Refugee Law and Practice in Japan

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List of Abbreviations

Act	Immigration Control and Refugee Recognition Act of Japan
Convention	Convention Relating to the Status of Refugees
DFAT	Department of Foreign Affairs and Trade of Australia
DIAC	Department of Immigration and Citizenship of Australia
DIEA	Department of Immigration and Ethnic Affairs of Australia
DILGEA	Department of Immigration, Local Government and Ethnic Affairs of Australia
DORS Committee	Determination of Refugee Status Committee of Australia
IARLJ	International Association of Refugee Law Judges
ICCPR	International Covenant on Civil and Political Rights
ICEAFRD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICOR	Interdepartmental Committee on Refugees of New Zealand
Immigration Act	Immigration Act 1987 of New Zealand
INZ	Immigration New Zealand
IRO Constitution	Constitution of the International Refugee Organisation
JAR	Japan Association for Refugees
JFBA	Japan Federation of Bar Associations
JLNR	Japan Lawyers' Network for Refugees
Migration Act	Migration Act 1958 (Cth) of Australia
NGO	Non-governmental Organisation
NLD	National League for Democracy
PCJSS	Parbattya Chattagram Jana Sanghati Samity
Protocol	Protocol Relating to the Status of Refugees
PTSD	Post-Traumatic Stress Disorder
REC(s)	Refugee Examination Counsellor (s) for the Japanese Minister of Justice
RHQ	Refugee Assistance Headquarters of Japan
RRT	Refugee Review Tribunal of Australia
RSAA	Refugee Status Appeals Authority of New Zealand
RSRC	Refugee Status Review Committee of Australia
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UPDF	United People's Democratic Front
Vienna Convention	Vienna Convention on the Law of Treaties

Author's Note

This book follows, in general, the style recommended by the Research Policy Office, Victoria University of Wellington *PhD Handbook 2000* (Victoria University of Wellington, Wellington, 2000) and Victoria University of Wellington *Law Review: Style Guide* (2001 Edition, Tim Smith, Student Editor in Chief, Victoria University of Wellington, Wellington, 2001).

All quotations from decisions, articles and materials in the Japanese language which appear in this book are the author's translations, unless otherwise stated.

This book originated from the author's PhD thesis, which was written in New Zealand and Japan between 1999 and 2002. The author has made efforts to update the content since the opportunity to publish was offered in 2006, given that a number of developments in refugee law and practice in Japan have occurred since the completion of the PhD thesis. Any errors and omissions of this book remain the author's responsibility alone.

The views expressed in this book are the personal ones of the author. They do not reflect the views of any bodies with which the author has associated.

Contents

Introduction

This is the first book written in English to provide a comprehensive account and analysis of the Japanese law and practice on the implementation of the 1951 Convention Relating to the Status of Refugees[1] and the 1967 Protocol Relating to the Status of Refugees.[2] The impetus lies in the author's concerns about Japan's involvement in the problem – how has Japan,[3] *Nihon-koku* or *Nippon-koku*, contributed to easing the tragedy of refugees and what should it do in the future? The author hopes that this work will attract the attention of scholars and practitioners who are concerned with the refugee law and practice of Japan but, due to language barriers and a dearth of materials, have been unable to access necessary information and analysis. It is also desirable that the work will provide Japanese players such as judges, attorneys, lawmakers, NGO members and public officers with useful material for when they consider how Japan can cooperate with the members of the international community in the field of international human rights and world peace.

The Japanese Government acceded to the Convention in October 1981 and to the Protocol in January 1982. The Convention and the Protocol entered into force for Japan on 1 January 1982.[4] Regrettably, actual practice relating to implementation of the Convention may be figuratively described as '*Hotoke wo Tsukutte Tamashii Irezu* (making the Buddhist image, and forgetting the soul)'; an equivalent phrase in English would be the expression 'Ploughing the field, and forgetting the seed.' This is not to ignore more recent developments in judicial practice and amendment of the law since the beginning of the new millennium.

After briefly addressing the recent background of refugee protection in Chapter 1 (Crisis of Refugee Protection), the substantive discussion of this book begins from Chapter 2 (Refugees and Japan). By way of introduction, the chapter provides a description of the history of asylum and refugee problems in Japan before, during and after its accession to the Convention and the Protocol. The historical factors that prompted the state to become a member of the international refugee regime

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1   Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137; referred to in this book as the 'Convention'.

2   Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267; referred to in this book as the 'Protocol'.

3   Japan is an island nation in East Asia which covers 377,907 km^2. It had a population of 127,770,000 in 2006. Statistic Bureau & Statistical Research and Training Institute of Ministry of Internal Affairs and Communications in Japan, *Japan Statistical Yearbook 2006*, http://www.stat.go.jp/data/nihon/index.htm (last accessed 25 March 2007). Statistic Bureau of Ministry of Internal Affairs and Communications in Japan, 'Monthly Reports of Population', http://www.stat.go.jp/data/jinsui/tsuki/index.htm (last accessed 25 March 2007).

4   Kazuya Hirobe and Takane Sugihara (eds), *Kaisetsu Johyakushu (Treaties and Conventions)* (Sanseidoh, Japan, 2007) 219, 225. Japan's accession record of the Convention: Treaty No 21 of 1981. Japan's accession record of the Protocol: Treaty No 1 of 1982.

and to form the present domestic system are one reason for the current systemic refusal to protect refugees in Japan.[5] In this chapter, socio-legal and political grounds to support future reform are also discussed. The discussion demonstrates newly emergent phenomena and views which affect the political, legal and social conditions for refugee protection in Japan. The argument here considers the process of change and, based on the process, seeks to identify the possibility for reform in the future.

In Chapter 3 (Refugee Status Determination Procedure), a comparative analysis based on the experiences of New Zealand and Australia is employed. The experiences of these states provide historical information on the factors that spurred change in the determination procedures so that the philosophy of fairness and human rights came to be integrated. This research reveals problems in Japan's refugee determination system which conflict with any reasonable understanding of the notion of fair decision-makers and fair procedure. Consequently, in the present Japanese determination system, it is difficult to be confident that accurate and fair decisions will be reached. Conceptualising the background to these problems as 'institutional underdevelopment', this chapter explains the absence of the necessary dynamics for the development of Japan's refugee determination system. Based on the examination of the problems and their background, the establishment of a new determination authority in Japan is proposed.

Chapter 4 (Refugee Definition) scrutinises the quality of Japan's judicial and administrative performance in the assessment of refugee claims, including proof of refugee status, and interpretation and application of the refugee definition. To do so, the specific practices of other states and views of scholars, which respond to the purpose of the Convention and embrace the potential to be involved in the formation of international legal norms, are used as an analytic measure. The review of Japan's judicial practice during the 1980s and 1990s concludes that, by failing to consider the development of international practice, the record of the negotiation of the Convention and academic dicta, the term 'refugee' was allowed to be narrowly circumscribed. As the background is not found in a single track but in complex strata, 'institutional lack of understanding' is a designation to articulate the impoverished law and practice on interpretation. However, judicial developments since the beginning of the new millennium have had an impact on this issue.

In Chapter 5 (Refugee Rights), supplementary research broadens the inquiry into the circumstances of the rights of asylum seekers and refugees. The Japanese situation of protection concerning post-refugee status determination can be partially characterised as 'institutional lack of assistance'.

It is proposed in the Conclusion (Towards International Cooperation for Human Rights and World Peace) that Japan should eliminate the systemic refusal and take innovative action towards refugee protection. The enthusiastic involvement of Japan in the promotion of human rights would allow a leadership role in the international community and accord with the constitutional doctrine of pacifism. Japan's economic

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5   This systemic refusal is defined by three key phrases in this book: institutional underdevelopment, institutional lack of understanding and institutional lack of assistance. In the following chapters, these terms are employed to articulate the background to each of the problems of refugee protection in Japan.

development in recent decades should bring with it a responsibility to contribute resources and powers for the promotion of human rights and world peace.

Chapter 1

Crisis of Refugee Protection

International refugee law, which governs refugee protection as a branch of international law, originates from the revolution in Russia and the collapse of the Ottoman Empire after the First World War in Europe, events which caused mass movements of people.[1] The international community modified the legal basis for international action in the early 1950s, creating a new regime to respond to the refugee flows of the dark years of the Second World War and in the era of the Cold War. This regime[2] – the international refugee regime – was initially established to

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1   Whereas both H Grotius and E de Vattel referred to the concept of the right of asylum, neither of them spoke of the right in the sense of human rights in modern international law. Grotius asserted 'the right of suppliants' as a right which belonged to an individual. However, his idea was based on natural rights: Hugo Grotius, *De Jure Belli ac Pacis Libri Tres Vol Two, Translation Book II* (Translation by Francis W Kelsey and Others) (James Brown Scott (ed.), Oceana Publications Inc, New York, 1964) 186–205, 530–531. He did not intend to imply a right of asylum in the structural framework of the relationship between individuals and states. Vattel insisted that 'the right to emigrate' was a natural right and that any action that prevented exercise of the right should be recognised as a wrong: Emer de Vattel, *Le Droit des Gens ou Principes De La Loi Naturelle* (German Translation by Wilhelm Euler, JCB Moher) (Paul Siebeck, Tubingen, Germany, 1959) 149–150. Although his argument recognised the right as pertaining to an individual, Vattel considered that the right was one of the 'imperfect rights' which does not impose any obligation of implementation. Thus, the right of asylum, Vattel claimed, was nothing more than a moral obligation in terms of its implementation. See the argument in Paul Weis, 'The UN Declaration on Territorial Asylum' (1969) VII: *CYBIL* 119; Atle Grahl-Madsen, *The Status of Refugees in International Law Vol II* (AW Sijthoff-Leiden, The Netherlands, 1972) 16. The legal basis for international refugee law altered several times during the era of the League of Nations. It included the Arrangements of 1928 and 1929, the Convention Relating to the International Status of Refugees (28 October 1933) 159 LNTS 199 and the Convention Concerning the Status of Refugees (10 February 1938) 129 LNTS 59. They were weak in terms of legal justification since arrangements were non-binding and the few states that joined the Conventions did so with reservations. After the Second World War, in 1947, a new legal basis was formed. It was the Constitution of the International Refugee Organisation (15 December 1946) 18 UNTS 3, referred to as the IRO Constitution in this book. The IRO Constitution included the original form of the definition of refugee used in the current Convention. See C1(i)(a) of Annex I to the IRO Constitution.

2   Stephen Krasner's influential definition of regimes, as 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations', constitutes the substantive definition of regime throughout this book: Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in Stephen D Krasner (ed.), *International Regimes* (Cornell University Press, Ithaca, 1983) 1–21.

regularise the status of victims of persecution, and to coordinate refugee policy among western European states. The international refugee regime is driven by two main engines. One is normative, that is, the Convention, and the other is operational, that is, the United Nations High Commissioner for Refugees (UNHCR).

The international refugee regime originates in the nation-state system of international politics. The regime is not equipped with the means to guarantee the full realisation of the ideas and principles of human-rights-based protection. In the sphere of the Convention, the limits of refugee protection stem from the nature of the treaty machinery for the implementation of protection norms. The relevant features of the treaty machinery are the absence of substantive guidance on a determination procedure in the Convention,[3] the vagueness of the definition of a Convention refugee or a person who is entitled to international protection under the Convention,[4] and the limited rights for refugees in the Convention.[5]

Since the end of the Cold War, the crisis in the refugee protection system has intensified. One conventional explanation for the crisis is based on the change in the international political system. Under the political structure of the Cold War era, the international refugee regime was regarded by the communist bloc as a symbolic instrument used to justify Western ideology.[6] The diplomatic implications of the international refugee regime that attracted attention during the Cold War have now paled into insignificance. The corollary of this decline in the political value of the regime and refugees is an increasing tendency since the 1990s for states to close their doors and exclude forced migrants from their territories.[7]

Another explanation for the crisis of refugee protection is associated with the re-conceptualisation of 'security' by the international community. The community has gradually come to recognise that the phenomenon of forced migration is closely related to national and international security concerns.[8] This recognition was propelled by a new perception of 'security' in the wake of the collapse of the Cold War system. A number of international politics scholars argue that the new concept of security is extensive, and encompasses not only traditional military confrontations between states, but also crises such as ethnic and religious conflict, environmental

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3   See the relevant discussion in Chapter 3 (Refugee Status Determination Procedure).

4   See the relevant discussion in Chapter 4 (Refugee Definition).

5   See the relevant discussion in Chapter 5 (Refugee Rights).

6   See for instance Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press, Oxford, 1993) 55–67.

7   See for instance BS Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5:3 *IJRL* 442, 443–444.

8   The linkage between forced migrants and security was implied in the past. After the First World War and during the Cold War, displaced persons caused international tensions which were perceived as a security issue by policymakers in the relevant states. For developing states which are already vulnerable as they undertake the process of state-building, mass influxes of refugees from neighbouring states are often regarded as a threat to their political, economic and ecosystems. For an outstanding work on this subject, see for instance Myron Weiner, 'Security, Stability, and International Migration' in Michael E Brown and others (eds), *New Global Dangers: Changing Dimensions of International Security* (The MIT Press, Cambridge, Massachusetts, 2004) 302.

disaster and poverty.[9] Conflicts witnessed in various regions of the world during the second half of the 1990s resulted in zealous discussion of the problems of forced migration in the context of national, regional and international security. Displacement of civilian populations became a deliberate strategy during the ethnic conflict in the Balkans.[10] In the African Great Lakes region, humanitarian NGOs and international organisations were exposed to severe criticism when the parties to the conflict systematically manipulated refugees and humanitarian assistance in and around the refugee camps. International assistance for refugees aggravated the regional conflict and escalated the insecurity in the region.[11] The prolonged refugee situations in Africa and Asia have security implications ranging from the generation of international conflict to tension between refugees and local populations.[12]

The phenomenon of 'securitisation' has extended the concept of security to involve issues of, on the one hand, culture and identity of states, and on the other hand, issues of forced migrants and refugees. The 'security of culture and identity' attaches importance to the socio-political bond between individuals and the state. The elements of the bond include the traditional values, language and norms of the community. For persons who claim security of culture and identity, mere physical survival, without these elements, cannot constitute survival as a human being. Thus, external threats to these elements generate insecurity.[13] The concept of security of culture and identity has highlighted the linkage between security concerns and refugees, in particular since the events of 9/11, that is, the terrorist attacks of September 2001 in New York and Washington, D.C. Emphasising potential associations between migrants, refugees and crimes such as trafficking and terrorism, developed states have voiced concerns for national identity and societal security. In the fortress-like states of the European Union and Australia, these security concerns are directly translated into restrictive policies to deter refugees. The universal trend is to seek to contain displaced persons within the regions which produce them, and deal with them regionally under so-called 'comprehensive approaches'. As a reflection of this trend, asylum is losing its value. At the same time, the ability and political will of major states to resolve the root causes of forced migration continue to be questioned. Preventive measures and imposed regional solutions are seemingly conducted at the cost of refugee protection. That is to say, due to the security concerns of states and the exclusion of aliens, genuine refugees have been placed in risky situations.

Yet, without any feasible strategies to resolve the root causes, and given the complexity of the globalised political economy, preventive measures and imposed

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9   See for instance Brown and others, above.

10 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford University Press, California, 1999) 32–67.

11 See a comprehensive analysis of the relationship between humanitarian assistance for refugees and regional conflicts in Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Assistance* (Cornell University Press, Ithaca and London, 2005).

12 Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and International Security Implications* (Adelphi Paper No 375, Routledge, London, 2005).

13 Jitsuo Tsuchiyama, *Anzenhoshou no Kokusaiseijigaku: Aseri to Ogori (International Politics of Security: Anxiety and Hubris)* (Yuhikaku, Japan, 2004) 83.

regional solutions create a 'security dilemma'. There is a risk that forced migrants, who are not permitted entry by developed states but who cannot return to their home states, may be dragged into the extra-legal and non-formal system of transborder activities. These activities are the globalisation of the shadow economy, and include smuggling of arms and drugs, and recruitment of terrorists.[14] It is possible that they could become a direct or indirect threat to the security of both individual states and the international community. It is ironic that people in safe places fear people who escape from fear in unsafe places. It is even more ironic that actions in the name of security create further insecurity.

Experts from various regions gathered and discussed the new agenda for refugees and forced displacement at the Global Consultations, organised by the UNHCR.[15] Further discussions as to how to prepare a new protection treaty and establish a new universal scheme to respond to the modern crisis of forced migrants are needed. In this context, the emphasis must be on the centralisation of the human rights approach in refugee law and the revitalisation of asylum. Strengthening the value of human rights in the new system for forced displacement is key to the rational solution of security problems.

Intriguingly, however, the issue is not straightforward. The current tide of universalisation of freedom concerns and the internationalisation of human rights has impacted on state practice of refugee protection to some extent. That is to say, international trends in refugee protection mirror also the dynamics of international human rights developments, shrinking, expanding, converging and diffusing in parallel with the environment. Since the regime's release from the spell of the ideological struggle, some practices in particular states have taken on a human-rights-oriented approach.

Formation and development of refugee law in Japan has always reflected the Convention's shortcomings in terms of protection and the state's security concerns relating to culture and identity. As later chapters of this book imply, however, the negative Japanese attitude towards refugee protection is not static. Japan is not immune from the globalisation of human rights values.

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14 Hiroyuki Tosa, *Anzenhoshou toiu Gyakusetsu (Security as a Paradox)* (Seidosha, Japan, 2003) 233–234.

15 Concerning the Global Consultations, see Office of the United Nations High Commissioner for Refugees, http://www.unhcr.org/cgi-bin/texis/vtx/global-consultations (last accessed 10 January 2007).

Chapter 2

Refugees and Japan

This chapter provides a historical background to refugee protection in Japan, describing asylum and refugee issues in the state before, during and after its accession to the Convention and Protocol in 1981. This background provides an insight into the factors that prompted the state to become a member of the international refugee regime. Further, the present domestic refugee protection system cannot be fully explained without examination of the annals of refugee events in Japan. Japan's actions towards asylum seekers and refugees after the Second World War in particular impacted on the design of the domestic protection mechanism. The experiences and attitudes of the past have had a lasting effect on the administration, legislation and jurisprudence of refugee protection.

I Prior to the Accession to the Convention and Protocol

The concept of asylum, in terms of providing shelter, was not totally unknown in Japan's early history. A proverb in the Samurai tradition, which teaches that one should help those in need, said, 'Even a hunter cannot harm the bird that comes to him for refuge.' Japanese facilitated domestic safe havens for particular categories of the population. *Ochuudo* in Japanese was a term meaning a defeated Samurai who had fled from a battlefield or base headquarters due to loss of the power to govern, and who spurned control by the opponent regime or compassion from the enemy ruler. After *Heike* (*Hei* family) was vanquished by *Genji* (*Minamoto* family) in 1185, many *Heike Ochuudo* relocated and formed villages in various parts of mainland Japan, where they lived as recluses. During that time, many of the defeated Samurais' wives became nuns at temples which exercised the power of asylum. It is asserted that the temples' power of asylum was fostered in response to the geographic circumstance that, because Japan is an island, losers of political disputes and their families were not able to escape across a border.[1]

In spite of a general scarcity of records until the end of the Edo era (1603–1867), some significant events in relation to Japan's confrontations with alien asylum seekers are documented. In 663, the alliance of Paeche, which had ruled the Korean region since 18 BC, and Japan suffered a crushing defeat. The opponent was a coalition composed of Tang, a Chinese dynasty, and Silla, then another hegemony in the Korean region. According to *Nihonshoki*,[2] several thousand individuals from Paeche

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1 See Tadamasa Fukiura, *Nanmin: Sekai to Nihon (Refugees: The World and Japan)* (Nihon Kyoiku Shinbunsha, Japan, 1989) 73.

2 *Nihonshoki* is the oldest textbook of Japanese history. The common understanding is that the text was written in 720 during the Nara era.