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United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

**UNHCR comments on the Bill for partial amendments to the Immigration Control and  
Refugee Recognition Act submitted to the 204<sup>th</sup> Diet session of year 2021  
Based on the Recommendations of the Sub-Committee on Detention and Deportation  
(SCDD), 7th Immigration Control Policy Discussion Panel  
9 April 2021**

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## **I. Introduction**

1. UNHCR offers these comments as the Agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.<sup>1</sup> As set forth in its Statute, UNHCR fulfils its international protection mandate, inter alia, by “promoting the conclusion and ratifications of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”<sup>2</sup> UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention,<sup>3</sup> to which Japan is a signatory State, according to which State parties undertake to “cooperate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.” The same commitment is included in Article II of the 1967 Protocol.<sup>4</sup>
2. On 19 June 2020, the Sub-Committee on Detention and Deportation (SCDD) under the 7<sup>th</sup> Immigration Control Policy Discussion Panel published its Report containing its Recommendations. UNHCR had an opportunity to contribute as an observer during the deliberations. Based on the SCDD’s Recommendations and other considerations, on 19 February 2021, Immigration Services

<sup>1</sup> See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428 (V), Annex, UN Doc. A/1775, Para. 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>2</sup> Ibid. (8)(a).

<sup>3</sup> UN Treaty Series No. 2445, Vol.189, p.137.

<sup>4</sup> UN Treaty Series No. 8791, Vol. 606, p.267.



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Agency (ISA), Ministry of Justice (MOJ) submitted a Bill to the Diet to partially amend the Immigration Control and Refugee Recognition Act (ICRRA) (“the Amendment Bill”). UNHCR acknowledges the challenges the ISA faces in relation to detention/deportation and how to address the issues of abuse of the asylum system<sup>5</sup> while ensuring to protect persons in need of international protection, which are common around the world. UNHCR commends ISA’s extensive efforts to address those issues (see below in paragraph 47) and welcomes the fact that some parts of the proposed amendments are expected to strengthen the protection of asylum-seekers and refugees, while there are a number of aspects that raise very serious concerns and require further discussions by members of the Diet and other relevant actors in light of Japan’s obligations under the 1951 Convention and other human rights instruments Japan is a Party to.<sup>6</sup>

3. This paper first lays out long-term recommendations that UNHCR proposes Japan to consider, and will subsequently discuss the proposed amendments and the relevant SCDD Recommendations that are particularly of interest to UNHCR, including by reiterating the comments that UNHCR has made through verbal and written submissions during SCDD. In doing so, UNHCR will not only refer to applicable international standards but will also refer to some of the relevant observations and submissions by Sub-Committee members recorded in the “Discussions” in relation to each Recommendation in the Report. It is hoped that this paper will help inform the discussions regarding the legislative amendments. Some parts of this paper may also be of use in considering the actual implementation of the amended ICRRA and other subsequent operational changes.

## **II. Long-term recommendations: For comprehensive asylum system/legislation**

4. In November 2011, on the occasion of the 60th anniversary of the adoption of the 1951 Convention and the 30th anniversary of Japan’s accession thereto, the Diet of Japan adopted unanimously a “resolution concerning Japan’s continued commitment to refugee protection and search for solutions.” The Diet resolution called on the government of Japan (GoJ) “to develop a **comprehensive asylum process** in Japan.”
5. As detailed in UNHCR Japan’s “Points of consideration related to global and domestic refugee and statelessness issues (Update I) (hereinafter ‘Points of consideration’)” (May 2017),<sup>7</sup> in UNHCR’s view, such a comprehensive approach encompasses the whole spectrum of refugee protection, including development of a **comprehensive asylum law, a dedicated agency, appropriate reception conditions** for asylum-seekers including the use of **alternatives to detention (ATD), fair and**

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<sup>5</sup> See paragraphs 30-32 on “The concept of manifestly unfounded claims” of this document.

<sup>6</sup> Japan is a State party to CRC, ICCPR, CAT, ICESCR and other major human rights instruments.

<sup>7</sup> See for more details UNHCR Japan, “Points of consideration related to global and domestic refugee and statelessness issues (Update I)” (May 2017), available at: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points\\_for\\_Consideration\\_ENGLISH\\_May\\_2017.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points_for_Consideration_ENGLISH_May_2017.pdf).



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**efficient asylum procedures, integration of refugees, and resettlement/humanitarian admission.**

**Addressing statelessness** would also be an extension to such a comprehensive process.

6. While refraining from reproducing what is already discussed in the “Points of consideration (May 2017),” some aspects merit reiteration, in summary, to lay the background for the “Short-term recommendations” that follow below. First, it is recommended that an appropriate and **comprehensive legal framework** is developed, covering the continuum of asylum in a holistic manner including reception arrangements, refugee status determination (RSD) as well as integration matters. Such a law, which could be separate from the legislation governing immigration control-related matters, should clearly stipulate the rights and obligations of asylum seekers and refugees, as well as contain references on the responsibilities of different authorities involved. It would also be useful to consider the establishment of a **dedicated government agency** responsible for all key refugee-related matters, which would consolidate the tasks currently handled by different governmental entities. The establishment of comprehensive legislation and a dedicated agency is, while not necessarily indispensable, an effective measure that would help ensure a more holistic, efficient, and protection-oriented approach to asylum related issues. In the absence of a dedicated agency, it would be useful at least to consider structural changes to strengthen, consolidate and upgrade the current entities responsible for RSD and other operations related to asylum.
7. Fair and efficient asylum procedures<sup>8</sup> are critical to identify those in need of international protection under the 1951 Convention and other international human rights obligations. As identified in the abovementioned “Points of Consideration (May 2017),” in addition to the full and inclusive

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<sup>8</sup> See for example Conclusion No. 8 (XXVIII) Determination of refugee status, UNHCR Executive Committee, 1977, available at: <https://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html>. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983; No.55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74 (XLV) – 1994; No. 81 (XLVIII) – 1997; No. 82 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 92 (LIII) – 2002. Also see the extensive body of UNHCR’s materials including the “Global consultations on international protection/Third track: Asylum processes (Fair and efficient asylum procedures),” UNHCR, 2001, available at: <https://www.refworld.org/docid/3b36f2fca.html>. Further, see Chapter 7 “Making asylum procedures fair and efficient,” in UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate* (26 August 2020), available at: <https://www.refworld.org/docid/5e870b254.html>(Japanese translation of the previous version can be found at: <https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/PSRSD.pdf>), “Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards” (2 September 2005) available at: <https://www.refworld.org/docid/432ae9204.html> (Japanese translation link: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/0509\\_rsd.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/0509_rsd.pdf)), “UNHCR Discussion Paper: Fair and Fast - Accelerated and Simplified Procedures in the European Union” (25 July 2018), available at: <https://www.refworld.org/docid/5b589eef4.html>, “UNHCR Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR’s Mandate (The Glossary)” (2020), available at: <https://www.refworld.org/docid/5a2657e44.html>. See also UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued 2011), available at: <https://www.refworld.org/docid/4f33c8d92.html> (Japanese translation link: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/HB\\_web.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/HB_web.pdf)).



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interpretation/application of the refugee definition, the following core elements in particular need to be ensured: (1) the independence of appeals within the RSD process, (2) provision of legal aid and support to asylum seekers at all stages of the asylum process, (3) compilation and availability of independent, up-to-date, relevant and reliable country of origin information (COI), (4) training and capacity development of all actors involved in the asylum process, particularly of decision makers and including interpreters, legal representatives and the judiciary (5) the introduction of adequate legal provisions, including the criteria and procedural safeguards for the treatment of subsequent applications and the granting of complementary forms of protection, (6) the allocation of sufficient financial and human resources, and, (7) well-established mechanisms that assure the quality of the decision making process. Legislation for a framework for the treatment of those found not to be in need of international protection was also considered to be an asset. While a number of the above elements were included in the Recommendations of the Sub-Committee on the RSD System (2014) in which UNHCR participated as an observer, ISA has made significant progress in some areas, specifically (3) and (4), and in (6) to some extent. ISA is currently making efforts to address item (5) (See also paragraph 47 below).

8. In terms of addressing statelessness, accession to the 1954 Convention on the Status of Stateless Persons (the 1954 Convention) and the 1961 Convention on the Reduction of Statelessness (the 1961 Convention) as well as the establishment of a statelessness determination procedure to protect stateless persons are desirable.<sup>9</sup>
9. In addition, it will be important that Japan develop legal migration alternatives or channels, including through regularization,<sup>10</sup> which will help address the issue of those wishing to stay in Japan for non-protection/statelessness related reasons resorting to the RSD procedure.
10. Japan's further progress on the above would constitute an important contribution to the efforts by the international community and be in line with the Global Compact on Refugees (GCR)<sup>11</sup> and the Global Compact on Migration (GCM)<sup>12</sup> that Japan has endorsed, as well as the #IBelong Campaign

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<sup>9</sup> See more details in paragraphs pp.6-7 of UNHCR Japan, "Points of consideration related to global and domestic refugee and statelessness issues (Update I)" (May 2017), available at: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points\\_for\\_Consideration\\_ENGLISH\\_May\\_2017.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points_for_Consideration_ENGLISH_May_2017.pdf).

<sup>10</sup> pp.250-254, Section 9.2 "Migration options as an alternative to return," UNHCR, "The 10-Point Plan in Action on Refugee Protection and Mixed Movements, 2016 Update, Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options" (2016) available at: <https://www.refworld.org/docid/584185c14.html>. The Japanese translation of the excerpts of the relevant parts has been submitted to SCDD's 4<sup>th</sup> meeting on 12 December 2019 and is available at: <http://www.moj.go.jp/content/001318369.pdf>.

<sup>11</sup> United Nations, "Report of the United Nations High Commissioner for Refugees. Part II Global compact on refugees" (17 December 2018), available at: [https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf).

<sup>12</sup> United Nations, "The Global Compact for Safe, Orderly and Regular Migration (GCM)" (19 December 2018) available at <https://www.iom.int/global-compact-migration>.



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to End Statelessness<sup>13</sup> supported by both GCR and GCM, and will contribute to the achievements of Sustainable Development Goals (SDGs)<sup>14</sup> that Japan is committed to. In particular, under the heading “Identifying international protection needs,” GCR mentions the Asylum Capacity Support Group (ACSG) in paragraph 62 to support States in developing and strengthening fair, efficient, adaptable national asylum systems that have integrity, a mechanism that Japan could utilize.

### **III. Short-term recommendations: Comments on the ICRRRA amendments following the SCDD Report**

11. As an overall comment, UNHCR stands ready to make relevant contributions to GoJ in the process of implementing the SCDD Report and amending ICRRRA in order to ensure international refugee and human rights law principles, including non-refoulement, are properly observed by Japan. In particular among the proposed amendments in the Bill, the proposal to lift automatic suspension of deportation procedures for certain cases (hereinafter “suspensive effect” - currently applicable to all asylum-seekers) raises very serious concerns as being undesirable because it increases the risk of refoulement. UNHCR considers that rather than devoting limited resources to legislate and implement any exceptions to the currently-automatic suspensive effect, measures to further improve the RSD quality, including by fully implementing the Recommendations of the 2014 Sub-Committee on RSD System and by continuing to make efforts to address other challenges such as those identified in paragraph 7 above will be crucial. Such efforts to invest resources on quality and prompt decision-making upon first-time applications would help fundamentally address the issues of detention and deportation which SCDD was tasked to consider. Nevertheless, if Japan were to decide to introduce any exceptions to the automatic suspensive effect as the Amendment Bill proposes, they have to be for very limited cases and must not include first-time applicants, and proper measures need to be put in place in order to ensure the principle of non-refoulement – including by establishing proper procedural safeguards as laid out below (Section 1 on lifting of automatic suspensive effect). This is on the premise that the measures to ensure the quality of the original RSD decisions have already been undertaken, as the relevant parts of the SCDD Report note.

#### **1. On lifting of automatic suspensive effect for certain cases (Article 61-2-9(4)(i) and (ii) of the**

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<sup>13</sup> See GCR section 2.9 and also 2.8 as well as GCR para 20 (e). In November 2014, UNHCR launched the #IBelong Campaign to End Statelessness within ten years by 2024, which was welcomed by the UN General Assembly Resolution in December 2014. See details on <https://www.unhcr.org/ibelong/>.

<sup>14</sup> See for example Ministry of Foreign Affairs (MoFA)’s specialized web-page at <https://www.mofa.go.jp/policy/oda/sdgs/index.html>.



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## Amendment Bill<sup>15</sup>)

### Excerpts of the relevant articles from ICRRA (current and amendment bill) and the SCDD Recommendations

**Article 61-2-9(1)-(3) of the Amendment Bill** (Article 61-2-6 of the current ICRRA) (Relation with the Procedures for Deportation) in summary provides for **automatic suspension of the deportation procedure**, including the **execution of deportation** itself, for persons who have applied for asylum. Article 61-2-9(4) of the Cabinet ICRRA Bill newly introduces exceptions to such safeguard.

Specifically, Article 61-2-9(3) of the Bill provides, in summary: “When the procedures for deportation provided for in Chapter V are carried out, deportation pursuant to the provisions of Article 52, paragraph (3)(...) are to be suspended with respect to a Foreign National without a status of residence (UNHCR Note: who has filed the application for refugee status or complementary protection).

Article 61-2-9(4) of the Bill then provides “*The provisions of the preceding paragraph do not apply if a Foreign National without a status of residence in the same paragraph falls under any of the following items.*

*(i) a person who, prior to the application (...) (Note by UNHCR: for refugee status or complementary protection) **filed the applications twice** while the person was in Japan, and each application (...) (Note by UNHCR: was rejected) (except for those who submit, **when applying** (UNHCR Note: i.e. for refugee status or complementary protection for the third time or more), **the material constituting reasonable grounds for recognizing as a refugee or a person to be granted complementary protection.**)*

*(ii) a person who was sentenced to **imprisonment or imprisonment without work for life or a period of exceeding 3 years** (except for those who were found guilty with full or partial suspension of execution of sentences) (UNHCR Note: While in Japan)<sup>16</sup> or a person who falls under **Article 24 (iii)-2, (iii)-3 or (iv) (l) through (n)**, or a person for whom **there are reasonable grounds to suspect that he or she falls under any of the abovementioned provisions** (UNHCR Note: i.e. Article 24 (iii)-2, (iii)-3 or (iv) (l) through (n) of ICRRA).”*

<sup>15</sup> Immigration Control and Refugee Recognition Act (ICRRA) Cabinet Bill, 19 February 2021: available at <http://www.moj.go.jp/isa/laws/bill/index.html>.

<sup>16</sup> While the text of the Bill does not specify that the said criminal sentencing occurred in or outside Japan, considering the where this provision fits in the Bill, it is understood that this provision refers to that in Japan.



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Article 24 (as referred to by Article 61-2-9(4) of the Bill above) of the current ICRRA<sup>17</sup> provides for the grounds for deportation, stating “Any Foreign National who falls under any of the following items may be deported from Japan in accordance with the procedures provided for in the following Chapter:”

Article 24(iii)-2 provides, as one of such grounds: “*a person who the **Minister of Justice determines**, based on reasonable grounds, is **likely to commit a criminal act for the purpose of intimidating the general public and governments** (...) provided for in Article 1 of the Act for Punishment of the Financing of Criminal Activities for the Purpose of Intimidation of the General Public and of Governments (Act No. 67 of 2002)*<sup>18</sup>, **prepare to commit a criminal act for the purpose of intimidating the general public and governments, or facilitate**<sup>19</sup> a criminal act for the purpose of intimidating the general public and governments;”.

Article 24(iii)-3 provides “*a person whose entry into Japan is required to be prevented pursuant to an international agreement,*<sup>20</sup>

Article 24(iv) items (l) to (n) provides:

*(l) A person who attempts or advocates the overthrow of the Constitution of Japan or the Government formed thereunder by means of force or violence, or who organizes or is a member of a political party or any other organization which attempts or advocates the same.*

*(m) A person who organizes, is a member of, or is closely affiliated with any of the following political parties or other organizations:*

*1. A political party or organization which encourages acts of violence or the assault, killing, or injury of officials of the Government or local public entities for the reason of their being such officials.*

<sup>17</sup> Immigration Control and Refugee Recognition Act (currently in force), available at: <http://www.japaneselawtranslation.go.jp/law/detail/?id=3039&vm&re>.

<sup>18</sup> Article 1 Act on Punishment of Financing to Offences of Public Intimidation, No.67 of 2002, as last amended by Act No. 113 of 2014, available in English at: <http://www.japaneselawtranslation.go.jp/law/detail/?vm=&re=&id=2977&lvm=02>. While the full text of the Article should be consulted, it refers to, for example, killing, injuring, hijacking, damaging buildings or other related behaviors with the aim of intimidating the public, national or local governments, or foreign governments and other entities, and includes criminal acts referred in the treaties concluded by Japan in order to prevent terrorism.

<sup>19</sup> Article 3 to 5 of this Act provides punishment for the acts to facilitate these offenses e.g. by provision of funds or other benefits which contributes to their commission. Act on Punishment of Financing to Offences of Public Intimidation, No.67 of 2002, as last amended by Act No. 113 of 2014, available in English at <http://www.japaneselawtranslation.go.jp/law/detail/?vm=&re=&id=2977&lvm=02>.

<sup>20</sup> Article 24, item(iii)-3, see footnote 18. A Security Council Resolution based on Article 25 of Charter of the United Nations is considered to constitute “an international agreement” in this item. Shutsunyukokukanri horei kenkyukai (Immigration Control Laws Study Society). Tyukai Hanrei Syutsunyukoku Kanri Jitsumu Roppo (Annotation and Cases: Immigration Control Practical Laws), Tokyo, Kajo Syuppan (2020) p98.





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2. *A political party or organization which encourages illegal damage or destruction of public facilities.*
  3. *A political party or organization which encourages acts of dispute, such as stopping or preventing the normal maintenance or operation of the security facilities of a factory or other workplace.*
- (n) *A person who has prepared, distributed or exhibited printed materials, motion pictures, or any other documents or drawings whose purpose is to attain the objectives of any political party or organization prescribed in sub-item (l) or (m). ”<sup>21</sup>*

### Excerpts of the relevant part of the Recommendations of SCDD Report

#### Section IV.1(4) of the SCDD Report (p.34) (italics and bold supplied):

“[1] Certain **exceptions** should be put in place to the **suspensive effect on deportation**, while providing appropriate protection for those in need of asylum referred to in [3] below, **on the premise that the principle of non-refoulement**, reflected in the provisions of Article 33 of the Refugee Convention and other instruments, **is complied with**. For example, consideration should be given to the introduction of measures which make it possible to ensure **prompt deportation** of the applicants who submit **subsequent applications for refugee status without the circumstances that may affect the findings** that had constituted the basis for refusal of their **previous applications** for refugee status.

[2](...)When consideration is given to making the assessment procedures streamlined and more efficient, care should be taken to ensure that **third party check** on the appropriateness of administrative decisions, with a view to guaranteeing due process. Moreover, in the interviews of the first-time applications, sufficient attention should be paid to the circumstances of the applicants, including by bearing in mind in conducting the hearings that it might be difficult for the applicants to disclose all of their circumstances from the outset.

[3]When taking the measures referred to in [1] and [2] above, **measures should also be taken at the same time** to make sure that **those in need of asylum are protected**, paying attention to international trends, on the basis of the recommendations made in December 2014 in the report of the Sub-Committee on the Refugee Recognition System, the Sixth Immigration Policy Discussion Panel, on the “Outline of the Revisions for Operation of the Refugee Recognition System”, including the **clarification and publication of the criteria to determine the eligibility for refugee status** and the establishment of a new

<sup>21</sup> ICRR as currently in force, No.319 of 1951, as last amended by Act No.113 of 2014, available at: <http://www.japaneselawtranslation.go.jp/law/detail/?id=3039&vm&re>.



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*framework for granting special permission to stay to those who are not recognized as Convention refugees but are in need of international protection.”*

### 1.1. Lifting of automatic suspensive effect from certain cases: General comments

12. Article 61-2-9, paragraph (4) of the Cabinet’s ICRRRA amendment bill proposes to **lift the suspension of deportation** pending an RSD decision including on appeal (referred to as “suspensive effect”), which is **automatic under the current ICRRRA**, from certain cases. The UNHCR’s fundamental position on this is that removing automatic suspensive effect of an asylum application is undesirable because it **“increases the risk of persons who are in need of international protection being returned**, contrary to the principle of non-refoulement.”<sup>22</sup>

13. UNHCR thus believes that:

*“An asylum-seeker should in principle have the **right to remain** on the territory of the asylum country and should not be removed, expelled or deported **until a final decision has been made** on the case (...).”<sup>23</sup>*

Further, right to effective remedy must be guaranteed as follows:

*“[S]tandards of due process require an appeal or review mechanism (...) All asylum-seekers should therefore have the right to an appeal or review against a negative decision, including a negative admissibility (UNHCR Note: explained below Section 1.2.2 below), decision before an authority, court or tribunal that is separate from and independent of the authority that made the original decision.(...) The remedy needs to be available in practice as well as in law, meaning, for instance, that the **appellant must have sufficient time** to file an appeal and prepare the appeal (...).”<sup>24</sup>*

Appeals (as well as first instance applications) should in principle have automatic suspensive effect, as below:

*“The **appeal should in principle have “suspensive effect,”** that is, the asylum-seeker should be allowed to remain on the territory until a final decision on the appeal has been made. **Given the***

<sup>22</sup> “Efficiency measures” within Executive Summary, p.5, “UNHCR Comments on the European Commission’s Proposal for an Asylum Procedures Regulation,” April 2019, COM (2016) 467, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>23</sup> See in general UNHCR’s submission to the 2nd SCDD meeting (10 November 2020) “Excerpts of UNHCR Positions/Guidance on Manifestly Unfounded or Abusive Applications and Other Matters.” Section 7.10 “Appeals and effective remedy” in UNHCR, *A guide to international refugee protection and building state asylum systems*, (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.180.



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*potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard to ensure respect for the principle of non-refoulement; and Suspensive effect should be automatic. Exceptions are only possible for manifestly unfounded or abusive applications as defined in Executive Committee Conclusion No. 30 (...), res judicata subsequent cases (...) and decisions allocating responsibility for determining an asylum claim on the basis of a bilateral or multilateral agreement (...). Even in these cases, the appellant should have an effective possibility to apply for suspensive effect.”<sup>25</sup>*

14. In this context, UNHCR notes the fact that the SCDD’s relevant Proposal at Section IV.1(4) of its Report also makes the lifting of the automatic suspensive effect **conditional upon** the fact that “the **non-refoulement** principle (...) is complied with.” Japan thus needs to consider, in light of the international standards above and SCDD recommendations, how to ensure non-refoulement, if it were to decide to indeed make exceptions to the currently automatic suspensive effect of a subsequent asylum application including on appeal. SCDD’s Recommendations under Section IV.1(4) [2] and [3] in this regard **to enhance the quality of RSD**<sup>26</sup> as a **precondition** to introduce exceptions to suspensive effect - including by implementing the remaining Recommendations by the 2014 Sub-Committee on RSD and by introducing third-party checks on the appropriateness of administrative decisions are thus important, as to be discussed in detail in paragraph 46 below.
15. For the purpose of ease of understanding, to lay out the persons for whom suspensive effect is lifted under Article 62-2-9(4) in simple terms as UNHCR understands (see the above excerpts of the relevant Articles/their full text for the precise criteria for accurate understanding): Article 61-2-9(4)(i) of the Bill covers **subsequent applicants beyond the third-time** who do not submit **justifications to re-examine the merits of their claims**. Article 61-2-9(4)(ii) lifts it for **those who have been sentenced to three years or more of imprisonment** (in Japan), and those who fall within Article 24, item(iii)-2, (iii)-3 or item(iv), sub-items (l) through (n) of current ICRRRA i.e. who are suspected, through the examinations within ISA, that they **might possibly become involved in terrorism, violent or subversive or other activities** and other persons.<sup>27</sup> As considered below, there appear

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<sup>25</sup> Section 7.10 “Appeals and effective remedy” in UNHCR, *A guide to international refugee protection and building state asylum systems* (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.179.

<sup>26</sup> See also paragraphs 12-14 above in this paper.

<sup>27</sup> While it is difficult to describe in summary the persons who fall within the latter part of Article 61-2-9, paragraph (4), item(ii), ICRRRA Cabinet Bill (which is in turn referring to Article 24, item(iii)-2, (iii)-3 or item(iv), sub-items (l) through (n) of ICRRRA (currently in force)), this summary description is used herein because the authoritative “Commentary to ICRRRA” refers to persons who fall within item(iii)-2, (iii)-3 as “foreign terrorists and other persons” and those who fall within Article 24 item(iv), sub-items (l) through (n) as “those involved in violent or subversive activities”, also taking into consideration the wording of Article



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limited procedural safeguards to ensure an effective remedy i.e. to enable the asylum-seekers concerned to appeal against the decision to lift the automatic suspensive effect (except for the possibility of judicial review on certain aspects), and to meanwhile request an independent body to suspend deportation. Below, UNHCR will examine each of the proposals under Article 61-2-9, paragraph (4), sub-paragraphs (i) and (ii) and provide key recommendations.

## **1.2. Subsequent applicants (third time or more) without “materials constituting reasonable grounds for protection” (Article 61-2-9(4)(i) of the Amendment Bill)**

16. Article 61-2-9(4)(i) of the Amendment Bill provides that **subsequent applicants beyond third-time who do not submit the “materials constituting reasonable grounds for recognizing as a refugee or a person to be granted complementary protection”** will have suspensive effect lifted. UNHCR understands that under Article 61-2-9(4)(i), suspensive effect can be lifted for third-time (and on) subsequent applicants during the first instance examination before a personal interview is held.

### **1.2.1 UNHCR’s views on the processing of subsequent applications in general**

17. UNHCR’s basic position on the processing of subsequent applications in general is that:

*“In order to prevent abuse of the asylum system, legislation may provide for subsequent applications submitted after a final rejection of the claim on the merits to be subjected to **accelerated and/or simplified procedures.**”* (On the use of accelerated procedures, please see Section 1.2.4 below.)

Further, UNHCR believes that for subsequent applications that have been properly adjudicated, **preliminary or admissibility examination** might be a useful tool to enhance the RSD efficiency, as also touched upon during SCDD sessions,<sup>28</sup> provided that the criteria for such examination is properly established and interpreted. On the other hand, while subsequent applications without justifications to re-examine the merits of their claim are indeed among the narrow exceptions to the grant of automatic suspensive effect<sup>29</sup> as a matter of State practice, UNHCR’s basic position remains that the lifting of automatic suspensive effect is generally undesirable as it increases the risk

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24 item (iii)-2, Shutsunyukokukanri horei kenkyukai (Immigration Control Laws Study Society), Chukai Hanrei Syutsunyukoku Kanri Jitsumu Roppo (Annotation and Cases: Immigration Control Practical Laws), Kajo Syuppan (2020).

<sup>28</sup> See the discussion related to p.4 of Professor Kawamura’s submission to the SCDD 2nd session, available at: <http://www.moj.go.jp/content/001312803.pdf>.

<sup>29</sup>Section 7.10 “Appeals and effective remedy” in UNHCR, *A guide to international refugee protection and building state asylum systems* (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.179.



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of refoulement.<sup>30</sup> If automatic suspensive effect is lifted for this category of persons, such persons should be able to seek effective remedy against the decision to consider their claims to be without the abovementioned materials. Further, those pursuing an appeal **should have an effective opportunity to apply** with an independent body **for suspensive effect of the appeal.**<sup>31</sup>

*“Where a case has been **properly and substantively adjudicated** in the jurisdiction (and was not, for example, (...)closed following the explicit or implicit withdrawal of an earlier claim), a simple administrative **decision not to entertain the application** rather than its reconsideration would be in keeping with the *res judicata* principle.”<sup>32</sup>*

18. It should however be noted that for a case to be considered to have been “**properly adjudicated**” as mentioned in the preceding paragraph, the quality of the original RSD decision and the minimum due process standards need to be guaranteed. These include the right to be heard, shared burden of proof and right to interpretation enabling the applicant to take part in the procedures in a language that he or she understands as well as right to effective remedy i.e. to appeal a negative decision to an authority separate and independent from the first instance decision-making authority with assistance of legal counsel.<sup>33</sup> Further, due process as well as the **declaratory and forward-looking character** of the refugee definition nevertheless require States to assess the asylum-seeker’s **individual circumstances.**<sup>34</sup>

### **1.2.2 Preliminary examination and the interpretation of the “materials constituting reasonable grounds” for protection**

19. UNHCR notes the fact that the term “materials constituting reasonable grounds for recognizing as a refugee or a person to be granted complementary protection” under Article 61-2-9(4)(i) is not defined. However, several opinions cited in the “Discussions” accompanying Recommendations [1] and [2] of the Section IV.1(4) of the SCDD Report refer to “new circumstances” and “new evidence” that affect the findings of the original rejection decisions (pp.34-36). Thus, the above “circumstances”

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<sup>30</sup> “Efficiency measures” within Executive Summary, p.5, “UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation,” April 2019, COM (2016) 467, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>31</sup>Section 7.10 “Appeals and effective remedy” in UNHCR, *A guide to international refugee protection and building state asylum systems* (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.179.

<sup>32</sup> Section 7.9 “Subsequent application and abandonment or withdrawal of applications” in UNHCR, *A guide to international refugee protection and building state asylum systems* (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.177.

<sup>33</sup> Ibid. 157.

<sup>34</sup> UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>. Section 7.9 (Subsequent application and abandonment or withdrawal of applications), pp.177-178.



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might include, but not be limited to, new circumstances, elements, findings and evidence that arose after the original decisions. Under UNHCR’s standards, such individual assessments need to examine whether there are (a) “any significant substantive changes to the asylum seeker’s individual situation and/or to the circumstances in the country of origin that may give rise to a *sur place* claim, and (b) “new evidence that relates to and supports the initial claim that warrants examination of the substance of the new claim or reopening the original claim.”<sup>35</sup>

20. UNHCR considers that preliminary examinations to identify whether there are new elements and findings “should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Procedural requirements, such as time limits, should not be established in a way that could effectively prevent applicants from pursuing subsequent applications.”<sup>36</sup>

Further, UNHCR recommends States to take into consideration:

“[V]alid reasons why an asylum-seeker did not disclose all the relevant facts in the initial claim, such as stigma associated with sexual violence, trauma, and/or misinformation.”<sup>37</sup>

Moreover, UNHCR believes that imposing a time limitation on the reopening of a claim, or a rejection of a claim in such circumstances, “carries the risk that existing protection needs are not examined and recognized.”<sup>38</sup>

21. UNHCR considers that preliminary examinations to identify whether there are new elements and findings “should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951

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<sup>35</sup> UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, Section 7.9 (Subsequent application and abandonment or withdrawal of applications), p.178. See also “Unit 9: Procedures for RSD Case Closure and Re-opening” in UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate (26 August 2020), available at: <https://www.refworld.org/docid/5e870b254.html> (Japanese translation of the previous version can be found at: <https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/PSRSD.pdf>).

<sup>36</sup> UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions” (March 2010), available at: <https://www.refworld.org/docid/4c63e52d2.html>, p.407(Interpretation of “new elements or findings”)

<sup>37</sup> UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, Section 7.9 (Subsequent application and abandonment or withdrawal of applications), p.178. See also UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions” (March 2010), available at: <https://www.refworld.org/docid/4c63e52d2.html>, p.409.

<sup>38</sup> UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, Section 7.9 (Subsequent application and abandonment or withdrawal of applications), p.178.



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*Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Procedural requirements, such as time limits, should not be established in a way that could effectively prevent applicants from pursuing subsequent applications.”<sup>39</sup> Moreover, as also indirectly indicated in the SCDD Report (pp.35-36), the “materials constituting reasonable grounds for recognizing as a refugee or a person to be granted complementary protection” under Article 61-2-9(4)(i) may also include situations where “[T]here is serious reason to believe that the claim was improperly decided and/or that grounds for eligibility for refugee status were not adequately examined or addressed.”<sup>40</sup>*

### 1.2.3 Effective remedy

22. UNHCR understands that the **examination to determine whether one has submitted the “materials constituting reasonable grounds for recognizing as a refugee or a person to be granted complementary protection”** under Article 61-2-9(4)(i) of the Amendment Bill does **not** constitute a formal procedure such as an “admissibility procedure” discussed above in Section 1.2.2. According to ISA, the determination that one has **not** submitted the justifying material (or the decision to lift the suspensive effect itself) does **not** constitute an “administrative disposition,” thus is **not**, in itself, subject to administrative or judicial review. It is thus theoretically possible for a person applying for the third time to be deported before he or she is personally interviewed or receive the first instance decision.
23. The subsequent applicant for whom suspensive effect has been (or will be) lifted could stop his or her deportation by filing a lawsuit to revoke the deportation order that has been issued and request the suspension of the execution of the deportation order. It needs to be highlighted that in Japan, it is not, in practice, possible for the majority of asylum-seekers to secure legal counsel in order to seek

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<sup>39</sup> UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions” (March 2010), available at: <https://www.refworld.org/docid/4c63e52d2.html>, p.407(Interpretation of “new elements or findings”)

<sup>40</sup> In terms of State practice, Article 40 of APD (2013) provides for preliminary examination as to “whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection.” A detailed study on what is considered to constitute “new elements or findings” under the equivalent Article in the previous version of APD (2005) can offer useful insights. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status which has been superseded by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

A comparative analysis of how Article 32(4) (“new elements or findings”) as well as (5) (other reasons to re-open) of APD 2005 in different EU States can be found in UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions” (March 2010), available at: <https://www.refworld.org/docid/4c63e52d2.html> pp.400-409.



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judicial review, in the absence of State-funded legal aid programmes applicable to those without legal status and in light of the very small number of volunteer asylum attorneys. To ensure due process including to ensure that a subsequent applicant in question could exercise a right to an effective remedy, UNHCR recommends that a **formal admissibility procedure** be established so that a negative decision to consider a case to be without justifications to re-examine its merits can be subject to **administrative review under the** Administrative Complaint Review Act. If this approach is not taken, then it is all the more important that GoJ takes measures to respect an individual's access to judicial review, such as by establishing the provision that deportation would not be executed during the six months allowed for the person to prepare a lawsuit if he or she wishes (to cancel the rejection of refugee status or complementary protection, or the deportation order on the grounds of such refugee claim) under the Administrative Case Litigation Act. Further, it would be very helpful that measures are taken to **facilitate access to legal representation** such as by amending the Comprehensive Legal Support Act, which currently excludes from its beneficiaries persons without legal status.

24. In terms of the timeframe of the submission of the “materials,” Article 61-2-9(4)(i) mentions “when applying” for refugee status or complementary protection third time or beyond. This raises a question whether corroborative evidence which later becomes accessible to support the statement of an asylum-seeker included on the subsequent RSD application form might not be taken into consideration. According to ISA's current interpretation, however, while the materials should normally be submitted upon application, if the submission of materials is foreseen at the time of application such as with the applicant mentioning that such submission is expected in the near future, such material is likely to be taken into consideration. It is nevertheless recommended that GoJ explicitly stipulate in 61-2-9(4)(i) a reasonable time following the subsequent application to allow an individual to submit such materials, and by when the ISA is to make a determination whether the submitted materials constitute “reasonable grounds” for protection, so that a person would know that he or she might be deported at any time beyond that day. While the UNHCR's position remains that lifting of the suspensive effect is undesirable, if Japan makes the decision to lift the suspensive effect for the category of people under Article 61-2-9(4)(i), any determination to lift it should only be made following the passage of the above period.
25. Subsequent applicants normally have already been issued with a deportation order upon the rejection of their previous RSD application. Concerns arise that theoretically, the subsequent applicant in question might not realize whether or not the suspensive effect has been granted to him or her and be deported without being able to seek an effective remedy. In this context, UNHCR understands that under Article 52-8 (Deportation Plan), the newly created provision, the person in question would normally be informed of the ISA's plan on when to deport him or her. Article 52-8 states:





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*“An Immigration Control Officer, when a Foreign National falls under any of the following items, shall formulate a plan for deportation, after grasping the circumstances that hinder immediate deportation of the person through measures such as by conducting a hearing on the intention of the person who has been issued with a deportation order: (i) When detaining a person under Article 52(9); (ii) When it has been decided that monitoring measures will be applied to the person who has been issued with a deportation order (...)”*

UNHCR understands that, while a written deportation order is normally to be enforced “promptly” under Article 52 of ICRRA, the intention of the ISA is to adjust its “deportation plan,” upon hearing the applicant’s plans or depending on the developments of RSD-related procedures. When the individual shares his or her plan to file a lawsuit, or when ISA decides to grant suspensive effect when the materials submitted by a person upon applying for protection for the third time or more is considered as “materials constituting reasonable grounds” for protection, the “deportation plan” is to be postponed. While the text of the Article is not explicit on this, UNHCR understands that ISA is also to inform the person in question *if* there has been such a change of its initial deportation plan. This might possibly enhance the applicant’s chance to seek an effective remedy i.e. by securing legal counsel to file the abovementioned lawsuit. UNHCR thus recommends to make obligatory the ISA’s plan to inform the person of its deportation plan in the text of Article 52 which is currently not explicitly referenced. The information to be provided would include whether or not the suspensive effect was granted including any reasons associated with the non-grant, as well the timing of deportation.

26. It should be mentioned that the non-refoulement principle is reflected in Article 53 (Deportation Destinations) of ICRRA at its paragraph (3) of ICRRA provides that *“the countr(ies) designated as the destination(s) for a person subject to deportation must not be the country(ies) prescribed in (i) territories of countries prescribed in the 1951 Convention Article 33 (1) or the territories of countries where the person concerned otherwise have fear of being persecuted belong (except for cases in which the Minister of Justice finds it significantly detrimental to the interests and public security of Japan);(ii)Article 3, paragraph (1) of CAT; or(iii) Article 16, paragraph (1) of the International Convention for the Protection of All Persons from Enforced Disappearances.”* UNHCR understands that, regardless of whether the person benefits from the suspensive effect of an RSD application, ISA in practice is required to review the appropriateness of the destination country written on the deportation order for the person before enforcing it, in light of Japan’s non-refoulement obligations. While the current application of Article 53(3) on individual cases is unclear, it is hoped that Article 53(3) would be implemented in the way it functions as an additional safeguard in in the absence of the right to administrative review for the decision to lift the suspensive effect.



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27. In terms of State practice, the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2013 EU Asylum Procedures Directive),<sup>41</sup> which approximately 25 States subscribe to, provides the room for a similar arrangement— where subsequent applications without circumstances justifying the re-examination of the merits of the claims are screened out as inadmissible (Article 33(2)(d)) and are excluded from automatic suspensive effect (46.6.(b)). However, Article 41.1 makes it a precondition for lifting the suspensive effect that non-refoulement principle is abided by; Article 46.6(b) provides for the right to an effective remedy, including the right to appeal against an inadmissibility decision as well as to apply for suspensive effect meanwhile with a court or a tribunal, and Article 46.8 provides for the right to remain in the territory pending the decision on the suspensive effect. Article 20 of APD provides for facilitated access to legal assistance and representation at the appeal stage to ensure effectiveness of the right to appeal. Further, it should be noted that the APD also explicitly provides for multi-layered measures intended to ensure the fairness and efficiency of asylum decisions. The APD specifically provides for access to independent appeals, UNHCR’s supervisory role, method of proper recording RSD interviews, COI research/analysis and the qualification of interpreters/RSD officers (see the preamble paragraph 26, Article 4, Article 10, Article 29), which might provide a useful example for GoJ in its efforts to further enhance the quality of first-time asylum applications.<sup>42</sup>

#### **1.2.4. Accelerated procedures for subsequent claims without compromising the fairness**

28. UNHCR notes that the SCDD Recommendation under IV.1(4) [2] proposes to **accelerate the processing** of subsequent applications, while it is not particularly reflected in the Amendment Bill. In contrast to the abovementioned measure to lift the automatic suspensive effect (which raises the risk of refoulement), accelerated processing itself is a useful tool to enhance the efficiency of the RSD, while preserving the fairness and integrity of the asylum system, if the types of applications to be placed on such procedures can be clearly defined and delimited, and **if appropriate safeguards are in place:**

*“Many States have introduced **accelerated procedures** to determine applications that*

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<sup>41</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>. Japanese translation available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54899e4c4>.

<sup>42</sup> See pp.4-7 of submission by Attorney Shin Miyazaki to the 7<sup>th</sup> SCDD meeting on 17 February 2020, entitled “Introduction of exceptions to suspensive effect and the issue of procedural safeguards” available at: <http://www.moj.go.jp/content/001318378.pdf>.



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*(...)overburden asylum procedures to the detriment of those with good grounds for requesting asylum.<sup>43</sup>(...)The term ‘accelerated procedures’ generally refers to a procedure which involves a substantive and individualized assessment of the claim for refugee status, but with an acceleration applied to all or some time lines in the process. This may mean shorter times between registration, interview and decision. Accelerated procedures can be combined with simplified procedures. However, an accelerated procedures[sic] **does not imply a simplification** of any aspect of the substantive determination or the procedure, **nor a reduction of procedural fairness guarantees**. (...) **if appropriate safeguards are in place, this approach can be a useful case management tool to expedite decision-making** when dealing with a significant caseload. Where fewer applications are received, a **focus on prompt quality decision-making** under a single procedure is likely to be a more effective option”<sup>44</sup>*

29. GoJ has in practice introduced accelerated processing when it introduced the categorization of cases through “Revision of operations of the refugee recognition system,” in September 2015 whereby asylum applications were categorized into categories A (in short, manifestly well-founded cases), B (manifestly unfounded cases), C (subsequent applications without new elements) and D (ordinary cases), and those categorized as “B” and “C” were channeled into accelerated processing.<sup>45</sup> GoJ is encouraged to consider the range of recommendations made by the “Monitoring Committee” tasked to examine the classification of cases to speed up the RSD processing in which UNHCR was a member. This would further enhance the appropriateness of the classification and the quality of RSD assessment in general.<sup>46</sup> GoJ may also wish to refer to examples of measures to speed up RSD processing without compromising the fairness and quality of the decisions and the integrity of the system detailed in a number of materials produced by UNHCR.<sup>47</sup>

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<sup>43</sup> The Executive Committee has addressed this issue in Conclusion No. 30 (XXXIV) “The problem of manifestly unfounded or abusive applications for refugee status or asylum,” UNHCR Executive Committee, 1983, available at: <https://www.unhcr.org/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html>.

<sup>44</sup> UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, Section 7.8 (Accelerated procedures) p.175.

<sup>45</sup> See for example p.7 of the Immigration Bureau (now ISA)’s material entitled “Nanmin nintei seidonounyo no minaoshi no gaiyo” (September 2015). For the exact wording of the names of different categories, see p.6 “Nanmin Nintei seido no unyo no saranaru minaoshi go no jyokyo nit suite” (September 2018) available at <http://www.moj.go.jp/isa/content/930003743.pdf>.

<sup>46</sup> Information on the Monitoring Committee on the revision of the operation of the refugee status determination system can be found here including its first Report here: [http://www.moj.go.jp/isa/publications/materials/nyuukokukanri08\\_00041.html](http://www.moj.go.jp/isa/publications/materials/nyuukokukanri08_00041.html). The second report can be found here: <http://www.moj.go.jp/content/001272566.pdf>.

<sup>47</sup> See for example UNHCR, “UNHCR Discussion on Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union,” (25 July 2018) available at: <https://www.refworld.org/docid/5b589eef4.html>.



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**1.3 Persons who have certain criminal record or who are suspected might possibly be involved in terrorism or violent or subversive and other activities (Article 61-2-9(4)(ii))**

30. While the exact wording of the relevant Articles should be consulted (excerpts are laid out in the beginning of Section 1 above), in summary, the first group of persons for whom suspensive effect is lifted under Article 61-2-9, paragraph (4), item(ii) is a person “who was **sentenced to imprisonment** or imprisonment without work for life or **a period of exceeding 3 years (...)**.” The second group of persons under **Article 61-2-9(4)(ii)** covers a **significantly wide range of persons with differing levels of involvement** in a broad spectrum of activities, and includes those who are “**suspected**” to be involved in the acts in question. Specifically, this group includes “a person who the **Minister of Justice** determines, **based on reasonable grounds, is likely to “commit”, or “prepare to commit,” or “facilitate,”** “a criminal act for the purpose of intimidating the general public and governments (ICRRA Article 24(iii)-2).” Such a criminal act is defined in Article 1<sup>48</sup> of the Act for Punishment of the Financing of Criminal Activities for the Purpose of Intimidation of the General Public and of Governments (referred to by the government as “Act for Punishment of Financing Terrorism”). It is noted that the acts in question include intimidation against a foreign government, and “facilitation” is to include provision of funds or other benefits that may contribute to its commission.<sup>49</sup> This second group within Article 61-2-9(4)(ii) also covers “a person whose entry into Japan is required to be prevented pursuant to an international agreement (ICRRA Article 24(iii)-3) (in concrete UN Security Council Resolutions),”<sup>50</sup> and persons who are involved (with different degrees of involvement) in political parties or organizations that attempt to overthrowing of the constitution or the government of Japan, encourage attacking public officials or public facilities, or encourage acts of dispute (such

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<sup>48</sup> See footnotes 18 and 19. Article 1 Act on Punishment of Financing to Offences of Public Intimidation, No.67 of 2002, as last amended by Act No. 113 of 2014, available at <http://www.japaneselawtranslation.go.jp/law/detail/?vm=&re=&id=2977&lvm=02>.

<sup>49</sup> Article 3 to 5 of the Act on Punishment of Financing to Offences of Public Intimidation, No.67 of 2002, as last amended by Act No. 113 of 2014, available at <http://www.japaneselawtranslation.go.jp/law/detail/?vm=&re=&id=2977&lvm=02>.

<sup>50</sup> UN Security Council Resolutions based on Article 25 of Charter of the United Nations is considered to constitute “an international agreement” in this item. Shutsunyukokukanri horei kenkyukai (Immigration Control Laws Study Society). Tyukai Hanrei Syutsunyukoku Kanri Jitsumu Roppo (Annotation and Cases: Immigration Control Practical Laws), Tokyo, Kajo Syuppan (2020) p98.) As affirmed in a number of resolutions adopted by the UN Security Council calling on States to take measures related to terrorism, such measures need to conform to international law, including international human rights law, refugee law and humanitarian law.



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as preventing the normal operation of the security facilities of a factory)<sup>51</sup> (ICRRA Article 24, item(iv), sub-items (l) through (n)). It is notable that, as discussed in Section 1.3.4.2 below, under Article 61-2-9(4)(ii), a person “for whom *there are reasonable grounds to suspect*” that he or she falls within ICRRA Article 24, item(iii)-3, Article 24(iv) (l) through (n)) as explained above **also have their suspensive effect lifted.**

### 1.3.1 Addressing security without undermining refugee protection

31. It is of **particularly serious concern** that under the current wording of Article 61-2-9 of the Bill, paragraph (4)(ii), the suspensive effect can be lifted for **first-time applicants pending first instance RSD decisions** or even the **first personal interview** by an RSD officer i.e. **before their eligibility for refugee status is assessed** under Article 1 of the 1951 Convention. **No reference** was made to persons with criminal record or persons likely to be involved in criminal activities or other such persons in the context of the **SCDD Recommendations** under Section IV.1(4) [1] of the SCDD Report in relation to exceptions to suspensive effect(p.34), nor was it particularly recorded on the SCDD Report or minutes. While UNHCR shares the legitimate concern of States to respond to possible security threats posed by those supporting or committing terrorist acts, security and protection are not mutually exclusive as detailed in its guidance<sup>52</sup> on **addressing security concerns without undermining refugee protection**. International refugee instruments do not provide a safe haven to those who have supported or committed acts of terrorism.<sup>53</sup> First of all, the refugee definition, properly applied, should lead to either non-inclusion or exclusion of those responsible for serious criminal, including terrorist, acts, under Article 1F.<sup>54</sup> A refugee who has committed a serious crime in the country of refuge is subject to due process of law in that country.<sup>55</sup> As discussed in detail below,

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<sup>51</sup> It is notable that Article 24(iv)(m)(3) refers to (“A person who organizes, is a member of, or is closely affiliated with any of the following political parties or other organizations (...) A political party or organization which encourages acts of dispute, such as stopping or preventing the normal maintenance or operation of the security facilities of a factory or other workplace” while Article 24(iv)(n) states “A person who has prepared, distributed or exhibited printed materials, motion pictures, or any other documents or drawings whose purpose is to attain the objectives of any political party or organization prescribed in sub-item (l) or (m).”

<sup>52</sup> Paragraph 2 and 3, UNHCR, Addressing Security Concerns without Undermining Refugee Protection - UNHCR's Perspective, 17 December 2015, Rev.2, available at: <http://www.refworld.org/docid/5672aed34.html>. UNHCR also continues to work with States to develop and implement protection sensitive border management systems as seen in the “10 Point Plan on Refugee Protection and Mixed Migration” which provides practical suggestions for management strategies and entry systems, available at: <https://www.unhcr.org/the-10-point-plan-in-action.html>.

<sup>53</sup> Ibid. (Addressing Security Concerns without Undermining Refugee Protection), paragraph 7.

<sup>54</sup> Ibid, paragraph 7 and 12 (and paragraphs 18-26, which provide more specific guidance on exclusion).

<sup>55</sup> Paragraph 154, UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued 2011), available at: <https://www.refworld.org/docid/4f33e8d92.html> (Japanese translation link: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/HB\\_web.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/06/HB_web.pdf)).



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there are also exceptions to *non-refoulement* under Article 33(2) of the 1951 Convention where the refugee is a “danger to the security of the host country” or “having been **convicted** by a final judgement of a **particularly serious crime, constitutes a danger to the community.**” Nevertheless, like any exceptions to human rights principles, Article 33(2) should be interpreted and applied restrictively i.e. when it is the last possible way to eliminate or alleviate the danger and it is proportionate, in the sense that the danger to the country or to its community must outweigh the risk to the refugee upon refoulement.

### **1.3.2. Right to be heard, effective remedy and a full assessment under Article 1 of the 1951 Convention**

32. Building on the relevant Executive Committee Conclusions and on international human rights standards, minimum due process standards that need to be guaranteed for all asylum-seekers, in particular for those applying for the first time, include the right to personal interview at first instance, before a qualified and impartial decision-maker of the authority responsible for determining asylum claims.<sup>56</sup> If the asylum-seeker is not recognized, he or she should be given a reasonable time to appeal the decision to a separate, independent authority, whether administrative or judicial. To be effective, this remedy must also permit the asylum-seeker to remain on the territory until a final decision has been made on the claim (except in very limited cases -see paragraph 13 of this document).<sup>57</sup>
33. Further, for the purpose of considering the applicability of the exception to non-refoulement under Article 33(2) of the 1951 Convention to an individual, it is **essential, first, to fully assess his or her claim against Article 1** of the 1951 Convention, as Article 33(2) applies to persons who have been recognized as refugees.<sup>58</sup> A status determination under Article 1 permits the State to assess whether the person is eligible for refugee status in the first place, and if this is determined to be the case, to

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<sup>56</sup> Section 7.3 “Minimum procedural guarantees” in UNHCR, A guide to international refugee protection and building state asylum systems (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.156-158.

<sup>57</sup> Ibid. 157.

<sup>58</sup> See paragraph 10 in UNHCR, which says “Unlike Article 1F which is concerned with persons who are not eligible for refugee status, Article 33(2) is directed to those who have already been determined to be refugees. Articles 1F and 33(2) are thus distinct legal provisions serving very different purposes. Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat.” UNHCR, “Background Note on the Interpretation and Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,” 4 September 2003, available at: <https://www.refworld.org/docid/3f5857d24.html>.



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conduct the **proportionality assessment** on whether the danger posed by the individual against the country or community of refuge **outweighs** the danger that the person would face upon return, provided all other requirements for the application of an exception under Article 33(2) are met. UNHCR thus recommends that all first-time applicants - including those who have been imprisoned 3 years or more or who are suspected to become possibly involved in terrorism, violent or subversive activities - be guaranteed their right to **access a full RSD procedure** and to have their refugee claim assessed against Article 1 of the 1951 Convention, including their **right to personal RSD interview** and to file an **effective appeal against a negative decision**, during which their deportation is suspended. In light of the security concerns faced by the State, the processing of such cases can be done at an expeditious manner by a specialized unit, the establishment of which UNHCR is ready to support Japan with.<sup>59</sup>

34. It is thus essential that the suspensive effect is not lifted for any asylum-seekers applying for the first time for reasons of their criminal record or possibility or likelihood of becoming involved in terrorism, violent or subversive activities including at the appeal stage.

### **1.3.3. Article 33(2) exceptions to non-refoulement– general guidance**

35. As evident from the SCDD Recommendation, the principle of non-refoulement, codified at article 33(1) of the 1951 Convention, is of central importance to the international refugee protection regime. The **only permissible exceptions** to the principle of *non-refoulement* as provided for in international refugee law are set out in Article 33(2) of the 1951 Convention. They apply in two circumstances: if there are **reasonable grounds for regarding** an individual refugee as “**a danger to the security of the country** in which he [or she] is” or if he or she, “having been **convicted** by a final judgement of **a particularly serious crime, constitutes a danger to the community** of that country”.
36. As UNHCR has previously advised:

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<sup>59</sup> While in the context of application of the exclusion clause, see paragraph 13 of UNHCR, Addressing Security Concerns without Undermining Refugee Protection - UNHCR's Perspective, 17 December 2015, Rev.2, available at: <http://www.refworld.org/docid/5672aed34.html>.



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*“There was initial reluctance by the drafters of the Convention to include any exception to the Convention’s non-refoulement obligation. While the threat to security exception was ultimately included, the drafters intended that its application be restrictive. (...)”<sup>60</sup>*

Further, *“Like any exception to human rights guarantees, **Article 33(2) must be interpreted restrictively and with full respect for the principle of proportionality**. This means it must be shown that the danger posed by the refugee to the security of the host country or to its community is **sufficiently serious** to justify refoulement. The “danger to the security” exception requires a threat to be to[sic] the country of refuge itself and to be **very serious**. The finding must be based on **reasonable grounds** and supported by **credible and reliable evidence**. The “danger to the community” exception requires a **final conviction** of a particularly serious crime as well as a finding that the person constitutes a **future risk**. In both cases there must be a **rational connection between the removal of the refugee and the elimination of the danger**. Refoulement must be the **last possible way** to eliminate or alleviate the danger and it must be **proportionate**, in the sense that the **danger to the country or to its community must outweigh the risk to the refugee** upon refoulement.”<sup>61</sup>*

The abovementioned assessment of “proportionality” in more concrete terms means:

*“In reaching a decision on the application of article 33(2), it is necessary to weigh the gravity of the danger which the individual presents against the possible consequences of refoulement, including the **degree of persecution feared**. If the applicant is likely to face severe persecution, the danger to the security of the country must be very serious to justify return.”<sup>62</sup>*

It is also important that the determination that a person falls within Article 33(2) of the 1951 Convention *“must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.”<sup>63</sup>*

37. It should also be noted that under human rights treaties that Japan is a State party to, refoulement is never permitted if it would expose the individual concerned to a **risk of torture, or to cruel, inhuman**

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<sup>60</sup> Advisory Opinion from UNHCR on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees <https://www.refworld.org/docid/43de2da94.html>.

<sup>61</sup>Section 4.2 “Admission to territory and the scope of the non-refoulement obligation,” in UNHCR, A guide to international refugee protection and building state asylum systems (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.66.

<sup>62</sup> UNHCR, N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States, Respondent. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, <http://www.refworld.org/docid/48622dd72.html> – concerning the exception to the principle of non-refoulement in Article 33(2); the requirement that a person has been convicted by a final judgment of a “particularly serious crime”; assessment of whether the person constitutes a future “danger to the community”.

<sup>63</sup> Ibid, paragraph 28.





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**or degrading treatment or punishment.** Article 3 of the Convention against Torture (CAT) prohibits the expulsion or return of anyone to a place where there is a substantial danger of torture. Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) have also been interpreted as prohibiting expulsion or return to torture, or to cruel, inhuman or degrading treatment or punishment or the death penalty.<sup>64</sup>

1.3.4. “Danger to the security of the country” under Article 33(2) of the 1951 Convention

38. The idea of introducing the second group of persons covered under Article 61-2-9(4)(ii) i.e. those falling within Article 24(iii)-2, Article 24(iii)-3 and Article 24(iv)(l) through (n) of the Amendment Bill for whom suspensive effect is to be lifted appears to reflect the “danger to the security of the country” exception under Article 33(2) of the 1951 Convention.

#### 1.3.4.1. General

39. In relation to the “danger to the security of the country” exception, UNHCR has emphasized that: *“The use of the term “danger to the security of the country” implies that the seriousness of the danger must reach a sufficiently high threshold. The travaux préparatoires makes clear that the drafters were concerned only with significant threats to the security of the country.”*<sup>65</sup>

The discussions of the drafters of the 1951 Convention on this point have been summarized as follows: *“Generally speaking, the ‘security of the country’ exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.”*<sup>66</sup>

Similarly, Professor Walter Kälin, a European expert in international refugee law, has noted that *“article 33(2) covers conduct such as “attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage,” and that the requirement of a danger*

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<sup>64</sup>Section 4.2 “Admission to territory and the scope of the non-refoulement obligation,” in UNHCR, A guide to international refugee protection and building state asylum systems (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.66.

<sup>65</sup> UNHCR, “Advisory Opinion from UNHCR on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees,” 6 January 2006, <https://www.refworld.org/docid/43de2da94.html>.

<sup>66</sup> Atle Grahl-Madsen, Commentary on the Refugee Convention, Articles 2–11, 13–37, published by UNHCR (1997) and available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4785ee9d2>, commentary to Article 33, para.(8).



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*to the country “can only mean that the refugee must pose a serious danger to the foundation or the very existence of the State, for his or her return to the country of persecution to be permissible.”<sup>67</sup>*

UNHCR has also advised for example that, in the context of a US legislation:

*“An individual who has provided a support to an individual or an organization that has engaged in ‘terrorist activity’ that as broadly defined by INA<sup>68</sup> does not necessarily pose a danger to the security of the United States.”<sup>69</sup>*

In implementing provisions which permit the expulsion of refugees on security grounds in a manner that is consistent with Article 33(2) of the 1951 Convention, ISA would thus need to take into account the activities of the individual or the organization in question, as well as the nature and the extent of the person’s involvement or assistance in such an organization, to determine whether there are reasonable grounds to consider that a person is a danger to the security of Japan, and whether his or her return to potential persecution is the only means of eliminating that danger.

#### **1.3.4.2 Procedural issues**

40. In terms of the procedures for finding that one might be involved in terrorism or similar activities (second group under 61-2-9(4)(ii) of the Amendment Bill), this is determined by the Minister of Justice according to Article 24 (iii)-2 of ICRRA.” It is understood that the determination will be done within ISA, MOJ i.e. an administrative body without an involvement of a judicial body. Nevertheless, Article 24-2(1) provides that the Minister of Justice is to “*seek the opinions of the Minister of Foreign Affairs, the Commissioner General of the National Police Agency, the Director-General of the Public Security Intelligence Agency and the Commandant of the Japan Coast Guard*” prior to making the determination on Article 24(iii)-2.
41. In terms of remedy, the finding that one falls within Article 24(iii)-2 of ICRRA is first made by an immigration inspector of ISA, and may go through the “three-tiered court system” within ISA which is applicable for anybody placed in the deportation procedures. Upon the immigration inspector’s

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<sup>67</sup> UNHCR, Advisory Opinion from UNHCR on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees, 6 January 2006, available at: <https://www.refworld.org/docid/43de2da94.html>.

<sup>68</sup> Immigration and Nationality Act of the United States

<sup>69</sup> UNHCR intervention before the United States Court of Appeals for the Fifth Circuit in the case of *Tuang Ling Thang v. Gonzales*, Attorney General, 21 February 2007, available at: <https://www.refworld.org/docid/4891c94a2.html> [accessed 16 November 2020].



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finding that he falls within Article 24(iii)-2, he or she can “request a Special Inquiry Officer for a hearing”. If the suspect has an objection to the findings of the hearing, he or she may appeal to the Minister of Justice. Nevertheless, UNHCR understands that the Minister of Justice’s final determination that the person falls within Article 24, item (iii)-2 is **not** considered to constitute an “administrative disposition” and the person concerned cannot appeal against this determination for administrative review under the Administrative Complaint Review Act, or judicial review under the Administrative Case Litigation Act. Nevertheless, once a written deportation order is finally issued, the person in question is able to file a litigation to cancel (or nullify) it (see above at paragraph 23 in Section 1.2.3 on effective remedy). It is still recommended that the determination to lift the suspensive effect be considered to constitute an administrative decision subject to administrative appeal, and that the ISA inform the person of such a decision. The person concerned should also have an effective possibility to apply for suspensive effect during such an administrative review.

42. Further, it is unclear how Article 61-2-9(4)(ii) combined with Article 24 (iii)-2 works in terms of threshold for lifting a suspensive effect. This is because Article 61-2-9(4)(ii) lifts the suspensive effect for a person “for whom *there are reasonable grounds to suspect*” that he or she falls within ICRRA Article 24(iii)2, 24(iii)-3 and Article 24 (iv) (l) through (n), and Article 24(iii)-2 in turn provides “a person who the **Minister of Justice** determines,” “**based on reasonable grounds,**” is **likely to “commit**”, or **likely to “prepare to commit,**” or **likely to “facilitate,**” “a criminal act for the purpose of intimidating the general public and governments.

### **1.3.5 “Danger to the community” exception due to “particularly serious crime” under Article 33(2) of the 1951 Convention**

43. Introduction of the first category of exception in Article 61-2-9(4)(ii) of the Amendment Bill i.e. those who have been sentenced to imprisonment in Japan for three years or more appears to reflect Article 33(2) “danger to the community” exception.

44. In relation to the term “particularly serious crime,” UNHCR has stated that:

*“The decisive factor is **not the seriousness or categorization of the crime** that the refugee has committed, but, rather, **whether the refugee, in light of the crime and conviction, poses a future danger to the community.**”<sup>70</sup>*

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<sup>70</sup> UNHCR, N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States, Respondent. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, available at: <http://www.refworld.org/docid/48622dd72.html> – concerning the exception to the principle of non-refoulement in Article 33(2); the requirement that a person has been convicted by a final judgment of a “particularly serious crime”; assessment of whether the person constitutes a future “danger to the community.”



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Further, UNHCR has also stated: *“Although the 1951 Convention does not specifically list the crimes that come within the ambit of Article 33(2), it is significant that the term “crime” is **doubly qualified** by the terms “**particularly**” and “**serious**,” thereby underscoring the high degree of gravity required for the crime to meet this prong of the exception.*”<sup>71</sup>

By comparison, Article 1F(b) of the 1951 Convention excludes from refugee protection anyone who *“has committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee.”* The *“serious non-political crime”* ground was intended to apply to persons who had committed an act so grave and unconscionable—a *“capital crime or a very grave punishable act”*—as to render them undeserving of international protection.<sup>72</sup>

*“Consistent with the drafters’ view that Article 33(2) be applied narrowly, the addition of the second qualifier “particularly” must be construed to require an even higher threshold and **an even more restrictive application** than the “serious non-political crime” ground of exclusion in Article 1F(b).”* *“An individualized assessment as to whether a refugee poses a “danger to the community” requires consideration of a variety of factors. At a minimum, the factors to be examined must include the nature and **circumstances** of the criminal act, the **motivation** in committing it, when the crime in question was committed, and any mitigating factors such as the individual’s mental state at the time the crime was committed, past criminal activities, the possibility of rehabilitation and reintegration within society, and evidence of the likelihood of recidivism(...)*”<sup>73</sup>

In conclusion, the relevant exception to the obligation of non-refoulement applies only to a refugee who has been convicted of a “particularly serious crime” and has been found to constitute a “danger to the community. Further, to determine whether a refugee poses a danger to the community, an individualized inquiry assessing all relevant factors must be conducted.”<sup>74</sup>

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<sup>71</sup> UNHCR, N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States, Respondent. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, available at: <http://www.refworld.org/docid/48622dd72.html> – concerning the exception to the principle of non-refoulement in Article 33(2); the requirement that a person has been convicted by a final judgment of a “particularly serious crime”; assessment of whether the person constitutes a future “danger to the community.”

<sup>72</sup> UNHCR, “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (Sept. 4, 2003) (“UNHCR Exclusion Guidelines”).

<sup>73</sup> UNHCR, N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States, Respondent. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, <http://www.refworld.org/docid/48622dd72.html> – concerning the exception to the principle of non-refoulement in Article 33(2); the requirement that a person has been convicted by a final judgment of a “particularly serious crime”; assessment of whether the person constitutes a future “danger to the community.”

<sup>74</sup> UNHCR, N- A- M-, Petitioner, v. Michael Mukasey, Attorney General of the United States, Respondent. Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, 19 June 2008, <http://www.refworld.org/docid/48622dd72.html> – concerning the exception to the principle of non-refoulement in Article 33(2); the requirement that a person has been convicted by a final judgment of a “particularly serious crime”; assessment of whether the person constitutes a future “danger to the community.”



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#### 1.4. Measures to enhance the quality of original RSD decisions

45. Further, UNHCR recalls that, as quoted above, the SCDD Recommendations under Section IV.1(4) of the SCDD Report (p.34) proposes some **measures to enhance the quality, fairness** and efficiency of RSD decisions as a way to **fundamentally address the issues** related to detention and deportation that SCDD was tasked to consider, as a **precondition for lifting suspensive effect** for certain cases.
46. UNHCR also notes the fact that SCDD Recommendation IV.1(4) at [2] refers to the need to have **“third-party-checks”** on the appropriateness of administrative decisions. Such a third-party monitoring mechanism including those referred to as “quality assurance (or initiatives)”<sup>75</sup> are indeed practiced in a number of States with or without UNHCR involvement as ways to ensure the quality of the RSD decisions which also helps enhance transparency and accountability of asylum systems. UNHCR believes that translating this recommendation into legislative, or operational amendments would help in further enhancing the quality of its RSD decisions. UNHCR wishes to add that it might be a valid option to revive and expand the mandate of the “Monitoring Committee” tasked to examine the classification of cases to speed up the RSD processing, in which UNHCR has participated as a member (see paragraphs 29 above). UNHCR also recalls the Recommendation to enhance techniques of how RSD interviews are conducted to better understand the applicants’ claims. Further, if it were decided to introduce any exceptions to suspensive effect, it would be important that the **implementation of such exceptions** also be subject to the said **third-party check mechanism**.
47. UNHCR also notes that the Recommendation under IV.1(4) at [3] urges ISA to implement the remaining **Recommendations of the 2014 Sub-Committee on RSD** including **the clarification and publication** of the interpretation of the refugee definition and of the **criteria for granting complementary protection**. UNHCR had an opportunity to participate as an observer in the Sub-Committee on the RSD System in 2014 which resulted in the abovementioned Recommendations that are fairly comprehensive especially in relation to the first instance RSD examination.<sup>76</sup> As stated in the “Introduction” above, UNHCR commends ISA’s extensive efforts so far to implement the Recommendations, and has closely collaborated with ISA in particular in the areas of capacity building of its staff involved in RSD adjudication and strengthening of its COI scheme. UNHCR

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<sup>75</sup> “UNHCR is engaged with a significant number of countries world-wide in so called ‘Quality initiatives’. They are undertaken in a spirit of working collaboratively with the authorities concerned (...)” UNHCR Japan, “Comments on the Draft 5th Immigration Control Basic Plan (24 July 2015),” available at: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final\\_UNHCR\\_Comments\\_ENG.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final_UNHCR_Comments_ENG.pdf).

pp.11-12 of this paper (“UNHCR’s role”) elaborates on different ways how UNHCR could assist governments including case reviews. Refworld has a dedicated page on Quality Assurance at <https://www.refworld.org/qualityassurance.html>.

<sup>76</sup> Proposals of the Sub-Committee on the RSD System (December 2014), available at:



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stands ready, to assist it in its further efforts to implement the remaining<sup>77</sup> recommendations, in particular the clarification of the RSD and complementary protection criteria, which would benefit from reflecting international refugee and human rights law standards. Further, UNHCR encourages GoJ to consider some of the **long-term recommendations** outlined in the earlier part of the paper, in particular paragraph 7, to further enhance the fairness and integrity of the RSD procedure including introduction of independent appeal and facilitated access to legal aid and support from the first instance RSD.

### 1.5. Concept of manifestly unfounded claims

48. While the current Amendment Bill does **not** contain any reference to the term “manifestly unfounded applications, there are **several references** to the term in the “Discussion” section (not in the Recommendation Section) under Section IV. 1(4) of the SCDD Report (pp.35-36) as well as in the minutes of the SCDD meetings. The concept is also used in the GoJ’s de facto classification of cases (category B, see paragraph 29 above), and also mentioned as one of the possible exceptions to automatic suspensive effect at the appeal stage as a matter of State practice (see above paragraph 13). This concept, which needs to be carefully defined and applied, thus merits clarification.
49. The term “manifestly unfounded” is defined in existing UNHCR guidance as covering applications for refugee status “clearly not related to the criteria for refugee status” or which are “clearly fraudulent or abusive.”<sup>78</sup> It should be noted that:

*“[O]nly if the applicant makes what appear to be false allegations of a material or substantive nature relevant for the determination of his or her status and the claim clearly does not contain other elements which warrant further examination, could the claim be considered “clearly fraudulent”. (...) The mere fact of having made false statements (...) does not, however, mean that the criteria for refugee status may not be met, nor would it obviate the need for asylum. A claim that is deemed likely to be Manifestly Unfounded **should be distinguished from asylum claims that are likely to be unsuccessful** but that are genuinely made. **Claims submitted by applicants from a particular country or profile may have, in the past or at present, very low recognition rates.** This does not, however necessarily imply that such claims are ‘clearly’ not related to the criteria for*

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<sup>77</sup> ISA, “The Progress of the Implementation of the Proposals of the Sub-Committee on the RSD System” (June 2020), available at: <http://www.moj.go.jp/content/001323270.pdf>.

<sup>78</sup> UNHCR, “UNHCR’s Position on Manifestly Unfounded Applications for Asylum,” (1 December 1992), 3 European Series 2, available at: <http://www.refworld.org/docid/3ae6b31d83.html>, p.397.



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*refugee status or that applicants from that country or profile are not acting in good faith.”<sup>79</sup>*

It should thus be emphasized that even if a person has criminal record or has been suspected to be possibly or likely to be involved in terrorism or violent or subversive activities as in Article 61-2-9(4)(ii), may not have any bearing on whether his or her claim is “manifestly unfounded”.

50. The meaning of “manifestly unfounded” claims thus should be clearly and narrowly defined (as above), and even a decision to determine an application to be “manifestly unfounded” itself should be taken in a procedure entailing appropriate safeguards including a personal interview by a fully qualified RSD officer through which the applicant’s assertions can sufficiently be taken into consideration.<sup>80</sup> Further, the due process principle requires that there must be a right to an appeal against the negative decision to reject a case for being manifestly unfounded before a body that is separate from and independent of the authority that made the original decision.<sup>81</sup>

#### **1.6. Summary conclusions on the lifting of suspensive effect**

51. In conclusion, summarizing the points above, UNHCR wishes to reiterate its position that the lifting of suspensive effect is **undesirable** because it **increases the risk of refoulement**. UNHCR thus considers that insertion of the exceptions i.e. Article 61-2-9(4)(i) (ii) is undesirable. Further, suspensive effect must not be lifted for first-time applicants during first instance examination and appeal instances for the sole reason that they have a certain criminal record or that they may possibly be or become involved in terrorism or violent, subversive or other similar activities. While UNHCR shares States’ legitimate concerns to respond to possible security threats posed by those supporting or committing terrorist acts, security and protection are not mutually exclusive: those suspected to pose a danger to the State can be processed expeditiously by a specialized unit with necessary expertise. Exceptions to the principle of non-refoulement under Article 33(2) of the 1951 Convention where the refugee is a “danger to the security” of the host country or, after having been convicted by final judgment of a particularly serious crime, to the community of that country, must be **the last possible way to eliminate or alleviate the danger** and it must be **proportionate**, in the sense that the future danger to the country or to its community must outweigh the risk to the refugee upon refoulement. UNHCR thus recommends that Article 61-2-9(4) (ii) referring to persons with criminal

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<sup>79</sup> UNHCR, “Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR’s Mandate (The Glossary),” (2020) available at: <https://www.refworld.org/docid/5a2657e44.html>, p.20-21 (“Manifestly Unfounded”).

<sup>80</sup> Conclusion No. 30 (XXXIV) “The problem of manifestly unfounded or abusive applications for refugee status or asylum,” UNHCR Executive Committee, 1983, available at: <https://www.unhcr.org/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html>.

<sup>81</sup>Section 7.10 “Appeals and effective remedy” in UNHCR, A guide to international refugee protection and building state asylum systems, 2017, Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.179.



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record or profile be deleted from the exceptions to suspensive effect. **UNHCR stands ready to assist GoJ in addressing security concerns without undermining refugee protection.** In relation to lifting of the suspensive effect for subsequent applicants beyond third time without justifications to re-examine the merits of their claims, in addition to the need to enhance the quality of first-time RSD decisions in the first place, UNHCR wishes to emphasize the need to ensure the relevant **procedural safeguards**. These safeguards include **a right to an effective remedy against an inadmissibility** (i.e. finding that one is without “materials showing reasonable grounds” for protection) **decision**, and to meanwhile request an independent body **to suspend deportation**. In the absence of an asylum-seekers’ right to appeal administratively against the finding that they have not submitted justifying materials, it is important that their access to judicial review is ensured; concretely, they should be informed of the planned timing of deportation in order to file a litigation(s) to suspend the deportation and be allowed to remain in the territory for the period during which they are entitled to file litigation, and are provided access to services including legal aid.

## **2. On Complementary Protection (Article 2(iii)2 of the Amendment Bill)**

Whereas Article 2 of the current ICRRA provides “definitions,”

Article 2(iii)-2 of the Amendments Bill newly provides:

“Persons to be granted complementary protection:

A person who is not a refugee, who fulfills the criteria for the application of the 1951 Convention as a refugee, **except** for the criterion that the reason(s) for the fear of being persecuted is(are) the reason(s) provided for within Article 1A(2) of the 1951 Convention.”

For the relevant part of the Recommendations of SCDD Report, please see Section IV.1(4) [3] of the SCDD Report (p.34) cited in the beginning of section III.2 above (“On lifting of automatic suspensive effect for certain cases (Article 61-2-9(4)(i) and (ii) of the Amendment Bill)”)

52. It is notable that the Amendment Bill contains references to the term “complementary protection” for the first time – to refer to the protection granted to persons who do not meet the 1951 Convention refugee definition (for which the term “special permission for residency on humanitarian grounds” was used). UNHCR **welcomes** the **introduction of the term** and the **concept** of “complementary protection” in the bill, which is symbolically important to convey the fact that the grant of status is **obligatory** rather than discretionary based on purely compassionate grounds.





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53. Nevertheless, UNHCR is concerned that the criteria proposed under the Amendment Bill do not reflect wording commonly adopted in international and regional refugee and human rights law as the criteria for complementary forms of international protection. In particular, the current definition might not cover those for whom GoJ would have non-refoulement obligations under international human rights instruments.
54. UNHCR defines “complementary” forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition contained in the 1951 Convention or broader refugee criteria included in regional refugee instruments.<sup>82</sup> Individuals who are outside their country of origin (typically because they have been forcibly displaced across international borders) but who do not qualify as refugees under international or regional law, may in certain circumstances also require international protection, on a temporary or longer-term basis,<sup>83</sup> for example, because of non-refoulement obligations under international human rights law.<sup>84</sup> Contracting States’ obligations under international human rights instruments are binding obligations which should be considered as the framework for any efforts to set complementary standards.<sup>85</sup> As Japan is a party to ICCPR, CAT, CRC and ICPED place upon Japan non-refoulement obligations which give rise to grounds for complementary protection.<sup>86</sup>
55. As stated in paragraphs 26 above, it is noted that ICRRA already reflects Japan’s non-refoulement obligations under two of the international human rights treaties that it is Party to. Specifically, Article 53(3)(ii)(iii) of ICRRA provides that the countr(ies) designated as the destination(s) for a person subject to deportation must not be the country(ies) prescribed in (...) (ii) Article 3 paragraph (1) of CAT; (iii) Article 16, paragraph (1) of ICPED. Nevertheless, Article 53(3)(ii)(iii) does not specifically provide for the grant of residency permit to those who cannot be deported due to such international obligations. It is recommended that GoJ defines “persons to be granted complementary protection” under Article 2(iii)-2 of the Amendment Bill so as to **cover all the international human**

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<sup>82</sup> UN High Commissioner for Refugees (UNHCR), Persons in need of international protection, June 2017, available at: <https://www.refworld.org/docid/596787734.html>.

<sup>83</sup> ExCom Conclusion No 103 (LVI) – 2005 on the Provision of International Protection Including Through Complementary Forms of Protection underlines the importance of developing the international protection system in a way which avoids protection gaps, and enables all those who are in need of international protection to find and enjoy it.

<sup>84</sup> Conclusion No 103 (LVI) – 2005 on the Provision of International Protection Including Through Complementary Forms of Protection

<sup>85</sup> Paragraph 15, UNHCR, UNHCR submission to the Senate Legal and Constitutional Affairs Legislation Committee in respect of its inquiry into the Migration Amendment (Complementary Protection and Other Measures) Bill 2015, 3 December 2015, p. 4, available at: <https://www.refworld.org/docid/56669e5e4.html> [accessed 12 October 2020].

<sup>86</sup> Paragraph 12. UNHCR, “Submission by the Office of the United Nations High Commissioner for Refugees Inquiry into the Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013,” 23 January 2014, pp. 2-3, available at: <https://www.refworld.org/docid/530b20594.html> [accessed 12 October 2020].



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**rights obligations** that Japan bears under the treaties that it is a Party to, including under the two Conventions already covered by Article 53(3)(ii)(iii) of ICRRA.

**3. The establishment of penalties for not complying with a deportation order or an order to apply for a passport and so on (Article 55-2(1) and Article 72(viii), Article 52(12) and Article 72(vi) of the Amendment Bill)**

**Relevant provisions from the Amendment Bill**

Section 6 Order to leave (*taikyo no meirei*)

Article 55-2 provides:

(1) *"In cases where **it is difficult to deport** a person subject to deportation to the destination of deportation prescribed in Article 53 for any of the reasons listed in the following items, the supervising immigration inspector may, when he/she finds it appropriate, **order the person to leave from Japan within a reasonable period of time**. In this case, the opinion of the person concerned shall be heard in advance.*

(i) *In the case where the person has expressed that he/she **does not intend to depart from Japan**, where the country to which the person is to be deported prescribed in Article 53 is **not included** in the countries specified by the Minister of Justice in the relevant Public Notice as **countries other than those that do not cooperate in the smooth execution of written deportation orders**.*

(ii) *The person has **obstructed** the deportation by means of **deception or force**, and is **likely to commit a similar act** upon deportation again.*

(2) *When a person who has received an order pursuant to the provisions of the preceding paragraph comes to fall under any of the grounds listed in the following items, said **order shall cease to be effective** until the person no longer falls under said grounds.*

(i) *The deportation has been suspended pursuant to the provision of Article 61-2-9, paragraph (3) (UNHCR Note: automatic suspensive effect of an RSD application).*

(ii) *A **lawsuit** concerning the effect of the **disposition of deportation** is pending and a stay of **execution has been ordered** pursuant to the provisions of the Administrative Case Litigation Act (Act No. 139 of 1962).*

(3) *In cases where the supervising immigration inspector orders a person to leave from Japan pursuant to the provision of paragraph (1), he/she shall deliver a document stating the reasons for the order and the period set forth in the same paragraph.*

(4) *The Supervising immigration inspector may extend the period set forth in paragraph (1) for a reasonable period of time, if necessary.*



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*(5) The order pursuant to the provision of paragraph (1) shall not preclude an immigration control officer from deporting a person who has been issued a written deportation order within the period set forth in the same paragraph (including the extended period in cases where the period has been extended pursuant to the provision of the preceding paragraph) pursuant to the provision of Article 52, paragraph (3).*

*(6) Any person who has been made to depart from Japan by the order pursuant to the provision of paragraph (1) shall be deemed to have been compelled to leave by a written deportation order for the purpose of application of the provisions of this Act.”*

Article 52 (12) of the Amendment Act states:

*“Where it is necessary for the deportation of a person to whom a written order of deportation has been issued, the supervising immigration inspector **may order the person to apply for the issuance of a passport** or to perform other acts specified by an Ordinance of the Ministry of Justice as necessary for the deportation, within a reasonable period of time.”*

Article 52(13) of the Amendment Act states:

*“The Supervising immigration inspector may, when necessary, extend the period specified in the preceding paragraph by setting a reasonable period.”*

Chapter IX Penal Provisions

Article 72 of the Amendment Act provides:

*“Any foreign national falling under any of the following items **shall be punished with imprisonment with work for not more than 1 year or a fine not exceeding 200,000 yen**, or shall be subject to the cumulative imposition of imprisonment and a fine.”*

Article 72(vi)-(viii) provide as follows:

*(vi) A person who has violated an order pursuant to the provisions of Article 52, paragraph (12) (UNHCR Note: an **order to apply for a passport** and so on; **newly created via Amendment Bill 2021**) and has failed to perform the acts prescribed in the same paragraph.*

*(vii) A person who has failed to leave Japan in violation of an order pursuant to the provisions of Article 55-2 (1) (UNHCR Note: **order to leave**; **newly created via Amendment Bill 2021**)*

*(...)*



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**Excerpts of the relevant parts of the SCDD Report**

p.29 Section IV.1(3) in the SCDD Recommendations states (italics and bold supplied):

*“In cases where it is not possible to immediately expel the individuals who are subject to written deportation orders and whose circumstances do not warrant refrainment from expulsion (...)consideration should be given to the establishment of mechanisms to oblige them to apply for travel documents and to depart from the country (...)before the specified date. The establishment of penalties for non-compliance should also be considered with a view to securing the fulfilment of these obligations. When the establishment of these orders are considered, explicit provisions should be introduced to clarify that **no obligations and/or penalties would be imposed on applicants for refugee status whose deportation should be suspended.** In addition, procedures and mechanisms should be in place to ensure that **appropriate consideration be given to the circumstances making the individuals refuse their deportation** in determining on the issuance of the orders (...) in order to make sure that these orders are only issued for those who genuinely need to be obliged to leave by way of indirect compulsory execution through the imposition of penalties, rather than for those who are to be deported in general.*

*\* Some members expressed dissenting opinions against the establishment of these orders and/or penalties.”*

56. Under the newly created Article 55-2 (1)(i) and (ii) of the Amendment Bill, ISA may issue an order to leave (taikyo no meirei) to persons whose deportation is difficult to execute. Such persons includes those who state that they do not have an intention to voluntarily depart from Japan, and those who have previously obstructed the deportation by means of deception or force, and are likely to commit a similar act upon deportation again. In addition, under the newly created Article 52(12) of the Amendment Bill, ISA may, in cases where it is necessary for the deportation of persons for whom a deportation order has been issued, issue an order to perform the acts necessary for deportation such as the application for issuance of passport (hereinafter “order to apply for a passport and so on”). A person who does not comply with the abovementioned order shall be **punished with imprisonment** for not more than 1 year or a fine not exceeding 2 hundred thousand yen (or their cumulative imposition ) (Article 72, item (vi)/item (viii)).
57. The **order to leave** under Article 55-2(1) will be exempted for **refugee applicants to whom suspensive effect** on an RSD application on deportation **applies** (see section III-1 of this Comments on the issue of exceptions from suspensive effect), and for persons, including asylum-seekers, for whom the execution of a deportation order has been suspended after filing a litigation to cancel or



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nullify a deportation order (Article 55-2(2) of the Amendment Bill). Therefore, in theory, ISA may issue an “order to leave” for refugee applicants to whom the suspensive effect is lifted under Article 61-2-9(4)(i) and (ii) of the Amendment Bill.<sup>87</sup> See Section III.1. of this Comments above), and penalize them for not departing after they have been issued with a deportation order. Nevertheless, the newly-created **order to apply for a passport** and so on under Article 52(12) of the Amendment Bill does **not have** such exceptions. ISA may in theory order **any asylum-seekers** (including those to whom suspensive effect on deportation applies and those who are pursuing judicial review over their negative RSD results/the issuance of a deportation order) to apply for a passport and perform other measures necessary to leave Japan. Nevertheless, asylum-seekers, who may be refugees fearing persecution, by definition are normally unable or unwilling to approach the authorities of their countries of origin. Approaching the consulates of their countries of nationality might heighten the asylum-seekers’ risk of being persecuted upon return or give rise to sur-place refugee claims. Further, stateless persons or persons of undetermined nationality are not specifically exempted either from “order to leave” under Article 55-2(1) or “order to apply for a passport and so on under Article 52 (12).”

58. In general, from the international human rights law perspective, the UN Working Group on Arbitrary Detention (WGAD) has repeatedly advised<sup>88</sup> against **criminalization of irregular stay** for all foreigners in general which should logically include penalization of non-departure after the issuance of a deportation order, stating:

*“The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health.”<sup>89</sup>*

In UNHCR’s view, this is particularly so for asylum-seekers and stateless persons.

59. Paragraphs 32 of UNHCR’s 2012 “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention” (hereinafter “Detention Guidelines”)

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<sup>87</sup> Third-time applicants without justifications to review the merits of their claim and those who have certain criminal record or who are suspected to become involved in terrorism or violent or subservice acts and son on. See section III. 1 of this Comments for UNHCR’s views on lifting of suspensive effect.

<sup>88</sup> Footnote 54 of UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention” (2012), available at: <https://www.refworld.org/docid/503489533b8.html>.

<sup>89</sup> Paragraph 10, p.32 of the No.5 A/HRC/39/45 (2 July 2018) Working Group on Arbitrary Detention Revised deliberation no 5 on deprivation of liberty of migrants (2 July 2018) available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/196/69/PDF/G1819669.pdf?OpenElement>.



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states:

*“(...) detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.”<sup>90</sup>*

60. UNHCR notes the fact that the SCDD Proposal also recommends “**applicants for refugee status whose deportation should be suspended**” be excluded from such measures (p.29 Section IV.1(3) in the SCDD Recommendations above).
61. In practice also, UNHCR understands that ISA’s intention in principle is **not** to impose the abovementioned orders to asylum-seekers in general, taking into consideration their special circumstances, but the order could possibly be imposed to them on very exceptional cases which are judged on case-by-case basis. Against this background, UNHCR recommends that both Article 55-2(1), and Article 52(12) of the Amendment Bill specifically exempt **all asylum-seekers** from the **imposition of both orders and consequent penalties** in order to comply with international refugee/human rights law principles. The term “**applicants for refugee status whose deportation should be suspended**” on p.29 Section IV.1(3) in the SCDD Recommendations should encompass all asylum-seekers who have not received the final decision on their refugee status for whom by definition deportation should be suspended. This should include such persons for whom the suspensive effect is lifted under Article 61-2-9(4)(i) and (ii) of the Amendment Bill (see Section III.1. of this Comments above on UNHCR’s view on the lifting of suspensive effect).
62. In addition, as a UN agency mandated by the General Assembly to address statelessness,<sup>91</sup> UNHCR also notes with appreciation that SCDD Report at page 32 (laying out the base “Discussion” for the Proposal under Section IV.1[3]) refers to an opinion expressed during the deliberation that stateless persons should also be exempted from the penalty, stating:

*“Certain categories of foreigners should be exempt from the orders, including, not only applicants for refugee status but also **stateless persons (whom it is practically difficult to deport)**; (...)”*

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<sup>90</sup> Paragraph 32 of UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention” (2012), available at: <https://www.refworld.org/docid/503489533b8.html>.

<sup>91</sup> The UN General Assembly (GA) assigned the mandate to UNHCR to assist stateless persons under article 11 of the 1961 Convention on the Reduction of Statelessness by Resolutions 3274 (XXIV) of 1974 and 31/36 of 1976. UNHCR’s mandate to address statelessness has since then been expanded through subsequent GA Resolutions 49/169 of 1994 and 50/152 of 1995, and now covers not only state parties to the two Statelessness Conventions but the entire world.



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63. As stated in the UNHCR’s Detention Guidelines (2012), stateless persons in the migratory context tend to “face a heightened risk of arbitrary detention,”<sup>92</sup> and they might **not** be able to **leave the country even after** the deportation order is issued and are indefinitely detained (and even if the proposed penalty is imposed). Specifically, *“stateless persons often do not have legal residence in any country. Because they generally do not possess identity documents or valid residence permits, stateless persons can be at high risk of arrest and repeated and prolonged detention. In situations where they are detained outside their country of origin, they may also face prolonged detention because they are unable to return to their country of origin. However, being undocumented or lacking required immigration or residence permits cannot be used as a general justification for detention of stateless persons.”*<sup>93</sup>
64. In practice, UNHCR understands that ISA’s intention in principle is not to impose any of the orders under Article 55-2(1) or Article 52(12) to stateless persons, for whom by definition it is impossible or difficult to execute deportation regardless of the concerned persons’ willingness to return. Nevertheless, especially in the absence of an established statelessness determination procedure in Japan, stateless persons might not necessarily be identified as such and might theoretically be punished for non-departure or non-compliance with an order to apply for a passport. Accordingly, UNHCR recommends that stateless persons should also be explicitly exempted from the imposition of orders (and the resultant penalties) under Article 55-2(1) or Article 52(12). Further, taking this opportunity, it might be useful for GoJ to consider establishing a statelessness determination procedure or otherwise streamline the stay arrangements for stateless persons so as to prevent them from remaining in irregular situation for an indefinite period even after the issuance of a deportation order. Furthermore, stateless persons should benefit from ATDs contained in ICRRRA as discussed below.

#### **4. Introduction of “monitoring measures” (Article 44-2(1) and Article 52-2(1) of the Amendment Bill) and efforts to expand the use of ATDs**

##### **Relevant Articles from the ICRRRA Amendment Bill**

<sup>92</sup> UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,” 2012, available at: <https://www.refworld.org/docid/503489533b8.html>. paragraph 4. See also Handbook on the Protection of Stateless Persons (2014) paragraphs 112-115, as well as 166-168, available at: <http://www.refworld.org/docid/53b676aa4.html>. UNHCR, “Stateless Persons in Detention: A tool for their identification and enhanced protection,” June 2017, available at: <https://www.refworld.org/docid/598adacd4.html>.

<sup>93</sup> p. 4, UNHCR, “Stateless Persons in Detention: A tool for their identification and enhanced protection,” June 2017, available at: <https://www.refworld.org/docid/598adacd4.html>.



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### **Article 52-2(1) of the Amendment Bill**

(**Note:** Article 44-2(1) provides similar provisions for persons to be placed under “monitoring measures” in the context of a written detention order) rather than a deportation order).

#### **(Monitoring measures in lieu of detention)**

Article 52-2 *“The supervising immigration inspector who has received the notice pursuant to the provision of paragraph (7) of the preceding Article (**Translator Note:** When those subject to deportation cannot be immediately deported) may, when he/she finds it appropriate not to detain a person subject to deportation (except those detained or accorded provisional release) until such time as deportation becomes possible, taking into consideration the **degree of risk** that the person may **flee or engage in illegal work** and **other circumstances**, apply the Monitoring Measures (the measures to monitor the person by a monitor prescribed in the following Article. The same shall apply hereinafter in this Section) on the condition that the person **pays a deposit** not exceeding three million yen specified by the Ministry of Justice Ordinance by the time limit specified by the Ministry of Justice Ordinance. In this case, a supervising immigration inspector shall impose on the person placed under the monitoring measures restrictions on his/her residence and the area of movement, the obligation of appearing at a summons, and other conditions deemed necessary to prevent fleeing and illegal work (referred to as “monitoring measures conditions” in paragraph (4) and Article 52-4, paragraph (2), item (iv)). (...)*

(3) *A person who is subject to deportation (limited to a person who is detained or accorded provisional release; the same shall apply in the following paragraph) may, pursuant to the Ministry of Justice Ordinance, request the supervising immigration inspector to refer him/her to be placed under monitoring measures.*

(4) *If, upon the request set forth in the preceding paragraph or ex officio, the supervising immigration inspector finds it appropriate to release the person subject to deportation until such time as deportation becomes possible, taking into consideration the degree of risk of the person **may flee or engage in illegal work** and other circumstances, the supervising immigration inspector shall make a decision to release the person and place him/her under supervision. In this case, the person who is placed on a monitoring measure shall be required to pay a deposit not exceeding three million yen as provided for by the Ministry of Justice Ordinance, and the conditions for the monitoring measure shall be attached.*

#### **(Monitor)**

Article 52-3 *The monitor shall be **selected by the supervising immigration inspector** who makes the decision on monitoring measures from among persons who understand the responsibilities of the monitor prescribed in the following paragraphs to paragraph (5), who have consented to be the monitor of the monitored person concerned, and who are found to be appropriate in consideration of their ability to*





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*perform their duties.*

*(2) A monitor shall, to the extent necessary for ensuring the appearance of the monitored person under his/her monitoring and for ensuring compliance with the conditions attached pursuant to the provisions of paragraph (1) or (4) of the preceding Article, **grasp the living conditions of said monitored person and provide guidance and supervision** to said monitored person.*

*(3) In order to **contribute to ensuring the appearance of the monitored person** under his/her monitoring and to **ensuring compliance with the conditions** attached pursuant to the provisions of paragraph (1) or paragraph (4) of the preceding Article, the **monitor shall**, in response to the consultations from said monitored person and provide said monitored person, **make efforts to provide support to him/her including assistance to maintain the place of his/her residence, provision of necessary information and advice.***

*(4) When a monitor falls under any of the following items, the monitor shall notify the supervising immigration inspector to that effect and the matters specified by the Ministry of Justice Ordinance, pursuant to the Ministry of Justice Ordinance*

*(i) When it becomes known that the monitored person falls under any of items (ii) to (v) inclusive of paragraph (2) of the following Article.*

*(ii) When the monitored person has died.*

*(iii) In addition to what is listed in the preceding two items, when the case falls under the cases specified by the Ministry of Justice Ordinance as cases where the continuation of the monitoring measures will be hindered*

*(5) The monitor shall, pursuant to the Ministry of Justice Ordinance, notify the supervising immigration inspector of the **living conditions of the monitored person, the status of compliance with the conditions** attached pursuant to the provisions of paragraph (1) or (4) of the preceding Article, and other matters specified by the Ministry of Justice Ordinance.*

*(6) The provision of paragraph (6) of Article 44-3 shall apply mutatis mutandis to the rescission of the selection of the monitor, and the provision of paragraph (7) of the same Article shall apply mutatis mutandis to the resignation of the monitor:*

*(Revocation of the decision on monitoring measures)*

*Article 52-4 The supervising immigration inspector shall rescind a decision on the monitoring measures when the monitored person or the monitors fall under any of the following items, pursuant to the provision of the Ministry of Justice Ordinance;*

*(i) In cases where the monitoring measures have been taken pursuant to the provision of paragraph (1) of Article 52-2 and the monitored person has failed to pay the deposit by the time limit specified by the Ministry of Justice Ordinance;*



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*(ii) In the case where the selection of the monitor has been rescinded pursuant to the provision of paragraph (6) of Article 44-3 as applied mutatis mutandis pursuant to paragraph (6) of the preceding Article, the monitor has resigned or the monitor has died and there is no one to be newly selected as the monitor for the monitored person.*

*(2) In cases where the monitored person falls under any of the following items, the supervising immigration inspector may rescind the decision on monitoring measures pursuant to the provision of the Ministry of Justice Ordinance.*

*(i) Cases where it has become necessary to detain the monitored person in order to carry out the deportation*

*(ii) When there are reasonable grounds to suspect that the monitored person has fled or is about to flee.*

*(iii) When there are reasonable grounds to suspect that the person engages in activities related to management of business involving income or activities for which he/she receives reward, or engages in these activities.*

*(iv) When the conditions for monitoring measures have been violated.*

*(v) When the monitoring person has failed to make a notification pursuant to the provisions of the following Article or has made a false notification.*

*(4) When the Supervising immigration inspector rescinds a decision on a monitoring measure pursuant to the provision of paragraph (2) (excluding cases where the decision falls under item (i) of the same paragraph (excluding cases where the decision falls under any of items (ii) to (v) inclusive of the same paragraph)). In this case, all or part of the deposit shall be forfeited.*

*(Notification by the monitored person)*

*Article 52-5 The monitored person shall, pursuant to the Ministry of Justice Ordinance, notify the supervising immigration inspector of the status of compliance with the conditions attached pursuant to the provision of paragraph (1) or (4) of Article 52-2 and other matters specified by the Ministry of Justice Ordinance.*

*(Revocation of the decision on monitoring measures)*

*Article 52-6 A decision on the monitoring measures shall cease to be effective when a written deportation order against a monitored person ceases to be effective.*

**Relevant parts of the SCDD Report**

**Section IV.2(3)(a) (p.51) of the SCDD Report states:**

*[1] "With regard to the individuals who have been issued with a deportation order (...), provisional release (...) should be appropriately used (...).*



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*(...)consideration should be given to the further clarification of its conditions and criteria as well as to their publication, including through the introduction of appropriate legal provisions.(...)*

*[2]Consideration should be given to the **modification of the current system, which makes it a rule to detain the individuals** who are subject to deportation after the issuance of written detention/deportation orders **until the time of deportation**. This can be done by introducing **new alternatives to detention**, in addition to provisional release, to permit those who are subject to deportation to live outside detention facilities, (...) while seeking to prevent them from fleeing and to ensure their reporting to the authorities (...) on the premise that (...) they can ensure their means of subsistence without resorting to illegal work, for example, with the support or assistance of third parties.*

65. The bill introduces “monitoring (supervisory) measures” (kanri-sochi) (Article 44-2 and Article 52-2). Where persons including asylum-seekers and stateless persons who have been issued with a detention order or a deportation order, are placed outside detention under certain conditions, including the payment of a bond money, and under the monitoring (or supervision) of “monitors” who are private actors. This is apparently a reflection of the SCDD Recommendation Section IV.2(3)(a) (p.51) which proposed the introduction of “new alternatives to detention” with the support or assistance of third parties. UNHCR notes that the SCDD Recommendation [2] **notably proposes the modification of the current mandatory detention system making it a rule to detain individuals until deportation**. Moving away from mandatory detention policy is especially crucial for asylum-seekers pending the final decisions and stateless persons whose deportation is likely impossible. Intention and efforts to expand the use of ATDs in themselves are welcome developments.
66. Among others, UNHCR notes that some of those on “monitoring measures” may be allowed to work when ISA “finds it appropriate” (Article 44-5) but some (including those who have already been issued with a deportation order) will not be granted work permit, which might lead to destitution. Under Article 44-3(3) and Article 52-3(3) of the Amendment Act, “monitors” are expected to “make efforts to” provide support to monitored persons including “assistance to maintain the place of their residence” and provision of necessary information and advice. There is currently no available information that “monitors” will be funded by GoJ, thus their efforts to assist the individuals in question assumingly need to come from the monitors’ own resources. However, simply counting on the good-will/voluntary efforts by private actors might not be sustainable. While there is scope of flexibility in the choice of reception arrangements to be put in place, States are ultimately responsible to ensure people have access to an adequate standard of living, including the means of livelihood for



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asylum-seekers pending the final decisions on their RSD,<sup>94</sup> and providing State-funded livelihood assistance in the absence of right to work is one of such means. Further, UNHCR wishes to emphasize the need to ensure access to public services such as basic healthcare including immunizations and basic education for those on “monitoring measures” according to international human rights standards. Further, in general, alternatives to detention that restrict the liberty of asylum-seekers *“may impact on their human rights and are subject to human rights standards, including periodic review in individual cases by an independent body. Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.”*<sup>95</sup> Further, alternatives to detention should not be used as alternative forms of detention and, it is important that States observe the principle of minimum intervention in designing alternatives to detention.<sup>96</sup>

67. As discussed during the SCDD sessions, it has been demonstrated including in Japan, through the Ministry of Justice (MoJ)-Japan Federation of Bar Associations (JFBA)-Forum for Refugees Japan (FRJ)’s tripartite framework etc.<sup>97</sup> that in order to ensure non-abscondment, it is highly effective for the government to collaborate with the civil society/communities in managing the ATD; in particular through case management mechanisms and structured community supervision including by providing counselling and other assistance. The Amendment Bill requires “monitors” to report to ISA on whether those on the monitoring measures are complying with the conditions imposed by ISA, failure of which also leads to “monitors” being imposed with a fine (Article 44-3(5), Article 52-3(5) and Article 77-2(ii) (iv)). This combined with the possible conflict of interests/difficulties in nurturing trust arising from their roles as supporters and advocates may make some NGOs and legal professionals working for asylum-seekers, refugees and stateless persons hesitant to take up the role of “monitors” which could endanger the successful implementation of the new ATD. It is hoped that if “monitoring measures” are to be introduced, they are implemented in a spirit of collaboration between the government and civil society actors whose purpose is to ensure the basic human rights

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<sup>94</sup> Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems, No. 93 (LIII) - 2002 <https://www.unhcr.org/excom/exconc/3dafdd344/executive-committee-conclusion-93-2002-conclusion-reception-asylum-seekers.html>.

<sup>95</sup> UNHCR Detention Guidelines (2011) para 37.

<sup>96</sup> UNHCR Detention Guidelines (2011) paras. 38-39.

<sup>97</sup> See FRJ, “Implementation of the project in relation to shelters and other arrangements for persons who seek asylum at airports in Japan” (6 December 2019) at p.5 of the Japan Association for Refugees (JAR)’s submission to the 5th meeting of SCDD (16 January 2020) at <http://www.moj.go.jp/content/001318373.pdf>. See UNHCR’s submission during the 5<sup>th</sup> meeting, i.e. the excerpts of the “Options Paper 2: Options for governments on open reception and alternatives to detention, 2015,” <https://www.refworld.org/docid/5523e9024.html>, Alice Edwards (UNHCR), “Back Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants,” April 2011, PPLA/2011/01. Rev.1, available at: <http://www.refworld.org/docid/4dc935fd2.html>, IDC, “There are Alternatives: A handbook for preventing unnecessary immigration detention, 13 (May 2011), available at: <http://www.refworld.org/docid/4f0c14252.html>.



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of those released into the ATD while addressing the State's concerns including on abscondment.

68. Relatedly on a separate note, UNHCR **welcomes the new provisions in relation to Provisional Permission to Stay (PPS)**, which was introduced in 2005, which are expected to strengthen the protection of asylum-seekers pending their RSD decisions - including by giving them the ability to acquire residency status (Article 61-2-5) and work permit (Article 61-2-7(2)). PPS was introduced in 2005 specifically to stabilize the legal status of asylum-seekers who do not have residency permits including those who apply for RSD at airports in the absence of any residency status which is designed for asylum-seekers.<sup>98</sup> The norm thus should be that among all the ATDs or temporary stay arrangement of asylum seekers under the ICRRA, PPS is granted to as many asylum-seekers as possible, and other ATDs should be considered for those who do not qualify for PPS. UNHCR thus hopes that PPS be utilized more widely by abolishing some of its criteria (that are frequently invoked to deny PPS) such as apparently **not having applied for RSD within six months** of landing in Japan, and **not** having been issued with a deportation order (Article 61-2-4(1)(vi)(viii)), and by restrictively implementing the requirement for not having the **risk of absconding** as UNHCR recommended in its comments in relation to the Bill to Reform ICRRA in 2004(Article 61-2-4(1)(ix)). Further flexible utilization of the landing permission for temporary refuge under Article 18-2 of ICRRA will also be important.<sup>99</sup>

##### **5. Maximum period of detention and independent review over the decision (to continue to) detain**

69. Further, UNHCR notes that the current Amendment Bill does not appear to particularly reflect the SCDD's Recommendation to consider the i) establishment of the mechanisms to examine the necessity of continuing detention beyond a certain period of time and ii) effective measures to further ensure the appropriateness of the administrative procedures concerning detention (**Section IV 2(1)** [1][2]).

##### **Relevant parts of the SCDD Report**

**SCDD Proposal under Section IV 2(1)** states at [1][2] (p.42):

*“[1] (...) consideration should be given to the **establishment of mechanisms to examine the necessity of continuing detention beyond a certain period of time**, paying attention to the argument that the maximum*

<sup>98</sup> For more details, see pp.4-8 of UNHCR, UNHCR's Comments on the Bill to Reform the Immigration Control and Refugee Recognition Act of Japan, 19 May 2004, available at: <https://www.refworld.org/docid/42b7f4894.html> [accessed 9 March 2021].

<sup>99</sup> According to the ISA statistics, PPS, among 733 persons whose eligibility for PPS was determined in 2019, only 25 were granted the same. p.8 of ISA, “Reiwa gan-nen ni okeru nanmin ninteisha su to nit suite” (March 2020) , available at: <http://www.moj.go.jp/isa/content/930005069.pdf>. If the application of PPS (along with landing permission for temporary refuge) is expanded, those who would need to be placed under “monitoring measures” is expected to be small.



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*period of detention should be provided for as well as the international trends (...).*

*\* Some members argued that the maximum period of detention and the maximum total period of detention should be explicitly provided for.”*

*[2] (...) there are major problems in requiring advance judicial review in all cases, because opportunities for judicial review are ensured through the administrative litigation system. Consideration should be given, however, to possible effective measures to further ensure the appropriateness of the administrative procedures concerning detention, including by establishing mechanisms to examine the necessity of continuing detention (see [1] above) and by providing information on opportunities for administrative litigation in a more appropriate manner.*

*\* Some members argued that advance judicial review should be necessarily conducted at the time of starting or extending detention because it is serious restriction on personal liberty.*

70. As summarized on p.18 of the SCDD Report, UNHCR’s position as laid out in its Detention Guidelines (2012) is that detention of asylum-seekers should be a **measure of last resort**, only when it has been individually determined to be **necessary, reasonable and proportionate in light of a legitimate purpose, after considering alternative measures to detention** (see in particular Guideline 4 of the Detention Guidelines). Detention must be in accordance with and authorized by law (Guideline 3). It is **necessary to establish the maximum period of detention** (Guideline 6) as well as the **system of prompt review by an independent body over the decision to detain** (Guideline 7, para 47[iii])<sup>100</sup> and regular periodic reviews of the **necessity to continue** to detain (Guideline 7, para 47[iv]).<sup>101</sup>

71. UNHCR thus supports the recommendation by some SCDD members recorded under the **Section IV 2(1) [1][2]** of the SCDD Report to establish the maximum period of detention and Judicial review of detention, and to ensure judicial review at the time of starting or extending detention. It would be beneficial for GoJ to consider establishing a system for a prior review at the time of detention as the current administrative litigation system, as referred to in the Recommendation [2], in practice only functions to review the appropriateness of the decision to issue a detention or a deportation order after a person has already been detained. As stated in the “Discussion” part of the relevant Section of the

<sup>100</sup> Guideline 7, para 47 states If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees: (...) and [iii] states “to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.”

<sup>101</sup> Guideline 7, para 47[iv] states “following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.”



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SCDD Report, legislating on the maximum period of detention and the review system over the decision to/continue to detain would indeed help GoJ to abide by: “[I]nternational human rights treaties to which Japan is a State party, including the Refugee Convention; the Global Compact for Migration, about which Japan has agreed; and the comments and recommendations on these instruments from different international bodies.”<sup>102</sup>In particular, Article 9 of ICCPR guaranteeing the right to liberty and security of person and the protection against arbitrary detention sets out an important principle.

#### **6. The establishment of penalties for absconding while on newly created “monitoring measures” (Article 72(iv) a of the Amendment Bill)**

##### **Excerpts of the Relevant Parts of the Amendment Bill**

###### Chapter IX Penal Provisions

Article 72 of the Amendment Act provides:

*“Any foreign national falling under any of the following items shall be punished with imprisonment with work for not more than 1 year or a fine not exceeding 200,000 yen, or shall be subject to the cumulative imposition of imprisonment and a fine.”*

Article 72 (iv) of the Amendment Bill provide as follows:

(iv) *“When a person has fled or has failed to appear when summoned without a justifiable reason in violation of the conditions imposed pursuant to the provisions of Article 44-2 (1) or (5) (UNHCR Note: monitoring measures in lieu of detention under a written detention order), or Article 52-2 (1) or (4) (UNHCR Note: monitoring measures in lieu of detention under a written deportation order).*

##### **IV.2 (3)(b) of the SCDD Report proposes the following:**

*[1] “Consideration should be given to the establishment of penalties for those on provisional release who have fled or who have not appeared before the authorities without justifiable*

<sup>102</sup> SCDD Report, p.43. It is also to be noted that as a latest development in 2020, WGAD of the UN Human Rights Council determined that Japan's current immigration detention policy/law (which can be indefinite without the maximum period of detention) amounted to "arbitrary detention" – which is to be prevented under international human rights law, including for not being proportionate in light of the purpose detention is meant to achieve. Opinion adopted in the 88th session of WGAD on August 28, 2020 A/HRC/WGAD/2020/58 available at: [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session88/A\\_HRC\\_WGAD\\_2020\\_58\\_Advance\\_Edited\\_Version.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session88/A_HRC_WGAD_2020_58_Advance_Edited_Version.pdf). In relation this opinion, ISA published on 30 March 2021 the Japanese government's response to the opinion adopted by WGAD dated 28 September 2020.



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*reasons in contravention of the prescribed conditions.*

*\* Some members objected to the establishment of such penalties.*

[2] *If alternatives to detention are to be introduced, effective measures to prevent fleeing, including penalties, should also be considered.”*

72. UNHCR notes that the Amendment Bill establishes the penalties of imprisonment for not more than 1 year or a fine for absconding while on newly created “monitoring measures” (Article 72 (vi) of the Amendment Bill). This was based on the SCDD’s Recommendation on the imposition of penalty on those absconding while on the newly created alternative to detention (i.e. “monitoring measures” – see Section 4 above on “monitoring measures”).
73. UNHCR notes that the Recommendation duly records the minority opinions against the establishment of such penalties. Imposing the penalty against abscondment is not only disproportionate in light of the aim, but might not necessarily address the government’s concerns over abscondment.<sup>103</sup> UNHCR notes the opinions recorded on the “Discussion” part of the Report that abscondment can already be addressed with other deterrent mechanisms which is confiscation of the bond deposited upon being put under ATD and the existence of a guarantor or a “monitor.” As one of the opposing opinions during SCDD rightly points out:
- “If the current practice, the so-called principle of **mandatory detention**, is changed and detention becomes the last resort, the incidence of fleeing and non-appearance is likely to be very low. Penalties should not be introduced before taking legislative measures to this effect.”<sup>104</sup>*
74. UNHCR supports the abovementioned minority opinion that a new penalty including imprisonment for absconding should **not** be established. The risk of abscondment by those on “monitoring measures” and other measures indeed can be effectively addressed by proper case-management accompanying ATDs, mentioned above in paragraph 67. If an individual is placed on an alternative to detention such as provisional release or “monitoring measures” and abscond but are then apprehended, there should once more need for a re-examination of the applicability of all alternatives to detention, including, for example, by imposing more intensified monitoring such as frequent reporting conditions and/or through the additional provision of bonds and/or sureties. Re-detention due to the status that caused the original detention should then be resorted to only after it is determined that none of the available alternatives to detention can be applied including to prevent re-abscondment.

<sup>103</sup> See also SCDD Report pp.54-55 of Attorney Masashi Ichikawa’s submission to the 29 June 2020 meeting of the Immigration Policy Discussion Panel (IPDP), available at: <http://www.moj.go.jp/content/001323272.pdf>.

<sup>104</sup> p.55, SCDD Report.





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## 7. Other issues

### 7.1 Conditions in detention and treatment of detainees

75. The Amendment Bill now contains many detailed provisions on the conditions in detention facilities including the treatment of detainees which used to be regulated under the relevant Ministry of Justice Ordinance (Regulations on the Treatment of Detainees). The Amendment Bill contains a number of newly created provisions, reflecting SCDD’s Recommendation in Section IV 2(2) of the SCDD Report at [1] to enhance the detention conditions to protecting detainees’ privacy, access to medical care and information. One of the examples of the new provisions that are positive is Article 55-5 of the Bill states: “*The director of an Immigration Detention Center or regional immigration bureau (...) must endeavor to support detainees in intellectual, educational, recreational activities or any other activities.*” Paragraph (2) of the article refers to the directors of Immigration Detention Centers’ obligation “to make books available for detainees” (assumably recreational or otherwise) reading.

76. These provisions are positive which would contribute to achieve the human rights guarantees for detainees, notably the right to humane and dignified conditions, as advocated for in Guideline 8-10 of the UNHCR’s Detention Guidelines 2012. UNHCR notes that, as noted in the “Discussion” part of the Report under this Recommendation, further facilitating *access to information and various communication equipment* (which can be interpreted to include newspapers, telephone, television and even internet) can enhance the detainees’ ability to gather and receive vital information relevant to their asylum claims and to their decision on return.<sup>105</sup> Further, as recommended in the SCDD Recommendations, GoJ is encouraged to take further measures to ensure “appropriate treatment of detainees in need of special consideration” (this can be interpreted to include persons with special needs and vulnerability namely women, elderly persons, persons with mental health, physical illness, or disabilities and LGBTI persons as laid out in the “Discussion” section of the Proposal at p.49) including by providing psychological counselling and care.<sup>106</sup>

### 7.2 Regularization and legal migration options

77. ICRR bill provides for the “**right to apply**” for special permission for Stay [zairyu tokubetu kyoka] (SPS) which is a regularization measure for those without legal status, along with examples of elements that are positively considered (Article 50). This reflects the SCDD Recommendation

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<sup>105</sup> As in the Detention Guidelines (2012) Guidelines 8, para 48 (vii) (xii) and (xiii).

<sup>106</sup> Detention Guidelines (2012) Guidelines 8, para 48 (vi).



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IV.1(2)[2] [2] and Section IV.1(1)[1]. On a separate note, the Amendment Bill also facilitates re-entry of foreigners considering the circumstances of their past stay, family affiliations and other factors; etc. to be granted any status of residence for employment under the mechanisms in the light of their skills or techniques and Japanese language ability. Establishing legal migration options are likely to help address the issues of the abuse or misuse of the asylum procedure.

78. In the past, SPS used to be granted completely as a discretionary measure without any application right almost without any criteria stipulated under ICRRA. UNHCR welcomes the creation of the “**right to apply**” for SPS. Nevertheless, UNHCR notes that the right to apply for SPS is **limited to those who have not yet been issued with a deportation order**. UNHCR considers useful for GoJ to consider **extending the right to apply for SPS** to persons who have already been issued with a deportation order and have been living in Japan for years without legal status including former asylum-seekers who have finally been rejected, as a regularization measure. This is especially so in light of the COVID-19 pandemic making it difficult for some to return to their country of origin in safety and dignity at the moment. UNHCR also welcomes the efforts to clarify the criteria or, rather, “elements for positive consideration” for SPS. These are, specifically, *“the reasons for the person concerned’s wish to stay in Japan, family relations, behavior, how he/she came to Japan, the length of stay in Japan and legal status during the period, the grounds for the person to have fallen under the deportation procedure, need for humanitarian consideration, and the situations inside and outside Japan and the possible implications of the person’s regularization for other illegal stayers and other reasons”* (Article 50(5)). UNHCR believes it is important that **statelessness** (or at least the lack of deportation prospects) **is also included** as elements for positive consideration.

### 7.3 COVID-19, ATDs and regularization

79. Section IV.3(2) of the SCDD Report refers to the opinions expressed by some members concerning the impact of COVID-19, which quickly spread around the world and in Japan as the SCDD deliberations progressed. UNHCR has noted ISA’s efforts intended to prevent the spreading of COVID-19 including by establishing “Task Force to Prevent Infection within Immigration Detention Facilities” and “Manual on Responding to COVID-19 within Immigration Detention Facilities”,<sup>107</sup> as well as by increased grant of provisional release.<sup>108</sup> UNHCR also welcomes the SCDD Report’s

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<sup>107</sup> Immigration Services Agency (ISA) of Japan, Manual on COVID-19 prevention within detention facilities, available at: [http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri01\\_00176.html](http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri01_00176.html).

<sup>108</sup> See SCDD Minutes of the 9th meeting p.2, available at: <http://www.moj.go.jp/content/001323906.pdf>.



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reference to the recommendations by international bodies<sup>109</sup> highlighting “[t]he importance of alternatives to detention and the need to make efforts for the regularization and, indeed, many developed countries have released most of the detainees and/or granted temporary status of residence for irregular residents.” As the SCDD Report points out, since the situation related to the COVID-19 pandemic is not expected to change drastically in the near future, these measures may continue for a significant period of time around the world. As the opinion cited in the SCDD Report points out, “The need for a policy measure to admit foreigners facing difficulties to return due to inability to enforce forcible deportation,” in addition to further expansion of ATDs (including for [rejected] asylum-seekers) may indeed become relevant to Japan. Under the current COVID-19 pandemic, the use of ATDs becomes even more necessary for persons with underlying medical conditions or vulnerabilities as they are more prone to COVID-19 infection, and for those who cannot be deported because of the disruption to international travel or border closures.

#### **7.4 Enhancement of the rights of refugees**

80. The Amendment Bill includes several changes that strengthen the protection and integration of refugees. One of them is that the Amendment Bill abolishes the existing requirements for recognized refugees to obtain “long-term resident” status, which are (i) filing applications within 6 months from arrivals in Japan and (ii) entering Japan “directly” from a territory where one would be persecuted under Article 61-2-2(1)(i)-(ii) of the current ICRRA. Further, under the Amendment Bill, those granted complementary protection also acquire long-term resident permit under Article 61-2-2(1)(i) (those granted “humanitarian status” under the current ICRRA are granted less stable “designated activities” status). Further, The Bill also **extends the maximum validity period of the Refugee travel document** from the current 1 year to 5 years (Article 61-2-15(3)). UNHCR welcomes the GoJ’s efforts to facilitate refugees to travel to other countries.<sup>110</sup> Further, UNHCR welcomes the facilitation of permanent residency for certain refugees by exempting them of certain requirements (Article 22[2]).

#### **7.5 Treatment of those who are found not to be in need of international protection**

81. While not particularly reflected in the Amendment Bill (which is understood to be done as part of

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<sup>109</sup> See pp.20-31 of UNHCR & Attorney Makoto Miyazaki’s submission on 22 May 2020 to the 8<sup>th</sup> SCDD meeting, The Working Group on Alternatives to Immigration Detention, United Nations Network on Migration, “COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?” (April 2020), available at: <http://www.moj.go.jp/content/001321075.pdf>.

<sup>110</sup> Section 7.12 “Recognition of refugee status” in UNHCR, *A guide to international refugee protection and building state asylum systems* (2017), Handbook for Parliamentarians N° 27, available at: <https://www.refworld.org/docid/5a9d57554.html>, p.189.



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practical measures) UNHCR welcomes the SCDD's Recommendation under *Section IV.1(2) [3]* which stated "*Efforts should be made to increase the number of voluntary returnees by making more effective use of the Assisted Voluntary Return and Reintegration Programme of the IOM (International Office for Migration) and other support programmes.*" As UNHCR submitted during SCDD,<sup>111</sup> the treatment of individuals who have sought international protection and who, after due consideration of their claims in full and fair procedures, are found neither to qualify for 1951 Convention refugee status, nor to be in need of international protection on human rights and/or humanitarian grounds, is an important factor in maintaining a credible refugee status determination system. A legislative framework and effective system should be put in place that fairly and transparently regulates the treatment of finally rejected asylum-seekers who are not entitled to domestic protection or other rights to remain. Such a regulation may include the provision of counseling at the end of the RSD process, provisions for assisted voluntary return and an effective and transparent return monitoring system to ensure return in safety and dignity. The basic principle governing the treatment of such persons includes that they be treated in a humane manner and with full respect for their basic rights and dignity.

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<sup>111</sup> Section 9.2 "Migration options as an alternative to return," UNHCR, "The 10-Point Plan in Action on Refugee Protection and Mixed Movements, 2016 Update, Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options" (2016) available at: <https://www.refworld.org/docid/584185c14.html>. The Japanese translation of the excerpts of the relevant parts has been submitted to SCDD's 4th meeting on 12 December 2019 and is available at: <http://www.moj.go.jp/content/001318369.pdf>.

See also pp.5-6 of UNHCR Japan, "Points of consideration related to global and domestic refugee and statelessness issues (Update I) (May 2017), available at: [https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points\\_for\\_Consideration\\_JAPANESE\\_May\\_2017.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Points_for_Consideration_JAPANESE_May_2017.pdf).