A Global Administrative Act? Refugee Status Determination between Substantive and Procedural Law

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4. A Global Administrative Act?

Refugee Status Determination between Substantive and Procedural Law

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4.1 Introduction

A person is subject to the jurisdiction of a state, personally and territorially, and belongs to the international community through said state. Refugees are people who have become unable to receive the protection from their country of nationality because of the fear of persecution and have had their personal ties with the state cut. They are linked to the state and the international community only by the fact that they exist and may be granted asylum in the territory of the host state. Under international law, immigration control is subject to the exercise of territorial sovereignty by a state, and it is unanimously recognized that a state has no obligation to grant entry to a person who does not have the nationality of that state unless international agreements or customary international law imposes restrictions.[1] Refugees or asylum seekers are primarily subject to this legal principle and to the right of immigration control enjoyed by the state that they have reached after fleeing their country of origin. In contrast to Thomas Jefferson's affirmation, they do not have the 'right to live somewhere on the earth.'[2]

International refugee law is a body of international norms that restricts state discretion on immigration control. It includes the 1951 Convention Relating to

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[1] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 608; Jean Combacau and Serge Sur, *Droit international public* [Public International Law] (12th edn, LGDJ 2016) 371; Sōji Yamamoto, *Kokusai-hō* [International Law] (2nd edn, Yūhikaku 1994) 514 (Japan).

[2] Thomas Jefferson, 'First Annual Message' (8 December 1801) in Paul Leicester Ford (ed), *The Works of Thomas Jefferson*, vol 9 (GP Putnam's Sons 1905) 341 fn 1, cited in Kaoru Obata, 'Imin, Nammin hō ni okeru Seigi-ron Hihan: "Chikyū-jō no Doko ka ni Sumu Kenri" no tame ni' [Criticism of Justice Theory in Immigration and Refugee Law: For "the Right to Live Somewhere on Earth"] (2015) 34 Sekai hō Nempō [YB World L] 111, 113 (Japan).

the Status of Refugees[3], the 1967 Protocol Relating to the Status of Refugees[4], and customary international law concerning the international protection of refugees.[5] Refugees are entitled to territorial asylum[6] backed by the principle of non-refoulement (a prohibition on the return of refugees to their country or region where there is a risk of persecution) and enjoy the rights and legal statuses guaranteed by the Refugee Convention and Protocol if the country of refuge is party to them. International refugee law can be seen as a framework to help individuals who have lost their personal ties to the international community through a network of international cooperation.

Paradoxically, to be accepted into such an international protection framework, an asylum seeker must be recognized as a refugee by the host state. As will be explained in detail in Part I, the Refugee Convention and Protocol define the term 'refugee' and provide for the requirements that must be satisfied for an individual to be a refugee. Those who meet these requirements should be able to receive refugee protection wherever they are in the world. In reality, refugee status determination (hereinafter 'RSD') under procedural law precedes the implementation of protection under substantive law. The Refugee Convention and Protocol are silent regarding the organ in charge of and the procedure involved in RSD. The consequence of this silence is the application of the principle of state territorial sovereignty, and RSD is to be conducted by the government of the country to which the asylum seeker wishes to be allowed entry and to be accepted as a refugee. At least in principle, anyone who meets the requirements for refugee status must be recognized as a refugee in any country, but the reality is that there are large differences between countries in the number and rate of recognition of ref-

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[4] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

[5] Regional treaties and other international instruments are also important, e.g., Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (Organization of African Unity (currently African Union) Refugee Convention); Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) (Cartagena Refugee Declaration) <www.refworld.org/docid/3ae6b36ec.html> accessed 19 March 2021. Nevertheless, this paper focuses only on general international refugee law and mentions regional instruments in relation to cases in which they are in question.

[6] Territorial asylum refers to the acceptance and sojourn in the host state of persons who are at risk of political persecution from the state of origin. A person who is granted territorial asylum can escape the accusation of the authorities of his own state as an effect of territorial sovereignty. On asylum, see generally Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed., OUP 2007) 355–58. See also P. Weis, 'Territorial Asylum' (1966) 6 Indian J Intl L 173, reproduced in Hélène Lambert (ed), *International Refugee Law* (Ashgate 2010) 13.

ugees.[7] As described above, the current situation of international refugee law can be described as 'substantive law is global, procedural law is domestic'.

This article focuses on the fact that in most countries the authority to grant refugee status is in the hands of administrative bodies, and that RSD is conducted as an administrative act and is regulated under administrative law. Here, an administrative act refers to a concept known in administrative law scholarship within civil law jurisdictions (Verwaltungsakt in German, acte administratif in French, and gyōsei kōi in Japanese), which indicates the type of a decision by an administrative agency to apply general norms of law to specific cases and to determine the legal status (rights and obligations par excellence) of particular parties. Although common law jurisdictions do not use this concept, the legal phenomenon in which administrative authorities make decisions that directly regulate the legal status of private persons can be seen there, too. Regardless of whether or not the term 'administrative act' is used, such a phenomenon is considered common among administrative legal systems.[8]

Because it is primarily the state that has the authority to regulate directly the legal status of private persons, the concept of an administrative act has conventionally been peculiar to domestic law. However, it has recently been recognized that international organizations and supranational entities in charge of global governance may make specific decisions to regulate directly the rights and obligations of individuals, and this has attracted theoretical interest.[9] For example, Global Administrative Law (GAL) scholars often cite the determination of mandate refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR),[10] along with the decisions of the Executive Board of the Clean Devel-

[7] According to UNHCR statistics, in 2016, Japan recognized 28 refugees and rejected 9,604 applications while Germany recognized 263,622 (the largest number in the world for that year) and rejected 196,184. UNHCR, *UNHCR Statistical Yearbook 2016* (16th ed., 2018) Table 9 <www.unhcr.org/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html> accessed 19 March 2021.

[8] Jaime Rodríguez-Arana Muñoz and others, 'Foreign Administrative Acts: General Report' in Jaime Rodríguez-Arana Muñoz (ed) *Recognition of Foreign Administrative Acts* (Springer 2016) 1 ('an administrative act—either "unilateral" or "individual"—could be defined as an individual decision taken by a public authority to rule a specific case, submitted to public law and immediately executed without judicial intervention, understanding that, except in the case of a specific statutory reserve, it refers to the decision, the final act—the one that ends a process—and not to the intermediary ones'). Compared to this definition, my definition only refers to the 'prescriptive' effect of an administrative act, and does not include the 'self-enforcement' or 'self-executory' character thereof. In civil law jurisdictions, administrative agencies are enabled to enforce and execute administrative acts without judicial intervention in many cases, while in common law jurisdictions, they generally need to ask the judiciary for authorization for enforcement or execution. I put this point aside because I am not interested in the self-enforcement or self-executory character of an administrative act here. I would like to concentrate on the commonalities between civil law and common law jurisdictions to make a cross-cutting analysis.

[9] See, e.g., Jakub Handrlica, 'International Administrative Law and Administrative Acts: Transterritorial Decision Making Revisited' (2016) 7 Czech YB Public & Private Intl L 105.

[10] BS Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law' (2005) 37 NYU J Intl Law & Pol 799, 819–26; Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 NYU J Intl Law & Pol 869; Emma Dunlop, 'A Globalized Administrative Procedure: UNHCR's Determination of Refugee Status and its Procedural Standards' in Sabino Cassese and others (eds) *Global Administrative Law: The Casebook* (3rd ed., Kindle 2012) pt IIIB3.

opment Mechanism (CDM) that determines the eligibility of projects in relation to the CDM and greenhouse gas emission reduction credits and the U.N. Security Council's 1267 Committee listing decisions freezing the assets of listed persons.[11]

'Mandate refugees' are refugees covered by UNHCR's mandate, as opposed to 'convention refugees' that come under the Refugee Convention and Protocol. Whereas the authority to recognize convention refugees rests with states, the recognition of mandate refugees is left to UNHCR. Although the definitions of mandate refugees and convention refugees are not identical, the requirements and elements to be recognized as such are mostly the same, and few fall under either. If UNHCR's mandate RSD complements, if not replaces, convention RSD by states, the abovementioned statement 'procedural law is domestic' would need to be considerably re-evaluated. In other words, the possibility of a global administrative act by an international organization that is comparable to an administrative act by a national agency should be discussed.

This article analyses the correlation between the authorities of states and UNHCR concerning the recognition of refugee status. To this effect, it refers to international administrative law and GAL as analytical frameworks. They are both theoretical frameworks that intend to understand cross-border activities for public interest as administrative activities and regulate them with legal rules and principles derived from (domestic) administrative law. However, they differ in that the former still emphasizes state rights and obligations and their roles in international administrative cooperation, while the latter comprehensively covers global governance developed in a space beyond states (global administrative space[12]).[13] International administrative law suggests an approach to constrain the discretionary right of a state with reference to international instruments such as the Refugee Convention and Protocol, and GAL gives an idea that a global administrative body such as UNHCR takes an administrative act vis-à-vis a private person directly. From this perspective, I analyse the RSD systems of states and UNHCR and their relationship.

I first outline the mechanisms of convention RSD by states (Part I) and of mandate RSD by UNHCR (Part II). Then, I analyse the legal implications of UNHCR's mandate RSD in relation to a state's RSD using Japanese and British cases (Part III) before concluding the article (Part IV).

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[11] Richard B Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?' (2005) 68(3/4) L&CP 63, 89. The listing of persons subject to the assets freezing is cited because '[a]lthough member states must implement freezes of listed persons' assets, implementation in many states is automatic, making the effective impact of committee listing decisions direct' (ibid 89 fn 96).

[12] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3/4) L&CP 15, 18–27.

[13] On international administrative law as compared to global administrative law, see Yukio Okitsu, 'International Administrative Law, a Precursor of Global Administrative Law?: The Case of Soji Yamamoto' in Jean-Bernard Auby (ed) *Le futur du droit administratif / The Future of Administrative Law* (LexisNexis 2019).

4.2 Convention refugee status determination by States

4.2.1 The Refugee Convention and the Refugee Protocol

Article 1A(2) of the 1951 Refugee Convention defines the term 'refugee' as any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[14]

This definition has a temporal limitation expressed by 'as a results of events occurring before 1 January 1951' and paragraph B(1) of the same article admits the possibility of geographic limitations leaving each contracting state to choose whether the scope of the 'events' is limited to events occurring in Europe or whether it includes events occurring in other countries.[15] The 1967 Refugee Protocol removes the temporal and geographic limitations imposed by the Refugee Convention. Article I, paragraph 2, of the Protocol abolishes the temporal limitation by providing that:

> For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words '... as a result of such events', in article 1 A (2) were omitted.[16]

Paragraph 3 also abolishes the geographic limitation by providing that '[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation' except the case provided for by its saving clause.[17] The Refugee Convention and Protocol are separate treaties that are independent of each other, which enables states to be party to one or the other if they choose, and the latter does not have the effect of amending the former.[18] However, Article I, paragraph 1 of the Protocol provides that '[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined',[19] and if a state becomes party to the Protocol, it will concurrently bear obligations under the substantive provisions of the Convention.

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[14] Refugee Convention (n 3) art 1A(2).

[15] ibid art 1B(1).

[16] Refugee Protocol (n 4) art I2.

[17] ibid art I3.

[18] Goodwin-Gill and McAdam (n 6) 508.

[19] ibid art I1.

4.2.2 *The Immigration Control and Refugee Recognition Act of Japan*[20]

The general framework

Upon its accession to the Refugee Convention and Protocol in 1981, Japan promulgated a relevant legislative act to implement them, which entered into effect on 1 January 1982.[21] The then Immigration Control Order, the fundamental statute in this field, was renamed the Immigration Control and Refugee Recognition Act[22] (hereinafter 'ICRRA'), into which related provisions were inserted. Article 2, item (iii-2), of ICRRA defines the concept of a refugee as follows: '[t]he term "refugee" means a refugee who falls under the provisions of Article 1 of the Convention Relating to the Status of Refugees (…) or the provisions of Article 1 of the Protocol Relating to the Status of Refugees.'[23] ICRRA does not provide its own definition of a refugee and its own substantive requirements that an asylum seeker is required to fulfil to be recognized as a refugee. Instead, it refers to provisions of the existing international instruments, and the same concept of a refugee as that defined by the Refugee Convention also applies in Japanese law. Thus, the substantive law is kept uniform under international and domestic law.

As a matter of procedural law, the Refugee Convention and Protocol provide for nothing on how and what organ shall determine refugee status although Article 9 of the Convention assumes that RSD will be conducted by states parties.[24] The general understanding is that each state party has the authority to carry out RSD on its own given that it actually assumes the task and responsibility to implement the Refugee Convention and Protocol and to grant asylum to refugees where necessary.[25] ICRRA entrusts the Minister of Justice with the authority for

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[20] See, generally, Osamu Arakaki, *Refugee Law and Practice in Japan* (Routledge 2008) (a comprehensive book written in English about the Japanese law and practice on the implementation of international refugee law).

[21] Nammin no chii ni kansuru jōyaku tō eno kanyū ni tomonau Shutsunyūkoku Kanri Rei sonota kankei hōritsu no seibi ni kansuru hōritsu [Act Relating to the Revision of the Immigration Control Order and Other Related Laws upon Accession to the Convention Relating to the Status of Refugees, etc.], Act No 86 of Shōwa 56 (1981) (Japan).

[22] *Shutsunyūkoku Kanri oyobi Nammin Nintei Hō* [Immigration Control and Refugee Recognition Act], Cabinet Order No 319 of Shōwa 26 (1951) (Japan) (ICRRA), translated in Ministry of Justice, Japanese Law Translation <www.japaneselawtranslation.go.jp/law/detail/?id=1934&vm=&re=&new=1> accessed 19 March 2021. The translation in this text is with my own modifications.

[23] ICRRA (n 22) art 2(iii-2).

[24] Refugee Convention (n 3) art 9: 'Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, ***pending a determination by the Contracting State that that person is in fact a refugee*** and that the continuance of such measures is necessary in his case in the interests of national security.' (emphasis added).

[25] UNHCR, 'Note on Determination of Refugee Status under International Instruments', UN doc EC/SCP/5 (24 August 1977) paras 7, 11. See also James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 129 Harvard Intl LJ 129, 166–8.

RSD,[26] by providing in Article 61-2 (1) that '[t]he Minister of Justice may, if an alien in Japan submits an application in accordance with the procedures provided for by a Ministry of Justice ordinance, recognize said alien as a refugee (…) based on the materials submitted by him or her'.[27] In this situation, we can see that 'procedural law is domestic'. In the following, analysing the legal effects of and requirements for RSD in Japanese law, I will discuss how the domestic procedural law affects the premise that 'substantive law is global'.

Effects of an RSD

The principal legal effect of an RSD is to 'authoritatively determine that the alien concerned fulfils the requirements for refugee status stipulated in the Refugee Convention and therefore is a refugee, as the premise [for the government] to perform the various obligations set forth in the Convention'.[28] This effect puts the person in a legal position to be treated as a refugee by the relevant authorities. It can be analysed into two types of sub-effects: a constructive (creative) one and a declaratory (confirmative) one. I will compare both with examples.[29]

First, the constructive (creative) effect creates a legal status that cannot be claimed without an RSD. A case in point is that it constitutes a necessary condition for the issuance of a refugee travel document. The Refugee Convention, on the one hand, under Article 28 (1), obliges contracting states to 'issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory'.[30] It does not require, at least on its face, obtaining an RSD, but just requires being a refugee in order to receive a travel document. ICRRA, on the other hand, in Article 61-2-12 (1), provides that '[t]he Minister of Justice shall, if an alien residing in Japan who has been recognized as a refugee seeks to depart from Japan, issue a refugee travel document based on an application from said alien, in accordance with the procedures provided for by a Ministry of Justice ordinance'.[31] According to this provision, an applicant for a refugee travel document must be one 'who has been recognized as a refugee', which means one who has previously obtained an RSD. In other words, an asylum seeker who has not been recognized as a refugee by an RSD is not entitled to a refugee travel document even if this person may objectively and substantively fall under the definition of

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[26] While ICRRA only uses the term 'recognition of refugee status' (***nammin no nintei***) instead of 'refugee status determination', I use both terms interchangeably throughout this article because they have the same meaning.

[27] ICRRA (n 22) art 61-2(1).

[28] Shutsunyūkoku Kanri Hōrei Kenkyūkai [Research Group on Immigration Control Laws and Regulations] (ed), ***Chūkai Hanrei Shutsunyūkoku Kanri Jitsumu Roppō*** [Annotated Cases and Statutes on Immigration Control for Practice] (2019 edn, Nihon Kajo Shuppan 2018) 131 (Japan).

[29] On the effects of RSD, including those not discussed below, see Nihon Bengoshi Rengōkai, Jinken Yōgo Iinkai [Japan Federation of Bar Associations, Human Rights Protection Committee] (ed), ***Nanmin Nintei Jitsumu Manyuaru*** [Manual of Refugee Status Determination Practice] (2nd edn, Gendai Jimbun Sha 2017) 152–7 (Noriko Watanabe) (Japan).

[30] Refugee Convention (n 3) art 28(1).

[31] ICRRA (n 22) art 61-2-12(1).

a refugee. This provision presupposes the constructive effect of an RSD that creates refugee status as a necessary condition for a refugee travel document.

How can it be justified to add such a requirement by domestic law that the Refugee Convention does not impose?[32] A justification may be offered as follows: a state party disposes of procedural discretion, which is supposedly and implicitly left to it by the Convention. When it determines whether or not to issue a refugee travel document, the relevant state agency must preliminarily determine whether the applicant fulfils the requirements for being a refugee in any case. If this preliminary determination has already been done by an RSD, it is redundant to reiterate the same determination only for the issuance of a travel document. If agencies authorized for RSD and travel documents are not the same, there is a risk that one agency's determination of refugee status may conflict with another's. Therefore, it is reasonable for a state party to grant the authority for RSD to one agency and require other agencies to comply with its determination. This treatment can be justified in the framework of procedural discretion.

Second, a declaratory (confirmative) effect confirms a legal status that is supposed to have existed before an RSD was done. An example can be found in Article 70-2 of ICRRA, which sets forth a requirement for the exemption from the penalty for a crime such as illegal stay. The article stipulates that '[a] person … may be exempt from penalty if it is proved that each of the following items is the case', and item (i) lists the case 'the person is a refugee'.[33] For this provision to apply, the accused must prove that she is a refugee before the criminal court, but literally need not have been previously recognized as a refugee by an RSD. It does not presuppose a refugee status that is created by the constructive effect of an RSD as a premise for the exemption. The accused has two choices. First, if she has already been recognized as a refugee by an RSD, she can present her certificate of refugee status issued by the Minister of Justice as a piece of evidence, which the relevant authorities, including courts, are required to treat as proving that she is a refugee. Second, if she has not, she can directly prove to the criminal judges that she actually fulfils the refugee requirements on other evidence. In the first case, the effect of an RSD is declaratory and not constitutive, because other modes of proof aside from an RSD are possible in the second case.

There are also benefits or protection given independently of refugee status, albeit originating from the Refugee Convention. The principle of non-refoulement is a case in point. Article 53 (3) of ICRRA applies it not only to refugees, but to all

[32] See, for example, 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, UN doc HCR/1P/4/ENG/REV.3 (December 2011) para 28 ('A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'); Goodwin-Gill and McAdam (n 6) 51 ('In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive').

[33] ICRRA (n 28) art 70-2.

foreign nationals who are deported from Japan. Another example is the national treatment with respect to public relief, public assistance, and other forms of social security accorded to refugees by Articles 23 and 24 of the Refugee Convention. Upon its accession to the Refugee Convention and Protocol, Japan amended the related legislation to abolish the nationality requirement so that these payments can be offered to all foreign nationals and not just to refugees. In these cases, RSD naturally has no effect on the application of the principle of non-refoulement or social security laws.

Requirements for RSD

When the Minister of Justice determines whether an applicant for RSD fulfils the definition of a refugee, the Minister must carry out a fact-finding exercise and apply the law.[34] The question is whether or not the Minister is given discretionary power in so doing. Some authors deny it because an RSD is not constitutive, but declaratory, or a fact-confirming act, by which the Minister just applies the legal concept of refugee as set forth in the Refugee Convention to facts and confirms whether the applicant falls under the definition or not.[35] I agree with the conclusion that there is no ministerial discretionary power, but it has yet to be justified. Merely characterizing an RSD as declaratory does not seem sufficient as a reason, for such an act is often accompanied by a certain margin of appreciation, at least a de facto one. Fact-finding draws facts from evidence and the application of the law determines whether these facts fulfil given legal criteria to infer a legal effect. If the legal criteria are given in the form of an indefinite term, such as 'persecution', there is supposed to be a margin of appreciation as to what this term exactly means and what kind of facts fall within its scope.[36] It is not necessarily true that any decision maker would not arrive at the same conclusion on a particular case. Therefore, just simply being a declaratory, fact-confirming act does not deny the existence of discretion. To deny it, it is necessary to argue that such a margin of appreciation should not be legally allowed; in other words, that the law that authorizes officials to carry out fact-finding and application of law delineates the scope of the term in question so that it prohibits deviating from it.

Although ICRRA grants Japanese officials the authority for RSD, the law that delineates the scope of the term 'refugee' is the Refugee Convention and Protocol because the relevant articles of ICRRA[37] simply refer to their provisions in defining it. If the Convention and Protocol granted discretion to states on RSD, it follows that they would allow a situation in which a person who reaches State A is granted asylum as a refugee and another who reaches State B is denied refugee status, even if both have fled from the same persecution in the same country. I

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[34] Arakaki (n 20) 77–8.

[35] Tatsuo Yamamoto, 'Nanmin Jōyaku to Shutsunyūkoku Kanri' [The Refugee Convention and Immigration Control] (1981) 34(9) Hōritsu no Hiroba 20, 23; Shigeki Sakamoto, *Jinken Jōyaku no Kaishaku to Tekiyō* [Interpretation and Application of Human Rights Conventions] (Shinzansha 2017) 319 (Japan).

[36] Arakaki (n 20) 20 (pointing to the difficulty of fact-finding and normative aspects of RSD).

[37] ICRRA (n 28) art 61-2 (1), 2 (iii)-2.

argue that this is not the case; the Convention and Protocol should be interpreted to aim at a universal system for the protection of refugees, and that asylum seekers escaping from the same persecution must be granted the same protection under the same conditions from any state party. This argument is supported by the Preambles to the Refugee Convention and Protocol. The former states: 'it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement',[38] referring to the UN Charter[39] and the Universal Declaration of Human Rights.[40] The latter reads: 'it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951',[41] and thereby abolishes the aforementioned temporal and geographic limitations. UNHCR's notes on the extraterritorial effect of RSDs, requesting that one country approve the effect of an RSD by another, also reinforce this argument.[42] States parties should not be allowed discretionary power to deny refugee status to asylum seekers who objectively and substantively fall within the scope of the concept of a refugee as delineated by the Convention and Protocol. Japan's ICRRA should be interpreted to the same effect.

Nevertheless, it is still occasionally true that a person who would be recognized as a refugee in State A may not be recognized as such in State B. This is because whereas substantive law is global, procedural law is domestic. While the Refugee Convention and Protocol deny state parties discretionary power as a matter of substantive law, it is still the case that they leave them a certain discretion in terms of procedure, including the rules relating to proof,[43] which belong to the procedural discretion left to each state party. Even if the substantive concept of a refugee is identical among states, different procedures can lead to different conclusions even in very similar cases. For example, if State A grants the benefit of the doubt to assess the credibility of the accounts of asylum seekers and State B does not, the two states can arrive at different conclusions in cases where the accounts in question are uncertain.

Under domestic administrative law, divergences among cases are reviewed by courts so that the procedural application of the substantive criteria will be unified. If there were an international judicial body such as an international refugee court, it would review decisions made by state authorities under international law, and it would become meaningless to distinguish between substantive and procedural law to determine whether or not states are allowed discretionary power. The

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[38] Refugee Convention (n 3) preamble.

[39] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter).

[40] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).

[41] Refugee Protocol (n 4) preamble.

[42] UNHCR, 'Note on Determination of Refugee Status' (n 25) paras 20–21. See also UNHCR, 'Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' UN doc EC/SCP/9 (24 August 1978) para 33.

[43] In relation to problems of proof in Japanese refugee status determination procedures, see Sakamoto (n 35).

denial of discretion as a matter of substantive law would result in the procedural subjection of decisions made by states to de novo review by the court that may substitute their decisions. Such a court does not (yet) exist in reality, and the discrepancy between substantive and procedural law still exists.

4.3 Determination of mandate refugee status by UNHCR[44]

4.3.1 Foundation for the Authority

The determination of mandate refugee status (mandate RSD) by UNHCR is called so because it is based on the mandate given to UNHCR under the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute).[45] The UNHCR Statute was adopted by a resolution of the United Nations General Assembly dated 14 December 1950. UNHCR itself was established on 1 January 1951 by a resolution of the United Nations General Assembly dated 3 December 1949,[46] and both these preceded the Refugee Convention and Protocol. It is characterized as a subsidiary organ of the General Assembly[47] and is supposed to exist independently of the Refugee Convention and Protocol. Although Article 35 (1) of the Refugee Convention and Article 2 (1) of the Refugee Protocol assign it a 'duty of supervising the application' of the provisions of these instruments,[48] UNHCR has no authority to implement them. Accordingly, mandate RSD finds no direct basis in the Refugee Convention or Protocol. It is carried out under UNHCR's independent authority based on its Statute.

4.3.2 The concept of mandate refugees

Mandate refugees can be divided into two categories: those in the narrow sense as set forth in the UNHCR Statute (almost identical to convention refugees), and those in the broad sense as recognized by UNHCR on its own. Both are substantive concepts. In terms of a procedural method of RSD, there can be a 'prima facie' recognition of refugee status, which is mostly conducted through a group-based assessment, instead of an individual assessment, of eligibility for refugee status. UNHCR also has a mandate to protect 'persons of concern' in addition to refugees per se, whose relationship with mandate refugees is not really clear.

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[44] For further details, see Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority in International Institutions: Advancing International Institutional Law* (Springer 2010).

[45] Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res 428 (V) (14 December 1950) (UNHCR Statute).

[46] UNGA 319 (IV) (3 December 1949).

[47] UN Charter (n 39) art 22.

[48] Refugee Convention (n 3) art 35(1); Refugee Protocol (n 4) art 2(1).

Mandate Refugees in the Narrow Sense

Mandate refugees in the narrow sense are people to whom the competence of the High Commissioner for Refugees shall extend, as defined in paragraph 6 of the UNHCR Statute. Section B of that paragraph provides:

> Any other person[49] who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.'[50]

This definition almost overlaps with that under Article 1A (2) of the Refugee Convention,[51] except that no temporal limitation ('as a result of events occurring before 1 January 1951') is imposed, that 'membership of a particular social group' is omitted as a reason for persecution,[52] and that the 'well-founded fear of persecution' need not currently exist and can be one that existed previously.[53] Furthermore, paragraph 8 of the Statute requires the High Commissioner to protect those refugees who fall under the definition. To discharge this obligation to protect, the High Commissioner needs to find out who a refugee is under the Statute,[54] and, consequently, his authority to conduct mandate RSD in the narrow sense is justified.[55]

Mandate Refugees in the Broad Sense

Mandate refugees in the broad sense are defined as those who are 'outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting

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[49] 'Any other person' means any person other than those falling under paragraph 6A of the UNHCR Statute, who: (i) have been considered as refugees under previous international treaties (corresponding to Article 1A (1) of the Refugee Convention), or (ii) meet the definition set forth in 6A (ii), which is almost identical to that in paragraph 6B, 'as a result of events occurring before 1 January 1951' (corresponding to Article 1A (2) of the Refugee Convention).

[50] UNHCR Statute (n 45) para 6B.

[51] James C Simeon, 'Refugee Adjudication under the UNHCR's Mandate and the Exclusion Dilemma' (2018) 2 Cambridge L Rev 75, 84 (asserting that UNHCR applies the definition of refugee in the Refugee Convention and Protocol in practice).

[52] However, it is determined that those who fall under the scope of the term 'convention refugee' also fall under the mandate of UNHCR, and, therefore, this point is not considered a major difference (UNHCR, *Refugee Status Determination: Identifying who is a refugee, Self-study module 2* (UNHCR 2005) 8).

[53] The text of the Statute, para 6B, reads 'because he has *or had* well-founded fear of persecution' (emphasis added), while the text of the Convention, art 1A(2), reads 'owing to well-founded fear of being persecuted'.

[54] High Commissioner's Advisory Committee on Refugees (First Session 1951), Item 6 of the Agenda, 'Memorandum by the High Commissioner on certain problems relating to the eligibility of refugees' (Conference Room Document No 1, 15 November 1951) <www.unhcr.org/4419921c2.pdf> accessed 19 March 2021.

[55] UNHCR, 'Note on Determination of Refugee Status' (n 25) para 8 ('[c]ompetence to determine refugee status under the Statute of UNHCR obviously rests with the High Commissioner for Refugees.').

from generalized violence or events seriously disturbing public order'.[56] They are different from convention and mandate refugees in the narrow sense in three ways: (1) instead of 'a well-founded fear of persecution' (Refugee Convention art 1A(2); UNHCR Statute para 6A(ii)), 'serious … threats' to life, physical integrity or freedom are sufficient (the existence of such threats having to be established with a reasonable likelihood as in the Refugee Convention); (2) such threats must originate in generalized violence or circumstances that seriously disturb public order, that is, circumstances wherein the state's capacity to provide protection has generally collapsed as may be a result of armed conflict, control or interference, occupation or colonization by a foreign country, or any other manmade disaster; (3) such threats may be indiscriminate (if there is a selective or individual risk of harm, the Refugee Convention may apply in most cases).[57]

The definition expands the scope of protection given that the concept of 'persecution' under Article 1A (2) of the Refugee Convention often entails a negative evaluation of the country of origin[58] and frequently shackles the recognition of refugee status.[59]

Prima Facie Recognition of Refugee Status Through a Group-based Assessment

In principle, the assessment of refugee status is conducted on an individual basis. However, it is often the case that a large group of people flee at once and are all considered refugees, judging from the circumstances. Although each could be recognized as a refugee if they were to be assessed on an individual basis, the urgent need for protection may make it impractical and impossible to carry out an individual assessment of each member of the group. In such cases, group recognition is conducted, whereby the members of the group are treated prima facie as refugees unless proven to the contrary.[60] Prima facie recognition differs from provisional or interim recognition, and, therefore, a person who has been recognized on a prima facie basis can enjoy full rights and status as a refugee as long as the recognition is valid.[61]

Persons of Concern

Ever since the adoption of its Statute, UNHCR has expanded the categories of persons to whom its competence extends by virtue of several UN General Assembly (UNGA) resolutions.[62] As a result, its personal scope currently covers asy-

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[56] UNHCR Division of International Protection, *UNHCR Resettlement Handbook* (rev. edn, UNHCR 2011) 81. See also UNGA, *Note on International Protection*, UN doc A/AC.96/830 (7 September 1994) paras 31–32.

[57] *UNHCR Resettlement Handbook* (n 56) 89.

[58] In this article, the term 'country of origin' means either the country of nationality or, in the case of a stateless person, the country of her former habitual residence.

[59] See Obata (n 2) 121–4.

[60] *UNHCR Resettlement Handbook* (n 56) 77.

[61] UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status', UN doc HCR/GIP/15/11 (24 June 24 2015) para 7.

[62] See UNHCR Statute (n 45) para 9.

lum seekers, returnees, stateless persons, and, under certain conditions, internally displaced persons. These persons, together with refugees, are collectively referred to as 'persons of concern to the UNHCR'.

Asylum seekers refer to persons 'whose refugee status has not yet been determined by the authorities but whose claim to international protection entitles him or her to a certain protective status on the basis that he or she could be a refugee, or to persons forming part of large-scale influxes of mixed groups in a situation where individual refugee status determination is impractical.'[63]

They have been included under the UNHCR's mandate since the term 'asylum seeker' was first used in a UNGA resolution in 1981.[64]

Returnees are 'former refugees who have returned to their country of origin spontaneously or in an organized fashion but are yet to be fully integrated'[65] including those to whom the Refugee Convention no longer applies because the circumstances on which the RSD was based have ceased to exist.[66] While at first UNHCR's mission had been thought to end once the repatriation was completed, monitoring returnees was also brought under its mandate following a conclusion by the UNHCR Executive Committee[67] and a UNGA resolution in 1985.[68]

Among stateless persons, those who qualify as refugees were originally included under the competence of UNHCR, and those who do not are now also covered by it. Pursuant to the 1961 Convention on the Reduction of Statelessness, 'a body to which a person claiming the benefit of the Convention may apply for the examination of his or her claim and for assistance in presenting it' is to be established within the framework of the United Nations,[69] and UNHCR came to bear this role under a UNGA resolution[70] thereafter.[71]

Internally displaced persons are 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular, as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or hu-

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[63] UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office' (October 2013) 3–4 <www.refworld.org/docid/5268c9474.html> accessed 19 March 2021.

[64] UNGA res A/RES/36/125 (14 December 1981) paras 5(a), 6, 13.

[65] UNHCR, 'Note on the Mandate' (n 63) 7.

[66] Refugee Convention (n 3) art 1C(5)(6).

[67] UNHCR Executive Committee Conclusion No 40 (XXXVI), 'Voluntary Repatriation' (1985) para. (l).

[68] UNGA res A/RES/40/118 (13 December 1985) para. 7.

[69] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175, art 11.

[70] UNGA res 3274 (XXIX) (10 December 1974); UNGA res A/RES/31/36 (30 November 1976).

[71] See, generally, UNHCR Executive Committee Conclusion No 78 (XLVI), 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons' (1995); UNHCR Executive Committee Conclusion No 106 (LVII), 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' (2006).

man-made disasters, and who have not crossed an internationally recognized border.'[72]

Although the reasons for fleeing are similar to those for refugees in the broad sense, internally displaced persons remain within their own countries and do not cross international borders. UNHCR does not have a general or exclusive mandate for them and operates based on the authorization by each UNGA resolution.[73]

Its intervention can be allowed based on specific requests from the UN Secretary-General or the competent principal organs of the United Nations with the consent of the concerned state by taking into account the complementarities of the mandates and expertise of other relevant organizations, and in situations calling for UNHCR's particular expertise, especially where such efforts can contribute to the prevention or solution of refugee problems.[74] Under the Inter-Agency Standing Committee's Cluster Approach (designating lead agencies for each cluster from among the various agencies involved in international humanitarian support and clarifying responsibility), UNHCR currently plays the role of the lead agency for the protection cluster while also sharing the role of the lead agency for the emergency evacuation site cluster jointly with the International Federation of Red Cross and Red Crescent Societies, and the role of lead agency for the refugee camp coordination and camp management cluster jointly with the International Organization for Migration.[75]

Besides, UNHCR may support people who do not fall within its conventional mandate through its 'good offices' upon a request by a UNGA resolution or by the UN Secretary-General where necessary.

Among the abovementioned 'persons of concern', the distinction between those who are refugees and those who are not is clear at least in theory. However, the UNHCR Resettlement Handbook states, 'UNHCR may also under certain circumstances conduct refugee status determination (RSD) under its mandate to identify persons of concern',[76] which seemingly suggests that people who are not refugees can be eligible for refugee status.[77] This is probably not true because this statement was made in the context that non-refugee 'persons of concern' are also eligible for UNHCR protection policies including resettlement, and also suggests that determination of such persons will be carried out by the same procedures as those followed for RSD.

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[72] *UNHCR Resettlement Handbook* (n 56) 24, citing UNHCR, *Guiding Principles on Internal Displacement*, ADM 1.1,PRL 12.1, PR00/98/109 (22 July 1998) 5.

[73] UNHCR, 'Note on the Mandate' (n 63) 9.

[74] UNGA res A/RES/48/116 (20 December 1993) para 12.

[75] UNHCR, 'Operational Guidelines for UNHCR's Engagement in Situations of Internal Displacement', UN doc UNHCR/OG/2016/2 (1 February 2016) 3.

[76] *UNHCR Resettlement Handbook* (n 56) 75.

[77] ibid 75 fn 1 ('Besides asylum-seekers and refugees, "persons of concern to UNHCR" also include returnees, stateless persons and, under certain circumstances, internally displaced persons.').

4.3.3 Relationship between Mandate RSD by UNHCR and Convention RSD by States

Because the recognition of mandate refugees by UNHCR is performed independently of the Refugee Convention and Protocol, it is possible for a person to be recognized as either a convention refugee or a mandate refugee or both.[78] However, in states that are party to the Refugee Convention and Protocol, refugee protection is primarily the responsibility of the state,[79] and protection by UNHCR is merely supplementary. Therefore, if a person has been recognized as a convention refugee by a state party, it will not be necessary for this person to be recognized as a mandate refugee again by UNHCR. Conversely, a state is very unlikely to recognize as a convention refugee a person whom UNHCR refuses to recognize as a mandate refugee given that the definitions of a mandate refugee in the narrow sense and a convention refugee mostly overlap.

UNHCR's mandate RSD is performed:

> In countries which are not Party to the 1951 Convention / 1967 Protocol; or
> In countries which are Party to the 1951 Convention / 1967 Protocol, but where asylum determination procedures have not yet been established; or
> the national asylum determination process is manifestly inadequate or where determinations are based on
> an erroneous interpretation of the 1951 Convention; or
> As a precondition for the implementation of durable solutions such as resettlement. [80]

When UNHCR conducts mandate RSD, it concludes agreements or memorandums of understanding with the host state so that it allows UNHCR to conduct mandate RSD in its territory, or obtains its approval in some form.[81] Nevertheless, in some cases, UNHCR is unable to receive explicit approval and even makes RSDs contrary to the will of the host state.[82] This is probably because refugee protection limits immigration control based on territorial sovereignty,[83] and can create tension with national interests.[84]

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[78] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN doc HCR/1P/4/ENG/REV. 4 (April 2019) paras 16–7.

[79] UNHCR, 'Note on Determination of Refugee Status' (n 25) para 7; UNHCR Executive Committee, 'Refugee Status Determination', UN doc EC/67/SC/CRP.12 (31 May 31 2016) para 14.

[80] UNHCR, *Refugee Status Determination* (n 52) 11.

[81] Smrkolj (n 44) 173–4.

[82] Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 Intl J Refugee L 251, 252.

[83] Mari Takeuchi, 'Nammin Jōyaku' [The Refugee Convention] (2015) 423 Hōgaku Kyōshitsu 113, 115, reprinted in Tadashi Mori and others (eds), *Bun'ya-betsu Kokusai Jōyaku Hando Bukku* [Handbook of International Treaties] (Yūhikaku 2020) 97 (Japan).

[84] Michael Kagan, '(Avoiding) The End of Refugee Status Determination' (2017) 9 Journal of Human Rights Practice 197, 198.

That said, statistics show that UNHCR's mandate RSD is by no means supplementary. According to UNHCR statistics for 2014, of the 173 countries and regions for which data were available, refugee status was determined by the state in 103 countries (60%), by UNHCR in 51 countries (29%), and by the state and UNHCR either separately or jointly in 19 countries and regions (11%).[85] Of the approximately 1,661,300 applications and appeals for RSD made the world over, 1,402,800 were made to states, 245,600 to UNHCR, and 12,900 to a state and UNHCR jointly, meaning that applications to UNHCR accounted for 15% of the total.[86] Of the approximately 1,061,400 substantive decisions made in response to these applications, 957,400 were made by states, 99,600 by UNHCR, and 4,400 jointly, with UNHCR accounting for 9%.[87] Only Russia (274,744) received more applications than UNHCR in 2014,[88] and this demonstrates the significance of mandate RSDs by UNHCR.

4.3.4 Effects of Mandate RSD

If recognized as meeting the requirements for mandate refugee status, a UNHCR refugee certificate will be issued to certify that the holder is a refugee.[89] However, because mandate refugees are not linked to the Refugee Convention and Protocol as discussed above, and are not approved by national law in many cases, it is not always clear what the legal effects and consequences of a mandate refugee status are. It is sometimes explained that the main effect is to identify those who are eligible for UNHCR's protection policies, which include the application of the principle of non-refoulement, permanent solutions, and social and economic support.[90] The first two are interesting enough to be discussed below because they can involve the relationship with state territorial sovereignty, while I will not develop the last any further because it is a direct grant by UNHCR and does not seem to be directly at odds with state sovereignty.

Application of the Principle of Non-refoulement

The principle of non-refoulement is set forth in Article 33 of the Refugee Convention. It prohibits the expulsion or return of a refugee to a country or region where the refugee's life or freedom is likely to be threatened. While it is not agreed

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85 UNHCR, *UNHCR Statistical Yearbook 2014* (14th edn, UNHCR 2015) 51 <www.unhcr.org/statistics/country/566584fc9/unhcr-statistical-yearbook-2014-14th-edition.html> accessed 19 March 2021. For specific details about each country and region, see ibid., Excel Annex Tables, table 10 <www.unhcr.org/statisticalyearbook/2014-annex-tables.zip> accessed 19 March 2021. Although the last edition of the UNHCR Statistical Yearbook is the 2016 edition (n 7), I use the 2014 edition because the format has changed and the figures on UNHCR's mandate RSD cannot be discovered in the 2016 edition.

86 *UNHCR Statistical Yearbook 2014* (n 85) 52.

87 ibid 54.

88 ibid Excel Annex Tables, table 9.

89 UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003) para 8.1.

90 Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 Intl J Refugee L 1, 4.

among scholars whether the principle is jus cogens under international law,[91] it is generally accepted that the principle is at least customary international law[92] and thus binding even on states that are not party to the Refugee Convention and Protocol.[93] In reality, however, in countries where RSD cannot be conducted on their own and domestic laws relating to refugee protection are not in place, voluntary compliance with the principle of non-refoulement is most unlikely, irrespective of whether the state is party to the Refugee Convention and Protocol. Therefore, UNHCR concludes agreements individually with the host state[94] to request the application of the principle of non-refoulement to those who are recognized as mandate refugees.

For example, Egypt had concluded an agreement with UNHCR in 1954 to grant residence permits to mandate refugees before it acceded to the Refugee Convention and Protocol in 1981.[95] UNHCR assists the Egyptian government to abide by the principle of non-refoulement, while seeking the resettlement of refugees in third countries as Egypt refuses to issue permanent residence permits.

In contrast, Lebanon is not a party to the Refugee Convention and Protocol and did not grant residence permits to refugees or asylum seekers even for short stays until 2003. In the early 2000s, it reportedly cracked down on illegal immigrants even if they were refugees or asylum seekers, and hundreds of people were deported to Iraq, in particular. UNHCR was refused interviews with detained refugees and asylum seekers in some cases. However, a memorandum of understanding was concluded between UNHCR and the Lebanese government in 2003, allowing refugees and asylum seekers to be granted residence permits for a maximum of 12 months and guaranteeing UNHCR access to detainees.

In the absence of such an agreement, the treatment of those recognized as mandate refugees generally depends on each country's domestic laws. In 2005, the Japanese government was criticized by UNHCR[96] for the possible violation of the principle of non-refoulement when it refused to grant convention refugee

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[91] For a detailed account, see Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2016) 2015 Netherlands YB Intl L 273, 306–9 (arguing that it constitutes *jus cogens*). See also Evan J Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (OUP 2016) 268–70 (explaining the customary nature and *jus cogens* status of the principle of non-refoulement based on the fiduciary theory of sovereign states acting on behalf of humanity).

[92] Goodwin-Gill and McAdam (n 6) 346.

[93] Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement; Opinion' in Erika Feller and others (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 149.

[94] When opening a local office in the host country, UNHCR sometimes concludes special agreements in order to 'promot[e] … the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection' (UNHCR Statute para 8(b)), in addition to a comprehensive cooperation agreement with its government. The application of the principle of non-refoulement is usually included in these special agreements. See Marjoleine Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal Publishers 2006) 52–3, 62–70.

[95] The examples from Egypt and Lebanon are all as reported in Kagan (n 90) 4–6.

[96] UNHCR, 'Deep concern over refugee deportation from Japan' Press Release (8 January 2005) <www.unhcr.org/news/press/2005/1/41ed2b804/unhcr-deep-concern-refugee-deportation-japan.html> accessed 19 March 2021.

status to Kurdish people from Turkey, Mr Ahmet Kazankiran and his eldest son, under Japan's ICRRA, and deported them to Turkey even though they had been recognized as mandate refugees by UNHCR.[97] In response, the Director-General of Japan's Immigration Bureau of the Ministry of Justice refuted that the deportation of the Kazankirans was not in breach of the principle of non-refoulement because the Japanese court had rendered a clear judgment that they were not convention refugees.[98] The point at issue in this exchange was not whether the principle of non-refoulement was breached, but rather what legal implications UNHCR's mandate RSD had when Japan's relevant agency examined whether the Kazankirans were refugees. The assertion of the Japanese government (the Director-General of the Immigration Bureau) was merely a consequence of the interpretation that was repeatedly given by Japanese courts that UNHCR determination had no legal effect on the examination of convention refugee status by the domestic agency. I will return to this point later (Section III 1 below).

Durable Solutions

UNHCR provides support as durable solutions for refugees in three forms, namely voluntary repatriation, in which refugees return in safety and with dignity to their country of origin and re-avail themselves of national protection;[99] local integration, in which refugees legally, economically, and socially integrate in the host country; and resettlement, in which refugees are selected and transferred from the country of refuge to a third country that has agreed to admit them as refugees with permanent residence status.[100] Voluntary repatriation supposedly does not involve state territorial sovereignty because the repatriated refugees usually have the nationality of their country of origin or another qualification for permanent residence. Neither local integration nor resettlement is inconsistent with state territorial sovereignty because refugees have no right to seek acceptance and the state is not obliged to accept them. To be eligible for resettlement, a person must have been recognized as a mandate refugee by UNHCR and resettlement must be identified as the most appropriate solution after an assessment of the

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[97] Arakaki (n 20) 216–7. For reports by supporters of the Kazankirans, see Kurudo-jin Nanmin Ni-kazoku o Shien suru Kai [Association for the Support of Two Kurdish Families] (ed), ***Nanmin o oitsumeru Kuni: Kurudo-jin Nanmin suwarikomi ga uttaeta mono*** [The Country That Runs Down Refugees: What the Kurdish Refugees' Sit-in Called for] (Ryokufū Shuppan 2005); ***Bakkudoroppu Kurudisutan*** [Backdrop: Kurdistan], documentary film directed by Masaru Nomoto (Uplink 2007) (Japan).

[98] Document issued by Masaharu Miura, then Director-General, Immigration Control Bureau, Ministry of Justice, to the UNHCR Representation in Japan (25 January 2005), collected and stored in the National Diet Library's Web Archiving Project (WARP) <warp.ndl.go.jp/info:ndljp/pid/285792/www.moj.go.jp/NYUKAN/nyukan34-01.pdf> accessed 19 March 2021 (Japan).

[99] Monitoring returnees is included within UNHCR's mandate as discussed above under Section 2 (4).

[100] See, e.g., UNHCR, *Resettlement Handbook* (n 56) 28.

prospects of all durable solutions.[101] The candidate host state usually conducts its own screening as well.[102]

4.4 Legal implications of mandate RSD by UNHCR on Convention RSD by States

As described above, the determination of convention refugee status rests with states parties to the Refugee Convention and Protocol, not with UNHCR (Sections I 2 and II 1). The determination of mandate refugee status is conducted only under UNHCR's mandate and cannot replace convention RSD. Nevertheless, the need for protection is not different between convention and mandate refugees. This is all the more evident because the concept of a mandate refugee in the narrow sense and the concept of a convention refugee are almost identical (Section II 2 (1)) and the application of the principle of non-refoulement, which lies at the core of refugee protection, is strongly required not only for convention refugees, but also for mandate refugees (Section II 4(1)).

How should a state party to the Refugee Convention and Protocol treat a person who has been previously recognized as a mandate refugee by UNHCR when it considers the application made by the same person to be recognized as a convention refugee? In other words, what are the legal implications of UNHCR's mandate RSD for the convention RSD of states? I analyse precedents from Japanese and British courts to answer this question.

4.4.1 Japan

The Supreme Court of Japan has not ruled on the treatment of UNHCR's mandate RSD in Japanese law, but there are several precedential rulings passed by lower courts. The points of their rulings are summarized as follows: (i) UNHCR determination on refugee status is not binding on state authorities,[103] and Japan's Minister of Justice, who is authorized to conduct RSD under ICRRA (see Section I 1), may determine whether an asylum seeker is a convention refugee or not on his own.[104] (ii) The burden of proof cannot be shifted to the Minister of Justice in

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[101] ibid 75.

[102] For example, for the conditions for permission to resettle in Japan, see 'Daisankoku Teijū ni yoru Nammin no ukeire no Jisshi ni tsuite' [Regarding the Acceptance of Refugees by Resettlement] (Cabinet Understanding, 4 January 2014) <www.cas.go.jp/jp/seisaku/nanmin/pdf/140124ryoukai.pdf> accessed 19 March 2021. For an example from the United Kingdom, see Katia Bianchini, 'The Mandate Refugee Program: a Critical Discussion' (2010) 22 Intl J Refugee L 367. For the conditions for acceptance imposed by each state, see UNHCR, *Resettlement Handbook* (n 56) Country Chapters.

[103] Tōkyō Kōtō Saibansho [Tokyo High Court], 20 January 2005, Heisei 16 (2004) (Gyō-ko) No 113, available at LEX/DB 28101882. This means, at the same time, that the Minister of Justice cannot rely, to deny that the applicant is a refugee, on the fact that UNHCR has not yet made any decision on an application for mandate RSD (Nagoya Chihō Saibansho [Nagoya District Court], 25 September 2003, Heisei 14 (gyō-u) No 19, 1148 Hanrei Taimuzu 139).

[104] Tōkyō Kōtō Saibansho [Tokyo High Court], 20 September 2000, Heisei 11 (gyō-ko) No 103, 47 Shōmu Geppō 3723.

favour of the applicant for an RSD, who originally bears it,[105] on the grounds of UNHCR's RSD.[106] (iii) However, the fact that the applicant has previously been recognized as a mandate refugee by UNHCR is one of the factors the Minister of Justice should take into consideration when the Minister examines the application.[107]

As discussed repeatedly above, point (i) is a logical consequence of the fact that the UNHCR's mandate RSD is not based on the Refugee Convention and Protocol. Other countries such as Bulgaria[108] and France[109] recognize the effect of UNHCR's mandate RSD under their domestic law, but this is because their domestic legislation provides so, and by no means does international law require that such legislation be enacted.

Point (ii) derives from point (i). However, it may turn out to be unfair to the applicant if the burden of proof always lies on the applicant, considering the difficulty that asylum seekers encounter in submitting effective evidence to support their claim. It is possible to conceive of techniques that alleviate the burden imposed on the applicant. Such techniques can include a de facto presumption that the applicant who has a mandate refugee status recognized by UNHCR is also a convention refugee. In this case, the applicant should be granted a convention refugee status unless refuted with other relevant evidence. Nevertheless, such a presumption is not adopted by the Japanese administrative authorities and courts.

Point (iii) can also be accepted reasonably because the requirements for mandate refugee status in the narrow sense (see Section II 2 (2)) and convention refugee status overlap substantially.[110] However, none of the rulings that suggested point (iii) has stated anything more than 'apart from the fact that a mandate RSD has been made is one of the factors that should be taken into account for the determination of refugee status [by the Minister of Justice] …' and deduced any

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[105] On the general discussion and case law of the burden of proof of refugeehood in Japanese law, see Arakaki (n 20) 142–8; Sakamoto (n 35) 319–20, 323–7.

[106] Ōsaka Chihō Saibansho [Osaka District Court], 27 March 2003, Heisei 12 (gyō-u) No 13, 1133 Hanrei Taimuzu 127; Ōsaka Kōtō Saibansho [Osaka High Court], 10 February 2004, Heisei 15 (gyō-ko) No 36, 51 Shōmu Geppō 80.

[107] Ōsaka Chihō Saibansho, 27 March 2003 (n 106); Ōsaka Kōtō Saibansho, 10 February 2004 (n 106).

[108] Article 10 of the Law for the Asylum and Refugees stipulates that 'refugee status shall also be provided to an alien who is within the territory of the Republic of Bulgaria, and has been recognized as refugee under the mandate of the United Nations High Commissioner for Refugees' (Law for the Asylum and Refugees (as amended in 2007) [Bulgaria], 16 May 2002, art 10 <www.unhcr.org/refworld/docid/47f1faca2.html> accessed 19 March 2021, cited in 'National law and practice…' (cited below, n 120) para 9).

[109] Article L711-1 of the Code on the Entry and Stay of Foreigners and on the Right to Asylum stipulates that '[a]nyone persecuted for their action in support of liberty is recognised as a refugee, as is anyone who falls within the mandate of the United Nations High Commissioner for Refugees as set out in Articles 6 and 7 of its Statute adopted by the General Assembly of the United Nations on 14 December 1950, or who fulfills the definition set out in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees. Their situation is regulated by the provisions of the abovementioned Geneva Convention which are applicable to refugees.' (Code de l'entrée et du séjour des étrangers et du droit d'asile, art L 711-1, cited in 'National law and practice…' (cited below, n 120) para 17).

[110] Sakamoto (n 35) 330.

consequence from this fact. These rulings have not clarified how the mandate RSD should be considered and what weight should be given to it.

Some courts pointed out that the materials and information on which UNHCR had based its determination were unclear,[111] indicating that the necessary condition is lacking for the determination to be factored in by national courts. For these courts, what can be considered is not the conclusion reached by UNHCR that the applicant is a (mandate) refugee, but the reasons for which it reaches that conclusion. This is a logical consequence of point (i) in that national authorities are by no means bound by UNHCR's decisions.

4.4.2 The United Kingdom: The Case of IA

A 2014 decision of the Supreme Court of the United Kingdom is interesting because it aimed to make the significance of UNHCR's mandate RSD on the domestic refugee recognition procedure clearer and to examine whether and how UNHCR should submit information and materials on which it has based its RSD to national courts.

The Facts

The case in question is IA v Secretary of State for the Home Department. IA, a Kurd from Iran, was allegedly at risk of persecution by the Iranian government because of his previous engagement with the Kurdistan Democratic Party of Iran (KDPI), and on these grounds, applied to the UK government for the recognition of refugee status and asylum[112] upon his arrival in Scotland in 2007 via Turkey. As the Secretary of State for the Home Department of the United Kingdom (hereinafter 'Home Secretary') refused his application on 10 November 2008, IA filed an appeal against this decision of refusal. One of the grounds of appeal was that the Home Secretary had not given due consideration to the fact that he had been recognized as a mandate refugee by the local UNHCR offices in Kurdistan in 1998 and in Turkey in 2003 before reaching Britain. Focusing on this point, I analyse the rulings by the Asylum and Immigration Tribunal, the Court of Session, and the Supreme Court of the United Kingdom.

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[111] Nagoya Chihō Saibansho [Nagoya District Court], 16 January 2002, Heisei 12 (2000) (Gyō-u) No 24, Saibansho Saibanrei Jōhō [Saibansho Web] <www.courts.go.jp/app/hanrei_jp/detail4?id=7793> accessed 19 March 2021; Tōkyō Kōtō Saibansho, 20 January 2005 (n 103).

[112] In the United Kingdom, an application for determination of refugee status and an application for asylum are synonymous (Ian A Macdonald and Ronan Toal (eds), ***Immigration Law and Practice in the United Kingdom***, vol 1 (9th ed., LexisNexis 2014) para 12.2).

The Asylum and Immigration Tribunal

The Asylum and Immigration Tribunal (hereinafter 'AIT')[113] dismissed the applicant's appeal by a decision dated 14 December 2009. Immigration Judge (IJ) Agnew addressed how UNHCR's mandate RSD should be taken into consideration:

> As I have noted, independent documentary evidence regarding the procedures used to issue the appellant the refugee certificate in Iraq and refugee status in Turkey by-the [sic] UNHCR was not before me, nor evidence regarding on what basis the appellant applied for this status and on which it was granted. The appellant's evidence was most vague. Therefore, whilst the granting of refugee status to the appellant should be regarded as a starting point, it is not necessarily a very strong one, on its own, without any helpful evidence as to the basis and procedures for the previous grant. I, however, do bear in mind that it is a starting point, that it is significant and that whilst considering the substantive merits of the case, the most clear and substantial grounds, if they exist, must be provided for coming to a different conclusion[.][114]

Just looking at the last passage, Agnew IJ appeared to have placed considerable weight on UNHCR determination. However, she evaluated the evidence and upheld the Secretary's decision of refusal on the grounds that the applicant had not discharged the burden of proof that rested with him to show that he had a well-founded fear of persecution.[115]

The Court of Session

The appeal by IA was permitted and the case was heard in the Court of Session. The judgment by Lord Clarke dismissed the appeal.[116] Before analysing its reasoning, let us first look at the judgment cited by the court. It was rendered on a similar case after the AIT's decision on IA.

This judgment was written by Sullivan LJ in the Court of Appeal on the case of MM. In this case, similar to IA, the refusal to grant refugee status to a Kurd from Iran was challenged, and the approach toward considering a mandate RSD

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[113] The AIT was an administrative tribunal for hearing appeals against decisions relating to immigration control and asylum claims, which existed from 2005 to 2010. Its predecessor was the Immigration Appellate Authority, which comprised the Immigration Adjudicator for the first tier and the Immigration Appeal Tribunal for the second tier. The AIT was replaced by the Immigration and Asylum Chamber created in 2010 within the First-tier Tribunal that was established in 2007.

The Nationality, Immigration and Asylum Act 2002, which was in force at the time of this case, allowed appeals to the AIT against decisions by the Home Secretary to refuse asylum (s 83) and applications to a higher court for an order requiring the AIT to reconsider its decision on the appeal (s 103A). Here I discuss the second AIT decision on *IA* that was made after reconsideration. A further appeal against the reconsidered decision may be brought on a point of law to the appropriate appellate court, which is the Court of Appeal for England and Wales, the Court of Session for Scotland, or the Court of Appeal in Northern Ireland for that area only with the permission of the AIT or the competent appellate court (s 103B). An appeal against the decisions by the appellate court may be filed with the Supreme Court of the United Kingdom under the requirements and procedures governing appeals in general.

[114] *IA v Secretary of State for the Home Department* (2009) (AIT) [25], cited in [2014] UKSC 6 [21]. As the original text of the AIT's decision could not be found in law reports or websites, it is quoted second-hand from the judgments of the Scottish Court of Session and the Supreme Court of the United Kingdom.

[115] *IA* (n 114), cited in [2011] CSIH 28, [8]–[9].

[116] IA v Secretary of State for the Home Department [2011] CSIH 28 (Lord Clarke).

made by UNHCR in Turkey was at issue. Sullivan LJ confirmed that UNHCR determinations had no binding force on the administrative authorities and courts of the United Kingdom, and then stated:

In reality, a decision by the UNHCR as to refugee status will, given the UNHCR's particular expertise and responsibilities under the Refugee Convention, be given considerable weight by the Secretary of State and the tribunal unless in any particular case the decision taker concludes that there are cogent reasons not to do so on the facts of that individual case. It would be just as unrealistic to contend that a decision by the UNHCR as to refugee status must always be given considerable weight regardless of any indications to the contrary as it would be to contend that it could be given less than considerable weight for no good reason.[117]

Based on this, Lord Clarke in IA wrote:

> While UNHCR decisions as to status, therefore, have no binding legal effect they are to be treated with great respect in the interests of legal diplomacy and comity having regard to their source. The mind of the decision maker, in this jurisdiction, where an applicant can lay claim to UNHCR status, as a given datism [sic], must in its decision- making process not lose sight of that fact in reaching its disposal of the case before it. A decision of the UNHCR on refugee status will be a very important piece of evidence throughout the decision maker's journey. But it has ultimately no greater claim than that and, if the other material before the decision maker leads him/her to considerations that point cogently against the conclusion arrived at by the UNHCR, then the decision maker is fully justified in departing from the latter conclusion.[118]

Then, he concluded that the AIT's decision had taken UNHCR's decisions into account 'in a perfectly appropriate way, namely by assuming that they were properly reached by a competent decision maker with a particular expertise' while deciding at the same time that considering 'other evidence', there were 'clear and substantial grounds for departing from' UNHCR's decisions.[119] The appeal was refused.

[117] *MM (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 1457 [27] (emphasis in the original).

[118] *IA* (n 116) [15].

[119] ibid.

UNHCR's Case for the Intervener

An appeal by IA to the Supreme Court of the United Kingdom was permitted. Before analysing its ruling, let us look at the 'case for the intervener' that UNHCR submitted to the Court.[120] UNHCR argued as follows:

Having regard, however, to UNHCR's unique international mandate and authority, and its expertise and experience, the fact that UNHCR has recognised an individual as a refugee is relevant to RSD carried out by States. It should be the starting point of any exercise in the determination of whether the individual should be recognised as a refugee by the State. In considering the asylum claim of an applicant who has been recognised as a refugee by UNHCR, the State should give the recognition considerable weight and take it seriously into account.[121]

It also maintained that the 'State decision-maker cannot disregard UNHCR's recognition of refugee status in evaluating the individual's claim unless there are cogent reasons for doing so'.[122] Here are a few examples of 'cogent reasons':

a. Where reliable information is available to the State decision-maker which supports a finding that the applicant does not meet the definition of a refugee in Article IA(2) of the 1951 Convention, for example where changes have occurred in the circumstances of the applicant or his or her country of origin which directly affect the assessment of the claim for refugee status. Other examples could include where previously unavailable or new information is now before the State decision-maker and which directly affects the assessment of the claim for refugee status. Information of this sort will often be information which post-dates UNHCR's decision.
b. Where reliable information is available to the State decision-maker which brings the applicant within the exclusion clauses in Article IF of the 1951 Convention.
c. Where reliable information is available to the decision-maker which, when considered in the light of all the available information, supports a finding that the applicant's statements on material elements of the claim are not credible.[123]

UNHCR stated that this treatment must not be changed even if the evidentiary materials that it had used as the basis for its RSD were not disclosed to the national administrative authorities or courts. UNHCR's procedural standards stipulate

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[120] UNHCR, '*IA v Secretary of State for the Home Department*: Case for the Intervener', UKSC 2012/0157 (27 October 2013) <www.refworld.org/docid/52a098e34.html> accessed 19 March 2021. Also of interest is 'National law and practice regarding the weight given by states to UNHCR mandate recognition, Annex to UNHCR intervention in *I. A. v. Secretary of State for the Home Department*'
<www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52eba1b84> accessed 19 March 2021, which offers a brief summary of how the main states parties to the Refugee Convention and Protocol treat UNHCR's mandate RSD under their domestic law. The cases of Bulgaria (n 108) and France (n 109) were previously mentioned on the basis of this report.

UNHCR also submitted observations to the Court of Session on *IA* ('UNHCR intervention before the Court of Session in the Application for Leave to Appeal by IA against a Decision of the Asylum and Immigration Tribunal' (22 October 2010) <www.refworld.org/docid/4cdbc2e02.html> accessed 19 March 2021) and the Court of Appeal on *MM* (n 117) ('UNHCR intervention before the Court of Appeal of England and Wales in the case of MM (Iran) v. Secretary of State for the Home Department', C5/2009/2479 (3 August 2010) <www.refworld.org/docid/4c6aa7db2.html> accessed 19 March 2021). However, I discuss only the observations submitted to the Supreme Court because they are the most recent and, in my view, the most refined.

[121] UNHCR, 'Case for the Intervener' (n 120) para 4 (emphasis added).

[122] ibid.

[123] ibid paras 4, 28.

confidentiality in order to ensure the safety of the applicants themselves, their families, and UNHCR staff, and the information and evidentiary materials used in examining applications are disclosed only under strict conditions.[124] Even when the applicant herself makes a request for disclosure, only materials submitted by her will be disclosed, but the records of interviews and surveys conducted during the examination process will not be disclosed as a general rule. Therefore, national administrative authorities and courts may suspect that UNHCR's RSD procedures lack transparency and wonder how reliable its determinations are. The AIT, as well as some Japanese courts[125], also pointed out that evidentiary material had not been submitted.[126]

However, UNHCR argued that its RSDs are made 'in accordance with its internal standards and in a robust and informed manner such that UNHCR's recognition must be given considerable weight'.[127] Thus, it continued, the absence of the disclosure of evidentiary materials does not reduce the weight to be given to UNHCR determinations, and it may be unfair and discriminatory if the parties who submitted evidence and those who did not are treated differently.[128] IA acquired interview surveys and other materials relating to his own RSD made in Turkey in 2003 from UNHCR and submitted them to the Supreme Court of the United Kingdom. But UNHCR emphasized that because this treatment had been tolerated before the confidentiality and information disclosure standards were established, and now nondisclosure has become the general rule, it does not affect the abovementioned argument that the weight of a UNHCR determination should not change even if materials are not disclosed or submitted.[129]

The Supreme Court of the United Kingdom

The Supreme Court judgment was written by Lord Kerr.[130] It dismissed the appeal, but at the same time suggested the possibility that IA would be recognized as a refugee if he intended to apply for asylum again. I analyse the grounds of the judgment relating to the weight to be given to UNHCR's mandate RSD.

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[124] UNHCR, *Procedural Standards* (n 89) para 2.1.2. In addition to the relevant person's informed written consent, the following requirements must be met: Disclosure (i) is required for a legitimate purpose; (ii) would not jeopardize the security of the individual concerned, his/her family members, or other persons with whom the person is associated; (iii) would not compromise the security of UNHCR staff and; (iv) would be consistent with UNHCR's international protection mandate, including its humanitarian and non-political character, and would not otherwise undermine the effective performance of UNHCR's duties.

[125] Text to n 111.

[126] Text to n 114.

[127] UNHCR, 'Case for the Intervener' (n 120) para 32.

[128] ibid paras 31–37.

[129] ibid paras 55–57.

[130] IA v Secretary of State for the Home Department [2014] UKSC 6 (Lord Kerr).

Lord Kerr made his position clear by quoting and refuting a judgment of the Immigration Appeal Tribunal on another case,[131] which had ruled on the weight to be given in the United Kingdom to an RSD by the government of another country (the Democratic Republic of Congo in that case) under the Organization of African Unity Refugee Convention. The writer of the judgment, Ouseley IJ, stated as follows:

> 18. The earlier grant of asylum is not binding, but it is the appropriate starting point for the consideration of the claim; the grant is a very significant matter. There should be some certainty and stability in the position of refugees. The Adjudicator must consider whether there are the most clear and substantial grounds for coming to a different conclusion. The Adjudicator must be satisfied that the decision was wrong. The language of Babela[132] is that of the burden of proof: their status is prima facie made out but it can be rebutted; the burden of proof in so doing is on the Secretary of State. We do not think that that is entirely satisfactory as a way of expressing it and it leaves uncertain to what standard the burden has to be discharged and what he has to disprove. The same effect without some of the legal difficulties is established by the language which we have used.
> 19. But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change in circumstances since the grant was made. Clear and substantial grounds may show that the grant should never have been made by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way. Exclusionary provisions may be relevant. The procedures adopted for examination of the claim may also be relevant. Considerations of international comity may be rather different as between EU member states and those with less honest administrations or effective legal systems.[133]

Lord Kerr of the Supreme Court, admitting that UNHCR determinations have no binding effect on national agencies (administrative authorities or tribunals and courts),[134] thought that they should be respected in some cases while not in others. Then, the question is under what circumstances the UK national agencies may arrive at a conclusion different from the determination by UNHCR. Lord Kerr contrasted the above-cited reasoning of Ouseley IJ with that of Sullivan LJ of the Court of Appeal which was also quoted by the Court of Session[135] and laid

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131 Secretary of State for the Home Department v KK (Congo), [2005] UKIAT 00054 <www.refworld.org/cases,GBR_AIT,42c947c02.html> accessed 19 March 2021. This judgment is also quoted in the AIT's decision on *IA* (n 114), cited in [2014] UKSC 6 [21]) and in UNHCR's intervention (UNHCR, 'Case for the Intervener' (n 120) para 46).

132 Babela v Secretary of State for the Home Department [2002] UKIAT 06124 <www.refworld.org/cases,GBR_AIT,51b9dc0f4.html> accessed 19 March 2021. This was a prior case in which the weighting of an RSD by the government of another country (South Africa) was at issue. The 'language' of the burden of proof was as follows: 'The Appellant's previous refugee status [determined by the South African government] should therefore not be questioned unless there is a very good reason for doing so. No such reason has been put forward here in our view and, therefore, prima facie he has made out his entitlement to refugee status in the United Kingdom. However, that is rebuttable, and we consider that the correct approach is to say that the burden of proof in rebutting that is on the Respondent [the Secretary of State]' (ibid., [29]). The general rule is that an asylum seeker bears the burden of proving that she is a refugee in the United Kingdom (Macdonald and Toal (eds) (n 112) para 20.122).

133 *KK (Congo)* (n 131) [18]–[19] (emphasis in the original; footnote added).

134 *IA* (n 130) [29].

135 Text to n 117.

out the following two views: (i) the view that allows a different conclusion if UNHCR's decision is incorrect at the time of its determination; and (ii) the view that allows a different conclusion if the applicant does not fall under the definition of a refugee when the UK national agency makes its decision.[136]

View (i) corresponds to Ouseley IJ's statement that '[t]he Adjudicator must be satisfied that the decision was wrong'.[137] However, there are two problems with view (i). First, it is meaningless to examine the correctness of the UNHCR decision at the time of its issuance, for it is sufficient to consider the national decision of refusal lawful if the applicant does not fall under the definition of a refugee at the time of the UK agency's decision.[138] Second, if the UNHCR determination can be overturned only if it is mistaken, it is presumed correct. However, considering that the grounds and materials for the decision of UNHCR may not always be available because of confidentiality and the nondisclosure rule, such a presumption is not convincing.[139]

Lord Kerr supported view (ii) for these reasons. Nevertheless, he did not say that the national agency may conduct a de novo determination of refugee status without any regard for UNHCR's previous determination. He held that given 'the accumulated and unrivaled expertise' of UNHCR, 'its experience in working with governments throughout the world, the development, promotion, and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determination', UNHCR determinations must be accorded 'considerable authority'.[140] He wrote:

> 47. Fitting the fact of an earlier UNHCR decision in favour of refugee status into (in the case of a determination by the Secretary of State) the quasi-judicial and (in the case of the tribunal) the judicial model of determination of a claim to asylum is not easy. It does not supply evidence which can be independently evaluated by the decision-maker. Nor does it, in my opinion, raise a presumption by which the adjudicator's assessment of the evidence is adjusted. It does not impose a burden of proof on the state authorities who resist the claim. It must be given weight but the manner in which it should be accorded weight does not conform to any conventional trial norm. Unsatisfactory though it may be, it seems to me that the influence that such a decision has on the determination of a claim to asylum must be expressed in general (and consequently, fairly imprecise) terms.
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> 48. The circumstance that the weight to be given to the UNHCR decision cannot be articulated in an exact way must not be allowed to detract from the influence that it wields. Quite apart from the respect that is due to such a decision by reason of the unique and matchless experience and expertise of UNHCR, considerations of comity, legal diplomacy and the need for consistency of approach in international protection of refugees demand no less. The United Kingdom's obligation to cooperate with UNHCR also impels this approach. Moreover, as a general

[136] *IA* (n 130) [35].

[137] *KK (Congo)* (n 131) [18], cited in text to n 133 (emphasis added).

[138] ibid [36].

[139] ibid [37].

[140] ibid [44].

rule, the UNHCR decision will have been taken at a time more proximate to the circumstances which caused the claim to have been made. Frequently, it will have been made with first-hand knowledge of and insight into those conditions superior to that which a national adjudicator can be expected to possess.

49. All of these factors require of the national decision-maker close attention to the UNHCR decision and considerable pause before arriving at a different conclusion. The approach cannot be more closely prescribed than this, in my opinion. The UNHCR conclusion on refugee status provides a substantial backdrop to the decision to be made by the national authority. A claimant for asylum who has been accorded refugee status by UNHCR starts in a significantly better position than one who does not have that status. But I would be reluctant to subscribe to the notion that this represents "a starting point" in the inquiry because that also hints at the idea of a presumption. Recognition of refugee status by UNHCR does not create a presumption, does not shift the burden of proof and is not a starting point (if by that one implies that it is presumptively assumed to be conclusive) but substantial countervailing reasons are required to justify a different conclusion.[141]

Because the national agency is not supposed to evaluate whether the original determination by UNHCR was appropriate, but rather to examine whether the applicant currently fulfils the requirements for refugee status, it can independently assess the evidence and determine refugee status. However, the national agency also takes the following two factors into account.

First, it considers changes in circumstances after the original determination by UNHCR. For example, the national agency can examine the situation in which, after UNHCR determined refugee status, the political situation in the country of origin has changed so that the fear of persecution has disappeared, or the refugee's personal circumstances have changed so that he now falls under a cause for exclusion, or the like, and come to a conclusion different from that of UNHCR (namely a refusal to grant asylum).

Second, on the assumption that such changes in circumstances have not occurred, the fact that UNHCR has previously decided on refugee status may have some sort of significance, which the national agency can (and should, according to Lord Kerr) take into consideration.

Lord Kerr held that UNHCR determinations had 'considerable authority' and 'weight' and that to reach a different conclusion and deny refugee status would require 'substantial countervailing reasons'. However, the authority or weight is not assured by the techniques of procedural law such as the presumption or a shift in the burden of proof, and simply binds the decision maker by a general rule or policy expressed in general, imprecise terms. How this will function in the process of RSD will depend on future cases as the present ruling does not make it clear.

Let us look at the result of IA. Lord Kerr, based on the general theory above, held that Agnew IJ of the AIT had given due consideration to the UNHCR determination, and had lawfully upheld the Home Secretary's decision of refusal, judg-

[141] ibid [47]–[49].

ing that the credibility of IA's testimony she had heard herself had been dubious when assessed in conjunction with other evidence from the evidentiary materials available at the trial.[142] She had supposedly shown 'substantial countervailing reasons' although Lord Kerr did not explicitly reveal what they were. The appeal was dismissed. Lord Kerr also pointed out that had she been able to refer to the materials from the 2003 RSD that were submitted to the Supreme Court, particularly the interview records, Agnew IJ could have reached a different conclusion regarding the credibility of IA's testimony, and suggested that IA file another application with the Home Secretary so that he could receive a new, reconsidered decision.[143]

How should Lord Kerr's opinion, on behalf of the UK Supreme Court, be read? My analysis is as follows. Even though UNHCR determinations should have considerable authority and weight, they cannot be considered to prevail in all cases because national agencies are also authorized to make their own decisions on RSD. Instead, they should be considered in the process of dialogue between UNHCR and the national authorities. For this purpose, states are responsible for explaining and demonstrating that their own decision is more reasonable than UNHCR's. However, such an explanation and demonstration will be possible only when the materials and grounds on which UNHCR based its determination are disclosed and available to the national agencies.

If they are not disclosed because of confidentiality, national agencies will have no choice but to provide a unilateral explanation that their perusal and evaluation of the evidence is appropriate. The authority and weight of UNHCR determinations are at best a psychological brake on a different decision to be so lightly taken. IA appears to suggest that if UNHCR determinations must have greater weight than that, it is necessary to share materials and information between UNHCR and states in ways that are compatible with the duty of confidentiality so that they are accountable to each other.[144]

4.5 Consideration from the global and international administrative law perspectives

4.5.1 International Administrative Law

International refugee law has been noted as an example of international administrative law. Sōji Yamamoto presented the Refugee Convention and the related Japanese legislation (ICRRA) as an example of the 'coordination function' of international administrative law. By this, he meant the function of multilateral treaties to 'make public the ways states exercise their jurisdiction (policy, legislation, and regulatory measures) individually and in accordance exclusively with the

[142] ibid [50]–[53].

[143] ibid [58]–[61].

[144] See ibid [26].

domestic law of each state and seek to standardize and coordinate them so that an 'obligation of result' can be assumed.'[145]

Yamamoto cited this as an example in which domestic measures to ensure the implementation of the Convention were forced to be specified because the Refugee Convention guarantees a legal status to individuals, thus limiting the freedom of each country to choose methods and means. To put it differently, he considered it an example of international administrative law restricting state discretion most distinctly.

This is certainly true if we look at the domestic implementation of the effects provided for in the Refugee Convention (notably the national treatment in relation to social security), which is evidenced by the fact that, when Japan acceded to the Refugee Convention in 1981, it became necessary to revise not only the then Immigration Control Order but also social security laws (see Section I 2 (2)). However, as I have argued thus far, state authority over RSD is still a perfect and independent presence. The reality is that while international standards are guaranteed in terms of the contents of refugee protection, the access thereto is highly decentralized among states, some of which are more generous and others more stringent.

Because the Refugee Convention and Protocol provide for the requirements for being refugees in a unified manner, which are binding on states parties conducting RSD, it is not correct to say that each state has a discretionary right over RSD (Section I 2 (2)). Those who meet the requirements should be treated and recognized as refugees anywhere in the world. States are not allowed to consider their diplomatic or internal policy factors when they decide whether or not to recognize an asylum seeker as a refugee. The statement that RSD is not a constitutive but a declaratory act[146] should be understood in this sense.

But this is a story of the world of substantive law. When procedural law is taken into consideration, things begin to change. Even if the requirements under substantive law are stipulated in so unified and specified a manner that there is no room for discretion, a certain margin of appreciation cannot be denied in terms of fact-finding and application of the law (Section I 2 (2)). In order to prevent this, it is necessary to establish a review body with a general jurisdiction to examine individual decisions made by each state so that fact-finding and application of law are standardized and unified throughout the world. Although in a domestic setting, judicial review by domestic courts takes care of that, there is no such review body in international (refugee) law. In terms of procedure, there is no mechanism to unify RSDs carried out separately and even haphazardly by each state.

Scholarship on international administrative law sometimes focuses on the 'coordination function' of international administrative institutions, which are tasked with coordinating domestic implementation of international administration by

[145] Yamamoto (n 1) 114–5.

[146] See n 32.

each state's agencies.[147] A case in point is the function of international administrative unions to standardize and unify the relevant domestic laws of each state based on the foundational treaty.[148] In international refugee law, UNHCR is perhaps expected to assume that role. However, as mentioned earlier, while UNHCR bears the 'duty of supervising the application' of the Refugee Convention and Protocol, it is not accorded the status of an implementing agency for these instruments (Section II 1). Compared to implementing agencies for human rights covenants, such as the Human Rights Committee for the International Covenant on Civil and Political Rights,[149] UNHCR is not authorized to review the information provided by states parties, and is not expected to play such a role as assumed by human rights implementing agencies in the reporting system in which they supervise the compliance of states parties with treaty obligations through report reviews.[150] UNHCR is not provided with a procedural mechanism that enables it to perform a coordination function in relation to RSDs.

4.5.2 Global Administrative Law

Is UNHCR's mandate RSD a global administrative act by a global administrative body? This is the question raised in the Introduction, which I try to answer in this last section. The answer seems to be negative because it is primarily an act made by UNHCR to identify those who fall under its mandate, and, from this viewpoint, it can be seen as an internal act of UNHCR. Although UNHCR also issues a refugee certificate to those who are recognized as mandate refugees, which can be seen as an external act, the certificate is no more than an ID card with no legal effect to modify the holder's legal situation. The legal implications of UNHCR determinations are limited, if any (Part III). It is difficult to say that UNHCR's mandate RSD has an essential element for an administrative act, that is, prescription of legal status.

However, such an analysis may be contrary to the intent of global administrative law (GAL) scholarship. According to Karl-Heinz Ladeur, in global governance, which is GAL's main target, the importance of the concept of an administrative act will decline because the state acts not as an integrated entity, but as a component of networks dispersed in various regulatory and policy fields, and the decision-making process becomes less and less consolidated because of the

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147 Okitsu (n 13).

148 Soji Yamamoto, 'Kokusai Gyōsei-hō no Sonritsu Kiban' [The Positive Basis of International Administrative Law] (1969) 67 Kokusai-hō Gaikō Zasshi [J Intl L & Diplomacy] 529, 569–79, reprinted in Atsuko Kanehara and Akio Morita (eds), *Kokusai Gyōsei-hō no Sonritsu Kiban* [The Positive Basics of International Administrative Law] (Yūhikaku 2016) 41–7.

149 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

150 Takeuchi (n 83), Hōgaku Kyōshitsu 116, *Bun'ya-betsu* 100.

fragmentation and diversification of global governance bodies and its regimes.[151] Benedict Kingsbury also points out that 'understanding global administrative law as "law" involves not only questions of validity ("is this a valid legal rule?"), but also assessments of weight ("what weight should Public Entity X give to a norm set by Public Entity Y?")'.[152] Interestingly enough, this coincides with the UK Supreme Court's approach toward UNHCR determinations.

Based on what has been said above, theoretical and normative issues relating to the global administrative act theory are clarified. If the legal significance of a 'global administrative act' is its weight or persuasiveness over other entities, rather than its legal effect, it is not the conclusion of the global administrative act, but the process thereof, that matters. In other words, the focus should be on what facts are found and considered, what law applies in what way, and for what reasons the act is taken. GAL scholars who are interested in refugee law tend to emphasize the lack of accountability, due process, and an effective review system in the UNHCR determination procedure, particularly when it refuses an application for RSD or delays in response.[153] However, principles such as accountability and transparency are not necessarily limited to the cases of refusal and delay, but can be extended to assure the legitimacy of global administrative acts.

This is exemplified by UNHCR's reluctance to provide national courts with the materials and information on which it based its determination (Section III 2 (4) (5)). There is unquestionably a reasonable need for the confidentiality of information held by UNHCR. For UNHCR determinations to be treated with due respect and accepted by the international society and states comprising it, it will be necessary to consider ways to share information and materials with the relevant national agencies in a manner that is compatible with the duty of confidentiality.

4.6 Conclusion

The attention of GAL scholars to individual decisions that are similar to administrative acts by global administrative bodies illustrates the decline of the dualism between the world of international law where states are the main subjects and that of domestic law where individuals are the main subjects.[154] Indeed, UNHCR's

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[151] Karl-Heinz Ladeur, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law' 16/2011 Osgoode Comparative Research in Law & Political Economy. Research Paper 27–8 <digitalcommons.osgoode.yorku.ca/clpe/54/> accessed 19 March 2021.

[152] Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23, 27 (emphasis added).

[153] See n 10.

[154] Yukio Okitsu, 'Gurōbaru Gyōsei-hō to Akauntabiriteii: Kokka naki Gyōsei-hō wa hatashite, mata ikanishite Kanō ka' [Global Administrative Law and Accountability: How Can Administrative Law Exist without the State?] in Yuki Asano and others (eds), *Gurōbaru-ka to Kōhō Shihō Kankei no Saihen* [Globalization and the Re-formation of the Relationship between Public Law and Private Law] (Koubundou 2015) 47, 54. But see Lorenzo Casini, 'Global Administrative Law scholarship' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 548, 563–4 ('For example, international law has always studied how international norms have directly affected individuals; when … international law was not sufficiently considered when examining them, it could not be implied that the topic was "discovered" by GAL and its scholarship.').

mandate RSD cannot replace the convention RSD of states. In other areas, too, this picture will remain more or less the same, at least in a procedural arena, as long as the state retains territorial sovereignty and the power to implement international agreements. But it is not useless at all to think of the concept of a global administrative act. The conclusion is that the meaning of this concept consists in its heuristic function to identify problems to be solved in the process of dialogue between global administrative bodies and states.