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This entry critically examines how countries decide who is a refugee, a process known as refugee status determination (RSD). Fair and effective RSD procedures are essential to ensuring refugees can access protection and for states to comply with their obligations under the Refugee Convention and international human rights law. Yet, the design of domestic RSD procedures occurs in highly politicized environment, with states weighing up competing interests and goals. The entry examines the relevant obligations under international refugee and human rights law to identify minimum constituent elements for RSD procedures. It then explores key controversies including restrictive RSD practices, lack of transparency, high degrees of inconsistency in RSD outcomes within and across countries, and emerging issues around the application of Artificial Intelligence and automated-decision-making.

Keywords: asylum process; procedures; fairness; efficiency; refugee law; human rights law

I. Overview

Refugee Status Determination (RSD) is the legal or administrative process used to determine whether a person seeking international protection is a refugee under international, regional or national law (UNHCR [n.d.]). The focus of this entry is on RSD under the Convention relating to the Status of Refugees and its Protocol (Refugee Convention).

The Refugee Convention is largely silent on the content and requirements of RSD procedures (Chetail [2019] at 194). This allows each state ‘to establish the procedure that it considers the most appropriate, in conformity with its particular constitutional and administrative structure’ (UNHCR [2019]). Recognition that a person is a refugee through RSD is declaratory, rather than constitutive (Goodwin Gill and McAdam [2021] at 54; UNHCR [2019] para 28). A person becomes a refugee at the time they satisfy the definition, rather than when that status is formally recognized. This means that many people on the move are entitled to international protection regardless of whether they have yet been recognized as refugees. However, in practice, recognition of a person as a refugee is vital as it is a precondition to securing various rights and protections.

One of the central considerations that has influenced how states design their RSD procedures is the question of how best to balance fairness and efficiency. The fairness of RSD procedures is of utmost importance given that the stakes are so high. A negative decision may result in the removal of a person from the country (see expulsion)—and where the process fails to recognize the risk of harm correctly, a person may face persecution, torture or death, in breach of the state’s obligations. At the same time, long delays in processing can have a

devastating impact on the physical and mental health of asylum seekers (Kenny and Proctor [2015]) and impede their integration into the host community. From the perspective of governments, inefficient procedures are financially costly and can compromise the integrity of the asylum system. Delays can incentivize unmeritorious claims, given that asylum seekers are often allowed to live and work in the community until their claims are finalized. However, as will be discussed, the broad trend across most states in recent years has been to tilt the balance too far towards efficiency and exclusion, at the cost of fairness. This was exacerbated by the COVID-19 pandemic, which saw many states suspend their RSD procedures, which further increased backlogs (Ghezelbash and Tan [2020]).

The 2018 Global Compact on Refugees highlighted the importance of fair and efficient mechanisms to determine individual international protection claims and established the Asylum Capacity Support Group to assist states to strengthen their RSD procedures to ensure their ‘fairness, efficiency, adaptability and integrity’ (United Nations [2018] paras 61-2).

II. Content and scope

As the Refugee Convention and Protocol do not provide explicit guidance on how RSD procedures should be run, the choice of means of implementation is left to the discretion of states. This discretion is limited by the principle of good faith and the standard of reasonable efficacy and efficient implementation under international law (Goodwin-Gill and McAdam [2021] at 521-23, 600-01). In the context of RSD, this requires states to adopt procedures that are *fair* and *effective* (UNHCR [2001]) and adequately implement the duty of *non-refoulement* found in Article 33(1) of the Refugee Convention. The obligations under the Refugee Convention do not operate in a vacuum. They must be read alongside other treaty obligations, particularly international and regional human rights law, regional norms (such as those developed in the European Union), as well as customary international law and general principles of law. Some additional guidance is also provided through policies developed by the Office of the United Nations High Commissioner for Refugees (UNHCR).

There is growing consensus around certain minimum constituent elements for RSD procedures, including: an in-person interview or hearing with the decision-maker; access to interpreters and legal representation; an opportunity to present supportive evidence and respond to adverse information; access to meaningful review of a negative decision; and the right to remain in the country until the initial claim and subsequent appeals are finalized. These core elements feature in UNHCR Executive Committee (ExCom) Conclusions (ExCom [1977], [1984]) and UNHCR materials (UNHCR [2001], [2019]), region specific instruments such as those produced by the Council of Europe (1981) and the EU’s Common Asylum Procedures Directives (2005, 2013). They also draw on procedural guarantees found in regional and international human rights law instruments and treaty body jurisprudence (UN treaty bodies and special procedures), including the prohibition of collective expulsion and the correlative right to an objective and individual assessment, and the right to an effective remedy (Cantor [2015]).

Similar requirements have been set out in academic writing (Jones and Houle [2008]; Legomsky [2000]; Goodwin-Gill [1997]; Vedsted-Hansen [2014]; Dastyari and Ghezelbash [2020]; Jeffries, Ghezelbash and Hirsch [2020]). Yet, as discussed in the following section,

the ‘relatively fragile legal basis’ of these requirements (Cantor [2015] at 85), has made it difficult to hold states accountable when they fail to adhere to these procedural standards.

Individual status determination is the gold standard of RSD. However, such procedures can be very resource intensive (Kagan [2017]), and a group-based approach may be appropriate in the context of large refugee movements (mass influx) (Global Compacts [2018] para 61). Group-based status determinations require fewer resources, as it allows an authority to grant (or at least *prima facie* recognize) everyone from a specific group as a refugee. It is widely recognized, however, that group-based approaches should only be used to recognize, rather than deny, refugee status (Curri-Roberts and Savage [2020] at 57-8). A decision to refuse recognition as a refugee should be made through an individual RSD assessment respecting the principles of due process (see also rule of law and due process guarantees (in the context of migration)).

RSD is generally carried out by state authorities. The agencies and individuals responsible for this task varies across jurisdictions, and can include border guards, migration officials, or dedicated asylum decision-makers and judges (Costello, Nalule and Ozkul [2020]). In states that lack formal national RSD procedures, or who are not party to the Refugee Convention, UNHCR may step in to conduct the RSD process (Abdelaaty [2020]; Kagan [2006]).

The rights and benefits which accrue from being recognized as a refugee through RSD vary in different contexts. This can range from a secure rights-protective status in some states, to a mere protection from *non-refoulement*. In other contexts, RSD carried out by UNHCR, can lead to resettlement in a third country.

III. Challenges and controversies

The lack of proscriptive guidance under international law on how to design RSD procedures has resulted in an absence of a firm legal basis to challenge attempts by states to curtail RSD procedures, or access to them (Cantor [2015]). As Chetail notes, ‘[i]n practice, domestic asylum procedures have increasingly become a stand-alone migration control tool rather than a proper means for identifying persons in need of international protection’ ([2019] at 194). Recent years have seen the global diffusion of various exclusionary RSD policies (Ghezelbash [2020]). This includes mechanisms that target claims that are deemed to be ‘manifestly unfounded’ (ExCom [1983]), or from applicants from a ‘safe country of origin’ or who can be returned (return and reintegration) to a ‘safe third country’ (Rausis [2022]; Gil Bazo [2015]). Some states exclude applicants falling under those categories from being able to access RSD procedures entirely, or funnel them into separate accelerated, expedited or fast-track procedures with shorter deadlines, and reduced substantive and procedural rights (Ghezelbash 2021).

Some states have also developed separate more limited procedures for asylum seekers applying for protection in specific contexts, including carrying out so called ‘pre-screening’ at airports and ports of entry (Jeffries, Ghezelbash and Hirsch [2020]), or extraterritorially at sea (see extraterritorial jurisdiction and migration) (Dastyari and Ghezelbash [2020]). Others, such as the United States and Australia, have attempted to move RSD procedures offshore, to third countries or external territories, with the aim of circumventing domestic legislative and constitutional protections (see externalization (including offshore processing)) (Ghezelbash

[2018])—a model which is now being emulated in countries such as Denmark and the United Kingdom (Gleeson and Yacoub [2021]).

The ability to hold states accountable for restrictive RSD practices is also impeded by a lack of transparency on how RSD procedures are run, and up to date data on the outcomes of the procedures. Even in the states of the global north, available data is often limited to published appellate court decisions, with little to no transparency in relation to first instance decision-making. There is similarly an absence of data on how RSD is carried out by UNHCR, which does not publish its decisions. As Costello, Nalule and Ozkul argue ‘the current lack of transparency not only renders the processes of refugee recognition somewhat impenetrable for researchers but also raises questions on the fairness of the process’ ([2020] at 7).

Where data on RSD procedures does exist, it often reveals significant disparities in RSD outcomes for similar asylum claims. Recognition rates for people from the same country of origin vary significantly across countries, including even within the relatively standardized European Union (Foster [2012]). Significant disparities also exist within individual states. In *Refugee Roulette*, Ramji-Nogales et al (2009) documented the significant degree of variation in outcomes before US judges within the same court. Rehaag’s work has uncovered similar disparities in the Canadian context (Rehaag [2012]). A new wave of computational and data driven research, is documenting a similar phenomenon in other jurisdictions including Australia (Ghezelbash, Dorostkar and Walsh [2022]) and across the Nordic countries (Byrne and others [2023]). These studies demonstrate that a refugee applicant’s chance of success in RSD procedures may largely turn on what jurisdiction they are seeking asylum, and the decision-maker assigned to their case.

Some of the variation can be explained by the different mechanisms and institutional processes and structures adopted in each state— which is facilitated by the lack of proscriptive guidance on RSD procedures under the Refugee Convention (Costello, Nalule and Ozkul [2020]; Hamlin [2014]). Another explanation is the highly discretionary nature of the assessment of individual claims, with decision-makers operating under conditions that have been described as ‘radical uncertainty’ (Kagan [2003]). The legal definition of a refugee set out in the Refugee Convention contains ambiguous terms that decision-makers must interpret and apply to a specific case (Liodden [2020]). Decision-makers also face unique fact-finding challenges (Cameron [2018]). Refugees often lack documentary evidence or witnesses which corroborate their stories. This means that fact-finding largely turns on the decision-makers assessment of the credibility of the claim. As Liodden notes, ‘the credibility assessment constitutes perhaps the most important source of uncertainty in the process’ (2020). Researchers have documented how credibility assessments can be influenced by cultural language barriers and ideologies (Kalin [1986]; Smith-Khan [2019]), anxiety, misunderstandings and the frailty of human memory (Cohen [2001]), as well as the unconscious biases of decision-makers (Rehaag and Cameron [2020]). Others have gone further, arguing that credibility assessments could be used by decision-makers to engineer ‘rejections by design’ (Noll [2005] at 5). These challenges have led to calls for changes in the way the burden of proof is applied in fact-finding in refugee cases, including recognising an obligation under the Refugee Convention to resolve doubt in the claimant’s favour (Cameron [2018]).

There are also some emerging controversies around the application of Artificial Intelligence (AI), and automated decision-making in RSD procedures. The preponderance of the existing scholarship has focused on the serious ethical and human rights concerns in relation to the use of AI in this context (Molnar and Gill [2018]; Forster [2022]). However, others have explored the potential for AI, when deployed in conjunction with adequate safeguards, to promote better decision-making and reduce unfairness in RSD procedures (Cameron et al [2022]) and increase efficiency (Kinchin [2021]).

IV. Conclusion

Fair and effective RSD procedures are essential to ensuring refugees can access protection and for states to comply with their obligations under the Refugee Convention and international human rights law. Yet, the design of domestic RSD procedures occurs in highly politicized environment, with states weighing up competing interests and goals. The absence of explicit and binding guidance in the Convention as to the design of RSD procedures has left significant leeway and discretion to states. This discretion has been limited to some degree by the procedural guarantees found in international human rights law. However, many states have nonetheless implemented RSD policies that prioritize exclusion and efficiency, over fairness.

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