

RSD by UNHCR: difficulties and dilemmas

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The arrangements established between governments and UNHCR in relation to conducting RSD reflect the varying motivations of, and challenges for, both parties.

Refugee status determination (RSD) is normally assumed to be the primary responsibility of States. However, as part of its mandate, UNHCR may conduct RSD when a State is unable or unwilling to perform this task, for example, if that State is not a party to the 1951 Refugee Convention. This is referred to as 'mandate RSD'.¹

Governments which involve UNHCR staff in their RSD processes usually formalise this arrangement in a

Cooperation Agreement or Memorandum of Understanding (MoU). UNHCR's involvement can take one of three forms. UNHCR may be involved in one or more stages (registration, interviews, decisions or appeals) of an otherwise government-run RSD procedure. Alternatively, UNHCR may conduct an independent process that operates in parallel to government-run RSD. Or UNHCR may be placed in charge of all RSD procedures on a country's territory.

In 2018, UNHCR had sole responsibility for RSD in 47 countries or territories, and shared some responsibility for RSD with the national government in 14 others.²

This article draws on archival research relating to Egypt, Kenya and Turkey to explore the potential consequences of UNHCR's involvement in RSD procedures in a country's territory. UNHCR has long conducted RSD for all non-Palestinian asylum seekers in Egypt under a 1954 MoU. UNHCR's RSD operations in Turkey, dating back to 1960, were fully handed over to the government in 2018. And the Kenyan government transferred RSD to UNHCR in 1991, and then assumed full responsibility again in 2017.³

Deflection and limiting leverage

Claiming that a neutral third party, like UNHCR, is responsible for refugee policy eases pressure on governments. In effect, delegating RSD allows governments to lay responsibility for decisions at UNHCR's door. For example, the Egyptian government's reluctance to take control of RSD may appear puzzling in light of the relatively small number of refugees in that country prior to the Syrian crisis. Indeed, in a 2010 interview, a Foreign Ministry official indicated that setting up a national asylum system for "40,000 [non-Palestinian refugees] is not a resource problem" but that RSD conducted by UNHCR "ensure[s] objectivity and integrity."⁴ Some observers, however, have attributed the Egyptian government's reluctance to conduct RSD itself to the large number of Sudanese in the country. By recognising Sudanese refugees, the Egyptian government would be indirectly criticising the Sudanese government for its role in atrocities in Sudan.⁵ By contrast, UNHCR's independence gives it the appearance of neutrality, enabling governments to assert that decisions were not theirs to make. Delegating responsibility for RSD also gives a government a degree of flexibility; it can detain or expel individuals under the pretext that it did not grant them refugee status itself in the first place.

Refugee-producing countries and domestic audiences often fail to recognise that UNHCR may be highly constrained.

For example, with the influx of Iraqi Kurds into Turkey in 1988, UNHCR requested, but was denied, access to the areas in which the refugees were encamped. It is worth noting that Turkey maintains a geographical limitation to the 1951 Refugee Convention (whereby only Europeans are eligible for refugee status).

Though UNHCR at times attempted to influence government policy, its efforts were often met with limited success. For example, Kenya rebuffed UNHCR's repeated requests to establish an official RSD process during the 1970s. Even when UNHCR was put nominally in charge of RSD in the 1990s, the Kenyan government never officially conceded that it would recognise UNHCR's decisions. Thus, after the bombing of the US embassy in Nairobi in August 1998 and Kenya's subsequent claim that radical Islamist organisations were using refugee camps as recruiting and training grounds, the Minister of Home Affairs announced that UNHCR had no authority to grant refugee status and its protection letters would not be recognised by the government.

Even as its activities were limited by governments, UNHCR was further constrained by its limited funds. With regard to an estimated four million Sudanese in Egypt, a UNHCR Senior Legal Adviser queried UNHCR's capacity, commenting in April 1993 that "UNHCR should consider seriously the consequences of any decision to become involved whether from a legal or material point of view."⁶ UNHCR was keenly aware of its own limitations. In general, today as then, UNHCR is perpetually under-resourced. Logistically, this limits the number of applications the organisation can process and the number of refugees it can assist. Since UNHCR must also try to protect the individuals it recognises as refugees, it may have incentives to recognise fewer refugees.⁷

Self-censorship and deference

Maintaining a good relationship with authorities is essential to UNHCR's continued operation in any country. Even with an agreement in place for UNHCR to conduct all or part of the RSD in a

November 2020

www.fmreview.org/recognising-refugees

given country, policymakers retain the ability to expel UNHCR staff, refuse to honour refugee status decisions, end UNHCR's RSD functions or simply prevent asylum seekers from accessing UNHCR's offices. UNHCR may worry about being denied access to persons of concern and about the 'protection space' for refugees shrinking; as such, it knows not to threaten governments and to tread carefully when it thinks that the awarding of asylum in particular instances will cause political tensions. In 1994, for example, UNHCR staff in Turkey deliberately avoided using the terms 'mandate' and 'refugee' in their correspondence with Turkish officials because these terms had provoked "a negative reaction". Moreover, they expressed the view that some refugee groups had to be dealt with on a case-by-case basis rather than discussed in general conversation because of the "extreme sensitivity of the Turkish authorities to them".⁸

There are also examples of UNHCR bowing to government pressure. In 1986, Turkish authorities asked UNHCR to report the names of all individuals who approached them, plus information about whom UNHCR recognised or rejected. UNHCR's representative saw this issue as "increasingly delicate" and did not want to look "uncooperative". UNHCR in Geneva subsequently confirmed that pending asylum cases and accepted refugees could be named.⁹

Conclusion

From UNHCR's perspective, a request to take over RSD is difficult, if not impossible, to decline. Performing these tasks when the government is unable or unwilling to undertake them lies firmly within the organisation's protection mandate. My recommendation is not that UNHCR stop conducting RSD. After all, it issues a large number of decisions worldwide – one out of every eleven decisions in 2018¹⁰ – and undoubtedly upholds refugee rights in doing so. RSD systems run by governments are not always preferable, particularly in cases where the government's intent is wholesale rejection of asylum seekers.

Rather, increased transparency on the part of UNHCR regarding its activities and limitations could help mitigate some of the negative consequences discussed above. Increased openness would make it difficult for governments to deflect blame while constraining UNHCR activities. In this way, more responsibility for addressing capacity constraints, access restrictions and other limitations could be clearly laid at the door of host governments (where it belongs). UNHCR is often forced to strike a difficult balance between pushing governments to better respect refugee rights and maintaining a good relationship with authorities to ensure it can continue to operate. But in some cases trading protection principles for access to refugees may lead to the gradual erosion of both.

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1. www.unhcr.org/uk/refugee-status-determination
2. Author's calculation based on the data in Table 10 of the Annex to UNHCR, *UNHCR Global Trends: Forced Displacement in 2018* bit.ly/UNHCR-Trends-2018
3. These three cases are analysed in greater detail in Abdelaaty L E (forthcoming 2021) *Discrimination and Delegation: Explaining State Responses to Refugees* bit.ly/OUP-Abdelaaty-2021
4. Personal interview by author. Ministry of Foreign Affairs, Cairo, Egypt, 4 September 2010.
5. Grabska K (2008) 'Brothers or Poor Cousins? Rights, Policies and the Well-Being of Refugees in Egypt' in Grabska K and Mehta L (Eds) *Forced Displacement: Why Rights Matter*, Palgrave Macmillan, p76.
6. Roberto Quintero-Marino to Karen Abu-Zayd, 19 July 1993, 'Sudanese in Egypt', *UNHCR Archives*, Fonds 11, Series 3, 100 ARE SUD Refugee Situations – Special Groups of Refugees – Sudanese Refugees in Egypt, Folio 4.
7. Kagan M (2006) 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law* 18(1) <https://academic.oup.com/ijrl/article/18/1/1/1538727>
8. Lina Sultani and Patrick Tezier to Head, Desk I, Regional Bureau for Europe, 20 January 1994, *UNHCR Archives*, Fonds 11, Series 3, 10 TUR External Relations – Relations with Governments – Turkey [Volume B], Folio 51. The Branch Office was referring specifically to Tunisians.
9. *UNHCR Archives*, Fonds 11, Series 3, 10 TUR External Relations – Relations with Governments – Turkey [Volume A]. To obtain the citations in full, please contact the author.
10. See endnote 2.