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## **Prima facie status and refugee protection**

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## Introduction

A dominant feature of the refugee problem is the phenomenon of large-scale influx of refugees.<sup>1</sup> A large scale influx, or 'mass influx' as this situation is also called, has been described by the United Nations High Commissioner for Refugee (UNHCR) as referring to an exceptional situation in which rapid arrival of large numbers of asylum-seekers may overwhelm the State's capacity, in particular, for the individual administration of their claims.<sup>2</sup> Although such influxes have existed since the 1950s when the present regime of refugee protection was formulated, they did not become such a big issue in refugee policy until the 1980s and 1990s when such influxes ceased to be confined to particular geographical regions and became experienced globally. A challenge for refugee policy has been how to devise appropriate mechanisms for responding to this type of mass influx.

One of the main mechanisms<sup>3</sup> that has been devised for responding to large-scale influxes is group determination of status on a *prima facie* basis. A group determination on a *prima facie* basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to exodus. Its purpose is to ensure admission to safety, protection from refoulement and basic humanitarian treatment to those patently in need of it.<sup>4</sup>

The determination of refugee status on a group basis gives rise to a number of questions. Among them are when should the *prima facie* mechanism be resorted to? What kind of procedures should be employed for this kind of status determination? If refugee status is not determined individually, how are those who do not need or deserve international protection identified and rejected or excluded? What is the nature of the status acquired under a *prima facie* determination? What are the standards of treatment which *prima facie* refugees are entitled to? Are these standards different from those applicable to refugees recognised on individual basis? What are the appropriate solutions for *prima facie* refugees?

This paper attempts to answer these questions by way of deductive reasoning from international instruments on refugees and by examining state practice, focusing on the experience in Africa. The position taken in this paper in relation to the above issues is that the principal triggering factors for employing the *prima facie* approach should be the objective circumstances which led to mass displacement and the scale of displacement. As to procedures, all asylum seekers arriving in mass influx should be admitted into the country of asylum and should not be subjected to *refoulement*. Those asylum seekers who

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<sup>1</sup> This study was commissioned by UNHCR's Department of International Protection for the Global Consultations on International Protection.

<sup>2</sup> UNHCR Background note: Informal meeting on Temporary Protection, 20 April 1995, para 25.

<sup>3</sup> The other main mechanism is the 'Temporary Protection approach'. This subject is beyond the scope of this paper. For relevant works see IGC, *Report on Temporary Protection in States in Europe, North America and Australia* (Geneva, Secretariat of the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, 1995); Kalin, W. *Towards a Concept of Temporary Protection*, A Study Commissioned by the UNHCR (UNHCR, Department of International Protection), 12 November 1996) and Fitzpatrick, J., 'Temporary Protection on Refugees: Elements of a Formalised Regime' in *American Journal of International Law*, April 2000, Vol. 94 No 2., p. 293.

<sup>4</sup> UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework, Background Paper prepared for the Global Consultation on International Protection, EC/GC/01/4, 19 Feb. 2001, para 6.

do not need or deserve international protection should be dealt with later through the process of cancellation.

The status of persons found to be *prima facie* refugees is that they are presumptively refugees within the meaning of the relevant instruments. This presumption is conclusive unless it is dislodged by evidence that either any person was wrongly recognised as a refugee or was liable to exclusion under the provisions of refugee law. As a logical consequence of this, *prima facie* refugees are entitled to enjoy all the rights of refugees under the 1951 Convention relating to the Status of Refugees (hereafter 1951 Refugee Convention) and any other instrument applicable to them.

The best solution for the plight of refugees in large-influx situations is repatriation. However, this should not be a reason for adopting policies which abridge the rights of refugees with a view to encourage them to repatriate. Moreover, local integration and resettlement should remain available for those refugees for whom these are the most appropriate solutions.

### **Circumstances under which *prima facie* recognition occurs**

Historically, recourse has been made to the *prima facie* mechanism in situations of large-scale influx. The factors that trigger the application of the *prima facie* approach are implicit in the following paragraph from UNHCR's *Handbook*:

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called 'group determination' of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.<sup>5</sup>

Thus, the interrelated factors for the application of the *prima facie* mechanism are first and foremost the objective circumstances which led to the mass displacement, which by its very nature demonstrates the need for international protection, the numbers of the asylum seekers involved and the urgency to provide assistance which make it impracticable and forbiddingly costly to administer individual status determination.

Over the last fifty years, the *prima facie* approach has been used in almost all parts of the world. It was used in the case of Hungarian refugees who fled the failed revolution in their country in 1956. The same approach was also taken in Africa both before and after the adoption of the 1969 OAU Refugee Convention. In Asia, *prima facie* status was accorded to refugees who fled Vietnam after the fall of Saigon until the adoption of the

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<sup>5</sup> UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Re-edited version) Geneva 1992, paragraph 44, at p. 13.

Comprehensive Plan of Action which required an individualised refugee status determination procedure to be followed.<sup>6</sup>

### **The juridical nature of *prima facie* status**

Under refugee law, a person is a refugee if s/he falls within any of the definitions of that term under relevant international instruments and which are applicable to him or her. The principal and universal definition of a refugee is found Article 1(2) of the 1951 Refugee Convention which, as modified by the 1967 Protocol defines the term refugee as a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it. Under Article 1(F), a person is excluded from refugee status if he or she has committed a crime against peace, a war crime or a crime against humanity, a serious non political crime outside the country of refuge prior to his/her admission to that country as a refugee or s/he has been guilty of acts contrary to the purposes and principles of the United Nations.

There are regional instruments on refugee protection which provide complementary definitions of a refugee. Notable among these is the 1969 OAU Convention on Refugees which adopts the definition of a refugee under the 1951 Convention and adds, under Article I(2), that: AThe term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. A similar definition is found under the Cartagena Declaration on Refugees of 1984 which is applicable in South America.

A question which has been subject to different opinions is whether or not refugees recognised on a *prima facie* basis acquire refugee status under any of the above definitions in the same way and to the same extent as those whose status is individually examined.

There are two schools of thought with regard to the nature of the status which refugees recognised on a *prima facie* acquire. One school maintained by George Okoth-Obbo is that Athe *prima facie* concept refers to the provisional consideration of a person or persons as a refugee without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual.<sup>7</sup> A[It] essentially consists in a device for preliminary decision-making on what is the separate

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<sup>6</sup> See Bronee, S. A., >The History of the Comprehensive Plan of Action= in *International Journal of Refugee Law*, Vol 5 No 4, pp.535-543, at 536 & 541.

<sup>7</sup> Okoth-Obbo, G., Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee problems in Africa, Paper Presented at the Special OAU/UNHCR Meeting of Government and Non-Government Experts Technical Experts on the 30<sup>th</sup> Anniversary of the 1969 OAU Refugee Convention, para 85.

question of refugee status.<sup>8</sup> The concept Asays nothing ... about the question of how to conclusively determine the status of those claimants.<sup>9</sup> Refugee status granted on a *prima facie* basis remains presumptive although this presumption continues to be enjoyed until there is a specific decision to the contrary.<sup>10</sup> This suggests that where persons are granted asylum after a group status determination, they are, strictly speaking, not conclusively determined to be refugees under any of the above definitions.

The second school of thought is that articulated by Ivor Jackson. In his comprehensive study of refugee determination in group situations he maintains that:

Determination that a group is *prima facie* a refugee group, raises a presumption that the individual members of the group are refugees. As such, they can benefit from the international protection and assistance extended to them by UNHCR, on behalf of the international community. They retain their refugee character unless there are strong indications that they are not -or are no longer- to be considered as refugees.<sup>11</sup>

In support of the above position, he argues that the concept of *prima facie* was developed not as a separate and autonomous juridical concept but with reference to refugee definitions found under the Statute of the UNHCR of 1950 and the 1951 Refugee Convention (the 1950/51 definitions). Whether or not a group of asylum seekers were entitled to *prima facie* refugee status depended on the manner in which the 1950/51 definitions themselves were interpreted.<sup>12</sup>

To support his argument, Jackson cites the example of the approach taken in determining the status of Hungarians who had fled the events of autumn 1956 which was explained by the then High Commission for Refugees as follows:

This interpretation has been adopted by the Austrian authorities who are prepared to consider the Hungarian refugees in Austria to be within the scope of the Convention and to issue them with a normal eligibility certificate to this effect as soon as it is technically possible, unless eligibility examinations show that any individual applicant should not be entitled to the benefits of the Convention. The attitude which has been taken by the Austrian authorities on this question has been followed in most countries where refugees of Hungarian origin coming though Austria have been given asylum.<sup>13</sup>

He then goes on to observe that the words 'unless eligibility examinations show that any individual applicant should not be entitled to the benefits of the Convention' can only imply a *prima facie* presumption of refugee status<sup>14</sup> in accordance with the Convention referred to in the paragraph which is the 1951 Refugee Convention.

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid, para 87.

<sup>10</sup> Ibid, para 86.

<sup>11</sup> Jackson, *The Refugee Concept in Group Situations*, Martinus Nijhoff, (1999), p. 4.

<sup>12</sup> Ibid, *passim*.

<sup>13</sup> Document A/AC.79/49, p2 quoted in Jackson, Ibid, p. 117.

<sup>14</sup> Ibid.

Another example cited by Jackson is the approach taken by UNHCR during the influx of Algerians in Morocco and Tunisia in 1957, particularly before the resolutions of the General Assembly expressly authorising the agency to assist these refugees. The High Commissioner would first satisfy himself that the influx contained in part persons who *prima facie* appeared to fall within the competence of the High Commissioner's Office as defined in the Statute of the Office.<sup>15</sup> The same study also reveals that in most subsequent mass influx situations that followed in Africa and Latin America, the reference point for determining whether or not the asylum seekers involved were refugees were the definitions of the term under the 1950 Statute of the UNHCR and the 1951 Refugee Convention.<sup>16</sup>

From the above review Jackson concludes that *prima facie* recognition is presumptive but conclusive that persons so recognised are refugees under applicable definitions unless that presumption is dislodged. If the objective circumstances that triggered the application are those under Article IA(2) of the 1951 Refugee Convention or Article I(1) of the 1969 OAU Convention on Refugees, then the persons recognised to be *prima facie* refugees are refugees within the meaning of those Articles. If the circumstances referred to are those under Article I(2) of the OAU Convention, then the refugees in question will be presumed to be refugees under that article.

Essentially, the question which both schools are trying to answer is what is the probative effect or worth of a *prima facie* determination on the question of the status of the persons concerned under refugee law. Therefore, in order to determine which of the two schools is correct, it is necessary to delve in greater detail in the law relating to proof, and the role of the concept of *prima facie* under this law.

The branch of law relevant to proof of disputed matters of fact is the law of evidence. Under this law, *prima facie* is a term used to denote evidence which, if accepted, appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary.<sup>17</sup> The principal use of the concept of *prima facie* in the law of evidence is for the allocation of burden of proof. Under the law of burden of proof, there are two main burdens.<sup>18</sup> There is the persuasive burden (the legal burden) and the evidential burden (the burden of adducing evidence). The legal burden refers to the obligation on a party to convince the tribunal of facts (on preponderance of probability or beyond reasonable doubt as the case may be), of the truth of some proposition of fact which is in issue and which is vital to the case.<sup>19</sup> This duty is fixed by law at the beginning of the proceedings and remains unchanged throughout the proceedings exactly, never shifting in any circumstances whatsoever.

Evidential burden (*onus probandi*) refers to the duty to go forward in argument or in producing evidence, whether at the beginning of a case, or any later moment throughout the proceedings. Unlike the persuasive burden, evidential burden is not constantly on any party. It shifts as soon as the proponent has adduced evidence which *prima facie* gives

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<sup>15</sup> See Jackson, *op. cit.*, pp. 122-124.

<sup>16</sup> *Ibid.*, pp. 143 *et seq.* and 347 *et seq.*

<sup>17</sup> Sarkar, P.C., & Sarkar, S., (eds) *Sarkar's Law of Evidence*, 13<sup>th</sup> ed, 1981, p 911.

<sup>18</sup> For a detailed treatment of this subject see Tapper, C., *Cross & Tapper on Evidence*, 9<sup>th</sup> ed., Butterworths, 1999, Ch. III.

<sup>19</sup> Buzzard, J.H., (ed) *Phipson on Evidence*, 11<sup>th</sup> ed, Sweet & Maxwell, London, 1970, p. 185.

rise to a presumption in his/her favour. It may again shift back to him/her if the rebutting evidence produced by his/her opponent preponderates.

When the proponent of an issue discharges the evidential burden which rests on him/her by adducing evidence that is *prima facie*, the evidential burden of disproving the case by the proponent of the issue in question provisionally shifts to the opponent. But for one party to shift the onus to the other party, s/he must prove his case sufficiently to justify a judgement in his favour if there is no evidence to the contrary.<sup>20</sup> This means that if the party to whom the onus has shifted does not adduce sufficient evidence to shift back the onus to his/her opponent, the evidence of the opponent becomes conclusive on the matter in issue.

How does this apply when the issue is whether or not an asylum seeker who arrives as part of a mass influx is a refugee? As under the general rules of evidence, the burden of proving a claim of refugee status lies with the person who submits that claim. However, due to the peculiar circumstances in which asylum seekers find themselves, the duty to ascertain and evaluate the relevant facts is, under refugee law, shared between the applicant and the examiner.<sup>21</sup> This then means that in principle the evidential burden rests, in the first instance, with the claimant. Where the claimant discharges that duty, either by themselves or with the assistance of the examiner, then s/he is presumed to be a refugee within the meaning of any applicable definition and the burden to disprove this provisionally shifts to any person who opposes this view. If for any reason no such evidence is adduced, the evidence by, or in favour of, the claimant becomes conclusive.

From the foregoing it is submitted that the view that *prima facie* recognition is presumptive but conclusive, unless the presumption is disproved, more accurately reflects the law. As will be seen below, this analysis accords with state practice.

### **Procedures for granting *prima facie* recognition**

Although group determination has been widely employed over a long period of time, specific procedures have rarely been put in place by which it is to be carried out.<sup>22</sup> There have been a number of EXCOM Conclusions which have addressed the question of asylum procedures but none of them adequately deals with this issue in the context of mass influx. One of the earliest instruments to specifically address the question of asylum procedures is EXCOM Conclusion No 8 on *Determination of Refugee Status* (1977). However, this conclusion was essentially aimed at individual applications for asylum and not group determination in situations of mass influx.

The applicability of the above Conclusion in situations of mass influx was considered by the 1979 Arusha Conference on the African Refugee Problem. After affirming that the definitions of the term 'refugee' contained under Article I paragraphs 1 and 2 of the 1969

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<sup>20</sup> Per Lord Hansworth MR, in *Stoney v Eastbourne RD Council*, 1927 1 Ch. 367, 367.

<sup>21</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992 ed, para 196 and Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> Ed., Clarendon Press, Oxford, 1996, pp. 34-35 and 349.

<sup>22</sup> UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, *Op. Cit*, para 7.



OAU Convention were the basis for determining refugee status in Africa, the Conference went on to recommend that in case of individual applications, the determination of status should be done in accordance with the procedure recommended by the Executive Committee of the UNHCR in Conclusion 8 (1977). However, the Conference considered “the application of such procedures might be impracticable in the case of large-scale movements of asylum seekers in Africa a matter which calls for setting up special arrangements for identifying refugees”<sup>23</sup> and went on to recommend that “the exact nature of such arrangements be subject of further study.” The Conference requested the Office of the United Nations High Commissioner for Refugees “to undertake a comprehensive in-depth study of the type of procedures or special arrangements envisaged, and, if appropriate, to cooperate in their implementation”.

Subsequently, the EXCOM adopted Conclusion No 22 on *Protection of Asylum Seekers in Situations of Large-Scale Influx* (1981). The Conclusion makes provisions for, *inter alia*, admission and non-refoulement. However, unlike Conclusion No 8, it is silent on procedural standards including on what procedures should be followed in granting group status and how can one exclude criminal and other elements who are not deserving of international protection.

Another relevant EXCOM Conclusion is No 82 on *Safeguarding Asylum* (1997), which reiterates the call for respect of the principle of *non-refoulement*, expressly calls for access, consistent with the 1951 Refugee Convention and the 1967 Protocol, for asylum seekers to fair and effective procedures for determining status and protection needs and calls for rapid, unimpeded and safe access to persons of concern to UNHCR. It also draws attention to the need to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Refugee Convention and in other relevant international instruments, in order to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are entitled to it. However, like the other two conclusions, it does not deal with how these matters are to be handled in situations of mass influx. In 1979, UNHCR published the *Handbook on Procedures and Criteria for Determination of Refugee Status*<sup>24</sup>. However this is essentially addressed to individual status determination under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.

In the absence of international instruments providing for standards for recognition of refugees on a *prima facie* basis, states have devised their own procedures under national legislation and state practice. There are two main ways of granting group status, namely ministerial declaration and status determination by a specified body, which are detailed here.

### *Ministerial declaration*

Refugee status can be granted on a group basis by the Minister or any other authority responsible for refugee affairs declaring a class of persons to be refugees. Among the countries which have used this technique for a long time is Tanzania where the power of the Minister to declare any class of persons as refugees was first provided for under the

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<sup>23</sup> Recommendation 2 paragraph 4.

<sup>24</sup> The Handbook was reedited in 1992.

now repealed *Refugees Control Act, 1966*. Section 3 thereof provided that “subject to the provisions of subsection (2), the Minister may, by order published in the *Gazette*, declare any class of persons who are, or who prior to their entry into Tanganyika were, ordinarily resident outside Tanzania to be refugees for the purposes of this Act.” This provision was reproduced often verbatim in the refugee laws enacted in other countries facing mass influx of refugees including Uganda<sup>25</sup>, Zambia,<sup>26</sup> Swaziland<sup>27</sup>, Lesotho<sup>28</sup> and Zimbabwe.<sup>29</sup> The powers to accord refugee status by way of declaration have been retained in the Refugees Act of 1998 of Tanzania under section 4(1)(c), which includes as refugees an individual who ‘belongs to a group of persons which by notice in the Government Gazette has been declared to be refugees’. Another recent legislation to make provision for status recognition by way of ministerial declaration is the South African Refugees Act of 1998.<sup>30</sup>

In practice the above provisions were operationalised by issuance of Orders by the specified Minister declaring specified persons to be refugees. An example of such Order, ‘The Refugees (Declaration) Order, 1966’ of Tanzania issued as Government Notice No 89 of 11/3/66, is reproduced below:

THE REFUGEES (CONTROL) ACT, 1965  
(No. 2 of 1966)

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**ORDER**  
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*Made Under Section 3(1)(a)*

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THE REFUGEES (DECLARATION), 1966

1. This Order may be cited as the Refugees (Declaration) Order, 1966.
2. A person described in column 1 of the Schedule hereto who has entered Tanganyika from the place and after the date opposite to such description in column 2 and 3 otherwise than as the holder of or as a person whose name is endorsed upon an entry permit or pass issued under the provisions of the Immigration Act, 1963 is hereby declared to be a refugee for the purposes of the Refugees (Control) Act, 1965.

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SCHEDULE  
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COLUMN 1	COLUMN 2	COLUMN 3
Rwandese National	Republic of Rwanda	1 <sup>st</sup> January, 1961
Rwandese National	Congo (Leopoldville)	1 <sup>st</sup> June, 1964
Congolese National	Congo	1 <sup>st</sup> June, 1964
Mozambique National	Mozambique	1 <sup>st</sup> September, 1964

Dar es Salaam  
23 February, 1966

R.M. KAWAWA,  
*Second Vice-President.*

Orders of this nature can be made not only in respect of asylum seekers already in the

<sup>25</sup> Control of Alien Refugees Act, Cap 64., Section, Section 3(1).

<sup>26</sup> Refugee (Control Act) 1970, Section 3(1).

<sup>27</sup> The Refugees Control Order, 1978, Sections 2 and 3(1).

<sup>28</sup> Refugee Act 1983, Section 3(1)((c).

<sup>29</sup> Refugee Act 1983, Section 3(2).

<sup>30</sup> Act No 19544, Section 35(1).

country, but also prospective arrivals as well as refugees *sur place*. For example, by General Notice No. 35 published on 4/3/1994, the Tanzanian Minister for Home Affairs declared three specific categories of persons from Burundi to be refugees: (i) those who had arrived and sought refuge on 21<sup>st</sup> October 1993 and thereafter; (ii) those who had entered Tanzania before 21<sup>st</sup> October, 1993 and applied for refuge for reasons unrelated to the events of that date; and (iii) those Burundians who had come to Tanzania before 21<sup>st</sup> October 1993 for any reason, but due to the killings that were taking in the country after that date they could not go back.

The principal advantage of status recognition by way of ministerial declaration is that it obviates the need for an individualised status determination of each asylum seeker which in situations of mass influx may be impracticable and too costly.

As a matter of legal construction, the Minister is not required to conduct any inquiry in relation to any person or class of persons before he or she declares them to be refugees. Thus, strictly speaking, the Minister does not have to form an opinion that a person is *prima facie* a refugee within any of the applicable statutory definition in order to declare them a refugee. However, in practice, Ministers would normally declare a class of persons to be refugees where there exists evidence to suggest that as a result of the situation in the country of origin, these persons were refugees within definitions recognised in a given jurisdiction. A glance at the Declarations made between the 1960s and 1980s indicates that persons declared to be refugees were coming from countries in Southern Africa experiencing external aggression and racial domination and those in central Africa which were experiencing civil wars. Thus, persons who were granted refugee status by ministerial declaration are recognised on a *prima facie* basis. As Okoth-Obbo rightly points out, refugee status acquired by virtue of ministerial declaration under statutory provisions like those under discussion is legally conclusive as to the status of the persons concern.<sup>31</sup>

When persons in respect of whom a ministerial declaration applies arrive in the country of asylum, they undergo screening at entry points in order, among other things, to ensure that they do not carry any weapons and if they do those weapons are confiscated. They are then registered and transferred to their designated camps or settlement.

#### *Status determination by a designated body*

The other method by which *prima facie* recognition is employed is to require each of the asylum seekers arriving in mass influx to appear before a designated body and present his/her case for refugee status. Then, in deciding whether or not such a person is a refugee, the body looks at the objective circumstances in the country of origin to determine whether or not the asylum seeker is a refugee within the meaning of any applicable definition.

Upon arrival in the country of asylum, refugees who are required to undergo this procedure are first screened and then registered at reception centres. Then they are normally placed in transit camps where they have to stay until their status has been

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<sup>31</sup> op. cit, para 86

determined. On the day appointed for status determination, the asylum seekers may appear before the designated status determination body individually or in family groups. They may also appear in clusters of people determined by the case file compilers to have similar cases. The questions that are put to the asylum seekers are not primarily directed at establishing personal circumstances, but on whether the objective situation in the country of origin is such that it would make persons from there refugees within the recognised definitions. Persons found to be refugees are thereafter allocated settlement camps.

The difference between this procedure and a grant of *prima facie* status by way of ministerial declaration is that under the latter, the determination of status is done by the minister without any interview with the asylum seekers. Under the procedure under discussion in this section, asylum seekers have to appear before a body of examiners. However in determining whether a person or a group of persons are refugees, both the minister and the designated body of examiners use the same criterion, namely the objective circumstances in the country of origin.

The procedure described above has been applied in several countries in Africa. In Tanzania, it is presently applied in relation to asylum seekers from Rwanda. Asylum seekers from that country upon arrival are pre-screened and registered at the reception centres where they are required to remain until their status is determined. At a later date, each of the asylum seekers is made to appear before the National Eligibility Committee (NEC), the statutory body charged with the responsibility of hearing asylum applications. During the hearing, the NEC seeks to obtain from applicants evidence showing the circumstances in the country of origin after which it is presumed that it is because of those circumstances that the applicants fled.<sup>32</sup>

A similar but simpler procedure was followed in Guinea before the influx of Sierra Leoneans in early 1998. Refugees arriving in Guinea were not subjected to any controls at the border. Once inside Guinea, asylum seekers would be registered by the staff of the *Bureau National de Coordination pour les Refugies* (BCR) located in the prefectures. They would then be granted *prima facie* recognition on a group basis and the lists would then be given to UNHCR for registration and assistance.<sup>33</sup> A similar procedure was followed in relation to the admission of Sierra Leoneans into Liberia.<sup>34</sup>

Up to 1991 in Kenya, refugee status determination was carried out on an individual basis by the Government's eligibility committee. With the arrival of hundreds of thousands of Somali and Sudanese refugees the system of individual status determination by the Kenyan Eligibility Committee came under unsustainable pressure. Consequently, the Kenyan Government decided to suspend status determination by this body and handled

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<sup>32</sup> On the procedure followed in Tanzania see Rutinwa, B., *Refugee Admission and Eligibility Procedures in Tanzania: the Law and Practice*, Study Commissioned for the National Refugee Policy Review, March 2001, Section 6.

<sup>33</sup> See O'Neill, B. & Kapferer, S., "Guinea - A Field Study carried out for the Lawyers Committee for Human rights Project on Exclusion", Draft October 1998., p. 1. An edited version of this report has now been published as O'Neill, W., 'Conflict in West Africa: Dealing with Exclusion and Separation' in *International Journal of Refugee Law Vol. 12 (2000) Special Supplementary Issue*, pp. 171-194. The original study is cited here because the material part does not appear in the edited version.

<sup>34</sup> *Ibid*, p. 187.

over this exercise to the UNHCR.<sup>35</sup>

Generally, UNHCR granted group recognition to these refugees on a *prima facie* basis and assigned them camps that had been established specifically for each nationality. For those refugees who applied for refugee status in Nairobi, they were interviewed and processed by the Jesuit Refugee Service which had been appointed by UNHCR to act as its implementing partner in matters of status determination. The Jesuit Refugee Service also recognised asylum seekers on a *prima facie* basis. In 1998, the Government of Kenya announced that it was terminating the mandate of UNHCR to grant refugee status in Kenya.<sup>36</sup>

Another country which has placed matters of status determination in the hands of UNHCR is the Gambia. In Banjul, UNHCR has established a Committee to undertake refugee status determination. In Basse, registration and status determination are carried out by the Immigration Department acting, unusually, as the UNHCR's implementing partner.<sup>37</sup> The majority of the refugees come from Sierra Leone and the Casamance region of Senegal and are accorded *prima facie* status. That is to say, refugees are not individually examined to determine the validity of their claims as to refugee status.

### **The limitations of the *prima facie* approach to refugee status determination**

Despite its advantages, group recognition of refugee status including by way of *prima facie* approach has a number of limitations. Perhaps the greatest limitation is the difficulty of excluding criminal and other elements that are not deserving of international protection. In one of the background papers for the Special OAU/UNHCR Meeting of Government and Non-government Technical Experts on the 30<sup>th</sup> Anniversary of the 1969 OAU Refugee Convention that took place in Conakry, Guinea in March 2000, this problem was articulated as follows:

In situations of large influxes, an obvious challenge is how to reconcile the *en masse* inclusive approach to the determination of refugee status, with the practical need to individually exclude combatants, militia, and persons in respect of whom the exclusion clauses may be applicable and, generally, other persons who may not be of concern to UNHCR. In some cases, the challenge in this context relates to practices which have often resulted in refugee status being declared in relation to persons who do not meet the criteria for that status.<sup>38</sup>

This matter is particularly important given that with the end of colonial domination and

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<sup>35</sup> O'Neill, W., Rutinwa, B. & Verdirame, G., 'The Great Lakes: A Survey of the Application of the Exclusion Clauses in the Central African Republic, Kenya and Tanzania' in *International Journal of Refugee Law Vol. 12 (2000) Special Supplementary Issue*, at 153-154. See also Mulei, C., 'Refugee Framework: Kenya's Experience', Paper Presented to the East African School on Forced Migration, Dar es Salaam, January 2000, pp. 3-4.

<sup>36</sup> *Ibid.*, p. 154.

<sup>37</sup> Lester, E., 'Work: A Doorway to Durable Solutions? A Study on Sierra Leonean Refugees in The Gambia', Study undertaken under the auspices of the Social Science Research Council Project on Forced Migration and Human Rights (January 2001 Draft), p. 20.

<sup>38</sup> See Paper titled 'Refugee Protection Challenges in Africa', CONF.P/OAU30th/CORE/1

apartheid, the *prima facie* approach to status determination is now applied almost exclusively in relation to persons fleeing civil wars many of whom are characterised by acts that constitute grounds for exclusion under Article 1 F of the 1951 Refugee Convention or Article I(5) of the 1969 OAU Convention on Refugees.

The difficulty in excluding those not deserving international protection has grave implications for international protection of refugees. In certain situations, the excludable persons who manage to go through as a result of group determination go on to create security problems in camps as happened in the camps in the east of the then Zaire after the genocide in Rwanda of 1994. The presence in refugee camps and settlements, of persons who have committed criminal conducts as heinous as genocide and crimes against humanity, poses a moral dilemma for humanitarian organisations over whether to assist such camps and settlements. Even donors have sometimes hesitated to extend aid to refugees in camps known to contain criminal elements.<sup>39</sup>

The presence of excludable elements among refugees also results in the entire refugee population being characterised as criminals with grave consequences. This complicates finding places to settle such refugees in the first countries of asylum or for resettlement in third countries. For example in 1995, Tanzania contemplated the possibility of transferring some Rwandese refugees from camps in north west Tanzania to southern Tanzania in the former settlements of refugees from southern Africa. However, this measure was abandoned for many reasons including the objections raised by the people in the intended relocation areas to be mingled with people they perceived to be criminals. For the same fears of taking in potential criminals, countries that offered to resettle Rwandese refugees receiving protection in Kenya had to screen them *de novo* and on an individual basis.

In order to avoid the consequences of hosting criminal elements among refugees, governments have taken various measures some with serious consequences for asylum seekers. One such measure is the closure of borders to prevent all asylum seekers from entering the country of asylum in the absence of mechanisms for separating genuine asylum seekers from criminals. A good example is what happened to Rwandese refugees seeking to enter the Central African Republic (CAR) in 1997. These refugees had been staying in the then Zaire until their camps were destroyed by the late Kabila's then rebel forces assisted by the Rwandese Patriotic Army. Some of them went back to Rwanda but others tried to cross the Bangui River into CAR. But the authorities there would not let them in. The reasons are set out in one study as follows:

The CAR government was not happy about admitting Rwandese; UNHCR also wanted to avoid a repetition of the Zaire camps saying it could not shelter *genocidaires*. Early on a debate ensued between Geneva and the UNHCR in Bangui over how to distinguish and separate *bona fide* refugees from 'excludables', the likely numbers of those who would be found ineligible, and the resources needed to do any screening properly.<sup>40</sup>

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<sup>39</sup> See Rutinwa, B., 'Refugee Protection and Security in East Africa' in *Refugee Participation Network*, 22 September 1996, pp. 11-14.

<sup>40</sup> O'Neill, B. *et al*, 'The Great Lakes: A Survey of the Application of the Exclusion Clauses in the Central African Republic, Kenya and Tanzania' in *International Journal of Refugee Law* vo. 12 (2000) *Special Supplementary Issue*, pp. 135-170, at 141.

The CAR authorities did not relent until after UNHCR had undertaken to provide all the resources, human and material, for carrying out the screening exercise to separate genuine refugees from criminal elements.

A similar situation occurred in Guinea where, as noted above, for a long time there was no control mechanism in place at its border with Sierra Leone. The border was completely open and refugees, as well as others, could pass without screening. This continued to be the case even after the deployment of Guinean security forces along the border in July 1997. However, during the refugee influx following the overthrow of the (Sierra Leonean) junta by ECOMOG in February 1998, the Guinean security forces did control the arrivals at the border crossing points in the forest region. “A number of people were either denied entry into Guinea or arrested and returned to Sierra Leone on account of their involvement with the junta, both in the forest region and at the port of Conakry”.<sup>41</sup> Well intended as these measures might have been, they lacked due process and they created a real risk of some genuine refugees being returned to Sierra Leone at grave risk to their lives.

In Tanzania, it was the potential existence of excludable elements among Rwandese asylum seekers which prompted the Government to require that as from 1997 all asylum seekers from Rwanda be screened individually. However the huge numbers involved almost brought the individualised system of refugee determination which had just been put on a statutory footing to a complete collapse. For example, while the newly enacted Refugees Act of 1998 required that all asylum applications be completed within sixty days, cases involving Rwandese took up to two years to complete. Meanwhile, asylum seekers in pre-recognition phase were required to remain at the Mbuba Transit camp. However, this camp had not been intended for people to stay for long periods and therefore it had very limited facilities. As a result of the failure of the eligibility procedures to clear people out of the camp as quickly as possible, the camp became overcrowded with people including families forced to share accommodation in tents irrespective of their gender, age or family relations.<sup>42</sup>

Consequently, the government was compelled to allow the transfer of Rwandese asylum seekers to settlement camps after pre-screening and even before their applications for asylum had been heard by the NEC. In other words, the policy not to grant asylum to Rwandese asylum seekers before they were individually screened has effectively failed. Moreover, no excludable persons were identified. According to UNHCR this was due to the numbers of the persons to be processed which at times compelled the Committee to deal with up to 200 individual claims a day. With this kind of workload, it is clearly impossible to give anything more than cursory attention to such important issues as exclusion.<sup>43</sup>

Apart from criminal elements, the simplicity of the *prima facie* approach may also enable persons who are not in need of international protection to be given recognition by way of

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<sup>41</sup> Ibid, *supra* note 32, p. 181.

<sup>42</sup> See Rutinwa, B. Refugee Admission and Eligibility Procedures in Tanzania: The Law and Practice, *op. Cit.*

<sup>43</sup> Information obtained from UNHCR.

pretence. For example, in Tanzania, when Lukole camp was established in 1997 exclusively for Burundian refugees, some 12,275 Rwandese managed to be admitted into the camp by claiming themselves to be Burundians. These Rwandese appear to have been refugees and the only reason they declared themselves Burundians was because they were not sure whether they would successfully undergo the individualised refugee status procedure which was mandatorily applied to asylum seekers from Rwanda.<sup>44</sup> However, this demonstrates how easy it is for the *prima facie* approach to be abused. The lack of a serious inquiry into the backgrounds of the asylum seekers also contributes to the phenomenon of multiple registration by refugees at one or several camps in order to multiply the supplies they get from UNHCR.

The other issues that have remained unclear in connection with the application of the *prima facie* approach relate to terminal issues in refugee protection such as ending of protection, return and other solutions. The unsettled debate over the legality of the mandated return of Rwandese refugees from Tanzania in December 1996 serves as an example of the point being made here.

### **Standards of treatment for *prima facie* refugees**

If persons recognised as refugees on a *prima facie* basis are presumed to be refugees within the definitions found under the relevant instruments, it logically follows that their treatment should be in accordance with the standards stipulated under those instruments. For refugees presumed to be refugees under Article 1(2) of the 1951 Refugee Convention, their standards of treatment are those set out under Articles 12 to 34 of the same Convention. The same standards apply to asylum-seekers presumed to be refugees under Article I(2) of the 1969 OAU Convention. As Fitzpatrick rightly notes, “the definition of refugee (under the OAU Convention) ... was expanded ... without any suggestion that the quality or durability of their protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention”.<sup>45</sup>

That refugees recognised under section I(2) of the OAU Convention are entitled to the same standards of treatment as those recognised under the 1951 Refugee Convention was confirmed by the Arusha Conference which recognised the definitions of the term ‘refugee’ contained in Article I, paragraphs 1 and 2 of the 1969 OAU Refugee Convention as the basis for determining refugee status in Africa and stressed “the essential need for ensuring that African refugees are identified as such, so as to enable them to invoke the rights established for their benefit in the 1951 Refugee Convention and the 1967 Refugee Protocol and the 1969 OAU Refugee Convention”.<sup>46</sup> This was irrespective of the procedure by which they were recognised.<sup>47</sup>

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<sup>44</sup> Many months later, these refugees re-declared themselves Rwandese after realising that over 99% of their fellow Rwandese who underwent individualised status determination were successful.

<sup>45</sup> Fitzpatrick, J., 'Temporary Protection on Refugees: Elements of a Formalised Regime' in *American Journal of International Law*, April 2000, Vol. 94 No 2., p. 293.

<sup>46</sup> See *Recommendations of the Arusha Conference on the African Refugee Problem*, Adopted at the Arusha Conference on the African Refugee Problem, 7-17 May 1979, Arusha, Tanzania, para 2.

<sup>47</sup> Fitzpatrick notes, “African protection was often generous, and not generally dependent on the determination of individual status ... Under the OAU Convention, persons who meet the criteria of its Article I(1) (drawn from the 1951 Convention) are not treated differently from those who met the broader definition contained in its Article I(2). op. cit at 283.



There is at least one instrument which appears to concede that not all rights as stipulated under the 1951 Refugee Convention may be affordable in situations of mass influx. This is Conclusion No 22 (1981) on *Protection of Asylum Seekers in Situations of Large Scale Influx* which makes recommendations as to the minimum standards to be accorded to refugees in situations of large scale arrivals. These recommendations cover almost all civil and political rights as well as other refugee specific requirements. However, they do not include certain rights found under the 1951 Refugee Convention such as the right to education, engagement in gainful employment and the right to be given identity papers or travel documents.

In past African State practice, refugees arriving in mass influx were able to enjoy not only the minimum rights stipulated in the above Conclusion, they also enjoyed other rights such as housing, education and engagement in gainful economic activities. There were however some notable rights which were not extended to refugees in full or at all. For example, notwithstanding Article 26 of the 1951 Refugee Convention which requires refugees to be accorded the right to choose their place of residence and to move freely within the host country, most countries required *prima facie* refugees to live in designated camps and settlements, which they could not leave without permission. Similarly, although refugees were given identity papers, they were, and still are, hardly given travel documents as required by Article 28 of the 1951 Refugee Convention.

More recently, even the rights that were extended to refugees have been severely restricted as many governments have modified their refugee policies to focus on repatriation. For example, a recent UNHCR report noted that in Tanzania, work permits for long-time urban refugees were revoked in 1997-1998 and that unlike in the past, refugees were no longer allowed to farm small plots outside the refugee camps. The purpose for stopping such activities was to reinforce the message that repatriation to the country of origin, once conditions permit, is the only durable solution available to them and that local integration was not going to be tolerated. For the same reason, access for refugee children to post-primary education was no longer allowed. The same policy shift in Uganda, for the same reasons, has led to active discouragement of growing perennial crops (eg. coffee, tea, matoke) on the basis of the idea that, should refugees return to their countries, they could claim compensation, which in turn could be a complicating factor in their return. Refugee children are also currently excluded from Uganda's Universal Primary Education.<sup>48</sup>

### **Duration of protection and solutions**

Under refugee law, the three traditional solutions to the refugee problem are voluntary repatriation, local integration and resettlement. It has sometimes been proposed that where refugees had been admitted on *prima facie*, the protection they received was temporary and in terms of solutions, emphasis was put on repatriation. This is said to be the approach taken particularly in Africa. Indeed it has even been asserted that temporary protection has a legal basis in the 1969 OAU Convention on Refugees. In one paper prepared under the auspices of the Reformulation of the Refugee Law project of the

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<sup>48</sup> See James Katalikawe, Temporary or Permanent Protection? A Critical Appraisal of Refugee Settlement Camps in Uganda, Paper presented at the 7<sup>th</sup> IRAP Conference, South Africa, 7-11 January 2001, pp18-19.

Centre for Refugee Studies, York University, this view was put as follows:

The debate about temporary *versus* permanent refugee protection has no real currency in the South, where protection has almost always been assumed to be temporary, even if it lasted for a long time. Protection has usually been provided by neighbouring countries with the clear understanding that the refugees would eventually return home. In fact, in Africa, temporary protection is not only common practice, it is given prominence in the Organisation of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 11(5):

Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangements for his resettlement.<sup>49</sup>

However, this view is not legally or empirically correct. It is legally wrong because it is a misquote and misinterpretation of Article II(5). To begin with, Article II(5) as is clear from its text, is intended to apply 'where a refugee *has not received the right to reside* in any country of asylum'. That is to say, the Article applies to persons who have been recognised as refugees but for one reason or another have not been granted the right of residence for any duration at all. It is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum. Secondly, Article II(5) expressly states that persons who have not received the right to reside in any country may be granted temporary residence *pending arrangements for resettlement*. This provision does not support the contention that protection to be provided is temporary. For where a person is resettled from one African country to another on account of the first country not being able to continue to provide him or her asylum, the function of resettlement in this case is not to terminate but to continue the refugee status of that person but in a different country. Thus, what is temporary is the duration of sojourn in the first country of asylum but not the protection.

The authority for the contention that the primary, if not the only, solution to *prima facie* refugees is repatriation is said to be found in Article V of the 1969 OAU Refugee Convention which relates to 'voluntary repatriation'. However, this provision is much more about elaborating the principles and the modalities of effecting voluntary repatriation than a prescription of it as the only solution.

It is true that voluntary repatriation has always been regarded as the most desirable solution. However the other solutions too, particularly local integration, were given greater significance than is generally acknowledged. In the Recommendations of the Conference on the Legal, Economic and Social Aspects of African Refugee Problems (1967), voluntary repatriation was expressly said to be "the best solution to refugee problems".<sup>50</sup> However, in the same recommendations the Conference observed:

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<sup>49</sup> The Refugee Research Unit, Centre for Refugee Studies, York University, 'The Temporary Protection of Refugees: A Solution-Oriented and Rights Regarding Approach', Discussion Paper prepared under the auspices of the research project AToward the Reformulation of International Refugee Law, July 17 1996, Section IV.A., at p 22.

<sup>50</sup> Recommendation IV, Preamble.

Considering that whilst the voluntary repatriation of refugees to the country of origin should be emphasized as the ideal solution of the refugee problem, it is nevertheless necessary to promote, for those refugees who do not wish to repatriate in the foreseeable future, a durable solution in the country of asylum, with a view to integrating them in the new country from an economic, social and legal point of view.<sup>51</sup>

In relation to refugees of rural background - who constituted the overwhelming majority of African refugees - it was considered that the provision of a permanent and adequate occupation, enabling them to fend for themselves, requires settlement on the land. It was therefore recommended that land settlement of the large groups of refugees of rural background be promoted and implemented in Africa and detailed provisions were made as to how this could be achieved.<sup>52</sup>

An early OAU document to hint at repatriation as the most appropriate solution was the Resolution of the OAU Council of Ministers on Voluntary Repatriation of African Refugees of 1975. However this hint was made in the preamble and it would appear from the pertinent paragraphs that repatriation was considered appropriate in situations where decolonisation had been achieved so that refugees could go and participate in the reconstruction of their countries. The entire substantive part of the Resolution was devoted to elaborating the principles and mechanisms of voluntary repatriation.

Just four years later, at the Arusha Conference, repatriation and local integration were given almost equal importance. The Conference, noting the provisions of the 1969 OAU Refugee Convention Article V concerning voluntary repatriation, stressed the importance of voluntary repatriation as a solution to refugee problems.<sup>53</sup> At the same time, the Conference noted the provisions of Article 34 of the 1951 Refugee Convention concerning naturalisation of refugees and stressed the importance of naturalisation as a solution for African refugee problems in cases where voluntary repatriation can no longer be envisaged and where refugees have attained a sufficient degree of integration in their country of asylum.<sup>54</sup>

In the 1960s and the 1970s, the above recommendations were largely followed in practice. In a paper commissioned for the Conference on the Refugee Problems in Africa which was held in Arusha, Tanzania in May 1979, Mr Brian Neldner, the then Secretary for Services Programmes, Lutheran World Federation/World Service, described the process of assistance to rural refugees as involving three phases:<sup>55</sup> emergency phase, self-support phase and integrated settlement phase.

During the emergency phase, Neldner described the issues involved as immediate action in close cooperation with the appropriate authorities to assess the nature of a refugee situation, the numbers involved, their location and to meet immediate needs of the

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<sup>51</sup> Recommendation VIII, Preamble.

<sup>52</sup> See Recommendation VIII.

<sup>53</sup> Recommendation 6 paragraph 3.

<sup>54</sup> Recommendation 6 paragraph 5.

<sup>55</sup> Neldner, Brian, 'Settlement of Rural Refugees in Africa' in Eriksson, Melander & Nobel, *An Analyzing Account of the Conference on the African Refugee Problem, Arusha, May 1979*, Scandinavian Institute of African Studies, Uppsala 1981, 161-177.

refugees.<sup>56</sup> The ‘self-support phase’ was described as involving planning for, and assisting, refugees to become self sufficient at some point in time with settlements becoming an integral part of the local society. In the ‘integrated community phase’, refugees were expected to have become self sufficient at least in non-manufactured goods and to have integrated into the commercial structure of the local community. External actors were expected to leave and refugees were expected to participate fully in the administration of their communities, while maintaining contact and consultation with district and other local authorities.<sup>57</sup> There are numerous other writers whose recount of the policy framework for assistance to rural refugees accord with Neldner’s.<sup>58</sup>

In sum, the focus on repatriation in formal African documents on refugees did not influence the policy of governments in relation to the duration of protection nor the economic activities refugees could engage themselves in. This supports Fitzpatrick’s conclusion that “refugee protection in Africa cannot be regarded as necessarily temporary, despite the adoption of broader criteria of eligibility”.<sup>59</sup> Nor did the prioritisation of repatriation mean the exclusion of other solutions where these were considered more appropriate.

Recently, there has been a policy shift whereby repatriation has indeed been elevated to not the most desirable but virtually the only solution. Measures that are being taken to ‘encourage’ refugees to repatriate have been seen in the previous section. This attitude is reflected in more recent official documents which emphasise repatriation and are less enthusiastic about local integration and/or resettlement. For example, under the Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, the principle of voluntary repatriation is ‘reaffirm(ed)’ but local integration and resettlement are only ‘recognise(d)’ as desirable.<sup>60</sup> In the durable solutions section of the recommendations from the same meeting, there is a strong provision relating to voluntary repatriation.<sup>61</sup> However, with regard to local integration, countries of origin are simply asked to “explore more systematically the potential benefits of local integration programmes both for refugees and hosting communities”.<sup>62</sup> Clearly this is not a ringing endorsement of local integration as a durable solution. Furthermore the recommendations are completely silent on resettlement. The Comprehensive Implementation Plan (CIP) adopted by the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the 30<sup>th</sup> Anniversary of the 1969 OAU Refugee Convention (2000) made strong provisions

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<sup>56</sup> Ibid, p. 167.

<sup>57</sup> Ibid, p. 174.

<sup>58</sup> See e.g. Sterkenburg, J., Kirby, J. & O’Keefe, P., ‘Refugees and Rural Development: A Comparative Analysis of Project Aid in Sudan and Tanzania’ in Adelman, H., and Sorenson, J., *African Refugees, Development Aid and Repatriation* (West View Press, Boulder) 1991-208. Daley, Patricia, *Refugees and Underdevelopment in Africa: The Case of Barundi Refugees in Tanzania*, D.Phil Thesis, Oxford University 1989; Gasarasi, Charles, *The Life of a Refugee Settlement: The Case of Muyenzi in Ngara District Tanzania*, Research Project for the UNHCR (1976), and ‘The Tripartite Approach to the Resettlement and Integration of Rural Refugees in Tanzania’ in Rogge, J.R., *Refugees, A Third World Dilemma* (Roman & Littlefield, 1984). 99-114.

<sup>59</sup> Fitzpatrick, p. 293.

<sup>60</sup> Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, 13-14 December 1998, Khartoum, The Sudan, paras 7 and 8.

<sup>61</sup> Khartoum Recommendations of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, 13-14 December 1998, Khartoum, The Sudan, para 12.

<sup>62</sup> Ibid, para 13.

on repatriation and resettlement but it is silent on local integration. This trend supports the view that there is a gradual but continuing retreat from durable solutions in Africa.<sup>63</sup>

### **Towards a framework for refugee management in situations of mass influx**

It is quite clear from the experiences accounted above that the *prima facie* approach was developed as a practical response to the mass influx of refugees. Such patterns of refugee arrivals continue to be a reality and hence the *prima facie* approach continues to be a valuable and needed tool. However, to make it more effective, this mechanism must be developed further to deal more holistically with the problem of mass influx including conditions on which the mechanism should be employed, procedures for status recognition and the related matters of exclusion, standards of treatment and termination of status. Below are some proposals on these specific matters.

#### *Structures for refugee management*

The effective management of refugee affairs requires the establishment of effective administrative bodies with adequate and well-trained personnel and other resources. Specifically, countries likely to experience mass influx of refugees should provide the immigration, police and other personnel who are likely to make initial contact with refugees, with training on the basic principles of asylum, particularly the duty not to return refugees to the places where they came from. There should be bodies charged with status determination which should handle the reception and registration of refugees, and individual status determination where this becomes necessary in situations to be suggested below:

#### *Admission and non-refoulement*

As recommended in Conclusion 22 (1981) on *Protection of Asylum Seekers in Situations of Large Scale Influx*, asylum seekers in situations of mass influx should be admitted into the country to which they present themselves and they should not be subjected to such measures as rejection at the frontier, return to the country from which they fled or in which their safety or liberty may be imperilled.

#### *Status recognition*

Persons fleeing from situations which suggests that if they were to be individually examined they would be refugees within any of the recognised definition should be presumed to be *prima facie* refugees within those definitions. After admission and registration, they should be allowed to enjoy refugee status in the country of asylum.

Refugees admitted on a *prima facie* basis should be conclusively regarded as refugees

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<sup>63</sup> See Rutinwa, B., The End of Asylum? The Changing Nature of Refugee Policies in Africa, In New Issues in Refugee Research, Working Paper No 5, CDR, UNHCR-Geneva, p5, at <http://www.unhcr.org>

within the meaning of the definition by reference to which they were so recognised unless they are established not to be refugees within that definition and any other definition that might be applicable to them or until a durable solution is found for them.

### *Exclusion, cancellation and cessation*

Asylum seekers admitted on a *prima facie* basis to be conclusively refugees in accordance with applicable international instruments can have their status withdrawn at some stage, if they did not deserve, or no longer need, international protection. Jackson sums up the point being made here as follows:

“Needless to say, a *prima facie* determination of group refugee character does not preclude the screening of individual members of the group, should this be considered appropriate at any stage. Pending such an individual screening, however, the persons covered by a *prima facie* determination of a group character should be regarded as refugees in accordance with the 1950/51 refugee definitions”.<sup>64</sup>

This screening out following inclusion can take the form of exclusion, cancellation or cessation.

Exclusion : Refugees who have been admitted under the *prima facie* mechanism are still liable to be excluded from refugee status if they come within the provisions of Article 1.D, E or F of the 1951 Refugee Convention and, in the case of Africa, Article I(5) of the 1969 OAU Refugee Convention. For refugees who undergo individualised status determination procedures, their excludability is considered as part of their original determination. Opinion is divided as to whether exclusion should follow inclusion or whether the opposite should be the case. In the case of *prima facie* recognition however, exclusion can only come after inclusion. This is because in so far as it entails admission of all persons arriving in mass influx and conclusively regarding them as refugees, the *prima facie* recognition is in fact the ‘inclusion’. Thus, exclusion considerations, when these are appropriate, must follow later.

There could be exceptions to the above proposition where exclusion could be considered immediately. An example is where an asylum seeker coming as part of a mass influx is discovered at the stage of reception and registration to be one of those already indicted by an international tribunal for having committed offences which would also make a person excludable from refugee status under relevant refugee law instruments. However, the mere fact that an asylum seeker was a combatant in the country of origin or came armed should not be a sufficient reason for considering exclusion immediately provided that asylum seeker is prepared to renounce war and lay down any arms. The recommended approach to be taken with regard to such persons is that:

Persons who previously were members of military organisation are not excluded from seeking asylum and protection as refugees. (But) before considering the asylum applications of such persons/groups, a reasonable period of time should be allowed to elapse, the purpose of which would

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<sup>64</sup> Ibid, p. 108.

be to establish that the persons have completely renounced military activities and have no intention of resuming the war.<sup>65</sup>

Given the individual and personal nature of the grounds on which a person may be excluded from refugee status and the seriousness of the consequences of exclusion, due process requires that excludable cases should be examined individually. Where, after such examination, it is found that a person who had been granted refugee status did not qualify for such status his/her exclusion should take place through a process of cancellation.<sup>66</sup>

Cancellation: Just as in the case of refugees recognised under an individualised procedure, “the status of persons granted asylum on *prima facie* basis may be cancelled if reliable, verified information becomes available after recognition, revealing that refugee status should never have been granted to the individual to begin with”.<sup>67</sup> O’Connor lists excludability as one of the grounds that can lead to cancellation.<sup>68</sup> To this reason, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* adds obtaining refugee status by misrepresentation or possession of another nationality as other circumstances which warrant cancellation of refugee status.<sup>69</sup> A more comprehensive list of grounds for cancellation of *prima facie* status is found in the provision of the South African Refugees Act (1998), which includes “if a person has been recognised as a refugee erroneous on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application”.<sup>70</sup> As with exclusion, the process of cancellation should follow individualised procedures and every refugee whose status is being considered for cancellation must have a genuine opportunity to refute the information and arguments against him/her.<sup>71</sup>

Cessation: If persons enjoying *prima facie* status are presumed to be conclusively refugees within the meaning of one or several international instruments on refugees, then, unless their status has been cancelled as above, cessation of their status should occur only when the grounds established under those instruments for such a measure have been fulfilled, and the modalities laid down in refugee law and jurisprudence should be followed<sup>72</sup>.

The grounds that may lead to cessation of refugee status as spelt out in Article 1C, clauses (1) to 6 of the 1951 Refugee Convention (cessation clauses) are voluntary re-

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<sup>65</sup> Overview of Key Conclusions/Recommendations of the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and other Locations, 26&27 February 2001, Pretoria, South Africa, para14(b).

<sup>66</sup> O’Connor, M., C., ‘Legitimizing Speed: Expediting Individual, 1951 Convention Refugee Status Determination Worldwide with Rebuttable Presumptions Triggered by the AOAU/Cartagena Standard’, Plenary Paper Presented at the Seventh IRAP Conference, Midland, South Africa, 10<sup>th</sup> January 2001, para 3.2.

<sup>67</sup> *Ibid*, para 3.3.

<sup>68</sup> *Ibid*.

<sup>69</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (1991), para 117.

<sup>70</sup> Refugees Act, 1998, S. 36(1).

<sup>71</sup> O’Connor, para 3.3.

<sup>72</sup> This section deals only with group cessation. Individual cessation will be discussed in the second track of the Global Consultations.

availment of national protection, voluntary re-acquisition of a new nationality, voluntary re-establishment in the country where persecution was feared and where the circumstances in connexion with which a person was a refugee have ceased to exist.<sup>73</sup> These same principles should apply in terminating *prima facie* status.

In applying cessation clauses, relevant authorities should be guided by EXCOM Conclusion 69 on *Cessation of Status* particularly those relating to group situations. Specifically, where cessation is sought to be applied to refugees who were recognised on a group basis “decisions to apply cessation clauses must have the possibility upon request, to have such application in their cases reconsidered on grounds relevant to their individual case”.<sup>74</sup> This is because even where fundamental changes have taken place in the country of origin and as a result the majority of refugees no longer needed international protection, some refugees may still have legally valid reasons not to want to return home. Thus according individual determination upon request ensures that no one is returned in violation of the 1951 Refugee Convention<sup>75</sup> or any other relevant instrument.

In addition to persons who may still be refugees at the time cessation clauses are invoked, other persons who should be heard individually are those who may invoke “compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country of origin”<sup>76</sup> as well as those who have developed strong family, social and economic links to the state of refuge during their sojourn.<sup>77</sup>

### *Standards of treatment*

As noted above, refugees admitted on *prima facie* basis are taken to be refugees within the recognised instruments and therefore their treatment should be in accordance with the standards established under the 1951 Refugee Convention which, as was also seen, apply even to refugees recognised under regional instruments such as the 1969 OAU Convention. It was further seen that in situations of mass influx certain rights provided for under the 1951 Refugee Convention may always not be realisable. Moreover, it is a fact that the actual levels of treatment will depend on the reception capacity, the prevailing system of social benefits and the economic situation of the asylum country.<sup>78</sup> That said however, these limitations should not be applied in a capricious manner. Where rights provided for under the 1951 Refugee Convention are to be abridged, there should be good reasons for doing so. Moreover, the restrictions imposed should be proportionate to the problem that prompted their imposition.

In any event the minimum standards of treatment recommended under Conclusion 22 on *Protection of Asylum Seekers in Situations of Large Scale Influx* (1981) should be adhered to.

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<sup>73</sup> If there is to be any dispute it would be of evidentiary nature.

<sup>74</sup> EXCOM Conclusion No. 69, para (d).

<sup>75</sup> Fitzpatrick, p.304.

<sup>76</sup> 1951 Refugee Convention, Article 1(c)(5)( proviso) and 1(C)(5)(proviso); Conclusion 69 para (e).

<sup>77</sup> Fitzpatrick, p. 304.

<sup>78</sup> EXCOM, Note on International Protection, Doc. A/AC.96/830, 1994, para 49.



Other rights, especially education and employment, should be extended to the extent possible. Refugees should also be given travel documents. The rationale for extending socio-economic rights to refugees is pointed out in an EXCOM Note on International Protection as follows:

... employment, educational opportunities and a certain measure of economic and social integration in the country of asylum are important for refugee's well-being, including their psychological and physical health, even when eventual voluntary repatriation is the expected long term solution. Since it is often impossible to predict with certainty when or even whether safe return will be possible, measures of partial integration may also benefit the country of asylum country in the event that the refugees do become permanent residents.<sup>79</sup>

The view, seen earlier, that extending to refugees the rights of post-primary education and gainful employment would discourage repatriation is to some extent exaggerated. As noted above, in the 1960s, the approach taken in situations of mass influx was aimed at making refugees as self-reliant as soon as possible. This entailed giving them land and integrating them into the existing rural development programmes. Yet this did not prevent large-scale repatriations. This proves that providing refugees with education and enabling them to become self-reliant may not be such disincentives to repatriation as it is generally believed. To the contrary, the pattern of repatriation to Rwanda after the genocide in 1994 and to some extent that of South Africans in the early 1990s suggest that educated and economically well-off refugees might be the first to repatriate when conditions allow since they are empowered and they have better prospects of playing a key part in the process of reconstruction and rehabilitation in the country of origin.<sup>80</sup>

It is important to point out at this juncture the difference between the function of extending socio-economic rights to 'classic' refugees individually recognised under the 1951 Refugee Convention, recipients and refugees recognised on *prima facie* basis. Traditionally, the extension of self-sufficiency rights to refugees individually recognised under the 1951 Refugee Convention was seen as a way of facilitating their local integration and permanent settlement. The extension of self-sufficiency rights to refugees dealt with under the *prima facie* mechanism, is not in the first instance intended to promote a durable solution by way of permanent local settlement. It is simply an 'interim solution' aimed at extending to beneficiaries full refugee rights but without prejudice to the duration of their sojourn nor the eventual durable solution to their plight.

The importance of the provision of travel documents to refugees was recognised by the Conference on the Legal, Economic and Social Aspects of African Refugee Problems (1967) as enabling refugees to visit other countries for the purposes of study, temporary employment or resettlement.<sup>81</sup> These factors remain valid today. In some jurisdictions, refugees are given travel documents upon application and when they demonstrate that

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<sup>79</sup> Doc. A/AC.96/830, paragraph 49.

<sup>80</sup> After the genocide in Rwanda in 1994, educated and employed Rwandese in Tanzania were among the first to leave for Rwanda. Paradoxically, this is one of the reasons why Tanzania has abandoned the policy of local integration because it was felt that whatever is done for refugees by host countries, they will always return home.

<sup>81</sup> See Recommendation V.

they have a good reason for travelling outside the country of asylum.

At the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the 30<sup>th</sup> Anniversary of the 1969 OAU Convention, the position that was taken is that travel documents should be issued to all refugees including women and children<sup>82</sup> whether or not, it would appear, the refugees are intending to travel. This position would appear to be in line with the strict letter of Article 28 of the 1951 Refugee Convention. However, it is submitted, the policy of requiring refugees to apply for travel documents when they are due to travel is not unreasonable. In most countries where the *prima facie* approach is taken, the refugee populations come from rural backgrounds. Among the hundreds of thousands of refugees that may be found in a given country, it is only a tiny minority that are educated and who are likely to want to travel and therefore to need travel documents. This being the case, it is not a wise use of scarce resource to start handling out travel documents as part of the standard package alongside things like non-food items to those refugees who it is certain would never travel out of the country of asylum except in the course of return or resettlement. What is important though is that when a refugee applies for the travel document, it should be issued without delay or cost.

#### *Duration of protection*

The question of how long should the duration of protection be arose recently in the discourse over the concept of temporary protection. Specifically protection is indeed supposed to be temporary and the standards of treatment are linked to the duration of sojourn. As has been seen, the duration of protection was not so important under the *prima facie* approach nor was it relevant to the standards of treatment. This is the approach which is recommended. *Prima facie* refugees should continue to receive protection as long as they need it and the standards of treatment should be the same from when they are recognised as refugees to the time when that status is cancelled or ceases.

#### *Solutions*

As far as is possible, protracted refugee situations must be avoided by ensuring that at some point in time *prima facie* refugees are availed one of the solutions noted above namely repatriation, local integration and resettlement. In most mass exodus situations, the realistic solution for the majority is return in safety and dignity when conditions allow. Voluntary repatriation, where feasible, should continue to be the preferred solution to refugee problems. Moreover, voluntary repatriation should take place as soon as it is feasible.

That said, the preference for voluntary repatriation should not result in repatriation becoming a prescriptive solution. In particular, the fact that voluntary repatriation is the best solution should not result in denying refugees rights perceived as likely to establish durable ties nor in any way to abridge the rights the enjoyment of which is perceived as capable of complicating repatriation. It should not also lead to what has been called 'precipitated' or 'induced' returns, which are nothing but euphemisms for forcible repatriation. At the level of principles, it is essential, to extrapolate Okoth-Obbo's words,

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<sup>82</sup> See the Comprehensive Implementation Plan (CIP), paragraph 10-11 and Action Six.

that any further elaboration of the applicable standards should take into account human rights perspectives and ensure that there is no dropping below the protection thresholds established by the elements of volition and safety.<sup>83</sup>

Realising voluntary repatriation in accordance with these principles requires a shift of focus from the treatment of refugees as a way of achieving their repatriation, to the country of origin with a view to establishing conditions therein that would permit refugees to return to their homes safely. This entails first and foremost, countries of origin creating conditions for voluntary repatriation.<sup>84</sup> “To this end, Member States should strengthen, where appropriate, their democratic institutions as well as other mechanisms for the prevention and resolution of disputes including the traditional ones”.<sup>85</sup> Conventional reintegration programmes<sup>86</sup> should also be complemented with activities which are more specifically designed to promote democracy, reconciliation and justice, including consensus-building on notions of responsibility and justice, and the promotion of human rights and minority rights.<sup>87</sup> For all this to be achieved, international commitment and support will be required.<sup>88</sup>

Voluntary repatriation may be the best solution to the refugee problem but it may not always be feasible. This includes where refugees cannot return for valid protection reasons including the continuance in the country of origin of the causes of their flight, severe trauma or because of family ties. Where this is the case, other durable solutions of local integration or resettlement should be pursued.<sup>89</sup>

Local integration normally means allowing and facilitating refugees to participate in the economic life of the local community. As has been seen above, in situations of mass influx economic integration will be allowed and facilitated right from the beginning. Consequently, refugees who are unable to repatriate will be able to retain their *status quo* in the country of asylum. However, where return becomes a remote possibility, the status of refugees should be enhanced by way of grant of permanent residence and the attendant rights and privileges. This includes the possibility, at some future point in time, of refugees applying for legal integration by way of grant of citizenship. Where the number of refugees unlikely to repatriate is higher than the capacity of the asylum country to host on a permanent basis, resettlement in other states should be sought in accordance with the principles of international cooperation and burden-sharing.

## Recommendations

### *For states of asylum*

- States of asylum should liberally admit asylum seekers in situations of mass

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<sup>83</sup> Okoth-Obbo, G., p. 39.

<sup>84</sup> See Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, 13-14 December 1998, para 7, the Declaration of the same Meeting, para 12 and The Conakry Comprehensive Implementation Plan, para 37.

<sup>85</sup> Khartoum Recommendations, Ibid, para 14.

<sup>86</sup> See UNHCR Handbook on Voluntary Repatriation (1996), Chapter 6.

<sup>87</sup> Khartoum Recommendations, *Op. Cit*, para 16.

<sup>88</sup> See Ibid, paras 22-24.

<sup>89</sup> See UNHCR Documents A/AC.96/930, para. 44; S/AC.96/830, para. 12 and A/AC.96/750 para. 6.

influx. The possibility of the existence of criminals and other persons not deserving of international protection should not of itself be a reason for closing borders and denying admission to all asylum seekers.

- States of asylum should treat asylum-seekers in pre-recognition in accordance with acceptable international standards. In particular, conditions in reception centres or in other types of collective accommodation for asylum seekers should fulfil minimum standards including the existence of basic facilities, as well as access to infrastructures with respect to health care and education<sup>90</sup> The privacy and dignity of asylum seekers must be ensured.
- Since the application of a *prima facie* approach effectively means inclusion of everyone in search of asylum, States of asylum should address the question of exclusion of those who have been wrongly granted refugee status by way of cancellation of status. Cancellation should follow an individualised procedure and should meet all the requirements of due process of law.
- Combatants who arrive in the country of asylum as part of a mass influx may be separated and detained until it is ascertained that they have renounced war.
- States may take special measures to safeguard the security of former combatants who are subsequently found to qualify for refugee status by, for instance, providing them with separate accommodation facilities away from camps or settlements for other refugees.<sup>91</sup>
- States should extend to refugees recognised on a *prima facie* basis treatment that meets protection standards under refugee and human rights law. The fact that refugees were recognised on a group basis should not of itself result in differential standards of treatment. In particular, *prima facie* refugees should enjoy the right to education and to engage in economic activities.
- States should also take necessary measures to ensure the civilian character of asylum including by prohibiting subversive activities and locating refugee camps at a reasonable distance from the border.<sup>92</sup>
- States should, upon application, grant refugees travel documents.
- States should endeavour to find durable solutions to the plight of refugees accorded *prima facie* status including by way of local integration.
- States should put in place such structures as are necessary to ensure the effective management of refugee affairs. In complex humanitarian situations, “cross-cutting policy, executive and management structures should be established ... bringing together all the key ministries concerned, including the Office of the President (or Prime Minister), home affairs, defence, security and border control, foreign affairs, justice and

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<sup>90</sup> Ibid, paragraph (Viii).

<sup>91</sup> UNHCR Regional Symposium, *Op. Cit*, para 17.

<sup>92</sup> Ibid., paras 26-32.

local administration”<sup>93</sup>.

*For UNHCR*

- As requested by Action Five of the Conakry Comprehensive Implementation Plan of March 2000, the UNHCR, in collaboration with OAU Member States, should carry out a country by country review of existing procedures for determining status, especially in situations of mass influx, with a view to strengthening them, particularly as regards group status determination.
- The UNHCR should consider preparing a handbook on procedures and criteria for determining refugee status in situations of mass influx providing standards and guidelines on, among other things, exclusion, cancellation, and termination of status of refugees recognised on a *prima facie* basis.
- The UNHCR should assist the countries applying the *prima facie* approach in refugee protection to obtain quality and verifiable information on the countries of origin to enable them to make correct decisions in relation to the grant and termination of refugee status.
- The UNHCR should cooperate with host countries in raising the resources necessary to maintain the institution of *prima facie* including funds to maintain sound status determination institutions and the costs of care and maintenance of asylum seekers and refugees.
- The UNHCR should facilitate the development of standards to be met in the repatriation of refugees in mass influx situations on matters which are not adequately addressed by the UNHCR Handbook on Voluntary Repatriation, EXCOM Conclusions and other relevant instruments. These matters include detailing the optimal conditions for the promotion of repatriation, who will make the assessment of the conditions, how the criteria is to be followed and how impartiality and objectivity in the process are to be guaranteed.<sup>94</sup>

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<sup>93</sup> UNHCR Regional Symposium, *Op. Cit.*, para 6.

<sup>94</sup> On the gaps and grey areas in the law of repatriation, see Okoth-Obbo, *Op. Cit.*, paras 93-108.