

Starting a Movement of Refugee Legal Aid Organizations in the South¹

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Abstract

This paper reviews the access to legal representation in the Global South and should be read with the Nairobi Code and the SRLAN Charter.

In January 2007, Africa and Middle East Refugee Assistance (AMERA)² organized a five day meeting of 'southern' refugee legal advocates in Nairobi, Kenya. The first meeting of its kind, it was attended by representatives from sixteen non-governmental organizations (NGOs) that provide legal aid for refugees or do policy work on their behalf;³ representatives from two networks comprising thirty-two countries in West and Southern Africa, and representatives from three university law clinics that provide refugee legal aid. Participants were mainly from Africa and the Middle East but included citizens of Ecuador and Hong Kong. The meeting was funded by the US Institute for Peace and the programme was planned with Mike Kagan, of Asylum Access, a US Charity.⁴

The tasks of the conferees were to establish a code of ethics for refugee legal aid practitioners who work through NGOs and law clinics, and to consider the potential of creating a 'southern' network to address common

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¹ We eschew terms like 'developing countries' and, for want of a better term, have adopted 'southern' or 'global south'. The countries with which AMERA is concerned include such places as Hong Kong, where UNHCR undertakes refugee status determination (RSD) because, while China is a party to the 1951 Convention and 1967 Protocol, it did not extend them to Hong Kong when it was handed back in 1997, and Turkey, a country which has not signed the 1967 protocol.

² See <<http://www.amera-uk.org>>. AMERA is a UK Charity, No. 1098788, registered July 2003. Its mission is to nurture and fund refugee legal aid in the Middle East and Africa. Thus far it is totally responsible for funding AMERA Egypt and contributes to the funding of the Refugee Law Project, Uganda. For this work it receives funds from Comic Relief, the Sigrid Rausing Trust, the Oak Foundation, the UN Voluntary Fund for Victims of Torture (UNVFVT), The War Trauma Foundation, and the Bromley Foundation.

³ Frontiers Association, *Ruwad*, a refugee legal aid NGO in Lebanon, was unable to attend because a military road block in Beirut prevented its director, Samir Trad, from reaching the airport.

⁴ See <<http://www.asylumaccess.org>>. Resource persons were Oldrich Andrysek, UNHCR; Dr-Rosemary Byrne, Trinity College and the Irish Human Rights Commission, Dublin, Ireland; Dr Martin Jones, University of York, Centre for Refugee Studies, Toronto, Canada; Marc Daly, Barnes & Daly, Law firm, Hong Kong; Michael Kagan, Policy Director, Asylum Access; Dr Barbara Harrell-Bond, AMERA-UK; Estelle Strizhak, Director, HIAS Refugee Trust Kenya; Allan Leas, Executive Director, AMERA-UK and outgoing Head of Operations, European Council on Refugees and Exiles, London, UK; Michael Gallagher, Jesuit Refugee Service, JRS Southern Africa, Johannesburg, South Africa; Parastou Hassouri, Sexual and Gender Based Violence Team Leader, AMERA Egypt; and Alice Johnston, Director, Cairo Community Interpreters Project, Forced Migration and Refugees Studies Program, American University in Cairo, Egypt.

concerns and to advocate more effectively on behalf of refugees as a collective. A full report of the proceedings of the meeting can be seen on-line.⁵

Until 1997, there was *no* provision for legal aid for refugees in the 'south' apart from in South Africa, where several anti-apartheid organizations had transformed themselves into refugee rights organizations that began operating in the mid 1990s. The Refugee Law Project in Kampala, Uganda, and the Kenya Refugee Consortium in Nairobi were both formally established in 1998–9.⁶ Provision of legal aid for refugees became available in Cairo in 2000.⁷ Frontiers, Lebanon, and the Helsinki Peoples Assembly's Refugee Legal Aid Project began operating in 2001–2.

How do we explain this dearth of legal aid services for refugees throughout Africa, Asia, Latin America and the Middle East? Since the UN High Commissioner for Refugees (UNHCR) has been operating in these regions of the world, where states had ratified the 1951 Convention, the general practice had been to accord *prima facie* recognition on grounds of nationality and to confine refugees to camps.⁸ Refugees rarely received any identification card other than a ration card indicating their entitlement to food and non-food items in order to subsist. Where states had not ratified the Convention, UNHCR applied their mandate status and was required to resettle those recognized out of the particular country.

Beyond the right to asylum and protection from *refoulement*, UNHCR and non-governmental organizations apparently ignored the other rights of refugees included in the Convention and other international human rights law, or perceived themselves as providing them through the material assistance they were providing.⁹ From 1984, the situation in these parts of the world began changing. Resettlement opportunities began to be extended in Africa and elsewhere and everywhere there was a growing

⁵ <<http://fmo.qeh.ox.ac.uk/fmo/Reader/ViewDoc.asp?Path=Oxford/1600/01/23&Style=OlvSaxLib:BookHitsArray&Zoom=1&QueryString=%28%53%52%4c%41%4e%7e%29&Label=1&BookKey=Oxford/1600/01/23/1/Ar00100.xml&BookCollection=FMO&Language=English>>.

⁶ Both began as a response to the research reported in Verdirame and Harrell-Bond's *Rights in Exile: Janus-Faced Humanitarianism*, Berghahn Books, 2005.

⁷ Dr Harrell-Bond was invited to Cairo to assist the American University to set up a refugee studies programme. Informal communication between Kenya and Uganda was efficient and soon refugees began lining up at her office door. At the beginning, a lawyer from the UK was invited to assist refugees with their claims for refugee status from UNHCR, the decision-maker in Egypt. There were no trained Egyptian lawyers so an intensive training programme began. The second year it was possible to raise funding and move under the umbrella for the Egyptian Organization for Human Rights (EOHR). In 2003, the charity African and Middle East Refugee Assistance (AMERA) was registered in the UK and legal aid formally began through AMERA Egypt, now an independent NGO, operating under the Ministry of Foreign Affairs. AMERA UK now has special consultative status with ECOSOC.

⁸ There were always exceptions. For example, until 1991, the Kenyan government granted refugee status, provided the rights granted under the Convention and did not allow camps on their territory. Egypt was another exception. In Egypt, all refugees live in urban areas, but UNHCR only began conducting RSD interviews from the mid-1990s.

⁹ See, for example, UNHCR 'UNHCR Comprehensive Policy on Urban Refugees', Geneva, 25 March 1997, 1–23.

urban population that required some form of identification as refugees. UNHCR began conducting refugee status determination interviews in most states in the global south.¹⁰

That there has been a crying need to establish refugee legal aid NGOs in every country in the south should have been self-evident.¹¹ Only a tiny minority of refugees in the global south live their lives in states that observe their rights. There was a ringing endorsement at the conference for the need to identify major sources of funding to support the establishment of a network of such organizations in 'southern' countries so that refugee rights can be safeguarded and promoted.

Immediate concerns leading up to the Conference

The provision of legal aid and representation of refugees are services that are presumed to be the right of refugees,¹² but such services are nearly non-existent in Africa, Asia, Latin America and the Middle East where most refugees remain and will remain. Where refugee status is determined by state mechanisms in the 'south', there is frequently the need for extensive law reform to ensure they have the right to fair procedures and the right to appeal against rejection. However, very few countries have domestic legislation and, where they do, it frequently is not in line with the Convention, for example, confining refugees to camps, thus denying them the fundamental freedom of movement which determines access to most other rights.

In addition, there is the ongoing concern about the role of the UN High Commissioner for Refugees (UNHCR) in status determination. As of 2006, UNHCR adjudicates claims for refugee status in eighty countries.¹³ This same year, it received 91,500 individual refugee applications, making it the largest refugee status decision-maker in the world.¹⁴

While UNHCR advises the highest standards of procedural justice in RSD determinations to States, it does not always meet these procedural standards in its own practice.¹⁵ There is now a growing body of literature

¹⁰ See <<http://www.rsdwatch.org>>.

¹¹ Studies such as Lawyers Committee for Human Rights (LCHR) *African Exodus*, New York, 1995, and its *Refugees, Rebels and the Quest for Justice*, New York, 2002, both preceded G. Verirame and B.E. Harrell-Bond's *Rights in Exile: Janus-Faced Humanitarianism*, Berghahn Books, 2005, all documenting the widespread violation of refugee rights.

¹² With the proposed enlargement of the European Community, the UN High Commissioner for Refugees (UNHCR) invested heavily in ensuring legal aid clinics were established throughout Eastern Europe in advance of these countries' admission to the EU. It has never made such an investment in the 'south'.

¹³ More than 70 % of the RSD applications to UNHCR are made in countries that have ratified the 1951 Refugee Convention (<http://www.rsdwatch.org/index_files/Page386.htm>).

¹⁴ Each application involves, on average, 2.4 family members.

¹⁵ See, for example, UNHCR 'Response to the European Commission's Green Paper on the Future Common European Asylum System', September 2007.

that analyzes UNHCR's deficiencies in this respect.¹⁶ These have included the failure to give reasons for rejection of a claim, rendering it nearly impossible to mount an effective appeal; the withholding of the file from either the claimant or the legal representative; the use of 'secret' evidence against a claimant; the refusal to allow refugees to be represented at all in most countries;¹⁷ and the lack of a mechanism for an independent appeal.¹⁸

Since 2004, four refugee legal aid NGOs from Egypt, Kenya, Lebanon and Uganda have been attending the September International Council of Voluntary Agencies (ICVA) and UNHCR annual consultations in Geneva to advocate for reforms in the UNHCR RSD system.¹⁹ One result has been that UNHCR made public for the first time its 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate Status 2005'. Following this release, a group of NGO representatives and the UNHCR RSD Unit began an email discussion of the weakness of these 'Procedural Standards', but the UNHCR members recommended that they should first draw up a code of professional ethics for those representing refugees. The necessity for creating a code of professional ethics for NGOs conducting refugee legal aid arose because not all persons who work for them are lawyers, who would naturally be bound by the ethics of their own professional bodies.

Their first draft included certain objectionable items, such as the requirement that the legal representative hand over case notes to UNHCR, making it impossible to maintain lawyer/client confidentiality. UNHCR wanted to ensure that NGOs never represented an 'unfounded' claim, with being 'struck off' the list of legitimate organizations representing refugees as a penalty if they did. Since, often, the perception of a claim as 'unfounded' is a matter of opinion, and, ultimately, the responsibility for giving accurate facts in the case rests with the claimant, NGOs could not tie themselves to such requirements.

¹⁶ See, for example, Iranian Refugee Alliance (1995) 'Evading Scrutiny: Does Refugee Status Determination Procedure Measure Up to International Standards?' <http://www.irainc.org/text/pub/report.html>; Michael Alexander, 'Refugee Status Determination Conducted by UNHCR', 11 *IJRL* 251 (1999); and, M. Kagan, 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002', American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1, Cairo 2002. An extensive bibliography of this literature is shown on <http://www.rsdwatch.org>.

¹⁷ UNHCR in Egypt and Turkey are exceptions; UNHCR Lebanon has recently changed its policy and allows representation.

¹⁸ The only appeal that has ever been taken (indirectly) against a UNHCR decision was *D. and Others v. Turkey*. This case was taken by the International Iranian Alliance Inc. to the European Court of Human Rights on behalf of an Iranian couple, who were found to have been wrongly rejected by UNHCR in Turkey. An unofficial translation appears at <http://rsdwatch.org/DandOthersVTurkey.pdf>. Also see, <http://www.irainc.org/text/pub/PR0705.html>.

¹⁹ These meetings, that precede the meetings of UNHCR's Executive Committee, usually attract the NGOs that are UNHCR's partners in the field, who are primarily concerned with humanitarian assistance. 2004 marked the first time the NGOs providing refugee legal aid participated. We began with 'side' room meetings and advanced to offering plenary sessions to the entire NGO community.

An appeal was made to a member of the International Refugee Law Judges, who managed to persuade the head of the UNHCR's RSD Unit that writing and committing themselves to a code of professional ethics was the task for the NGOs themselves, and not one for UNHCR to be involved in.

The Conference Conclusions

By the end of the conference, participants had produced two documents that are intended to shape the future of refugee legal advocacy in Africa, Asia, Latin America and the Middle East, the 'Model Rules of Ethics for Legal Advisors in Refugee Cases' (The Nairobi Code) and the 'Charter for the Southern Refugee Legal Advocates Network' (SRLAN) (that follow in the Documents section of this issue). Joining the Network is contingent on signing the Nairobi Code. Whether located in the 'global south' or not, it is believed that the Nairobi Code provides a standard of professionalism that everyone providing legal aid for refugees might want to consider adopting.

Participating organizations were charged with taking these documents back to their main offices and circulating them, with the goal of having them approved by the governing structures of their organization. It was also decided that a Southern Refugee Legal Aid Network (hereafter SRLAN) would be established and would develop an internet interface to facilitate communication between member organizations. An interim executive committee was created comprising AMERA UK, Asylum Access, and West African Refugees and Internally Displaced Persons Network (WARIPNET) to make sure that SRLA moves forward as a network.

The aims of this Network are to address the ongoing training and technical assistance needed to enable SRLAN members to meet their self-imposed standards and to set up a programme to: a) share best practices for serving refugee clients, b) work collectively to promote recognition of refugee rights as guaranteed in international treaties, c) share strategies for achieving the enactment of domestic legislation that ensures access to rights or otherwise promotes rights-based refugee assistance, d) provide each other with pertinent information and, where necessary, assist with training on refugee and human rights law, e) document and report on the refugee protection in each country, and f) work jointly to push for fairer practices respecting refugee rights by the United Nations, governments, and other international and regional actors.

Addressing the training and technical needs of SRLAN members will be a substantial step towards ensuring that member organizations' efforts will promote fairness for asylum seekers in RSD procedures, and will uphold best practices in the provision of *pro bono* legal aid and counselling to refugees.

Everyone lamented the lack of training in refugee law available at law schools in their countries. The development of refugee law courses at third level institutions and legal clinics has been a relatively recent phenomenon, even in the North. The difficulties of providing high level training at university level in less resource-rich regions often rests on the shoulders of young professors, who have not had extensive exposure to the subject and who have extremely limited access to both primary material and secondary literature to put it in context.

Dr Rosemary Byrne presented the 'Refugee Law Reader: Cases, Documents and Materials' (4th edition) (<<http://www.refugeelawreader.org>>) as a resource for such situations. The project aims to transfer both pedagogical expertise and resource material through the creation of a comprehensive on-line 'living casebook' for the study of the complex and rapidly evolving field of international refugee law. It provides an on-line model curriculum with access to over 600 documents and materials. In 2000, the project was initiated and supported by the Hungarian Helsinki Committee for use by a network of refugee law clinics across Central and Eastern Europe, but it now has over 20,000 members across the globe. To meet the needs of 'universal' refugee legal education, the Reader will soon introduce Latin American, African and Asian regional sections, as well as appearing in adapted language versions in French, Russian and Spanish.

Other subjects considered in detail at the conference included building strong, fundable organizations; staff training, expanding the numbers of lawyers trained in this field; the need to train interpreters, and how to do it in the most cost efficient way; accessing country of origin information that is accurate; the advantages and disadvantages of using foreign interns; and strategies for introducing or improving domestic legislation.

The participants were also challenged by the experience in Hong Kong, where refugees rejected by UNHCR had been protected from expulsion through the application of the Convention Against Torture,²⁰ as well as the ground-breaking case (*D. and Others v. Turkey*), heard in the European Court of Human Rights, of a group of Iranians who took another case rejected by UNHCR to this court.²¹

More contentious issues were discussed, all according to 'Chatham House' rules.²² These included relationships with international human rights advocacy groups, and with UNHCR. How, for example, can NGOs work with UNHCR at the same time as they are promoting refugee rights, resettlement and refugee protection. Attention was also given to issues of

²⁰ See the case of Prabakar, which can be found on HK government Court of Final Appeal website (FACV 16 of 2003).

²¹ See <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>;, *Affaire D. et autres c. Turquie* 24245/03, 22 June 2006.

²² Chatham House rules refer to rules imposed on a discussion whereby no remarks may be attributed to individuals in any subsequent reporting.

sexual and gender based violence, separated or unaccompanied minors, as well as the value of collaboration with national, cross-border, and international NGOs.

Only three of the organizations represented provide psychosocial support to their clients; many lack adequate referral services for those clients who have been tortured and/or who suffer chronic post traumatic symptoms, and only two had any formal training for interpreters. A keynote lecture by Dr Martin Jones on the rights of refugees *beyond* refugee status was a high point of the Conference.

Although still in its infancy, and there remains much work to do, the SRLA Network has already proven its worth. Members have begun to exchange information on particular cases, more family reunion for separated children is proceeding between South Africa and Zambia since the conference, and, most dramatically showing the need for the network to span the globe, a refugee who had been recently *refouled* from Australia to his home country escaped again to another African country where two members of the network are in contact with him.