# REGULATION GAPS OF THE UNHCR'S MANDATE REFUGEES IN TAJIKISTAN: INTERNATIONAL AND DOMESTIC LEGAL ASPECTS

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**Abstract** - UNHCR's unregulated practice of granting refugee and asylum seeker status under its mandate in Tajikistan challenges the sovereignty and fairness of the state jurisdiction. The UN organ acts in parallel with and functions as an alternative to the national refugee protection instrument leading to a degree vulnerability and invisibleness for its alien beneficiaries in the national legal system. As a result, mandate refugees are de facto in a refugee situation, but when viewing under legal lenses, they are not. In comparison with conventional refugees, mandate ones do not have local integration opportunities and cannot benefit from the guaranteed provisions of the national legislation. The purpose of this research is to address ways to overcome the regulation gaps of mandate refugees in Tajikistan. In the light of the upcoming security issues after the withdrawal of the Western troops from Afghanistan, one of the world's top refugee producing countries, and presence of the Islamic State extremist in its Northern provinces bordering with Tajikistan, it is inevitable that UNHCR's parallel operating mandate refugee protection program would cease to exist as a sustainable program.

**Keywords** - Conventional Refugees, UNHCR Mandate Refugees, Refugee Status Determination, Refugee Protection Instrument, Complementary Protection.

## I. INTRODUCTION

Under the international refugee law, refugee protection instruments depending on the resource provisions' are classified into two types: conventional and non-conventional based instruments. Conventional instrument is found on the basis of 1951 Convention relating to the status of refugees and its 1967 Additional Protocol (1951 Convention), while the latter instrument is established under the UNHCR's Statute and regional conventions (Mandal, 2005; Kholikov, 2011). In other words, they can be described as primary or relatively permanent protection and complementary or relatively temporary protection instruments. Tajikistan has a dual refugee protection system, which consists of national refugee protection regime, formed in accordance with the 1951 Convention and UNHCR's mandate refugee protection regime, created according to the Statute of this organization. The 1951 Convention norms, which are part of the international law with binding international duties, set a precise refugee definition. The provisions of the UNHCR's Statute and relevant General Assembly's resolutions broadly describe a refugee notion. Even though both Statute and mentioned resolutions are considered as soft laws, and strictosenso, do not impose obligations on the states to follow them, UNHCR hosting countries mostly acknowledge them in respect of their humanitarian motives.

UNHCR as a specialized UN Organization in responds to emergingrefugee crisis under the approval of the hosting states conducts refugee status determination (RSD) on behalf of them or jointly under its own mandate, until the formation of a sustainable national protection instruments. However, in the case of Tajikistan, UNHCR practiced its RSD mandate in parallel and as an alternative to the national refugee definition that resulted to various misunderstandings and obstacles for both asylums granting bodies and their asylum beneficiaries. The initial course of action of arefugee-seeking candidate is to first undergo an all-national procedure and receive a negative result. A negative result means that an asylum request does not meet the criteria of the Convention and national laws. A candidate then must re-apply and satisfy the standards set by UNCHR. This means that asylum-seeker first should be rejected by national RSD Commission, and then he/she should appeal thedecision of the Commission in the court system up to the Supreme court. Only in case of a failure, an asylum seeker may succeed in getting mandate protection. National RSD Commission, as a representative of executive branch, operates in the frame of the domestic laws that are adopted by the legislative branch. Meanwhile, national courts, as a judiciary bodies, consider cases of appeal and grant verdict based on the national legislation. Consequently, the decision of UNHCR to grant mandate refugee protection to nationally rejected asylum seeker challenges the complete State's authority, sovereignty, and national jurisdiction and in this perspective. While in principle, the two organs function as co-equal offices that address refugee-concerns, UNHCR appears to operate with a supranational authority.

Governments and UNHCR's offices worldwide conduct RSD procedures to define the applicability of an asylum request under their refugee protection instruments. A number of scholars, (Alexander, 1999, Kagan, 2011, Fresia, 2016) state that countries has a primary duty for carrying out RSD. UNHCR as well support this idea (UNHCR, 2014). However, majority of Asian states pass on the responsibility of carrying out this procedure to UNHCR' offices (Alexander, 1999). The active RSD atlas by countries and

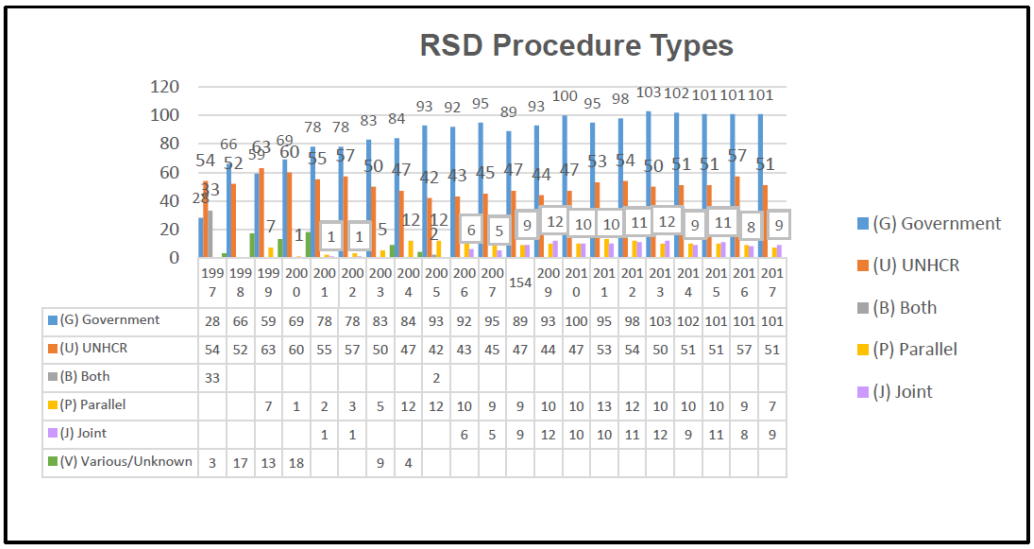
territories of asylum is diverse. For instance, in the last 20 years, visible modifications had happened in RSD system. In the 1997's world RSD system, government's RSD portion was 23, 7%, while the UNHCR had a 45, 7% RSD contribution (UNHCR, 1997).

In contrast to 1997 data, in the mid-2017, governments had 60, 5% RSD, whereas UNHCR's RSD constituted 30, 5% (UNHCR, 2017).Evaluation of the individual RSD application statistics registered by the states and UNHCR's offices worldwide in from 1997 to 2017 revealed that Tajikistan is not the only state where UNHCR conducts RSD in parallel with the government. Moreover, the data remarkably exposed that Post-Soviet region, specifically Central Asia, is UNHCR's notable target area to operate mandate RSD. In the following countries: Tajikistan, Kazakhstan, Kyrgyzstan, Azerbaijan, Ukraine, Thailand and Sudan, UNHCR RSD is functioning in parallel with hosting states' RSDs (UNHCR, 2017).

The significance of the research is its new and specific approach of examining UNHCR mandate RSD actingin parallel with and functions as an alternative to the national refugee protection instrument. Moreover, using legal-comparative and statistical methods to define the UNHCR RSD tendencies and mandate refugees regulation characteristics supported by UNHCR statistical datagathered within last 20 years s by deserves the readers attention.

## II. LITERATURE REVIEW

UNHCR RSD mandate is a controversial and disputable part of the UNHCR's supervisory responsibility. Scholars divergently define UNHCR's mandate. For example, Kagan states that UNHCR RSD is the result of the government failure to conduct RSD, expressed in a form of its unwillingness or inability; and he adds that UNHCR has neither mandate nor means to directly supplement the shortage in government's refugee protection, but it has an authority to promote this protection (Kagan, 2006). Alexander emphasizes that UNHCR RSD process should be a guiding model for the governments, but in fact, it is deficient and behind the practice of many countries which developed their national RSD system (Alexander, 1999). Another author claims that there is no clear provision in the 1951 Convention or the 1967 Protocol or …UNHCR Statute, which would give UNHCR the right to conduct individual RSD (Smrkolj, 2010). According to the UNHCR statistical yearbooks, there are three ways, how UNHCR can conduct mandate RSD in the soil of hosting states (UNHCR, 2008). First, when states do not have their national refugee protection mechanis,. UNHCR steps in, to fulfill this gap and conducts RSD on behalf of itself or the hosting governments. Second, when hosting states are developing their national protection mechanisms and UNHCR resources and expertise is involved in national RSD in the form of joint RSD activities. Third, when UNHCR considers national RSD insufficient, it will trigger a parallel RSD.




| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 154 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| (G) Government | 28 | 66 | 59 | 69 | 78 | 78 | 83 | 84 | 93 | 92 | 95 | 89 | 93 | 100 | 95 | 98 | 103 | 102 | 101 | 101 | 101 |
| (U) UNHCR | 54 | 52 | 63 | 60 | 55 | 57 | 50 | 47 | 42 | 43 | 45 | 47 | 44 | 47 | 53 | 54 | 50 | 51 | 51 | 57 | 51 |
| (B) Both | 33 | | | | | | | | 2 | | | | | | | | | | | | |
| (P) Parallel | | | 7 | 1 | 2 | 3 | 5 | 12 | 12 | 10 | 9 | 9 | 10 | 10 | 13 | 12 | 10 | 10 | 10 | 9 | 7 |
| (J) Joint | | | | | 1 | 1 | | | | 6 | 5 | 9 | 12 | 10 | 10 | 11 | 12 | 9 | 11 | 8 | 9 |
| (V) Various/Unknown | 3 | 17 | 13 | 18 | | | 9 | 4 | | | | | | | | | | | | | |

**Figure 1. The figure is based on the UNHCR Statistical Yearbooks from 1997 until mid-2017 years. For more details, please refer to the UNHCR website: https://www.unhcr.org.**

In this regard, 2003UNHCR Statistical Yearbook (UNHCR, 2003) highlights several reasons for UNHCR to conducts RSD under its mandate in a hosting country, when the states do not have their national refugee protection mechanism or they restrict the main norms of the 1951 Convention and 1967 Protocol. Remarkably, 2014 UNHCR Statistical Yearbook (UNHCR 2014) adds few new grounds, when governments have insufficient national procedures to determine people of concern, and in countries where UNHCR assumes RSD for the resettlement campaigns.

A literature search does not explain how UNHCR evaluates the sufficiency and insufficiency of the national RSD procedures. From a sufficient national RSD angel, UNHCR parallel RSD can be interpreted as a sanction or humanitarian intervention measure adopted to force the hosting government to confirm certain rules. Nevertheless, as it was highlighted in the previous chapter governments have different RSD evaluation procedures deriving from their internationally assumed obligation, while UNHCR has more humanitarian based evaluation standpoints. Thus, when nationally rejected asylum-seeker gets UNHCR mandate protection it doesnot doubt the fairness and legitimacy of national protection instruments. In the case ofTajikistan, we should bear in mind that UNHCR as a second-hand user, contracts with those who have already crossed international borders and who previously have dealt with national RSD system. A government provides access of the aliens to its territories for the asylum purposes and guarantees physical protection. Thus, UNHCR parallel RSD largely depends on the hosting governments. UNHCR has a leading role and obligation, but it also depends on the financial contribution of donor states, international and non-governmental implementing partner organizations (Guy S., 2008).

According to article 35 of the 1951 Convention contracting member states have a duty to cooperate with the UNHCR in supervising the application of the Convention. Relatively, UNHCR supervision of the hosting states RSD is clear . In vice versa, who will oversight and assess the UNHCR international protection RSD? For mid-2017, just UNHCR's independent RSD represented 30. 5% of the whole RSD activities, not taking into account the UNHCR participation in the joint and parallel RSDs in the hosting states (UNHCR, 2017).

UNHCR parallel RSD for the resettlement campaigns to somehowdescribes the purpose of this activity. Because on the one hand, a national refugee protection instrument is not willing to provide an asylum-seeker withprotection status, on the other hand, an asylum-seeker still have a fear of returning back to his country of nationality or country of his habitual residence. UNHCR mandate status, in this regard, might be explained as a status that protects an asylum-seeker from the hosting states involuntary removal, but not from the threat that caused a person to search an asylum. In other words, it could be explained as a protection from the first protector – an asylum hosting state. This phenomenon is very similar to the historical church asylum, where a free man or a slave founded protection from the prosecution of the state for committedaccidental crimes or mistreatment of their masters and violation of this sanctuary could cause Gods anger and punishment (Galenskaya, 1968).

UNHCR currently classifies the signatory states to 1951 Convention into two groups: the Industrialized and Non-industrialized countries. This is not in line with the UNHCR fairness and impartiality principles. In the majority of the industrialized countries, UNHCR has restricted authorities in terms of RSD, thus it mainly focuses on gathering statistics (UNHCR, 2014). However, all countries, where the UNHCR fulfills parallelRSD (UNHCR, 2017) are developing countries. The principles of noninterference in the domestic affairs and state sovereignty continue restricting the operation of UNHCR among several powerful Western states, Russia, China, India, Iran, and few other developing states (Gil,2001).

Determination of the legal status of mandate refugees not only in Tajikistan in other Central Asian countries is a complex issue. For example, since 2007 the government of Uzbekistan has not considered the UNHCR mandate certificates as the basis for extended legal residence, and persons carrying out such certificates must apply either for tourist visas or residence permits or face deportation (Report, 2014). Similarly, the new law of Kazakhstan adopted in 2010 does not recognize the mandate status certificates granted under the UNHCR competence and enforced the status holders to approach to the national Commission to reconsider their status according to national refugee protection instrument (FIDH, 2010). Likewise, after detecting several cases when criminal had a UNHCR mandate protection certificates there were concerns that UNHCR in Kazakhstan is a patron of terrorist (Darkenbaev, 2010)

Based on the discussions and the focus of the research, the following hypotheses are proposed:

1. There are significant differences in UNHCR and hosting states national is RSD procedures and their legal provisions.
2. UNHCR and hosting state protection instruments complement the international protection of refugees.
3. UNHCR parallel practice of granting mandate status does not mean a state's failure in protecting refugees.
4. In the light of security concerns, the issueof mandate refugees deserves urgent attention.
5. UNHCR lacks a model or guidance on the mandate RSD activities conducted in parallel with the hosting state's RSD.
6. Countries of the Eastern Block are the main field, where UNHCR conducts RSD in parallel with the hosting states.

## III. RESEARCH METHODS

Legal-comparative method is used to define the changing tendencies of issue of mandate refugees internationally and domestically over time and space. Article 35 of the 1951 Convention, empowered UNHCR to evaluate the Contracting States' information and statistics about the refugees,

application of the Convention and relevant national norms. In the states or territories that are not member of the Convention, UNHCR conducts RSD and assesses the data. Since the UNHCR is the uniquely authorized international institution to supervise and assess the states' RSD reports worldwide, its database was used as a reliable source.

## IV. SAMPLING DESIGN

UNHCR's statistics are available from 1997 until mid-2017 and cover all parallel RSD performing UNHCR field offices, states and territories. UNHCR statistics have these RSD type procedures: governmental ("G"), UNHCR's ("U"), joint government and UNHCR's ("J"), and various or unknown ("V"). However there are states or territories where both ("G") and ("U") operates in parallel. So, the author examined these cases and called the discovered RSD type procedure parallel ("P").

## V. RESULT AND DISCUSSION

The 1951 Convention norms, which are part of the international law with binding international duties, set a precise refugee definition. The provisions of the UNHCR's Statute and relevant General Assembly's resolutions broadly describe a refugee notion. Even though both Statute and mentioned resolutions are considered, as soft laws, and strictosenso, do not impose obligations on Tajikistan to follow them, the government mostly acknowledge them in respect of their humanitarian motives. However, in the light of upcoming security concerns, the issueof mandate refugees deserves proper regulations.

The UNHCR statement about the governments' insufficient national procedures that cause a parallel UNHCR RSD needs revision, because the mandate of the organization is too broad comparing to the state focus and founding grounds to grant a mandate status to nationally rejected asylum-seeker does not mean a state's failure or insufficiency in protecting refugees. UNHCR's selective policy in practicing parallel RSD in a specific area or group of states deserves reconsideration.

## CONCLUSION AND RECOMMENDATION

UNHCR's unregulated practice of granting refugee and asylum seeker status under its mandate in Tajikistan challenges the sovereignty and fairness of the state jurisdiction. The UN organ acts in parallel with and functions as an alternative to the national refugee protection instrument leading to a degree vulnerability and invisibleness for its alien beneficiaries in the national legal system. As a result, mandate refugees in compare with conventional refugees are in a discriminatory situation that leads to their social culnerability.

Creation of a model or regulation guidance on the NHCR mandate RSD activities conducted in parallel with the hosting state is a way to overcome the regulation gaps of mandate refugees not only in Tajikistan, but in another countries with the same issue.

## LIMITATIONS AND FURTHUR SCOPE OF THE STUDY

The unexplained changes of the RSD types in the UNHCR annual statistics is a gap for researchers. They cannot attest these changes in their works and properly clarify them. For instance, there is a gap in the statistics about the governmental and UNHCR' both "B" RSD type. How could an RSD type that took the second position among the existing RSD type procedures in 1997, so abruptly disappear from the statistical evaluation? Is there any kind of correlation between the loss of this type of RSD and a rise of new types - government and UNHCR joint "J" RSD in 2001 and government and the UNHCR' Parallel "P" RSD in 1999.

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