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Articles

The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination

MICHAEL KAGAN*

Abstract

The number of individual RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001, while UNHCR's RSD operations have been criticized for failing to implement basic standards of procedural fairness. Yet, although there is some literature critiquing *how* UNHCR determines refugee status, there is little literature examining whether UNHCR should do so, and if it should, when, where, and under what conditions.

UNHCR performance of RSD poses protection challenges because it is founded on a basic contradiction. On the one hand, government action is essential for effective refugee protection. On the other hand, UNHCR RSD is premised on at least partial government failure.

Neither direct concern for protection from *non-refoulement* nor strict legal obligations completely explain UNHCR's current RSD activities. UNHCR's RSD activities seem best explained by what Goodwin-Gill has called 'negative responsibility', and hence can represent a risky shift of responsibility from governments to the UN. At the same time, in some circumstances UNHCR RSD substantially advances refugee rights.

In order to match its actual mandate and resources, UNHCR should perform RSD when it can enhance the protection provided to refugees by governments, but the activity should be more limited and conditional than it is today.

1. Introduction: A crowd at the fence

At many UN High Commissioner for Refugees (UNHCR) offices around the Middle East, a common scene develops in the morning. Iraqis, Sudanese, Somalis, and a few people from farther away gather at the

* Revised May 2004 and December 2005. This article stems in large part from my experience working to develop refugee legal aid and advocacy programs in Egypt and Lebanon from 2001 through 2003. For this opportunity, I am especially grateful to Samira Trad for her courage and determination, and to Liza Hazelton and Prof. Barbara Harrell-Bond for their wisdom and collaboration. The work and research which led to this article was funded by the Initiative for Public Interest Law at Yale, the Clara Belfield & Henry Bates Overseas Travel Fellowship at the University of Michigan Law School, and the American University in Cairo Forced Migration and Refugee Studies Program. Michael Alexander and Prof. James C. Hathaway provided useful comments on earlier drafts. The views expressed here are solely my own.

outer fence. Some arrive early in the morning. Most are men, but there are some women and occasionally children. The crowd presses in toward openings in the fence without any clear order; on crowded days they sometimes push each other for position, elbows used for leverage. Every so often voices are raised.

These people — refugees and asylum-seekers — come to UNHCR with a range of queries, petitions, and complaints. Some have just arrived and want to start their applications for refugee protection. Some have been accepted by UNHCR before, and want to be resettled. Rejected asylum-seekers look for someone to ask how to re-open their cases.

Often, just a single person works for UNHCR at the fence, fielding questions from the crowd, trying to distinguish those who should be let into the office, while providing quick answers to others. UN staff often collect inquiries, slips of paper, and documents to take inside and return to the fence with official responses. The refugees and asylum-seekers at the gate often remain for hours, while in the summer the temperatures can reach over 40 degrees in the sun.

This daily scene outside UNHCR offices, which I have personally witnessed in both Cairo and Beirut, is the most publicly visible link in an increasingly important but little studied part of refugee protection: the determination of refugee status by UNHCR.

Refugee status determination (RSD) is the doorway to the protection and assistance that the international community provides to refugees. In dozens of countries, UNHCR acts as the gatekeeper. In this role, which was little noticed in academic and NGO literature until recently, the UN's refugee agency effectively decides among asylum-seekers who can be saved from deportation and in some cases released from detention, who can get humanitarian assistance, and often who can apply to resettle to third countries.

Since the mid-1990s, scholarly and NGO literature has been critical of the way UNHCR performs RSD. In the seminal study on the subject, Michael Alexander argued that UNHCR's RSD systems had been left behind by the standards of fairness developed elsewhere.¹ Other assessments have repeated similar criticism.² In September 2005, UNHCR for the first time published comprehensive procedural standards governing its RSD activities. At the same time, UNHCR RSD has steadily grown.

¹ M. Alexander, 'Refugee Status Determination Conducted by UNHCR', 11 *IJRL* 251 (1999).

² See, e.g., Amnesty International, *Selective protection: Discriminatory treatment of non-European refugees and asylum-seekers*, EUR 44/16/94 (Mar. 1994); Iranian Refugees Alliance, *Evading Scrutiny: Does Refugee Status Determination Procedure Measure Up to International Standards?* (May 1995); Human Rights Watch, *50 Years On: What Future for Refugee Protection?* (2001); Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala* (2002); M. Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001–2002*, American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1 (2002), available at www.aucegypt.edu/academic/fmrs (follow 'Reports' link).

The number of individual³ RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001.⁴ UNHCR performed RSD in at least 60 countries in 2001, nearly all in the developing world and received approximately 66 000 individual refugee claims, more than the United States, five times more than Australia, and about as many as Austria, Belgium, Denmark, Greece and Spain combined.⁵ UNHCR RSD predominantly affects urban refugee populations, and is particularly common in the Middle East.⁶

Although most of this activity has been in the geopolitical south, UNHCR has also occasionally offered its RSD services as a means of resolving refugee protection conflicts in wealthy countries. In one of the most controversial recent examples, UNHCR performed RSD in Nauru to resolve the crisis over the Australia-bound asylum-seekers who were rescued at sea by the Tampa in 2001. UNHCR also offered to perform RSD to help resolve the British-French dispute over the Sangatte camp near Calais in 2002, although in that case the governments did not accept.

This growth in UN-administered RSD has occurred even though status determination is normally assumed to be a government responsibility.⁷ Although there is a growing literature critiquing *how* UNHCR determines refugee status, there is little literature examining whether UNHCR should do so and, if it should, when, where, and under what conditions. This article is based on the premise that UNHCR will not be able to fully resolve the weaknesses of its RSD procedures until it resolves these underlying questions.

³ In cases of mass influx, governments and UNHCR sometimes recognize whole groups of asylum-seekers as refugees on a *prima facie* basis. The focus in this article is on individual RSD, a typically intensive adjudication that decides the fate of a single person or family. But even when UNHCR initially avoids individual RSD by providing protection to groups of refugees on a *prima facie* basis, cessation of refugee protection can require a large-scale, short-term burden on UNHCR to provide an individual hearing for refugees who do not want to repatriate. For instance, after UNHCR decided to cease *prima facie* protection of Eritrean refugees in Sudan in 2002, it conducted individual screening of cases to determine if individuals had continuing reasons for fearing persecution in Eritrea. UNHCR announced in Feb. 2003 that it would hear close to 27 000 claims, involving almost 100 000 people, by Eritreans in Sudan who were resisting the cessation of their refugee status. See 'ERITREA: Refugee screening underway in Sudan', UN Integrated Regional Information Network (IRIN) (16 Sept. 2002); UNHCR, 'Tens of thousands of Eritreans re-apply for refugee status in Sudan' (10 Feb. 2003).

⁴ UNHCR *Statistical Yearbook 2001* (2002) at 49. For more updated statistical information, see www.rsdwatch.org.

⁵ UNHCR, *Statistical Overview 2001* (provisional); UNHCR *Statistical Yearbook 2001* (2002), above n. 4, at 49; *2001 Statistical Yearbook of the Immigration and Naturalization Service* at 17.

⁶ Individual applications in nineteen Arab League states plus Cyprus, Israel and Turkey constituted more than half of UNHCR's worldwide RSD cases in 2001. Computed from UNHCR, *Statistical Overview*, above n. 5.

⁷ See UNHCR Executive Committee Conclusion No. 8(d) (1977) (expressing 'the hope that all Governments party to the 1951 Convention and the 1967 Protocol which had not yet done so would take steps to establish such procedures in the near future').

My analysis is based largely on experience with UNHCR RSD in the Middle East from 2001 through 2003, principally in Egypt and Lebanon. UNHCR faced its largest RSD caseload in the world during this period in Egypt. This analysis focuses on situations in which UNHCR is solely responsible for RSD, with little or no government involvement. It hence may not apply to a number of other countries, as diverse as Israel and Uganda, in which RSD decisions are made by a government but UNHCR is heavily involved in assessing cases.

I argue that UNHCR RSD poses serious protection challenges because it is founded on a basic contradiction. On the one hand, government action is essential for effective refugee protection. On the other hand, UNHCR RSD is premised on at least partial government failure. UNHCR steps in to determine refugee status only when governments prove unwilling or unable to do so.

I conclude that in some circumstances UNHCR RSD substantially advances refugee rights by effectively facilitating basic protection to refugees who otherwise might be left vulnerable. At the same time, UNHCR's RSD work appears driven by an implicit tendency to attempt to fill protection gaps left by governments. This is a role that UNHCR often has neither the mandate nor the resources to perform because UNHCR has the power to promote, but not to provide, refugee protection. I argue that UNHCR needs to reduce its current RSD activities to match its actual mandate and resources. UNHCR should perform RSD when it can enhance the protection provided to refugees by governments, but the activity should be limited and conditional.

2. Successes and challenges in UNHCR RSD

This section will first identify major ways in which UNHCR's performance of RSD effectively enhances refugee protection. It will then summarize major corresponding protection concerns which stem from UNHCR's RSD work.

2.1 Three major ways UNHCR RSD facilitates protection

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.

2.1.1 *Non-refoulement*

By conducting RSD, UNHCR is often able to promote implementation of the principle of *non-refoulement*, at least in some cases. For instance, in Egypt, in accordance with a 1954 agreement between the government

and UNHCR,⁸ Egypt agreed to grant residence permits to 'bona fide refugees, residing in Egypt, who fall within the High Commissioner's mandate'.⁹ The agreement ruled out any permanent refuge for asylum-seekers in Egypt. UNHCR agreed to facilitate voluntary repatriation and to seek resettlement in other countries 'in every possible measure, in the countries of immigration, for the refugees residing in Egypt'.¹⁰ RSD was left in the hands of the United Nations; UNHCR agreed to 'cooperate with the governmental authorities in view of undertaking a census of and identifying the refugees eligible under the mandate of the High Commissioner'.¹¹ Half a century later, UNHCR continued to identify refugees who meet the legal criteria, the Government granted them residence permits, and UNHCR sought durable solutions for refugees, with a particular emphasis on resettlement and with little prospect of local integration.¹² Through this arrangement, UNHCR RSD delivered enforceable protection for refugees, helping Egypt to comply with article 33 of the Refugee Convention.¹³

UNHCR RSD does not always ensure *non-refoulement*, however. In Lebanon, the practical mechanisms for protecting and assisting non-Palestinian refugees and asylum-seekers were largely identical to those in Egypt: the country had no refugee legislation and UNHCR carried out RSD and referred many or most refugees for resettlement. Yet, until 2003,¹⁴ the government of Lebanon never committed itself to even temporary residence for asylum-seekers and refugees. Lebanon has not ratified the Refugee Convention, and refugee protection depended on a 'Gentlemen's Agreement' with the General Security Department, which in theory reduced arrests and prevented deportations. Yet, beginning in 2000, the Lebanese government launched a widespread crackdown on undocumented migrants, without distinction for refugees and

⁸ Agreement Between the Egyptian Government and UNHCR (on file with author).

⁹ Ibid. article 6.

¹⁰ Ibid. article 2(b).

¹¹ Ibid. article 2(a).

¹² See UNHCR, *2002 Global Appeal* 136 ('None of these refugees [under UNHCR protection] are economically self-reliant, and none have integrated locally... despite UNHCR's efforts in that direction... At present, political, social and economic conditions in Egypt continue to militate against success in these efforts').

¹³ CSR51 article 33(1): 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

¹⁴ In Sept. 2003, UNHCR and Lebanese authorities signed a Memorandum of Understanding granting refugees and asylum-seekers a maximum of 12 months residence in Lebanon, and guaranteeing UNHCR access to them in detention. The implementation and ramifications of the UNHCR-Lebanon agreement were not included in the main period of study for this article. However, the basic structure of the agreement raises concerns because long- and even medium- term protection relies completely on UNHCR finding resettlement opportunities for all refugees. In the past this was rarely achieved in 12 months, especially after Sept. 11.

asylum-seekers. Hundreds of refugees and asylum-seekers were reportedly deported over the following years, especially to Iraq.¹⁵ From late 1999 until October 2001, UNHCR was often denied access to detained asylum-seekers and refugees.¹⁶

2.1.2 *Durable solutions*

UNHCR RSD assisted efforts to promote durable solutions for refugees, though extensive reliance on resettlement became more problematic after September 11. Seeking durable solutions for refugees is one of the main objectives of UNHCR protection.¹⁷ In the Middle East, resettlement has often been the primary durable solution because local integration prospects are generally slim. For instance, in Egypt, beyond the basic right to residence, the government denies refugees most key social and economic rights, and refugees faced a growing level of racial harassment and occasional violence against African migrants.¹⁸ Since UNHCR refers many or most of the recognized refugees in Egypt to third countries, UNHCR RSD was a first step toward resettlement processing. In the late 1990s and early part of this decade, between 2 000 and 3 000 refugees were referred by UNHCR for resettlement from Egypt in most years.¹⁹ For the US and Canada, UNHCR referral was usually the only means of being accepted for resettlement from Egypt.²⁰

However, UNHCR's capacity to use RSD as a gateway to resettlement is fraught with limits. Resettlement quotas are small relative to the global refugee population, and processing is slow. Refugees hence need to be able to spend significant time — in many cases, years — in their first country of asylum. In Lebanon, where the government did not recognize even a temporary right of residence for refugees, refugees faced a serious protection crisis when resettlement opportunities dwindled. After September 11, 2001, the US government temporarily suspended its refugee resettlement program while it devised new security screening measures. Since the threat of *refoulement* was higher in Lebanon than in Egypt, the normal priority-setting criteria set out in UNHCR's *Resettlement Handbook* would have called for resettlement from Lebanon to be a higher

¹⁵ See Amnesty International, 'Lebanon: refugees and asylum-seekers at risk', MDE 18/002/2001 (26 Feb. 2001); Amnesty International, 'Lebanon: Amnesty International reiterates its concerns on the situation of refugees and asylum-seekers', MDE 18/005/2002 (3 May 2002); UNHCR 2003 *Global Appeal* at 137 ('Due to the strict application by the Lebanese Government of its immigration legislation, asylum-seekers and persons recognized as refugees by UNHCR risk detention and deportation, often to Syria, on the grounds of illegal entry and residence in the country').

¹⁶ See *Ibid.* at 134.

¹⁷ UNHCR, *Resettlement Handbook* (Nov. 2004) at 2.

¹⁸ C. Johnston, 'Egypt's African migrants dodge rocks, fight racism', *Reuters* (24 June 2002).

¹⁹ UNHCR-Cairo statistical report, June 2002 (on file with author).

²⁰ Some refugees are resettled from Egypt to Canada with private sponsorships, without UNHCR referral. However, UNHCR-referred cases are more numerous in Egypt. Australia provides resettlement to a larger number of refugees and 'humanitarian' cases who have private sponsorship.

priority. Yet, processing for US resettlement from Egypt resumed in March 2002,²¹ but by the end of 2003, US resettlement had not resumed in Lebanon, and many who had been 'tentatively approved' by the US before September 11 were still in limbo nearly two years later.²²

2.1.3 *Direct assistance*

UNHCR RSD identified refugees to whom UNHCR could directly provide some social and economic assistance. Yet, the future of direct UNHCR aid to urban refugees in the Middle East was threatened by UNHCR's increasingly strained budget. From 1999 through 2002, during which time UNHCR was grappling with a nearly two-fold increase in applications, UNHCR-Cairo's operating budget dropped from around \$4 000 000 to around \$3 000 000.²³ UNHCR-Cairo's annual 'care and maintenance' funds for assisting refugees declined 42 percent from 1997 to 2001.²⁴ Only about half of UNHCR-Cairo's operating budget went to direct social or economic assistance to refugees in 2002.²⁵

UNHCR's policy on urban refugees places great stress on promoting self-reliance, but lack of funds imperiled UNHCR-sponsored self-reliance programs in Egypt.²⁶ A news bulletin by UNHCR highlighted the human costs in inadequate medical care, poor housing, and hunger caused by a growing refugee population and a shrinking assistance budget.²⁷ In one case, an Eritrean two-year-old boy became ill and died, apparently from inadequate medical care, while his mother's RSD appeal was pending at the UNHCR Cairo office.²⁸ A UNHCR-sponsored evaluation concluded:

Altogether, one must conclude that while UNHCR made attempts to implement the self-reliance component of the policy on urban refugees in Cairo the results have been less than successful. The policy is meant to help refugees secure an independent source of income while reducing the financial burden on UNHCR. What happened in Egypt is that the organization both lacked the funds to implement the policy and could not persuade the authorities to provide a legal framework for its implementation. Despite this it went on to reduce its

²¹ See US Committee for Refugees, 'Resettlement to Resume at some Middle Eastern Posts, on Hold at Others', (2002).

²² See B. Osmat, M. Kagan, and S. Trad, 'Promises without solutions: Iraqi refugees left in the lurch in Lebanon', (Sept. 2003) 18 *Forced Migration Review* 42.

²³ See UNHCR, *1999 Global Appeal* and *2002 Global Appeal*.

²⁴ See S. Sperl, *Evaluation of UNHCR's policy on refugees in urban areas: A case study review of Cairo*, UNHCR Evaluation and Policy Analysis Unit, EPAU/2001.07 (June 2001) at 14.

²⁵ UNHCR, 'Hard Times for Cairo's Refugees', (25 Nov. 2002) (noting that UNHCR-Cairo's current urban assistance budget is \$1.5 million, or \$171 per refugee).

²⁶ See Sperl, above n. 24, at 3, 12–15.

²⁷ UNHCR, above n. 25.

²⁸ Ibid.

care and maintenance expenditures drastically, with severe consequences for the refugees who are facing a life of increasingly desperate penury.²⁹

2.2 Strains on the system

Refugee flows are often quite volatile and can differ from country to country. But, as I noted in the introduction, the general global trend reported by UNHCR through 2001 was a significant increase in the number of new asylum-seekers making individual applications to UNHCR offices. Backlogs of pending cases at UNHCR offices grew as well, with more than 70 000 people waiting for UNHCR to decide their cases at the end of 2001.³⁰ In 1998, UNHCR's Department of International Protection initiated a 'Refugee Status Determination Project' that provides additional staffing in response to 'reports from field operations of a growing inability to process claims for refugee status in a timely manner'.³¹

The effects of this growth could be seen at a microlevel in Egypt, which was home to one of the five largest urban refugee populations in the developing world.³² The number of persons seeking refugee protection annually at UNHCR-Cairo grew 96 percent from 1998 to 2001, including 13 176 applicants in 2001³³ and 9 002 in 2002.³⁴ With this increase in applications, UNHCR's Cairo office handled more individual refugee claims than any other UNHCR office in 2001 and 2002.³⁵

Initially, UNHCR opted not to increase RSD processing capacity at its Cairo office for fear of generating a 'pull-factor'.³⁶ Reversing this choice in 2001, UNHCR initiated a temporary RSD Project which funded additional staffing and the opening of a secondary office to handle only Sudanese refugee claims in the first half of 2002. But this project was intended to be temporary only. It was scheduled to expire in 2003, and it did not eliminate the backlog of cases.³⁷ At the end of March 2003, UNHCR reported that it still had 12 200 pending, undecided RSD cases in Egypt.³⁸

²⁹ Sperl, above n. 24, at 15.

³⁰ UNHCR explains: 'UNHCR offices are experiencing increasing difficulties in processing new claims. The number of undecided cases quadrupled from 16 400 in 1997 to 71 400 in 2001, while the number of offices with more than 500 cases pending doubled to 18 from 1999 to 2001'. Ibid. at 49.

³¹ UNHCR website (www.unhcr.ch, under Protecting Refugees, Capacity Building) (last checked 3 Aug. 2003).

³² See Sperl, above n. 24, at 1.

³³ UNHCR-Cairo statistical report, June 2002 (on file with author).

³⁴ 2002 UNHCR Population Statistics (Provisional), 4 Aug. 2003.

³⁵ The one country with more applications than Egypt in 2002 was Sudan, with 27 023. However, this was nearly entirely a one-time aberration resulting from screening not of new asylum-seekers, but of Eritrean refugees who had been recognized on a *prima facie* basis and who were applying for the right to continue to stay in Sudan rather than be repatriated. See above n. 5; UNHCR, 2001 Statistical Overview, above n. 5; UNHCR, Population Statistics 2002 (4 Aug. 2003).

³⁶ See Sperl, above n. 24, at 8.

³⁷ See Kagan, above n. 2, at 39.

³⁸ UNHCR, 'Trends in Refugee Status Determination 1 January - 31 March 2003', (4 July 2003) 1.

2.3 Inadequate procedural safeguards

In his 1999 study of UNHCR RSD procedures, Michael Alexander concluded that in terms of basic fairness, UNHCR's RSD procedures had been left behind by developments in administrative and human rights law.³⁹ There were some signs of improvement in procedures, at least in some UNHCR offices. In Cairo, initial steps were taken to make the appeal system somewhat more independent.⁴⁰ Cairo was the site of substantial innovation in the provision of legal aid and advice to asylum-seekers in the UNHCR RSD process. UNHCR accepted asylum-seekers' rights to counsel. Initial statistics collected in 2002 from three separate legal aid initiatives in Cairo showed that asylum-seekers who had some form of advice or assistance had a significantly higher chance of being recognized as refugees by UNHCR.⁴¹ On the downside, such progress was hardly universal. In Lebanon, during the period when government pressure on refugees increased, UNHCR's recognition rate in its RSD procedures in Lebanon dropped dramatically. Whereas UNHCR-Cairo recognized and implemented asylum-seekers' right to counsel in RSD, the UNHCR-Beirut office resisted efforts by a Lebanese NGO to offer individual counseling and representation.

UNHCR addressed procedural issues through the publication of 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' in September 2005. The new standards state clearly that asylum-seekers may bring legal representatives with them to RSD interviews, and recommends (but does not require) field offices to give rejected applicants specific reasons for decision. But the standards do not establish an independent structure for deciding appeals, and leave in place UNHCR's policy of withholding from asylum-seekers critical evidence considered in their cases. In general, the core of Alexander's 1999 criticisms of UNHCR RSD procedures appears generally valid today. In addition, UNHCR has now issued more comprehensive advice to states about standards necessary for a fair and effective RSD procedure. As a result, in terms of procedural fairness there is now a gap not just between UNHCR RSD practice and international standards, but also between what UNHCR says about RSD procedures, and UNHCR's own actual practice.

In May 2001, as part of its Global Consultations on International Protection, UNHCR issued its most comprehensive guidance on RSD procedures to date, a background paper called *Fair and Efficient Asylum Procedures*. This paper updated previous UNHCR advice to governments

³⁹ Alexander, above n. 1, at 255.

⁴⁰ See Kagan, above n. 2, at 33–34.

⁴¹ For full discussion of these statistics and legal aid programs in Cairo during this period, see M. Kagan, 'Frontier Justice: Refugee Legal Aid and UNHCR Refugee Status Determination in Egypt', *JRS* (forthcoming).

about fairness in RSD.⁴² UNHCR added to this guidance in February 2003 with comments submitted to the Council of Europe.⁴³ Many of the standards emphasized by UNHCR in these documents remained unimplemented at its offices. The following table⁴⁴ provides a summary, based on practices in Cairo at the end of 2002:

Procedural standards implemented	Procedural standards not implemented
<ul style="list-style-type: none"> ● Applicants had access to the refugee status determination procedure. ● Applicants had the right to remain in the country while their cases are pending. ● As of November 2002, appeals were screened by a partially independent unit (though independence meeting UN standards has not been achieved). ● Special procedures were in place to expedite applications by especially vulnerable people. ● Applicants have the right to legal representation and other forms of advice. ● Applicants were given some information about the procedure to be followed. ● Interpreters were provided by UNHCR in the most common languages spoken by asylum-seekers. ● Asylum-seekers had the right to an oral hearing at the first instance stage. 	<ul style="list-style-type: none"> ● Specific written reasons for rejection were not provided; detailed case assessments in UNHCR files were withheld from applicants and their legal representatives. ● Evidence considered in cases was withheld from the applicants concerned; withholding reports from forensic medical exams appeared to violate medical ethics and may have violated Egyptian law. ● There are reasons for concern that the decision-making process was structured so that positive decisions received more thorough and more immediate scrutiny than negative decisions. The practice of durable solutions staff reviewing positive RSD decisions violated the principle of <i>res judicata</i>. ● Negative credibility decisions were reached without providing specific reasons, and often without follow-up interviews.

⁴² UNHCR Executive Committee Conclusions No. 8 (1977); OAU-UNHCR Guidelines for National Refugee Legislation and Commentary (1980); UNHCR, Note, Fair and Expeditious Asylum Procedures (1994).

⁴³ UNHCR annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final of 18 June 2002, presented by the Commission (hereafter 'Comments to the Council of Europe').

⁴⁴ Table adapted from Kagan, above n. 2, at 37.

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- | | |
|--|---|
| <ul style="list-style-type: none">● UNHCR-Cairo interviewing staff appeared increasingly well-trained in proper interviewing techniques. | <ul style="list-style-type: none">● Most appeals were rejected without an in-person re-hearing.● Many critical parts of the standard operating procedures of the UNHCR-Cairo office were withheld from the public. |
|--|---|
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One of the more far reaching limits of the UNHCR procedure is the withholding of evidence. Alexander noted in 1999 that UNHCR offices typically do not permit asylum-seekers or their legal representatives to have access to their own files,⁴⁵ a practice continued in Cairo in 2001 and 2002. In August 2001, UNHCR's Department of International Protection issued a memorandum directing field offices to withhold evidence from asylum-seekers.⁴⁶ The memorandum prohibits UNHCR offices from distributing 'UNHCR generated information' to applicants or their legal representatives, and specifically prohibits disclosure of interview transcripts.⁴⁷ UNHCR repeated this standard in September 2005 in its 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate':

As a general rule, UNHCR interview transcripts and notes should not be disclosed, however the interview transcript taken directly from Applicant's own statements may be read back to the Applicant during the interview.⁴⁸

Evidence routinely withheld from applicants in Cairo included reports from mental health assessments and medical examinations of their bodies, transcripts of their own interviews, statements by other witnesses, and country of origin information.

Established principles of human rights and administrative law make clear that people have the right to know evidence in their cases against them in an administrative decision-making process, especially evidence that might be used against them.⁴⁹ Such protections are particularly

⁴⁵ Alexander, above n. 1, at 273–277.

⁴⁶ See Kagan, above n. 2, at 24–27.

⁴⁷ UNHCR, Department of International Protection, Protection Policy and Legal Advice Section, UNHCR Guidelines on the Sharing of Information on Individual Cases 'Confidentiality Guidelines', Aug. 2001, at paras. 21, 26, 27, (on file with author).

⁴⁸ UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', section 2.1.2 (2005).

⁴⁹ See *Feldbrugge v. Netherlands*, A99 Eur. Ct. H.R. (29 May 1986) (holding in an employment disability case that a fair hearing requires that a party be allowed to consult the reports made by two gynaecological experts used by the authorities); Basic Principles on the Role of Lawyers (Principle 21), Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.–7 Sept. 1990.

strong when the stakes are high, as they clearly are in refugee status determination.⁵⁰ The European Court of Human Rights has held specifically that claimants in administrative hearings have the right to see medical reports considered in their cases.⁵¹

UNHCR took a different approach in 2003 comments to the Council of Europe. UNHCR specified that country of origin information should 'be available to the asylum-seeker and his or her legal adviser/counselor as well as be subject to the scrutiny of reviewing bodies'.⁵² UNHCR expressed concern about a proposed European standard that would allow some limitations to access to information in an applicant's file for an asylum-seeker and his or her legal advisor:

UNHCR is concerned that this would leave asylum-seekers and decision-makers in unequal positions. UNHCR therefore recommends that information and its sources may be withheld only under clearly defined conditions where disclosure of sources would seriously jeopardize national security or the security of the organizations or persons providing information.⁵³

Transparency in evidence remains one of the most severe gaps between established standards of procedural fairness and UNHCR's RSD procedures.

3. UNHCR protection and government primacy

3.1 The primacy of government policy

Of the three main benefits of UNHCR RSD identified in the previous section, the two that are most important — *non-refoulement* and resettlement — depend heavily on government action. They are not fully, or even primarily, within the control of UNHCR. Although refugee status determination by UNHCR is often called 'mandate status determination', it is unrealistic to expect UNHCR to itself provide effective protection through its mandate alone. In reality, governments, not

⁵⁰ As one text on administrative law explains:

[C]ompliance with a fair procedure should require that [a person] is informed of the case against him, to the extent that there is one, so that he can tailor his submissions accordingly and, where appropriate, refute some of the allegations, correct mistakes, or explain away otherwise damaging evidence. . . . Clearly the more that is at stake for the applicant, the greater the obligation to give notice of the case to be met.

M.T. Moran, *Administrative Law*, 2nd Ed., (1999), 136–7. UNHCR has said, 'The importance of these [RSD] procedures cannot be overemphasized. . . . A wrong decision might cost the person's life or liberty'. See *Determination of Refugee Status*, RLD 2 (1989), chapter 2.

⁵¹ *Feldbrugge v. Netherlands*, above n. 50.

⁵² UNHCR annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 of 18 June 2002, at 8 (commenting on Article 7).

⁵³ *Ibid.* at 12 (commenting on Article 14).

UNHCR, determine the quality of refugee protection. When government commitments to refugees falter, so does UNHCR protection capacity.⁵⁴

While it is sometimes said that UNHCR has a 'mandate to *provide* international protection',⁵⁵ the protection that UNHCR has the authority to provide on its own is quite limited. The agency's Statute requires that UNHCR 'shall provide for the protection of refugees', and that it should seek 'permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations'.⁵⁶ Hence, UNHCR's work somewhat ambiguously includes both providing protection and assisting governments in doing the same. Yet, the specific activities enumerated in the Statute make clear that governments bear the primary responsibility. As set out by the UN General Assembly, UNHCR authority to protect refugees consists of:

- Promoting international refugee conventions and supervising their application;
- Promoting special agreements with states to benefit refugees;
- 'Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities';
- 'Promoting the admission of refugees';
- Helping refugees obtain permission to transfer assets;
- Obtaining from governments information about refugee conditions;
- Communicating with governments and inter-governmental organizations;
- Establishing contact with private organizations and facilitating their efforts to assist refugees.⁵⁷

UNHCR also has a duty to supervise implementation by governments of the 1951 Refugee Convention, and its mandate has been expanded by the general growth of human rights law since the 1950s.⁵⁸ But as this list sets out, UNHCR's most explicit authority is to promote, facilitate, and assist refugee protection by others, principally by governments.

The United Nations, UNHCR included, has emphasized that refugee protection is ultimately a state responsibility. In 2003 the General Assembly made clear that protection is primarily the responsibility of

⁵⁴ See D. McNamara, 'The Protection of Refugees and the Responsibility of States: Engagement of Abdication?', (1998) 11 *Harvard Human Rights Journal* 355, 356, ('UNHCR has often been caught in the middle... Put simply, Conventions and UN structures are ultimately only as strong as States allow them to be'); J.C. Hathaway, 'Who should watch over refugee law?', (2002) 14 *Forced Migration Review* 23, 25.

⁵⁵ UNHCR, *Resettlement Handbook*, above n. 17, at 2 (emphasis added).

⁵⁶ Statute of the Office of the United Nations High Commissioner for Refugees (hereafter UNHCR Statute) articles 1, 8.

⁵⁷ UNHCR statute article 7.

⁵⁸ See Volker Türk, 'The role of UNHCR in the development of international refugee law', in *Refugee Rights and Realities*, 153, 154–155 (Frances Nicholson and Patrick Twomey eds.) (1999).

governments.⁵⁹ UNHCR, in its Notes on International Protection, has been clear that it can assist governments, but cannot take over for them.⁶⁰

Nevertheless, the fact that UNHCR is so often involved in implementing refugee policies can blur the distinction about whether UNHCR itself is in fact providing protection. In particular, the application of the principle of primary state responsibility in the context of UNHCR RSD has been less than clear. UNHCR's 2000 Note on International Protection acknowledged that where UNHCR performs RSD, 'UNHCR's ability to ensure the protection of and solutions for those persons recognized as refugees under its mandate has to depend on the commitment of States, particularly the host States'.⁶¹ However, UNHCR did not explain how the agency would respond when the necessary state commitment is not forthcoming.

3.2 Disconnect between UNHCR's legal role and its RSD activities

In light of the primacy of government protection, three key questions emerge about UNHCR's RSD activities in Egypt and Lebanon.

First, why would UNHCR continue RSD even when, as in Lebanon, a host government disregards both UNHCR's refugee status decisions and the principle of *non-refoulement*? UNHCR's 1998 internal report on Lebanon states that RSD was conducted because it 'was able to secure some minimal protection limited to ensuring protection against *refoulement* and to some degree from detention for illegal entry/residence'. However, this does not explain UNHCR's actual RSD activities in the following years after widespread deportations began. Two factors in Lebanon beyond UNHCR's control — detention and *refoulement* by the Lebanese government and the US government's decision to put resettlement on

⁵⁹ UN G.A. Res. 57/187 paras. 7 and 8, A/RES/57/187 (18 Dec. 2002) ('*Reiterates* that international protection is a dynamic and action-oriented function, carried out in cooperation with States and other partners, inter alia, to *promote and facilitate* the admission, reception and treatment of refugees and to ensure durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups; *Re-emphasized* that the protection of refugees is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the Office of the High Commissioner to fulfill its mandated functions.') (emphasis added).

⁶⁰ See UNHCR, Note on International Protection, A/AC.96/930 (7 July 2000), at para. 2. ('While the main responsibility for safeguarding the rights of refugees lies with States, UNHCR's statutory role is to assist governments to take the necessary measures, starting with asylum and ending with the realization of durable solutions'); UNHCR Note on International Protection, A/AC.96/830, (7 Sept. 1994), at para. 13 ('Since sovereign States have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction, effective protection of refugees requires action by the Government of the country of asylum on their behalf. UNHCR's role in providing international protection consequently, and above all, involves ensuring that Governments take the necessary action... The fulfilment of the High Commissioner's international protection function requires the active cooperation of the Government concerned, and the support of other countries in the international community'.)

⁶¹ UNHCR, Note on International Protection, A/AC.96/930 (7 July 2000) at para 25.

hold — combined to make refugee protection an increasingly hollow concept in 2001 and 2002. Yet, UNHCR continued conducting status determination.

Secondly, why would a state's ratification of the Refugee Convention appear to have relatively little impact on the nature of UNHCR RSD? In 2001, more than half of the states where UNHCR performed RSD were in fact parties to the Refugee Convention.⁶² On paper, Egypt's ratification of the Refugee Convention should have superseded its 1954 bilateral agreement with UNHCR, and should have led to the government taking increasing direct responsibility for the administration of refugee protection. Instead, twenty years after Egypt's ratification of the Convention, the 1954 Memorandum of Understanding continued in practice to be the main instrument defining the mechanisms of refugee protection in the country. Continuation of this system violated one of the terms of the Refugee Convention. The Convention's article 35 obligated Egypt to provide to UNHCR 'information and statistical data requested concerning: (a) the condition of refugees [and] (b) The implementation of this Convention'.⁶³ Instead, UNHCR's RSD work in Egypt continued under the pre-existing arrangement, in which UNHCR itself undertakes to take a 'census of and identifying the refugees eligible under the mandate of the High Commissioner'. In addition, Egypt had not implemented the Refugee Convention's Article 17, which requires that 'restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market' be lifted once a refugee has been resident for three years.

Thirdly, why has UNHCR not implemented procedural standards to match those that the agency advocates for governments? Flaws in UNHCR's procedures raise special questions because, given its mandate as a promoter of refugee protection, one would expect UNHCR to be the guardian of protection standards. On the other hand, some may question whether UNHCR actually needs to be bound by the same procedural standards that apply to states.

UNHCR itself has not published any comprehensive policy about its status determination work that would answer these questions.

4. Shifting responsibility from governments to the UN

4.1 Negative responsibility: a practical explanation for UNHCR RSD

A convincing answer to the questions raised in the previous section comes from the concept of 'negative responsibility'. As used by Goodwin-Gill,

⁶² From analysis of UNHCR, 2001 Statistical Overview.

⁶³ CSR51 art. 35.

'The doctrine of "negative responsibility" [is] the idea that we are as much responsible for what we do, as for what we do not do, for deliberately harming others, as for failing to relieve their suffering'.⁶⁴ Focusing on UNHCR operations in militarized refugee camps, Goodwin-Gill has argued that UNHCR resists stopping operations that fall short of international standards because it would feel responsible for failing to act in the face of dramatic need.⁶⁵ From these examples, Goodwin-Gill argues UNHCR sometimes acts not because it is mandated to do so, but rather out of an institutional sense of negative responsibility.

Goodwin-Gill focused on examples of extreme failure of refugee protection, principally in the Great Lakes region of Africa. But the concept of negative responsibility can also be helpful to explain UNHCR's refugee status determination work. Although the harms may not be as extreme as those facing Rwandan and Burundian refugees in the 1990s, there is a basic parallel in terms of UNHCR's activities. UNHCR's mandate allows it to choose to do RSD, but it has no specific duty to conduct RSD. Alexander's article alludes to the concept of negative responsibility by defining UNHCR RSD in terms of filling gaps left by governments:

For the most part asylum seekers have no choice but to approach UNHCR, because very few governments in the region are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Even some countries which are parties, such as Cambodia, do not have their own refugee status determination processes, so refugees cannot apply directly to those governments for recognition. UNHCR steps in to fill the gap.⁶⁶

A review of internal UNHCR annual country reports from the Middle East from the late 1990s indicates that gap-filling figures prominently in UNHCR's internal understanding of the rationale for its RSD activities. Most vividly, the 1998 internal UNHCR report on Lebanon states: 'The vacuum caused by the lack of any asylum procedures in Lebanon is filled by UNHCR'. The 1998 report on Djibouti (a party to the Refugee Convention) says, 'In the absence of an active [government RSD system] BO [UNHCR Branch Office] is conducting eligibility determination interviews of asylum seekers and provides those with meritorious cases protection letters (attestations), pending a final determination of their status'.

The concept of negative responsibility as an explanation for UNHCR RSD convincingly answers the three questions posed in the previous section. First, if filling the RSD vacuum is the policy driver, it is natural

⁶⁴ G. S. Goodwin-Gill, 'Refugee identity and protection's fading prospect', in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999), 220.

⁶⁵ *Ibid.*, at 240–241.

⁶⁶ Alexander, above n. 1, at 251.

that UNHCR would continue RSD even when a host government systematically violates the principle of *non-refoulement*. Stopping deportations of refugees is not actually determinative of UNHCR action. Second, if UNHCR RSD is an attempt to fill a gap left by a government, it is not surprising that ratification of the Refugee Convention on its own would not change UNHCR's RSD activities. The non-existence of an alternative RSD system is more decisive than the legal framework established by the Refugee Convention. Third, in the gap-filling mode, the procedural flaws in UNHCR are not surprising since UNHCR RSD is conceived only as a substitute measure, an issue I explore in more detail below in section 4.3.

The negative responsibility concept highlights the challenges UNHCR confronts when it conducts RSD. As Goodwin-Gill argues, negative responsibility can be a trap for UNHCR because it leads the agency to take on responsibilities that it is not prepared to meet:⁶⁷

Transposed to the institutional context, 'negative responsibility' can be seen to have led UNHCR to embrace every humanitarian operation remotely connected to the issue of displacement. . . . Given the complexity of causes, however, not to mention their political dimensions and the finite resources available, such engagement is doomed to failure.⁶⁸

Negative responsibility gives UNHCR a limitless burden while simultaneously allowing states to stand back and let UNHCR do the hard work of implementing refugee protection. The following section explores in greater detail the ways in which this shift of responsibility for RSD can be based on misconceptions about UNHCR's mandate, false assumptions about the necessity of individual RSD, and can ultimately damage refugee protection.

4.2 Unnecessary reliance on individual RSD

An analysis of UNHCR's RSD activities depends to a great degree on whether individual status determination is always necessary to ensure refugee protection. If it is always necessary, UNHCR would naturally feel substantial pressure to perform RSD in a country that did not set up its own RSD system. For instance, there is in at least one UNHCR report an indication that UNHCR based its activities in Egypt for several years on the premise that it could not abandon reliance on individual status determination.⁶⁹ If this is the case, it could conceivably be worth the cost for UNHCR to fill a vacuum left by a government. Yet, in June

⁶⁷ Goodwin-Gill, above n. 64, at 248.

⁶⁸ Ibid. at 240–241.

⁶⁹ See Sperl, above n. 24, at 29 (raising concerns about rejected asylum-seekers in Egypt who refused to return home, Sperl notes that UNHCR disfavored a proposal to create a secondary legal status for rejected asylum-seeker and insisted on the necessity of a refugee status determination procedure).

2004, UNHCR in Cairo suspended individual RSD for most refugees in Egypt, providing Sudanese temporary protection on a group basis instead.

On the other hand, if individualized RSD is not always necessary, then the pressure of negative responsibility on UNHCR should be substantially lessened. There is nothing in refugee law that requires either a state or UNHCR to conduct individual RSD. The Refugee Convention sets out a refugee definition, but it does not necessarily require that the definition be applied through an individualized procedure. If individualized RSD is in essence optional for a state, UNHCR can be more cautious about incurring the costs and protection challenges involved in taking on such a role.

UNHCR has been clear that individual RSD is often not necessary. Rather, whenever the number of asylum-seekers overwhelms a state's RSD capacity, UNHCR advises adopting *prima facie* recognition, rather than conduct flawed individual RSD. *Prima facie* recognition of all asylum-seekers is normally assumed to be a reaction to a large scale influx. But as UNHCR explained in its Global Consultations, the size of an asylum-seeker influx must be assessed compared to the receiving state's RSD capacity.⁷⁰ In a state without any RSD apparatus, even a small number of asylum-seekers could justify the use of *prima facie* recognition. Hence, when states leave an RSD gap, UNHCR need not always carry out individual status determination itself. Instead, UNHCR may best promote refugee protection by helping a government design *prima facie* means of recognizing refugee status.

UNHCR's publications make clear that RSD systems that meet standards of fairness and efficiency are quite costly in terms of financial and human resources. Individual refugee status determination requires significant staffing, time, and facilities when it is conducted fairly. In 2001, UNHCR advised legislatures: 'Parliamentarians can promote effectiveness [of RSD] by allocating sufficient resources for refugee status determination'.⁷¹

Refugees also need education, social security, housing, healthcare, and other services that impose costs on a state. Since government and UNHCR resources are limited, a decision to engage in individual RSD should be seen in terms of the resources that could otherwise be spent on social and economic programs that assist refugees. Promoting refugee protection might be best facilitated by looking for ways to reduce the

⁷⁰ UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework para.14, EC/GC/01/4, 19 Feb. 2001 ([W]hat amounts to 'large-scale' or 'mass influx' will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. The analysis needs to take into account the size and speed of the influx *balanced against the size and capacity of the receiving country to process the cases in individual status determination systems*) (emphasis added).

⁷¹ UNHCR, *Refugee Protection: A Guide to International Refugee Law*, (2001), 50.

costs of determining legal status by avoiding individual RSD. Relying extensively on individual applications as the default form of RSD places increased resource burdens on UNHCR offices. Likewise, a host government in the developing world might understandably be hesitant to take on such a burden, undermining UNHCR efforts to encourage governments to take greater responsibility for refugee protection.

Rather than fill all RSD gaps left by governments, UNHCR has the option of encouraging and assisting governments to set up forms of *prima facie* refugee recognition that facilitate effective local integration (and hence reduce the need for resettlement). In such a system, intensive individual screening would be needed only to identify especially vulnerable refugees, and to deal with exclusion issues.

4.3 UNHCR RSD versus government RSD: the same procedural standards?

The tendency to see UNHCR RSD as a substitute for government RSD may provide some explanation, though not justification, for why UNHCR has not implemented many of its stated standards of fairness in its own RSD procedures. If UNHCR RSD is thought of as a substitute measure, there may be doubts about whether procedural standards are as important with UNHCR as with governments. One does not normally expect a substitute to be as good as the real thing. In addition, one might argue that procedural safeguards are less critical with UNHCR because UNHCR's interests are less adverse to refugee claims than those of governments. UNHCR was established to protect refugees, while governments might be interested in migration control and restricting access to asylum.

In a 1989 training manual, UNHCR made clear that its RSD procedures should be held to the same standards as those run by governments: 'The main elements [of due process applicable to governments] must also apply to UNHCR if we are to ensure fair and proper examination of applications'.⁷² However, UNHCR has repeatedly questioned whether it should be expected to live up to the same standards as states in RSD procedures.⁷³

⁷² UNHCR, *Determination of Refugee Status*, RLD 2 (1989).

⁷³ UNHCR's short-lived Mar. 1997 *Comprehensive Policy on Urban Refugees*, which was revised after criticism, asserted that UNHCR procedures could not equal those of 'sophisticated and resource well-endowed governments'. Cited in Alexander, above n. 1, at 254. UNHCR's Sept. 2005 *Procedural Standards*, which fall short of the advice that UNHCR has given to governments on RSD, state: 'The RSD Procedural Standards reflect the particular constraints and challenges under which UNHCR must conduct RSD. They are not intended to identify standards for national procedures, which in certain States may exceed the standards proposed'. *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* at 1-4.

There are a number of reasons why the same procedural protections are essential with UNHCR RSD as with government RSD. The stakes in UNHCR RSD are often just as high as in government RSD, given that UNHCR refugee recognition facilitates social and economic assistance, opens doors to resettlement, and in countries like Egypt triggers governments' respect for the principle of *non-refoulement*. UNHCR has called fair and efficient asylum procedures 'essential' for full application of the 1951 Geneva Refugee Convention.⁷⁴

Given the way UNHCR RSD works in practice, it would be a mistake to presume that UNHCR's interests in RSD decision-making are necessarily less adverse to refugee claimants than a government's interests would be. There are at least three main reasons for this.

First, an abstract commitment to protection is not a substitute for actual procedures. The International Criminal Court and its Yugoslavia and Rwanda predecessors have a mandate to protect and enforce international justice, but nevertheless must guarantee defendants fair trials. Governments that are party to the Refugee Convention have a mandate to protect refugees much like UNHCR's. While it is true that UNHCR's purpose is to protect refugees, the same can be said of many government agencies that are responsible for refugee status determination.⁷⁵

Secondly, UNHCR offices conducting RSD are subject to pressures that have the potential to negatively influence decision-making. In many UNHCR field offices, protection staff supervising RSD are

⁷⁴ UNHCR, Asylum-Processes: Fair and Efficient Asylum Procedures para. 5 (May 2001). The UN General Assembly, to which UNHCR is accountable, has urged 'access, consistent with relevant international and regional instruments, for all asylum-seekers to fair and efficient procedures for the determination of refugee status and the granting of asylum to eligible persons'. G.A. res. 51/75 para. 4, 51 UN GAOR Supp. (No. 49) at 208, UN Doc. A/51/49 (Vol. I) (1996). See also G.A. res. 50/152 para. 5, UN Doc. A/RES/50/152 (1995).

⁷⁵ If UNHCR RSD systems were in fact more favourable to refugee claims than governments, one might expect to see UNHCR recognize similar refugee claims at a higher rate. But that does not appear to occur, judging from UNHCR's statistical reports. UNHCR statistical reports suggest that recognition rates at UNHCR offices are above the rates of some governments receiving claims from the same nationalities, and below the rates of other government RSD systems.

In some cases, government-run RSD systems post substantially higher recognition rates than UNHCR offices receiving claims by the same nationalities. For instance, in 2001, UNHCR's Cairo office recognized 49% of Sudanese claims and 46% of Somali claims. See 2001 UNHCR Population Statistics, provisional, 7 June 2002, Table 17. The US asylum adjudication system recognized 73% of Sudanese claims, and 70% of Somalis. See 2001 Statistical Yearbook of the Immigration and Naturalization Service at 23 (Table 27). Of course, the merits of refugee claims made in Egypt may be different from those in the United States or in another country. But at least in theory, UNHCR-Cairo should have been more open to refugee claims from war-torn countries. UNHCR maintained a more broad interpretation of the refugee definition for people fleeing war than the US. Moreover, the UNHCR Cairo office was operating in a country where it could apply the extended African refugee definition, with its wider protection for people fleeing civil war, while the US did not. It is therefore noteworthy that UNHCR-Cairo accepted Sudanese and Somali claims less frequently than the US.

simultaneously responsible for relations with host governments, resettlement referrals, and for assistance budgets. In this context, there are several factors that have the potential to negatively influence RSD:

- UNHCR often provides monetary and other material assistance to recognized refugees, which introduces a potential financial incentive for UNHCR to keep the numbers of recognized refugees low.
- Host governments are often resistant to allowing large numbers of recognized refugees to stay in their territories, which can conceivably create a pressure on a UNHCR office to be cautious about recognizing refugee claims.
- In countries where resettlement is the primary durable solution for recognized refugees, there is a risk of pressure on UNHCR to favor refugee claims from applicants who can be successfully resettled.⁷⁶ In addition to host countries' policies against local integration⁷⁷ resettlement referrals are indirectly linked to government funding of UNHCR, since many of UNHCR's major donor states are also UNHCR's major resettlement partners.⁷⁸
- UNHCR has increasingly played a role in migration control, not just refugee protection. This is epitomized by the application of its policy of sanctions against 'irregular mover' refugees, and by general concern about creating 'pull factors' that could stimulate increased refugee migration. Such concerns could encourage field offices to be relatively strict in their status determination in order to avoid creating a pull factor of perceived generosity.

The potential for these pressures to influence decisions makes procedural protections as essential with UNHCR as in RSD systems run by governments.

Thirdly, human challenges inherent in any RSD process necessitate safeguards no matter whether UNHCR or a government acts as the decision-maker. RSD involves formidable cultural, linguistic, legal, and emotional challenges (including staff stress and 'burnout') which can affect UNHCR offices just as government agencies.

⁷⁶ Examination of internal decision-making procedures at UNHCR's Cairo office indicated that UNHCR durable solutions staff reviewed positive RSD decisions, and had authority to ask RSD staff and supervisors to clarify, justify, or reconsider cases. See Kagan, above n. 2, at 30–33.

⁷⁷ For instance, the 1954 Egypt-UNHCR agreement requires UNHCR to seek resettlement out of Egypt, rather than seek opportunities to integrate refugees into Egyptian life. Other countries in the region, such as Jordan and Lebanon, similarly insist that any refugee residence on their territories must be temporary.

⁷⁸ See G. Troeller, 'UNHCR Resettlement: Evolution and Future Direction', 14 *IJRL* 85, 89 (2002) ('In contrast to the less than central importance accorded within UNHCR to resettlement over much of the last decade, major donors, many of whom are resettlement partners, have continued to attach great importance to resettlement as this function is directly involved in the question of who is admitted to their respective countries').

Limited procedures at UNHCR offices pose the same basic risk as limited procedures operated by governments: *bona fide* refugees who are in danger in their countries of origin risk being denied protection. The principle of *non-refoulement* as spelled out in the Refugee Convention prohibits a state from returning 'in any manner whatsoever' any refugee to a country where his or her life or freedom would be in danger. A state's obligation to not forcibly return a refugee applies to any asylum-seeker until his or her claim has been refused in a fair determination process.⁷⁹ Currently, UNHCR's RSD procedures do not satisfy this requirement because they lack several key procedural safeguards.⁸⁰ Rejected asylum-seekers may in fact be refugees who would be recognized in a system with minimal procedural protections. Deporting such people amounts to *refoulement* in fact if not *refoulement* in form.⁸¹ Until the current limits of UNHCR's RSD procedures are overcome, *de facto refoulement* will often be the most direct and glaring protection problem resulting when UNHCR uses its RSD procedures to fill gaps left by governments.

4.4 Undermined UNHCR moral authority

Shifting RSD responsibility from a government to UNHCR poses a two-fold threat to UNHCR's mandate to supervise refugee law. First, by performing a role normally reserved for governments, UNHCR acquires the burden of living up to the standards it promotes for governments. If UNHCR fails to do this, UNHCR's moral authority to set standards for states will be eroded. Second, by becoming intimately involved in the implementation of refugee law, UNHCR faces a conflict of interest in being able to effectively supervise refugee law.

UNHCR often lacks the concrete leverage to change state behavior, and its ability to confront governments that violate refugee rights is often hampered by the agency's dependence on the same governments for funding and access.⁸² UNHCR issues substantial guidance and advice to governments on refugee protection standards, but none of it is binding. Since UNHCR has no enforcement authority over states, UNHCR's efforts to set standards depend on how the agency is perceived subjectively. Preserving UNHCR's moral authority on matters of refugee

⁷⁹ See J.C. Hathaway, 'Refugee Law is Not Immigration Law', in US Committee for Refugees, *World Refugee Survey* (2002) 38.

⁸⁰ CSR51 article 33.

⁸¹ See T.A. Aleinikoff, 'Aliens, Due Process and Community Ties: A Response to Martin', (1983) 44 *University of Pittsburgh Law Review* 237, 251 ('[I]t seems to me that the appropriate standard of accuracy [in RSD] should be the percentage of good claims denied, not the percentage of all claims properly decided').

⁸² See G. Loescher, *The UNHCR and World Politics* (2001) 350; G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 138.

protection standards, therefore, must be a high concern for the agency, and for refugee advocates.⁸³

UNHCR's standard setting work has been criticized because its advice to states sometimes appears detached from practical protection contexts.⁸⁴ UNHCR's role in RSD in much of the south is contrary to the long observed declining significance of UNHCR's legal authority in more developed asylum systems in western countries.⁸⁵ UNHCR may be losing legal influence in the geopolitical north even as it has acquired government-like power in many places in the south. In RSD, the more precise problem is that while UNHCR has tremendous practical experience in the field, it has not implemented many of its own standards. The strains that this puts on UNHCR's moral authority have already become obvious. In 2001, Australia's Minister of Immigration and Multicultural Affairs, Phillip Ruddock, attempted to deflect UNHCR criticism of Australia's restrictive refugee policies by complaining that UNHCR did not hold itself to the same standards in its refugee status determination activities. According to news media reports, Ruddock said: 'There is one standard for the UNHCR, and there is another standard that elements of the UNHCR impose on developed countries and I don't think it can go on'.⁸⁶ Ruddock's criticisms were no justification for Australia's policies, but they illustrate the importance for UNHCR to lead by example.

Leaving aside the issue of UNHCR's moral authority, UNHCR RSD gives the agency a conflict of interest in attempting to supervise refugee protection.⁸⁷ Normally, it would fall to UNHCR to identify major gaps in an RSD process. A significant danger posed by UNHCR performing RSD is that UNHCR will not be in a position to provide complete evaluations of refugee protection. For instance, in one case Sweden argued to the UN Committee against Torture that it could return an

⁸³ See M. Weiner, 'The Clash of Norms: Dilemmas in Refugee Policies', (1998) 11 *JRS* 433, 435 ('One view of UNHCR [] is that it must adhere to its own norms if it is to have any success in getting states to do so. Institutions that make or implement norms have a dual responsibility: Strict adherence to norms in their own conduct, and the responsibility of persuading governments and private bodies to conform to the norms'); G. Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order', 10 *IJRL* 349, 373 (1998).

⁸⁴ See J.C. Hathaway, 'Who should watch over refugee law?' (2002) 14 *Forced Migration Review* 23, 24 ('In practice, neither DIP [UNHCR's Department of International Protection] nor EXCOM [UNHCR's Executive Committee] has done enough to provide systematic, non-crisis policy guidance on the substance of refugee law, carefully anchored in the real context of refugee protection challenges').

⁸⁵ See J. C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', (1990) 31 *Harvard International Law Journal* 129, 166.

⁸⁶ Quoted in M. Christie, 'Australia blasts UN stance on illegal migration', *Reuters* (21 Feb. 2001).

⁸⁷ See generally Hathaway, above n. 85, at 24–25 (2002) ('UNHCR is no longer at arms-length from the implementation of refugee protection. . . . UNHCR therefore faces a dilemma, in my view. Either it must return to concentrating on the implementation of its core supervisory responsibilities, and leave what has become the majority of its operational mandate to others; or it must concede that it cannot ethically supervise itself, and endorse establishment of a genuinely arms-length body to ensure the oversight of the Refugee Convention').

Iraqi asylum-seeker to Jordan because Jordan had agreed to allow refugees recognized by the local UNHCR office to stay.⁸⁸ In opposing Sweden's position, UNHCR's submissions did not address the adequacy of the RSD procedures at its office in Jordan, even though that was central to the protection Sweden asserted Mr Korban could find there. Instead, UNHCR based its advice on the fact that he might not be admitted to Jordan.⁸⁹

5. UNHCR RSD: Re-assessing when, where, why and how

5.1 Using RSD to promote protection

UNHCR has engaged in RSD in a large and diverse group of countries, with growing backlogs of cases, growing financial strain, and continuing procedural gaps. These circumstances call for a re-assessment about if, when, where, why and how UNHCR should conduct RSD.

No legal instrument requires UNHCR to determine refugee status under any circumstances. UNHCR has a duty to protect refugees, but only by indirect means, principally by encouraging governments to live up to their protection obligations and share protection responsibilities. The difference between promoting protection and directly providing it is not just a legal nuance. UNHCR lacks the power to effectively protect refugees when governments steadfastly refuse to do so. UNHCR does not have the legal authority to force a state to change its policies, and it lacks the financial and human resources to substitute its work for roles normally assigned to governments. UNHCR's power to protect refugees depends heavily on its moral authority and its capacity to focus its resources where they can best encourage governments to develop their own protection capacity.

Despite cause for caution about UNHCR RSD, it would be an overly extreme reaction for UNHCR to suspend all refugee status determination. The basic argument advanced in this article has been that UNHCR RSD in certain circumstances facilitates meaningful protection for refugees, but that UNHCR RSD, as practised now, shifts responsibility from governments to the UN in ways that strain resources, erode UNHCR's moral authority, and sometimes do not achieve tangible benefits for refugees. This situation calls not for ending UNHCR RSD, but for searching for more focused ways for UNHCR to use its RSD work as a tool to effectively promote protection by governments. In general, UNHCR should conduct RSD in fewer countries and for shorter periods than it does now. At the same time, UNHCR can offer

⁸⁸ *Avedes Hamayak Korban v. Sweden*, Committee against Torture, Communication No. 88/1997 at 4.8.

⁸⁹ *Ibid.*

to perform RSD where governments are willing to take concrete and active steps to improve their refugee protection policies. In American political terms, this calls for a 'mend it, don't end it' re-assessment of UNHCR RSD.⁹⁰

UNHCR's refugee status determination activities can be reconfigured as a means to promote government protection of refugees through four main strategies:

a. Promote prima facie refugee recognition

Because fair individual RSD is both high risk and resource intensive, it should be a fall back option rather than a cornerstone of refugee protection. Group-based refugee recognition would render moot many concerns about UNHCR's RSD procedures. A host government's reluctance to establish its own RSD system should be taken as an initial signal that individual RSD may not be viable, rather than be interpreted as a gap that UNHCR should step in immediately to fill. Even where individual RSD is necessary, its viability depends on the host government's and/or UNHCR's capacity to actually set up a fair and efficient system. UNHCR's first priority should be to promote at least temporary protection for all asylum-seekers, rather than to find a way to individually adjudicate each claim.

b. Link UNHCR RSD to government reciprocity and burden sharing

Since UNHCR is funded internationally, its work is in essence a means of sharing the costs of refugee protection. UNHCR performance of RSD should hence be construed as a service to a host state, giving UNHCR a carrot which it can offer to governments. In exchange for performing a task normally left to a government, UNHCR should expect

⁹⁰ This approach, at a more specific level, is consistent with what Volker Türk recently urged in response to UNHCR's often complicated role in national refugee status determination systems. Türk argued:

Compared to other international involvement in national legal and administrative systems, the exercise of the UNHCR's supervisory role is rather unique in this respect. In fact, it may be the only UN organisation that is directly involved in national law-making, national procedures and national decision-making. This is not to say that such involvement does not have its own set of difficulties, such as the possibility of being perceived to be closely associated with government policies. Other problems concern a real or perceived lack of independence because of dependency on the funding of donor countries as well as operational obstacles hindering the implementation of certain aspects of supervision, for instance, through denial of access to refugees or inadequate involvement in the legislative process. These difficulties are, however, of a practical nature that would need to be addressed at the practical, operational level. It would be wrong to deduce from these problems a need to change the supervisory system as a whole. Before embarking on a discussion about how to enhance the UNHCR's supervisory role, it is therefore crucial to acknowledge the achievements that have been made by involving an international institution in domestic legal and administrative contexts and to build any strengthening of the UNHCR's role around these achievements.

V. Türk, 'UNHCR's Supervisory Responsibility', New Issues in Refugee Research Working Paper No. 67 (Oct. 2002), at p. 15–16 (available at www.unhcr.ch, Research/Evaluation).

some tangible positive steps toward refugee protection in exchange. In some manner, UNHCR's performance of RSD should advance refugee protection beyond the status quo ante. For instance, in exchange for UNHCR performing RSD, a state might be asked to open its school or hospital systems to refugees, if this was not done previously. UNHCR should not conduct RSD where governments offer nothing in exchange, especially where governments even refuse to recognize the basic principle of *non-refoulement*. If UNHCR is to continue conducting RSD over a long period of years, the host state should be expected to similarly continue improving its refugee protection policies in exchange; a one-time step forward should not justify an indefinite commitment by UNHCR.

c. Limit UNHCR RSD in states party to the Refugee Convention

Promotion of government responsibility for refugee protection should lead UNHCR to be more cautious about conducting RSD in states that have ratified the Refugee Convention. By ratifying the Convention, such states have already committed themselves to the principle of *non-refoulement*, along with a range of civil, political, social, and economic rights for refugees. Hence, UNHCR conduct of RSD carries a special risk that responsibility already agreed to by a government will in effect shift back to the UN without any reciprocal gain in refugee protection. In states that are party to the Refugee Convention, UNHCR RSD can still be useful to promote refugee protection, but under more strictly defined arrangements that expect more from governments. For instance, UNHCR might conduct RSD in a time-limited transitional period while helping to develop a government's own RSD system. Or, UNHCR might conduct RSD in exchange for a government extending refugee protection beyond the requirements of the Convention, for instance by making refugees eligible for immediate work permits or permanent residence.

d. Make UNHCR RSD procedures a model of best practice

Protecting refugees and maintaining UNHCR's moral authority necessitate that UNHCR implement the procedural fairness standards it has promoted for states whenever it conducts RSD. Even if other conditions are met, UNHCR should refrain from conducting RSD whenever it cannot implement these standards. In addition to improving protection in host countries, UNHCR should use its RSD work as a means to lead other countries by example. By being more strict about where and when it conducts RSD, UNHCR should be able to focus more fiscal and human resources on its RSD activities, using its RSD sites as demonstration grounds for models of best practice which can then be promoted to governments.

Establishing clear standards of transparency should be a priority in the reform of UNHCR RSD. UNHCR's September 2005 publication of global standards for mandate status determination was an important step.⁹¹ There remain substantial gaps between UNHCR policy and established international standards of fairness, especially on establishing an independent appeal system and putting applicants and decision-makers on an equal footing in terms of access to evidence.

In addition to improving procedural policies and practices, UNHCR RSD would benefit from built-in institutional feedback mechanisms that would simultaneously raise and enforce standards. UNHCR could create an RSD ombudsman office, and publish an annual or biannual report assessing and detailing RSD procedures used at its various offices. UNHCR should also establish an independent UNHCR RSD Appeal Tribunal staffed by independent refugee law experts to publish rulings on selected cases emanating from field offices that raise important legal issues.⁹² All rejected asylum-seekers should enjoy an appeal of right in local field offices. This tribunal would be a tertiary appeal level (rather than an automatic appeal) that would select cases from field offices that raise important issues. Its decisions would be binding on UNHCR offices, allowing UNHCR to develop an evolving body of jurisprudence from real cases. It would be similar to having an international refugee court, but since this tribunal would only hear appeals from UN offices, it would lack the political downsides implied in having a UN agency reviewing decisions by governments.⁹³ Nevertheless, its precedents could be persuasive guidance for domestic courts hearing refugee cases.

5.2 UNHCR RSD as a means of pressuring governments?

I have examined UNHCR RSD from the assumption that refugee status determination should produce direct protection for refugees. Recognizing refugee status is a formal, symbolic act that has importance for refugees only if governments accept its legitimacy by protecting refugee rights. From this argument, the basis for UNHCR RSD is very questionable in a country that, like Lebanon in 2001 and 2002, systematically violates the principle of *non-refoulement*.

But what if UNHCR were to conduct individual RSD in a country precisely because a recalcitrant government refused to accept basic refugee rights? UNHCR might hope that the symbolic act of the United

⁹¹ Such a step was called for by Alexander, above n. 1, at 286.

⁹² See Alexander, above n. 1, at 287 (proposing an independent appeals system and urging UNHCR to publish appeals decisions); M. Kagan, 'The UN Needs a Refugee Court', (2005) RSDWatch Forum, www.rsdwatch.org.

⁹³ See A. Pyati, 'Overseeing the Refugee Convention Working Paper No. 1: Reporting', para. 7 (Dec. 2001) (available at <http://www.icva.ch/egibin/browse.pl?doc=doc00000505>) (noting that offering comments on state practices under the Refugee Convention would put UNHCR in conflict with governments).

Nations officially recognizing the existence of refugees would make it more difficult for the government to ignore their rights. It might be argued that the best way to confront a government that claims there are no real refugees on its soil would be for UNHCR to assess individual cases and declare that there are, in fact, refugees present. In a similar vein, UNHCR can demand a government grant access to detained asylum-seekers in order to assess whether they are in fact refugees. This tactic could in theory work in some circumstances, but there are reasons for caution.

To make this approach work, UNHCR would need to scrupulously follow standards of procedural fairness. Using RSD to pressure a government would assume that UNHCR will readily recognize refugees in the face of government pressure. Without such safeguards, UNHCR may be as much subject to pressure from governments as vice versa. The Lebanon example feeds such concerns, given that UNHCR's RSD recognition rate dropped from over 40 percent to below 10 percent in just a few years at the same time that government detentions and deportations increased.⁹⁴ While there is no direct evidence on which to argue the two phenomena are linked, the correlation is cause for concern. Just as UNHCR could shame a government by recognizing refugees the government prefers to ignore, UNHCR could give dangerous government policies a veneer of legitimacy if UNHCR mistakenly rejects *bona fide* refugees.

Beyond the mechanics of RSD, the problem with this approach is that it would put UNHCR into direct confrontation with a recalcitrant government. There are many good reasons to want a UN agency willing and able to take such stands. But there are doubts about whether UNHCR is such an agency, given its heavy dependency on governments for funding and access. UNHCR's experience and assets are best suited to using inducements and dialogue to encourage better government policies. Performing RSD is something that UNHCR can offer to a government, but not necessarily something UNHCR can use to challenge a government.

6. Conclusion

UNHCR's current RSD activities around the globe appear as an *ad hoc* response to government failures, though there are indications that UNHCR is now beginning to reassess its approach. On the ground, UNHCR's RSD activities appear explained by an inclination to fill gaps left by governments, but this is neither a sufficient justification for

⁹⁴ Based on figures from UNHCR Statistical Overviews and UNHCR, 2002 Population Statistics (Provisional).

UNHCR's RSD work, nor a fully developed plan of action. There are no published UNHCR guidelines that set out a systematic strategy for confronting the challenges inherent in substituting UN work for government responsibility. In October 2004, UNHCR's Director of International Protection Erika Feller told the UNHCR Executive Committee that:

We are also undertaking a concerted analysis of the role of RSD in UNHCR's global protection strategies, with a view to seeing where we should be strengthening our efforts, as well as where RSD might not be the correct response.⁹⁵

As UNHCR's RSD burden has grown in recent years, UNHCR needs a fully developed strategy to help it make country-by-country decisions about conducting RSD.

For international refugee law to function, it is essential to identify, from the mass of migrants around the world, those refugees eligible to enjoy international protection. This is a job designed for governments, but it is one that UNHCR could do well under certain circumstances. But to do it well, UNHCR must measure its endeavors to its actual authority and resources, and be willing to stand back even when governments fail to protect refugees.

Too often, weaknesses in UNHCR RSD operations have appeared as symptoms of an agency operating under too much strain, with too few staff to answer asylum-seekers' most basic inquiries, procedures that fail UNHCR's own stated standards, and limited impact on government policy. This predicament is not inevitable and it need not continue. In the foreseeable future, RSD could be a means for UNHCR to lead states by example.

⁹⁵ E. Feller, Statement at Fifty-fifth Session of the Executive Committee of the High Commissioner's Programme, 7 Oct. 2004.