

**Protecting Whom? Japanese Refugee Policies Revisited**

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## I From Tampa to Shenyang

It is a prime example of shrinking asylum opportunities in the industrialized countries that Australia, once highly admired for its strong commitment to human rights, is now giving an extremely cold shoulder to a number of people in dire need of safe refuge. Vividly recalled is an incident where a Norwegian freighter, the Tampa, was refused entry to Australian territory after it had rescued hundreds of Afghan and other boat people from a sinking wooden ferry near Indonesia in the summer of 2001. Still shocking was a subsequent legislative initiative taken as a response to the incident to exclude certain islands and territories from the country's "migration zone" with a view to avoiding its international obligations to protect refugees. Simply put, certain parts of Australian territory were excised for the purpose of blocking asylum applications<sup>1</sup>.

Howard government's hard line policies on illegal immigrants and refugees also put in world-wide spotlight the plight of desperate young children, unaccompanied minors, pregnant women and the elderly, all confined under inhuman conditions in outback refugee camps, the infamous Woomera detention center in particular. The Working Group on Arbitrary Detention of the UN Human Rights Commission slammed Australia's mandatory and indefinite detention of asylum seekers after visiting five detention camps in June 2002<sup>2</sup>. The Group's reasoned criticism,

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<sup>1</sup> Mathew, "Australian Refugee Protection in the Wake of the *Tampa*," *American Journal of International Law*, Vol. 96 (2002), pp.665-676. See also Refugee and Immigration Legal Centre (Melbourne), "Submission Concerning Article 31 of the Refugee Convention: Non-Penalization, Detention and Protection," a paper submitted to the Global Consultations Expert Roundtable, Geneva, November 2001 (on file with author).

<sup>2</sup> *Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia*, UN Doc.E/CN.4/2003/8/Add.2, 24 October 2002. The Working Group concluded after the visit that: "At the end of its visit, the delegation of the Working Group had the clear impression that the conditions of detention are in many ways similar to prison conditions: detention centres are surrounded by impenetrable and closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centre they are, as a rule, handcuffed; escape from a centre constitutes a criminal offence under the law and the escapee is prosecuted. In certain respects, their regime is less favourable (indeterminate detention; exclusion from legal aid; lack of judicial control of detention; etc.). Several detainees who had been in both situations told the delegation that their time in prison had been less stressful than the time spent in the centres. During talks with government officials it became obvious that one of the goals of the system of mandatory detention and the way it is implemented is to discourage would-be immigrants from entering Australia without

however, was adamantly rejected by the intransigent federal government, thus causing grave disappointment among refugee advocates.<sup>3</sup>

Human rights know no borders and there should be no ethical problem whatsoever in a Japanese citizen or academic criticizing Australian refugee policies. Frankly speaking, however, I feel a bit awkward in accusing a former human rights giant of its blunt failure to honor international legal standards: As an academic based in Japan and concerned about human rights, I must confess that my own country's achievement in respect of refugees and asylum seekers, no better than the Australian record, is not really a source of pride. According to the UNHCR<sup>4</sup>:

Of the major industrialized countries, Japan, which, has been a party to the 1951 UN Convention since 1981, has received by far the smallest number of asylum applications. The country's ethnic and cultural homogeneity has been sustained by strict controls on population movement and immigration, although over 10,000 Indochinese refugees have been resettled or allowed to remain in Japan since 1975. In the 10 years from 1990 to 1999, only 1,100 people applied for asylum in Japan. A strict time limit for making an application for asylum and an unusually high standard of proof meant that between 1990 and 1997, fewer than four per cent of these were recognized as refugees under the Convention. In 1998 and 1999, more asylum determinations were made than in the preceding decade, and the acceptance rate rose to over seven percent in 1999, while an increasing number of rejected asylum seekers were allowed to remain on humanitarian grounds.

Japan acceded to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol in 1981. Until the end of 2002, 2,725 applications had been lodged, of which 305 were granted refugee status and 1,932 were rejected. During the ten-year period between 1992 and 2001, merely 91 applications were granted. This figure is extremely small compared with that of any other major industrialized country. Even Luxembourg and Malta, often categorized in international legal discourse as mini-states, outnumbered our country in recognized refugees with 156 and 422

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a valid visa”(id.,para.60).

<sup>3</sup> “U.N. Hits Aussies for Refugees’ Indefinite Detention,” *Japan Times*, June 7, 2002.

<sup>4</sup> UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action 2000*, pp.142-143.

respectively during the same period<sup>5</sup>.

It was in March 1993 that Japan's exceptionally strict refugee policy caught international attention. Amnesty International issued the report *Japan: Inadequate Protection for Refugees and Asylum-seekers* alleging a number of ways in which the country failed to fully abide by its obligations toward refugees and asylum seekers<sup>6</sup>. A follow-up report was published in January of the following year highlighting continuing inadequacies in Japanese policies toward them<sup>7</sup>. Each time the Immigration Bureau of the Ministry of Justice, a responsible state organ for determining refugee status, made a submission staunchly refuting Amnesty's observations<sup>8</sup>.

Amnesty's interventions helped unveil the country's otherwise secretive refugee determination procedures. Encouraged, academics, practicing lawyers and NGOs voiced concerns about the treatment of asylum seekers in Japan with the hope of inducing institutional reform, but to no avail<sup>9</sup>. Human rights treaty bodies for their part, in examining Japanese periodic reports, urged that refugees and asylum seekers be guaranteed due treatment in conformity with international obligations<sup>10</sup>.

Toward the end of 1990's, an increasing number of asylum applications were lodged by Burmese, Kurds and Afghans. Responding to this newly emerging phenomenon, a National Association of Lawyers to Defend Refugees was established in 1997, enabling otherwise powerless asylum seekers to be effectively represented in the administrative determination procedure as well as in the process of judicial review.

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<sup>5</sup> UNHCR, *Statistical Yearbook 2001: Refugees, Asylum-seekers and Other Persons of Concern-Trends in Displacement, Protection and Solutions* (October,2002),Annex C.11.

<sup>6</sup> Amnesty International, "Japan: Inadequate Protection for Refugees and Asylum-Seekers," *International Journal of Refugee Law*, Vol.5(1993),p.205.

<sup>7</sup> Amnesty International, *Japan: Asylum-Seekers Still at Risk*, AI INDEX:ASA 22/01/94(January 1994).

<sup>8</sup> Yamagami, "Determination of Refugee Status in Japan", *International Journal of Refugee Law*, Vol.7(1995),p.60.

<sup>9</sup> A comprehensive report was produced by the Forum on Refugee Studies. See Forum on Refugee Studies, *Refugee Recognition Procedures in Japan: Proposals for Reform* (1996, in Japanese).

<sup>10</sup> *E.g.*, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan,27/04/2001*,UN.Doc. CERD/C/304/Add.114 (27 April 2001),para.19.

As mentioned below, industrious endeavours of lawyers in due course brought forth epoch-making judicial decisions in favour of asylum seekers. In 1999, the Japan Association of Refugees was launched by concerned citizens and started providing an impressive array of assistance to those in need of protection. The Association has been working on programs to raise awareness among local citizens of the unspeakable plight of refugees in Japan as well<sup>11</sup>.

It is ironic that a long-awaited political process for institutional reform was eventually ignited by an incident which took place abroad: The Shenyang incident is a case in point. Five North Koreans entered the Japanese General Consulate compound in Shenyang in China on May 8, 2002, seeking refuge and passage to a third country. Three of them, two adult women and a two-year old little girl were seized by Chinese armed police and dragged from the premises. Two adult men reached the visa application section of the consulate but were forcibly removed from there by Chinese police. A shocking video footage was widely aired on national TV showing a vice consulate quietly picking up debris on the spot and handing it over to the police while desperate North Korean women were being dragged kicking and screaming out of the compound. Obviously, consulate staff were not concerned about a possible violation of relevant articles of the 1963 Vienna Convention on Consular Relations. However, as Brad Glosserman pointed out<sup>12</sup> :

The real scandal is the policy that Tokyo has pursued in handling refugees. Last year 353 individuals sought asylum in Japan and less than two dozen were given it. Reportedly, hours before the intrusion in Shengang the Japanese ambassador in Beijing told his staff that any North Koreans who turned up seeking asylum were to be turned away to avoid "difficulties." This long-standing policy is an embarrassment. It mocks Japan's declared intention to aid the disadvantaged and undermines its claim to play a leading role in the region. A willingness to help the poor only when they keep their distance is just another form of xenophobia.

In terms of international law, the Shenyang incident was relevant to diplomatic

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<sup>11</sup> For activities of Japan Association for Refugees, see its homepage at <<http://www.refugee.or.jp>>.

<sup>12</sup> Glosserman, "Tokyo Bars the Door: Asylum Policy the Real Scandal," *Japan Times*, May 22, 2002.

asylum, a legally controversial institution which nonetheless has been often invoked worldwide to give refuge at least temporarily to those who need protection<sup>13</sup>. Strangely, what started out as an incident of diplomatic asylum turned out to be an exemplar symbolizing Japan's poor record of territorial asylum extended to those who make it to Japan<sup>14</sup>. The summer of 2002 saw an array of proposals put forward by political parties including the ruling Liberal Democratic Party aimed at reforming the Japanese refugee protection system. Most noteworthy was the establishment in June of the Special Working Group on Refugee Problems in an advisory panel on Japanese immigration policies to the Justice Minister. The Working Group, composed of 8 individuals, compiled a progressive report in November with a number of proposals in an attempt to revise the current legal framework to deal with asylum applications<sup>15</sup>. In March, 2003, a government prepared bill was submitted to the Diet to amend part of the immigration rules regulating the treatment of asylum seekers<sup>16</sup>, the first legislative attempt ever made to handle refugee issues in the last 20 years.

This paper explores the development of Japanese laws and judicial decisions concerning refugees in an attempt to show how far we have come and where we are headed in terms of asylum policies. In so doing, it will be of some use to put refugee problems into global perspective first and find out how the global development on refugee law has affected, if any, contemporary Japanese practices.

## II Global Development : A Paradigm Shift

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<sup>13</sup> For the international practice of diplomatic asylum and its implication on international law, see *Question of Diplomatic Asylum: Report of the Secretary-General*, UN Doc.A/10150; G.Noll & J.Fagerlund, *Safe Avenues to Asylum?: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests-A Study Conducted within the Framework of the Refugee Research Programme at the Danish Center for Human Rights* (April 2002).

<sup>14</sup> Struck & Sekiguchi, "Opening Japan's Door?: Calls for Change to Restrictive Policies on Refugees Grow After Diplomatic Standoff Over Asylum Seekers," *Washington Post*, June 8, 2002.

<sup>15</sup> Fourth Advisory Panel on Immigration Policies, *Review of the Refugee Recognition System: A Progressive Report*, November 1, 2002 (in Japanese).

<sup>16</sup> Ministry of Justice, *Materials relevant to the Bill to Revise Part of the Immigration Control and Refugee Recognition Act*, submitted to the 156<sup>th</sup> Session of the Diet, 2003 (in Japanese).

The current international system, based on the principle of equality of sovereign states, require that individuals belong to a state to ensure their protection and to ascertain state responsibilities for particular individuals. Refugees are a problem in this system precisely because they have broken bonds with their state of origin and are left stateless either *de jure* or *de fact*. This understanding is reflected in the legal concept of refugee formulated in the 1951 Refugee Convention. The Convention was drafted to deal with a large number of refugees remaining in European soil in the Post-WW II period. It also was heavily informed by the political interests of the West in the prevailing cold war realities. It defines a refugee in Article 1 A(2) as a person who:

as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.

As analyzed by one influential writer, “the normal mutual bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken (or simply does not exist) in their case”<sup>17</sup>, which makes a refugee. It is a logical consequence therefore that a solution to the problem is to re-establish social bonds with a country either of origin or elsewhere. It has been widely known that there are three durable solutions to the refugee problem: voluntary repatriation to their countries of origin, settlement in the country of refuge and resettlement in a third country, all to re-establish social bonds.

For geopolitical reasons in the cold war context, voluntary return to the country of origin was nearly inconceivable: external settlement or in the words of Gervase Coles “exilic bias”<sup>18</sup> was considered most durable. On the other hand, refugees were

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<sup>17</sup> A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol.1(1966),p.79. See also, J. Hathaway, *The Law of Refugee Status* (1991),p.135.

<sup>18</sup> Coles, “The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry,” in *Human Rights and the Protection of Refugees under International Law* (A.Nash ed.1988),p.109.

not guaranteed admission to re-establish membership elsewhere as her own right. The Universal Declaration of Human Rights, the Refugee Convention, and the 1967 UN Declaration on Territorial Asylum deliberately avoided providing for a duty on states to grant asylum to refugees. A UN Conference on Territorial Asylum in 1977<sup>19</sup> found itself unsuccessful in setting forth an individual right to asylum. All that was imposed on states is the principle of non-refoulement, a duty not to return a refugee to a country where there would be a risk of persecution.

Another feature of international refugee law is that it does not mandate any particular procedure for determining refugee status. Nor does it create an international mechanism in charge of status determination. Thus the determination of refugeehood is left entirely to state authorities. Article 35 of the Refugee Convention regulating a role of UNHCR to supervise the implementation of the Convention is simply emasculated<sup>20</sup>. The Conclusions issued by the Executive Committee of the UNHCR Programme are given surprisingly low profile lest they should shake the foundation of states' complete control over immigration.

Since 1980's and particularly 1990's, the exilic bias has broken down. International discourse was now filled with new arguments supporting liberal/human rights approaches. Legal theories emphasizing the right to return emerged while the exilic bias was criticized for unduly relieving refugee producing countries of their international responsibility. A new legal concept, the right to remain, was coined by UNHCR while tackling the root causes of mass flight was repeatedly called for. From this new perspective, the most durable solution is no more external settlement: it is either repatriation or prevention of flight<sup>21</sup>.

Liberal/human rights approaches seem to fundamentally reformulate refugee law. Traditionally refugees were outside their countries of origin and the solution to refugee problems was almost always external settlement. Only those who could not meet the standard of refugeehood were returned home. The responsibility of refugee

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<sup>19</sup> UN Doc.A/CONF.78. See *generally* A. Grahl-Madsen, *Territorial Asylum* (1980).

<sup>20</sup> Walter Kaelin examines the issue of international implementation of the Refugee Convention in "Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond", a paper submitted to the Global Consultations Expert Roundtable, Cambridge (July 2001).

<sup>21</sup> For an incisive analysis of the newly emerging asylum situations, see Hathaway, "Preface: Can International Refugee Law be made Relevant Again?" in *Reconceiving International Refugee Law* (J.Hathaway ed.1997).



producing countries was left untouched. In other words, refugee law simply stopped at the border of the home country. These formulae are now substantially challenged. An argument casts doubt on the concept of refugee which is inherently connected with alienage, “outside the country of origin”. The argument goes that from a human rights perspective, the internally displaced persons are as worthy of international protection as refugees<sup>22</sup>. The implication is that managing the internally displaced is the best solution to refugee problems for it prevents the outflow of refugees and helps them exercise the right to remain in their countries of origin<sup>23</sup>.

The focus of international discourse is now increasingly shifted to source countries, and seemingly refugee protection is coalescing into a human rights paradigm which does not stop at the national border. Creation of safety zones, resort to humanitarian intervention and interdiction at sea are a logical extension of the new formula. Clearly, this new trend was spurred by the end of cold war. The political and ideological value attached to refugees has evaporated. A sharp rise in the number of asylum seekers from the East as well as the South put the Western governments on their guard. Thus came narrow constructions of the definition of refugee, detention of asylum seekers, new visa controls, sanctions on carriers and what have you. As Alexander Aleinikoff analyzes<sup>24</sup>:

[W]e may well be witnessing the troubling use of a humanitarian discourse to mask a reaffirmation of state-centeredness. That is, the emphasis on repatriation and root causes will help developed states justify the new strategies adopted to “solve” their asylum “crises”....[T]he story of change is not about the melding of refugee law into human rights law; rather, it is the exchange of an exilic bias for policies of containment- detention of asylum

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<sup>22</sup> Lee, “Legal Status of Internally Displaced Persons,” *Remarks in the Panel on Widespread Migration: International Law and International Institutions*, 86<sup>th</sup> Annual Meeting of the American Society of International Law, April 4, 1992 (on file with author). See also Plender, “The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced Persons,” in *The Problems of Refugee in Light of Contemporary International Law Issues* (V. Gowlland-Debbas ed. 1996), p.120.

<sup>23</sup> See Chimni, “Perspectives on Voluntary Repatriation: A Critical Note,” *International Journal of Refugee Law*, Vol.3 (1991), pp.541-46.

<sup>24</sup> Aleinikoff, “State-centered Refugee Law: From Resettlement to Containment,” in *Mistrusting Refugees* (E. Daniel & J. Knudsen eds. 1995), pp.265-66.

seekers, visa requirements, closing opportunities for resettlement, push-backs, and return. These politics are grounded less in a desire to breach the walls of state sovereignty than in an attempt to keep third world refugee problems from inconveniencing the developed states. The significant risk here is that a politics of containment will have the ugly result of abandoning refugees to the very states from which they fled in search of assistance and protection. If this is so, then refugee advocates who see recent repatriation efforts as vehicles for doing human rights work within the sending countries may be unwitting allies in reinforcing the state-centered paradigm they seek to overthrow.

This analysis was presented in a book published in 1995. What transpired in the following years, the Tampa incident in particular, evidently testifies to the validity of his discerning observation. The exilic bias is now replaced by another bias, the source country bias. What we witnessed in the 1990's may be properly expressed as a shift in refugee policy "from asylum to containment"<sup>25</sup>. Undoubtedly, this shift was reflective of state-centered concerns of ruling elites of the industrialized countries.

The decreasing number of refugees in the industrialized North may be seen as a victory of the containment policy by those who advocate it, but it in fact has led to more asylum-seekers resorting to any means necessary, regular or irregular, safe or dangerous, to access the soils of the advanced countries. As Jenna Shearer Demir points out, "[t]he nationalities of those most often smuggled or trafficked into the European Union closely corresponds to the nationalities most often given asylum worldwide, with most asylum seekers either smuggled or trafficked into the European Union"<sup>26</sup>. Obviously, these human tragedies are a structural outcome of the source country bias.

### **III Refugee Protection in Japan**

#### **1 A Brief Historical Portrayal**

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<sup>25</sup> Shacknove, "From Asylum to Containment," *International Journal of Refugee Law*, Vol.5 (1993), p.516.

<sup>26</sup> Demir, *The Trafficking of Women for Sexual Exploitation: A Gender-based and Well-founded Fear of Persecution?* ( UNHCR New Issues in Refugee Research Working Paper No.80, March 2003), p.4.

Since the nineteenth century, there have been quite a few cases in which Japan provided asylum in its territory to those who fled from persecution<sup>27</sup>. However, the admission of asylum seekers was determined only on a political basis, and the legislation on the treatment of asylum seekers was not established. In courts, people who sought asylum from persecution had no choice but to resort to the jurisprudence of the necessity or principle of the non-extradition of political criminals.

Since the occurrence of Yoong Sun-Gil case in 1960's that attracted immense public attention, interest in refugee issues has been raised among civic and academic circles, and there were even occasions where a "Bill of the Protection of Political Asylum-Seekers" was introduced to the House of Representatives in the form of the Petition or Diet Members' Bill. Such attempts, however, were not successful. In the Bill on the Immigration Control Law introduced by the government several times, the provisions of the entry and status of refugees were not included. In the late 1960's, the extradition of young Taiwanese activists for independence was carried out in spite of the risk of their lives and physical safety. It unveiled the government's negative attitudes towards the admission of asylum-seekers.

Despite the fact that the Refugee Convention had been adopted in 1951, the Japanese Government, considering it to be solely targeting the specific situation in Europe, did not take any steps to ratify or accede to it. Since the adoption of the Protocol on the Status of Refugees in 1967 that aimed at abolishing time and geographical limitations in the Convention, the Ministry of Foreign Affairs and the Prime Minister's Office became interested in and began to investigate the treatment of refugees in foreign countries, and yet, the accession to the Convention and the Protocol was not realized. The restrictive attitudes of the government towards asylum-seekers and refugees have arisen both from the government's fundamental immigration control policy which restricts the settlement and residence of foreigners, and the geopolitical and diplomatic circumstances under which Japan exists as neighbour to politically unstable countries. It is undeniable that the society which has placed paramount value on economic development functioned as one of the obstructers to the establishment of refugee protection

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<sup>27</sup> See generally, H. Honma, *What Is the Refugee Problem?*(1990),pp.128-160 (in Japanese);Miyazaki, "Refugees and Japanese", in *Introduction to Refugee Problems* (R.Komatsu ed. 1981),pp.13-18 (in Japanese).

legislation.

In Japan, refugee issues were considered as those of assistance to people who were seeking relief in refugee camps in foreign countries and the treatment of asylum-seekers who arrived in Japan and the admission of refugees in its territory were not considered refugee issues as such. Vietnamese boat people who had arrived in Japan since 1975 were treated like illegal immigrants or stowaways and they were not given permission for landing unless they had a guarantee of living expenses from UNHCR and a guarantee of an admission from a foreign country. Moreover, a permitted period for landing was strictly limited and the resettlement in a third country was strongly advised by the authorities.

The Japanese attitudes of refusing the admission of boat people soon faced acute criticisms from the Western countries, particularly from the United States. Owing to such foreign pressure, the Japanese government determined to allow the settlement of Vietnamese refugees through the Cabinet Understanding. The scope of admission was expanded to include Indo-Chinese refugees in general, as a quota of admission was gradually increased. In the meantime, due to the delay in responding to the issue of boat people, the fragility of Japanese refugee policy was brought to light both at home and abroad, and among other things, non-accession to the Refugee Convention and the Protocol became highlighted. In order for the government to show a positive attitude towards refugee issues, the accession to the Convention was considered to be the most effective, and the government ministries concerned began to explore the possibility of accession. As a consequence, the Refugee Convention and the Protocol were finally acceded to in 1981. With the accession to the Convention, the Immigration Control Order was amended into the "Immigration Control and Refugee Recognition Act (Immigration Control Act)". The Convention, the Protocol and the Immigration Act came into force on 1 January 1992.

The Immigration Control Act was proposed and adopted for the purpose of "establishing refugee recognition procedures in order to implement" the Refugee Convention and the Protocol. The Refugee Convention has no provision on refugee recognition procedures. Yet it is indispensable to identify the beneficiaries of protection when the Convention is implemented. The Western countries which have signed the Convention, virtually without exception, have established refugee

recognition procedures, and provided protection under the Refugee Convention to those who were recognized as refugees. Domestic measures taken by the Japanese government is basically in line with such practice. Accordingly, the refugee recognition procedures were introduced for the first time in Japan.

As mentioned above, the direct cause of an introduction of refugee recognition procedures was the emergence of Indo-Chinese refugee problems. Nevertheless, Indo-Chinese refugees continued to be admitted in practice at the policy level, on the Cabinet Understandings. In other words, Indo-Chinese refugees brought the refugee recognition procedures to Japan, yet, except for a small number of cases handled in earlier years, they never went through the procedures themselves. Indo-Chinese refugees were admitted for settlement according to a special quota and the Refugee Convention was only invoked correspondingly to them.

The Japanese government, at the time of accession to the Refugee Convention, presented a primary reason for the accession as “promoting Japanese international cooperation in refugee issues”<sup>28</sup>. Although the meaning of “international cooperation” here was not clear, Japan made it clear that it would follow the practice of the Western countries in the field of refugees. Even so Japan did not intend to apply the Convention solely to those who fled from the Communist countries. The political nature of the Convention did not alter the particular geopolitical and diplomatic circumstances in which Japan existed. Among other things, the fundamental policy that strictly controls the entry of foreigners was maintained. While the government declared itself a member of the Western Block by participating in the Convention, it kept vigilant in granting asylum, taking into account Japan’s particular circumstances. The Ministry of Justice stated, right before the accession to the Convention, “we do not have an intention to immediately open the door for asylum”<sup>29</sup>.

## **2 Refugee Determination in Law and Practice**

Application for refugee status is effected by an asylum application filed with a local immigration bureau. In earlier years, local immigration officers tended to show an excessively negative reaction due to their inexperience and lack of training and on

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<sup>28</sup> Report of the 94<sup>th</sup> Plenary Session of the House of Representatives, *Official Gazette* (extra edn. No.29), p.1018.

<sup>29</sup> Quoted in Asahi Shimbun Evening March 13(1981),2.

some occasions even refused to accept asylum applications, which fortunately is no more the case. An asylum applicant, upon submitting an application, is called to report in person to a local immigration bureau (now mainly the Tokyo or Osaka Regional Immigration bureau) and have an interview directly with a refugee inquirer, an officer newly appointed under the Immigration Control Act.

The Refugee Inquirer is required to summarize the results of the interview in the form of a written statement. Following the examination by the inquirer, the local immigration bureau forms its views and forwards it to the Refugee Recognition Section in the Immigration Bureau of the Ministry of Justice. Then the Director of the Bureau, taking into consideration the views and the report prepared by a local bureau, makes a refugee status determination in the name of the Minister of Justice. Apparently, UNHCR is entitled to be informed of all the asylum applications registered and is allowed to freely express its own views on those applications. Yet it is unclear how much influence UNHCR's views have on the actual decision-making of refugee recognition. In practice there are cases in which a person recognized as refugee by the UNHCR has been refused refugee status by the Ministry of Justice<sup>30</sup>.

An asylum seeker who has received a negative decision is eligible to appeal to the Ministry of Justice within seven days of the date he/she receives the notice of such decision. The appeal follows exactly the same path as the initial application except that the views and the report of a local bureau are forwarded to the Adjudication Division of the Immigration Bureau, not the Refugee Recognition Section. The decision on the appeal is made by the Director of the Bureau in the name of the Minister of Justice. As indicated, until the end of 2002, 305 applicants were

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<sup>30</sup> The Ministry of Justice stated its official views as follows; "It is only the contracting State that has competence and responsibility for the internal implementation of a convention, and the government of Japan is responsible for internal implementation of the Convention relating to the Status of Refugees. Moreover, persons covered by the Convention and the persons the UNHCR regards as being entitled to its protection are not necessarily the same...[T]he government of Japan on its own sovereignty decides who is to be accorded refugee status, and is not bound to make the decision based on the recommendation of the UNHCR. Article 35 of the Convention stipulates that the party States are obligated to co-operate with the UNHCR. However, it does not state that the UNHCR has the competence to determine who is entitled to refugee status and that the decisions of the UNHCR are superior to those of the party States", reproduced in Yamagami, *supra* note 8, pp.74,78-79.

granted refugee status out of 2782 applications. Included in the successful figure are seven appeal cases.

The negative decision at the first instance is handed out with the reasons, which in the past were so simple as to merely mention that the application does not meet the criteria for refugee status articulated in Article 1 of the Refugee Convention. Such reasoning was criticized as being no more than giving no reason for non-recognition decision. As a result, the contents of reasons for non-recognition decision were to be slightly improved. In general, the existence of sufficient evidence is emphasized in the refugee status determination.

One of the reasons for non-recognition that has attracted particular interest in recent years is so called “60-day rule”. According to Article 61, 2-2 of the Immigration Control Act, application for refugee status is required to be filed within 60 days of the date of applicant’s landing in Japan. If circumstances that make the applicant a refugee arise while he/she is staying in Japan, the period starts from the date when he/she becomes aware of the occurrence of such facts. Those who could not make application within 60 days for unavoidable reasons, however, may apply, as an exception to the rule, even after the period has passed. It is submitted that the time limitation rule was introduced not only because it was necessary to conduct prompt refugee recognition, but also because it was considered that “the fact that the applicant did not apply for refugee status promptly by itself revealed inappropriateness for refugee status”. Taking into account geographical circumstances in Japan, 60 days were considered to be adequate for the asylum applicant to visit one of the local immigration bureaus<sup>31</sup>.

The problem is that the 60-day rule has been applied formally and negative decisions at the first instance were made without initiating the examination of the merits of the application in the handling of asylum applications. The Immigration Control Act provides an exception to the “60-day rule” in the name of “unavoidable circumstances”. However, the circumstances recognized as unavoidable tend to be interpreted quite restrictively, only including such circumstances as illness and the disruption of traffic. Thus, blocked by the time limitation, not a few asylum seekers who are otherwise entitled to refugee status have been denied such status.

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<sup>31</sup> S.Yamagami, *Present Situations and Problems concerning Refugee Issues*(1990),p.110 (in Japanese).

Refugee recognition procedures are in essence aimed at assessing whether or not an asylum applicant is a refugee. Rejecting an asylum solely because the application was made outside the 60-day timeframe generates strange results in which a refugee cannot be recognized as a refugee. The actual implementation of “60-day rule” displays to a great degree the Japanese government’s attitudes towards refugee recognition.

The problem is amplified by the poor quality of Refugee Inquirers. Although the post of Refugee Inquire is professional in character, in practice an immigration officer is appointed as Refugee Inquirer in two to three-year term. Without receiving any substantial training beforehand, the Refugee Inquirer so appointed tends to do the work as he/she does the work for regular immigration control. It is likely inevitable that it will negatively affect proper implementation of refugee recognition work, including the way of conducting interviews. Under the circumstances, the consciousness on the part of Refugee Inquirer of doing the regular immigration work severely influences the administration of refugee recognition.

In the refugee recognition procedures in Japan, the process through which to reach a decision on refugee recognition lacks transparency. The appeal process has fundamental flaws in that it is a mere repetition of the initial examination. Moreover, the legal status of asylum applicants is quite unstable until the determination on refugee status is made. The Immigration Control Act does not offer such resident status as “refugee” or “asylum-seeker”. The issue of refugee recognition is regarded as a separate issue from that of allowing resident status. Due to the lack of proper resident status, the access to various social services including medical treatment become difficult to obtain. As a consequence, ensuring the minimum standard of living also becomes difficult for asylum seekers.

A person who has been denied refugee status by the Justice Minister is entitled to bring a legal claim, demanding the repeal of the negative decision. For a long period of time, however, lawsuits had been by no means an effective remedy for asylum-seekers largely due to the lack of understanding of the nature of refugee recognition on the side of the judiciary. It was only in 1997 that the repeal of non-recognition decision was for the first time granted. From the cases decided, following problems have been identified.



First, excessive reliance on objective evidence. The courts have put forward a basic principle that, for a person to be recognized as a refugee, “in addition to the existence of subjective circumstances under which a person has a fear of persecution, objective circumstances need to exist, in which an ordinary person must have a fear of persecution if he/she were in the same position”<sup>32</sup>. The courts have placed a great emphasis on “objective circumstances” and rigorously required the submission of evidence which prove the existence of those objective circumstances. Such rigid stance on the existence of objective evidence does not contribute to proper judgment on refugee status. It should be remembered that asylum seekers are often in a disadvantageous position in terms of collecting evidence. Objective evidence should be considered to be the material for reference, but as is internationally agreed, the refugee status is to be determined by the judgment on the credibility of the applicant’s statements.

Second, there is an issue of burden of proof. The courts clearly stated that “the burden of proof for establishing that an asylum applicant had met criteria for refugee status was placed upon the same asylum applicant him/herself”<sup>33</sup>. However, the rules on the burden of proof in ordinary criminal or civil cases cannot be directly applied to the refugee status determination. Since refugee status determination is the application of criteria to the facts under the circumstances in which the verification of the facts is extremely difficult, it is not relevant to place the burden of proof solely on the asylum applicant.

Third, there is an issue touching the essence of the refugee recognition. A court once categorically stated: “When the country’s political situation is quite unstable, the objective assessment of whether or not events which verify the applicant’s refugee status have occurred is extremely difficult and requires a highly political judgment”<sup>34</sup>. The recognition of refugee status is here characterized as the one which requires a highly political judgment. This is a grave mistake. It is true that refugee recognition is a difficult task. However, it should be an application of criteria to the facts and, juridically speaking, it never requires a highly political judgment. If the refugee recognition were characterized as a political act, the room for judicial review would be considerably narrowed.

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<sup>32</sup> *Judgment*, Tokyo District Court, July 5 1989.

<sup>33</sup> *Judgment*, Tokyo District Court, February 28 1995.

<sup>34</sup> *Id.*

Fourth, there is an issue of interpretation. It may be worth mentioning here some representative examples which reveal insufficient understanding. First, such a statement in the court's ruling as "escape from the army or illegal departure from the country should be duly punished, but such punishment is not related to refugee status"<sup>35</sup> emanates from a quite inaccurate understanding of persecution. It is fully legitimate to grant refugee status based upon the very risk of being punished on the escape from the army or the illegal departure from the country.

The courts also ruled that "since the applicant's motivation for illegal entry into Japan was considered as earning money by working as a migrant worker, it can never be assessed that the applicant fled the country of his nationality, China, due to his fear of persecution"<sup>36</sup>. However, there may be a case where a refugee's immediate purpose of departure from his/her country of origin was to earn money. Furthermore, the courts' understanding revealed in an expression like "since persecution in the Refugee Convention is interpreted to mean the matters relating the acts committed by the state authorities, the court cannot conclude that there has been a persecution even though the applicant has a fear of being attacked by a religious opposition group"<sup>37</sup> also discloses the courts' inadequate understanding of the agent of persecution. Japanese courts have rarely, if ever, shown interest in the Conclusions of UNHCR Executive Committee and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status<sup>38</sup>.

### 3 Dynamics of Judicial Review<sup>39</sup>

As mentioned above, an increasing number of lawyers started jumping into the refugee field toward the end of 1990's and grouped themselves into an association for the protection of asylum seekers. Two of the largest groups of asylum seekers, Burmese and Kurdish, received particular attention and a number of litigations

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<sup>35</sup> *Judgment*, Tokyo High Court, May 7 1984.

<sup>36</sup> *Judgment*, Osaka District Court, April 1 1993.

<sup>37</sup> *Judgment*, Nagoya District Court, March 28 1994.

<sup>38</sup> *E.g.*, *judgment*, Tokyo District Court, February 28 1995.

<sup>39</sup> For a succinct analysis of recent court decisions, see Namba, "Development of Judicial Precedence regarding Refugees: From 2001 to 2002", *Law and Democracy*, No.372(2002),pp.8-13; Kodama, "Critical Review of Detention Problems", *id.*,pp.14-18; Shimonaka, "Significance of Article 31 of the Refugee Convention: Can Penalties Be Imposed on Illegal Entrants Who Sought Asylum?," *id.*,pp.24-29. (These articles are all published in Japanese.)

were filed challenging the legality of non-recognition of their refugee status. Ironically, it was after 9/11, however, that refugee advocates felt the advent of a new era of judicial activism. The immigration authorities confined Afghan asylum seekers, mostly Hazaras, immediately after the WTC attack for alleged violations of the Immigration Control Act. Refugee advocates were put heavily on the alert. Asylum seekers had been seldom detained; If any, it had been only after the initial negative decision was made. Afghan asylum seekers were confined pending their initial applications and even the interviews by Refugee Inquirers had yet to come. The confinement was unprecedented.

Nine Afghan asylum seekers undertook an action to the Tokyo District Court demanding revocation of the disposition of issuance of the confinement order and the suspension of its execution. On November 6 2001, the court issued a decision accommodating the request of five of them for the suspension of execution of the confinement order. Presiding Judge Masayuki Fujiyama said the immigration authorities need not detain the Afghans because they had accepted being questioned before they were confined. In correctly acknowledging the domestic applicability of the Refugee Convention which enjoys legal status superior to statutes in Japanese law, Fujiyama opined: “one cannot but conclude that the issuance of confinement order and the subsequent confinement of a person who may be qualified as a refugee simply because there are reasons to suspect illegal entry or illegal residence are in contravention of Article 31(2) of the Refugee Convention.” Demonstrating outstanding sensitivity to international legal discourse, he stated that traveling through third countries in a series of movements with a view to fleeing from the territory where his life or freedom is threatened still qualifies him as a refugee “directly coming” in the sense of the same provision<sup>40</sup>.

Just one day prior to the epoch-making decision, another bench of the Tokyo District Court had reached quite the opposite decision in respect of the rest of the Afghan asylum seekers. The circumstances of the case were almost analogous to those of the above mentioned case, but Presiding Judge Yosuke Ichimura trod a different reasoning path: “Considering that the confinement ensures the smooth and prompt progress of oral inquiry and examination procedures regarding the foreign national liable to be deported and considering also that the fact that he may be qualified as a refugee does not perfunctorily make unlawful a disposition with a view of his

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<sup>40</sup> *Decision*, Tokyo District Court, November 5, 2001.

eventual deportation, even if he in fact should be a refugee as defined by the Refugee Convention, the confinement as prescribed by the Immigration Control Act would hardly be a restriction of movement ‘other than those which are necessary,’” and therefore the issuance of the confinement order in this case does not violate Article 31(2) of the Refugee Convention<sup>41</sup>.

Ichimura’s decision substantially negates the validity of the Refugee Convention. Inadvertently subsuming international law into otherwise inferior domestic statutes, the finding represents a fundamental misunderstanding of Japanese Constitutional order. It was truly unfortunate that the Tokyo High Court repealed Fujiyama’s decision on December 18, thus giving appellate imprimatur to the arguments propounded by the Ichimura’s bench<sup>42</sup>.

The Afghan asylum seekers were confined in execution of the confinement order. After the determination denying refugee status was made (on November 26), a deportation order was issued against them (on December 27), and they were transferred from the Tokyo Regional Immigration Bureau Confinement Facility to the East Japan Immigration Center to give effect to the deportation order. They filed yet another litigation, demanding suspension of the deportation order. To the surprise of many legal observers, their request was granted on March 1 2002 once again by Judge Fujiyama of the Tokyo District Court. His incisive reasoning is undoubtedly up to international standards<sup>43</sup>:

At the moment of his entry into Japan, he feared the risk of persecution by reason of his ethnicity and religion in his home country, Afghanistan, and his fear was well-grounded enough to qualify him as a refugee as defined by Article 31 of the Convention Relating to the Status of Refugees.

It is not impossible to construe that, even if the designation of Afghanistan as the destination of his deportation should be a violation of the principle of non-refoulement, such violation would necessitate only the revocation of the designation of the destination of deportation, but not that of the confinement, and the question of the legality of the confinement would call for other considerations.

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<sup>41</sup> *Decision*, Tokyo District Court, November 4,, 2001.

<sup>42</sup> *Decision*, Tokyo High Court, December 18,2001.

<sup>43</sup> *Decision*, Tokyo District Court, March 1, 2002.

However, Article 31(2) of the Convention, which provides that the contracting States shall not apply to the movement of those refugees who meet the conditions provided in paragraph 1 of the same article, restrictions of movement other than those which are necessary, prohibits in principle such restrictions even when those refugees could have entered the country illegally and were residing illegally. This is because for most refugees it is difficult to lawfully enter the country. Therefore, it must be construed as being in violation of Article 31(2) of the Convention to issue a deportation order against a person likely to be qualified as a refugee and place him in confinement only on the grounds that there are reasons to suspect illegal entry and illegal residence.<sup>44</sup>

As predicted, however, the Tokyo High Court annulled part of Fujiyama's decision on the grounds that there was no immediate necessity to suspend the execution of confinement<sup>45</sup>. Fujiyama for his part was adamant in holding up the noble spirits of international documents. Thus another welcoming decision came from his bench,<sup>46</sup> this time rescinding a decision of the Minister of Justice which refused refugee status to an Ethiopian man on the grounds that his application had been submitted overdue, namely after the prescribed time limit of 60 days had passed (January 17, 2002). Fujiyama for the first time in history of judicial judgments called for the liberal application of the exception to the 60-day rule and sensibly stated that a decision not to apply for asylum while residing peacefully should be categorically qualified as an unavoidable circumstance, an exception to the 60-day rule. Exceptions were allowed by the immigration authorities only for illness and traffic disruption. He chided the immigration authorities for such restrictive application of the exception, saying that such a view does not fit the purpose of the Refugee Convention as it leads to many cases in which the government rejects refugee status for applicants. In so deciding, Fujiyama pointed out that no other developed country sets such a deadline for asylum applications, a comparative law analysis rarely seen in Japanese jurisprudence. The decision was upheld by the Tokyo High Court on February 18, 2003.

Interestingly, Judge Ichimura of the Tokyo District Court whose view had been in a

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<sup>44</sup> *Japanese Annual of International Law*, No. 45(2002), p.150.

<sup>45</sup> *Decision*, Tokyo High Court, June 10, 2002.

<sup>46</sup> *Judgment*, Tokyo District Court, January 17, 2002.

marked contrast to that of Fujimayma in regard to the legality of confinement of Afghan asylum seekers granted a request by a Turkish Kurd and rescinded an administrative decision which denied him refugee status <sup>47</sup>. Examining in detail the legal, political and human rights situations surrounding Kurds in Turkey, and affirming credibility of his testimony, Ichimura dived into recognizing him as a refugee. Ichimura found that he would be subjected to torture in the prosecution proceedings without due process and that an anticipated punishment would be disproportionately severe. The judge correctly emphasized that it is not the quality or the degree of political activities but fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion that is the very basis for refugee status. This encouraging decision, however, was overturned by the Tokyo High Court (on May 22,2003). The appellate court cast doubt on his fear of being persecuted if returned after finding that the man had not faced persecution before entering Japan.

A watershed ruling was rendered by the Osaka District Court on March 27, 2003, in which for the first time an Afghan national was awarded refugee status in a suit against the government<sup>48</sup>. A man of the Hazara minority fought Taliban forces in 1994 as a soldier for the Hazara-dominated Islamic Unity Party. He later left the party and fled to Pakistan. He entered Japan in 1998 and applied for asylum after learning that the Taliban expanded its influence in Afghanistan and fearing that he would face persecution if returned. Thoroughly looking into the circumstances and correctly giving benefit of the doubt to the asylum seeker, Presiding judge Ikuo Yamashita affirmed his refugee status, thus revoking the Justice Mnister's earlier negative decision.

In a case where an Afghan asylum seeker was arrested and prosecuted for illegal entry and presence, the Hiroshima District Court exempted him of a penalty based on a thoughtful understanding of Article 31(1) of the Refugee Convention as embodied in Article 70-2 of the Immigration Control Act<sup>49</sup>. Presiding judge Hidenobu Konishi recognized him to be a refugee after examining the relevant circumstances and finding his (apparently inconsistent) testimony credible. Correctly, the applicant's motivation to gain employment per se was not considered

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<sup>47</sup> *Judgment*, Tokyo District Court, March 8, 2002.

<sup>48</sup> *Judgment*, Osaka District Court, March 27, 2003.

<sup>49</sup> *Judgment*, Hiroshima District Court, June 20, 2002.

a factor against refugee status. Particularly noteworthy was the fact that Konishi took into full consideration the UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers of 1999 in interpreting Article 31(1) of the Refugee Convention. The court stated: "The expression 'coming directly' covers the situation of a person who, entering Japan directly from the country of origin, or from another country where his protection, safety and security could not be assured, transits an intermediate country for a short period of time without having applied for, or received, asylum there.", a phrase entirely copied from the Guideline.

The applicant let five months pass by before presenting himself to the authorities. Konishi carefully considered the feelings and special situations of a refugee and judged that the requirement of "without delay" in Article 72-2 of the Immigration Control Act had been met in the present case. The judgment was appealed by the prosecutor to the Hiroshima High Court, which in turn sentenced the man to a fine of ¥300,000 for illegal entry and presence<sup>50</sup>. Apparently the appellate court overturned the lower court decision. In fact, it substantively upheld Konishi's thoughtful finding. The only difference lied in the interpretation of "without delay". The appellate court found that under the particular circumstances a reasonable period of time had already passed, which would have guaranteed immunity from penalization under the rubric of "without delay".

The single most dramatic judgment was rendered by the Tokyo District Court on April 10, 2003<sup>51</sup>. Again it derived from Fujiyama's bench. The court ordered the government to pay ¥9.5 million in damages to a Myanmar man for the suffering he had to endure after being denied refugee status. It ruled the initial non-recognition determination was in error. Fujiyama stated that the government failed to examine his case thoroughly and made an incorrect decision in 1998.

The man filed a lawsuit seeking reversal of the initial negative decision. In an unprecedented move, shortly before the suit was to be concluded in March 2002, the Justice Minister retracted her earlier decision and granted him refugee status, saying that the facts of his case became known during the legal process. The man switched his lawsuit to one demanding redress for his suffering. Fujiyama

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<sup>50</sup> *Judgment*, Hiroshima High Court, September 20, 2002.

<sup>51</sup> *Judgment*, Tokyo District Court, April 9, 2003.

emphasized the government's duty to conduct a careful investigation into asylum applications. The court recognized the man's physical and psychological damages suffered while in detention for nine months from June 1998 and during the period until March 2002 when he was granted refugee status and ordered the government to pay the amount of money almost equivalent to that requested by the plaintiff.

It is particularly worth noting that the judgment clearly declared that the burden of proof rests with both the refugee and the government, the first judicial pronouncement to that effect helping, at least partly, bring Japanese secluded refugee recognition practice into line with international standards. After admitting the initial duty to present materials relevant to refugee status lies on the asylum applicant, Fujiyama stated: "The Justice Minister has an obligation to make a refugee determination after, giving due consideration to the situations of the refugee applicant, she assesses and examines fairly and carefully the applicant's testimony as well as the materials submitted, and conducts a supplementary investigation as necessary. One should say that this obligation is owed to the refugee applicant as well who has a right to submit such application."

One most recent judgment dealt another blow to the government strict refugee policy. Fujimaya's bench rescinded a decision which, based on the "60-day rule", had denied refugee status to a Kurdish asylum seeker (on May 16,2003). Fujimaya stated that the negative decision was unfounded.

#### **IV The Way Forward**

A series of judicial pronouncements described above, never expected only a few years ago, signals a strong message from the judiciary calling for the revamping of the outmoded refugee recognition procedures in Japan. Triggered by the Shenyang incident in May 2002, a working group was established in June 2002 in a private advisory panel on immigration policies of the Justice Minister to review the current refugee protection system. The mandate entrusted to the working group, however, was quite limited; It was requested only to examine: (i) validity of the 60-day rule,(ii) legal treatment of asylum seekers whose refugee applications are pending, and (iii) the mechanism of appeal.



A progressive report of the working group was submitted to the advisory panel on immigration policies in October<sup>52</sup>. It proposed that the deadline should be extended to 6-12 months and that asylum seekers should be legally protected against deportation while their applications are pending. It also proposed that the government secure conditions in which asylum seekers may concentrate on their application processes. The third issue on the appeal system was deferred to the final report that should come in due course.

The panel, after examining the report, added two warnings against possible abuse of the system by illegal residents or workers and even terrorists. The panel insisted as well that the legal guarantee against deportation and the provision of social services to asylum seekers should be extended only to genuine refugees and that such measures should be taken under conditions which do not allow asylum seekers to work. It seems that the primary concern of the panel is to keep refugees away from the national border, in line with the containment policy widely administered by the industrialized countries. That the report starts with expressing suspicions about asylum seekers indicates that refugees are basically not welcome not only in the West but also here in Japan.

In March 2003, the Ministry of Justice submitted a bill to the Diet in an attempt to revise part of the Immigration Control Act<sup>53</sup>. Among other things, it introduced a new system for the refugee recognition procedures after, at least partly, the proposals made by the panel. A welcome revision is the abolition of the notorious 60-day time limitation. Another conspicuous feature of the bill is that it provides for the granting of temporary residence permits to asylum applicants. Currently a number of applicants lack permits allowing them to stay in Japan and face the possibility of deportation at any time.

The problem is that temporary residence permit would not be granted to those who have not applied for refugee status within six months of their arrival or who have not come directly from a territory where their life, physical integrity or security of person is threatened for the reasons enumerated in Article 1A(2). If not granted a temporary residence permit, applicants may not be eligible for long-term residency even after they are recognized as refugees. Although applicants who failed to meet

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<sup>52</sup> *Supra* note 15.

<sup>53</sup> *Supra* note 16.

the criteria for temporary residence would not be deported, they may likely be detained despite being asylum seekers. Furthermore, it is totally up to the discretion of the Justice Minister whether those who have not been granted temporary residency would be permitted to stay in Japan after they are recognized as refugees.

As of writing this paper, the bill is yet to be deliberated in the Diet. In the meantime, the Japan Federation of Bar Associations and other organizations working for the protection of refugees expressed concern, while appreciating the abolition of the 60-day rule, that the bill would bring in new problems rather than solutions to refugee problems. Particularly criticized is the introduction of the “six-month rule”, which might simply contribute to producing yet another time limit problem. The requirement of “coming directly” is another source of concern. From a perspective of international human rights law, one fundamental question is whether the distinctions made between asylum seekers and between recognized refugees regarding residency status are tantamount to discrimination prohibited by such documents as the International Covenant on Civil and Political Rights. In any event, it is unfortunate that the bill was prepared predominantly by the Ministry of Justice, a state organ responsible for controlling immigration. The scope of refugee issues is much wider than the jurisdiction of the Ministry of Justice. One could hope that the bill signals the beginning of a series of discussion that would lead up to the betterment of refugee policies of our country.

As a final note, let me get back to the global perspective. Parallel to the construction of restrictive containment policies, there has been an increase in cases regarding refugees and asylum seekers brought to international human rights mechanisms. European lawyers are apt at using the European Court of Human Rights to protect refugees. One of the most encouraging judgments of the Court is the one which dealt with the legal status of an international zone which France established apparently to avoid international obligations, a measure reminiscent of the Australian excised territories. The Court, flatly denying the extraterritorial character of the international zone, held<sup>54</sup>;

Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasizes, however, that this

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<sup>54</sup> *Amuur v. France*, 1996-III European Court of Human Rights, 1996, paras.41-43.

right must be exercised in accordance with the provisions of the [European] Convention, including Article 5...Holding Aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions.

In a case in which the legality of a measure of expulsion was challenged, the Court stated<sup>55</sup>:

[I]t is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.

The Committee against Torture, since 1994 when it received its first case, has issued on several occasions its views prohibiting the expulsion of a person to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture. More important, the Committee addressed issues relevant to assessment of testimony of asylum seekers, often victims of torture. The problem is how you assess the credibility of the story told by asylum seekers when contradictions and inconsistencies occur. The Committee in employing the most advanced psychological knowledge stated that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies should not raise doubts

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<sup>55</sup> *Chahal v. United Kingdom*, 1996-V European Court of Human Rights, 1996, para.74.

about the veracity of the application for asylum”<sup>56</sup>.

The Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights for their part expressed concerns about issues relevant to refugees, such as carrier sanctions, housing, education and social services. It seems that restrictive asylum policies of the North have helped anchor refugee issues as an integral part of international human rights law, an encouraging phenomenon for refugee advocates who are forced to witness the shrinking scope of the Refugee Convention. Surely recourse should be had to international human rights law whose protection is extended to every human being, refugees and asylum seekers being no exception. It is highly likely that international human rights arguments will permeate Japanese legal practice in respect of refugee protection. But I am not sure whether the recourse to human rights law, no matter how effective it may be, will substantively reshape the directions of restrictive asylum policies heavily propounded by ruling elites to exclude and contain refugees.

Fundamentally speaking, what should be addressed is the contemporary international structure which serves as a direct cause of refugee production. It is recalled that virtually all refugees come from the South/East. Very few if any asylum seekers flee from the North/West. Yet, of those granted asylum, seven out of ten are hosted by the South. Unless the issue of the shamefully disproportionate international political and economic structures is addressed up front, we will never be liberated from human tragedies arising from refugee exodus. Demir argues: "As life expectancy is dropping in the global south and rising in the global north, and the wealth of the richest 200 people in the world is ten times that of the combined wealth of the 582,000,000 poorest, a transfer of funds from the rich global north to the poor global south is desperately needed. However, as documented by the UNDP, there has been a massive shift away from a global-north to global-south allocation of development resources. While these global inequities exist, it is unlikely that we will see any great reduction of migration...."<sup>57</sup>

One should not forget that Northern/Western international lawyers have been always behind these structural inequities. For those committed to third world

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<sup>56</sup> *Amei v. Switzerland*, Communication 34/1995, May 9, 1997.

<sup>57</sup> *Supra* note 26, p.3.

perspectives, international law is the illegitimate, predatory and oppressive regime of the unjust global order and so is to be resisted<sup>58</sup>. International law underpins Western political and economic hegemony and enshrines as global gospel the values of Western liberal civilization. True, there once was a passionate quest for a post-hegemonic order during the period of decolonization. Some of the achievements included: elevation of the principle of self-determination to an established norm of international law, reorganization of the law of expropriation based on permanent sovereignty over natural resources, the substantiation of the concept of common heritage of mankind, reshaping of international economic order under the banner of the New International Economic Order. The search for a new order was initiated with a view to achieving the full democratization of the international structures so that all voices can be heard. Unfortunately, however, traces of the third world voices cannot be easily located today in international law<sup>59</sup>.

The post-cold war period has seen a triumph of the West. A neo-liberal model developed and utilized by the West now dominates the entire fields of international discourse. Antony Anghie eloquently asserts that: “the essential structure of the civilizing mission may be reconstructed in the contemporary vocabulary of human rights, governance, and economic liberalization.”<sup>60</sup> Western liberal thinking about international legal order increasingly bears resemblances to the 19<sup>th</sup> century standards of imperialism which dictates the division of the world into a hierarchy of civilized nations, barbarous humanity, and savage humanity<sup>61</sup>. As long as the colonial and imperial past of the international system remains embedded in the contemporary rules and institutions of international law, the structural inequities last and the outflow of refugees continues.

For international lawyers working for the protection of refugees, particularly those based in the culpable North, a fundamental challenge is to chart a new direction for

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<sup>58</sup> Mutua, “What Is TWAIL?”, *American Society of International Law Proceedings*, Vol.94(2000),p.31.

<sup>59</sup> Fidler, “Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law,” *Chinese Journal of International Law* (2003),p.48.

<sup>60</sup> Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,” *Harvard International Law Journal*, Vol.40(1999),p.80.

<sup>61</sup> Kingsbury, “Sovereignty and Inequity”, in *Inequity, Globalization, and World Politics* (A. Hurrell & N. Woods eds. 1999),p.90.

revamping and democratizing the unjust structure of international legal order. No doubt this is an exceptionally formidable intellectual challenge, but it is an indispensable challenge for unraveling and hopefully eradicating the genuine “root causes” of perpetuated global refugee problems.