Refugee Determination Procedures in Australia', 6 *IJRL* 253 (1994).

⁸⁵ See, for example, Terje Einarsen, 'The Legal Condition of Refugees in Norway', 7 *JRS* 277, 296 (1994).

procedural fairness to applicants, but also of increased consistency in decision-making, and, if decisions are published, more guidance to asylum seekers, their advisers, and to governments.

2.9 Requirement of ‘new information’ for appeals in Bangkok office

2.9.1 UNHCR practice

In Bangkok, the ‘pro forma’ letter of rejection says: ‘you may seek a review of this decision within 30 days of receipt of the same, if you have any materially new or additional information.’ This would not constitute an appeal in the generally accepted sense, for UNHCR Bangkok is effectively saying that they are not prepared to look at the possibility of errors in the gathering of evidence, in the interpretation of the evidence, or in the application of the law. However, the experience of JRS Bangkok is that the requirement of new evidence is not strictly adhered to: submissions in relation to existing evidence or in relation to application or interpretation of the law will in fact be considered by UNHCR even if new evidence is not submitted.

Other UNHCR offices surveyed in Asia do not appear to have this requirement of new evidence.

2.9.2 UNHCR policies and statements

The minimum requirements laid down by ExCom refer to ‘formal reconsideration of the decision’, without any mention of the need for new evidence.⁸⁶ In the training manual RLD2 it is said that ‘appeals should not be rejected merely because new facts are not presented. Appeal systems exist because of the serious consequences of wrong decisions.’⁸⁷ At another point, the same manual says that ‘An appeal on the merits of the case, not just on questions of law, is absolutely essential in any refugee determination procedure.’⁸⁸

2.9.3 International standards

Clearly the stated policy of UNHCR Bangkok is not in accordance with the requirements of international law, is out of line with the practice of States parties, and is in breach of UNHCR’s own policies as laid down to Convention countries. It appears that the rejection letter in Bangkok may be worded so as to discourage appeals. If that is the case, it is entirely inappropriate and inconsistent with UNHCR’s own published policies.

⁸⁶ See UNHCR *Handbook*, para. 192.

⁸⁷ UNHCR Training Module RLD2, n. 5 above, discussion of Case F.

⁸⁸ *Ibid.*, discussion of case G.

3. Conclusions

3.1 UNHCR's obligations in relation to 'fair hearing'

Western governments have introduced a number of mechanisms in recent years to keep potential refugees outside their borders, such as visa requirements, interdiction, carrier sanctions, and so forth. Refugees who manage to escape their own countries increasingly find themselves in non-Convention countries, with no alternative but to apply to UNHCR for recognition. Refugees who manage to make their way to Western countries, despite all the barriers, are increasingly characterised as 'queue jumpers'. The 'queues' referred to are apparently the programmes for resettlement of refugees from other countries of first asylum. A condition precedent for entry to most such programmes is recognition as a refugee by UNHCR, and Western governments rely on UNHCR referrals to their resettlement programmes. Indeed, most governments rely completely on UNHCR for referrals, and do not accept direct approaches from refugees seeking resettlement;⁸⁹ thus, UNHCR has effectively become a proxy decision-maker for Western governments in refugee status determination. Acting in this proxy role, it is all the more important that UNHCR not deprive people of the right to a 'fair hearing' which they would receive if they were physically present in North America, Europe, or Australasia.

UNHCR asserts that its procedures 'guarantee the asylum seeker a fair and proper hearing'.⁹⁰ As discussed in section 1.5 above, the words 'fair hearing' have a particular meaning in international human rights law. Judging by its practice, however, UNHCR appears to have a different understanding. Whilst there are strong arguments that the 'fair hearing' requirements of international human rights law apply to refugee status determination, there has yet to be a definitive ruling on this question. Nevertheless, in practice many governments extend fair hearing rights to asylum seekers within their borders.

The legal arguments against the applicability of the 'fair hearing' standard are primarily based on the premise that there is no right of entry to a State, and that this is the right being determined. Whilst this argument is problematic, it is clearly not applicable to UNHCR which cannot and does not purport to accord the right of entry to any State. In that sense, it might be said that there are stronger arguments for the applicability of this human rights standard to UNHCR than to States, in the context of refugee status determination.

UNHCR ought not wait until there is a definitive ruling on the question

⁸⁹ UNHCR, *Resettlement Handbook*, Geneva, July 1997.

⁹⁰ Letter from Dennis McNamara (Director, Division of International Protection, UNHCR) to JRS Asia Pacific, 23 Oct. 1997.

from the Human Rights Committee. On the contrary, and consistently with its advocacy role for the human rights of refugees, UNHCR should promote the extension of 'fair hearing' rights to refugee status determination. Indeed, UNHCR has advocated this position in Europe in recent years, and one would also expect it to recognise its own obligations in this regard.

3.2 Resources

Compliance with international standards will undoubtedly require an increase in the resources devoted to refugee status determination within UNHCR. Given its shrinking budget, the broad range of its responsibilities, and the many competing priorities, should more resources be devoted to the relatively small number of people subject to individual status determination? A number of interrelated issues are involved in attempting to answer this question.

First, UNHCR is of the view that its status determination processes do not and cannot parallel the procedures put in place by 'sophisticated and resource well-endowed governments'.⁹¹ Governments in developing countries would be likely to hold the alternative view that UNHCR is more 'sophisticated and well-endowed' than governments. Governments would argue that their resources are in fact very limited, and that there are many other competing priorities. The fact is that individual refugee status determination is expensive, but it is UNHCR's role to convince governments to allocate the necessary resources.⁹² In fact, this is currently one of UNHCR's primary roles in the Asian region.⁹³

This task can only be made more difficult by the fact that UNHCR itself is not prepared to commit the necessary resources to refugee status determination. UNHCR is in the process of trying to reduce the proportion of its budget spent on so-called 'urban refugees', who almost invariably are the people seeking individual recognition. UNHCR has recently argued that 'urban refugees, while constituting less than 2% of UNHCR's refugee caseload (and less than 1% of the total caseload of concern to the High Commissioner), demand a disproportionate amount (estimated at 10–15%) of the organisation's human and financial resources'.⁹⁴ The issue might be expressed more directly: is it not a priority to provide food and shelter for people in camps, rather than sophisticated administrative and appeal systems for people in cities? UNHCR's dilemma must be

⁹¹ Ibid.

⁹² See Training Module RLD2, n. 5 above, Discussion of Case Study G: '... the authorities should be encouraged to increase the resources in their system. Experience has shown that an increase in staffing is cost effective when compared with the financial assistance costs of excessively long determination processes.'

⁹³ See, for example, UNHCR, 'Update on Regional Developments in Asia and the Pacific', n. 60 above.

⁹⁴ *UNHCR Comprehensive Policy on Urban Refugees*, n. 2 above, para. 21.

acknowledged, but it is not unlike that facing governments. UNHCR's role is to remind governments that legal obligations are owed to people who come under the Convention refugee definition. Although arising in different ways, UNHCR also has legal obligations towards this group of refugees.

The consequences of a favourable refugee status determination conducted by UNHCR are quite different from those when decisions are made by governments. If people are recognised as refugees by a government, they normally receive legal status in that country as well as the other rights under the 1951 Convention. Recognition by UNHCR does not have the same outcome. In many countries, for example, Thailand, a UNHCR-recognised refugee is still considered 'illegal' by the government, and durable solutions remain elusive. For many people, recognition by UNHCR appears to have little tangible outcome, and the significance of such recognition varies from country to country, from one person to another, and over time.

For many people, UNHCR recognition has very concrete effects. In some countries, recognition will entitle people to some form of temporary legal immigration status. In India, for example, UNHCR-recognised refugees can register with the Foreigners Regional Registration Office where they will usually receive a visa to stay for up to 12 months. The Indian courts have also recognised the role of UNHCR; in some instances courts have stayed the deportation of individuals when an application for the determination of refugee status is pending with UNHCR, and granted leave to detainees to travel to New Delhi to seek determination of refugee status from UNHCR.⁹⁵

Whilst UNHCR recognition does not itself entitle a person to resettlement in a third country, in many instances it opens the door to this possibility, as noted in section 3.1 above. Also significant is the assistance provided to recognised refugees by UNHCR for food, shelter and healthcare; although generally at a very minimal level, it is essential to survival for many refugees.

Refugee status determination is the linchpin of refugee protection because it is the means by which those who need protection are identified. Despite all the problems which exist for UNHCR in the provision of 'international protection' in unsympathetic asylum countries, recognition by UNHCR is still of great significance. The process of refugee status determination will be expensive for UNHCR, as it is for governments, but it is an expense that must be borne. UNHCR's donors must be persuaded of the importance of providing funding to enable UNHCR to

⁹⁵ See, for example, *Dr Malavika Karlekar v. Union of India*, Supreme Court of India, 25/9/92, *Shri Khy-Htoon v. The State of Manipur*, Gauhati High Court, 11/9/90. See B.S. Chimni, 'The Legal Condition of Refugees in India', 7 *JRS* 378, 380 (1994).

carry out its obligations in relation to refugee status determination, particularly as these donors are in many cases the very same governments which use UNHCR as a proxy decision-maker for resettlement purposes.

3.3 Institutional culture

Some UNHCR officers are likely to resist calls for greater transparency and accountability in their dealings with individual applicants. This is a familiar pattern with government officers in most countries where administrative law reforms have been introduced; there is often a culture in a bureaucracy that ‘we are the experts in this area, we are sympathetic, we are honest, and we are overworked. The system might not be perfect but all-in-all the people get a fair deal. Why make life more difficult for us?’ This is an understandable response, but it is not justifiable. A system which openly submits itself to scrutiny is more likely to maintain its integrity.

Some UNHCR officers may argue, as government officers have argued, that they need to be able to write frank assessments of people in the files and that people might be offended if they were allowed to see them. They may argue that introduction of modern administrative law principles will increase workloads, leading to increased staffing requirements, and more expense. They may claim that the system will become unworkable. These arguments should be rejected, as many governments have now rejected them.

In any system of refugee status determination, a culture of cynicism or disbelief can emerge, particularly where people are overworked and exposed to large volumes of asylum seekers. This is not necessarily the problem within UNHCR, however, but there is no reason why UNHCR staff should be immune. As in any other system, an independent appeal structure is particularly important in providing a corrective to any imbalances which may develop, and in ensuring consistency amongst decision-makers.

3.4 A fair and open process

For the many reasons outlined in this article, it is important that UNHCR’s clients should have access to a fair and open refugee status determination process, in accordance with the highest international standards. Such a system, it is suggested, would involve the following:

- publication and wide availability of clear guidelines or rules for UNHCR staff working in refugee status determination,
- provision to all asylum seekers of standardised clear written information — in their own languages — on the criteria for refugee status and the procedure used by UNHCR field offices,

- promoting free access to independent legal advice and representation in relation to refugee status determination,
- encouraging and facilitating the presence of legal representatives or other advisers at all interviews and appeal hearings,
- permitting asylum seekers (and their representatives) to have access to their files, and to have copies of any material on their files,
- permitting asylum seekers to have access to all materials or information on which decisions are based,
- provision of transcripts of interviews to asylum seekers and their representatives,
- full written decisions including reasons for any decisions, particularly where claims are rejected,
- the establishment of an independent and impartial body to decide appeals, outside the branch office structure,
- appeals to involve a full review of the merits of the decision,
- appeals to be conducted as hearings with the right of appearance and representation,
- appeal decisions to be published and widely available,
- publication of detailed statistics on rates of recognition/rejection and appeals.

UNHCR's donors may need to provide targeted funding for the necessary upgrading of refugee status determination procedures, and to enable UNHCR to carry out its obligations in this regard. This will not only benefit clients, but ultimately it will benefit UNHCR itself to adopt a process of refugee status determination which embodies the principles of 'best practice' outlined above. First, UNHCR will bring itself into clear compliance with international human rights law. Secondly, UNHCR will overcome the suspicion, anger and resentment engendered by the current system, and will regain the respect of many disaffected asylum seekers and refugees. Thirdly, these reforms will promote consistency in UNHCR decision-making, which will also lead, among others, to reduced incentives for 'irregular movement'. Finally, the changed mechanism will give UNHCR an important tool in its promotion of fair and effective procedures for refugee status: UNHCR will be providing a model for States to emulate and aspire to.

Appendix A

A unique case: UNHCR's refugee status determination in Cambodia

As mentioned in the introduction, the practice of refugee status determination in Cambodia is unique. Whilst there are minor differences in UNHCR's practice from one location to another, there are many

common features which are described and analysed in detail in the following sections. The arrangements in Cambodia are so different as to merit a separate description.

Cambodia is a State Party to the refugee convention. However the Cambodian government has not yet implemented any legislation relating to the recognition or treatment of refugees. It does not yet have its own refugee status determination procedure, and continues to rely on UNHCR to carry out this function.

UNHCR has entered into a formal agreement with a non-government organisation, the Jesuit Refugee Service (JRS), to provide assistance to asylum seekers in preparing, presenting and defending their cases to UNHCR. This agreement, in place since 1995, is part of a broader agreement in which JRS is an 'implementing partner' of UNHCR, for the purposes of providing more general welfare assistance to asylum seekers and refugees, including financial, housing, medical and other emergency assistance. Funding is provided by UNHCR for all these purposes.

Under the agreement, UNHCR conducts a brief initial interview and then refers asylum seekers to JRS. The JRS lawyer assumes responsibility for preparing a written claim for refugee status and a 'well-balanced factual file'. Under the agreement, the JRS lawyer is required to:

- conduct an extensive interview with the asylum seeker, 'maintaining a clear and accurate transcript of the interview',
- collect personal documentation, such as ID cards, military cards, court judgments, prison release certificates, visas etc.,
- collect and record all available and relevant country of origin information, which may either support or challenge the asylum seeker's claim,
- prepare a written brief comprising a statement of the facts together with a concise legal analysis of the claim.

According to the agreement, following submission of the brief, a meeting is held between UNHCR, the asylum seeker, and the JRS lawyer. UNHCR has the opportunity to pose questions and the asylum seeker and/or JRS has the opportunity to respond, as well as to raise other matters whether or not they are mentioned in the written brief.

Under the agreement, the primary duty of the JRS lawyer is to the asylum seeker. It is not the role of the JRS lawyer to offer a personal opinion regarding the asylum seeker's credibility. However the JRS lawyer is obliged to relate to UNHCR any fundamental and material inconsistency in the asylum seeker's claim.

UNHCR will then make a decision on the claim. Prior to making a final decision to reject a claim, UNHCR will identify to JRS any crucial issues which form the basis of rejection, and JRS has an opportunity to

address these issues. The decision is communicated to JRS and the asylum seeker in person, and a written statement of the decision is provided. UNHCR prepares a brief statement of the reasons for the decision, and this is placed on file. The agreement obliges UNHCR to discuss the reasons for the decision with JRS.

There is no appeal from UNHCR's decision. However, either UNHCR or JRS may request to reopen the case should there be any new evidence or new elements.