

A network society communicative model for optimizing the Refugee Status Determination (RSD) procedures

Um modelo comunicativo de sociedade em rede para aperfeiçoar os procedimentos para Determinação do Status de Refugiado

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Introduction

The refugee status determination (RSD) procedure comprises, in general, the roles of and interaction among various implementing partners, such as the United Nations High Commissioner for Refugees (UNHCR), sovereign states, local and international nongovernmental organizations (NGOs) as well as refugees and refugee claimants (“claimants”). Not all of them are completely regulated by the international refugee regime and at times there are clashes between the spheres of their legal competences.

A regime, for Krasner (1982, 185–86) is formed by principles, norms, rules, and decision-making procedures. As to the RSD procedure, it differs from one state to another, being sometimes complex and sometimes simple. In industrialized countries, for instance, the UNHCR local office and NGOs do not usually have a key role in taking decisions regarding the refugee status, whereas in developing countries, the UNHCR local offices and NGOs have usually different roles, mainly because the UNHCR is able only to determine who is a (mandate) refugee, but not who is a state refugee.

This paper is about the RSD procedures, not about the entire regime. The guidelines for determining refugee status come from the 2005 UNHCR Handbook on Procedural Standards for Refugee Status Determination under the UNHCR’s Mandate (UNHCR 2005), which is an instrument or guide in the process. Hence, a proposal to change the procedures comes together with, and is a result of, the proposal to change the roles of all partners who are responsible, in

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different ways and places, for applying those guidelines. The solution proposed here is the formation of a network society composed of all of these partners and based on a dialogical model inspired by communicative action.

After providing an overview of the current RSD procedures, mainly as it relates to refugee claimants, applied on an individual basis that they must undergo to achieve refugee status within a host country, this paper describes the current general procedures for RSD established by the 2005 Handbook and discusses the roles of the implementing partners. Regrettably, the lack of standard rules concerning the roles of each partner in the process leads to a lack of coordination in their functions, duplicates some activities, and creates gaps in others. Useful practices do exist, though partners sometimes do not work in “real partnership,” but instead in an adversarial way, due to conflicts of interests among them.

Finally, in order to create a coordinated system in which all partners are legally bound by international laws and principles, mainly administrative ones, this paper suggests a network society communicative model by having all implementing partners gather at “round tables” to speak and be heard, and to have their own realities and needs be considered. The UNHCR’s responsibility for protection should be better focused by building standard rules, principles and decision-making procedures to be followed by all partners, under organized domains and by educating and training implementing partners and opinion-makers to disseminate, *lato sensu*, the international refugee regime, and, *stricto sensu*, a fair RSD procedure, as well as by periodically examining their roles, conducting local, regional, and international meetings to share knowledge and practices found in different realities.

The current Refugee Status Determination: general procedures

The current international refugee regime was created in 1951 as a response to the forced displacement of people after World War II, to provide protection to those in need of physical and economic security and social well-being, under the support of the Office of the UNHCR, which provides policies, guidelines, and legal rules for implementing durable solutions for these vulnerable people. Yet during the RSD procedure, difficulties are encountered in the application of the definition, the implementation of the solutions, and in the observation of the procedural standards.

The 1951 Convention and the 1967 Protocol defined refugees, and the procedures to determine refugee status are expected to adhere to these definitions. However, the current reality and regional differences lead each state and region to adjust the international and general rules to its own needs, creating a lack of standard rules and a failure to implement policies for refugee integration in host countries. For this reason, some refugees’ human rights are not observed.

General global rules created by the 1951 Convention and the 1967 Protocol to protect refugees and refugee claimants do not specifically outline the stages of

the RSD procedures and the roles of the implementing partners. Hence, it was necessary to standardize the procedures for the RSD worldwide in order to avoid discrepancies among different regions and realities, which could culminate in human rights violations, e.g. a lack of work permits and access to health care, or even in *refoulement* to the persecuting country.

Hence, the Office of the UNHCR published the Procedural Standards for RSD under UNHCR's Mandate in 2005 because protection is a core UNHCR function and also "to provide guidance on UNHCR procedures to determine eligibility for mandate refugee status on an individual basis" (UNHCR 2005, 1). The individual procedure may be conducted by a local government, by the UNHCR, and/or by local non-governmental organizations (NGOs), in partnership with the local government or the UNHCR local office, though there are some differences among states' practices. Some steps are common to procedures in every country: the claimant's arrival, written application form completed presenting all reasons for the claim, interview, gathering of details about the country of origin, decision with reasons given, administrative review, and right to judicial review.

In addition to establishing general standard procedures for determining refugee status (including the provision of physical facilities and office security, reception, registration, adjudication, and ruling on claims), the Handbook also defines the rights, obligations, and responsibilities of UNHCR offices and, rarely, of implementing partners.

Unfortunately, in practice, the Handbook does not provide details on the roles of each of the implementing partners. This leads to gaps in their roles and the inefficient and ineffective protection of refugee claimants in many places. In general, the Handbook gives UNHCR local offices the right to implement the procedures according to their own reality, which is sometimes useful and necessary, but lack of supervision and comparison with other offices at times leads to poor RSD procedures and decisions, which negatively affect refugee claimants' lives.

For Pestre (2007, 157, 389–91, 449), the negative effects include delayed decisions, fear of *refoulement*, bad outcomes of poor interviews conducted by unprepared officers and lack of necessary information. Pestre (2007, 147–57) also observed some difficulties and unsuitable consequences encountered when claimants are traumatized during interviews, such as by remembering past events, being interviewed in an insensitive manner, or having difficulty being understood by interpreters. These problems indicate a need to re-evaluate and change the current RSD procedural rules and guidelines.

Some guidelines for change in order to achieve a fast, fair, effective, efficient, and final RSD procedure are suggested in Showler and Maytree (2009, 9–13), who affirm that the Canadian government should minimize the steps in the process, make the first decision the best one, have competent and independent decision-makers, manage the case load, let the claimant tell his or her story, facilitate access to legal representation, and invest in good mechanisms to achieve objective country of

origin information. This shows how the Handbook has been interpreted differently in different locations: even Canada, well-known as a host country receptive to refugees and refugee claimants, has found difficulties in dealing with the standard procedures presented by the UNHCR.

The procedures may not be absolutely standardized or global, while generalization can lead to a lack of application. However, it is important to analyze each partner's roles, how each implements the UNHCR procedures and the cooperation among them. Each partner cooperating for a better way to accomplish fair, fast, and reliable RSD procedures should consider its own reality, while following some standard procedures, particularly concerning its roles and the claimants' protection. The Handbook fails to establish these individual roles, producing confusion among the roles each partner has to follow locally, for which reason in many countries the RSD procedure does not achieve its goal of protecting claimants from human rights violations.

Refugee Status Determination: implementing partners

Whereas everyone has the right to seek and enjoy in other countries asylum from persecution (article 14 of the UN Universal Declaration of Human Rights), states have the sovereign power to bar people from entering their territories. This means that people have the right to leave, but not to enter, which creates a paradox between the right of individuals to claim refugee status versus the right of sovereigns states to close their borders. These difficulties have increased for the RSD procedures mainly because of the increased global tensions triggered by the attacks of September 11, 2001.

States have to protect their citizens and abide by international agreements based on humanitarian principles. The problem is how to reach equilibrium between the rights of states and those of individuals as well as how to deal with different implementing partners that have different interests. The task is to reorganize each domain, that is, the role of implementing partners, as Hardy (1994) suggests, and develop a collaborative organized domain.

In order to protect refugee claimants, governments, NGOs, refugees, and the UNHCR need to interact with one another and to get along among themselves. Hardy (1994, 280–82) considers refugee systems, i.e. an established or organized procedure (RSD procedures are part of the system and the focus of this paper), in general to be under organized domains, since “interactions within and between stakeholder groups are complex because both collaboration and conflict occurs.” For Hardy (1994, 289), a domain is under-organized if it is “characterised either by a lack of consensus around the legitimate stakeholders and/or a lack of common values.”

While states insist on their sovereignty, NGOs, even if dependent on the former, push them to guarantee respect for human rights and to legislate accordingly. Additionally, world events, the media, public opinion, and complex

legal systems manifest contradictions that “serve to render refugee systems under organised domains”, according to Hardy (1994).

When it comes to the refugee claimant procedure, *ab initio*, it is necessary to identify the implementing partners and to legitimize their roles and common goals. That is, claimants must be treated according to international human rights principles and law. To achieve this goal, a collaborative and consensual structure must be built that is legally supported by public policy, so that it can withstand the constant changes in world society.

The primary implementing partner is the UNHCR, which undertakes its functions by interpreting and applying the RSD procedures it created. By listening to governments, NGOs, refugees, scholarly research, and its own staff, the UNHCR is responsible for preparing and publishing principles, norms, rules, guidelines, and procedures that will later become domestic laws in each country.

The Handbook (UNHCR 2005) presents core standards for due process in mandate RSD, for instance, appropriate access to UNHCR staff and procedures, non-discrimination, transparency, fairness, efficiency, time limits, impartiality, and qualified staff. However, nothing is said about partners, particularly how these standards may be implemented by the latter, considering regional realities, different qualifications, goals, and values. The guidelines are detailed and cover all of the issues, but they do not mention who does what, what adjustments may be made, and who provides training, to achieve a standard mandate in processes such as registration, document reception, evidence gathering, interviewing, decision-making, and notification.

In order to exercise its functions, the UNHCR needs to be recognized legally by states due to the sovereignty principle that determines that states are free to admit or not anyone (individual or legal person) into their own territory. For this reason, the UNHCR, as a UN body, should act as the umbrella agency responsible for creating the RSD procedures and supervising its implementation, by educating its partners, and by organizing collaboration among them, instead of going to the frontline and taking on responsibilities that should be delegated to others.

The second implementing partner are the states, which need to attain equilibrium between the exercise of their sovereignty, through border control for collective and individual security reasons, and their commitments to human rights, through international treaties internalized into domestic law. It is not sufficient to ratify an international treaty. States must match international obligations with domestic interests.

Within the international refugee regime, though the RSD procedures are not binding rules or norms, states are bound by international conventions such as the 1951 Convention and the 1967 Protocol and Human Rights Conventions, thereby making them responsible for building policies for their implementation. For Tazreiter (2004, 7), “refugee policy [of a state] also reveals aspects of the core values of a state, which immigration policy *per se* does not reveal.”

In relation to refugee claimants, local governments that accept a claim should be in constant vigilance to comply with their international obligations, mainly because refugee claimants require special attention due to their vulnerability. However, states sometimes forget this and institutionalize a complex top-down system, mentioned by Clark (1985) and by Suzy (apud Buchwald 1991), without considering access to local resources, the refugee claimant's needs, and local partnership with, for instance, NGOs based locally. In addition, lack of standardization of the UNHCR RSD procedure leads to an under-organized system, which fails to protect refugee claimants.

The leading role of the government is unquestioned, but no state is able to act alone when dealing with waves of traumatized people who fear persecution, lack family and cultural identity, and also face cultural and language differences. Hence, some states delegate several duties to local NGOs (Egypt), others leave their task in the hands of the local UNHCR offices (some Asian states) and others share the task between local NGOs and the government (Brazil and Canada). This lack of standardization makes it difficult to protect claimants' human rights, to follow the UNHCR RSD procedure guidelines as well as to implement standard RSD procedural rules or guides to be pursued by all implementing partners, mainly those that operate locally and, for that reason, better know the local region.

Thirdly, there are Non-Governmental Organizations (NGOs). Indeed, refugee claimants are in need of shelter, physically and mentally, and local governments do not always have enough resources to deal with these issues or to implement the UNHCR procedures. Hence, a close relationship with local NGOs needs to be established, financially or politically. Some agreements are made directly between UNHCR and NGOs, independent of governments, allowing NGOs to act independently from local governments, yet following the UNHCR's guidelines as to fairness and impartiality. Nevertheless, state sovereignty over the NGOs' legal operation within the country must be observed. For Tazreiter (2004, 16), "NGOs have been pivotal in the proliferation and efficacy of the universalisation of human rights." For Castells (1997, 352), they "are the most powerful proactive, mobilising factor in informational politics."

NGOs may protect refugee claimants' human rights independently, by pressuring governments or by gathering media and public support, or by formal collaboration with local governments and/or local UNHCR offices. Their roles are to conduct both advocacy and/or service delivery, for instance, by providing legal aid, language and culture courses, and access to health care. Additionally, local NGOs are able to identify local partners, as happens in Brazil (through Caritas) and Canada (through the Canadian Council for Refugees). However, it must be reminded that local NGOs and the UNHCR local offices need legal permission from local governments to operate within a territory, as well as the ability to be more involved in implementing the RSD procedures. If government policy changes, states may withdraw previously granted permission, even if this

means that the government would need to compensate the recipient for having broken an agreement. In case a government closes a local UNHCR office, international political sanctions may be imposed, such as exclusion and loss of seats in international organizations. This is why, in general, states collaborate with the local UNHCR office by facilitating its job and building partnerships with it and with local NGOs.

Regarding the last implementing partners, refugees and refugee claimants, some NGOs have useful support from refugees and former refugees (current citizens) working in different functions. This is important when dealing with claimants from the same country, that is, those with the same culture and needs. Furthermore, refugees (not refugee claimants who usually have not yet achieved their regular legal status in the country) have also been recognized as legitimate partners in the eyes of government, not only in developed countries, such as the UK and Canada, but also in developing countries, such as Brazil and Egypt, where refugees become active by getting the media support to struggle for rights, particularly through NGOs dealing with refugees' rights, as insisted by Harrell-Bond (2010).

To be a legitimate partner means to have legal status within a country and, hence, access to the media, to legal aid, and to protection, all this related to the RSD procedures. As stressed by Harrell-Bond (2010, 12), "a new global infrastructure for the protection of refugees" is necessary. However, Tazreiter (2004, 55) emphasizes that unlike refugees, a refugee claimant "is a voiceless individual in a country in which s/he has no membership claim and yet wishes to claim protection."

Pestre (2007, 20), by indirectly agreeing with Tazreiter (2004, 7), claims that states usually forget the claimants' real situation and submit them to the legal-administrative state machinery that does not have, and is not interested in developing, the psychotherapeutic competence to deal with them. Tazreiter (2004, 53) insists that an ideal RSD system (i.e. procedures) "is challenged and called into question by the everyday realities of the physical, legal and psychological needs" of claimants during the determination process. Indeed, immigration officers, who are the first contact with claimants, should have deeper knowledge of psychic disturbances.

Refugee claimants (not only refugees) also need to be engaged in daily activities, in order to overcome trauma, disturbing memories and, sometimes, Post-Traumatic Stress Disorder. The lack of support and system institutionalization (a top-down system created without considering their needs and wishes) make claimants suffer from the dependency syndrome (whereby they are physically protected and psychologically unprotected). According to Suzy (apud Buchwald), the best therapy is to include them in community activities and to remove unnecessary obstacles in order to increase the refugee's participation, which assists in strengthening his or her self-esteem and self-confidence and in reducing feelings of isolation, depression, and dependency.

Considering that each partner has its own values and interests, but also the same goals as the others (to protect those making refugee claims), due to the non-adversarial character of the RSD system (apart from the level of appeal), it is expected that they treat each other fairly, despite the unbalanced power relations among them—states are legally the most powerful, while refugees are the least powerful, and NGOs act as mediators. The UNHCR seems to be the umbrella of the system, gathering information from each partner, talking with them separately or together, proposing international rules, guidelines, principles, and procedures, encouraging states to adjust their domestic law to the international regime, *lato sensu*, and to the RSD procedures guidelines, *stricto sensu*, and advocating for an equitable network society. Regrettably, positive results are not always reached.

Refugee Status Determination practice

Some different practices have been developed due to lack of standardized rules and, hence, there have been failures in implementing the RSD procedures in different parts of the world. However, some successful examples of achievements are also highlighted.

The Global Consultations on International Protection Report (2001, 9–50) issued some recommendations that were included in the Handbook (UNHCR 2005). Though they sometimes exist only on paper, they would be useful for building more humane RSD procedures that could be considered a “best practice.” The recommendations include the following suggestions: standard rules and basic guiding principles be applied; domestic legislation on refugees be introduced that is compatible with the international refugee regime; fast, single, prompt, efficient, and confidential core decision-making procedures be adopted; guidance, legal advice and counsel, personal interviews, and opportunities to present evidence be provided; states create a sole and central specialized decision-making authority, which operates with accurate, impartial, sensitive, flexible, and up-to-date Country of Origin Information from a variety of sources; and that written decisions be issued automatically, and the right to an independent appeal or review of a negative decision be assured.

These recommendations are merely principles that are currently implemented differently in different countries, as indicated by the examples below. Expected results are not always achieved because of the lack of standardized procedures and measures. According to the Handbook (UNHCR 2005) and to Alexander (1999, 283–87), once a claim is made, it is expected that a fair hearing (i.e. hear the other side) be conducted, physical and human resources be allocated properly (i.e. fast and effective processes be followed to avoid errors that can have life-long consequences for refugee claimants, as well as adequate physical facilities for their reception and for conducting RSD procedures), institutional integrity be shown, and a fair and open process applied.

Meanwhile, institutional integrity, for Alexander (1999, 286), requires that the local system (i.e. ways of implementing the RSD procedures) be open, reasonable, workable, and consistent. Full disclosure or publicity (i.e. written decisions with clear reasons) and efficiency (i.e. backlog cases avoidance) are principles of administrative law that should be considered by UNHCR staff and all implementing partners handling claimants. Not only must hearings be fair and open, but the whole procedure must be supported by physical and human resources that are well established within a system based on cultural integrity. The combination of these elements is the basis of a fair and open process for refugee claimants.

For Alexander (1999, 286–87), and according to the Handbook (UNHCR 2005), a fair and open process requires the publication of rules and guidelines, standardized and clear written information, free access to legal advice and representation, access to files, and an impartial body to decide appeals. A fair procedure should be followed by all implementing partners to protect claimants' basic human rights, such as life, liberty, equal treatment, and equity.

Some NGOs provide good examples of what should be done to protect refugee claimants. In Brazil, Caritas has an agreement with the UNHCR local office and the federal government to conduct the first interview and to send a written assessment to the National Committee for Refugees (Conare), i.e. a collective deliberation body within the Brazilian Ministry of Justice (Art. 11, Act 9474/1997). Accordingly, Caritas also seeks to integrate refugee claimants to society, by giving them advice on how to get work permits and find a job, register for Portuguese and academic courses, and get financial aid, housing, and health care.

Alexander (1999, 288–89) refers to an international NGO called the Jesuit Refugee Service (JRS), whose branch in Cambodia provides general assistance to claimants and refugees as a result of an agreement with the UNHCR, including funds for financial, housing, medical, and any emergency assistance. JRS assists them with lawyers who prepare, present, defend, and request reopening their cases to the UNHCR.

This kind of professional legal aid, regardless whether it comes from lawyers or paralegal representatives, has a high positive impact on claims and is part of the procedural standards for RSD, as prescribed by the Handbook (UNHCR 2005, 4.3.3). Unfortunately, the Handbook does not require legal representatives and decision-makers to have a background in psychology. A legal knowledge is not enough to prepare individuals to conduct interviews with profound implications for the lives of vulnerable and traumatized people.

Legal aid has to be individual, confidential, private, and specific to each case, due to the unique nature of each refugee claimant. According to Pestre (2007, 143–71, 342), states aggravate the trauma and disturbances suffered by claimants in several situations: prolonging the pain of waiting (by public services and processes that contribute to the uncertainty and insecurity of waiting for a decision) and compulsory interviews (in which claimants must relive painful conflicts that they

wish to forget, because they have hurt them and could again, when, in fact, states should have mechanisms to avoid situations capable of aggravating trauma). States, by focusing on categorizing each individual based on his or her medical and legal conditions, recognize the individual as a victim of persecution or of trauma who deserves access to rights; if not characterized as a victim, the person will not be recognized to have the right to refugee status and may be forced to leave.

Additionally, the UNHCR should assist governments and local NGOs to ensure that legal representatives are experts in refugee law and provide them with specific training. This does not mean they should require that the refugee's legal aid be a lawyer or be regulated domestically. Yet, under UNHCR's assistance and coordination, local governments might consider evaluating competence before conferring authorization for someone to act as claimants' legal representative. Procedural rules and guidelines built and implemented with the aim at preventing errors and avoiding backlogs would save time and money. Kagan (2006b, 4) affirms that the UNHCR should facilitate basic protection, fill gaps left by governments, and reduce its own activities by motivating governments and local NGOs to provide protection for claimants.

In fact, the current RSD procedures have several failures, which lead to human rights violations and cause problems for host states, the UNHCR, NGOs, refugees, and claimants. These failures have several causes, such as lack of physical structure, lack of legally and psychologically trained human resources to apply RSD procedures, limited financial resources, the failure to take into account regional differences when implementing the RSD procedures, and lack of a legally-binding committee on international refugee law, as there is in the international human rights law sphere. Although it is not easy, these issues should be addressed to help adjust the current RSD procedures and assist claimants to achieve legal status in the host country through domestic procedures.

All of these recommendations are designed to protect refugees and claimants both internationally (through international obligations taken by states) and domestically (through fair, fast, and efficient procedural rules). According to Kagan (2006, 4), "UNHCR RSD facilitates protection for refugees in three main ways: promoting the principle of *non-refoulement*, assisting in the promotion of durable solutions, and identifying refugees in need of social and economic assistance."

For claimants, protection should focus on avoiding *refoulement* (i.e. forcible return to the country of persecution, according to Article 33, ¶ 1 of the 1951 Convention) and on promoting and implementing human rights as a way to attain integration, which is a first step to attaining legal citizenship and a sense of belonging. Isin (2002, 15) and Nyers (2004, 26) affirm that after being recognized as citizens, structural difficulties can be transformed to allow refugees to avoid, or at least to reduce, the risk and insecurity of being negatively labeled as criminals, transmit disease, and increase unemployment in the host community. Hence, the responsibility for implementing solutions should be shared by all implementing

partners, in a clear and dialogical way that considers each regional reality and the implementing partners' aims in order to re-organize the RSD procedures and, therefore, optimize it and protect refugees and claimants' human rights.

The Network Society Communicative Model

To optimize the role of each implementing partner in better RSD procedures, a network society communicative model could be used. It would be built by gathering ideas from Castells, Habermas, Apel, Chimni, and Betts. Castells (1997, 2000) affirms that a *network society* is the best available social model. Habermas (1989) maintains that *communicative action theory* is the most valuable one, while Apel (1997) favors a *communication and argumentation* community. Chimni (2001), meanwhile, prefers using a *dialogical model*, and Betts (2006) suggests *interconnections* in global governance.

If Castells' ideas were to be applied to the international refugee regime, particularly to the RSD procedures, all partners would be linked as nodes of a net, with different roles, but united for the same goal, which is refugee and refugee claimant protection under the international human rights regime in general. In this case, the UNHCR would be responsible for educating and training public servants and NGO staff for this purpose and for promoting standard RSD procedures among all implementing partners, mainly the importance of organizing the partners' roles and their domains.

The goal of Habermas (1989) is a world where all live together in a democracy without violence or exploitation. To achieve this goal he proposes *communicative action* (social integration) focused on mutual understanding. He understands that communication is only successful if it produces a consensus among all partners ("speakers") about the meaning of the transmitted messages. He defends a *universal discursive ethics* as a method to resolve conflicts. In short, he selects three basic rules for his ethics of communicative reason: inclusion (individuals linguistically able to express themselves are included in negotiations and allowed to speak), participation (all speakers have the right to express themselves, to act, and to be treated equally) and communication free from violence and coercion.

With respect to the RSD procedures, all implementing partners, especially refugees and claimants, might be allowed to express opinions and to provide input into discussions about the process, considering refugees' and claimants' cultural background as well as state sovereignty. The UNHCR might act to change partners' positions through a bottom-up education and training program for public, private, and third sector actors, by teaching them a new way to apply moral rules for refugees and claimants.

Apel (1997), apud Velasco (2001, 62–74), favors a *communication and argumentation community* to solve humanity's conflicts, which he affirms are mainly due to cultural relativism and diversity problems caused by globalization.

While recognizing that an ideal communication community does not yet exist, he maintains that a real community is sufficient for initiating an attempt to build a universal solidarity ethics, which culminates in consensus and mutual understanding among all people, based on individual freedom to make decisions, build consensus, and work. According to Apel, apud Carbonari (n.d.), only human desires that can be universalized through an agreement based on rational arguments, whose aim is the formation of will based on solidarity, are ethically relevant.

Until this time, due to conflicts that surge from globalization, the formation of the community envisioned by Apel is not possible, but, in terms of the RSD procedures, the UNHCR has the power and capability to educate and train all implementing partners to reciprocally recognize one another as partners in a discussion with equal communicating rights. These implementing partners must be aware of the dangerous outcomes of lack of responsibility, solidarity, and universal rules in favor of standard consensual procedures, particularly that related to procedures for handling claimants and assuring their protection.

Chimni (2001, 152–68) affirms that he has a new *dialogical model* for reforming the current international refugee regime. However, the focus here is only the RSD procedures. He maintains that dialogue should take place among all partners on a continuous and institutionalized basis, and should be based on democratic principles. It should be between states; among NGOs, academics, and the UNHCR; within the UNHCR; and between NGOs and governments. This implies a network society, adapted for the refugees and claimants' needs, *stricto sensu*, and for the international community, *lato sensu*: “[i]n conducting the dialogue these actors must of course ensure that they do not always speak on behalf of, but in conversation with, refugees.”

Instead of focusing on what changes should be made, Chimni proposes new ways of achieving changes in a dialogical model. He claims that, due to regional differences, inter-regional dialogue should come first (2001, 156–58). He also affirms that NGOs can play a key role by publishing and circulating reports “to persuade States to negotiate with each other with respect to finding innovative solutions to the global refugee problem” (2001, 162–63). For him, while the dialogue between civil society (NGOs and academia) and the UNHCR should be transparent, it is essentially a dialogue between UNHCR divisions and a long-term pattern plan (2001, 160–62).

In general, he favors a dialogical model (process of argumentation) among all implementing partners in order to transform state interests and identities, mainly those involving shared responsibilities [North-South relations related to burden sharing], education, and people mobilization (2001, 164). Again, even considering regional peculiarities (i.e. each region has its own RSD procedures), education, and training are at the top of the proposed model for change.

Betts also presents his own model for a better refugee protection, by conceptualizing *interconnections in global governance*, that is, that “refugee protection

is interconnected with migration, security, development, peace-building, and human rights and these interconnections have significant implications for the politics of protection,” built by the international refugee regime, organizations, ideas, and identities, of which RSD procedures are a part (2007, 11–16).

Hence, dialogue is the keyword for a network society communicative model. The way to organize the implementing partners’ domains and optimize the RSD procedures is through a bottom-up educational and training programme, which should be supported, coordinated, and monitored by the UNHCR, in which dialogue is established among all implementing partners, thus building a network of negotiations. Regardless of the terminology chosen, what matters is that all implementing partners be allowed to negotiate effectively among each other, considering their own importance within the RSD procedures, which should be better organized in order to “build bridges instead of walls.”

The Network Society Communicative Model has been applied successfully by the International Committee of the Red Cross (ICRC), through its several programmes and activities worldwide. With regards to education and training, for instance, the ICRC is a valuable model, as it deals with similar issues as the UNHCR and has developed useful practices that might also be developed by UNHCR: official and in-depth information, assistance to avoid the dependence syndrome and to foster self-sustainability, humanitarian diplomacy, development of links with the private sector, and education in International Humanitarian Law among military and civil servants, decision-makers, opinion-makers, and students, as a prevention policy.

A useful way to persuade governments and private bodies to follow their rules is by educating them. For optimized RSD procedures, Kagan (2006b, 13) declares that “[the] UNHCR’s most explicit authority is to promote, facilitate, and assist refugee protection by others, principally among governments,” as well as by local NGOs, instead of doing the frontline work without enough resources. It is important to educate and pressure implementing partners to determine a refugee status based on humanitarian grounds, to avoid *refoulement*, to fully implement the 1951 Convention and to advocate for fast, fair, efficient, and impartial internal procedures.

Kagan (2006b, 17–18) adds that “[the] UNHCR’s publications make clear that [...] individual RSD requires significant staffing, time, and facilities when it is conducted fairly.” Given that “refugees [and refugee claimants] also need education, social security, shelter, health care, and other services [basic human rights] that impose costs on a state,” states usually ignore their responsibilities, which undermines protection.

Suggestions and recommendations

The ideal RSD procedures should establish procedural standards for UNHCR and for governments, though Kagan emphasizes that “[the] UNHCR’s interests are less adverse to refugee claims than those of governments. [The] UNHCR was

established to protect refugees, while governments might be interested in migration control and restricting access to asylum” (2006b, 19). Therefore, the UNHCR needs to strengthen its moral authority and to persuade governments and private entities to obey the international refugee regime, though the focal points here are the RSD procedures.

Although sovereign states are in crisis, losing power, wealth, and information to other entities such as NGOs and private transnational companies, they are still the most powerful actors in international society. Castells affirms that we live in a network society, “made of markets, networks, individuals, and strategic organisations” (1997, 355–59). Power “is diffused in a global network of wealth, power, information, and images [...]. Yet, it does not disappear. *Power still rules society; it still shapes, and dominates.*”

In short, power is distributed and decentralized among all subjects of this new network society, formed by states, NGOs, transnational firms, and individuals (refugees and claimants in this case). Yet, in practice, sovereign states remain dedicated to protecting themselves from unwanted foreigners, mainly refugees and refugee claimants, who suffer from trauma, bureaucratic delays that impede integration, lack of just, fair, and fast RSD procedures, lack of adequate public policies for dealing with claimants while awaiting decisions, and human rights violations, including absence of the right to work, health care or education.

The UNHCR, meanwhile, conducts some of the same activities as the ICRC, but not enough to achieve success. It does not publish essential and in-depth reports with information needed by the media, NGOs, academics, and government officers, to advocate for the RSD procedure standards and guidelines to monitor international protection for refugees and refugee claimants. Open workshops, especially in places where there are large numbers of urban refugees and claimants threatened with deportation, *refoulement* or detention, should be conducted on a regular basis, providing refugee and claimants a chance to be heard and have their human rights protected.

The establishment of dialogue among all implementing partners—refugees and claimants included—, the training of decision-makers, and the provision of educational programmes coordinated by the UNHCR should be mid-term solutions for building RSD procedures, particularly its administrative and judicial procedures, based on the promotion, protection, and implementation of human rights in a collaborative society where all partners are in regular and constant dialogue and are treated equally.

Conclusion

The current international refugee regime, created in 1951, needs legal change, mainly for refugee claimants and in the RSD procedures, including legal representation, hearing design, time limits, and the reorganization of the

implementing partners' roles. Refugees and claimants have been legally protected by a theoretical regime implemented by the UNHCR, by states, and by NGOs. Yet, International Refugee Law has not been fully applied in practice, mainly those procedures used to deal with claimants.

Procedures taken to decide a claim should be fast, fair (i.e. hearing and open process), effective, impartial, public, and efficient (i.e. in a reasonable time), hence, based on minimal principles of administrative and natural law, in a safe and well-equipped institution, and conducted by trained decision-makers, according to Alexander (1999, 283–87) and Wade and Forsyth (2009, 371–75, 328–48), already mentioned, in order to preserve refugee claimant's human rights (i.e. due process with an appeal or review mechanism, *non-refoulement*, human dignity, and institutional integrity) and to guide the RSD procedures.

For instance, the Canadian Law has been applying fair hearings since the Singh Case (1985), by allowing a claimant an oral hearing during the first phase of the procedure. Unfortunately, no appeal division on the merits, with right to oral hearings, for claimants has been implemented yet. It does not mean that lack of oral hearing is the same as unfair procedure. Other jurisdictions, like Australia, do not have oral hearings in the first instance, but they have them in the appeal level and are recognized as fair procedures.

Nevertheless, there is a huge gap between theory and practice, which sometimes leads to human rights violations against claimants who, for instance, do not automatically have a right to work, to education or to health care, and often remain without means to provide for themselves. This leads to the dependence syndrome, which affects their own life, the local society, and the government, due to the fact that they need the assistance of government, the UNHCR, and NGOs, instead of having an opportunity to work and act according to their own skills.

This paper maintains that the current situation can be changed by reorganizing the domain in which all implementing partners act. The UNHCR, states, NGOs, and refugees should have their rights and duties clearly established, considering regional realities. Standard procedures for RSD should be created and implemented for each and every partner. General customary law and principles of natural justice above mentioned should be emphasized. This can be achieved by giving all partners a chance to speak and to be heard in a “round table” format where all participants are treated equally and have an opportunity to express their wishes, needs, and situation. They must all be provided options to follow new steps.

The Handbook published by the UNHCR in 2005 is a useful tool. There are examples of countries where it has been adjusted to the local reality with positive outcomes for claimants, in one or more aspects, such as Brazil and Canada. However, many needs will only be met when the implementing partners are aware of their own responsibilities, which should be determined and monitored on a regular basis by the UNHCR, whose central aim is to promote the international refugee regime as a whole.

Whereas states should act as local partners, by providing physical and human resources—who can be educated, trained, monitored, and evaluated by UNHCR officers—, NGOs and their staffs should be legally and psychologically prepared to assist refugees and claimants, and should be the UNHCR's partners by implementing the RSD procedures and being politically active in persuading governments to promote and implement them.

The UNHCR, as the global coordinator of this regime, should remain central to the RSD procedures and be aware of its particular goal in the education, training, and the establishment of clear rights and responsibilities for all partners, based on the implementation of a network society communicative model, even depending financially on states (i.e. states' interests drive the UNHCR's actions). The ICRC is a useful example of an independent and politically neutral international organization (i.e. it does not receive financial aid from states and does not take part in conflicts) that does a good job of promoting International Humanitarian Law among states, NGOs, security forces, teachers, and researchers by listening to them and educating and facilitating their roles as partners, in order to find better ways to develop and implement the system.

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Abstract

This article recommends a new way to improve Refugee Status Determination (RSD) procedures by proposing a network society communicative model based on active involvement and dialogue among all implementing partners. This model, named after proposals from Castells, Habermas, Apel, Chimni, and Betts, would be mediated by the United Nations High Commissioner for Refugees (UNHCR), whose role would be modeled after that of the International Committee of the Red Cross (ICRC) practice.

Keywords: communicative model; International Committee of the Red Cross (ICRC) practice; Refugee Status Determination (RSD) procedures.

Resumo

Este artigo sugere um novo caminho para melhorar os procedimentos de Determinação do Status de Refugiado, propondo um modelo comunicativo de sociedade em rede baseado no envolvimento ativo e no diálogo entre os parceiros implementadores. Esse modelo, a partir das teorias de Castells, Habermas, Apel, Chimni e Betts, seria mediado pelo Alto Comissariado das Nações Unidas para os Refugiados (ACNUR), cujo papel tomaria como modelo a prática do Comitê Internacional da Cruz Vermelha (CICV).

Palavras-chave: modelo comunicativo; prática do Comitê Internacional da Cruz Vermelha (CICV); procedimentos para Determinação do Status de Refugiado.