



Refugees / Migrants

Refugee Mobility, Recognition and Rights

**Recognising Refugees:
A Review of the Literature and Approaches (1990-2020)**

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Working Paper No. 01



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About RefMig Project

The RefMig project aims to examine the global refugee regime, with a particular focus on the institutionalisation of the refugee/migrant binary globally. The project is divided into two strands: Recognising Refugees and Organisations of Protection. This report falls under the Recognising Refugees strand, which examines the institutional practices that seek to distinguish refugees from migrants. We take a purposefully broad conception of refugee recognition, encompassing not only individual refugee status determination (RSD) but also the institutional processes that determine access to RSD, as well as various forms of group determination. We examine the role of state institutions in this context (bureaucracies, legislatures, and the judiciary), as well as UNHCR's mandate RSD practices, and its handovers to state authorities.

The project lead is Professor Cathryn Costello. During the RefMig project, she held the positions of Andrew W. Mellon Professor of International Refugee and Migration Law, Refugee Studies Centre, University of Oxford and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, Berlin. RefMig obtained ethics clearance from the Central University Research Ethics Committee (CUREC) of the University of Oxford (Ref No: R61177/RE001) and the European Research Council.

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1. Introduction: Why Study Recognising Refugees?

In a world with widespread conflict and persecution, and asylum policies of varying restrictiveness, it is crucial to understand the processes protection seekers are subjected to when they seek refuge in another country. These processes have profound impacts. In general, refugee status brings with it crucial rights, in some contexts putting refugees on a pathway to permanent residency. Even in those countries, where rights are not so easily endowed, at least some protection is offered from *refoulement*¹ and some basic rights.² There are many routes to being recognised as a refugee, most commonly through formal refugee status determination (RSD). In the RefMig project, we take a purposefully broader understanding of refugee recognition, developing the concept of the refugee recognition regime, which encompasses individual RSD, but also the alternatives to it, including various forms of group recognition.

Although the recognition processes and their outcomes are hugely impactful, the scholarship falls short of providing a systematic, global examination about their workings. This gap in scholarship has many explanations, including a general failure or disinterest in studying processes in the Global South, where most refugees reside. Moreover, there are inherent challenges to studying any form of bureaucratic decision-making. Daan Bronkhorst has identified RSD as a ‘black box’. In his words,

‘The only way to draw conclusions on the character of asylum seeker determination is to deal with the outcome of the process. This we can try and undertake by way of a model in which the government procedure is a ‘black box’. We know what comes into the box (asylum applications) and what comes out (decisions on admittance and recognitions as refugee), but we don’t know what happens inside the box.’³

Despite the ‘black box’ nature of the process, scholars from various disciplines have explored at least some aspects of refugee recognition practices.

This literature review focuses on research carried out on refugee recognition practices since the 1980s, with a particular emphasis on the years from 1990 to 2020. It was carried out in the initial stages of the RefMig project for our internal use, and we are now making it available more widely to other researchers.

We have reviewed the literature based on a keyword search of articles published on refugee status determination, *prima facie* recognition, country of origin information (COI), evidential assessment and the United Nations High Commissioner for Refugees (UNHCR), among others. We have focused on scholarship published in leading journals, including *International Journal of Refugee Law* and *Journal of Refugee Studies*. Most of our source material, with a few exceptions, is in English. Notwithstanding these limits, the review reflects a synthesis of key articles, book chapters and monographs, mainly published from 1990 to 2020.

We analyse the literature according to the modes of recognition, actors that are involved in recognition and geographic locations where studies are conducted. In the modes of recognition, we explore two strands of literature, the first on individual RSD and the second on group recognition. In the first strand,

¹ The forcible return of any person to a country where they are at real risk of persecution or a serious human rights violation.

² Refugee status may also bring limitations and the perception of being vulnerable and needy. Therefore, some refugees may want to circumvent the asylum system altogether. See, Georgina Cole, *Questioning the Value of ‘Refugee’ Status and its Primary Vanguard: the Case of Eritreans in Uganda* (2018) <<https://www.rsc.ox.ac.uk/publications/questioning-the-value-of-refugee-status-and-its-primary-vanguard-the-case-of-eritreans-in-uganda>> [accessed on 28 October 2020]. Also see, Derya Ozkul, ‘Refugee recognition: not always sought’ 65 *Forced Migration Review* (2020) 38-42; Maja Janmyr and Lama Mourad, ‘Modes of Ordering: Labelling, Classification and Categorization in Lebanon’s Refugee Response’ 31 *Journal of Refugee Studies* (2018) 544-565.

³ Daan Bronkhorst, ‘The Realism of a European Asylum Policy: A Quantitative Approach Part A’ 9 *Netherlands Quarterly of Human Rights* (1991) 142-158, 146-147.

we identify the literature according to the methods that are used. These include doctrinal legal, socio-legal, historical, ethnographic and quantitative studies in political science. In the second strand, we look at studies studying recognition with group-based mechanisms. We find that there is little attempt to explain why (or under what conditions) some states and/or the UNHCR decides to recognise refugees via group-based mechanisms. In the actors that are involved in recognition, we look at the literature according to the actors that play a role in the recognition process. We find that the scholarship mainly examines state bodies, while the role of UNHCR remains mostly unexplored. In this section, we critically examine the geographic distribution of the existing studies. We find that, compared with numerous studies assessing the quality of refugee recognition in the so-called ‘Global North’, there are relatively fewer studies on the countries in the ‘Global South’ that are hosting the largest number of refugees,⁴ and where UNHCR plays a more prominent role in RSD. We conclude the review by pointing out the areas that need further exploration.

2. Modes of Recognition

Although the 1951 Convention Relating to the Status of Refugees (hereafter, the 1951 Refugee Convention) and its 1967 Protocol do not require any particular mode for refugee recognition, states, especially in the ‘Global North’, generally recognise refugees individually, a process often called ‘individual RSD’. Therefore, most of the scholarship on these states’ practices focuses on individual RSD. Group recognition, where refugees are recognised on the grounds of their nationality or other identity grounds, is also a prevalent form of recognition, but has been subject to much less scholarly attention. There is little legal scholarship that traces the origins and development of RSD,⁵ although there are some political scientific studies that demonstrate the development of RSD processes at specific historical periods, particularly in the post-World War II period.⁶ These processes and practices were in place in the period leading up to the 1951 Refugee Convention coming into force. In this section, we review the existing work on both modes of recognition.

2.1. Individual RSD

Doctrinal legal scholarship generally examines the legal norms that are applicable. Historians explore the process of recognition by looking at archival materials and documenting the various reasoning of past decision makers. Ethnographers observe and interpret judges’, asylum seekers’ and other actors’ interactions and practices in various stages of the process. Comparative political scientists often compare recognition rates across states, states in federated systems, regions in a state, or even across different RSD offices. In this section, we focus on doctrinal legal, socio-legal, historical, ethnographic and quantitative, largely political scientific, studies. We note that some studies may have used multiple methods and, therefore, may fall into multiple disciplines.

⁴ The term, ‘Global North – Global South’ divide is a socio-economic term is used to distinguish the economically wealthy nations, the majority of which are situated in the northern hemisphere, with the exception of a few Asian and Pacific countries, from the economically poorer and least developed countries in the southern hemisphere. However, it is important to note that this term falls short of identifying the differences within and across countries, hence our use of inverted commas.

⁵ See, for instance, Bruce Burson, ‘Refugee Status Determination’ in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) .

⁶ Louise W. Holborn, ‘The League of Nations and the Refugee Problem’ 203 *The ANNALS of the American Academy of Political and Social Science* (1939) 124-135; Jacques Venant, *The Refugee in the Post-War World* (Yale University Press 1953); Gerard Robin Cohen, *In War’s Wake: Europe’s Displaced Persons in the Postwar Order* (Oxford University Press 2011).

2.1.1. Doctrinal Legal Studies

Legal scholarship largely acknowledges that, while the 1951 Refugee Convention provides a definition and specific standards of treatment for refugees, it does not stipulate *procedures and processes for recognising refugees*.⁷ Goodwin-Gill and McAdam demonstrate that the refugee definition necessitates the assessment of claims, taking into account ‘complex subjective and objective factors’.⁸

The normative gaps on refugee determination in the Convention notwithstanding, RSD practices have developed within international, regional and national frameworks that, in turn, borrow from other branches of law. The international standards include UNHCR conclusions by its Executive Committee and the *Handbook on Procedures and Criteria for Determining Refugee Status* (the Handbook), among others.⁹

Much of the literature on regional standards, both on Europe and other regions, tends to examine the interaction of international human rights law with refugee law. For instance, a number of scholars point out the crucial role that human rights norms and bodies play in filling in the normative gaps in the 1951 Refugee Convention, including the extension of the principle of *non-refoulement* to possible torture victims, and the application of human rights norms, such as the requirement for an effective remedy in case of a violation of one’s rights, including in the course of administrative action.¹⁰ Human rights law tends to bolster refugee law, not only with regard to substantive protections, but also with applicable procedural standards in RSD.

Some scholars have studied the refugee law-human rights law nexus within the Americas, Africa and among various treaty bodies established under various human rights instruments, regional or international.¹¹ Notably, David Cantor, while acknowledging the many configurations through which refugee and human rights laws reinforce each other, notes that there is a divergence of approaches by the various human rights bodies, although there will always be a convergence in results. He demonstrates, for instance, that, whereas the United Nations Human Rights Committee and the European Court of Human Rights derive procedural guarantees in RSD from the principle of *non-refoulement* or risk of expulsion, the Inter American Court of Human Rights and the African Commission on Human and Peoples Rights, both of which espouse the right of asylum, draw procedural guarantees applicable to RSD from the right to a fair trial. Nevertheless, human rights law will, in any case, reinforce procedural guarantees in RSD.¹² Alvaro Botero and Jens Vedsted-Hansen similarly note

⁷ G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd Edition (Oxford University Press 2007) 53-54.

⁸ G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd Edition (Oxford University Press 2007) 54.

⁹ See Executive Committee Conclusions No. 8 (XXVIII) – 1977 on Determination of Refugee Status; No. 15 (XXX), 1979 on Refugees Without an Asylum Country; No. 30 (XXXIV), 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum; No. 29 (XXXIV), 1983; No. 55 (XL), 1989; No. 65 (XLII), 1991; No. 68 (XLIII), 1992; No. 71 (XLIV), 1993; No. 74 (XLV), 1994; No. 81 (XLVIII), 1997; No. 82 (XLVIII), 1997; No. 85 (XLIX), 1998; No. 92 (LIII), 2002; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001; See also Rainer Hofmann and Tillmann Löhr, ‘Requirements for Refugee Determination Procedures’ in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1080-1128.

¹⁰ Alvaro Botero and Jens Vedsted-Hansen, ‘Asylum Procedure’ in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021). Costello and Hancox similarly emphasise the influence of the effective remedy standards on asylum procedures and processes in the EU. See, Cathryn Costello and Emily Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’ in V. Chetail, P. De Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2015) <<https://ssrn.com/abstract=2609897>> .

¹¹ See for instance, Alvaro Botero and Jens Vedsted-Hansen, ‘Asylum Procedure’ in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); David James Cantor and Stefania Eugenia Barichello, ‘The Inter-American human rights system: a new model for integrating refugee and complementary protection?’ 17 *The International Journal of Human Rights* (2013) 689-706; Monette Zard, ‘Refugees and the African Commission on Human and Peoples’ Rights’ 33 *Forced Migration Review* (2003) 34.

¹² David James Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’ 34 *Refugee Survey Quarterly* (2014) 79-106, 106.

not only the difference in ‘legal approach and protection levels’ in the various human rights systems, concluding that higher procedural standards are evident within the Inter-American human rights system compared to other regional human rights systems in Europe and Africa.¹³

While regional human rights norms offer some standards applicable to RSD in Europe, Latin America and Africa, only the EU has adopted common rules on asylum procedures. Jens Vedsted-Hansen narrates in depth the development of the EU asylum law, which was initially conceived as a ‘Common European Asylum System’.¹⁴ The EU has developed a number of instruments on asylum, the most pertinent of which is its Asylum Procedures Directive. There is ample doctrinal legal scholarship on EU asylum procedures.¹⁵

i. Evidential Assessment

Norms on evidential assessment in RSD are contained in UNHCR’s guidelines, namely the *Handbook on Procedures and Criteria for Determining Refugee Status* (the Handbook)¹⁶, and the *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*.¹⁷ The Handbook was meant to guide government officials, judges, practitioners and UNHCR staff in applying the refugee definition. The standards set out therein have been expounded upon in various guidelines on international protection over the years, most notably the UNHCR Note on Burden and Standard of Proof¹⁸ and the CREDO report, which focused mainly on credibility assessment in the EU asylum systems.¹⁹ The latter

¹³ Álvaro Botero and Jens Vedsted-Hansen, ‘Asylum Procedure’ in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

¹⁴ Jens Vedsted-Hansen, ‘Common EU Standards on Asylum: Optional Harmonisation and Exclusive Procedures?’ in E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (2012) 255; Rainer Hofmann and Tillmann Löhr, ‘Requirements for Refugee Determination Procedures’ in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011).

¹⁵ Rainer Hofmann and Tillmann Löhr, ‘Requirements for Refugee Determination Procedures’ in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011); Álvaro Botero and Jens Vedsted-Hansen, ‘Asylum Procedure’ in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Cathryn Costello and Emily Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’ in V. Chetail, P. De Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff 2015); Cathryn Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ *7 European Journal of Migration and Law* (2005) 35-70;

¹⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at <https://www.refworld.org/docid/5cb474b27.html> [accessed on 28 October 2020]. This Handbook was first issued in September 1979 and has been revised thrice, in January 1992, December 2011, and February 2019.

¹⁷ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate* (2003) <https://www.refworld.org/docid/42d66dd84.html#_ga=2.224490650.1859547668.1639231258-981955169.1637664738> accessed 23 November 2021; UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate* (2020) <<https://www.refworld.org/docid/5e870b254.html>> accessed 23 November 2021; Emma Dunlop, ‘A Globalized Administrative Procedure: UNHCR’s Determination of Refugee Status and its Procedural Standards’ in Sabino Cassese and others (eds), *Global Administrative Law: The Casebook* (Kindle 2012); Jara Al-Ali, ‘UNHCR Procedural Standards for Mandate RSD 2003/2020 Comparison’, (Unpublished RefMig Working Paper 2023)

¹⁸ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at <https://www.refworld.org/docid/3ae6b3338.html> [accessed 28 October 2020].

¹⁹ UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at <https://www.refworld.org/docid/519b1fb54.html> [accessed on 28 October 2020]. See also UNHCR, Fair and Efficient Asylum Procedures: a Non-Exhaustive Overview of Applicable Standards, 2 September 2005, available at: <https://www.refworld.org/docid/432ae9204.html> [accessed 27 November 2020]. The latter document was specially aimed at informing and guiding asylum decision makers and advocates in Japan.

report highlighted variations in approach in credibility assessment among EU states and called for more consistent, transparent and principled approaches.²⁰

Legal scholarship has analysed the pertinent procedural and evidential standards in asylum adjudication, often highlighting the distinctiveness of evidential assessment in asylum. For instance, Trish Luker summarises the idiosyncrasies in asylum applications as a,

‘reliance upon oral testimony that can rarely be corroborated; a cross-cultural context in which nearly all hearings are facilitated by an interpreter; the likelihood that applicants will have difficulty in speaking about experiences of trauma, persecution and violence; and the likelihood that there is a lengthy period between when relevant events occurred and the hearing of the claim.’²¹

Luker suggests a rebuttable presumption of credibility that would accord an applicant a greater benefit of the doubt,²² while Rosemary Byrne further proposes that asylum adjudicators should rather adopt the framework developed by international criminal tribunals for assessing the testimony of victims of human rights violations.²³

Gregor Noll’s important contributions on this topic include a critique of the evidential assessment standards in EU law,²⁴ and a critique of the incoherence of evidential standards and practices.²⁵ A further multidisciplinary collection offers insights into how select EU states apply principles of evidential assessment to asylum cases and the impact on the outcome of the case. The book asserts that a number of cases are ‘arguably decided on the basis of evidential assessment rather than on legal issues.’²⁶ The legal scholarship on the evidential assessment of applicant testimony seems to concur that there is an overwhelming tendency among decision makers to deem applicants incredible.

In a recent, ground-breaking work on fact-finding in refugee law, Hilary Evans Cameron, using the Canadian asylum system as her case study, looks deeper into what ‘the law of fact-finding is trying to accomplish in refugee status determination, and how and why’.²⁷ She concludes that ‘international refugee law should recognise an obligation under the 1951 Refugee Convention to resolve doubt in the claimant’s favour’.²⁸

²⁰ Hilary Evans Cameron, *Refugee Law’s Fact-finding Crisis: Truth, Risk and the Wrong Mistake* (Cambridge University Press 2018).

²¹ Trish Luker, ‘Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal’ 25 *International Journal of Refugee Law* (2013) 502-534, 533.

²² Trish Luker, ‘Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal’ 25 *International Journal of Refugee Law* (2013) 502-534, 533.

²³ Rosemary Byrne, ‘Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals’ 19 *International Journal of Refugee Law* (2007) 609-638.

²⁴ Gregor Noll, ‘Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive’ *European Public Law* (2006) 295-317; Gregor Noll, ‘Credibility, Reliability, and Evidential Assessment’, in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

²⁵ Gregor Noll, ‘Credibility, Reliability, and Evidential Assessment’, in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

²⁶ Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005) 1.

²⁷ Hilary Evans Cameron, *Refugee Law’s Fact-finding Crisis: Truth, Risk and the Wrong Mistake* (Cambridge University Press 2018), 2-4.

²⁸ Hilary Evans Cameron, *Refugee Law’s Fact-finding Crisis: Truth, Risk and the Wrong Mistake* (Cambridge University Press 2018); Hilary Evans Cameron, ‘Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations’ 20 *International Journal of Refugee Law* (2008) 567-585. See also James C Hathaway, ‘International Protection within One Single Asylum Procedure’, a paper presented at an EU Presidency Seminar held at Norrköping, 23-24 April 2001 cited in Brian Gorlick, ‘Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status’ 15 *International Journal of Refugee Law* (2003) 357-376, 360; Michael Kagan, ‘Believable Victims: Asylum Credibility and the Struggle for Objectivity’ 16 *Georgetown Journal of International Affairs* (2015) 123, 124; Gregor Noll, *Credibility, Reliability, and Evidential Assessment* (The Oxford Handbook of International Refugee Law, 2021).

ii. Country of Origin Information

A number of studies have raised concerns over the COI relied upon by decision makers in asylum adjudication. In his study among EU states, Gabor Gyulai finds that the law and jurisprudence have established standards on transparency and retrievability of COI, its accuracy and currency, reliability and balance, as well as its relevance. However, decision makers do not always observe these standards in practice, which have provided grounds for the quashing of many administrative asylum decisions.²⁹

Femke Vogelaar assesses the use of COI by national authorities in the UK,³⁰ the European Court of Human Rights (ECtHR),³¹ and the UNHCR.³² In her research, she finds that there are questions around the transparency of the COI all bodies use. While the UK asylum tribunals were at least found to use a wider range of sources on which it relied for its COI and that most of this was up to date, both the ECtHR and UNHCR fell short in terms of adhering to their own standards on the collection and use of COI.

iii. Other 'Safe Country' Considerations

While country of origin information is invariably used in an assessment in RSD procedures, in some instances, states employ practices to generalise about the safety of those countries of origin (so-called 'Safe Country of Origin' or 'SCO' practices). Furthermore, led by European states, many states now seek to treat asylum claims as inadmissible if the applicants have protection or could have sought protection in a 'Safe Third Country' (STC). The procedural and evidential impacts on these practices are profound.

Henry Martensen and John McCarthy conducted a study in nine European countries, noting those that had incorporated SCO provisions into their laws and some that had gone ahead to 'whitelist' some countries as safe. One of their key findings was that the 'most common effect of SCO procedures is that asylum seekers are automatically treated as "without foundation" cases and go through a truncated asylum determination process'.³³ Costello's assessment of European SCO practices contrasts their European proliferation to Canada, where the Courts found these processes discriminatory.³⁴ Claudia Englemann's important doctoral study and article demonstrated that EU states' decisions about SCO designation were often based on political aims, including whitewashing the human rights records of allied countries of origin and deterring potential asylum claimants, rather than an objective assessment of country conditions.³⁵

²⁹ Gábor Gyulai, *Country Information in Asylum Procedures: Quality as a Legal Requirement in the EU* (2007) <<https://www.refworld.org/docid/479074032.html>> . See also, Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury Publishing 2011), 167-195.

³⁰ Femke Vogelaar, 'A Legal Analysis of a Crucial Element in Country Guidance Determinations: Country of Origin Information' 31 *International Journal of Refugee Law* (2019) 492-515.

³¹ Femke Vogelaar, 'Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment' 18 *European Journal of Migration and Law* (2016) 302-326.

³² Femke Vogelaar, 'The Eligibility Guidelines Examined: The Use of Country of Origin Information by UNHCR' 29 *International Journal of Refugee Law* (2018) 617-640.

³³ Henry Martensen, John McCarthy, 'In General, No Serious Risk of Persecution': Safe Country of Origin Practices in Nine European States, 11(3) *Journal of Refugee Studies* (1998) 304-325.

³⁴ Cathryn Costello, "'Safe Country?' Says Who?" 28 *International Journal of Refugee Law* (2016) 601-622.

³⁵ Claudia Englemann, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States' 16 *European Journal of Migration and Law* (2014) 277; Claudia Englemann, 'Common Standards via the Backdoor:

There is a vast literature on STC practices, which characterise the development of STC policies and practice as increasingly diverging from international refugee law norms, through which states seek to shift the responsibility of refugee hosting and protection.³⁶ Many critiques have questioned their legality in toto (cite Violata Moreno-Lax), as well as their impact on rendering asylum claims generally inadmissible and undermining international responsibility-sharing.³⁷ Specifically on the EU's contribution to the proliferation of STC practices, Costello demonstrates that they tended to undermine access to asylum.

2.1.2. Socio-Legal Studies

Socio-legal scholars have studied asylum decision-making (at both first instance and on appeal) to understand the process of refugee recognition.

In the US in the late 1980s, Deborah Anker and her team of researchers attended 193 asylum hearings, in addition to conducting interviews with all court participants.³⁸ This study examined the process against due process norms and the goals of the Refugee Act of 1980. Anker concluded that the adjudicatory system was governed by *ad hoc* rules and standards, with ideological preferences and unreasoned and uninvestigated political judgments impacting the decision-making process. Specifically, they found that decisions suffered from the exaggerated standard of proof, informal and restrictive evidentiary rules, the appearance of adjudicator partiality, problems in interpretation, rejection of objective human rights assessments, inconsistent standards, the inappropriate role of cultural, social and ideological factors, and bureaucratic inefficiencies and causes of delay.

Socio-legal scholars have also looked at the aspects of testimonial evidence and country of origin information, using different methodologies and approaches. Most socio-legal research emphasises the role of the decision maker's personal discretion. This renders credibility assessment a vital determinant of the outcome of one's asylum application.

i. Applicant Testimony

The work of socio-legal scholars often finds that credibility assessment dominates asylum processes.³⁹ In particular, research has demonstrated the difficulty of being believed when asylum claims are based

The Domestic Impact of Asylum Policy Coordination in the European Union' (Doctoral Thesis, Maastricht University 2015).

³⁶ For an overview, see Luisa Feline Freier, Eleni Karageorgiou and Kate Ogg, 'The evolution of safe third country law and in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

³⁷ Morten Kjaerum, 'The Concept of Country of First Asylum' (1992) 4 *International Journal of Refugee Law* 514; Agnès Hurwitz, 'Safe Third Country Practices, Readmission, and Extraterritorial Processing' in Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 173-222.

³⁸ See Deborah E. Anker, 'Determining Asylum Claims in the United States - Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court' 2 *International Journal of Refugee Law* (1990) 252-264; Deborah E. Anker, 'Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment' 19 *New York University Review of Law & Social Change* (1991) 433-528.

³⁹ Bruno Magalhães, 'The Politics of Credibility: Assembling Decisions on Asylum Applications in Brazil' 10 *International Political Sociology* (2016) 133-149. Also see, Walter Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing' 20 *International Migration Review* (1986) 230-241; Cécile Rousseau and others, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' 15 *Journal of Refugee Studies* (2002) 43-70.

on religious persecution (which is premised on inner convictions) and sexual orientation.⁴⁰ There is also literature that assesses the difficulties of establishing credibility in asylum cases involving children.⁴¹ Several psychological studies have also found that the decision makers tend to be influenced by assumptions they may hold that the applicant's narration and any corroborating evidence may not necessarily dispel.⁴² Socio-linguists and linguistic anthropologists also show that applicants may not be able to express themselves due to cultural differences and power differentials, or decision makers may not be well equipped to understand their narration.⁴³ The interpreters' role in this process is substantial and well-researched.⁴⁴

Studies have indicated that there are higher chances for an asylum claim succeeding where an asylum seeker has benefited from legal representation and assistance.⁴⁵ However, most asylum seekers are not

⁴⁰ Michael Kagan, 'Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt' 43 *Vanderbilt Journal of Transnational Law* (2010) 1179-1233; Michael Kagan, 'Believable Victims: Asylum Credibility and the Struggle for Objectivity' 16 *Georgetown Journal of International Affairs* (2015) 123; Jenni Millbank, 'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' 21 *International Journal of Refugee Law* (2009) 1-33; Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' 13 *The International Journal of Human Rights* (2009) 391-414; Uwe Berlit, Harald Doerig and Hugo Storey, 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach' 27 *International Journal of Refugee Law* (2015) 649-666.

⁴¹ Judith Kumin, 'Credibility: the Challenge of Establishing Credibility in Child Asylum Cases' in Jacqueline Bhabha, Jyothi Kanics and Daniel Senovilla Hernández (eds), *Research Handbook on Child Migration* (Edward Elgar 2018) ; Zoe Given-Wilson, Jane Herlihy and Matthew Hodes, 'Telling the Story: A Psychological Review on Assessing Adolescents' Asylum Claims' 57 *Canadian Psychology* (2016) 265-273; Daniel Hedlund and Thomas Wimarck, 'Unaccompanied Children Claiming Asylum on the Basis of Sexual Orientation and Gender Identity' 32 *Journal of Refugee Studies* (2018) 257-277; Rachel Bien, 'Nothing to Declare but Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children Notes and Comments' 12 *Journal of Law and Policy* (2003) 797-842; Marta Guarch-Rubio and Antonio L. Manzanero, 'Credibility and Testimony in Asylum Procedures with Unaccompanied Refugee Minors' 22 *European Journal of Migration and Law* (2020) 257; Crystal Estrada, 'Misperceived Child Testimony: Why Credibility Should Be Presumed for Unaccompanied and Separated Children Seeking Asylum' 31 *Thomas Jefferson Law Review* (2008) 121-156; Stephanie Silverman, J., "'Imposter-Children" in the UK Refugee Status Determination Process' 32 *Refugee: Canada's Journal on Refugees* (2016) 30-39) 30.

⁴² Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' 22 *International Journal of Refugee Law* (2010) 351-366; Jane Herlihy and Stuart Turner, 'Untested assumptions: psychological research and credibility assessment in legal decision-making' 6 *European Journal of Psychotraumatology* (2015) 273-280; Tanja S. van Veldhuizen and others, 'Interviewing asylum seekers: A vignette study on the questions asked to assess credibility of claims about origin and persecution' 14 *Journal of Investigative Psychology and Offender Profiling* (2017) 3-22.

⁴³ Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' 12 *Discourse & Society* (2001) 413-449; Jan Blommaert, 'Language, Asylum, and the National Order' 50 *Current Anthropology* (2009) 415-441; Marco Jacquemet, *Credibility in court : communicative practices in the Camorra trials* (Cambridge University Press 1996); Marco Jacquemet, 'Transidioma and Asylum: Gumperz's Legacy in Intercultural Institutional Talk' 23 *Journal of Linguistic Anthropology* (2013) 199-212; Katrijn Maryns, 'Procedures without borders: The language-ideological anchorage of legal-administrative procedures in translocal institutional settings' 42 *Language in Society* (2013) 71-92; Sigurd D'Hondt, 'Others on trial: The construction of cultural otherness in Belgian first instance criminal hearings' 41 *Journal of Pragmatics* (2009) 806-828.

⁴⁴ Rebecca Tipton, 'Reflexivity and the Social Construction of Identity in Interpreter-mediated Asylum Interviews' 14 *The Translator* (2008) 1-19; Robert Gibb and Anthony Good, 'Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France' 14 *Language and Intercultural Communication* (2014) 385-399; E. O. Abuya, "'Parlez-vous l'Anglais ou le Swahili?'" The Role of Interpreters in Refugee Status Determination Interviews in Kenya' 19 *Forced Migration Review* (2004) 48-50; Jieun Lee, 'A Pressing Need for the Reform of Interpreting Service in Asylum Settings: A Case Study of Asylum Appeal Hearings in South Korea' 27 *Journal of Refugee Studies* (2013) 62-81; Sarah Craig and David Gramling, 'Is There a Right to Untranslatibility? Asylum, Evidence and the Listening State' 22 *Tilburg Law Review* (2017) 77-98; Katrijn Maryns, 'Disclosure and (re)performance of gender-based evidence in an interpreter-mediated asylum interview' 17 *Journal of Sociolinguistics* (2013) 661-686; Carmen Valero-Garcés, 'Interpreting and Translating in the Spanish Asylum and Refugee Office: A Case Study' 23 *The European Legacy* (2018) 773-786; Amparo Jiménez-Ivars and Ruth León-Pinilla, 'Interpreting in refugee contexts: A descriptive and qualitative study' 60 *Language & Communication* (2018) 28-43.

⁴⁵ Andrew I. Schoenholtz and Jonathan Jacobs, 'The State of Asylum Representation: Ideas for Change' 16 *Georgetown Immigration Law Journal* (2002) 739; Eleanor Acer, 'Making a Difference: A Legacy of Pro Bono Representation' 17 *Journal of Refugee Studies* (2004) 347-366; Michael Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt' 19 *Journal of Refugee Studies* (2006) 45-68; Katia Bianchini, 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' 24 *Journal of Refugee Studies* (2011) 390-410.

able to access any form of legal assistance for the first instance adjudicatory phase for various reasons. These may include scarcity of legal aid services, limited resources, mainly capacity and funds, and the fact that states simply do not prioritise legal aid to asylum seekers.⁴⁶ Despite the avouched significance of legal assistance and the challenges in making it a reality for most refugees, the scholarship in this area is still rather scant. In fact, with the exception of Michael Kagan's work⁴⁷, the scholarship is more sparse for legal representation in UNHCR RSD.

ii. Expert Evidence

Benjamin Lawrence and Galya Ruffer's edited book stands out for its focus on expert evidence in asylum cases.⁴⁸ They observe that there is 'little international guidance on the role of experts in asylum claims', with the exception of torture cases, and yet 'increased dependence on expert testimony has distorted the standards, principles and methods of establishing facts in refugee claims'.⁴⁹ Anthony Good, whose work shall be expounded upon in a subsequent section, pinpoints that concern with most expert evidence, particularly as relates to COI, as being normally imbued with personal 'moral, professional, motivational and cognitive biases', which renders such evidence less objective in many cases.⁵⁰

iii. Country of Origin Information

One particular socio-legal study on COI looks at how it is generated by host country research units in several European countries. Jasper Van der Kist and others, much in agreement with legal doctrinal scholars, find that most COI is based on inaccurate data that is often collected from 'conflicting forms of expertise and expert viewpoints'.⁵¹

Most of the studies on evidential assessment and asylum adjudication generally have been done in jurisdictions in the EU, North America and Australia, which have highly individual RSD systems. There is almost none in the Global South, where UNHCR tends to be the predominant refugee status decision maker and where other modes of recognition such as group recognition are more prevalent. Even though most of the literature cites UNHCR's Handbook and RSD procedural standards, there is virtually no comparable in-depth or empirical study on how UNHCR applies those standards in its own decision-making.

⁴⁶ Katia Bianchini, 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' 24 *Journal of Refugee Studies* (2011) 390-410; Eleanor Acer, 'Making a Difference: A Legacy of Pro Bono Representation' 17 *Journal of Refugee Studies* (2004) 347-366; see also Stephan Anagnost, 'The Challenge of Providing High Quality, Low Cost Legal Aid for Asylum Seekers and Refugees' 12 *International Journal of Refugee Law* (2000) 577-588; Jeff Handmaker, 'Public interest litigation for refugees in South Africa and the potential for structural change' 27 *South African Journal on Human Rights* (2011) 65-81; Barbara Harrell-Bond, 'Starting a Movement of Refugee Legal Aid Organizations in the South' 19 *International Journal of Refugee Law* (2007) 729-735.

⁴⁷ Michael Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt' 19 *Journal of Refugee Studies* (2006) 45-68.

⁴⁸ Benjamin N Lawrence and Galya Ruffer (eds), *Adjudicating Refugee and Asylum Status: the Role of Witness, Expertise and Testimony* (Cambridge University Press 2015).

⁴⁹ Benjamin N Lawrence and Galya Ruffer (eds), *Adjudicating Refugee and Asylum Status: the Role of Witness, Expertise and Testimony* (Cambridge University Press 2015) 3-4.

⁵⁰ Anthony Good, 'Anthropological Evidence and Country of Origin Information in British Asylum Courts' in Benjamin N. Lawrence and Galya Ruffer (eds), *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2015) 122-144 139.

⁵¹ Jasper van der Kist, Huub Dijkstra and Marieke de Goede, 'In the Shadow of Asylum Decision-Making: The Knowledge Politics of Country-of-Origin Information' 13 *International Political Sociology* (2019) 68-85, 81.

2.1.3. Historical Studies

Historical studies are important to understand how, whether and why refugees were recognised in the past. They can provide us with essential insights for current policy-making and imagine alternatives to current practices of RSD.

Key historical works include Claire Higgins' book, *Asylum by Boat: Origins of Australia's Refugee Policy*, which documents the establishment of the asylum system and individual RSD in Australia from a historical perspective.⁵² Based on an archival work, Higgins explores the changes in state and public policy response to the arrival of 'boat people' from the 1970s to the 1990s. She shows that the arrival of the Vietnamese in 1976 was a turning point in the establishment of an asylum system. Though Australia was a signatory to the 1951 Refugee Convention at the time when 2,000 Vietnamese arrived by boat, it did not have formal procedures to conduct RSD. Higgins examines archival records related to decision-making (records that were created or compiled by Guy Goodwin-Gill as part of his role as UNHCR Legal Advisor in Australia between 1978 and 1983), oral history interviews and cabinet papers. She finds that the government at the time first considered punitive measures, but then adopted a humanitarian approach to recognise refugees, while it also tried to reassure the public that Australia was in control of its borders.

Higgins also explores in detail how Australia's first Determination of Refugee Status (DORS) Committee worked and evolved. She argues that, in addition to respecting international obligations, the establishment of the DORS Committee enabled the then government to counteract negative media coverage of the boat arrivals. The government showed that it was selecting who a refugee was on an individual basis and that it was, therefore, in control of who was accepted into the Australian territory.⁵³ She also documents the disagreements between the UNHCR, the Department of Foreign Affairs and the other departments that were part of the DORS Committee at the time, particularly over conditions in countries of origin.⁵⁴ This rich historical study provides a valuable analysis of how states chose to recognise refugees in the past, in this case on an individual basis.

2.1.4. Ethnographic Studies

Ethnographers have assessed refugee recognition processes by attending asylum hearings and exploring how decisions are made in practice. Among those, Didier Fassin's ethnographic work in France has made use of extensive observation of everyday work at the National Court of Asylum. Fassin explores asylum seekers' files, and medical and psychological certificates in support of their applications. His study is based on extensive interviews with asylum seekers, lawyers, rapporteurs, activists, magistrates granting refugee status, as well as physicians from non-governmental organisations.⁵⁵ Together with D'Halluin, they show how asylum seekers' autobiographical accounts were not adequate for their asylum case and how they needed to demonstrate their physical sequela and mental traumas to be able to make their claims.⁵⁶ They also investigate how NGOs dealt with these requirements to provide proof and how medical officers' 'objective' accounts and medical certificates gradually substituted asylum

⁵² Claire Higgins, *Asylum by Boat: Origins of Australia's refugee policy* (UNSW Press 2017).

⁵³ Claire Higgins, 'Status Determination of Indochinese Boat Arrivals: A 'Balancing Act' in Australia' 30 *Journal of Refugee Studies* (2016) 89-105.

⁵⁴ Claire Higgins, 'New Evidence on Refugee Status Determination in Australia, 1978-1983' 35 *Refugee Survey Quarterly* (2016) 71-93.

⁵⁵ Didier Fassin, 'The Precarious Truth of Asylum' 25 *Public Culture* (2013) 39-63; Didier Fassin, 'Refugees, Anthropology, and Law' in *The International Encyclopedia of Anthropology* (2018) 1-10.

⁵⁶ Didier Fassin and Estelle D'Halluin, 'The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers' 107 *American Anthropologist* (2005) 597-608.

seekers' autobiographical accounts. Similarly, Heath Cabot's ethnographic work in Greece centres on the work of an asylum advocacy NGO.⁵⁷ In her book, *On the Doorstep of Europe Asylum and Citizenship in Greece*, Cabot explores how the authorities (in both governmental and non-governmental spheres) made their decisions by balancing their ethical concerns and judgments, while also considering law and policy.⁵⁸

Among ethnographic studies, Anthony Good's scholarship stands out. In his book, *Anthropology and Expertise in the Asylum Courts*, Good examines how expert evidence was produced, interpreted and reviewed in the asylum courts in the UK.⁵⁹ He shows how anthropologists were asked to provide expert evidence and how these 'experts' anthropological thinking is translated into legal notions of facts and evidence.⁶⁰ In this process, the term 'culture' is transformed from being an analytical tool for experts to a piece of objective evidence for courts to make their decisions.⁶¹

Apart from the role of expert evidence, Good also examines the other elements taken into consideration in status determination. For instance, together with Robert Gibb, he explores the use of Country of Origin Information (COI) in RSD processes in France and the UK.⁶² They argue that COI exists due to the need for legally-understood, 'objective evidence' to counter-balance the subjective definition of the notion of 'fear', as defined in Article 1A(2) of the 1951 Refugee Convention. Their article finds that COI has a crucial role in the decision-making process in both countries. However, the way it was collected and used in administrative and judicial procedures is vastly different. Daniela Berti and Anthony Good's edited collection, *Of Doubt and Proof: Ritual and Legal Practices of Judgment*, examines how the question of doubt is understood and dispelled in different legal settings.⁶³

Good's scholarship also explores the role of interpretation, translation and intercultural communication throughout the decision-making process. Together with Robert Gibb, he specifically explores interpreters' role in facilitating intercultural communication between asylum applicants and the different administrative and legal actors who assess and defend their claims.⁶⁴ They find that both in the UK and France, interpreters' role is highly complex, requiring them to facilitate intercultural communication between asylum seekers and the different administrative and legal actors in the process. In this sense, interpreters need to make both linguistic and cultural translation and interpretation. In a different study, Good lays out how asylum narratives are guided and interpreted by lawyers, interpreters and

⁵⁷ Heath Cabot, 'The social aesthetics of eligibility: NGO aid and indeterminacy in the Greek asylum process' 40 *American Ethnologist* (2013) 452-466.

⁵⁸ Heath Cabot, *At the doorstep of Europe. Asylum and citizenship in Greece* (University of Pennsylvania Press 2014).

⁵⁹ Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge 2007).

⁶⁰ Anthony Good, 'Expert Evidence in Asylum and Human Rights Appeals: an Expert's View' 16 *International Journal of Refugee Law* (2004) 358-380; Anthony Good, 'Cultural Evidence in Courts of Law' 14 *The Journal of the Royal Anthropological Institute* (2008) S47-S60; Anthony Good, 'Undoubtedly an Expert? Anthropologists in British Asylum Courts' 10 *The Journal of the Royal Anthropological Institute* (2004) 113-133; Anthony Good, 'Anthropologists as expert witnesses: political asylum cases involving Sri Lankan Tamils' in Richard Wilson and Jonathan Mitchell (eds), *Human Rights in Global Perspective* (Routledge 2003) 93-117.

⁶¹ Anthony Good, 'Cultural Evidence in Courts of Law' 14 *The Journal of the Royal Anthropological Institute* (2008) S47-S60.

⁶² Robert Gibb and Anthony Good, 'Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures' 25 *International Journal of Refugee Law* (2013) 291-322; Anthony Good, 'Anthropological Evidence and Country of Origin Information in British Asylum Courts' in Benjamin N. Lawrance and Galya Ruffer (eds), *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2015).

⁶³ Anthony Good, 'The benefit of the doubt in British asylum claims and international cricket' in Daniela Berti, Anthony Good and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate 2015) 119-140; Carolina Kobelinsky, 'Emotions as Evidence: Hearings in the French Asylum Court' in Daniela Berti, Anthony Good and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate 2011) ; Zachary Whyte, 'In Doubt: Documents as Fetishes in the Danish Asylum System' in Daniela Berti, Anthony Good and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate 2011) 141-162

⁶⁴ Robert Gibb and Anthony Good, 'Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France' 14 *Language and Intercultural Communication* (2014) 385-399.

caseworkers—all from their own point of view.⁶⁵ In this process, asylum seekers' statements can only be understood in the context of their interactions with the audience and their own expectations and interpretation of the process.

Nick Gill and Anthony Good's 2019 collection *Asylum Determination in Europe: Ethnographic Perspectives* brings together studies on ten different European countries.⁶⁶ The chapters in this book provide a legal overview of asylum determination procedures in each state, followed by sections on a broad description of actors that are involved in the process. In the chapters on France, Belgium, the UK and Greece, for example, the authors explore how actors interpret the case and communicate with each other while making the RSD decisions. The following chapters look at the specific roles of translation, communication, narration and lawyers' representation. The interpretation of concepts like vulnerability, credibility, justice and accuracy is also examined in detail by exploring actors' confusion, inconsistent decision-making and the complexities inherent in these processes. Overall, by analysing ethnographic data from asylum hearings, courtrooms and training materials for decision makers in different European settings, this book shows that various other factors than the legal criteria impact the recognition process.

Other ethnographic scholarship includes Olga Jubany's on the UK system. In her study, Jubany shows that officers' criteria for screening applicants are not derived from regulations but their own categorisation, rules and values that stem from their own prejudices.⁶⁷ Carolina Kobelinsky also uses ethnography in her analysis of the assessment of sexual orientation in asylum claims in France.⁶⁸ She suggests that judges find it increasingly difficult to count on material evidence in order to examine applicants' 'intimate', in other words private and personal, lives. Julia Dahlvik's work in Austria is also crucial. Her book, *Inside Asylum Bureaucracy: Organizing Refugee Status Determination in Austria*, shows how decision makers find themselves in a contradiction between providing a human rights-based assessment and ensuring administrative productivity.⁶⁹ Using the theories of social practices, social construction and structuration, Dahlvik explores how officers respond to structural forces, while also using their agency. She shows that officers co-construct facts, artefacts and (in)credibility of applicants throughout the process of status determination.⁷⁰ Finally, in her doctoral dissertation, Tina Gehrig explores Afghan asylum seekers' experiences with the German state in detail. She argues that the German state uses its power over asylum seekers through its various legal classifications of foreigners and administrative practices regulating their presence.⁷¹

There is comparatively little ethnographic study of UNHCR Mandate RSD. Marion Fresia and Andreas von Känel's study is important in this regard. By focusing on the narratives of eligibility officers in UNHCR's Ankara office, Fresia and von Känel critically examine the everyday work of UNHCR Mandate RSD. They show how eligibility officers in a country office struggle to turn the local and contextual nature of decision-making into legalised and objectified decisions. They find that the most

⁶⁵ Anthony Good, 'Tales of suffering: asylum narratives in the refugee status determination process' 68 *West Coast Line* (2011) 79-87. Also see, Anthony Good, 'Witness statements and credibility assessments in the British asylum courts' in Livia Holden (ed), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Routledge 2011) 94-122.

⁶⁶ Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave 2019).

⁶⁷ Olga Jubany, *Screening Asylum in a Culture of Disbelief: Truths, Denials and Skeptical Borders* (Palgrave 2018); Olga Jubany, 'Constructing truths in a culture of disbelief: Understanding asylum screening from within' 26 *International Sociology* (2011) 74-94.

⁶⁸ Carolina Kobelinsky, 'Judging Intimacies at the French Court of Asylum' 38 *Political and Legal Anthropology Review* (2015) 338-355.

⁶⁹ Julia Dahlvik, *Inside Asylum Bureaucracy: Organizing Refugee Status Determination in Austria* (Springer 2018)

⁷⁰ Julia Dahlvik, 'Asylum as construction work: Theorizing administrative practices' 5 *Migration Studies* (2017) 369-388

⁷¹ Tina Gehrig, 'Procedures of Exile: Afghan Experiences of Asylum in Germany, PhD Thesis' (University of California, Irvine 2006). Also see, Tina Gehrig, 'Afghan Experience of Asylum in Germany: Towards an Anthropology of Legal Categories' 9 *Tsantsa Zeitschrift der Schweizerischen Ethnologischen Gesellschaft* (2004) 72-80

important aspect of this socialisation process is that, throughout their work, RSD officers embrace the idea that refugees are different from migrants and that they should therefore be sorted out.⁷²

2.1.5. Comparative Political Science

There is a burgeoning literature on RSD in comparative political science showing that the actors – in other words, institutions and/or individuals – that are involved in refugee recognition have a direct impact on the RSD outcome, as well as extraneous political and economic factors. Some of this scholarship uses quantitative methods to identify and problematise variations in the outcomes of the process, usually taking formal recognition rates as the key outcome variable. These studies generally use published data on refugee recognition rates and assume that those of the same nationality should be recognised at similar rates at the same time, all else being equal.

The variation is seen across states, particularly across the European Union (EU), despite the legal harmonisation of the asylum system. For example, Neumeyer notes considerable variation in the treatment of asylum seekers from the same nationality in his study of Western European countries (Norway, Switzerland and the 14 countries that formed the EU in 1999) for the period between 1980 and 1999.⁷³ He concludes that overall domestic conditions in the asylum states (such as their unemployment rate) and the numbers of asylum seekers from the same country of origin, directly lowers the recognition rates. Vink and Meijerink also find variation across European states in their study of the period between 1982 and 2001.⁷⁴ Avdan investigates the impact of transnational terrorism on asylum recognition rates in Europe from 1980 to 2007. She finds that states recognised fewer refugees when there was a terrorist attack in their territory, but general concerns over global terrorism had no significant effect on asylum decisions.⁷⁵

More recent studies on the impact of EU harmonisation have found some convergence in recognition rates. For example, Toshkov and de Haan find some evidence for a convergence of the overall asylum recognition rates. Still, differences in recognition of applicants from the same country of origin persist.⁷⁶ In another study, Toshkov explores the dynamic relationship between recognition rates and the relative application shares that asylum countries receive.⁷⁷ He finds an inverse relationship between recognition rates and applications. Higher recognition rates in past years attract more applications, while higher asylum applications in the past years lower the recognition rates.

Several studies have demonstrated that the outcome of applications also varies across federal states, such as in Germany and Switzerland, which led some scholars to interpret the process as an ‘asylum lottery’.⁷⁸ In Germany, Riedel and Schneider’s study shows that recognition rates vary vastly in

⁷² Marion Fresia and Andreas von Känel, ‘Universalising the refugee category and struggling for accountability: the every-day work of eligibility officers within UNHCR’ in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNCHR and the Struggle for Accountability: Technology, Law and Result-Based Management* (Routledge 2016) 101-118.

⁷³ Eric Neumayer, ‘Asylum Recognition Rates in Western Europe: Their Determinants, Variation, and Lack of Convergence’ 49 *Journal of Conflict Resolution* (2005) 43-66.

⁷⁴ Maarten Vink and Frits Meijerink, ‘Asylum Applications and Recognition Rates in EU Member States 1982–2001: A Quantitative Analysis’ 16 *Journal of Refugee Studies* (2003) 297-315.

⁷⁵ Nazli Avdan, ‘Do asylum recognition rates in Europe respond to transnational terrorism? The migration-security nexus revisited’ 15 *European Union Politics* (2014) 445-471.

⁷⁶ Dimiter Toshkov and Laura de Haan, ‘The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates’ 20 *Journal of European Public Policy* (2013) 661-683.

⁷⁷ Dimiter Doychinov Toshkov, ‘The dynamic relationship between asylum applications and recognition rates in Europe (1987–2010)’ 15 *European Union Politics* (2014) 192-214.

⁷⁸ Lisa Riedel and Gerald Schneider, ‘Dezentraler Asylvollzug diskriminiert: Anerkennungsquoten von Flüchtlingen im bundesdeutschen Vergleich, 2010-2015 [Decentralised asylum policy discriminates: A comparison of asylum recognition rates in the federal states of Germany]’ 58 *PVS Politische Vierteljahresschrift* (2017) 23-50. For English, see the summary of this article in their blog post, Gerald Schneider and Lisa Riedel, *The Asylum Lottery: Recognition Rates Vary Strongly within*

different federal states (Bundesländer).⁷⁹ While in Saarland the highest recognition rate between 2010 and 2015 was 69 per cent, in Berlin it was 24.6 per cent. The stark differences were also visible when considering applicants' nationality. For the same period, while 75.5 per cent of Iraqi asylum seekers were recognised in Lower Saxony, only 37.5 per cent of them were recognised in Saxony-Anhalt. Or while 34.4 per cent of Afghani asylum seekers were recognised in North Rhine-Westphalia, only 10 per cent of them were accepted in Brandenburg. In Switzerland, Holzer, Schneider and Widmer analyse more than 180,000 individual asylum applications in different Swiss cantons for the period between 1988 and 1996.⁸⁰ They find that, all else being equal, it was twice as likely that asylum seekers would receive positive decisions in some states than in others. They show that, in general, cantons with a centralised asylum administration system had lower recognition rates. Cantons with a high proportion of foreigners and negative attitudes in the population towards asylum seekers also had lower recognition rates. Those with a low proportion of foreigners had higher recognition rates. Finally, unlike small and large states, middle-sized cantons had lower recognition rates. Based on these findings, they conclude that decentralised decision-making could be discriminatory for asylum seekers.

In addition to first instance recognition, variation across federal states also exists in other stages of the process. For instance, in their study across the 16 federal states of Germany, Schneider and his colleagues find that all the actors involved in refugee recognition (the regional offices of the Federal Office for Migration and Refugees, the administrative courts and the immigration agencies of the states) consider various factors – such as the administrative, socio-economic and political environments in their states – when making their decisions.⁸¹ These factors result in positive or negative discrimination of asylum seekers in all stages, including recognition/rejection, appeal and deportation. Remarkably, they find states that were led by the Social Democratic Party had lower rates of rejection.

Other studies have found variation in recognition rates within states, depending on judges' and bureaucrats' policy dispositions or work experience, among other factors. For example, Camp-Keith and Holmes find that individual characteristics that are not related to the merit of their claims, such as gender, the ability to speak English, marital status and religion, impact the RSD outcome.⁸² In another study, Keith and her colleagues explore the reasons behind the wide variety of grant rates among immigration judges in the US between 1997 and 2004.⁸³ They find that the policy predispositions of the judges (liberal as opposed to conservative) play a crucial role. Drawing on archival records of asylum applications filed in France between 1976 and 2016, Emeriau also finds that Muslim applicants were 30 per cent less likely to be granted asylum than Christian applicants because of bureaucrats' years of work experience. Those who worked for more than one year on the same job stopped discriminating against Muslims because they no longer underestimated the probability that Muslims were persecuted.⁸⁴

Germany (2017) <<https://eumigrationlawblog.eu/the-asylum-lottery-recognition-rates-vary-strongly-within-germany/>> . Also see, Gerald Schneider, *Germany's Triple Asylum Roulette* (2019) <<https://www.gmfus.org/blog/2019/03/01/germanys-triple-asylum-roulette>> [accessed on 28 October 2020].

⁷⁹ Lisa Riedel and Gerald Schneider, 'Dezentraler Asylvollzug diskriminiert: Anerkennungsquoten von Flüchtlingen im bundesdeutschen Vergleich, 2010-2015 [Decentralised asylum policy discriminates: A comparison of asylum recognition rates in the federal states of Germany]' 58 *PVS Politische Vierteljahresschrift* (2017) 23-50.

⁸⁰ Thomas Holzer, Gerald Schneider and Thomas Widmer, 'Discriminating Decentralization: Federalism and the Handling of Asylum Applications in Switzerland, 1988-1996' 44 *Journal of Conflict Resolution* (2000) 250-276.

⁸¹ Gerald Schneider, Nadine Segadlo and Miriam Leue, 'Forty-Eight Shades of Germany: Positive and Negative Discrimination in Federal Asylum Decision Making' *German Politics* (2020) 1-18.

⁸² Linda Camp Keith and Jennifer S. Holmes, 'A Rare Examination of Typically Unobservable Factors in US Asylum Decisions' 22 *Journal of Refugee Studies* (2009) 224-241.

⁸³ Linda Camp Keith, Jennifer S. Holmes and Banks P. Miller, 'Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach' 35 *Law & Policy* (2013) 261-289.

⁸⁴ Mathilde Emeriau, *Learning to be Unbiased: Evidence from the French asylum office* (Winner of the APSA Migration & Citizenship Section 2019 Best Paper Award, 2019) <<https://mathildeemeriau.com/>> .

The leading US study, *Refugee Roulette*, shows that the chances of recognition vary wildly between judges, even in the same office.⁸⁵ In this study, Ramji-Nogales and her colleagues find a high level of variation in recognition rates, even when they look at the different adjudicators' decisions for applications from the same country of origin, in the same office. For example, one judge granted asylum for 88 per cent of Colombian asylum applicants, while another in the same building granted asylum for only 5 per cent of the same cohort. Analysing judges' individual characteristics, they find that judges' gender and work experience prior to appointment played a crucial role in their decisions. In their conclusion, they recommend more comprehensive training and effective and independent appellate review. Ramji-Nogales' and her co-authors' follow up book, *Lives in the Balance*, also shows that other factors than applicants' merits play a role in recognition rates.⁸⁶ These factors include the one-year filing deadline and various other issues, such as whether the applicant entered the country with a visa, whether s/he had dependents, whether s/he was represented by a legal representative, how many cases their adjudicator had previously decided, and whether their adjudicator was a lawyer. In other words, they find that factors that are unrelated to the merits of their claims play a critical role in asylum decisions.

The work of Sean Rehaag also demonstrates a considerable variation in Canada.⁸⁷ In order to seek judicial review, asylum applicants in Canada must seek leave from the Federal Court, where a judge decides whether their case is suitable for review. In his study of over 23,000 applications for judicial review from 2005 to 2010, Rehaag observes significant variation among judges' decisions.⁸⁸ The inconsistency renders the process of accessing judicial review arbitrary for applicants. Similarly, in his study of over 65,000 RSD outcomes from 2004 to 2008, Rehaag shows that judges' gender also plays a role.⁸⁹ He documents that male adjudicators approved their cases at a slightly higher rate than female adjudicators. Their recognition rates were significantly higher in cases involving female principal applicants and in cases involving gender-based persecution. However, female adjudicators with prior experience in women's rights had higher average rates overall, especially in cases involving female claimants and gender-based persecution.

Similarly, in her study *Political Bias in Court? Lay Judges and Asylum Appeals*, Linna Martén demonstrates the link between the lay judges' political affiliation and RSD decisions in Sweden.⁹⁰ She finds that asylum appeals were more likely to be rejected if the lay judges were from the anti-immigrant party, the Swedish Democrats. They were less likely to be rejected if lay judges were from the Left Party, the Christian Democrats or the Green Party. The findings caution that lay judges – who lack legal education – create a bias for asylum seekers in courts. Variation exists even in the eligibility stage. For instance, Peter Mascini studies the differences among 98 caseworkers' decision-making in the Netherlands.⁹¹ He finds that employees' perceived work pressure, attitude, background and reputation all play a role in assessing applicants' eligibility.

In their study in the US for the period between 1999 and 2004, Andy Rottman and his colleagues also find variation in asylum officers' and judges' decisions.⁹² According to their findings, judges approved applications from countries that are important to US security to a greater extent. Also, asylum officers

⁸⁵ Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' 60 *Stanford Law Review* (2007) 295-411.

⁸⁶ Andrew I. Schoenholtz, Philip G. Schrag and Jaya Ramji-Nogales, *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security* (NYU Press 2014).

⁸⁷ Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' 39 *Ottawa Law Review* (2008) 335-365.

⁸⁸ Sean Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw' 38 *Queen's Law Journal* (2012) 1-58.

⁸⁹ Sean Rehaag, 'Do Women Refugee Judges Really Make a Difference - An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations' 23 *Canadian Journal of Women and the Law* (2011) 627-660.

⁹⁰ Linna Martén, *Political Bias in Court? Lay Judges and Asylum Appeals* (2015) <https://EconPapers.repec.org/RePEc:hhs:uunewp:2015_002> .

⁹¹ Mascini Peter, 'Explaining Inequality in the Implementation of Asylum Law' 25 *Refuge: Canada's Journal on Refugees* (2008).

⁹² Andy J. Rottman, Christopher J. Fariss and Steven C. Poe, 'The Path to Asylum in the US and the Determinants for Who Gets In and Why' 43 *The International Migration Review* (2009) 3-34.

tended to deny cases involving persons hailing from English-speaking countries, and judges tended to refuse cases involving persons from Arabic- and Spanish-speaking countries. Finally, they find a significant change in refugee recognition after the 11 September attacks. Especially those from Arabic-speaking countries were much less likely to be recognised in the post-September 11 period.

The leading study that goes comparatively deeper into RSD processes is that of Rebecca Hamlin.⁹³ Her book compares asylum in Australia, Canada and the US – states with similar legal systems applying the same refugee definition. This is a comparative study of fairly similar systems, and also quite legible in terms of being able to isolate the recognition rates for particular types of claims. In these case studies, she compares three specific sets of claims: Chinese one-child policy claims, gender claims, and claims from those fleeing war under complementary protection systems. She notes divergences in recognition rates and explains these by reference to the degree of ‘administrative insulation’ in the asylum system, that is the extent to which decision makers were protected from political pressures. 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 asylum claims. This is in line with Daan Bronkhorst’s argument in the early 1990s. Looking at the recognition rates in Western countries in 1990, Bronkhorst also finds that ‘the granting of asylum [was] on average more generous in the countries where an independent body [was] responsible’.⁹⁴

In recent years, scholars could also make use of new technologies to study decision-making. New technologies can enable the study of mass decision-making, depending on the accessibility of source material. For example, the *Data Science for Asylum Legal Landscaping* (DATA4ALL) project has recently obtained access to at least 75,000 decisions from Denmark, Sweden and Norway.⁹⁵ With access, scholars can provide generalizable and important insights into the quality of decision-making. For example, using machine learning to predict judges’ decisions in the US, a team of researchers has recently found that software systems can predict the result with 80 per cent accuracy by looking only at the judge’s identity and the applicant’s nationality.⁹⁶ This high accuracy rate alone should raise concerns about whether all individual applicants are receiving equal treatment under the law.

2.2. Group Recognition

States in the ‘Global North’ have generally employed individual RSD; however, informal group recognition practices can also be found in many states – both in the ‘Global North’ and ‘South’. For instance, in 2015, Germany created simplified procedures to process applications for Syrian asylum seekers. In the same year, Germany recognised 95.8 per cent of Syrian applicants.⁹⁷ In addition, over 3.5 million Syrians have also been provided with temporary protection in Turkey.

⁹³ Rebecca Hamlin, ‘International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia’ 37 *Law & Social Inquiry* (2012) 933-968; Rebecca Hamlin, *Let Me Be a Refugee* (University of Oxford 2014).

⁹⁴ Daan Bronkhorst, ‘The Realism of a European Asylum Policy: A Quantitative Approach Part A’ 9 *Netherlands Quarterly of Human Rights* (1991) 142-158, 146-147.

⁹⁵ See their website at <https://jura.ku.dk/icourts/research/data-science-for-asylum-legal-landscaping-data4all/> [accessed on 28 October 2020].

⁹⁶ Mathew Dunn and others, *Early Predictability of Asylum Court Decisions (Proceedings of the ACM Conference on AI and the Law, 26 January 2017)* (2017) <<https://ssrn.com/abstract=2816191>> [accessed on 28 October 2020].

⁹⁷ AIDA, *Country Report: Germany, 2016 Update* (2016) 11, 84 <<https://www.asylumineurope.org/reports/country/germany>> [accessed on 20 November 2020].

In 2014 and 2015, UNHCR published guidelines on *prima facie* recognition of refugee status⁹⁸ and temporary protection.⁹⁹ These guidelines reflect a concerted effort to urge states to consider group recognition to enhance refugee protection. In tandem, UNHCR sought both to explain and improve its mandate RSD by promoting mass recognition. On 31 May 2016, it published a paper announcing a ‘new approach’ within UNHCR to strategic engagement with respect to refugee status determination (RSD), providing some examples of the practices that had at that point already been developed.¹⁰⁰

Considering these state practices and fundamental changes in UNHCR’s approach and guidelines for states, the scholarship on the workings of group recognition remains scarce and insufficient. One of the first and comprehensive works in this field is written by Ivor C Jackson, the former Deputy Director of International Protection at UNHCR. In his detailed manuscript, *The Refugee Concept in Group Situations*, Jackson examines the historical development of the refugee concept in instances where it was applied to groups.¹⁰¹ He argues that asylum applicants could be entitled to *prima facie* refugee status depending on the interpretation of the refugee definition. This book provides a comprehensive description of the practices for the period between 1921 and 1985. Jackson claims that recognition practices became more restrictive, especially after 1985. Since the publication of this book, there has been no other work describing group recognition practices around the world to this detailed extent.

Jean-François Durieux, a former UNHCR staff member, is another leading scholar who has worked on group-based recognition mechanisms. He starts by identifying that there is no universally agreed definition of mass influx.¹⁰² He also argues that group-based determination is ‘not a mechanism reserved for mass influx situations’.¹⁰³ On the contrary, Durieux states that ‘a measure of group-based determination is inherent in *any* process applying the refugee definition to individual asylum-seekers, regardless of their numbers’.¹⁰⁴ He argues that the concept of ‘groups at risk’ is intrinsic to the concept of refugee, according to the 1951 Refugee Convention. For him, the approach should be one where both individual and group determination processes co-exist, and where the critical elements of both approaches interpenetrate. In order to understand past and current practices in detail, he suggests analysing both formal and informal methods of group recognition in a ‘systematic compilation and comparative analysis’.¹⁰⁵

In addition to Durieux’s work, this topic has been the subject of an article based on an MSc thesis by Matthew Albert, written at the Refugee Studies Centre.¹⁰⁶ Like Jean-François Durieux, Albert’s article explores the legal basis of *prima facie* recognition. However, in Albert’s view, this remains ‘outside the scope of the Convention’.¹⁰⁷ Instead, he considers *prima facie* refugee status determination an expedited

⁹⁸ UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, available at <https://www.refworld.org/docid/555c335a4.html> [accessed on 28 October 2020].

⁹⁹ UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, available at <https://www.refworld.org/docid/52fba2404.html> [accessed on 28 October 2020].

¹⁰⁰ UNHCR, Executive Committee of the High Commissioner’s Programme, Standing Committee 66th meeting, Refugee Status Determination, 31 May 2016, EC/67/SC/CRP.12, available at <https://www.refworld.org/pdfid/57c83a724.pdf>, supra note 3 [accessed on 28 October 2020].

¹⁰¹ Ivor C. Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999).

¹⁰² Jean-François Durieux and Agnes Hurwitz, ‘“How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees’ 47 *German Yearbook of International Law* (2004) 105–159.

¹⁰³ Jean-François Durieux, ‘The Many Faces of of “Prima Facie”’ 25 *Refuge: Canada's Journal on Refugees* (2008) 151-163, 152. Also see Jean-François Durieux and Jane McAdam, ‘Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ 16 *International Journal of Refugee Law* (2004) 4-24, 9-10.

¹⁰⁴ Jean-François Durieux, ‘The Many Faces of of “Prima Facie”’ 25 *Refuge: Canada's Journal on Refugees* (2008) 151-163, 152.

¹⁰⁵ Jean-François Durieux, ‘The Many Faces of of “Prima Facie”’ 25 *Refuge: Canada's Journal on Refugees* (2008) 151-163, 161.

¹⁰⁶ Matthew Albert, *Prima Facie Determination of Refugee Status: An Overview of its Legal Foundation* (2010) <<https://www.rsc.ox.ac.uk/publications/prima-facie-determination-of-refugee-legal-status-an-overview-of-its-legal-foundation>> [accessed on 28 October 2020].

¹⁰⁷ Matthew Albert, ‘Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ 29 *Refugee Survey Quarterly* (2010) 61-91, 80.

form of individual refugee status determination. In other words, for him, *prima facie* recognition is another form of individual recognition.

In an earlier UNHCR working paper, Bonaventura Rutinwa analyses the modalities of *prima facie* recognition generally. He argues that the trigger for this mode of recognition should be the objective circumstances that lead to mass displacement and the scale of displacement.¹⁰⁸ As such, refugee status should be presumptive and would only be dislodged where one was either wrongly recognised or was subject to exclusion under refugee law. He acknowledges that one of the *prima facie* approach's limitations is the difficulty in excluding criminal elements. Rutinwa's work is particularly significant as it is an outstanding analysis of the application of *prima facie* recognition in Africa.

Overall, this relatively scarce literature falls short of explaining the question of why (or under what conditions) some states and/or the UNHCR decide to recognise refugees via group-based mechanisms in a systematic manner. For instance, Ivor Jackson's work mentioned above traces the development of the refugee definition and its practices from the early 1920s until the end of the century, yet does not explore the factors leading to the adoption of group-based recognition in some situations, but not others.¹⁰⁹ Rutinwa analyses the modalities of *prima facie* recognition without examining the intricate practices and processes that lead to this type of recognition and how it is effected in any specific state.¹¹⁰

Moreover, some studies providing a more generalist account may fall short of explaining the differences at the national and regional level. For instance, Didier Fassin suggests that refugee recognition in the 'Global South' and 'North' are sharply distinct, with 'mass treatment with precarious living conditions in the South, parsimonious casuistry potentially leading to substantial benefits in the North.'¹¹¹ Notably, he treats South Africa as 'belonging more to the global North than to the global South', in that it hosts many asylum-seekers, but does not recognise refugees *en masse*.¹¹² This schematic account may not hold weight, particularly as many states in Africa¹¹³ shift to individual RSD. Also, many others, including Turkey (hosting the largest number of refugees in the world), use hybrid forms of recognition. What the literature lacks is a systematic analysis of these diverse forms of recognition at a global level.

3. Actors Involved in Refugee Recognition

As mentioned earlier, the 1951 Refugee Convention does not specify any particular institution for recognising refugees. In practice, a diverse constellation of institutions may be involved in refugee recognition. These may include security or border forces, specialists in dedicated institutions or general civil servants in interior ministries or even border guards and police services. Appellate bodies also vary from general or specialist quasi-judicial tribunals, to internal reviews within the main asylum bureaucracy. The role of UNHCR varies from sole authority to joint or to outside advisor. In some cases, decision-making committees include members from several government departments and/or the UNHCR.¹¹⁴ In others, relatively independent bodies, such as the Immigration and Refugee Board of

¹⁰⁸ Bonaventura Rutinwa, *Prima facie status and refugee recognition* (UNHCR Working Paper No 69, 2002) <<https://www.refworld.org/docid/4ff3f8812.html>> [accessed on 28 October 2020].

¹⁰⁹ Ivor C. Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999).

¹¹⁰ Bonaventura Rutinwa, *Prima facie status and refugee recognition* (UNHCR Working Paper No 69, 2002)[accessed on 28 October 2020].

¹¹¹ Didier Fassin, 'The Precarious Truth of Asylum' 25 *Public Culture* (2013) 39-63.

¹¹² Didier Fassin, Matthew Wilhelm-Solomon and Aurelia Segatti, 'Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa' 58 *Current Anthropology* (2017) 160-187.

¹¹³ Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' 26 *International Journal of Refugee Law* (2014) 555-580.

¹¹⁴ For example, in Australia, the inter-departmental DORS Committee included four voting representatives from four Departments and one non-voting representative from the UNHCR. See, Claire Higgins, 'New Evidence on Refugee Status

Canada (IRB), or the French Office for the Protection of Refugees and Stateless Persons [Office Français de Protection des Réfugiés et Apatrides] (OFPRA), are empowered to take RSD decisions.

The empirical literature outlined in the previous sections largely explores the role and workings of governmental institutions and relatively independent bodies, mostly in the ‘Global North’. In comparison, there is little scholarship on the role of institutions – and their impact on the quality of recognition – in the Global South. There is also limited literature on UNHCR’s Mandate RSD, one of the main actors in the Global South, particularly in non-Convention states. Finally, the transfer of RSD responsibilities between the UNHCR and governmental authorities remains mostly unexplored.

3.1. UNHCR Mandate RSD

A number of scholars, including Guy Goodwin Gill and Jane McAdam, James Hathaway and Michelle Forster, have rightly pointed out that UNHCR’s RSD mandate is implied rather than expressed. It is inherent within its international protection mandate.¹¹⁵ Thimm-Braun further argues that UNHCR’s RSD mandate not only falls under its supervisory role within its Statute and Refugee Convention, but it should also be seen as the ‘soft enforcement’ of its standards.¹¹⁶

Despite its RSD operations worldwide, there is relatively little scholarship on mandate RSD by UNHCR. Michael Alexander’s work in the late nineties is considered seminal in this regard. In this work, he criticised UNHCR for its failure to adhere to universal human rights and procedural fairness standards. He specifically noted its lack of publicly available and standardised RSD guidelines, inconsistencies in making adequate information on RSD available to asylum seekers, inconsistencies regarding legal representation for asylum seekers, withholding evidence on file from asylum seekers, failure to ensure accuracy in the interview transcripts, failure to provide written reasons for an adverse decision, and the lack of an independent appeal mechanism.¹¹⁷ Most of Alexander’s criticisms were subsequently followed up by scholars, such as Michael Kagan, who also questioned UNHCR’s interview techniques and examination of credibility.¹¹⁸

Subsequent to these critiques, UNHCR published its *Procedural Standards on Refugee Status Determination under UNHCR Mandate*¹¹⁹, which addressed some of the critiques. Yet some of the key deficiencies, specifically the lack of an independent appeals mechanism and withholding of evidence on file from an applicant, were not addressed. Moreover, continuing problems in implementation have

Determination in Australia, 1978–1983’ 35 *Refugee Survey Quarterly* (2016) 71-93. Higgins argues that, in addition to respecting international obligations, the establishment of the DORS Committee enabled the Fraser government to counteract negative media coverage of the boat arrivals by showing that the government was selecting who a refugee was on an individual basis and that therefore it was in control of who was accepted into the territory. See, Claire Higgins, ‘Status Determination of Indochinese Boat Arrivals: A ‘Balancing Act’ in Australia’ 30 *Journal of Refugee Studies* (2016) 89-105.

¹¹⁵ See for instance, G. Goodwin-Gill and J. McAdam, *The Refugee in International Law, 3rd Edition* (Oxford University Press 2007) 53-54; James C Hathaway and Michelle Forster, *The Law of Refugee Status* (Cambridge University Press 2014) 1-4; Niamh Kinchin, ‘The Implied Human Rights Obligations of UNHCR’ 28 *International Journal of Refugee Law* (2016) 251-275; Jones Martin and Houle France, ‘Building a Better Refugee Status Determination System’ 25 *Refuge: Canada’s Journal on Refugees* (2008) 3-11.

¹¹⁶ Laura Sophie Thimm-Braun, ‘Refugee Status Determination under the Mandate of UNHCR: “Soft Enforcement” of the Supervisory Role of UNHCR in International Law’ 17 *Migration Letters* (2020) 179-190.

¹¹⁷ M Alexander, ‘Refugee status determination conducted by UNHCR’ 11 *International Journal of Refugee Law* (1999) 251-289.

¹¹⁸ Michael Kagan, ‘Is Truth in the Eye of the Beholder - Objective Credibility Assessment in Refugee Status Determination’ 17 *Georgetown Immigration Law Journal* (2002) 367-416:

¹¹⁹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*, 1 September 2005, available at <https://www.unhcr.org/uk/publications/legal/4316f0c02/procedural-standards-refugee-status-determination-under-unhcrs-mandate.html> [accessed on 28 October 2020].

become a cause for recurring criticism, as evidenced in the available literature.¹²⁰ Through his empirical work and RSDWatch website, Kagan assessed UNHCR's compliance with its own procedural standards and international standards, highlighting the inconsistencies in practice across various field offices¹²¹ and continued shortcomings in procedural fairness. He went ahead to argue for a more rationalised approach to where, how and when UNHCR should conduct RSD, given that, in some instances, UNHCR RSD did not lead to protection.¹²² In many ways, this key article foreshadows some of the changes UNHCR formalised in the mid-90s, discussed below.

Two recent scholarly movements have also assessed mandate RSD, albeit in a limited fashion. The significant body of work on 'global administrative law' includes a study of mandate RSD by the leading refugee law scholar, BS Chimni,¹²³ and three further contributions.¹²⁴ Chimni argues that global administrative law can serve as a tool of change if the relevant regime has a progressive character and a human rights dimension that can be used to critique UNHCR's decision-making.

Similarly, the scholarship on 'international public authority' includes one contribution to these practices.¹²⁵ Both contributions share the negative assessment of the practice from a procedural justice point of view. For instance, Smrkojl identifies a litany of deficits:

'The problems already occur in facilitating actual access to the procedure since no right exists on the part of the applicant and no legal duty on the part of UNHCR to enable him access to the procedure and to examine his application. Within the eligibility assessment procedure the applicant does not need to be provided with an interpreter or counsel, the decision can be taken on the basis of secret evidence, and the level of discretion in allowing third parties to be present and to participate in the individual procedure is very high. The field officers deciding on the cases are also not obliged to provide the applicant with reasons for the decision. And finally, there is no proper legal remedy in its classical meaning that would enable the applicant to invoke his substantial and procedural rights after the decision has been issued.'¹²⁶

¹²⁰ Jones Martin and Houle France, 'Building a Better Refugee Status Determination System' 25 *Refuge: Canada's Journal on Refugees* (2008) 3-11; James C. Simeon, 'A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration' 22 *International Journal of Refugee Law* (2010) 72-103; James C Simeon, 'Refugee Adjudication under the UNHCR's Mandate and the Exclusion Dilemma' 2 *Cambridge Law Review* (2017) 75; Niamh Kinchin, 'The Implied Human Rights Obligations of UNHCR' 28 *International Journal of Refugee Law* (2016) 251-275; Ricarda Roesch and others, 'The Deficiencies in UNHCR's RSD Procedure: the case of Choucha Refugee Camp in Tunisia' 4 *Oxford Monitor of Forced Migration* (2014) 46; E. Odhiambo-Abuya, 'United Nations High Commissioner for Refugees and status determination Imtaxaan in Kenya: an empirical survey' 48 *Journal of African Law* (2004) 187-206; Edwin Odhiambo Abuya and George Mukundi Wachira, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?' 53 *Netherlands International Law Review* (2006) 171-204.

¹²¹ Michael Kagan, 'No Margin for Error: Monitoring the Fairness of Refugee Status Determination Procedures at Selected UNHCR Field Offices in 2007', available at <https://rsdwatch.com/no-margin-for-error/>. The website rsdwatch.com has been dormant since 2016.

¹²² Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' 18 *International Journal of Refugee Law* (2006) 1-29.

¹²³ B. S. Chimni, 'Co-Option and Resistance: Two Faces of Global Administrative Law' 37 *New York University Journal of International Law and Politics* (2004) 799-828.

¹²⁴ Yukio Okitsu, 'A Global Administrative Act? Refugee Status Determination between Substantive and Procedural Law' in Maria Grahn-Farley, Jane Reichel and Mauro Zamboni (eds), *Governing with Public Agencies: The Development of a Global Administrative Space and the Creation of a New Role for Public Agencies* (Stockholm University 2022); Emma Dunlop, 'A Globalized Administrative Procedure: UNHCR's Determination of Refugee Status and its Procedural Standards' in Sabino Cassese and others (eds), *Global Administrative Law: The Casebook* (Kindle 2012); Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 *NYU Journal of International Law & Politics* 869.

¹²⁵ Maja Smrkojl, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in von Bogdandy A. and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010).

¹²⁶ Maja Smrkojl, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in von Bogdandy A. and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010), 1782.

UNHCR has, over the years, issued new policy documents to guide its RSD, including guidelines on *prima facie* recognition¹²⁷ and temporary protection¹²⁸, and a new approach on strategic engagement with RSD.¹²⁹ These have all been consolidated in its recently revised Procedural Standards published in August 2020.¹³⁰ Although the revised version elaborates and clarifies most of the existing standards, it also introduces new procedural practices for purposes of efficiency, such as simplified and merged RSD procedures and a more assertive requirement for sufficiently-reasoned, adverse RSD decisions. However, there is still no independent appeals mechanism, and asylum seekers and their legal representatives are still not entitled to all the evidence on file, save for that submitted by the asylum seeker.

Scholars have reported difficulties in reaching UNHCR RSD staff in field offices in order to evaluate the quality of its RSD practices.¹³¹ Overall, the opaqueness that surrounds UNHCR RSD possibly accounts for the dearth of literature on its application of evidential assessment standards.¹³²

3.2. UNHCR-State Relations and Handovers of RSD

There is surprisingly little scholarship on the relationship between states and UNHCR. The leading scholarship in international relations, pioneered by Gil Loescher and followed by Alexander Betts and James Milner, traces the origin and evolution of UNHCR's mandate, stressing that the successful execution of UNHCR's mandate is mainly dependent on state cooperation, which is increasingly waning. Consequently, mainly relying on 'socialisation and persuasion', UNHCR has to be 'creative and proactive in seeking ways to make asylum compatible with the concerns of states without diluting the quality or quantity of asylum available to refugees'.¹³³ Their emphasis is on UNHCR's relations with states, but they do not go into details of UNHCR's role in RSD and the quality of its decision-making.

There is an important scholarship on UNHCR-State relations in terms of understanding existing protection mechanisms for refugees and identifying their legal status. For instance, Marjoleine Zieck explores the legal status of Afghan refugees in Pakistan.¹³⁴ In this context, bilateral agreements between UNHCR and Pakistan may bring important protection mechanisms for Afghan refugees, rather than Pakistan's signing of the 1951 Refugee Convention.¹³⁵ Zieck also examines the workings of the previous dual-track refugee status determination in Turkey, undertaken both by domestic authorities

¹²⁷ UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, available at <https://www.refworld.org/docid/555c335a4.html> [accessed on 28 October 2020].

¹²⁸ UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, available at <https://www.refworld.org/docid/52fba2404.html> [accessed on 28 October 2020].

¹²⁹ UNHCR, Executive Committee of the High Commissioner's Programme, Standing Committee 66th meeting, Refugee Status Determination, 31 May 2016, EC/67/SC/CRP.12, available at <https://www.refworld.org/pdfid/57c83a724.pdf>, supra note 3 [accessed on 28 October 2020].

¹³⁰ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 26 August 2020, available at <https://www.refworld.org/docid/5e870b254.html> [accessed on 28 October 2020].

¹³¹ Niamh Kinchin, *Administrative Justice in the UN: Procedural Protections, Gaps and Proposals for Reform* (Edward Elgar 2018), Chapter 5.

¹³² Cathryn Costello, Caroline Nalule and Derya Ozkul, 'Recognising refugees: understanding the real routes to recognition' 65 *Forced Migration Review* (2020) 4-8.

¹³³ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001); Alexander Betts, Gil Loescher and James Milner, *UNHCR: The Politics and Practice of Refugee Protection*, 2nd edition (Routledge 2012) 94-95; Gil Loescher and James Milner, 'UNHCR and the Global Governance of Refugees' in Alexander Betts (ed), *Global Migration Governance* (Oxford University Press 2011) 189-210.

¹³⁴ Marjoleine Zieck, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises' 20 *International Journal of Refugee Law* (2008) 253-272.

¹³⁵ Marjoleine Zieck, *Accession of Pakistan to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees: 'Signing on Could Make All the Difference'* (2010) <Available at SSRN: <https://ssrn.com/abstract=1554620>> .

and UNHCR. In this study, Zieck most importantly questions the mandate *ratione personae* of UNHCR at large, that is, beyond Turkey.¹³⁶ Maja Janmyr explores the reasons behind Lebanon's reluctance to sign the 1951 Refugee Convention.¹³⁷ She investigates Syrian refugees' legal status,¹³⁸ and the extent to which UNHCR can provide protection in Lebanon, a state that rejects the international refugee law regime and refuses to let UNHCR provide Syrians with refugee status.¹³⁹

The practice of 'handovers' and, indeed, the general role of UNHCR-host state relations in shaping refugee protection is fascinating, yet, to date, mostly unexplored. In 2012, UNHCR's most extensive mandate operations were in Kenya, Malaysia, Turkey, Indonesia, Egypt, Libya, Pakistan, Cameroon, Somalia and Yemen. In two of the three largest, Kenya and Turkey, a handover has taken place, and it is under discussion in Malaysia. More generally, under the framework of the Global Compact on Refugees, UNHCR established an Asylum Capacity Support Group, to facilitate more states in creating or developing their national RSD systems in the coming years. Despite this significant trend, there has been no systematic examination of handovers – assessing and comparing the quality of decision-making before and after – on a global scale. The major challenge in evaluating handovers is that neither the 'before' nor 'after' picture is easy to assess.

There is little scholarship on this topic. The more comprehensive literature on the subject is UNHCR's own evaluation reports.¹⁴⁰ Independent studies include a recent doctoral study, which looks in more depth at the handover process in Kenya.¹⁴¹ Lamis Abdelaaty's book, *Discrimination and Delegation*, also examines why some states delegate RSD to UNHCR. Looking at Egypt, Turkey and Kenya, Abdelaaty shows that states consider both foreign policy and domestic politics when deciding to delegate. Policy makers may provide protection to refugees from rival countries, but they also need to consider the importance of ethnic identity in domestic politics. They decide to delegate RSD to UNHCR when these international and domestic incentives are in conflict.¹⁴² However, this study does not explain why the UNHCR has handed over the responsibility of RSD to Turkish and Kenyan states. A couple of scholarly pieces point to the dearth of scrutiny of handovers, but are by no means extensive or in-depth systematic discussions of the varied handover processes.¹⁴³ Handovers of RSD, particularly from UNHCR to states, are without doubt one of the areas that would benefit from independent and scholarly examination and scrutiny. An independent analysis could reveal whether the handover has resulted in a fair and efficient recognition system for asylum seekers.

¹³⁶ Marjoleine Zieck, 'UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks' 22 *International Journal of Refugee Law* (2010) 593-622.

¹³⁷ Maja Janmyr, 'No Country of Asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention' 29 *International Journal of Refugee Law* (2017) 438-465.

¹³⁸ Maja Janmyr, *The Legal Status of Syrian Refugees in Lebanon* (2016) <https://www.aub.edu.lb/ifi/Documents/publications/working_papers/2015-2016/20160331_Maja_Janmyr.pdf> ; Maja Janmyr, 'Precarity in Exile: The Legal Status of Syrian Refugees in Lebanon' 35 *Refugee Survey Quarterly* (2016) 58-78.

¹³⁹ Maja Janmyr, 'UNHCR and the Syrian refugee response: negotiating status and registration in Lebanon' 22 *The International Journal of Human Rights* (2018) 393-419.

¹⁴⁰ UNHCR, *Providing for Protection: Assisting States with the assumption of responsibility for refugee status determination - A preliminary review*, March 2014, PDES/2014/01, available at <https://www.refworld.org/docid/53a160444.html> [accessed on 28 October 2020]; UNHCR, *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*, April 2015, PDES/2015/01, available at <https://www.refworld.org/docid/559f9a4a4.html> [accessed on 28 October 2020].

¹⁴¹ Claire Walkey, 'Building a Bureaucracy: the Transfer of Responsibility for Refugee Affairs from United Nations Refugee Agency to Government of Kenya' (DPhil Thesis, University of Oxford 2019).

¹⁴² Lamis Elmy Abdelaaty, *Discrimination and Delegation: Explaining State Responses to Refugees* (Oxford University Press 2021).

¹⁴³ Michael Kagan, *Why is UNHCR doing RSD anyway? A UNHCR report identifies the hard questions* (2014) <<https://rsdwatch.com/2014/12/11/why-is-unhcr-doing-rsd-anyway-a-unhcr-report-identifies-the-hard-questions/>> ; Caroline Nalule and Derya Ozkul, 'Exploring RSD handover from UNHCR to States' 65 *Forced Migration Review* (2020) 27-29.

4. Global Inequality of Scholarly Attention

As this literature review shows, a large part of the empirical scholarship is concerned with processes in the ‘Global North’ and thus focuses on national bureaucracies as the predominant actors. Scholars studying refugee recognition in the ‘Global North’ analyse published decisions and recognition rates and, in many instances, have secured access to decision-making, including permission to do ethnographic observation at proceedings held in public. On the contrary, there is a paucity of scholarship on RSD and the quality of refugee recognition in states in the ‘Global South’. It is particularly crucial to study these countries because they host some of the largest numbers of refugees.

Existing research on other countries reveals important insights into the actors that are involved in refugee recognition, UNHCR’s mandate RSD and some governmental institutions’ RSD practices. In addition to her crucial work on Lebanon’s ambivalent asylum policies, Maja Janmyr studies the UNHCR’s negotiations with the Lebanese government in their Syrian refugee response.¹⁴⁴ As indicated earlier, Michael Kagan’s work focuses on assessing UNHCR RSD in the Middle East and Northern Africa¹⁴⁵ and particularly the impact of legal aid organisations in Egypt.¹⁴⁶ Norman’s recent manuscript, *Reluctant Reception*, also shows the responses of Egypt, Morocco and Turkey in the face of asylum seekers’ arrival.¹⁴⁷ Norman argues that some states may use ‘strategic ignorance’. In other words, they may act indifferently towards migrants and refugees and, instead, invite international organisations, such as UNHCR and NGOs, to provide protection for refugees. There is a fair amount of research on Turkey, but it mainly focuses on refugee law and policies, not on how UNHCR and the government conduct RSD in practice.¹⁴⁸

In South America, there is an important scholarship on refugee law in distinct countries in the region.¹⁴⁹ Liliana Lyra Jubilut’s important work explores the working of the tripartite enterprise, involving UNHCR, the government and civil society in Brazil.¹⁵⁰ Of particular significance for RSD, Bruno Magalhães explores the assessment of credibility. Based on extensive fieldwork during 24 months in Brazil, Magalhães explores how caseworkers downplay the inherent contestability of credibility assessments. He shows that credibility assessments provide law with authority despite applicants’ lack of capability to prove their stories.¹⁵¹ This is a significant intervention that is applicable in other contexts too. However, despite these important cases, the examination of RSD practices in South America written in English is scant.

¹⁴⁴ Maja Janmyr, ‘UNHCR and the Syrian refugee response: negotiating status and registration in Lebanon’ 22 *The International Journal of Human Rights* (2018) 393-419.

¹⁴⁵ Michael Kagan, ‘“The UN “Surrogate State” and the Foundation of Refugee Policy in the Middle East’ 18 *UC Davis J Int'l L & Pol'y* (2012) 307.

¹⁴⁶ Michael Kagan, ‘Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt’ 19 *Journal of Refugee Studies* (2006) 45-68.

¹⁴⁷ Kelsey P. Norman, *Reluctant Reception Refugees, Migration and Governance in the Middle East and North Africa* (Cambridge University Press 2021).

¹⁴⁸ See in particular, Neva Ozturk, *Mültecinin Hukuki Statüsünün Belirlenmesi* (Seçkin Yayıncılık 2015); Cavidan Soykan, ‘The New Draft Law on Foreigners and International Protection in Turkey’ 2 *Oxford Monitor of Forced Migration* (2012) 38-47. However, due to lack of transparency, none of these studies could explore the workings of RSD, in other words how UNHCR and the governmental authorities processed asylum applications and conducted status determination for various nationalities.

¹⁴⁹ See for example, Alex Garcia, ‘International Refugee Law in Mexico’ 7 *ISIL Year Book of International Humanitarian and Refugee Law* (2007) 203; Liliana Lyra Jubilut, ‘Refugee Law and Protection in Brazil: a Model in South America?’ 19 *Journal of Refugee Studies* (2006) 22-44.

¹⁵⁰ Jubilut Liliana Lyra and Apolinário Silvia Menicucci de Oliveira Selmi, ‘Refugee Status Determination in Brazil: A Tripartite Enterprise’ 25 *Refuge: Canada's Journal on Refugees* (2008) 29-40.

¹⁵¹ Bruno Magalhães, ‘The Politics of Credibility: Assembling Decisions on Asylum Applications in Brazil’ 10 *International Political Sociology* (2016) 133-149.

With specific reference to Africa, Alice Edwards notes the increasing prevalence of individual status determination, even though status determination procedures may still be ‘inadequate’ and ‘have failed to elaborate any comprehensive jurisprudence’.¹⁵² However, her work is not an examination of specific country processes. There are some country-specific studies on RSD, most of which are more than a decade old, in Kenya,¹⁵³ Uganda,¹⁵⁴ Tanzania,¹⁵⁵ Botswana,¹⁵⁶ Cameroon¹⁵⁷ and Tunisia.¹⁵⁸

Several studies have been done on the South African RSD process, revealing many of its flaws, most of which may account for the asylum limbo of the majority of its asylum seekers and, possibly, the significantly high rejection rates.¹⁵⁹ Most of these studies focus on the RSD processes and the interface of the asylum seekers with bureaucracy, without necessarily looking at other actors, including the courts, that have a critical and substantive role in the recognition process. Aspects of judicialisation within the refugee recognition process have not received adequate attention. Also, this scholarship does not provide a systematic assessment of the quality of refugee recognition processes.

There is emergent literature on refugee recognition practices in Asia, where UNHCR does most of the RSD among the larger refugee-hosting countries. Most of this literature is on refugee law and not RSD in particular.¹⁶⁰ There has been important research on previous RSD practices, particularly for Vietnamese asylum seekers under the framework of The Comprehensive Plan of Action for Indochinese Refugees.¹⁶¹ In Thailand, Saltsman explores the everyday interactions between authorities and forced

¹⁵² Alice Edwards, ‘Refugee Status Determination in Africa’ 14 *African Journal of International and Comparative Law* (2006) 204-233.

¹⁵³ Edwin Odhiambo Abuya, ‘Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective’ 19 *International Journal of Refugee Law* (2007) 51-95; E. O. Abuya and G. M. Wachira, ‘Assessing asylum claims in Africa: missing or meeting standards?’ LIII *Netherlands International Law Review* (2006) 171-204; Jennifer Hyndman and Bo Viktor Nylund, ‘UNHCR and the Status of Prima Facie Refugees in Kenya’ 10 *International Journal of Refugee Law* (1998) 21-48; E. O. Abuya, ‘“Parlez-vous l’Anglais ou le Swahili?” The Role of Interpreters in Refugee Status Determination Interviews in Kenya’ 19 *Forced Migration Review* (2004) 48-50; Rose Jaji, ‘Refugee Law, Agency and Credibility in Refugee Status Determination in Nairobi, Kenya’ 1 *GJRS* (2018) 32-56.

¹⁵⁴ Marina Sharpe and Salima Namusobya, ‘Refugee Status Determination and the Rights of Recognized Refugees under Uganda’s Refugees Act 2006’ 24 *International Journal of Refugee Law* (2012) 561-578.

¹⁵⁵ Toby Mendel, D., ‘Refugee Law and Practice in Tanzania’ 9 *International Journal of Refugee Law* (1997) 35-59.

¹⁵⁶ Elizabeth Macharia-Mokobi and Jimcall Pfumorodze, ‘Advancing Refugee Protection in Botswana through Improved Refugee Status Determination’ 13 *African Human Rights Law Journal* (2013) 152.

¹⁵⁷ T S Claire Matsinkou and Tinteu Y Pauli, ‘Fairness in refugee status determination upon the transfer of competence to the national authorities of Cameroon’ 13 *International Journal of Innovation and Scientific Research* (2015) 636-643.

¹⁵⁸ Ricarda Roesch et al, ‘The Deficiencies of UNHCR’s RSD Procedure: the Case of Choucha Refugee Camp in Tunisia’ 4 *Oxford Monitor of Forced Migration* (2014) 46.

¹⁵⁹ Roni Amit, *All roads lead to rejection: persistent bias and incapacity in the South African refugee status determination* (ACMS Research Report, 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274021> ; Roni Amit, *No way in: barriers to access, service and administrative justice at South Africa’s refugee reception offices* (ACMS Research Report, 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274020> ; Roni Amit, *Queue here for corruption: measuring irregularities in South Africa’s asylum system* (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274014> ; Roni Amit, ‘No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection’ 23 *International Journal of Refugee Law* (2011) 458-488; Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African Perspectives on Understanding Law, ‘Refugee’ Policy and Protection’ 27 *Journal of Refugee Studies* (2014) 534-552. See also, Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ 26 *International Journal of Refugee Law* (2014) 555-580.

¹⁶⁰ R Dhavan, ‘Refugee Law and Policy in India’ 24 *Refugee Survey Quarterly* (2005) 170; Shuvro Prosun Sarker, *Protection of Refugees in India: Quest for National Refugee Law* (RLI Working Paper No 11, 2017) <<https://ssrn.com/abstract=2961103>> ; Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (Palgrave 2017); Kum-sim Jeong, ‘Research on the Amendment Direction of the Refugee Act: Focusing on Refugee Status Determination and Treatment of Refugees’ 5 *Journal of Migration and Social Integration* (2020) 131; Kelley Loper, ‘Human Rights, Non-refoulement and the Protection of Refugees in Hong Kong’ 22 *International Journal of Refugee Law* (2010) 404-439.

¹⁶¹ Daniel Wolf, ‘A Subtle Form of Inhumanity: Screening of the Boat People in Hong Kong Part I: Refugees: Facing Crisis in the 1990s: Human Rights and Forced Repatriation: South East Asia’ 2 *International Journal of Refugee Law* (1990) 161-172; Shamsul Bari, ‘Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment’ 4 *International Journal of Refugee Law* (1992) 487-513; Arthur C. Helton, ‘Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment Focus on the Comprehensive Plan of Action’ 5 *International Journal of Refugee Law* (1993) 544-558; Arthur C. Helton, ‘Judicial Review of the Refugee Status Determination Procedure for Vietnamese Asylum Seekers in Hong Kong: The Cases of do Giau’ 17 *Brooklyn Journal of International Law* (1991) 263-292. Also see,

migrants who challenge the notion of who is entitled to refugee status and humanitarian protection.¹⁶² As mentioned above, Zieck explores the legal status of Afghan refugees in Pakistan.¹⁶³ However, existing literature on the region as a whole is truly scant, and the examination of RSD practices among Asian countries remains largely understudied, despite the fact that they host a substantial number of refugees.

5. Conclusion

This literature review shows that the process of recognising refugees, while heavily reliant on the applicant's testimony, also depends on multiple factors that are not related to the strength of the applicant's case. For instance, who makes the decision – which institution and individual – can have a significant impact on the question as to whether the applicant is recognised as a refugee or not. Other actors, such as interpreters and expert witnesses, may all influence the decision-making process.

The review also shows the relative abundance of literature on RSD practices in the so-called 'Global North'. Most of this literature explores the workings of individual RSD. In contrast, there is a striking absence of scholarship on the workings of refugee recognition in the 'Global South'. This may be related to the difficulty of studying these processes, especially in countries where bureaucratic transparency is a general concern. However, investigating these practices is crucial because the 'Global South' hosts the largest numbers of asylum seekers and refugees.

Similarly, the scholarship on UNHCR's RSD practices is also limited, and much of it predates significant changes in recent years, including its 'new approach' to strategic engagement in RSD.¹⁶⁴ This 'new approach' highlights group-based determination and simplified procedures for nationalities manifestly in need of protection. However, as of yet, no scholarship assesses the impact of these reforms.

Overall, access to decision-making is crucial for understanding how decision makers recognise or reject asylum seekers. With the growing use of AI-based technologies in various bureaucratic decision-making, states and UNHCR may be tempted to turn to automation in the near future. Before any decisions on automation are made, we need a much better understanding of the workings of refugee recognition practices globally. This literature review exposes the relative lack of attention to the recognition practices that affect the majority of the world's asylum seekers and refugees.

Sten A. Bronee, 'The History of the Comprehensive Plan of Action Focus on the Comprehensive Plan of Action' 5 *International Journal of Refugee Law* (1993) 534-543; Claire Higgins, 'Status Determination of Indochinese Boat Arrivals: A 'Balancing Act' in Australia' 30 *Journal of Refugee Studies* (2016) 89-105.

¹⁶² Adam Saltsman, 'Beyond the Law: Power, Discretion, and Bureaucracy in the Management of Asylum Space in Thailand' 27 *Journal of Refugee Studies* (2014) 457-476.

¹⁶³ Marjoleine Zieck, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises' 20 *International Journal of Refugee Law* (2008) 253-272.

¹⁶⁴ UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee 66th meeting, 'Refugee Status Determination' (31 May 2016) EC/67/SC/CRP.12 accessed 5 March 2023

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