Recognising refugees: understanding the real routes to recognition

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Refugee status determination procedures are the gateway to refugeehood and as such are profoundly important. Various challenges arise, however, in studying these practices.

Our research project 'Recognising Refugees' aims to understand the factors that determine who is recognised as a refugee (and who is rejected) globally.[1] In practice, recognition depends not only on the legal definition of 'refugee' but also, and most significantly, on the institutional processes used to recognise refugees. These processes may variously be called an 'asylum procedure' or 'refugee status determination' (RSD). They may be conducted by State authorities (border guards, police, migration officials or dedicated asylum decision-makers and judges); by UNHCR; or by a combination of State and UNHCR officials. The processes may be group-based or individualised.

It is vital to study these processes, as they are the gateway to refugeehood. Recognition as a refugee brings different benefits in different contexts (from a secure rights-protective status in some States to mere protection from *refoulement* and arbitrary detention in others) but it is generally transformative. However, it is not only the outcome of refugee recognition that is important. The processes themselves shape lives profoundly. In the course of our fieldwork, many asylum seekers recounted the indignities of waiting, prolonged uncertainty, and indeed the degradations of asylum interviews. The recognition processes, while they ought to be a gateway to protection, often entail obstacles for applicants, with a profound and long-lasting negative impact on well-being and rights.

The aim of this article is to introduce FMR readers to some of the recent academic research on refugee recognition, and to share some of the challenges we have faced in our own research. Overall, we have sought to broaden out the range of practices studied, in order to reflect the diversity of approaches worldwide. In so doing, we also aimed to understand the three key aspects of refugee recognition globally: group-based processes; the role of UNHCR in status determination; and refugee recognition processes in States that have not ratified (or do not apply) the 1951 Refugee Convention. We chose four States on which to focus which bring together these features in diverse constellations, namely Kenya, Lebanon, South Africa and Turkey, but we also engaged with local researchers and institutions in other key States in North Africa, South America and Asia. However, we confronted one challenge in particular in our research: lack of transparency. We hope that this piece may trigger reflection on the part of the many practitioners involved in refugee recognition, including within UNHCR and government bodies.

Scholarship on RSD: variation and its causes

In terms of the outcomes of RSD, there is now a large body of scholarship (mainly in political science) problematising variation in the 'recognition rates' of different groups of asylum seekers. This scholarship clearly illustrates that whether an applicant is recognised as a refugee depends not only (or sometimes not at all) on the strength of her claim but on the design of the recognition regime or even the particular decision-maker's identity (a sure sign of an arbitrary process). This variation is seen across States (particularly across the EU despite legal harmonisation of its asylum system), and also within them. The leading US study, *Refugee Roulette*, showed that the chances of recognition varied wildly even between judges in the same office.[2]

Much of the empirical scholarship illustrates the problem of variation and

demonstrates that factors other than the strength of the claim explain the outcome. For example, Linna Martén's Swedish study demonstrated the link between the judges' political affiliation and recognition.[3] Rebecca Hamlin's exemplary book *Let Me Be a Refugee* compares the RSD regimes in Canada, the US and Australia. These are States with similar legal systems applying the same refugee definition but with dramatically different outcomes in terms of who is recognised; she finds that the more insulated decision-makers are from political influence, the greater their ability both to develop refugee law in progressive ways and to recognise strong claim.[4]

UNHCR team registers Rohingya refugees in Bangladesh.

Scholars studying the processes of recognising refugees in the Global North analyse published decisions and recognition rates, and in many instances have secured access to records which document decision-making. Scholars have not only observed proceedings held in public but have also been granted institutional access to decision-making usually held in private. New technologies enable the study of mass decision-making but this too relies on the accessibility of source material. With access, scholars can provide powerful insights into the quality of decision-making.

Key aspects of refugee recognition

1. Group recognition

Group recognition is a key aspect of recognising refugees, and one that is often underappreciated. For instance, Turkey – which hosts more refugees than any other country – has adopted group-based protection[5] for almost 3.7 million Syrians (although it maintains a highly individualised process for other nationalities). While recognition on a '*prima facie*' basis is mostly applied in Africa, other forms of group recognition, including use of strong presumptions of inclusion, are found in many contexts, including in UNHCR's own practice. In the Middle East, both Iraqi and Syrian refugees tended to be recognised as a group. Moreover, some EU States responded to the 2015 refugee arrivals with de facto forms of group recognition for Syrians, in the sense that they were treated presumptively as refugees. For example, for some time in Germany asylum interviews were no longer required as long as Syrians' nationality was not in doubt.

One of the main challenges we have confronted is the difficulty in gathering data on the legal basis and processes underlying group recognition. *Prima facie* practices are widespread in Africa but there is no centralised source of information on these decisions, and in some instances records are difficult to locate, even though they effectively determine the status of millions of refugees. Notwithstanding deficits in official sources and transparency, it does seem that *prima facie* status is effective in terms of providing

security of status for refugees. For instance, in Kenya, Sudanese refugees who are recognised *prima facie* were one of the few cohorts of refugees we interviewed who expressed satisfaction with the recognition process in terms of its accessibility and fairness.

2. The role of UNHCR

The great understudied decision-maker is UNHCR. UNHCR undertakes RSD in States that are not party to the 1951 Convention, and in many States that do not have a national asylum procedure in place. The scholarship on UNHCR mandate RSD (as it is called) is now out of date, dating from the late 1990s and early 2000s,[6] but what was written was overwhelmingly critical, commenting on the lack of fair procedures and accountability within UNHCR processes. It would appear that in the intervening years, UNHCR has reformed its RSD operations. It has elaborated on its own procedural guidelines. In 2014 and 2015, it published guidelines on *prima facie* recognition of refugee status and temporary protection. In tandem, it sought to both explain and improve its mandate RSD by promoting group recognition. In May 2016, UNHCR formalised a new approach to its 'strategic engagement' on RSD, consolidating some of its pre-existing practices.[7] This new approach states that "diversified case processing strategies – such as group processing based on a *prima facie* recognition of refugee status or simplified procedures for nationalities manifestly in need of protection – need to be considered to safeguard the quality, integrity and efficiency of the process."

As yet, however, we cannot assess the impact of these reforms. The main challenge in studying UNHCR's role in RSD is its opacity. UNHCR's decisions are not published, unlike appellate decisions in national systems. Indeed, there are still no independent appeal mechanisms for UNHCR RSD decisions. Moreover, despite UNHCR's procedural guidelines on RSD, information on how UNHCR itself is taking its RSD decisions is not available. In contrast to the remarkable openness of some State authorities – mostly in the Global North – UNHCR lacks transparency and its practices are not open to scrutiny.

3. Refugee recognition in non-signatory States

We are just beginning to understand the diverse purposes of RSD, in particular in States that host refugees reluctantly, including those that have not ratified the Refugee Convention. Often, the role of UNHCR mandate RSD in non-signatory States is ostensibly to enable resettlement. However, for the vast majority of refugees, resettlement places are simply not available. When we examine the links between RSD and resettlement, resettlement emerges as an even less transparent process.

UNHCR conducts a particular form of RSD for resettlement as it must pick refugees who fit resettlement States' priorities. In this process, there is an intertwining of the refugee definition, vague vulnerability criteria and the knowledge that refugees must be acceptable to both the spoken and unspoken preferences of States. The lack of transparency in this process leaves scholars, practitioners and – most importantly – refugees often in the dark about the basis for choices.

UNHCR's role in recognising refugees may be hampered by the host State and RSD may not necessarily generate any clear benefits for refugees. For example, in Lebanon in 2015 the government required UNHCR to stop recognition of Syrian applicants – which led to a population of refugees merely recorded rather than registered; this prevented refugees from having a refugee certificate, potentially reducing their access to certain rights and assistance. Indeed, the lack of 'protection' ensuing from recognition is evident in many States. Echoing findings of Maja Janmyr in Lebanon, and as Derya Ozkul further explores in this issue of FMR, for many (potential) refugees, seeking recognition as a refugee in non-signatory States may diminish rather than increase their rights. The Lebanese authorities' requirement for refugees recognised by UNHCR to sign a pledge not to work in Lebanon is one such example.

Conclusion

At this preliminary stage in our research, we continue to struggle to come to an evidence-based assessment of refugee status determination procedures. If processes

are opaque and not open to public or scholarly scrutiny, we have to rely on the accounts of refugees, legal aid providers, and others who support refugees in their engagement with recognition processes. For our research, we depend on the goodwill of decision-makers and officials, both in UNHCR and government bodies, to allow access to records documenting refugee recognition processes. 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.

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2. Schoenholtz A I, Ramji-Nogales J and Schrag P G (2007) 'Refugee Roulette: Disparities in Asylum Adjudication', *Stanford Law Review* 60 (2): 295 bit.ly/SLR-Refugee-roulette

3. Martén L (2015) 'Political Bias in Court? Lay Judges and Asylum Appeals', Uppsala University, Department of Economics Working Paper Series 2/2015

4. Hamlin R (2014) *Let Me Be a Refugee*, Oxford University Press

5. Where there is automatic recognition for most if not all members in the particular group that is recognised.

6. Alexander M (1999) 'Refugee Status Determination Conducted by UNHCR', *International Journal of Refugee Law* 251; Kagan M (2006) 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law* 1. The blog 'RSD Watch', founded by Michael Kagan, also published many pieces on the challenges involved in UNHCR RSD.

7. UNHCR, Executive Committee of the High Commissioner's Programme, Standing Committee 66th meeting, 'Refugee Status Determination', 31 May 2016, EC/67/SC/CRP.12 www.refworld.org/pdfid/57c83a724.pdf

Refugees are Migrants: Refugee Mobility, Recognition and Rights (RefMig)

This FMR feature has been produced in collaboration with colleagues in the RefMig research project. In order to achieve a deeper understanding of the laws, norms, institutions and practices that govern refugeehood and the migration and mobility of refugees, the RefMig project examines the division between refugees and (other) migrants in several contexts.

Current RefMig research is organised in two distinct but interrelated strands. 'Recognising Refugees' examines Refugee Status Determination and related processes comparatively, and 'Organisations of Protection' focuses on international organisations in the refugee/migration regime, in particular the International Organization for Migration, and how these organisations understand, shape and determine the distinction between refugees and other migrants. An overarching RefMig theme is the accountability (both legal and political) of international organisations, which runs through both strands of research.

The project is led by Professor Cathryn Costello, Andrew C Mellon Professor of Refugee and Migration Law, Refugee Studies Centre (on special leave) and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, working with Dr Derya Ozkul, Dr Caroline Nalule and Dr Angela Sherwood at the Refugee Studies Centre, University of Oxford. The project is a Horizon 2020 award funded by the European Research Council (grant number 716968).

RefMig needs you!

The RefMig team is currently conducting interviews and other data gathering, and is particularly interested to discuss your experiences if you are:

- a current or former UNHCR RSD officer or reviewer
- working for a legal aid organisation representing applicants in UNHCR mandate RSD proceedings

Please email us refmig@qeh.ox.ac.uk if you are interested in sharing your experiences. Find out more by visiting www.refmig.org/weneedyou

Online surveys for both UNHCR RSD officers and legal aid organisations will be available at www.refmig.org/weneedyou in early 2021.