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# Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt

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Where UNHCR conducts refugee status determination (RSD), its reactions to legal aid for asylum-seekers have been mixed. Statistical evidence collected from Egypt in 2002 indicates a correlation between receiving some form of legal aid service and an asylum-seeker's increased chances of gaining refugee protection from UNHCR. Unconventional forms of legal aid, including limited services by supervised non-lawyers (including volunteers from the refugee community) showed a positive impact on first instance cases, while traditional legal aid models showed an impact at the appeal stage. Legal aid should form an essential part of UNHCR's RSD procedures, and NGOs should work to expand both traditional and innovative forms of legal aid for asylum-seekers.

Keywords: refugee status determination, legal aid, UNHCR, Egypt

## Introduction

In western countries, pro bono legal aid for asylum-seekers has been one of the most important developments in systematic refugee rights advocacy since the 1980s (Acer 2004). This article<sup>1</sup> revisits refugee legal aid in a widespread but under-studied context: refugee status determination by the UN High Commissioner for Refugees (UNHCR).

Refugee status determination (RSD) is the procedure by which refugees are identified and distinguished from other migrants. RSD can be conducted on a group or an individual basis, but individual procedures are much more resource intensive and (because a person might be incorrectly rejected) riskier for refugees. Individual RSD is normally handled by a government, but in many places it is conducted solely by UNHCR.

UNHCR's RSD work is currently the subject of review and debate. For several years, studies in academic and human rights fora have criticized UNHCR's procedures for lack of fairness safeguards. At the 2004 UNHCR Executive Committee meeting, UNHCR's Director of International Protection said,

We are also undertaking a concerted analysis of the role of RSD in UNHCR's global protection strategies, with a view to seeing where we should be

strengthening our efforts, as well as where RSD might not be the correct response (Feller 2004).

At the same time, a coalition of non-governmental organizations called for an independent assessment of UNHCR's RSD activities (NGO Statement 2004). In September 2005, UNHCR for the first time published a comprehensive set of standards applicable to its own RSD procedures (UNHCR 2005).

This article seeks to add to this discussion by focusing on one particular aspect of refugee status determination: the role of lawyers, legal aid, and the right to counsel. In countries as diverse as Thailand, Kenya, Egypt, and Lebanon, NGOs have begun to develop legal aid programmes to help asylum-seekers working their way through UNHCR RSD systems. The reaction from UNHCR field offices to legal aid has varied from country to country. In Egypt, UNHCR generally respected the right to counsel, but in Lebanon, at least until 2004, UNHCR resisted NGO attempts to advise or advocate on behalf of individual asylum-seekers. In 2005, UNHCR stated clearly that its field offices should allow asylum-seekers to have legal representation (UNHCR 2005: section 4.3.3).

A survey by an NGO in Egypt that asked refugees and asylum-seekers to rank their own needs for humanitarian services found that migrants rated 'UNHCR case preparation and advice' second in priority out of 15 potential services, surpassed only by medical care (Briant and Kennedy 2004: 450–451). Migrants who had been in Egypt for less than six months rated UNHCR case preparation their first priority (*ibid.*).

This article begins by providing background on UNHCR refugee status determination activities, and then describing the legal aid programmes that existed in Egypt in 2001 and 2002. It then presents statistics drawn from a sample of legal aid programmes in Egypt in 2002 demonstrating that provision of legal assistance corresponds to an increase in asylum-seekers' chances of receiving protection from UNHCR. This should not be seen as a surprising finding; it is consistent with statistical studies of government-run RSD systems.

Following these statistics, the article outlines potential legal aid needs for refugees and asylum-seekers and some of the obstacles a legal aid programme is likely to face in countries where UNHCR conducts RSD. It then describes some of the legal aid models suggested in academic literature and examines how these models have been applied in Egypt. From this discussion, a means of understanding how and why legal aid works in the UNHCR RSD context is proposed.

Several limitations or cautions about this study should be noted from the outset. First, the statistics presented here offer only a rough indication of the role of legal aid. Legal aid programmes by their nature are set up to serve their clients, not to conduct a clinical study. The hypothesis offered here is simply that what is true of government RSD systems appears also to be true of UNHCR: the right to counsel and the right to advice are essential to fair and effective refugee status determination, and produce apparent results.

Asylum-seekers applying to UNHCR are entirely reasonable to rank advice and case preparation assistance as high priorities, and UNHCR and civil society should seek to meet their demands.

A second limitation, or perhaps a strength, of this study is that the conclusions are to a significant extent based on personal experience. This paper is largely the product of 18 months of work as a legal practitioner developing a refugee legal aid programme in Egypt in 2001 and 2002. Since 2002, I have either worked in, consulted with, or visited refugee legal aid programmes in Israel, Lebanon, Thailand, Turkey, and Uganda. I will attempt in this article to use my experience to make meaningful hypotheses based on the data that is available. Nevertheless, legal advocacy will always remain to some extent more art than science. Any attempt to analyse if, how and why legal aid works with refugees will always be somewhat subjective. I proceed on the premise that a somewhat subjective discussion of a critical issue is better than no discussion at all.

### **UNHCR Refugee Status Determination: Background**

In much of the geopolitical south, especially where refugees are housed in rural camps, refugee status determination is often conducted on a *prima facie* basis. In this method, all arrivals from a particular country are presumed to be refugees without an in depth assessment of individual cases. In most northern and western states, the process of applying for asylum involves individual RSD, by which a government investigates an individual application. Such individual RSD procedures typically involve an asylum-seeker submitting a written explanation for his or her application, followed by an in depth interview, research into country of origin conditions, and a decision about whether the person meets the legal criteria for refugee status. There are often also mechanisms for administrative or judicial appeals.

Individual RSD also takes place in the south, especially in urban settings. But in the south, UNHCR often has a far more extensive role, while governments are comparatively less involved in the RSD process. Because of UNHCR's extensive role in RSD in the developing world, the agency is the world's largest refugee status decision-maker. UNHCR conducted individual refugee status determination in at least 48 countries in 2003, receiving at least 56,000 individual refugee status applications (UNHCR 2004). In 2004, UNHCR reported that it conducted RSD in 80 countries, handling at least 75,000 applications per year, more than any single country.<sup>2</sup> All these sites of UNHCR RSD were in the developing world. This prevalence of UNHCR RSD runs counter to the general preference in international law that status determination be conducted by states.<sup>3</sup>

These numbers include states where UNHCR conducts RSD solely on its own, in place of government procedures. This is the norm in most Arab countries. There are also other types of RSD procedures, what might be called mixed systems, which involve both government agencies and UNHCR, in which

UNHCR has substantial influence in refugee status determination despite a government's involvement, rather than just giving advice. Countries with such mixed systems include Uganda and Israel.

When UNHCR handles all aspects of the RSD procedure, it is sometimes called 'mandate status determination'. In theory, since the government is not itself implementing the 1951 Convention Relating to the Status of Refugees (and its 1967 protocol), UNHCR is determining instead whether the applicants are refugees according to its own mandate. But UNHCR often conducts RSD in states that are parties to the Convention. In fact, in 2003 at least 26 of the states where UNHCR conducted RSD were parties to the 1951 Convention. In Egypt, which is one of these states, UNHCR determined refugee status by virtue of an agreement with the Egyptian Government in which Egypt agreed to provide refugees recognized by UNHCR with residence permits. Hence, UNHCR's mandate status determination was also effectively a means by which UNHCR could determine refugee status on behalf of the Egyptian Government.

As noted in the introduction, UNHCR's RSD procedures are undergoing re-assessment. In published literature on the subject, there have been roughly three lines of criticism or concern about UNHCR RSD. First, there are concerns that when UNHCR decides refugee cases it has a conflict of interest between its role as refugee protector and refugee decision-maker (Human Rights Watch 2001). Second, there are concerns that resource-intensive RSD programmes over-extend UNHCR's resources (Kagan 2002, 2005). Third, and most relevant for present purposes, UNHCR's RSD procedures lack many of the safeguards that are normally expected in government-run procedures, and hence create a risk of errant decisions that could leave *bona fide* refugees unprotected (Alexander 1999; Kagan 2002, 2005; Human Rights Watch 2002; Harrell-Bond and Verdirame 2005). Among other things, UNHCR offices typically have not provided failed applicants with specific explanations for their rejections, do not allow asylum-seekers access to most of the information considered in their cases, and do not provide an appeal to an independent tribunal. In 2005, UNHCR issued standards stating that it is a 'best practice' for its field offices to provide specific reasons for rejection, but did not change its policy with regard to withholding evidence or providing an independent appeal (UNHCR 2005).

In Egypt in 2002, asylum-seekers registered at the UNHCR office and were scheduled for an interview at which they also submitted written statements of their cases. They were interviewed by UNHCR staff, and then told to wait for results. Results were posted after weeks or months, on public notice boards next to anonymous case numbers. Rejected applicants were not given specific reasons, only three-letter codes such as LOC (lack of credibility) or NWP (no well-founded fear of persecution). Rejected asylum-seekers could appeal, but appeals were considered only by a staff member different from the one involved in the first decision; there was no separate appellate tribunal or department. Appeals could be rejected on the basis of the written submission

alone, or UNHCR could grant a new interview. After the rejection of an appeal, UNHCR closed asylum-seekers' files (Kagan 2002).

UNHCR–Cairo permitted asylum-seekers to obtain legal assistance at all stages of this procedure, so long as they submitted a written representation agreement. Legal advisers would assist with preparing initial submissions, accompanying applicants to interviews, and writing appeals. At interviews, legal representatives could make opening and closing statements, and could in limited cases ask for questions to be rephrased (*ibid.*).

Asylum-seekers (or their lawyers) were generally not allowed to see the transcripts of their interviews at UNHCR, nor the assessments that UNHCR staff completed about their applications, nor any other evidence UNHCR collected and considered. In the course of the RSD process, UNHCR sometimes asked for medical or mental health assessments. The asylum-seekers were not allowed to see the reports generated by these examinations (*ibid.*).

### **Legal Aid Programmes in Cairo**

In 2000, 2001 and 2002 UNHCR's office in Egypt received more individual RSD applications than any other UNHCR office in the world, according to the agency's annual statistical overviews. In 2001, the number of applications in Egypt (13,176) was almost twice the number in the next largest office, Kenya, where 6,713 applications were lodged. Today, Egypt may have the largest and most developed asylum-seeker legal aid initiatives of any country where UNHCR is solely responsible for refugee status determination. Coinciding with the large number of asylum-seekers in Egypt, three main legal aid initiatives were developed in Cairo between 2000 and 2002 to assist asylum-seekers applying for protection at UNHCR.

The methods and nature of each legal aid programme as they operated in this period will be described in the following sections. It should be noted that since 2002, both legal aid and refugee policy have evolved in Egypt. In particular, in 2003 the recognition rate at UNHCR climbed over 50 per cent after being below 30 per cent in 2002, most likely because UNHCR in Egypt began more consistently applying the broader Organization of African Unity refugee definition. In 2004, as peace talks in Sudan progressed, UNHCR in Cairo began giving all Sudanese applicants temporary protection, while suspending individual RSD for most of them. This dramatically changed the nature of RSD in Egypt, since Sudanese constituted the vast majority of refugee applicants at UNHCR's Cairo office. Legal aid programmes also changed, including becoming more selective of the kinds of cases they took on. There have also been substantial organizational and institutional changes, which are not described here.

#### *Egyptian Organization for Human Rights (EOHR) Refugee Legal Aid Project*

The Refugee Legal Aid Project housed at EOHR began officially in summer 2001. It was the largest and best funded of the legal aid programmes during the

period studied. EOHR Refugee Legal Aid offered full service legal aid to asylum-seekers, although most of the work was conducted by paralegal volunteers working with training and supervision by lawyers (including the author of this study). Paralegals interviewed and advised clients, helped them collect evidence and draft personal statements, researched country of origin information, prepared legal memoranda to accompany the evidence to UNHCR, and attended UNHCR RSD interviews with clients. In addition to legal aid, EOHR offered weekly classes teaching asylum-seekers about how to prepare their own refugee claims.

### *Refugees Centre for Human Rights (RCHR)*

RCHR was at the end of 2002 the only wholly Egyptian legal aid centre for refugees and asylum-seekers. It grew from a legal and social work centre that began work with refugees in 2001, receiving training from lawyers at EOHR. RCHR began by offering clients similar services as EOHR. But largely because its lawyers were still receiving training in refugee law, RCHR stopped writing legal memoranda for submission to UNHCR in many of its cases, and instead concentrated on helping clients write coherent personal statements and accompanying them to UNHCR interviews where the client asked for such service.

### *Musa'adeen Project: All Saints Cathedral*

The Musa'adeen project at All Saints Cathedral used non-lawyers to provide limited assistance to asylum-seekers. Most of the non-lawyers were displaced persons themselves working on a voluntary basis. Musa'adeen was a somewhat informal project shared between four churches that sponsored programmes for displaced people. Three of the churches had relatively little permanent organization or facilities for Musa'adeen, and provided little or no supervision for the project, raising a number of concerns about the competence and effectiveness of the service at those centres.

The data reported here about Musa'adeen work is based on the experience of the Musa'adeen centre at Joint Relief Ministries, All Saints Cathedral, which was the best organized of the Musa'adeen centres at the end of 2002. Because the programme was based on the work of non-lawyers, the Musa'adeen–All Saints focused their work solely on first instance cases, and offered clients only two services: preparation of written testimonies, and interview preparation. Musa'adeen volunteers were trained and supervised by the author of this study (an American lawyer), and an Australian humanitarian worker who had taken university and UNHCR courses in refugee law.

In addition to individual casework, the Musa'adeen–All Saints offered weekly courses on interview preparation and 'writing your own testimony'. In late 2002, Joint Relief Ministries, which operates a large health and nutritional programme for newly arrived displaced people, began distributing Musa'adeen leaflets and presented a video with advice about applying to

*Table 1*

**Musa'adeen–All Saints Non-lawyer Limited Assistance Model**

Training	Training course Observation Probation/trial period Regular re-training, on group and individual basis
Supervision	Emphasis on need for complete, coherent, detailed case preparation All case work supervised Supervisor with expertise in law or RSD
Limited assistance	Core service: Case and interview preparation Advice limited to encouragement to tell truth, provide complete facts No research No legal memoranda No representation at RSD interviews No appeals (first instance cases only) No durable solutions cases Referrals made where needed (i.e. to full service legal aid or medical/psychiatric care)
Organization	Centralized intake and client registration Regular group meetings Dedicated workspace and equipment

UNHCR to all new arrivals registering for humanitarian services. Table 1 illustrates the legal aid model developed at Musa'adeen–All Saints.

**Impact of Legal Aid in Egypt: Statistical Data**

*Statistical Confirmation of the Importance of Legal Aid*

International law and UNHCR guidelines guarantee refugees and asylum-seekers a right to counsel in a variety of contexts. In refugee status determination, UNHCR has stressed that asylum-seekers have a right to legal counsel 'at all stages of the procedure' (UNHCR 2001: para. 50 g). In its own RSD procedures, UNHCR standards specify that asylum-seekers should be able to bring legal representatives with them to their interviews (UNHCR 2005: section 4.3.3). Refugees and asylum-seekers should also have the right to counsel in court proceedings on the same basis as nationals.<sup>4</sup> International law guarantees equal access to courts and fair hearings to 'all persons', without regard to nationality, in any criminal case or suit at law (see International Covenant on Civil and Political Rights, article 14).

The wide endorsement of the right to counsel for asylum-seekers is based on an implicit assumption that counsel is important to effective refugee status



determination. One would therefore expect assisted asylum-seekers to succeed in gaining refugee status recognition at a higher rate, all other factors being equal. One recent study by Schoenholtz and Jacobs used success rates to assess asylum legal aid in the United States and found that having a lawyer increased people's chances of winning asylum in the US system (Schoenholtz and Jacobs 2002: 743–745). This finding confirmed the conclusion of a study of US asylum adjudication more than 30 years earlier (Sofaer 1972: 1303). Schoenholtz and Jacobs reported that asylum-seekers with legal representation were four to six times more likely to be granted asylum than those without. They provide the following additional details:

Representation matters even among nationalities that have an above-average success rate for gaining *pro se* affirmative asylum.... For certain nationalities with relatively average or low rates of success for the *pro se* affirmative applicant, representation is particularly meaningful: 31% of those represented from India won asylum as opposed to 1% who were not represented, and 60% of Liberian asylum seekers were granted asylum when represented but only 8% when *pro se* (Schoenholtz and Jacobs 2002: 743).

Schoenholtz and Jacobs' data also showed a positive effect of legal representation at different stages of the US asylum procedure, both in immigration court and at the US asylum office (*ibid.*). Immigration court in the United States is a complex and adversarial process. The asylum office is typically less adversarial, with a neutral asylum officer interviewing an applicant in an office setting (a process that has much in common with UNHCR RSD procedures). This indicates that legal representation is important in both adversarial and non-adversarial asylum systems. Schoenholtz and Jacobs observe that while the complexity of court makes legal counsel especially important, the need to help asylum-seekers prepare to tell their stories clearly and coherently is equally critical (*ibid.*).

These and other studies of administrative adjudication have indicated that legal aid makes a statistically demonstrable impact on success rates in both adversarial and non-adversarial settings (Getter 2001; Popkin 1977; McNeal 1999; Denckla 1999: 2597 fn.106). In a similar manner, a general measure of the impact of legal aid on UNHCR RSD can be had by comparing the recognition rate of UNHCR applicants assisted by legal aid programmes against the overall recognition rates at UNHCR. Yet, while Schoenholtz and Jacobs based their study on government statistics, UNHCR does not systematically collect or report data showing the effect of legal representation in its RSD procedures.

The 2001–2002 period in Egypt offers important data on the role of legal aid in UNHCR RSD for several reasons.

First, the nature of RSD and legal aid in Egypt in 2001–2002 offered a unique opportunity to use statistics as a rough gauge of the impact of the right to counsel. Refugee legal aid programmes normally do not select clients as a random sample; in fact many or most are highly selective. This means that success rate statistics are difficult to analyse because the population that

receives legal aid is pre-screened and not comparable to the overall population. But Egypt in 2002 offered a unique opportunity to make an approximate comparison in success rates. In Cairo in 2002, the legal aid programmes generally took clients and entered them in their records on a first come, first served basis, with each organization taking new clients off waiting lists. There is still a risk that legal aid clients were not representative (for instance, perhaps not all asylum-seekers seek legal aid in equal numbers). However, the scenario of mass RSD combined with first come, first served legal aid is probably the closest approximation possible in a legal aid context of a representative sample allowing a meaningful statistical comparison of success rates. By 2004, legal aid programmes in Egypt were systematically screening clients, and UNHCR was no longer conducting individual RSD with the largest group of asylum-seekers (Sudanese). These changes make it difficult, if not impossible, to meaningfully compare legal aid success rates with overall success rates and identify any significant correlations.

Second, in this period there were at least three different forms of legal aid offered to asylum-seekers in Cairo.<sup>5</sup> This diversity allows an analysis of how different types of services affect refugees in the RSD process, and can help offer guidance to future legal aid initiatives.

I collected results from three main legal aid programmes for asylum-seekers in Egypt for January through October 2002, including the Egyptian Organization for Human Rights Legal Aid Project (EOHR), the Musa'adeen–All Saints Cathedral, and the Refugee Centre for Human Rights (RCHR). Statistics for EOHR and Musa'adeen were compiled using the same method for both groups: client case numbers in the organizations' client databases were compared to weekly UNHCR results bulletins. Results were divided by first instance cases and appeals, because recognition rates are vastly different at different levels of the procedure. The majority of cases in both programmes' databases were not found on the bulletin, mainly because of long delays in UNHCR decision-making. RCHR's results were reported to me by the organization itself, though I also checked a sample of RCHR's client case numbers against UNHCR's public results notice sheets to ensure that the data kept by the legal aid programme did not contain any noticeable reporting biases. The samples tested were those where UNHCR announced RSD decisions from January through October 2002.

The statistical comparisons presented here are those where the sample size offers a measure of confidence in the results (power of 80 per cent and alpha of .05), and the phenomena reported appeared consistent across comparable national or ethnic groups. However, as stated in the introduction to this article, the data here should be seen only as a rough measure of the effect of legal aid, relevant mainly to confirm that what previous studies have found regarding government-run RSD systems is also true with UNHCR. There are many variables that contribute to success rates in RSD, and while the circumstances in 2002 in Egypt allowed for a rough comparison, they cannot account for all of the human variables that contributed to the results.

*Overall Impact of Legal Aid at UNHCR–Cairo*

UNHCR–Cairo reported an overall recognition rate for the first half of 2002 of 24 per cent. Analysis of its results sheets found a first instance recognition rate of 27 per cent (based on a sample of 3053 decisions) and an appeal success rate of 4 per cent (based on a sample of 1107 decisions). Ideally, one would want to compare the success rate of applicants with legal assistance to those without, but since UNHCR does not report this data I compare assisted cases with the overall rate. Since a small portion of the overall rate includes applicants who had legal assistance, this data may slightly underestimate the impact of legal aid.

As Table 2 illustrates, obtaining legal assistance correlated with an approximately doubled chance of an asylum-seeker winning refugee recognition at UNHCR–Cairo. These statistics indicate that what is true for government-run asylum systems is also true for RSD conducted by UNHCR: legal aid appears to make a positive impact for asylum-seekers. This provides a strong argument that legal aid is essential for people to have an effective right to seek asylum in countries where UNHCR conducts RSD. UNHCR is correct to embrace the right to counsel within its RSD procedures just as it encourages governments to do within theirs.

*Alternative Legal Aid Programmes: Comparative Indicators*

Because the three programmes in Cairo offered different types of services, comparing their success rates offers an opportunity to measure the relative impact of various models of legal aid in the UNHCR RSD context. This means of comparison can show the general effect of legal aid in what might be called a 'typical' refugee case, since statistics of this kind cannot account for all individual differences between cases and clients. The impact of legal aid may be very different in particular cases, for instance in especially legally complex cases, or cases involving especially vulnerable asylum-seekers such as unaccompanied minors or people with severe post-traumatic stress. Some caution about comparing recognition rates is necessary because of the possibility that certain programmes attract different types of clients. If a particular programme attracts more challenging cases, its success rate is likely to be lower. At the first instance level, the more limited forms of legal aid (Musa'adeen and RCHR)

*Table 2***Correlation between Legal Aid and Recognition Rate at UNHCR–Cairo**

Combined legal aid programmes	UNHCR overall	Assisted cases	Sample size
First Instance cases	27%	49%	172
Appeal cases	4%	18%	77
Total sample size			249

Table 3

Comparative Success Rates in First Instance RSD Cases				
First Instance RSD	UNHCR Overall	EOHR Clients	Musa'adeen-All Saints Clients	RCHR Clients
Success rate	27%	19%	64%	64%
Sample size	N = 3,053	N = 58	N = 72	N = 42

Table 4

Success Rates in Appeal RSD Cases		
Appeal RSD	UNHCR Overall	EOHR Clients
Success rate	4.3%	14.5%
Sample size	N = 1,107	N = 69

produced a higher statistical rate of success than full service legal aid offered by EOHR. While applicants assisted by the Musa'adeen programme and RCHR more than doubled their chances of refugee recognition, those assisted by EOHR showed no significant improvement in success rate at first instance (Table 3).

This comparative phenomenon holds true when the comparison is made within a single nationality of asylum-seeker. For instance, among Sudanese first instance asylum-seekers, the Musa'adeen-All Saints success rate was 67 per cent, while EOHR's was 29 per cent. UNHCR's *2002 Population Statistics (Provisional)* indicates that Sudanese asylum-seekers in Egypt had an overall 42 per cent success rate (4,245 recognized out of 10,142 decided cases).

However, EOHR's full service legal aid showed a substantially more positive impact at the appeal stage. At appeal, clients assisted by EOHR were recognized at more than triple the overall UNHCR rate (Table 4). No data on the effect of limited or non-lawyer assistance on appeal was available. The Musa'adeen-All Saints avoided appeals cases in 2002 due to concerns that it was not an adequately competent service in appeals, and RCHR also worked mainly on first instance cases.

### Understanding the Impact of Legal Aid at UNHCR

The refugee legal aid programmes in Egypt in 2002 are interesting in part because each represented an entirely different approach.

The most traditional programme was EOHR, which aimed to offer full service legal aid. Full service legal aid envisions a traditional lawyer-client relationship in which a lawyer interviews and counsels a client, prepares documents, represents the client in court or in negotiations as necessary,

from the beginning to the resolution of a case. Full service legal aid offers the advantage of a professional advocate concentrating on an individual's case to provide comprehensive, zealous, and competent counsel. However, the advantage of this model is also its weakness. Since full service legal aid requires a high level of competence and time, it is difficult to expand legal aid capacity to meet the demand. Only approximately half of the asylum-seekers receiving legal aid in Cairo were receiving full service legal aid, and most of these were receiving assistance from paralegals, not fully qualified lawyers.

RCHR had a staff including lawyers, but offered a more limited service. RCHR began by offering full service legal aid, but moved to a limited legal assistance model in much of its work by focusing on helping clients write testimonies and de-emphasizing legal memoranda and arguments. Responding to the resource burdens imposed by full service representation, practitioners and scholars have increasingly advocated offering more limited services to legal aid clients. This 'unbundles' legal aid by breaking it down into component parts. In the refugee context, it would mean limiting service to preparing a personal affidavit, or helping an asylum-seeker prepare for a UNHCR interview.

The movement for limited legal services has been fuelled by demonstrations in some contexts that it can make a substantial impact in increasing unrepresented peoples' chances of achieving their legal objectives. For instance, one study found that tenants who had short counselling sessions with paralegals fared better in landlord-tenant disputes than uninformed, unrepresented tenants (Kim 1987: 1642 fn. 6).

The Musa'adeen similarly offered limited service, namely preparation of first instance testimonies. The Musa'adeen also represented a further innovation because it relied on the work of non-lawyers, in this case refugees assisting other refugees. Legal aid reformers have increasingly called for an increased role for non-lawyers in advising and in some contexts representing clients in order to increase the quantity of available advocates. There has been acknowledgement 'that non-lawyer representatives appearing before agencies achieved a success rate for their clients only marginally below the success rate of parties represented by lawyers and radically better than unrepresented parties appearing before the same agency' (*Fordham Law Review* 1999a: 1759-1760).

One of the central concerns with non-lawyer legal assistance is that it deprives clients of the competent service they should be able to expect. Concerns about non-lawyer assistance are usually torn between two commitments or realities. First, there is a commitment that low income people should not get second-class legal services. Second, there is a realization that there simply are not enough lawyers doing work with low income people for all of legal aid needs to be met. Out of these concerns, the weight of academic commentary now argues that non-lawyer services must be acknowledged and encouraged, but that context-specific regulations should be developed to define the training requirements, ethical boundaries, accountability and limits of non-lawyer practice (*Fordham Law Review* 1999a: 1763-1765).

Another legal aid technique evident in Cairo in 2002 was attempts to provide general legal information to groups rather than just individuals. In the case of the Musa'adeen programme, this included classes where refugee volunteers informed other refugees what to expect in their RSD interviews, and experiments with courses that taught asylum-seekers how to write their own testimonies for UNHCR. Such programmes can reach a large number of people with relatively few resources. They would seem a natural initiative to inform communities about their rights and legal procedures, and combat misinformation. However, unlike more individualized services, there is little evidence available about exactly how effective they are at increasing a person's chances of success in an asylum process.

With these categories of legal aid services in mind, we can better interpret the success rates of the Egyptian programmes. The most surprising result found in this study is that in first instance cases, full service legal aid did not fare better in UNHCR RSD cases than more limited assistance, though it showed strong impact in appeals cases. In theory, one would expect full service legal aid to equal or exceed the success of more limited service. As noted above, Musa'adeen and RCHR clients fared better at first instance than EOHR clients. Because of the limits of the data in my study, I do not assert that this data indicates that limited programmes like the Musa'adeen were actually better than full service legal aid. It is possible that EOHR attracted a more challenging set of clients and cases, a possibility that is very difficult to verify statistically. The data here supports the expansion of limited and non-lawyer legal aid programmes for asylum-seekers, and with UNHCR RSD in particular, but it should not necessarily be seen as undermining the case for full service legal aid.

Despite these caveats, I would hypothesize that the procedural limitations of the UNHCR RSD system stunt the effectiveness of the services that lawyers normally offer their clients. Normally, having a lawyer means having an advocate trained to apply the law to the facts of a case, which in a refugee case should reduce the chances that an asylum-seeker loses his or her application due to a narrow or errant application of the refugee definition. However, a lawyer's ability to do this will be severely constrained in a procedure that withholds evidence, does not provide reasons for decision, and does not provide an independent appeal. In this context, the main service a legal advocate can provide may be to help a client simply establish the facts of his or her case by helping to prepare a coherent personal statement and get ready for the RSD interview (Care 2001).

At the same time, the success of full service legal aid in appeals is likely the result of the greater need for legal analysis and argument at that level of procedure. The appeals process is more like an adversarial adjudication because a client is seeking to reverse a previous negative decision and needs to argue that something went wrong initially. In the first instance stage, by comparison, UNHCR has never evaluated the case before, and is deciding what initial position to take on the case.

In another system, a natural legal aid response to a flawed RSD procedure would be impact litigation designed to challenge the propriety of UNHCR's RSD procedure. This strategy would require a full service legal aid programme that would strategically pick and develop 'test cases' to set positive judicial precedents. When resources are scarce, impact litigation has obvious appeal because community-wide policy change can compensate for an inability to provide direct legal aid to all persons. However, impact litigation depends on having a judicial system that follows the principle of *stare decisis*, making a precedent set in one case enforceable in future cases. It also requires an independent appeal structure in which to promote test cases. These structural requirements make impact litigation, at least as traditionally conceived, difficult to implement in UNHCR RSD systems. To start with, reasons for decisions are not provided, much less published as binding precedents. It is therefore difficult to conceive how a successful appeal would make any impact beyond the individual client.

The suggestion that first instance legal aid should be limited in most cases to testimony and interview preparation may be troubling for many advocates. A refugee claimant *should* be able to submit all available arguments at all levels of the RSD procedure. In many contexts, standard litigation strategy calls for asserting all claims, defences, and arguments early if only to preserve potential grounds of appeal. Failure to do so would often be considered legal malpractice. But if the success rates in Cairo are any indication, the most effective advocacy with UNHCR's first instance refugee status determination is minimalist.

All of this points to a 'less is more' strategy for refugee advocacy with UNHCR RSD, at least at the first instance stage. This would mean limiting assistance in most first instance cases to case preparation, while focusing full service representation on appeals and particularly difficult first instance cases. An exception might be made for especially vulnerable clients or legally complex cases in which legal analysis and extra attention is likely to serve a greater purpose at the first instance stage.

### **Legal Aid as a Safeguard against Error**

As noted in this article, UNHCR's individual refugee status determination procedures have been faulted for lack of procedural safeguards. UNHCR has advised: 'The importance of [refugee status determination] procedures cannot be overemphasized. . . . A wrong decision might cost the person's life or liberty' (1989 ch. 2). It is for this reason that UNHCR has advocated procedural safeguards such as an independent appeal, providing reasons for rejection, and access to interpreters and legal counsel, among others (UNHCR 2001). If an RSD system operates without procedural safeguards, it increases the risk of errant rejections, defined here as any refusal of protection to a person who is in fact a refugee within the legal definition.

RSD is rarely a simple exercise of applying a legal standard to a set of facts. Complete evidence is rarely available. Finding the facts often requires applying the 'benefit of the doubt' to the testimony of the applicant. Assessing the credibility of this testimony is shaded by language and cultural barriers, variable levels of education, trauma, the interviewing techniques used, the quality or lack of legal advice, and fear of authority. Moreover, refugee status is one of the few areas of legal adjudication in which the decision-maker must make an assessment of risks in the future rather than of events in the past or circumstances in the present. RSD often touches on areas of high political sensitivity—immigration and political opposition to asylum, gender relations, ethnicity, race, and religion, and the politics of foreign governments.

There are no known studies systematically quantifying the risks of wrong decisions inherent in various types of RSD procedures, so the risk of errant rejections remains to some extent conceptual. Different types of RSD error risks can nevertheless be identified. RSD errors fall into two broad categories: those resulting from decision-maker error, and those resulting from applicant errors. Decision-maker errors are those in which all evidence that should come to light has come to light, but the adjudicator nevertheless misinterprets the evidence (for instance, incorrectly issuing a negative credibility assessment) or misapplies the refugee definition (for instance, denying protection to someone fearing persecution for reason of sexual orientation). Applicant errors are those in which the applicant is unable or unwilling to coherently produce all available facts and evidence in order to allow the decision-maker to make the correct decision. This may occur because asylum-seekers misunderstand the process, fear authority, or make costly decisions based on false advice. It may also occur when trauma, language, educational, or other difficulties prevent an asylum-seeker from coherently explaining all of his or her experiences.

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

At a policy level, applicant errors are as much a failure of the system as decision-maker errors in that they are often preventable by adequate procedural safeguards. This is why the most recent UNHCR advice on RSD procedures places significant emphasis on providing advice and information to asylum-seekers early in the process, with special attention to vulnerable groups, and requires the provision of competent interpreters (UNHCR 2001). Some safeguards operate mainly to prevent decision-maker errors, such as providing



reasons for rejection, access to evidence, and an independent appeal. Others, such as the right to an interpreter, operate to prevent applicant errors.

The right to counsel can combat both applicant errors and decision-maker errors. Legal advisers can prevent applicant errors by helping clients recount their experiences coherently and in detail, and by encouraging honesty and combating damaging rumours about the RSD process that spread through refugee communities. Legal advocacy can prevent decision-maker errors by providing research and analysis of the facts, and presenting legal theories that support a client's case.

It is suggested here that in a non-adversarial RSD system such as UNHCR's, legal aid at the first instance level should focus on preventing applicant errors. In a non-adversarial refugee status determination process, the most important voice—at least at first instance—must be the applicant's. A lawyer (or trained non-lawyer) can provide essential assistance by helping the asylum-seeker to tell their own story and make sure the facts are known to the decision-maker. If the decision-maker rejects the asylum-seeker, then the focus should shift on appeal to decision-maker errors. In this case, a lawyer's research, analytical and persuasive skills will be at a premium.

## **Dealing with Scarce Resources**

### *Vast Needs, Limited Capacity*

Legal aid capacity often is dwarfed by the demand for the service. In Egypt, at the end of 2002, legal aid in some form was available for about one in seven asylum-seekers (estimated annual legal aid capacity of 1,350 cases, compared to an estimated 10,000 refugee claims). This was an improvement on 2001, when legal aid was available for about one in 15 asylum-seekers. Although legal aid capacity in Egypt improved from about 900 persons in 2001 to about 1,350 persons in 2002, the improvement in percentage of the population served was mainly the result of a drop in the number of refugee claimants arriving in Egypt.

UNHCR generally performs RSD where governments have not enacted their own refugee legislation. This can translate to a lack of local lawyers, police, prosecutors, government officials, and judges with knowledge of refugee or migration law. This problem creates a range of protection challenges, and is a hurdle to the expansion of legal aid capacity. In countries where UNHCR performs RSD, legal aid needs are likely to be split between those requiring assistance at UNHCR and those requiring access to domestic tribunals. Although this paper concentrates on UNHCR RSD-related needs, the existence of other needs, and the split between UN and domestic authorities, must factor into any legal aid strategy.

Refugees and asylum-seekers need access to domestic courts and authorities much as citizens do, to resolve family or personal status problems, contractual or employment disputes, and criminal matters, among others. Domestic courts can also be engaged to prevent a migrant's detention or deportation (Table 5).

*Table 5*

**Potential Refugee and Asylum-seeker Legal Aid Needs**

UNHCR-related legal aid needs	Domestic authority-related legal aid needs
Refugee status determination	Defences to deportation
Resettlement/durable solutions	Family law/personal status cases
Material assistance decisions (health, education, housing, nutritional, monetary, etc.)	Employment cases
	Contractual and tort cases
	Criminal cases
	Other routine legal matters

The relative scarcity of legal aid causes administrative, strategic and ethical dilemmas for legal aid programmes. In 2001, when the number of asylum-seekers in Egypt was higher and legal aid capacity was lower, legal aid programmes struggled to set up workable systems for managing intake, a task that typically involved turning away large numbers of desperate people. More fundamentally, each legal aid programme has to decide how to allocate its scarce resources, which raises strategic questions about how legal aid services are best targeted to make the most impact, and ethical questions about whether it is appropriate for a legal aid programme to choose between potential clients on anything but a first-come, first-served basis.

Legal aid for refugees requires a wide array of skills that are difficult to find in one person. In Egypt, most lawyers speak only Arabic, while most texts and training materials on international refugee law are available only in English or other European languages. UNHCR's Cairo office functions primarily in English; although most staff are Egyptian and speak Arabic, supervisors are generally international staff and work in English. While legal aid at UNHCR may require English and a knowledge of international law, providing legal aid in front of Egyptian courts requires Arabic and a licence to practice law in Egypt.

*Client/Matter Selection*

The reality that low cost legal aid is not available to all who need it has led legal aid programmes to search for criteria by which to prioritize cases and clients in order to focus legal services where they will do the most good. This has been controversial with some commentators because it requires a legal aid programme to decide which type of clients or which type of cases are most important, typically based on some external agenda or value judgment. More recently, legal aid scholars and practitioners have embraced the need for client/matter selection (Tremblay 1999). A first come, first served system favours people with the time, knowledge, foresight and persistence to come early and often and can amount to a 'survival of the fittest technique [ ] to select clients' (*Fordham Law Review* 1999b: 1836).

Client/matter selection was endorsed by the 1998 Fordham University Conference on the Delivery of Legal Services to Low-Income Persons (*Fordham Law Review* 1999a: 1780). The Fordham Recommendations propose seven criteria by which to prioritize clients and issues:

- Importance of the interests at stake;
- Degree to which the legal aid resources will make a difference in the outcome;
- Whether the case offers long or short term benefits;
- Whether there are potential collective benefits to the community;
- Amount of resources that would be required to take the case;
- Availability of alternative resources (i.e. cases that can get assistance elsewhere could be a lower priority);
- Degree of emergency;
- Referrals for community-based organizations.

The Fordham Conference also developed a list of factors that legal aid programmes should *not* consider in client/matter selection:

- Personal judgment about the client's moral worth as an individual;
- Client skill at surmounting arbitrary access rules in the intake process;
- Unpopularity of the case, client, or cause;
- Restrictions on clients or cases imposed as a condition to receive funding.

Before deciding how to apply such principles in the context of refugee legal aid at UNHCR, legal aid needs a clear definition of the purpose. Should legal aid seek to help as many people as possible get refugee protection? Though a tempting goal for any legal aid programme, the utilitarianism implied by this objective is potentially undermining to human rights. It slides legal aid away from asserting rights and toward advocating for a benefit to an interest group (i.e., more UNHCR recognition for more asylum-seekers). A utilitarian perspective could have disturbing concrete effects in the way scarce legal aid resources are delivered. The statistics from Cairo illustrate that only a small minority of appeals are successful at UNHCR–Cairo, even with legal aid. But it is an area where legal aid still made a significant impact in increasing the chances of success. In a scenario where only one in seven asylum-seekers can get legal aid, should a legal aid programme take a difficult, time-consuming case that has a low chance of success?

The Universal Declaration of Human Rights (article 14) says that people do not only have a right to enjoy asylum; people have the right to seek asylum. I would argue that legal aid is ultimately more about seeking asylum than about enjoying it. Legal aid ensures that asylum-seekers can present their cases as effectively as possible, which facilitates more effective refugee status determination, and hence more effective refugee protection. In this formulation, it is not important how many people will ultimately win their cases, but it is important (as the Fordham Recommendation set out) whether legal aid

will make a difference in the outcome (and hence in enhancing a person's effective right to seek asylum). Hence, providing legal aid in an appeal might be just as important as in a first instance case, even if the overall chance of success is low.

Full service legal aid by qualified lawyers is the most scarce resource in legal aid programmes. It is most important in appeals, petitions to re-open closed files, legally complex first instance cases, and first instance cases with especially vulnerable clients (traumatized people, unaccompanied minors, mentally impaired asylum-seekers, etc.). In these cases, complete attention by a qualified professional is most necessary for asylum-seekers to have an effective opportunity to present a refugee claim. Cases involving potential exclusion from refugee status, cessation of refugee status, or cancellation of refugee protection due to fraud also call for full service legal aid because they involve unique procedural safeguards and (where accusations of crime or fraud are involved) can take on an adversarial character requiring a vigorous legal defence.

In the end, a legal aid programme should aim to have more first instance clients who receive limited services than clients who receive full service, both because they require fewer legal aid resources, and because cutting down on first instance errors reduces the need for legal aid on appeal. Because full service legal aid is such a scarce resource, it is particularly important that such programmes establish strong referral partnerships with other legal aid programmes, humanitarian NGOs, and UNHCR. This will help ensure that the people most in need of the service can be identified.

### **Professional Qualifications and Ethics**

Ensuring basic standards of ethics and competence is essential for providing effective, responsible and sustainable legal aid for refugees. These matters must be addressed either through internal regulation by legal aid programmes themselves, or by UNHCR establishing standards and regulatory mechanisms through transparent consultations with legal aid providers, and studies of other forms of administrative adjudication.

A first step would be to set minimum training qualifications to perform different services, and create a register of people permitted to provide legal assistance or counsel to asylum-seekers. A second step would be to draft a code or guidelines governing ethics and competency standards. This could be based on the codes already in place regulating refugee advocates in many asylum states. It should cover issues such as confidentiality, lawyer–client privilege and work product, and diligence. A third step is to design a complaints mechanism to establish accountability to the established standards. Clients of legal aid programmes should be able to make complaints if they believe they have received incompetent or unethical service. NGOs and UNHCR should establish mechanisms to resolve such problems.

Since UNHCR is an international institution operating outside the normal domestic legal framework, should legal aid practitioners at UNHCR be licensed to practise law in the country?

If a law licence is required, it need not necessarily be a *local* law licence. In Egypt, Thailand and elsewhere, legal aid for refugees was initiated by foreign activists or lawyers who aimed to eventually turn the programmes over to local lawyers. As an international adjudicator and UN agency, UNHCR is for these purposes akin to the International Court of Justice or International Criminal Court. These bodies require lawyers to be admitted to practise in any state, not necessarily in the state where the tribunals operate. Though UNHCR is not a court *per se*, in the RSD context it functions under a similar international banner as a system of administrative adjudication. Since UNHCR offices themselves typically have a mixture of local and international staff, it would be inappropriate for UNHCR to prohibit international lawyers to practise before it. To the degree lawyers are required in UNHCR RSD, any lawyer admitted to practise in any state should be able to practise in front of UNHCR.

In September 2005, UNHCR issued standards specifying that a legal representative in its RSD procedures need not be a licensed attorney but should have a 'working knowledge of refugee law' (UNHCR 2005: section 4.3.3). There are a number of reasons to support the position that legal aid at UNHCR RSD should not always require a law licence, although there is a need to regulate professional qualifications through other means. RSD systems in a significant number of major asylum states have long allowed non-lawyers to act as advocates for asylum-seekers. UNHCR offices typically have non-lawyers acting as interviewers and decision-makers in RSD, and use a generally informal adjudication process. As the statistics reported here from Musa'adeen show, non-lawyers (including refugees themselves) can make a substantial positive impact by providing limited assistance in RSD. For these reasons, requiring legal aid personnel to be lawyers would be unnecessarily restrictive.

Nevertheless, there is a need to develop a means of guaranteeing minimum standards of ethics and competency in legal aid in the UNHCR RSD context. The fact that UNHCR acts as an adjudicator in dozens of countries, deciding tens of thousands of cases around the world, is good reason for the development of applicable codes of professional conduct at the local or global levels.

Any definition of competence in UNHCR RSD should be tied to the service provided. Non-lawyers or less qualified people may be competent to provide testimony preparation services under supervision, but not to write legal memoranda, prepare appeals, or represent clients in RSD interviews. Organizations might set up two tiers of registered advocates. The first tier could be refugee caseworkers, who would prepare testimonies and conduct interview preparation under supervision but be prohibited from engaging in more extensive individual counselling or representation. The second tier could be refugee advocates and could include lawyers or people with a high degree of training and experience in refugee status determination. Refugee advocates would be

allowed to draft legal memoranda, provide more specific legal advice, and represent applicants in RSD interviews.

## **Conclusion**

The available data from refugee legal aid programmes in Egypt in 2002 support the hypothesis that providing advice and assistance to asylum-seekers increases their chances of success in obtaining refugee recognition through a UNHCR-operated refugee status determination procedure. This result is unsurprising in light of past studies of government-run RSD procedures, and studies of other forms of administrative adjudication.

The available data also provide support for the use of unconventional forms of legal aid to asylum-seekers, at least at a first instance level in a non-adversarial procedure. At this stage of RSD in Egypt, assistance limited to advice and preparation of testimonies correlated with a significant increase in clients' chances of success. Such limited assistance by trained and supervised non-lawyers showed a similar success rate. Full service legal aid, involving preparation of legal arguments and research as well as client testimonies, did not show such an impact. However, on appeal, full service legal aid did correlate with a significant increase in success rate.

I argue that legal aid is essential as a safeguard against RSD error at UNHCR. UNHCR is correct to embrace the right to counsel for asylum-seekers and should encourage the development of legal aid wherever it conducts status determination. UNHCR should inform all applicants of their right to counsel, and refer them to reputable legal aid organizations. Such referrals are especially important for the most vulnerable asylum-seekers, such as single women, traumatized people, and people lacking formal education.

In first instance cases, the non-adversarial nature of UNHCR's RSD process combined with the shortage of legal aid resources should give legal aid providers reason to focus on preventing errors by the applicants themselves. The focus here should be on developing a coherent and detailed testimony, and collecting evidence to which the asylum-seeker has direct access. These services can be provided, with training and supervision, by non-lawyers and should be aimed at making sure that the decision-maker has a complete and truthful understanding of the facts of the case.

At the appeal level, the full impact of legal aid may be reduced by the limits of UNHCR's RSD procedures. The fact that UNHCR does not let applicants see the evidence considered in their cases, and does not provide full reasons for rejection, limits the contribution that lawyers' analytical skills could make in ensuring a reliable adjudication process. Such procedural gaps eliminate essential safeguards against decision-maker errors. Even with these limits, legal aid is an important safeguard against factual or legal errors by decision-makers, especially in appeals.

No matter the form of legal aid, attention must be paid to ethics and professional qualifications. Legal aid organizations and UNHCR should work

together to develop standards defining who is qualified to carry out particular legal aid tasks, and to develop some form of regulation to prevent abuses and exploitation of asylum-seekers.

The right to counsel is only one part of a wider discussion of UNHCR's refugee status determination work. However, legal assistance to asylum-seekers should be an expanded part of UNHCR RSD in the future.

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1. A previous version of this paper was presented at the Eighth International Association for the Study of Forced Migration (IASFM) Conference, 5–9 January 2003, Chiang Mai, Thailand. This study was conducted while the author was adjunct faculty at the American University in Cairo.
2. This data is summarized and updated at [www.rsdwatch.org](http://www.rsdwatch.org) (follow link for 'UNHCR RSD Statistics').
3. UNGA Res. 57/187 paras. 7 and 8, A/RES/57/187 (18 December 2002) (*Reiterates* that international protection is a dynamic and action-oriented function, carried out in cooperation with States and other partners, inter alia, to *promote and facilitate* the admission, reception and treatment of refugees and to ensure durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups; *Re-emphasizes* that the protection of refugees is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the Office of the High Commissioner to fulfill its mandated functions.) (emphasis added); UNHCR, Note on International Protection, A/AC.96/930 (7 July 2000), at para. 2. ('While the main responsibility for safeguarding the rights of refugees lies with States, UNHCR's statutory role is to assist governments to take the necessary measures, starting with asylum and ending with the realization of durable solutions.');
- UNHCR Note on International Protection, A/AC.96/830, (7 September 1994), at para. 13 ('Since sovereign States have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction, effective protection of refugees requires action by the Government of the country of asylum on their behalf. UNHCR's role in providing international protection consequently, and above all, involves ensuring that Governments take the necessary action . . . The fulfilment of the High Commissioner's international protection function requires the active cooperation of the Government concerned, and the support of other countries in the international community.')
4. This right is provided for in the 1951 Convention Relating to the Status of Refugees, article 16, and in the International Covenant on Civil and Political Rights, article 14 fn. (right to counsel in criminal trials).

5. It should be noted that the legal aid programmes in Cairo have developed substantially since 2002; this research represents a snapshot from the infancy of Egyptian refugee legal aid. It would be well worth replicating this research today.

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