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BACKGROUND PAPER

Strategic Litigation, Refugee Legal Representation and Advocacy: Pathways to
Protection, Durable Solutions and Refugee Rights

Wednesday 4 July 2012, 11h15 – 13h00 – Room 4

Background

Asylum seekers, refugees and stateless persons are often marginalized in legal systems across the globe. As non-citizens, and as those fleeing persecution from their countries of nationality or places of habitual residence, they are often unable to access the same level of enforcement of fundamental human rights as citizens. This manifests in discriminatory barriers to education, health care and other social and economic rights, including inadequate access to police protection from xenophobic and other forms of violence.

In attempting to address this gap, UNHCR is engaged with the legal community, including lawyers and judges, in various countries and regions, by assisting legal aid organizations and lawyers in bringing cases to court, by strengthening the capacity of lawyers and judges through training, by cooperating and liaising with specific courts and judges associations and by intervening in cases before courts as a third party. According to the High Commissioner “[e]ngagement with the judiciary, at national and regional levels, is a central part of my Office’s work.”¹

Legal assistance and representation is also an essential safeguard in asylum and statelessness determination procedures. In addition to providing applicants with the support necessary to navigate complicated legal systems, quality legal assistance and representation is in the interest of the decision-maker in that it can help to ensure that international protection needs are properly and quickly identified. Legal representation also facilitates an applicant’s submission of evidence that is relevant to the claim and presented in a clear and coherent fashion. This in turn leads to greater efficiency of both first instance and appeal procedures.

Non-governmental organizations (NGOs) that provide legal support services play a prominent role in improving the quality of asylum systems, advancing legal standards and securing the rights of asylum seekers, refugees and stateless persons.

This session will introduce and discuss the variety of legal services offered to asylum seekers, refugees and stateless persons and the range of ways that both NGOs and

¹ Remarks of the High Commissioner at the opening of the judicial year of the European Court of Human Rights in Strasbourg, January 2011

UNHCR engage with the legal community and the judiciary. The aim is to identify opportunities for further cooperation between NGOs and UNHCR to improve legal aid and representation, to pursue strategic litigation, and advance legal standards for the protection of asylum seekers, refugees and stateless persons.

UNHCR's Judicial Engagement Work

The development of international standards for the protection of asylum-seekers, refugees, and stateless persons depends increasingly on national and international case law or jurisprudence. Judicial decisions contribute to consistent and sound interpretation and application of relevant standards, often bridging the protection deficit when political, administrative and legislative processes fail. The work of lawyers and judges is crucial for adequate legal protection standards for persons of concern to UNHCR, to guarantee fair and efficient legal systems and to ensure access to justice for these people. Engagement with lawyers and judges is one of many protection tools UNHCR uses to address specific protection problems, to enhance consistent interpretation and application of legal standards, to strengthen the capacity of lawyers and judges, to improve the quality of legal aid and representation and to secure the rights of persons of concern to UNHCR.

Engaging with and servicing lawyers and judges

UNHCR's engagement and work with the judiciary is focused on liaising with and informing and supporting specific courts, including national and regional courts, as well as through cooperation with judges associations, in particular the International Association of Refugee Law Judges (IARLJ). UNHCR is engaged with lawyers through partnerships with legal practitioners, law firms and legal aid organizations and associations, including the ELENA network in Europe and the Asia-Pacific Refugee Rights Network (APRRN) in Asia. UNHCR also seeks to support lawyers and judges by organizing and facilitating training on substantive refugee and statelessness law issues, country of origin information and the use of *Refworld*, as well as by developing specific training material.

In addition, UNHCR aims to serve, among others, lawyers and judges by maintaining a case law database in *Refworld* of relevant judicial decisions in the field of refugee and statelessness law and by issuing *Guidelines on International Protection* and *Eligibility Guidelines* pursuant to its mandate. The Guidelines on International Protection complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and are based on the accumulated views of UNHCR, state practice, Executive Committee Conclusions, academic literature and judicial decisions (see <http://www.unhcr.org/refworld/docid/3ae6b3314.html>). UNHCR Eligibility Guidelines are legal interpretations of the refugee criteria in respect of specific profiles on the basis of assessed social, political, economic, security, human rights and humanitarian conditions in the country or territory of origin concerned.

Refworld

Refworld (www.refworld.org) is the leading source of information necessary for taking quality decisions on refugee status. *Refworld* contains a vast collection of reports from a wide range of sources, including UNHCR, relating to situations in countries of origin, policy documents and positions, case law and court interventions, and documents relating to international and national legal frameworks. The information has been carefully selected and compiled from UNHCR's global network of field offices, Governments, international, regional and non-governmental organizations, academic institutions and judicial bodies. *Refworld* is updated daily.

Intervening before courts

UNHCR's court interventions are designed to better inform the courts of UNHCR's positions in concrete as well as abstract situations, providing authoritative guidance. UNHCR's interventions generally take the form of legal argument on one or more point(s) of law. Depending on the context, UNHCR's court interventions include formal third party interventions, such as amicus curiae briefs, or take the form of advisory opinions or letters to the court or parties involved. UNHCR may also issues public statements in relation to specific judicial proceedings, for example in relation to preliminary ruling references before the Court of Justice of the European Union (CJEU). UNHCR's court interventions have been influential in many ways, including being stated in court decisions. Recent examples include the judgment of the Supreme Court in the United Kingdom in the case of *HJ(Iran) and HT(Cameroon)*, which relied in part on UNHCR's submissions in concluding that it would be wrong for a person to change or conceal his or her sexual orientation in order to avoid persecution, and the judgment of the European Court of Human Rights in the case of *M.S.S. v Belgium and Greece* which drew upon UNHCR's submission in concluding that transfers of asylum-seekers to Greece under the EU Dublin Regulation is in breach of the European Convention on Human Rights.

Non-Governmental Organizations (NGOs) Providing Legal Support Services

A growing number of NGOs provide a wide range of legal services for refugees, asylum-seekers and stateless persons. These services range from the provision of community legal education about the rights of these groups, to advice to individuals, families and communities about their legal situation, to active representation in proceedings before UNHCR, national and regional legal processes. Many legal services organizations also use the expertise and insights developed during the course of their provision of legal services to engage in both strategic litigation and political advocacy for law reform. In relation to both these activities there have been a number of recent successes in many countries and regions (including the success in litigation before the ECtHR as well as strategic litigation successes in South Africa, Egypt, Australia, Hong Kong, and a number of other countries, and productive law reform initiatives in many countries including Ecuador and South Korea).

Much of the work delivering legal services provided by NGOs has traditionally been provided on a local and *ad hoc* basis. The character of many of the legal services provided is that they are rooted in the local laws and legal procedures of a particular

jurisdiction. However, in recent years, networks of NGOs involved in providing legal services have emerged, including both regional (including the aforementioned ELENA network and the Legal Aid Working Group of APRRN) and global (including the Southern Refugee Legal Aid Network [SRLAN]). These networks have facilitated the exchange of experience and the sharing of best practices. In addition, there has been an expansion of the provision of legal services to individuals undergoing UNHCR processes, including refugee status determination.

The provision of legal aid to refugees, in particular, raises a series of issues around the substantive expertise and particular ethical and professional obligations of practitioners. NGOs have attempted to address these challenges by developing a shared vision of their ethical and professional obligations to refugee clients articulated in the Nairobi Code (see <http://www.frlan.org/content/nairobi-code-0>). Efforts have also been made to expand the availability of training on refugee law, including through the expansion of the number of courses offered at law schools on refugee law and the offering of refugee law short courses and continuing legal education courses to practicing lawyers.

Legal interventions on behalf of refugees, asylum-seekers and stateless persons are often controversial. Furthermore, in some cases there is not a consensus in the legal advocacy community (including legal service providers and UNHCR) about the best manner of proceeding. In recent years, providers of legal services have been subject to assault and harassment; unfounded criminal charges; and forced closure of their organizations. This vulnerability has been exacerbated by financial instability caused by cutbacks in funding for legal aid resulting from the current global financial crisis. While there have been successes in some jurisdictions (notably in Hong Kong) in providing expanded government funding for legal services, in most jurisdictions legal service providers must source funding from time limited contracts with private funders and UNHCR.