

“Building a Better Refugee Status Determination System”

INTRODUCTION

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The numbers that provide a context for this issue on refugee status determination (RSD), though stark and well-known, bear repeating. In excess of two hundred million people live outside of their country of nationality.¹ Sixty-seven million people have been forcibly displaced from their homes.² Twelve million individuals have no country of nationality.³ Of these overlapping populations, only about eleven million⁴ fall under the definition of “refugee” within the meaning of the term set out in the mandate of the United Nations High Commissioner for Refugees⁵ and as defined in the *Convention Relating to the Status of Refugees* of 1951.⁶ In these statistics lie the challenges of refugee status determination (RSD): determining who is a “refugee” and, conversely, who is not. As to how this task should be accomplished, neither the treaty nor the statute is of much direct assistance: there are 46 articles in the *Refugee Convention* and 22 paragraphs in the *Statute of UNHCR*, none of which address the issue of RSD.

And yet every year, over half a million individuals approach state or UNHCR officials and seek a determination that they are refugees. In Canada alone, over 25,000 individuals seek recognition of their status as refugees every year.⁷ Decisions are made by states and UNHCR in a similar number of claims and there is a slowly shrinking backlog of 750,000 individuals who continue to await a determination of their status. Decisions are issued by a variety of officials and institutions: administrative officers of a state, quasi-judicial tribunals, courts, members of the political executive of states, and by agencies of the United Nations.⁸

Amongst policy makers the problematic of RSD—of sorting out the eleven million refugees from a larger group of migrants and displaced persons—has become known as “the

asylum-migration nexus”⁹ or, more recently and more prosaically, the problem of “refugee protection and durable solutions in the context of international migration.”¹⁰ The articles in this issue of *Refuge* directly and indirectly engage with this problematic but collectively see the problem less as ensuring migrants do not access refugee protection and more as ensuring that refugee protection is in fact offered and legal protections guaranteed to refugees.

As Care points out in his article in this issue, RSD has been with us in one form or another for more than a century. However, it has only been within the past few decades that RSD processes became widely entrenched in most Northern countries. As a guide to the more recent development of RSD, it is now almost three decades since the UNHCR’s seminal global survey of RSD processes and the publication of its handbook on how RSD decisions should be made. Before these publications, there was almost nothing by way of common standards and guidelines that extended beyond the parochial study of the system presently in place in any given country.

In the 30 years since these publications, a vast scholarship has emerged on the criteria that should be applied by decision-makers in RSD or, in short, the definition of a refugee. The cornerstones of the refugee law scholarship addressed in this issue were laid by Grahl-Madsen¹¹, Goodwin-Gill¹² and Hathaway.¹³ Their work has enduring worth but precious little to say about RSD. Perhaps the neglect of RSD is simply a reflection of a relative inattention in the scholarship and in practice to the processes of law as opposed to its substance. Nonetheless, the debate over RSD has increased in recent years. European states and civil society turned their attention to the issue in the drafting of the European Union’s minimum

standards on RSD.¹⁴ NGOs from the Global South have campaigned for UNHCR to reform its RSD.¹⁵ Throughout the late 1990's numerous countries, including Canada, the United Kingdom, and Australia, immersed themselves in debates over the reform of their RSD processes. In this context, it is no surprise that RSD scholarship has raised its profile in the academic community and with those in charge of developing public policy. More recently, new groups in civil society have entered the discussion of RSD¹⁶ and conferences have been organized on the topic which, in turn, has generated a large body of literature on the subject. Notably, the conference organized by Susan Kneebone and France Houle in Prato, Italy on "Best Practices in Refugee Status Determinations" in 2008 resulted in some of the articles in this issue.¹⁷

This new scholarship builds upon an existing and vibrant literature: Barsky's early work on the discourses at place in refugee status determination proceedings,¹⁸ Cr peau and Nakache's examination of the critical spaces in the Canadian RSD¹⁹ and Houle's analysis of the use of different types of evidence by the Canadian Immigration and Refugee Board (IRB)²⁰ are only a few examples. There are numerous comparative studies of the RSD process²¹ and research on both the micro and macro variables at play in status determination.²² This issue adds to this literature with both general and specific articles on the RSD theme. Authors seek to advance the literature in important ways. It contributes to the body of knowledge by further developing the study of legal frameworks pertaining to RSD processes. It advances our understanding on practices and norms establishing RSD processes and decision making processes. It also expands the study of RSD to include the RSD processes of the Global South, including UNHCR RSD. Finally, it actively engages with the literature outside of refugee law—both in the broader field of law as well as other fields of study and practice.

Legal Framework

As noted previously, the *Refugee Convention* (and subsequent refugee treaties²³) does not specify the process by which RSD should be accomplished.²⁴ In the words of the UNHCR's *Handbook on Procedures and Criteria* "the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status."²⁵ Nor does it in fact require individualized RSD; a state may choose to give all asylum seekers *prima facie* refugee status as is frequently done in the case of mass influx situations. Indeed, there is a diversity of state practice with respect to RSD which must be acknowledged. New models of RSD are continually emerging, including the Brazilian model which involves civil society described by Jubilit and Menicucci in this Issue. Existing models continue to evolve as any practitioner of refugee law will confirm.

While silent on the precise process to be followed, Article 9 of the *Refugee Convention* authorizes the use of provisional measures (such as detention) against a refugee only "pending a determination by the Contracting State" of refugee status. Similarly, Articles 32 and 33 specify formal legal processes that must occur before, respectively, expulsion and *refoulement* are permitted. The former article goes so far as to normally require the right to present evidence and the right to representation.²⁶

The silence of the *Refugee Convention* as to process has been filled to a large extent by other international treaties and domestic procedural standards. Articles 13 and 14 of the *International Covenant on Civil and Political Rights* provide procedural guarantees in various proceedings.²⁷ Articles 19 and 22 of the more recent *International Convention on the Rights of Migrant Workers and Members of their Families* provide procedural guarantees.²⁸ Regional conventions, including the *Banjul Charter*,²⁹ the *American Convention on Human Rights*³⁰, the *European Convention on Human Rights*³¹, also provide procedural guarantees. Although there is some debate as to the extent to which each of these provisions apply to RSD *per se*, collectively they provide guidance in establishing minimum standards for RSD. Heckman and Jones's articles further elaborate on the applicability of the procedural protections granted in international treaties to procedural rights in RSD.

Furthermore, if there is a single lesson to be drawn from the domestic refugee law jurisprudence which has proliferated over the past two decades it is that domestic law is not silent about the rights to be accorded refugee claimants during RSD. In many countries, particularly in the Global North, domestic constitutional provisions, statutory protections and the bedrock notion of the rule of law have all guided the judicial understanding of the minimum standards for RSD. Where the *Refugee Convention* is silent and international human rights law contested, domestic courts have provided guidance. Here in Canada, RSD as it exists in its present form bears the markers of past judicial decisions: *Singh*³²; *Deghani*³³; *Say*³⁴; *Thamotharem*;³⁵ *Benitez*³⁶; and *Canadian Council for Refugees et al.*³⁷ to name but a few.

Less noticed however, has been the absence of equivalent guidance by the judiciary in the countries of the Global South. In many countries, appeals concerning the procedures by which refugees are protected are heard in courts sorely unprepared and ill-equipped to adjudicate the debate.³⁸ The courts in these countries have been poorly served by their legislative counterparts; most countries in the Global South do not have specific legislation dealing with the manner in which claims for refugee protection are to be determined.³⁹ The gaps extend to the legal profession. The well-developed refugee bar of the Global North is absent in most countries

of the Global South. As noted by Harrell-Bond in this Issue, it is rare to find training on refugee law in even the leading legal institutions of countries home to large populations of refugees.

In many of these countries in which domestic law is silent about RSD, the gap is filled by UNHCR. UNHCR is now the largest single determiner of status in the world, rendering individual RSD decisions to 51,000 refugee claimants per year in over 52 countries.⁴⁰ Countries in which UNHCR performs RSD most frequently automatically accept the decisions of UNHCR with respect to refugee status. The problem this presents is that UNHCR RSD frequently fails to provide the minimum procedural guarantees mandated by international law.⁴¹ Furthermore, as an international organization, UNHCR is exempt from abiding by domestic constitutional and statutory procedural protections. The tragic irony of UNHCR RSD is that its operational determination of status often fails to meet the standards recommended in its advocacy to states.⁴²

RSD Processes

Even in states with legislated RSD processes and close judicial supervision of RSD, recent years have seen a troubling narrowing of access to the RSD process. Safe third country rules in Europe⁴³ and North America⁴⁴ have restricted the ability of an “onward traveler” to even enter the RSD process; in addition Australia, the UK and elsewhere such rules are also used no less insidiously to curtail the ability of refugees to gain protection once within RSD processes.⁴⁵ Foster’s analysis of these provisions in her article in this issue is bleak: “safe third country schemes are unworkable and undermine refugee protection.” Limitation periods also prevent refugee claimants from undergoing RSD if they have delayed beyond a certain period of time. In some countries, the limitation periods arbitrarily limit those who can seek asylum.⁴⁶ In other countries, UNHCR deliberately limits the number of refugee claimants who are allowed to register in order to assuage concerns of the host country and control the intra-regional movements of forced migrants.⁴⁷ In too many countries the threat of detention act as a deterrent to seeking asylum.⁴⁸

Any complete study of RSD must analyse not only the processes by which status is determined but also the rules, processes and practices which exclude individuals and groups from status determination. Foster, along with Durieux, Jones, and Vigneswaran in this issue, take up this point. Durieux discusses the situation of individuals who never receive individual status determination but rather benefit from group determinations. Jones analyses how the Canadian procedure on the abandonment of refugee claims significantly reduces the chances of adequate protection for refugee claimants. Vigneswaran’s analysis suggests that our assessment of the

exclusionary rules of an RSD process must include an assessment of how individuals and institutions actually behave towards refugee claimants rather than simply the text of the law. Vigneswaran paints a particularly troubling portrait of access to RSD in South Africa, which at its inception was often cited as a successful model for RSD in the Global South.

Notwithstanding earlier antecedents, RSD as it is practiced today is a relatively recent development. The decisions that are produced in RSD processes have been described as engaging in a “transnational” legal discussion.⁴⁹ A similar description can be applied to the development of RSD: it has occurred as a result of and is the product of a transnational examination of the practice of RSD. At times this has occurred as a result of regional deliberations, but more often the developments in RSD can be better explained as stopgap measures designed to respond to specific parochial requests for reform, whether from the judiciary or the public.

A consensus has emerged concerning the constituent elements and requirements of RSD. It should occur after an in-person interview or hearing with a decision maker sensitive to the situation of the refugee claimant. The process should allow for, but not require nor necessarily automatically provide, legal representation; interpretation should be provided as required. A decision should be taken only after the refugee claimant has had an opportunity to present supportive evidence and after the decision maker has undertaken an inquiry into the existence of such evidence. There should be an opportunity for an independent review of the decision and, in normal circumstances, the removal of the refugee claimant should be suspended pending the outcome of such a review. These elements are not controversial and are found in the vast majority of RSD processes in both the Global North and Global South. UNHCR’s own practice in RSD is consistent with this consensus. All of the authors herein take issue in their analysis with the adequacy of the RSD processes under study as compared against this consensus and against the prevailing binding norms.

At the core of the debate is the extent to which each of these foregoing elements of consensus is required as a matter of law and how each of them should be interpreted. As Schreier notes in her article, South Africa’s use of the OAU Convention in its decision-making shows variation during the RSD process in interpretation of the law by different decision-making bodies. These variations raise the problem of the competence and abilities of decision-makers, but also the degree of their independence in relation to government of the day, whether recognized by law or not. Heckman takes up this question in his article by examining to which extent international and domestic law requires refugee decisions (including appeals) to be made by “independent” decision

makers. To this end, he pays particular attention to existing international safeguards on independence.

The issue of independence is central when the time comes to design a RSD process. As can be witnessed, decision makers in state RSD processes range from specially trained immigration officers to quasi-judicial officers to judges. The legal situation of UNHCR imposes unique problems: who can provide an “independent” appellate review of first-instance RSD decisions? Equally, debate continues concerning the degree of access to appellate review—and the appropriate extent of that review. Again, practice is quite parochial with there being no agreed upon model for appellate review. Although some of the processes of RSD are heterogeneous, this is not to suggest that comparisons cannot be made, minimum standards set nor minimum standards and best practices proposed.

The question of providing refugee claimants with legal assistance is of particular importance. Despite RSD often being formally “non-adversarial” and the dominance of an investigative model (often wrongly labeled inquisitorial) of proceedings, the increasing complexity of the definition of “refugee” and the procedures used to determine status has led to the necessity of claimants having access to legal assistance. Absent the provision of such legal aid, refugee claimants have a demonstrably lower probability of success in the pursuit of their claims.⁵⁰ These statistics are doubly troubling: both because of the implication that unrepresented genuine refugees are being refused status and because most refugees are unrepresented. While NGOs in the Global South, including members of the SRLAN, are now providing legal aid to some refugees, they are unable to meet the demand.⁵¹ In the Global North, legal aid to refugees is in crisis.⁵²

Reinforcing their already mentioned procedural disadvantages, refugees undergoing RSD for resettlement have even less access to legal assistance.⁵³ Indeed, a growing number of countries conduct RSD for refugees applying for resettlement. These applications are dealt with by relatively junior and inadequately trained staff, are often disposed of without an interview and are rarely subject to judicial scrutiny. Although there may be no enforceable international obligation to grant refugee protection to applicants overseas⁵⁴, it is inconsistent not to provide them with some of the procedural protections provided to inland applicants. Most of the refugee claimants applying for resettlement from overseas are in a situation as precarious as an applicant applying for refugee protection from within a country; many such applicants are in danger of imminent *refoulement* or severe human rights violations in their country of temporary refuge.⁵⁵ This raises the equally important question as to who must pay for the legal representation and provision of interpretation services to a refugee claimant? Harrell-Bond suggests that the cost

must be borne both by the world both collectively, including the more affluent countries of the Global North who indirectly benefit from the Global South’s refugee burden, and individually through committed personal action on behalf of refugees.

These debates are joined by national and international policy makers, academics, and, increasingly, the individuals within the process itself. Decision makers, lawyers, interpreters and refugees themselves are beginning to organize and to advocate on procedural issues. The International Association of Refugee Law Judges (IARLJ), of which Case is past president, recently celebrated the tenth anniversary of its founding. Organizations and individuals providing legal representation to refugee claimants during RSD are increasingly members of national and international networks. The new Southern Refugee Legal Aid Network discussed by Harrell-Bond in her article (and with which she was involved in founding) is one such network and there are currently discussions underway about organizing a global refugee bar association. Interpreters, the literal voice of the process to most claimants, have also spoken out about unfair procedures used in refugee and immigration proceedings.⁵⁶ Refugees have themselves organized themselves locally and along communal lines in mass protest over deficiencies in RSD processes (or its absence)—sometimes with tragic results.⁵⁷

RSD Decision Making

To put it plainly: RSD is not easy. By definition, it involves determining the status of individuals from foreign countries, describing events elsewhere about which little is known, often speaking foreign languages and with a range of different cultural beliefs and behaviors. Most refugees have suffered significant trauma, if not before flight then as a result of flight. It is a process of determination that requires perpetual sensitivity to the unique predicament of the refugee. Oddly the “uniqueness” of a refugee claimant’s predicament is often used as a cudgel rather than a salve by decision makers. As Cleveland points out in her article, the use of prescribed special procedures for “vulnerable” claimants has been hampered by the view of the decision makers that the situation of the particular claimants was not sufficiently different from the generic situation of all refugees:

Few refugee decision makers can understand refugee claimants.⁵⁸ Metaphorically, the experiences of the former and the latter are vastly different. But additionally, refugee claimants frequently cannot speak the official language of their country of asylum. Interpreters and translators are omnipresent in RSD. And yet mistakes of language are made and are costly. To avoid mistakes and misunderstanding as much as possible, the right to an interview or hearing (with interpretation) before the decision-maker has become

established practice in RSD. However, this right can be severely limited in practice. For example, in order to expedite refugee determinations, the Immigration and Refugee Board of Canada has resorted to a paralegal instrument—a guideline—to ensure that the inquiry into claims will focus only on the issues decision-makers have predetermined to be central, as Houle has discussed in her article. The disclosure of extrinsic evidence relevant to the claim or the country of origin that will be considered by the decision maker has also become common practice.⁵⁹

Language and access to information are not the only barriers facing a refugee claimant. Differing social and cultural mores between a refugee claimant, his or her country of origin and his or her country of asylum can produce obstacles to inquiry and misunderstanding. With so much of RSD hinging on the credibility of the refugee claimant, obsessive attention is often paid to the precise wording of his or her written and oral testimonies. As a result, nonsensical judicial doctrines persist, such as the requirement that a claimant identify problems in interpretation as soon as they occur. A potential solution to the quagmire of micro-analysis of testimony given in another language and behavior produced by a differing socio-cultural point of view is the greater use of country of origin information. However, the article written by Pettitt, Townhead and Huber is a report on a research project of the Research and Information Unit of the Immigration Advisory Service examining the use of country of origin information in the UK RSD cautions that such information is not always as objective a source of information as often stated in refugee decisions and that its use by decision makers is plagued by a significant selection bias.

There is such variation between jurisdictions and within jurisdictions that RSD has been described as a “lottery.” Refugee claimants from Iraq provide a good example of the variation in outcome. Within the European Union, the member states of which have accepted common minimum standards with respect to both criteria and process for RSD, acceptance ranged from 63% in Germany to 0% in Greece.⁶⁰ Within jurisdictions, there was an 1820% variation in asylum acceptance rate between the best and the worst immigration judge in the same courthouse.⁶¹ In Canada, 9 in 10 refugee claimants get accepted by one member of the Refugee Protection Division of the Immigration and Refugee Board while a similar proportion of the same claimants get refused by another member.⁶² Mascini adds to this newer literature in this issue with his case study of the variation in and variables affecting RSD outcome in the Netherlands. Although efforts have been made by various tribunals to standardize processes and outcomes, such efforts are more often than not motivated by concerns around efficiency than the fairness of

the proceedings and run the risk of arbitrarily fettering the discretion of decision makers.

Conclusion

RSD is a means not an end. It is the process by which states and UNHCR identify who are entitled to the benefits of refugee protection and thereby facilitate the fulfillment of their obligations to the beneficiaries of the international refugee regime. It is a truism of refugee law that RSD does not confer status on a refugee but merely confirms it.⁶³

The statistics quoted at the outset of this editorial belie the reality of refugee protection: as Durieux points out in his article “[t]he majority of the world’s refugees have secured a legal status without resort to an individual examination of their claims”. The use of group, temporary and *prima facie* recognition⁶⁴, and the application on an inter-generational basis of the doctrine of family unity all mean that most refugees are granted or denied status without ever undergoing anything other than the briefest of biographical examinations.

Nor could the international refugee protection regime function otherwise. RSD consumes significant resources and is unsustainable on a universal basis. Although exact figures are difficult to determine, it is likely that the combined cost of RSD performed by states and UNHCR approaches or exceeds the total cost of direct humanitarian assistance provided to refugees by UNHCR.⁶⁵ Hathaway has estimated that the Global North alone spends \$10 billion on RSD, a number which is a scale of magnitude larger than UNHCR’s budget and exceeds even total UN expenditures.⁶⁶

But if RSD is the means—and often an expensive one—then the end is the protection of refugees. The questionable and unspoken premise of this proposition is that those individuals who are not refugees are not protected. While by definition such individuals do not have the *same* need for protection as refugees, this is not to say that they are not in need.⁶⁷ The equally questionable premise is that, once recognized, refugees gain protection. In many parts of the world this proposition is demonstrably false.⁶⁸

This is not to say that the project of studying and improving RSD is without merit but simply to remind us that it must be linked to the larger questions of the provision and apportionment of asylum and ultimately how we react to the strangers amongst us. The broader milieu of RSD is indeed the 200 million individuals outside of their country of nationality. In assessing RSD we must look at not only how we treat refugees but also how we treat strangers in our midst.

NOTES

1. Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* (Geneva: Global Commission on International Migration, October 2005) at 83.
2. United Nations High Commissioner for Refugees [UNHCR], *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva: UNHCR, June 2008) at 1 [*UNHCR Global Trends 2007*].
3. *Ibid.* at 20.
4. *Ibid.*
5. *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950) [*Statute of UNHCR*].
6. *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150 (entered into force April 22, 1954) [*Refugee Convention*].
7. Immigration and Refugee Board of Canada, *Part III: Report on Plans and Priorities, 2008–2009* (Ottawa: Department of Citizenship and Immigration, 2008) at 19.
8. In addition to UNHCR, the United Nations Relief and Works Agency (UNRWA) makes determinations of status of refugees falling under its mandate (and who are thereby excluded from the protection on UNHCR and the *Refugee Convention* by Article 1D).
9. The most prominent recent articulation of the concept (although not using the term) can be found in UNHCR's 2002 "Agenda for Protection" (which was endorsed by the Executive Committee of UNHCR in its Conclusion on International Protection No. 92 (LIII) of 2002 and by the UN General Assembly in A/RES/57/187 of 4 December 2002).
10. Jeff Crisp, "Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration" (New Issues in Refugee Research, Paper No. 155, UNHCR Policy Development and Evaluation Service, Geneva, April 2008) at 2.
11. Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, vol. 1:1966 and vol. 2:1972).
12. Guy S. Goodwin-Gill, *The Refugee in International Law*, (Oxford: Oxford University Press, 1983); (2nd ed., 1996).
13. James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1993).
14. *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* (13/12/2005) 326 Official Journal L at 13.
15. The RSD Watch project of Asylum Access (<<http://www.rsdwatch.org>>) initiated, along with Barbara Harrell-Bond, advocacy on this issue. The Southern Refugee Legal Aid Network, of which Asylum Access was a founding member, has now joined the advocacy effort.
16. The Asylum Access, the Southern Refugee Legal Aid Network, and the Asia Pacific Refugee Rights Network have all been formed in the past five years and have all adopted as one of their core advocacy projects the reform of RSD processes.
17. Simeon's article in this Issue provides a report from another conference held in 2008 at the Centre for Refugee Studies at York University.
18. Robert Barsky, "Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing" (New York: John Benjamins Publishing, 1994); Robert Barsky, "The Construction of the Other and the Destruction of the Self: The Case of the Convention Hearings" in G. B. Gabler, ed., *Encountering the Other(s)* (New York: SUNY Press, 1995) 79–100; and, more recently, Robert Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (New York: Ashgate Publishing, 2000).
19. Francois Crépeau and Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System, 1989–2002" (Paper presented at the 9th Biennial Conference of the International Association for the Study of Forced Migration, 2005) [unpublished]; and the more recent François Crépeau and Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System: 1989–2002" (2008) 20:1 *International Journal of Refugee Law* 50.
20. France Houle, "Pitfalls for Administrative Tribunals in Relying on Formal Common Law Rules of Evidence" in Robin Creyke, ed., *Tribunals in the Common Law World* (Annandale, Aus: Federation Press, 2009); "The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience" (1994) 6:1 *International Journal of Refugee Law* 6.
21. See for example Jean-Yves Carlier *et al.*, *Who Is a Refugee? A Comparative Case Law Study* (Kluwer, 1997), dealing with 15 countries of the European Union.
22. See for example Mary-Anne Kate, "The Provision of Protection to Asylum-Seekers in Destination Countries" (New Issues In Refugee Research, Working Paper No. 114, UNHCR Evaluation and Policy Analysis Unit, Geneva, May 2005).
23. Notably the *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967; *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45, entered into force June 20, 1974 [*OAU Convention*]; and, the *Cartagena Declaration on Refugees*, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85), 17 April 1998 [*Cartagena Declaration*].
24. Durieux in his article (at note 2) in this issue refutes the notion that the *OAU Convention* deals with the issue of *prima facie* RSD for mass influxes.
25. *UNHCR Handbook on the Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1979) (re-ed., 1992) at ¶ 189 [*UNHCR Handbook*].
26. Article 32(2).

27. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [ICCP].
28. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003 [MWC]. Article 3(d) specifically precludes the application of the MWC to refugees. However, given that many refugee claimants are not in fact refugees it would be inappropriate to design an RSD process that did not meet the requirements of the MWC.
29. Article 7 of the *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [Banjul Charter].
30. Article 8 of the *American Convention on Human Rights* O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
31. Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively) [*European Convention on Human Rights*].
32. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.
33. *Dehghani v. Canada (Minister of Employment and Immigration)* [1993] 1 S.C.R. 1053.
34. *Say v. Canada (Solicitor General)*, [2005] FCA 422.
35. *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C. 385 (Fed. Ct. Ap.).
36. *Benitez v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C. 155 (Fed. Ct. Ap.). (The case of *Benitez* was joined with eight other cases raising similar issues by the Court of Appeal.)
37. *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen* [2008] FCA 229.
38. As an example, in the matter of *Subramaniam Subakaran v. the Public Prosecutor* Criminal Review No. 43-01-2006, the High Court of Malaya (in Malaysia) proceeded in its analysis on the assumption that Malaysia was a state party to the *Refugee Convention* when in fact it is not.
39. Furthermore, in those countries which do have (or are introducing) legislation, the compatibility of the legislation with the requirements international law is doubtful. The Domestic Law Project of the Southern Refugee Legal Aid Network (co-directed by Marina Sharpe, Fatima Khan and Martin Jones) is in the process of collating evaluations of these legal frameworks—many of which are obscure even to UNHCR and legal professionals in these countries.
40. *UNHCR Global Trends 2007* at 13 *et seq.*
41. UNHCR has been criticized in particular for its failure to disclose evidence to a refugee claimant, its refusal of the right to counsel, its failure to provide adequate reasons for rejection of a claim to refugee status, and its failure to provide for an independent appeal of a refusal of claim to refugee status. Many of these criticisms are the subject of ongoing discussions between members of the SRLAN and UNHCR; some recent progress has been made on increasing UNHCR's compliance with international norms.
42. The additional irony is that UNHCR is often in the position of performing RSD due to the reluctance or inability of states to perform RSD according to international norms.
43. The *Dublin Convention* Official Journal C 254, 19.08.1997 and its associated European Union regulation—*Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* Official Journal L 50, 25.2.2003—restrict the ability of refugee claimants to seek protection in a country other than the country of their arrival (or the country otherwise responsible for their arrival) in Europe. In essence, the *Dublin Convention* rules require most refugees to seek asylum only in the country of their arrival in Europe—generally the countries of Eastern and South Eastern Europe. The problems that can be caused by such arrangements are illustrated in the recent controversy over the return of refugee claimants to Greece under the *Dublin Convention*. See UNHCR, “UNHCR Position on the Return of Asylum-Seekers to Greece under the *Dublin Regulation*” (15 April 2008).
44. The Safe Third Country Agreement (STCA) between Canada and the USA—more formally the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries of 5 December 2002*, [2004] Can. T.S. No. 2—limits the ability of refugees to transit through one of the countries and seek asylum in the other. The STCA was the subject of an unsuccessful court challenge in the above-noted matter of *Canadian Council of Refugees et al. v. Her Majesty the Queen* (see note 40 above).
45. In the United Kingdom, section 94 of the *Nationality Immigration and Asylum Act 2002* makes provision for a list of countries from which asylum or human rights claims can be certified as clearly unfounded unless the applicant is able to prove otherwise. In Australia, sections 91M to 91Q of the *Migration Act 1958* (Cmwlth.) and sections 33 and 36 of the *Border Protection Legislation Amendment Act 1999* (Cmwlth.) make provision for the refusal of protection to individuals who transit certain countries while *en route* to Australia.
46. In Japan, those who make a refugee claim more than six months after arrival are subject to detention and the com-

- mencement of removal proceedings under the terms of the *Immigration Control and Refugee Recognition Act*. In the US, there is a one year limitation period on seeking asylum (see 8 U.S.C. § 1158(a)(2)(B)).
47. An examples of this practice can be found in Malaysia, where the number of registered refugees is arbitrarily capped by UNHCR at about 50,000 (despite a refugee population which is by all accounts a multiple of that number) in order to both placate the host government and to decrease “primary and secondary movements” of refugees; currently UNHCR refuses to commit to the full registration of refugees in Malaysia despite its obligations under the *Statute of UNHCR* and stated policies to the contrary.
 48. The threat of detention is frequently used to deter refugee claims. Detention itself can also act as a barrier to seeking asylum, especially where those in detention have no access to or ability to communicate with state or UNHCR officials responsible the RSD process. In the next issue of *Refuge*, we will publish a report on detention practices in Turkey which illustrates the insidious effect of detention on asylum.
 49. Harold Koh of the Yale Law School is the most notable proponent of this analysis: “Transnational Public Law Litigation” (1990–1991) 100 Yale L.J. 2347; “The 1994 Roscoe Pound Lecture: Transnational Legal Process” (1996) 75 Neb. L. Rev. 181; and, “Bringing International Law Home” (1998) 35 Hous. L. Rev. 623.
 50. Michael Kagan, “Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt” (2006) 19 Journal of Refugee Studies 45.
 51. Most Southern refugee legal aid organizations are able to provide representation to less than 5% of refugee claimants.
 52. As this editorial was being written, the government-funded legal aid provider in British Columbia (the Legal Services Society of British Columbia) announced an immediate discontinuation of representation at refugee hearings except in extremely meritorious cases. Ian Mulgrew, “Economic blues herald ‘perfect storm’ for B.C. legal aid system” *Vancouver Sun* (18 November 2008) A1; Erik Eckholm, “Interest Rate Drop Has Dire Results for Legal Aid” *New York Times* (19 January 2009) A12.
 53. Very few legal aid organizations in either the Global North or Global South provide legal aid for resettlement applications.
 54. Gregor Noll, “Seeking Asylum at Embassies. A Right to Entry under International Law?” (2005) 17 International Journal of Refugee Law 542.
 55. Given that resettlement as a durable solution is a limited resource, both UNHCR and countries of resettlement pursue the resettlement of only those individuals for which no other durable solution is available, including often due to the risk of violence to the individual in the country of first asylum.
 56. The most famous example of this is the open letter of Erik Camayd-Freixas, a contract interpreter with the US Department of Homeland Security’s Immigration and Customs Enforcement unit and also the director of the interpretation and translation program at Florida International University. His widely circulated letter critiques the immigration proceedings which occurred after what was then the largest immigration raid in US history. Erik Camayd-Freixas, “Interpreting after the Largest ICE Raid in US History: A Personal Account” (13 June 2008) (copy on file with author).
 57. As this editorial was being written 300 Rohingya Burmese refugees in Kuala Lumpur publicly protested the registration policies of UNHCR described below. In 2005, refugees in Cairo protested a not dissimilar policy; their protest (a sit-in of a park outside UNHCR’s office) was forcibly ended after three months with over two dozen dead.
 58. There are a few refugee decision makers who have themselves been refugees, notably Justice Albie Sachs of the South African Constitutional Court (a topic on which he spoke at the recent gathering of the IARLJ in South Africa in January 2009).
 59. There are of course exceptions, most notably in UNHCR’s RSD which continues to bar and limit access by a refugee claimant to material considered by the first instance and appeal decision makers. This practice has been colorfully described by refugee advocates as the use of “secret evidence.”
 60. *UNHCR Global Trends 2007* at 17 (Table).
 61. Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication” (2007) 60 Stan. L. Rev. 295.
 62. Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39 Ottawa Law Review 335.
 63. Paragraph 28 of the *UNHCR Handbook* famously states this truth as follows: “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”
 64. These terms describe the overlapping and interrelated practices of assuming unless there is evidence to the contrary (i.e. concerning exclusion) that an individual is a refugee (*prima facie*), performing such a determination on a group basis (group), and providing protection to such refugees for a time limited period (temporary).
 65. By way of example, Canada spends approximately \$150 million on the determination of refugee status of about 35,000 inland and overseas refugee claimants per year—or just under \$5000 per claim. This figure does not include the cost of legal aid or subsequent judicial reviews. *Citizenship and Immigration Canada: Report on Plans and Priorities, 2008–2009* (Ottawa: Treasury Board of Canada, 2008) at 14

and *Immigration and Refugee Board of Canada: Part III, Report on Plans and Priorities, 2008–2009 Estimates* (Ottawa: Treasury Board of Canada, 2008) at 18 (Table 1.7).

66. James Hathaway, “Toward the Reformulation of International Refugee Law” (1996) 15:1 *Refugee*; Amitav Acharya and David B. Dewitt, “Fiscal Burden Sharing” in James Hathaway, ed., *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997) at 117.
67. The belated discussion of “complementary protection” by Macadam and others has begun to address, from a human rights perspective, other groups in need. Furthermore, as any practitioner knows (and as Cleveland’s article makes clear), even the “needs” of refugees vary tremendously.
68. The annual *World Refugee Survey* published by the US Committee for Refugees and Immigrants (USCRI) makes this abundantly clear for most countries surveyed, even those that do not make the USCRI’s “Bottom 10” list.

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