
Are You a Good Refugee or a Bad Refugee? : Security Concerns and Dehumanization of Immigration Policies in Japan¹

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I From the *Tampa* to Shenyang

Although once highly admired for its strong commitment to human rights, Australia is now giving an extremely cold shoulder to a number of people in dire need of safe refuge. This is a prime example of shrinking asylum opportunities in the industrialized countries. 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 applications².

The Australian 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 2002³.

¹ This is an unedited paper subject to change as necessary..

² 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).

³ *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

The Group's reasoned criticism, however, was adamantly rejected by the intransigent federal government, thus causing grave disappointment among refugee advocates.⁴

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 UNHCR⁵:

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

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 a valid visa"(*id.*,para.60).

⁴ "U.N. Hits Aussies for Refugees' Indefinite Detention," *Japan Times*, June 7, 2002.

⁵ UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action 2000*, pp.142-143.

1967 Protocol in 1981. Until the end of 2004, 2,782 applications had been lodged, of which 313 were granted refugee status. During the ten-year period between 1995 and 2004, merely 106 applications were granted⁶. This figure is shamefully 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.

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 seekers⁷. A follow-up report was published in January the following year highlighting continuing

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Year	Application	Granted	Not granted	Withdrawn	Visa on Humanitarian Ground
1982	530	67	40	59	
1983	44	63	177	23	
1984	62	31	114	18	
1985	29	10	28	7	
1986	54	3	5	5	
1987	48	6	35	11	
1988	47	12	62	7	
1989	50	2	23	7	
1990	32	2	31	4	
1991	42	1	13	5	7
1992	68	3	41	2	2
1993	50	6	33	16	3
1994	73	1	41	9	9
1995	52	1(1)	32	24	3
1996	147	1	43	6	3
1997	242	1	80	27	3
1998	133	15(1)	293	41	42
1999	260	13(3)	177	16	44
2000	216	22	138	25	36
2001	353	24(2)	316	28	67
2002	250	14	211	39	40
2003	336	6(4)	298	23	16
2004	426	9(6)	294	41	9
Total	2,782	313(17)		443	284

* () granted after appeal, not included in the total.

⁷ Amnesty International, "Japan: Inadequate Protection for Refugees and Asylum-Seekers," *International Journal of Refugee Law*, Vol.5(1993),p.205.

inadequacies in Japanese policies toward them⁸. 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 observations⁹.

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, only to no avail, though¹⁰. 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 obligations¹¹.

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. As mentioned below, industrious endeavours of lawyers in due course brought forth epoch-making judicial decisions in favour of asylum seekers. In 1999, 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 well¹².

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 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 forcibly removed from there by Chinese police. A shocking video footage was widely aired

⁸ Amnesty International, *Japan: Asylum-Seekers Still at Risk*, AI INDEX:ASA 22/01/94(January 1994).

⁹ Yamagami, "Determination of Refugee Status in Japan", *International Journal of Refugee Law*, Vol.7(1995),p.60.

¹⁰ 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).

¹¹ *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.

¹² For activities of Japan Association for Refugees, see its homepage at <<http://www.refugee.or.jp>>.

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 out¹³ :

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 Shengnan 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 asylum, a legally controversial institution which nonetheless has been often invoked worldwide to give refuge at least temporarily to those who need protection¹⁴. 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 Japan¹⁵. 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 applications¹⁶. In March, 2003, a government prepared bill was submitted to the Diet to amend part of the immigration rules regulating the treatment of

¹³ Glosserman, "Tokyo Bars the Door: Asylum Policy the Real Scandal," *Japan Times*, May 22, 2002.

¹⁴ 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).

¹⁵ 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.

¹⁶ Fourth Advisory Panel on Immigration Policies, *Review of the Refugee Recognition System: A Progressive Report*, November 1, 2002 (in Japanese).

asylum seekers¹⁷, the first legislative attempt ever made to handle refugee issues in the last 20 years.

Below 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 for 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

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”¹⁸, 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,

¹⁷ Ministry of Justice, *Materials relevant to the Bill to Revise Part of the Immigration Control and Refugee Recognition Act*, submitted to the 156th Session of the Diet, 2003 (in Japanese).

¹⁸ 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.

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"¹⁹ was considered most durable. On the other hand, refugees were 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 1977²⁰ 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 refuge status: Neither 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 emasculated²¹. 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 flight²².

¹⁹ 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.

²⁰ UN Doc.A/CONF.78. See *generally* A. Grahl-Madsen, *Territorial Asylum* (1980).

²¹ 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).

²² 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).

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. Responsibility of refugee 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 refugees²³. 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 origin²⁴.

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 the 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 control, sanctions on carriers and what have you. As Alexander Aleinikoff analyzes²⁵:

[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 seekers, visa requirements, closing opportunities for resettlement, push-backs, and return. These politics are grounded less in a

²³ Lee, "Legal Status of Internally Displaced Persons," *Remarks in the Panel on Widespread Migration: International Law and International Institutions, 86th 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.

²⁴ See Chimni, "Perspectives on Voluntary Repatriation: A Critical Note," *International Journal of Refugee Law*, Vol.3 (1991), pp.541-46.

²⁵ Aleinikoff, "State-centered Refugee Law: From Resettlement to Containment," in *Mistrusting Refugees* (E. Daniel & J. Knudsen eds. 1995), pp.265-66.

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 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"²⁶. 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 danger, to access 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"²⁷. Obviously, these human tragedies are a structural outcome of the source country bias.

Racialized fear of "terrorist attacks" certainly works hard against refugees. Most concerned is the deterioration of basic international norms which have been the very basis of peaceful relations among peoples and nations. What comes to mind first is of course the declining quality of the fundamental principle of international law prohibiting the threat and use of force. Equally devastating is the transformation of the norm prohibiting torture. This is not the concern exclusively stemming from notoriously abhorrent US rendition policies (*i.e.*, outsourcing of torture to other countries) or horrendous practices committed in Guantanamo .

The deterioration of anti-torture norm is deepening widely in the industrialized world. It

²⁶ Shacknove, "From Asylum to Containment," *International Journal of Refugee Law*, Vol.5 (1993), p.516.

²⁷ 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.

cannot be stressed enough that the Canadian Federal Supreme Court rendered a decision in 2002 which approved the expulsion of a Sri Lankan “terrorist” to his country of nationality where there were substantial grounds to believe that he would be subjected to torture. The rationale behind that appalling decision is that the national security concerns are of such an exceptional nature that they preempt the requirement of human rights.. In fact, international human rights law and the Anti-Torture Convention to which Canada is a state party clearly state that prohibition of torture is absolute: It is applied to everyone in every circumstance. As long as you are human, you are protected against torture even in exceptional circumstances. In holding that the “terrorist” is a source of threat to the national security and is unqualified to be protected against torture, the Supreme Court of Canada effectively declared that terrorists are no more human beings, a statement with an effect to dehumanize human rights norms.

That the person concerned in the above mentioned Canadian case was a refugee from a country in the South is not a matter of accident. In many cases, the impact of dehumanization of human rights norms may be disproportionately felt by racialized minority who seek protection in the industrialized North. The message is clear. The North welcomes foreigners as long as they are beneficial and safe. Those who are perceived to be a source of threat is now publicly subject to exclusion even where human rights of absolute nature are endangered. In order to secure public safety in their gardens, further reinforcement of strict control over the borders as well as inside the borders is considered inevitable.

III Refugee Protection in Japan

1 A Brief Historical Portrayal

Since the nineteenth century, there have been quite a few cases in which Japan provided asylum in its territory to those who fled from persecution²⁸. 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 attentions, the interest in refugee issues has been raised among civic and academic circles,

²⁸ 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).

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 neighbours politically unstable countries. It is undeniable that the society which has placed paramount value on economic development functioned as one of the obstructing the establishment of refugee protection legislation.

In Japan refugee issues were considered as those of assistance to people who was 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 settlement of Vietnam refugees through the Cabinet Understanding. The scope of admission was expanded to include Indo-Chinese refugee 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 a small number of cases handled in earlier years, they never went through the procedures for 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”²⁹. 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

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

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"³⁰.

2 Refugee Determination in Law and Practice: How It Operated Prior to Recent Legislative Initiatives

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 some occasions even refused to accept asylum applications, which fortunately is no more a 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.

Refugee inquirer is required to summarize the results of the interview in the form of the 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 Justice³¹.

³⁰ Quoted in Asahi Shimbun Evening March 13(1981),2.

³¹ 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 9, pp.74,78-79.

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.

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 had attracted particular interests in recent years was so called "60-day rule". According to the relevant article of the Immigration Control Act, application for refugee status was required to be filed within 60 days of the date of applicant's landing in Japan. If circumstances that made the applicant a refugee arose while he/she was staying in Japan, the period started from the date when he/she became aware of the occurrence of such facts. Those who could not make application within 60 days for unavoidable reasons, however, might apply, as an exception to the rule, even after the period had 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 bureaus³².

The problem was that the 60-day rule had been applied formally and negative decision 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 provided 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 were otherwise entitled to refugee status had

³² S.Yamagami, *Present Situations and Problems concerning Refugee Issues*(1990),p.110 (in Japanese).

been denied such status. 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 generated strange results in which a refugee was not recognized as a refugee. The actual implementation of "60-day rule" displayed to a great degree the Japanese government's attitudes towards refugee recognition.

The problem was 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, Refugee Inquirer so appointed tended to do the work as he/she did the work for regular immigration control. It is inevitably likely that it would 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 influenced the administration of refugee recognition.

In the refugee recognition procedures in Japan, the process through which to reach a decision on refugee recognition lacked transparency. The appeal process had fundamental flaws in that it was a mere repetition of the initial examination. Moreover, the legal status of asylum applicants was quite unstable until the determination on refugee status was made. The Immigration Control Act did not offer such resident status as "refugee" or "asylum-seeker". The issue of refugee recognition was 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 treatments became difficult to obtain. As a consequence, ensuring the minimum standard of living also became difficult for asylum seekers.

A person who had been denied refugee status by the Justice Minister was 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 decide, following problems had been identified.

First, excessive reliance on objective evidence. The courts had 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"³³. The courts had placed a great emphasis on "objective circumstances" and rigorously required the submission of evidence which proved the existence of those objective circumstances. Such rigid stance on the existence of objective evidence did not contribute to proper judgment on refugee status. It should be reminded 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"³⁴. 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. One 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"³⁵. 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 does never require a highly political judgment. If the refugee recognition were characterized as a political act, the room for judicial review would be considerably narrowed.

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"³⁶ 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.

³³ *Judgment*, Tokyo District Court, July 5 1989.

³⁴ *Judgment*, Tokyo District Court, February 28 1995.

³⁵ *Id.*

³⁶ *Judgment*, Tokyo High Court, May 7 1984.

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”³⁷. 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”³⁸ also discloses the courts’ inadequate understanding of the agent of persecution. Japanese courts have rarely if ever shown interest in Conclusions of UNHCR Executive Committee and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status³⁹.

3 Dynamics of Judicial Review⁴⁰

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 attentions and a number of litigations 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

³⁷ *Judgment*, Osaka District Court, April 1 1993.

³⁸ *Judgment*, Nagoya District Court, March 28 1994.

³⁹ *E.g. , judgment*, Tokyo District Court, February 28 1995.

⁴⁰ 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.)

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 provision⁴¹.

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 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"⁴².

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 bench⁴³.

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

⁴¹ *Decision*, Tokyo District Court, November 5, 2001.

⁴² *Decision*, Tokyo District Court, November 4, 2001.

⁴³ *Decision*, Tokyo High Court, December 18, 2001.

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 standards⁴⁴:

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.

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.⁴⁵

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 confinement⁴⁶. Fujiyama for his part was adamant in holding up the noble spirits of international documents. Thus another welcoming decision came from his bench,⁴⁷ 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 the traffic disruption. He chided the immigration authorities for such restrictive

⁴⁴ *Decision*, Tokyo District Court, March 1, 2002.

⁴⁵ *Japanese Annual of International Law*, No. 45(2002), p.150.

⁴⁶ *Decision*, Tokyo High Court, June 10, 2002.

⁴⁷ *Judgment*, Tokyo District Court, January 17, 2002.

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 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 status⁴⁸. 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 government⁴⁹. 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 Act⁵⁰. Presiding judge Hidenobu Konishi recognized him to be a refugee after examining the relevant circumstances and finding his (apparently

⁴⁸ *Judgment*, Tokyo District Court, March 8, 2002.

⁴⁹ *Judgment*, Osaka District Court, March 27, 2003.

⁵⁰ *Judgment*, Hiroshima District Court, June 20, 2002.

inconsistent) testimony credible. Correctly, the applicant's motivation to gain employment per se was not considered 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 presence⁵¹. 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, 2003⁵². Again it derived from the Fujiyama's bench. The court ordered the government to pay ¥9.5 million in damages to a Myanmar man for suffering he had to endure after 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. Unprecedented, 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 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

⁵¹ *Judgment*, Hiroshima High Court, September 20, 2002.

⁵² *Judgment*, Tokyo District Court, April 9, 2003.

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."

IV Opening up the Border for Refugees?

A series of judicial pronouncements described above, never expected only a few years ago, signaled 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.

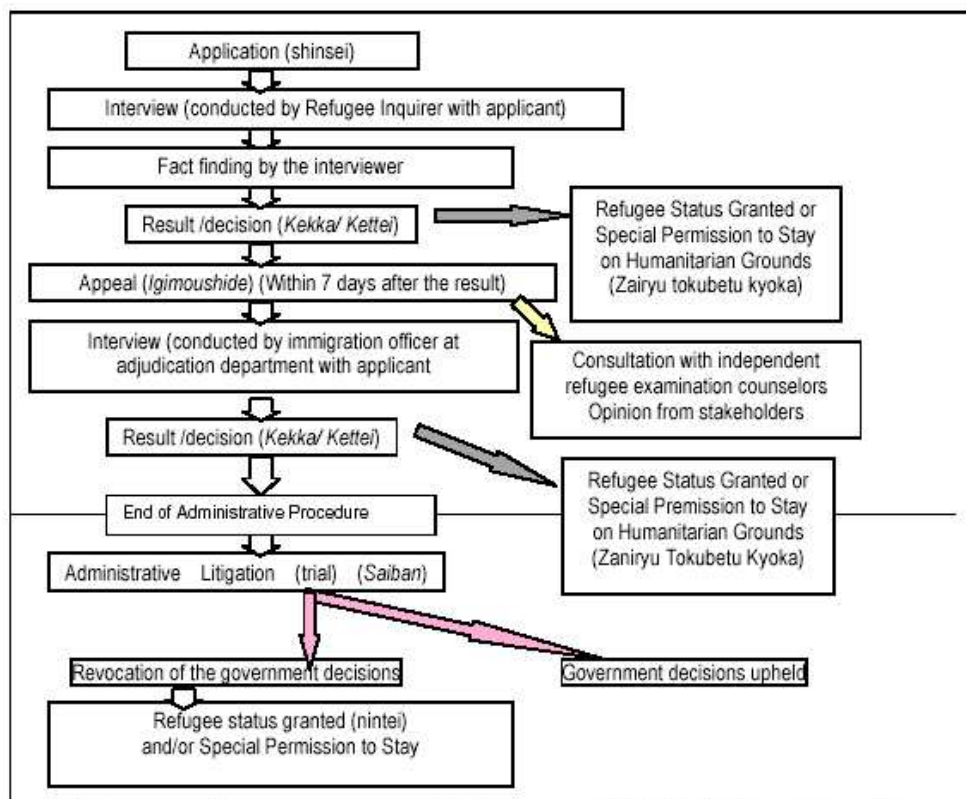
The final report of the working group was submitted to the advisory panel on immigration policies in December, 2003, preceded by a progressive report issued in October of the same year. Following the proposals made in these reports, the Ministry of Justice submitted a bill to the Diet in an attempt to revise part of the Immigration Control and Refugee Recognition Act. Among other things, it introduced a new system for the refugee recognition procedures. A most welcoming revision was 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 permit to asylum applicants. A number of applicants lacked permit allowing them to stay in Japan and faced 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 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 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. Regarding the appeals system, a significant change was introduced by a legislative initiative which sets up a advisory group of examination counselors who are to present their opinions on the recognition of refugee status with respect to objection filed after a negative decision is rendered.

The bill came into effect as of May 2005⁵³. In the meantime, the Japan Federation of Bar Associations and other organizations working for the protection of refugees expressed concern that, while appreciating the abolition of the 60-day rule, 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

⁵³ The Current Refugee Recognition Procedure in Japan is described below.



Refugee recognition procedures are explained in the pamphlet “Guide to Refugee Recognition Procedures,” produced by the Immigration Bureau (available in Japanese, English, Chinese, French, Arabic, Turkish, Burmese, Urdu, Farsi, Russian, and Korean).

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.

Betraying these concerns, however, the revamped refugee determination procedures seem to begin serving for the benefit of asylum-seekers. One significant characteristic is the increase in the number of those who are granted refugee status, or special permit for stay even when refugee status is denied for lack of necessary qualifications. Apparently, the involvement of independent third parties (refugee adjudicators) in the appeals process affects the outcome of the entire procedure. In 2005, 46 were recognized as refugees, more than three times the figure for the previous year. Jumping from the figure of 14 in 2004, as many as 43 Burmese asylum-seekers were granted refugee status. When it comes to the number of people who were granted special permit for stay, it was 97, almost ten times that of the previous year (nine, indeed)⁵⁴. Thus, a prominent refugee lawyer representing Burmese refugees states that “I can sense an effort on the part of the Justice Ministry to bring Japanese standards closer to the international level”⁵⁵.

Interestingly, the otherwise secluded Bureau of Immigration of the Ministry of Justice has recently reinforced its training program for refugee inquirers and other officials involved in refugee determination. UNHCR Japan Office is constantly invited to give lectures on refugee law to them together with human rights NGOs such as Amnesty International and academic experts in international law. The current director of the Justice Ministry’s Refugee Recognition Office claims that “officials in charge of refugees have no discriminatory feelings. Officials handling refugees have a much better understanding of human rights than other immigration officials”⁵⁶.

As an academic who has been observing the Japanese refugee determination practice in the last two decades, I cannot but confess that this really seems a positive and welcoming development in terms of opening up the country’s closed doors to those who seek protection herein. Japan is a contracting party to most of the major universal human rights treaties including the International Covenants, the Anti-Torture Convention and the Refugee Convention as well as the Women’s Convention and the

⁵⁴ Kaho Shimizu, “Number of official refugees up threefold in 2005”, *Japan Times*, February 25, 2006. Of 384 new applications filed in 2005, 212 were from Burmese.

⁵⁵ Quoted in Kana Inagaki, “Pressure prizing open door for refugees”, *Japan Times*, Feb. 8, 2006. See also, Ryuta Ichikawa, “The First Step to ‘Opening Up the Country for Refugees’”, *Tokyo Shinbun* (Tokyo Newspaper), December 20, 2005.

⁵⁶ Quoted in Inagaki, *supra* note 54.

Children's Convention, which all call for the protection of human dignity of those present within its jurisdiction, asylum-seekers being no exception. Control over the entry and exit of foreigners is no more a sovereign prerogative but is now subject to international obligations imposed by international human rights treaties. The current development in Japan concerning the treatment of asylum-seekers might be considered something which helps give at least in part effect to the requirements of these international normative documents.

Considering the worldwide deteriorating situations of refugee protection, Japanese government's recent policy change regarding asylum applications may seem surprising. No doubt this is not a natural outcome brought forth by well-intentioned ruling elites. A driving force behind the current development is the birth of new generations of lawyers who, indignant of Japanese cold-hearted policies toward refugees, are committed to employing their talents and skills for the sake of social justice. One indicator which eloquently shows the active commitment of lawyers to the protection of refugees is provided by government statistics on litigations. Refugee lawyers resort to an increasing number of lawsuits seeking either revocation of negative administrative decisions or stay of deportation of asylum seekers pending judicial review.

The government statistics indicate that in 2000 the number of such lawsuits was 46, in 2002 it was 52 and in 2003 it reached the contemporary peak of 53. In 2004, another 25 new litigations were launched on behalf of refugees. In terms of nationality breakdown, since 2000 up until the end of 2004, 52 lawsuits were lodged by Afghans while 49 were brought by Burmese and 29 were launched by Turks (Kurds, to be more precise). Iranians are another major group filing 12 litigations against the Japanese government, followed by Sudanese who lodged 10 lawsuits. In all, during the period extending from 2000 through 2004, 184 litigations were launched by asylum seekers, a number clearly unpredicted a decade ago in a country where very few jurists were interested in pursuing the cause of asylum seekers. The arguments and legal interpretations presented by lawyers before municipal courts are progressively refined and it is no more an exception at least in lowers that litigants carry the day. Logics and legal reasonings are likely given due weight in courts of first instance, which unfortunately is not the case in stubbornly conservative upper courts.

V Reinforcement of Border Control for "Public Safety"

The above mentioned positive assessment might be found too simplistic if countervailing factors were neglected. First, it should be noted that virtually all refugees accepted last year came from one particular country, Burma. Two were from

Iran and one from the Republic of Congo. No Kurdish asylum-seekers were granted refugee status. Neither was the case with asylum-seekers from Pakistan, China and North Korea. Those who came ashore from friendly or politically sensitive countries end up in suspense with regard to their status. The most they can expect to obtain is special permit for stay without being recognized as refugees. After all, recognition of refugees is an act to judge human rights situations in their countries of origin and thus is likely to give rise to diplomatic repercussions. Second, asylum seekers are not guaranteed sufficient legal safeguards when they enter Japan. Nobody knows what transpires in the international zone at airports reserved for foreigners excluded by immigration officers. Third, the treatment of asylum-seekers in detention is considered far below the international standards set by UN human rights documents. Fourth, refugees may encounter serious problems after being recognized as such for lack of institutional and societal support to help them integrate into Japanese society.

The biggest concern, however, is the tightening security at and inside the border while the acceptance of refugees is seemingly improving. Indeed, a whole panoply of machinery is now set in motion to protect public safety of Japan. The Ministry of Justice announced the third edition of its influential Basic Plan for Immigration Control in March 2005. As readily observed from the table of contents⁵⁷, the government is keen on

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inviting skilled workers for the economic benefit of the country while bluntly intent on “recovering public safety” by promoting tougher border measures. The revamping of refugee recognition procedures is thus accompanied by intensive reinforcement of border measures taken in response to rising public concerns about deterioration of public security perceived to be caused by the presence of illegal foreign residents. As countermeasures, the government has introduced a number of amendments to the Immigration Control and Refugee Recognition Act⁵⁸: Raising the amount of fines for illegal entry and encouragement of illegal employment, extension of the period for denying re-landing permission, revocation of residence status for a certain illicit acts. Measures against trafficking in persons in line with the Protocol on Trafficking in Person came into effect in July 2005, which significantly expanded the penal scope with strong administrative and criminal sanctions. Private actors (employers and transport companies in particular) are firmly integrated into the strict immigration control mechanism.

Cooperation with immigration authorities of other countries is increasingly strengthened. Utilization of biometric technologies and sharing of information about foreigners were two of the major topics discussed on the occasion of 19th Seminar on Immigration Control organized by the Immigration Bureau of the Ministry of Justice in Tokyo, which gathered representatives from 17 countries and a territory in South East Asia.

Regarding the international cooperation on immigration control, one incident that garnered international attention was the visit to Turkey in June 2004 by the government officials in charge of refugee determination to investigate the families of those seeking asylum in Japan. The Turkish police provided with them substantial assistance in pursuing their mission. The investigations were thought to have been launched after two district courts ruled in April 2004 that two Turkish asylum-seekers should be recognized as refugees against government negative decisions. Together with UNHCR, Amnesty International strongly criticized the visit by stating that “the investigations in Turkey have exposed the asylum-seekers and their families to increased danger, including the cessation of contacts and information from their families in Turkey.” Amnesty International warned that “by providing information regarding the applications of the asylum-seekers to the Turkish authorities, the

⁵⁸ Appended at the end of this paper is part of the Basic Plan which indicates the strengthening the border measures.

Japanese government has increased the risk of serious human rights violations including arbitrary detention, torture and ill-treatment if the asylum-seekers are forcibly returned.”⁵⁹

The government’s action taken in cooperation with the Turkish authorities was a blunt disregard of the right to privacy protected under the International Covenant on Civil and Political Rights as well as a contravention of the rules of confidentiality to be observed regarding asylum information. The visit to Turkey seems to indicate that what concerns Japan is not protecting but containing asylum-seekers in their country of origin⁶⁰.

The overall picture of border controls is described as stricter selectivity. True, refugees seem to be enjoying a better treatment than ever. The revision of the Immigration Act in 2005 for the first time sets forth that recognized refugees are legally entitled to stay in Japan. During the period in which their cases are pending before the administrative authorities, they are to be given provisional permit for stay. This really is improvement. That said, however, this is a treatment that should be properly portrayed as “less bad” as opposed to “better”. Since there had been no inns available in Japan for the Convention refugees, a small step forward for them appears to be gigantic. After all, at least at this moment, it is only Burmese who enjoy the benefit of the current improvement in refugee determination.

One should note that the improved treatment is to be enjoyed by a certain category of asylum-seekers: Only those who meet the conditions provided for in the revised Immigration Act (*i.e.*, submission of applications within 6 months and coming directly from the country of persecution) are entitled to provisional permit for stay during the examination period and permit for an extended stay after receiving refugee status. Asylum-seekers unable to meet these conditions are subject to a markedly different treatment. The implication is that there are now two distinctive groups of refugees in Japan: good refugees and bad refugees. Good refugees in terms of meeting the conditions are treated warmly while bad refugees are forced to bear the institutionally cold treatment. Moreover, given that visa requirements are being extended to a wide range of countries and immigration control exercised in cooperation with transportation companies and the authorities of other countries is being intensified, it will be next to impossible to come to the border of Japan directly from countries of persecution. The Immigration Act dictates that rule-abiding refugees be protected, but

⁵⁹ Amnesty International, Japan: Government endangers refugees’ families in Turkey, press release, 02/09/2004.

⁶⁰ Japan is occasionally deporting Kurdish asylum-seekers to Turkey even when UNHCR expresses serious concerns about safety of the deportees.

rules are in fact very hard to be complied with for a vast majority of refugees. Humanitarian posture reflected in the revision of the Immigration Act may turn out to be a castle in the air for those in need of help, justifying harsh exclusion of asylum-seekers. It should be stressed that the revision of refugee determination procedures came with the introduction of stricter border measures ostensibly to defend the public safety against outside threat.

Looking inside the border, one notices a widespread suffocation of human rights in society. The UN Human Rights Commission's Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recently made public a special report on Japan⁶¹ after making a visit therein, in which he cites some incidents of concern as follows:

61. In February 2004, the Immigration Bureau of Japan created an e-mail reporting system on its website inviting citizens to anonymously inform on any "suspected illegal migrant". Since citizens cannot enquire on the nationality of a person, the only way they can suspect that a person could be an illegal migrant is by their "foreign appearance", on the basis of racial or linguistic characteristics: this system is a direct incitement to racial profiling and xenophobia.

62. Most worryingly, elected public officials make xenophobic and racial statements against foreigners in total impunity, and affected groups cannot denounce such statements. For example, the Governor of Tokyo declared in 2000 that in Tokyo "foreigners are repeating very vicious crimes ... in case of a serious disaster, even a big riot could be expected", and in 2001 that the "very pragmatic DNA of Chinese ... [makes them] steal without hesitation in order to satisfy their desire."ⁱ The national Government did not react to such statements.

Thus a culture of misgivings is nurtured among citizens against foreigners, particularly racialized people, on the initiative of the very officials who are legally required to eliminate racial hatred and discrimination against foreigners. Regarding Japanese people, in response to the growing movement against military expansion of Japan, measures taken by the government get harsher even to the point where a mere distribution of leaflets against the dispatching of the Self-Defense Forces to Iraq is subject to prosecution for trespassing private properties. Liberal school teachers are constantly subject to strict disciplinary measures merely because they have not observed orders to sing Japan's national anthem, Kimigayo, and bow to the national flag, Hinomaru. Exercise of freedom of expression against the government policies is strictly regulated and shamefully suppressed through these disciplinary and criminal

⁶¹ UN Doc. E/CN.4/2006/16/Add.2, 24 January 2006.

measures while expression of racism is left unattended. Here again, to the chagrin of social justice, courts of upper level are more likely to uphold the government action or inaction.

The state structure of Japan is being transformed. The declining population, it is said, inevitably needs significant foreign labour. Foreigners and refugees are thus welcome to help sustain the international competitiveness of Japanese economy. They are welcome, however, as long as they are good in terms of observing the existent rules. Once breaking national rules, they are harshly forced out. The ghost of terrorism hovers here and there to reinforce such strong measures.

The same is said about the destiny of Japanese. Good Japanese, in terms of uncritically and unconditionally following the rules set by the government, are treated distinctively from bad Japanese who take oppositions to the government policies. Transformation of Japan into a country of immigration and a country of neo-liberal militarism is in progress on an unprecedented scale. Control rather than tolerance is behind that process. In the meantime, as an economic giant and a country seeking a permanent seat in the UN Security Council, a total rejection of refugees is not an option available. Rather, acceptance of more refugees is inevitable to heighten Japan's international status. They may also turn into strong work force in otherwise shrinking labour market. These considerations induced the current apparent improvement of refugee determination procedures, which is widely assessed positive and welcoming.

Yet, border rules are clearly getting stricter and human rights are increasingly suppressed in our country. Such being the case, I am in no mood to celebrate the current development regarding refugee determination in Japan. After all, you have to be good to be accepted in our country but refugees are a group of people who likely move irregularly in search of protection. Refugees are best protected in a society where the spirit of tolerance permeates, a condition unfortunately yet to be realized in Japan. The current development is, at most, a small first step hopefully in that direction.

Appendix

[Measures for Recovering Japan's Public Security through Promotion of Tough Border Measures and Substantial Reduction of Illegal Foreign Residents (Basic Plan for Immigration Control, third edition, March 2005)]

The number of illegal foreign residents in Japan is now estimated at

some 240,000. Over recent years, foreign nationals' crimes in Japan have become more serious. Brutal crimes including break-in robberies have increased and some foreign nationals have collaborated with crime syndicates in committing crimes. It has been pointed out that the presence of illegal foreign residents has become a hotbed for crimes committed by foreign nationals.

In order to address such a situation, the Ministerial Meeting against Crimes formulated an "Action Plan for the Realization of a Society Resistant to Crime" in December 2003. According to this action plan, the government will aim at reducing the number of illegal foreign residents by half in the next five years to ensure public security. It also indicates that it is necessary to eliminate unreasonable suspicion toward the many foreign nationals who are staying in Japan peacefully and legally.

In order to openly accept foreign nationals who are needed in Japan, the immigration control administration should develop an environment where foreign nationals are easily accepted, by reducing the number of illegal foreign residents who influence Japanese society to resist acceptance of all foreign nationals. Strong measures to halve the number of illegal foreign residents will be promoted in reinforced cooperation with the police and other relevant agencies.

Enhancement of measures to prevent terrorists from entering Japan has become a key challenge. Tougher border measures to forestall terrorist attacks will be promoted based on the "Action Plan for Prevention of Terrorism" as adopted at the Headquarters for Promotion of Measures Against Transnational Organized Crime and Other Relative Issues and International Terrorism in December 2004.

(1) Promoting Border Measures

Border measures are needed to block the entry of terrorists and other foreign nationals planning to commit crimes in Japan, as well as those planning to illegally stay or work in Japan. These measures will be aggressively promoted in cooperation with relevant agencies or officials including crisis management officials at international airports and seaports.

A. Implementing Stricter Examinations for Landing

In order to reduce the number of illegal foreign residents in Japan, it is necessary to prevent foreign nationals who wish to stay illegally from coming to and entering Japan. Regarding the status of residence of "Temporary Visitor" which accounts for 70% of the status illegal foreign residents have, as well as the "Entertainer," "Pre-college Student," "College Student" and "Trainee" statuses of residence which account for a large percentage of the status illegal foreign residents have, stricter examinations for landing will be implemented

based on analysis of the accepting organizations and their home countries. Landing permission conditions will also be reviewed as needed. Stricter examinations on applications for certificates of eligibility will be implemented through investigation of existing conditions and other measures.

It is vital to cooperate with the examinations of the Ministry of Foreign Affairs for issuance of visas in preventing foreign nationals from coming to Japan for the purpose of staying illegally.

B. Introducing Immigration Examinations Using Biometrics

In order to detect and oust, at the border, terrorists or foreign nationals who have been deported from Japan or committed crimes, one effective method is to further enhance measures against forged and falsified documents and to utilize biometrics in immigration examinations.

In order to take facial portraits and fingerprint data during landing examinations of foreign nationals under the “Action Plan for Prevention of Terrorism” (as adopted at the Headquarters for Promotion of Measures Against Transnational Organized Crime and Other Relative Issues and International Terrorism on December 10, 2004), necessary preparations will be made by putting in order points for us to keep in mind, observing relevant measures taken by foreign countries and developing relevant law. The Ministry of Foreign Affairs is planning step-by-step to implement the fingerprinting of foreign nationals for their visa applications depending on the overall system and the installation of materials and equipment at diplomatic establishments and on developments in foreign countries, while consideration is also being given to linkage with the landing examinations.

As for examinations of Japanese nationals upon their departure from and return to Japan, introduction of automatic examination gates utilizing biometric data for those willing to use the system is being planned. Using such gates for foreign nationals will also be considered.

C. Introducing Other New Measures

The Advance Passenger Information System (APIS) was introduced in January 2005 for airlines to transmit information on crew members and passengers on flights bound for Japan before reaching Japan to allow automatic verification of the data against data maintained by immigration control, customs and police authorities. Strict landing examinations are being promoted by utilizing this system. Obliging airlines to introduce this system will be considered while observing operation of the present system in which airlines participate voluntarily.

As described in 1(3)A, through the introduction of the secondary

examination system and the implementation of a pre-clearance system, strict and effective landing examinations will be secured. A measure will also be introduced to dispatch Japanese experts in verification of forged or altered documents as liaison officers to foreign airports to detect forged or altered passports and to instruct airline officials to prevent their holders from boarding aircraft bound for Japan. Another possible measure that may be introduced is requiring airlines to verify the passports of foreign nationals boarding aircraft bound for Japan. In addition, the effectiveness of border measures will be increased by proceeding with preparations for immigration examinations using a database that the International Criminal Police Organization is developing for real-time sharing of information on missing and stolen passports, and by cooperating with other government agencies in developing laws to block entry of foreign nationals identified as terrorists.

(2) Strict Status of Residence Examinations

Problems have been highlighted not only with illegal foreign residents but also with legal foreign residents who have valid statuses of residence while concealing their real purposes for entering and staying in Japan. Focusing on “College Student,” “Pre-college Student,” “Entertainer,” “Spouse or Child of Japanese National” and other statuses of residence that foreign nationals frequently use to conceal their real purposes for entering and staying in Japan, existing conditions will be thoroughly investigated, and strict examination of statuses of residence will be conducted based on such investigations. The status of residence revocation system will also be aggressively utilized.

The immigration control administration will also continue to cooperate with the health, labor and welfare administration to implement pre-entry and post-entry status of residence examinations using information on dishonest businesses that fail to pay wages or social insurance premiums for foreign nationals who are identified as technical interns or illegal workers. This will help develop an environment where foreign nationals who should be accepted in Japan can engage in their activities free of problems.

(3) Reinforced Detection Based on Close Information Analysis and Cooperation with Relevant Agencies

In order to halve the number of illegal foreign residents in Japan, it is necessary to efficiently deport foreign nationals who have illegally stayed in Japan. To this end, based on collection and close analysis of information on illegal foreign residents, detection will be reinforced in major entertainment centers and other districts that have concentrated numbers of illegal foreign residents. Joint detection with the police and other relevant agencies will be

constantly implemented to create an environment where foreign nationals attempting to illegally stay in Japan with false purposes for entry into the country have difficulties working illegally for a long period of time. In this way, the realization that illegal stay in Japan has few benefits will be reached.

At the same time as exposing illegal foreign residents to reduce their number, detection of dishonest employers and brokers will be promoted aggressively by applying the regulations on the offenses of encouraging illegal employment, in cooperation with the police in order to improve the present environment, which encourages foreign nationals to illegally stay in Japan. Detection will also be reinforced for brokers who, by mediating for employment and forging and selling fake passports and alien registration certificates, make it easy for illegal foreign residents to stay in Japan.

(4) Utilizing Detention Facilities and Implementing Prompt Deportation

In order to halve the number of illegal foreign residents, it is necessary to reinforce detection and other measures, and then increase the number of foreign nationals to be deported from Japan. Therefore ample detention facilities and prompt deportation are indispensable. To this end, development of detention facilities will continue in order to increase the capacity of the detention facilities. In order to ensure prompt and secure deportation, the relevant countries will be firmly requested to facilitate and accelerate the issuance of passports and other documents for deportees' return to their home countries and requests to airlines will also be increased. The district immigration offices at the airports will enhance their function as a deportation base to facilitate deportation.

(5) Reviewing the Systems for Efficient Deportation Procedures and Prevention of Illegal Residents

In order to promote measures against illegal foreign residents under our limited structure, it is necessary to review the systems for effective and efficient deportation procedures.

In this respect, the creation of the departure order system, as well as the additions to the reasons for deportation and review of the penalties, is significant. The departure order system may be utilized to encourage illegal foreign residents to voluntarily appear.

ⁱ Quotations provided by the “Solidarity Network with Migrants Japan”.

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