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

UNHCR's COMMENTS ON THE BILL TO REFORM THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT OF JAPAN

I. INTEREST OF UNHCR

1. The UN General Assembly has entrusted UNHCR with the responsibility for providing international protection to refugees worldwide and for seeking permanent solutions for them[1]. Further, under Article 35 of the 1951 Convention relating to the Status of Refugees (hereinafter "the 1951 Convention"), Japan, as a State Party, undertakes to: "*co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention."* Therefore, UNHCR has a direct interest in national legislation of signatory countries that regulates the application of the 1951 Convention. The Office therefore welcomes the opportunity to provide comments on the proposed changes on the Immigration Control and Refugee Recognition Act ("ICRRA").

II. RELEVANT DRAFT PROVISIONS FROM UNHCR'S PERSPECTIVE

2. The following issues, as amended in the draft ICRRA are relevant to refugee protection:

- Abolition of the time limit of 60 days to apply for asylum;
- Provision of long-term residency rights to recognized refugees under certain conditions;
- Introduction of a "Permission for Provisional Stay" for asylum-seekers, which entails regularization of stay pending the outcome of the asylum procedure;
- Suspension of deportation procedures, including related detention measures, against asylum-seekers who are present in Japan illegally;
- Penal provisions regarding certain categories of aliens, including asylum-seekers and refugees;
- Reform of the appeal instance through the introduction of "Refugee Adjudication Counsellors" in the review process;
- Issues of procedural fairness.

What follows is a detailed examination of the current law, proposed changes as reflected in the draft law, comments relating to each proposed changes and other relevant issues.

III. ABOLITION OF THE TIME LIMIT OF 60 DAYS TO APPLY FOR ASYLUM

The ICRRA in force states (Art. 61-2):
"1. The Minister of Justice may, if an alien in Japan submits an application…. recognize such a person as a refugee…"
2. The application mentioned in the preceding paragraph must be submitted within 60 days after the day the person landed in Japan (or the day he became aware of the fact that the circumstances in

[1] See the Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950.

connection with which he may become a refugee arose while he is in Japan). However, this shall not apply if there are unavoidable circumstances."

The draft bill proposes the deletion of the whole paragraph 2 above.

3. In UNHCR's view, should time limits be strictly interpreted without taking into account the specific circumstances of the individual case, this may be at variance with the principle of *non-refoulement*, the right to seek asylum and the stated purposes of the 1951 Convention[2]. UNHCR therefore welcomes the proposed suppression of the time limit for asylum applications, which is in line with standards of fair asylum procedures as recommended by UNHCR's Executive Committee[3] (Excom), in particular Excom Conclusion 15 (i) which provides that

> *"While asylum seekers may be required to submit their asylum claim requests within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration".*[4]

IV - PROVISION OF LONG-TERM RESIDENCE STATUS TO RECOGNIZED REFUGEES

Treatment of the issue under the current ICRRA:
Based on the current legislation, persons who have been recognized as refugees do not automatically obtain residency rights. Those refugees whose stay is illegal at the time of recognition, as well as those with short-term visas, have to submit an application to the Ministry of Justice for a long-term residence permit.

The draft law proposes the following provisions:
(Permission for Status of Residence)
Article 61-2-2. In the case of recognizing refugee status provided for in paragraph 1 of the preceding article, if the application described in the same paragraph has been made by an alien without a status of residence (excluding those residing in Japan with a status of residence described in the left hand column of Annexed Table I or II, or those staying in Japan with landing permission for temporary refuge and who have not exceeded the designated period of stay, or special permanent residents; this exclusion is applicable hereinafter), the Minister of Justice shall grant the alien concerned permission for status of long-term residence unless the alien concerned comes under any one of the following items,:

(1) The application described in Article 61-2, paragraph 1 was submitted six months or more after the day the person landed in Japan (or the day he became aware of the fact that the circumstances in connection with which he may become a refugee arose while he is in Japan). However, this shall not apply if there are unavoidable circumstances;

(2) Any person who did not enter Japan directly from a territory where his life, physical security or physical freedom was threatened due to the reasons defined in Article 1, A(2) of the Refugee

[2] See the Preamble to the 1951 Convention, in particular: "Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of their fundamental rights and freedoms".

[3] The Executive Committee is an advisory body composed of 64 Member States, which provides guidance to both the High Commissioner in the implementation of his mandate and to States on asylum matters. It draws its responsibilities from the U. N. General Assembly and the U.N. Economic and Social Council. Japan is an active Member of ExCom and has voted for the adoption of the Conclusions on International Protection, which provide policy guidance relating to the admission, adjudication and treatment of refugees.

[4] Other guarantees recommended by the Executive Committee are contained in the following Conclusions: 8, 15, 30, 73, 79, 82 and 84. The Japanese version of selected Excom Conclusions is available at www.unhcr.or.jp

Convention except for the case in which the circumstances in connection with which the person may become a refugee arose while he is in Japan;

(3) Any person who comes under Article 24, item (3) or any one of the sub-items (e) through (o) of Article 24, item (4);

(4) Any person, who has been sentenced to penal servitude or imprisonment after his or her entry to Japan on the charge of a crime referred to in Book II, Chapters XII, XVI to XIX, XXIII, XXVI, XXVII, XXXI, XXXIII, XXXVI, XXXVII or XXXIX of the Penal Code of Japan, or in Article 1, 1-2 or 1-3 (except for the parts concerning Article 222 or 261 of the Penal Code of Japan) of the Law concerning Punishment of Physical Violence and Others, or in the Law for Prevention and Disposition of Robbery, Theft, etc, or in Article 15 or 16 of the Law for Prohibition , etc. of Possessing Specialized Unlocking Tools;

2. In case where an alien without a status of residence has made the application described in paragraph 1 of the preceding article, if the Minister of Justice rejects the refugee status, or if he does not grant the permission described in the preceding paragraph, he shall examine whether there are special circumstances for permitting the alien concerned to remain in Japan as a special case. If he judges so, he may grant the alien concerned such special permission of residence.

3. In the case of granting the permission described in the preceding paragraph 2, the Minister of Justice shall decide the status of residence and the period of stay and have an immigration inspector issue to the alien concerned without a status of residence a Certificate of a Status of Residence, in which is entered the status of residence and the period of stay concerned. The permission becomes effective when the Certificate concerned has been issued.

4. In the case of granting the permission described in paragraph 1 or 2, if the alien concerned without a status of residence has been granted permission for provisional landing, or the landing permission as provided for in chapter III, section IV, the Minister of Justice shall revoke the permission for provisional landing or the landing permission concerned.

4. UNHCR welcomes these proposed modifications, as they will provide refugees with a secure legal stay in Japan, but also will ensure that they will have effective access to health care, welfare benefits and other services on an equal footing with long-term residents. This will facilitate the integration of refugees in Japan. However, according to the proposal, Convention refugees' residential permits will also be subject to two conditions: (i) they must have applied for asylum within 6 months and (ii) they must have come "directly" from a territory where their life, physical security or physical freedom was threatened due to the reasons defined in Article 1, A(2) of the 1951 Convention.

5. Residency rights are the corollary of rights protected by the 1951 Convention, in particular provisions which specifically refer to "lawful stay". A number of Convention rights will be curtailed for refugees without appropriate residence status as they would not be able to earn a living, to gain admission into hospitals or will not qualify for social insurance. Refugee status should lead to solutions, and there cannot be integration as a durable solution without legal residency.[5] While the proposed provisions contain several conditions imposed on persons who are formally determined to be refugees, the draft bill also refer to "special circumstances" which may, in practice, exempt the person concerned from being subject to such conditions.[6] These "special circumstances" are not further defined and are therefore left to the discretion of the Minister of Justice. In UNHCR's opinion, if these provisions were to be applied restrictively, this would be at variance with the 1951 Convention, [7] as the proposed conditions may become,

[5] A number of rights in the 1951 Convention require "lawful stay". Likewise, various Japanese regulations require legal residence to qualify for to permanent residence or access to citizenship.

[6] See draft Article 61-2-2 para 2.

[7] As for the current practice concerning the application of existing provisions regulating the granting of residency status to Convention refugees, it appears that refugees are provided with residency status. During the discussions before the Committee on Judicial affairs in April 2004, the Ministry of Justice indicate that the proposed conditions would be implemented in a flexible manner.

in some cases, a form of penalty in the sense of Article 31 of the 1951 Convention (see also paragraph 10 below).

6. As regards the condition which requires that asylum-seekers or refugees "must have come "directly" from a territory where their life, physical security or physical freedom was threatened due to the reasons defined in Article 1, A(2) of the Refugee Convention" (see also paragraph 11 below), the following observations need to be made, insofar as the ICRRA may be indicative of the way refugee claims are assessed by the Ministry of Justice : the concept of "persecution", as referred to in Article 1A(2) of the 1951 Convention, encompasses serious violations of human rights, including threats to life and physical security or freedom, but also other forms of denial of civil, and political rights, for example, violations of the right to freedom of opinion expression. Therefore, the concept of persecution should not be restricted to threats to the physical integrity of the person.

V - REGULARIZATION OF STAY PENDING THE OUTCOME OF THE ASYLUM PROCEDURE

UNHCR's observations on the status of asylum-seekers under the current legislation:

ICRRA does not provide any form of legal status to asylum-seekers who have entered Japan without authorization or who have overstayed their visas pending the outcome of the asylum application. Asylum-seekers falling under this category are only provided with a note that acknowledges receipt of the asylum application, which does not constitute a temporary authorization to stay. As a result, they can be detained at any point of time during the asylum procedure and sometimes during the entire duration of the asylum procedure, which may take several months.

As regards asylum-seekers who possess a visa to enter Japan, the validity of such visa may end during the course of the asylum procedure, unless the Immigration Bureau decides otherwise.

Lastly, the short-term visa does not enable asylum-seekers to access health insurance, or, for those who are destitute, to apply for welfare benefits.

The draft bill proposes the following provisions:

(Permission for Provisional Stay)
Article 61-2-4.
1. In a case where an alien without a status of residence has made the application described in Article 61-2, paragraph 1, the Minister of Justice shall permit the alien concerned to stay provisionally in Japan unless he comes under any one of the following items:

(1) Any person who has been granted permission for provisional landing;
(2) Any person who has been granted permission for landing at a port of call, permission for landing in transit, landing permission for a crewman, permission for emergency landing or landing permission in the event of a disaster and has not exceeded the designated period of stay, which is entered in his passport or the landing permit concerned;
(3) Any person who is allowed to stay in Japan under the provision of Article 22-2, paragraph 1;
(4) A person who had already come under one of the items (4) through (14) of Article 5, paragraph 1 at the time of entry into Japan;
(5) There are reasonable grounds to suspect that the person comes under Article 24, item (3) or any one of the sub-items (e) through (o) of Article 24, item (4);
(6) It is evident that the person comes under item (1) or (2) of Article 61-2-2, paragraph1;
(7) Any person, who has been sentenced to penal servitude or imprisonment after his or her entry to Japan on the charge of a crime referred to in Book II, Chapters XII, XVI to XIX, XXIII, XXVI, XXVII, XXXI, XXXIII, XXXVI, XXXVII or XXXIX of the Penal Code of Japan, or in Article

1, 1-2 or 1-3 (except for the parts concerning Article 222 or 261 of the Penal Code of Japan) of the Law concerning Punishment of Physical Violence and Others, or in the Law for Prevention and Disposition of Robbery, Theft, etc, or in Article 15 or16 of the Law for Prohibition , etc. of Possessing Specialized Unlocking Tools;
(8) Any person who has been issued a written deportation order;
(9) There are reasonable grounds to suspect that the person is likely to abscond
(…)
3. When the Minister of Justice grants the permission described in paragraph 1, he may, in accordance with the ordinance of the Ministry of Justice, impose on the alien concerned without a status of residence restrictions on the place of residence, area of movement and activities in Japan, a duty of appearing at a summons, and any other conditions deemed necessary. Furthermore, the Minister may have the alien concerned fingerprinted if it is deemed necessary.
(…)
5. In a case where an alien granted the permission described in paragraph 1 has come under any one of the following situations, a period of provisional stay (including an extended period of provisional stay under the provision of the preceding paragraph; this inclusion is applicable hereinafter.) for the alien concerned, shall expire when any one of the situations has arisen:
(1) Refugee status has been rejected, but the applicant has not filed the objection described in Article 61-2-9, paragraph 1 and the time limit defined in paragraph 2 of the same article has passed;
(2) Refugee status has been rejected, and the applicant has filed the objection described in Article 61-2-9, paragraph 1. However, the objection concerned has been withdrawn by the applicant, or it has been rejected or dismissed;
(3) While refugee status has been recognized, the permission described in Article 61-2-2, paragraph 1 or 2 has not been granted;
(4) The permission described in paragraph 1 has been revoked in accordance with the provisions of the following Article;
(5) The application described in Article 61-2, paragraph 1 has been withdrawn.

(Revocation of Permission for Provisional Stay)
Article 61-2-5. In a case where an alien granted the permission described in paragraph 1 of the preceding article has been found to come under any one of the facts defined in the following items, the Minister of Justice may revoke the permission concerned in accordance with the procedures of the ordinance of the Ministry of Justice;
(1) When a person was granted the permission described in paragraph 1 of the preceding article, he had already fallen within one of the items (4) through (8) of the same paragraph;
(2) After a person was granted the permission described in paragraph 1 of the preceding article, he has come to fall within item (5) or (7) of the same paragraph;
(3) A person has violated the conditions attached to the permission as provided for in paragraph 3 of the preceding article;
(4) For the purpose of being recognized as a refugee by wrongful means, a person submitted forged or altered, or false materials, or made a false statement, or had another person or persons concerned make a false statement;
(5) A person made arrangements to receive the confirmation of departure described in Article 25.

7. Based on the draft provisions, it is UNHCR's understanding that an asylum applicant who would have entered or remained in Japan without authorisation may be entitled to a temporary permit *only if* he or she: 1) applied for asylum within six months of arrival in Japan;[8] 2) came "directly" from a territory where his life, physical security or physical freedom was threatened due to the reasons defined in Article 1, A(2) of the 1951 Convention;[9] 3) is considered to be

[8] See proposed Article 61-2-4 (1) (6)
[9] See proposed Article 61-2-4 (1) (6) - In UNHCR's understanding, applicants who have a claim arising after their arrival in Japan are not subject to the "direct arrival" and the time limit conditions.

unlikely to abscond;[10] and 4) has not been "convicted of a violation of any law or regulation of Japan, or of any other country, and sentenced to penal servitude of one year or more" (emphasis added) –except for political crimes.[11]

8. UNHCR welcomes the proposed provisions as they will provide asylum-seekers with a permit reflecting their status as asylum-seekers.[12] However, UNHCR has serious reservations concerning the various conditions put forward for some applicants to obtain temporary permit while awaiting the result of the refugee status determination procedure. According to these draft provisions, any applicant falling under the scope of the proposed provision, as described in paragraph 7 above, will be denied such temporary permit for the whole asylum procedure. In practice, the denial of provisional residency permit will amount to the detention of the asylum applicant, unless the latter request and obtain a "permit for provisional release" from detention. However, based on the current provisions regulating the conditions of provisional release, the decision is at the discretion of the authorities, as set out in Article 54 of ICRRA.[13] Noting that this provision does not clearly define the requirements imposed on the detained asylum-seeker to seek provisional release, UNHCR is concerned that alternatives to detention will not be properly considered (see also paragraphs 30 and 31 below).[14]

9. In UNHCR's view, the detention of asylum-seekers should be resorted to only in exceptional cases and where alternatives to detention are not available.[15] In cases where such detention may be necessary, UNHCR recommends that it should only be resorted to after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose. It is important to stress that deprivation of liberty obstructs and undermines the operation of a fair and efficient procedure for the determination of refugee status. For example, detention can physically interfere with the provision of legal advice to an asylum-seeker and creates an intimidating atmosphere for

[10] See proposed Article 61-2-4 (1) (9)

[11] See proposed Art. 61-2-4 (1) (4) in connection to Art. 5:1:4 of the ICRRA.

[12] Excom Conclusion No.93 on reception of asylum seekers in the context of individual asylum systems, (LIII) (2002), Para b) v. reads*:" For the purpose, inter alia, of protection against refoulement, as well as access to reception arrangements, both male and female asylum-seekers should be registered and be issued with appropriate documentation reflecting their status as asylum-seeker, which would remain valid until the final decision is taken on the asylum application"*. Also, in the context of the EU harmonisation process, the Council of the European Union adopted a Directive on the reception of asylum-seekers which foresees that Member States shall provide the asylum applicant with a document certifying that he or she is allowed to stay in the territory while the application is pending (See Council Directive 2003/9/EC of 27 January 2003 "laying down minimum standards for the reception of asylum-seekers" Article 6).

[13] Article 54 (2) of the ICRRA reads:" A Director of an Immigration Centre or a Supervising Immigration Inspector may accord provisional release to an alien detained under a written detention order or deportation order upon application provided for in the preceding paragraph or ex officio, taking into consideration of circumstances, evidence produced in support of the application, character, financial ability, etc. of such an alien in accordance with the ministry of Justice Ordinance, upon his depositing a bail or bond not more than 3 million yen as provided for by the Ministry of Justice Ordinance, and with conditions as may be deemed necessary, such as, inter alia, TBC.

[14] Based on the information available to UNHCR, a number of asylum-seekers are kept in detention during the asylum procedure despite the lack of risk of absconding, alternative accommodation, the deposit of a bail and other guarantor requirements.

[15] See the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999 and the UNHCR Executive Committee Conclusion No. 44 (XXXVII) concerning the detention of refugees and asylum seekers (1985). Other human rights bodies have also emphasised that detention of asylum-seekers should only occur as a measure of last resort, after other non-custodial alternatives have proven or been deemed insufficient in relation to the individual. See, for example, Resolution of the UN Sub-Commission on Promotion and Protection of Human Rights regarding detention of asylum seekers, 2000/21; and the recommendation of the UN Working Group on Arbitrary Detention which reads: "alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention." E/CN.4/1999/63/Add.3.

persons undergoing the interview process. Asylum-seekers may also have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious, causing severe emotional and psychological stress to the extent that it may amount, in some cases, to inhuman and degrading treatment.

10. It results from the proposed provisions that the reception policy of Japan will have an element of detention. Of key significance to this issue is Article 31 of the 1951 Convention. Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized**,** or they obtain admission into another country.

11. The expression "coming directly" in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay". The expression "good cause", requires a consideration of the circumstances under which the asylum-seeker fled.

12. The proposed provisions[16] foresee the possibility for the immigration authorities to grant a provisional permit to an asylum-seeker who would otherwise be denied such permit due the non-compliance with the 6 months time limit. Clarification is needed concerning these "unavoidable circumstances" which are not further defined in the draft law. Furthermore, the draft bill does not contain any specific provision allowing for some flexibility in assessing the term "coming directly" as mentioned in the conditions imposed on the asylum-seeker in order to be eligible for a provisional permit. In UNHCR's view, if these provisions were to be applied restrictively, the proposed conditions may become, in practice, a form of penalty in the sense of Article 31 of the 1951 Convention. The term 'penalties', in this context, may be interpreted to include punitive measures, such as certain forms of detention if resorted to in lieu of punishment or any arbitrary or discriminatory limitation to the full enjoyment of rights granted to refugees under international refugee and human rights law. Accordingly, the denial of provisional permit appears to be a punishment for failure to meet prescribed conditions as foreseen in the draft provisions. To the extent that a provisional permit would be provided to other asylum-seekers who meet procedural requirements unrelated to the merits of the claim, the denial of such permit would seem to constitute a penalty in the meaning of Article 31(1). UNHCR therefore recommends that the exemptions of penalisation for illegal entry or presence as provided for in Article 31(1) be clearly reflected in the draft law.[17]

13. As regard the requirement for having come directly from the territory where the asylum-seeker's life, physical security or physical freedom was threatened due to the reasons defined in

[16] See proposed Article 61-2-4-1-6 of ICRRA in connection with Article 61-2-2 (1) which refers to "unavoidable circumstances".

[17] See Global Consultations on International Protection, " Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection " 1 October 2001; "Summary Conclusions on Article 31" 9 November 2001 (www.unhcr.org)

Article 31 of the 1951 Convention: this provision has been interpreted not to exclude persons who have briefly transited through other countries or who are unable to find effective protection in the first country or countries to which they flee. Rather, the drafters of the 1951 Convention intended that immunity from penalty should not apply to refugees who found asylum, or who were settled in another country. In that context, the concept of "safety" in the third country where an asylum-seeker or refugee may have travelled through needs to be carefully examined. This applies to asylum-seekers who had already found protection, as defined in international standards.[18] Overall, UNHCR's main interest is to ensure that persons seeking protection from persecution will have access to a fair procedure to assess their claims, and that protection will be accorded to those in need of it. It is therefore important that this rationale is reflected in these draft provisions.[19]

14. Regarding the draft provision that foresees denial of residence permits to asylum-seekers who are "likely to abscond",[20] it is UNHCR's understanding that the risk of absconding, in this context, is linked to the measure of detention to which the asylum-seeker would be subjected. Since the current wording provides room for unpredictable and perhaps arbitrary application of this condition, immigration officers would make better decisions if the law clearly determines parameters to *reasonably conclude* that an applicant is likely to abscond.

15. As regards the proposed provision that a provisional residence permit may be denied to an applicant who has been *"convicted of a violation of any law or regulation of Japan, or of any other country, and sentenced to penal servitude of one year or more"* (except political crimes): Based on international standards, seeking international protection does not exempt criminals from prosecution and/or criminal conviction in the host country. If the offence was committed prior to entry into the country of refuge, Article 1F (b) of the 1951 Convention becomes relevant and may justify exclusion from refugee status if the crime committed qualifies as a serious non-political crime. Furthermore, the issue of commission of a political or non-political crime prior to admission into Japan should be examined as part of the substantive asylum process in relation to possible applicability of the exclusion clauses. This issue should not be pre-judged by denial of a residential permit. Moreover, the proposed provision does not take into account the fact that in many cases, asylum applicants may be prosecuted in their own country in a way that amounts to persecution, that is, due to their political or religious affiliation.[21] If the crime was committed in Japan, the offender should be prosecuted and/or convicted, but this should not, in principle, prevent such an applicant from being allowed to remain in the territory pending the final outcome of his or her refugee claim. Although under the current practice in Japan, the denial of provisional permit to stay does not seem to entail removal from Japan, it is worth mentioning that if the crime committed by the asylum-seeker is very serious, this may justify the application of Article 33(2) of the 1951 Convention under certain conditions.

16. Overall, UNHCR would like to suggest that fair and expeditious asylum procedures would better tackle the problem of asylum applications without foundation, as opposed to penalising indiscriminately all asylum-seekers who would fall into the categories enumerated in the draft provision.

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[18] See Excom Conclusion No. 58. See also UNHCR Global Consultations on International Protection process, "Asylum Processes (Fair and Efficient Asylum Procedures)", Paras. 7-18, EC/GC/01/12, 31 May 2001(available at www.unhcr.org). See also, "Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers", Lisbon Expert Roundtable, December 2002 (available at www.unhcr.org).

[19] While UNHCR shares the concern of States to limit unwarranted "forum shopping", Excom Conclusion No.15 provides that the intentions of the asylum-seeker should "as far as possible" be taken into account.

[20] See proposed Article 61-2-4 (1) (9)

[21] See, in particular, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1992, para 56 to 60.

VI - SUSPENSION OF DEPORTATION PROCEDURES (AND RELATED DETENTION MEASURES) AGAINST ASYLUM-SEEKERS STAYING ILLEGALLY

Treatment of the issue under the ICRRA in force:

Article 24 of the ICRRA provides that aliens who entered, landed or stayed illegally in Japan are to be deported from Japan. As the law does not make any exception regarding asylum-seekers, they usually undergo a deportation procedure simultaneously and separately from their asylum application. In practice, the execution of a deportation decision is suspended during the asylum procedure. However, the suspension of the execution of deportation order of applicants rejected in the first instance does not prevent their detention during the asylum procedure.[22]

Immigration officers have full discretion to decide on the detention aliens staying illegally.[23] In principle, detention is a temporary measure prior to the issuance of a deportation order and initially it is for up to 30 days, which may be extended to 60 days.[24] Provisional release may be granted, but this is also subject to the discretion of the Immigration Bureau/MOJ. Detention under a deportation order does not have a time limit and it can continue until "deportation becomes possible".[25]The decision on when deportation becomes "impossible" is again, left at the MOJ's discretion.

The bill proposes the following provisions:

Article 61-2-4

(…) 2. When the Minister of Justice grants the permission described in the preceding paragraph, he shall, in accordance with the ordinance of the Ministry of Justice, decide a period of stay for the permission concerned (hereinafter referred to as "a period of provisional stay") and have an immigration inspector issue to the alien concerned without a status of residence a permit for provisional stay, in which is entered the designated period of provisional stay. The permission for provisional stay becomes valid when the permit concerned has been issued.

In Relation to Deportation Procedures

(…)

4. In a case where an alien granted the permission described in paragraph 1 has applied for an extension of a period of provisional stay, the Minister of Justice shall permit the extension. In this case, the provision of paragraph 2 shall apply mutatis mutandis.

(…)

Article 61-2-6.

1. In the case of an alien who has been granted the permission described in Article 61-2-2, paragraph 1 or 2, he shall not be subject to the deportation procedures as provided for in chapter 5 (including the deportation procedures under the provision of Article 63, paragraph 1; this inclusion is applicable throughout this article hereinafter.) even if s/he had already come under one of the items of Article 24 when he was granted the permission concerned.

2. In the case of an alien without a status of residence, who made the application described in Article 61-2, paragraph 1 and has been granted the permission described in Article 61-2-4, paragraph 1, the deportation procedures as provided for in chapter 5 shall be suspended until the expiration of the period of provisional stay designated for the permission concerned even if there are reasonable grounds to suspect that he falls within any one of the items of Article 24.

3. In the case of an alien without a status of residence, who made the application described in Article 61-2, paragraph 1 but has not been granted the permission described in Article 61-2-4,

[22] The ICCRA gives wide discretionary powers to immigration officers to decide whether or not detention is necessary, and asylum-seekers may be subjected to detention at any point of time, including upon arrival at the airport.

[23] ICRRA 39

[24] ICRRA 41

[25] ICRRA 52:5

paragraph 1, or whose period of stay designated for the permission concerned has expired (excluding those coming under any one of the items (1) through (3), or item (5) of paragraph 5 of the same article), when the deportation procedures as provided for in chapter 5 are processed, the deportation as provided for in Article 52, paragraph 3 (including delivery under the proviso of the same paragraph and deportation under Article 59) shall be suspended until he falls within any one of the situations described in items (1) through (3) of paragraph 5 of the same article.
4.The provision of Article 50, paragraph 1 shall not be applicable to the deportation procedures as provided in chapter 5, which are taken against an alien who is defined in paragraph 2 and has come under any one of the items (1) through (3) of Article 61-2-4, paragraph 5, or an alien who is defined in the preceding paragraph.

17. According to the draft provisions, asylum-seekers who will receive provisional permit to stay will also have their deportation procedures suspended and therefore will not be subject to detention while the asylum claim is being examined. UNHCR welcomes this development in that will enable asylum-seekers to secure their stay in the territory of Japan, free from detention, until a final decision is reached on their asylum claim.

18. Clarification is needed about the initial period of validity of the provisional permit to stay and whether this permit will be extended until the end of the asylum procedure. The draft provisions do not contain information on the period of validity of the permit which is at the full discretion of the Ministry of Justice. This seems to suggest that the period of validity of the permit will be decided on an individual basis under unspecified criteria.[26] Also, the draft bill foresees the extension of the permit subject to certain conditions. [27] However, the proposed provisions are unclear as regards the period of validity. [28] While this might be aimed at providing the immigration authorities with some flexibility in deciding the period of validity of a provisional permit granted to an individual asylum-seeker, the draft provisions should explicitly determine the period of validity of residence permits for the entire duration of the asylum procedure, with some reasonable timeframe for judicial review (see also paragraph 22 below).

19. In connection with reception conditions of asylum-seekers: Under the current regulations on access to medical insurance and welfare benefits, a one year residency permit is required. Therefore, in practice, asylum-seekers holding a temporary permit as defined in the proposed provisions will not be eligible for such assistance. While the scope of the amendments to the ICRRA may not extend to the current regulations on welfare assistance, the need to ensure adequate reception conditions is of direct relevance to the fairness of the asylum procedure. It is essential to enable asylum-seekers to sustain themselves during the asylum process, not only out of respect for their rights but also to ensure a fair and effective asylum procedure.[29] Japan has recently made significant efforts to improve the reception conditions of asylum-seekers, including the provision of financial assistance and accommodation to needy applicants. UNHCR welcomes these developments which are in accordance with established state practice and international standards on reception. UNHCR also recommends, however, that basic reception arrangements be provided throughout the asylum procedure, including access to welfare benefits and medical insurance. As reception conditions of asylum-seekers pertain to basic human rights, the adoption of measures to improve the living conditions of asylum-

[26] See proposed ICRRA Art. 61-2-4-2
[27] See proposed Art. 61-2-4-4 but at the request of the applicant (who may have to fill forms hopefully not only written in Japanese language)
[28] Proposed Art, 61-2-4-5 (1)
[29] See Excom Conclusion No.93 (LIII) Preamble, "Acknowledging the centrality of applicable international human rights law and standards in the development and implementation of reception policies", "para (b) (ii) Asylum-seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs, including food, clothing, accommodation and medical care, as well as respect for their privacy are met". See, also, European Union Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

seekers in Japan would best underpin Japan's commitment to promote and protect human rights worldwide.[30]

VII. APPEAL PROCEDURES

The draft bill proposes the following provisions:
(Filing of Objection)
Article 61-2-9.
(…)
3. The Minister of Justice, when making a decision on an appeal based on paragraph 1, must hear the opinion of the Refugee Adjudication Counsellors in accordance with the Ministry of Justice Ordinance.
4. When the Minister of Justice makes a decision on an appeal based on paragraph 1 in accordance with the provisions of Article 47, paragraph 1 or 2 of the Administrative Objection Examination Law, the Minister of Justice must reveal in the reasons to be attached to the said decision, the summary of opinion of the Refugee Adjudication Counsellors described in the preceding article.
5. The Refugee Adjudication Counsellors may request the Minister of Justice to provide an opportunity for the appellant or the intervener to verbally state their opinion. In this case, the Minister of Justice must immediately provide such an opportunity.
6. The Refugee Adjudication Counsellors may observe the procedure concerning the statement of opinion of appellant or the intervener and may conduct a hearing with them, in accordance with the proviso of Article 25 paragraph 1 of the Administrative Objection Examination Law applied mutatis mutandis in Article 48 of the same law, or the preceding paragraph.
(…)

(The Refugee Adjudication Counsellors)
Article 61-2-10.
With regard to the filing of objection regulated in the preceding Article, paragraph 1, a few Refugee Adjudication Counsellors are placed in the Ministry of Justice, in order to have them submit their opinion regarding the refugee status determination.
2. The Refugee Adjudication Counsellors shall be appointed by the Minister of Justice, among individuals with integrity, who are able to make a fair judgement concerning the appeal described in paragraph 1 of the preceding article, and who have academic knowledge and experience in law or international affairs.
3. The term of Office of the Refugee Adjudication Counsellors shall be for two years. However, they shall not be barred from re-appointment.
4. The Refugee Adjudication Counsellors shall be on a part-time basis.

20. UNHCR welcomes the fact that a third party advisory panel, the "Refugee Adjudication Counsellors", may be introduced in the appeal instance. This constitutes a positive development, which might contribute to improve the quality and the speed of the decisions. However, based on international standards, the appeal procedure must ensure asylum-seekers' *access* to protection by enabling them to present the merits of their claim to an authority independent from the first instance decision-making body, and with the necessary training to take a substantial decision. The appeal instance should also provide a full review, that is, a review which includes matters of fact as well as of law.

[30] See the opening statement at the 60th session of the Commission of Human Rights, Geneva 16 March 2004, by Isao Matsumiya, Parliamentary Secretary for Foreign Affairs of Japan. As for applicable international human rights standards, see, *inter alia*, ICCPR, ICESCR, CEDAW, CRC and CERD. The CERD monitoring Committee made an observation to Japan in 2001 in this respect (See *Concluding observations to the periodic report from Japan, 27/04/2001 (CERD/C/304/Add.114*).

21. From UNHCR's perspective, it is essential that the body established to examine and decide on asylum claims ensures decision-making which is independent, based only on human rights and other considerations relevant to asylum, and not influenced by other considerations, such as immigration or foreign policy. Moreover, an appeal is not a final decision until such time as the appeal has been considered by an independent authority. Based on the above draft provisions, however, the proposed appeal instance will remain within the Ministry of Justice and the decision-making will not be independent from the first instance body, since all asylum decisions will be made by the Minister of Justice. Further, based on the draft provisions, it is unclear whether or not the opinions of the "Refugee Adjudication Counsellors" will be binding on the Ministry of Justice.

22. Under the current system, an asylum-seeker whose claim was rejected on first instance or on appeal by the Ministry of Justice may seek judicial review, which provides an independent re-examination of factual and legal matters, including new evidence. In UNHCR's view, such judicial review may be part of the refugee status determination process if it is also clear that the principle of *non-refoulement* applies until a decision by the court has become final and enforceable. In addition, procedural fairness requirements must be considered in a broader sense. In practice, judicial review proceedings in Japan often take a long time and the procedure is costly. Failed asylum-seekers seeking judicial review are not granted with any form of legal status and are subject to detention. Likewise, they do not get any form of assistance during the lengthy period of judicial review. Therefore, UNHCR recommends that the amendments to the ICRRA address these issues by providing temporary permit to asylum-seekers during the judicial review.

23. UNHCR understands that under the new scheme, the "Refugee Adjudication Counsellors" are expected to bring a perspective that is different from the current immigration-oriented approach. While this is a positive development, it falls short, however, of establishing a fully independent appeal instance. UNHCR wishes to recommend that decisions on appeal should be taken by an independent authority other than the first instance decision-making body, that is, the Minister of Justice. Alternatively, UHHCR wishes to suggest a system whereby the review of the negative decisions would be done by a collegial body composed of Refugee Adjudication Counsellors and representatives of the Ministry of Justice. Decisions would be made by a majority of the members of the collegial instance.

24. The nature and competence of the determining authority is also of great importance. As the human rights, including the right to life and freedom from torture, of individuals may be at stake, the responsibility for decision-making must be taken by an appropriate body and adequately qualified officials. In addition, the determining authority must be a specialised body. The status and tenure of the decision-makers should afford the strongest possible guarantees of their competence and impartiality. If the "Refugee Adjudication Counsellors" are selected by the Minister of Justice, the guarantee of impartiality might be compromised. Therefore, UNHCR wishes to recommend that in view of guaranteeing the impartiality of the members of the panel, the "Refugee Adjudication Counsellors" should be designated by the Minister of Justice on the basis of a proposed list submitted by an independent authority or institution, as recommended by the Committee on Judicial Affairs in the Resolution adopted by the House of Councillors on 16 April 2004.

25. As regards the possibility for the applicant to have a personal hearing, UNHCR welcomes the draft provision that suggests that every applicant is entitled to a personal interview. It is important that the competent authority conducts a personal interview with *all* applicants for asylum, without allowing discretion to give the opportunity or not to the particular asylum-seeker to have a personal interview.

26. The law does not contain any provision concerning the access of asylum-seekers to legal assistance. UNHCR wishes to recommend that the draft law ensures that appellants have a right

to have their legal advisers or counsellors present during the appeal interview, as it is the current practice in Japan. To the extent possible, legal assistance should be provided free of charge if the applicant has not adequate means to pay for it himself or herself.

VIII – OTHER ASPECTS OF PROCEDURAL FAIRNESS

Treatment of the issue under the ICRRA in force:
(Inquiry of the Facts)
Article 61-2-3.
The Minister of Justice may have a Refugee Inquirer inquire into the facts if there is a possibility of not being able to make a proper recognition of refugee status with only the data furnished as provided for in Article 61-2, Paragraph 1, or if it is deemed necessary in dealing with the recognition of refugee status or withdrawal.

The draft bill proposes the following provision:
(Inquiry of the Facts)
Article 61-2-14. The Minister of Justice may have a refugee inquirer conduct an inquiry into the facts, when it is necessary in dealing with refugee status determination, or permission as provided for in Article 61-2-2, paragraph 1 or 2, Article 61-2-3 or 61-2-4, paragraph 1, a revocation of permission as provided for in Article 61-2-5, a revocation of refugee status as provided for in Article 61-2-7, paragraph 1, or a revocation of a status of residence as provided for in Article 61-2-8, paragraph 1.
2. When the refugee inquirer deems it necessary in dealing with the inquiry described in the preceding paragraph, he may request a person or persons concerned to make an appearance to ask questions to the person(s), or request presentation of documents.
3. The Minister of Justice or the refugee inquirer may make inquiries to public offices or to public or private organizations and request submission of reports on necessary facts concerning the inquiry described in paragraph 1.

27. With respect to the right of every applicant an opportunity to have his claim heard in an interview, the term "may" implies that not necessarily all or even the majority of applicants should be interviewed prior to a decision. EXCOM Conclusions Nos. 8, 30 and 64 provide useful guidance in this regard.[31] For instance,

    Conclusion 30 - "(e)(i) As in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official…)

    Conclusion 64 - "(a)(iii) Provide, whenever necessary, skilled female interviewers in procedures for the determination of refugee status…"

28. UNHCR suggests that the draft law should contain a clear provision specifying that <u>all</u> asylum applicants should be interviewed by a competent official, with the assistance of an interpreter, and that female applicants should preferably be interviewed by female officers and interpreters.

IX - PENAL PROVISIONS

Treatment of the issue under the current legislation (ICRRA):

CHAPTER IX PENAL PROVISIONS

[31] See also Global Consultations on International Protection, Asylum Processes (Fair and Efficient asylum Procedures), EC/GC/01/12, 31 May 2001.

Article 70.
Any person subject to any of the following items shall be punished with penal servitude or imprisonment of not more than 3 years or a fine not exceeding 300,000 yen, or shall be punished with either penal servitude or imprisonment and a fine:
(1) A person who entered Japan in violation of the provision of Article 3;
(2) A person who landed in Japan without obtaining landing permission etc, from an Immigration Inspector;
(…)
(4) A person who is clearly found to be engaged solely in activities involving the management of a business involving income or activities for which he has received remuneration in violation of the provisions of Article 19, Paragraph 1;
(5) A person who has stayed in Japan beyond the period of stay authorized without obtaining an extension or change thereof;
(6) A person who was granted permissions for provisional landing and escaped or failed to appear at a summons without justifiable reason in violation of the conditions imposed under Article 13, Paragraph 3;
(7) A person who has been granted permission for landing at a port of call, permission for landing in transit, landing permission for crewman, permission for emergency landing, landing permission in the event of a disaster or landing permission for temporary refuge and has stayed in Japan over the period mentioned in his passport or permit;
(7)-2 A person, who was designated a period for departure under the provisions of Article 16, Paragraph 7, but did not return to his vessel or leave Japan within that period;
(8) A person provided for in Article 22-2, Paragraph 1, without receiving permission pursuant to Paragraph 3, of the same article, applicable correspondingly to Article 20, Paragraphs 3 and 4 or pursuant to Article 22-2, Paragraph 4, applicable correspondingly to Article 22, Paragraphs 2 and 3, who has stayed in Japan over the period provided for in Article 22-2, Paragraph 1;
(…)
(9) A person who was recognized as a refugee by making a false statement or by other dishonest means.
2. Any person falling within the preceding item (1) or (2) who has landed and stayed illegally in Japan shall be punished in the same manner.

The bill proposes the following provisions:
CHAPTER IX PENAL PROVISIONS
Article 70.
Any person subject to any one of the following items shall be punished with penal servitude or imprisonment of not more than 3 years or a fine not exceeding 3,000,000 yen, or shall be punished with either penal servitude or imprisonment, and a fine:
(3) A person who has remained in Japan after his status of residence was revoked under the provisions of Article 22-4, paragraph 1 (exclusive to those coming under item (1) or (2));
(3)-2 A person who was designated the period of stay under the provision of Article 22-4, paragraph 6 (including cases applied mutatis mutandis by Article 61-2-8, paragraph 2) and has remained in Japan beyond the designated period concerned;
(…)
(8)-2 A person who was given an exit order described in Article 55-3, paragraph 1 and has remained in Japan beyond the designated period for departure;
(8)-3 A person whose exit order was cancelled in accordance with the provisions of Article 55-6 and who has remained in Japan;
(8)-4 A person who was granted the permission described in Article 61-2-4, paragraph 1 and has remained in Japan beyond the designated period of provisional stay.

29. UNHCR noted that while the amendments to ICRRA foresee new “Penal Provisions” (imprisonment of up to 3 years and/or a fine up to 300,000,000 yen) for individuals who have

overstayed their permit or have entered the country illegally.[32] UNHCR noted with satisfaction that the amendments do not modify the current regulations which exempt refugees from these penalties.[33]

30. UNHCR also noted that failed asylum-seekers who do not comply with reporting requirements might be subjected to these provisions, as they might be regarded as having absconded.[34] As for failed asylum-seekers who bring their cases to judicial review, UNHCR recommends that if such individuals benefit from alternatives to detention, this will greatly reduce the risk of absconding and therefore the application of the aforementioned penal provisions. Overall, the amendments to ICRRA should ensure that the combination of the new and existing provisions do not result in deterring failed asylum-seekers to exercise their right to seek judicial review.

X. ADDITIONAL OBSERVATIONS

Detention of asylum-seekers

31. For detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the 1951 Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.

32. As regards the detention of asylum-seekers for violations of the ICRRA, the current law does not clearly define the cases where detention may not be necessary (see also paragraph 8 above concerning Article 54 of ICRRA regulating the conditions of provisional release from detention). In principle, since Article 54 does not refer to the status of application, the provisional release of a detained individual should be examined irrespective of whether the asylum application was rejected by the Ministry of Justice. Furthermore, asylum-seekers seeking judicial review should also benefit from this provision.

33. In addition, the current provisions of the ICRRA allow, in practice, for indefinite detention of asylum-seekers since detention for the purpose of deportation is not subject to time limits. This may constitute arbitrary detention in contravention with the relevant international human rights instruments to which Japan is Party (e.g. ICCPR) and international standards. [35]In accordance with international standards and State practice, the law should establish mandatory judicial review of the initial reasons for detention as well as periodic review of its continuance.[36]

Resettlement of refugees in Japan

34. It may also be appropriate to establish a resettlement quota for a certain number of refugees. This would follow, for example, the manner the USA approached this issue through the Refugee Act, passed by the US Congress in 1980 in order to create a procedure for the resettlement of refugees to that country. Such an approach to resettlement would also be in line with Japan's humanitarian response to the Indochinese refugee crisis from the late 1970s.

Complementary forms of protection

[32] See, in particular, proposed Article 70 (8-4).
[33] See Article 70-2 of ICRRA.
[34] See proposed Article 70(8)-4
[35] See, for instance, the recent Council of Europe recommendation on detention of asylum-seekers (Rec 2003/5 adopted by the Committee of Ministers of Interior/Justice on 16 April 2003);
[36] See 1999 UNHCR guidelines on detention of asylum-seekers and paragraph 12 above.

35. Based on Article 50 of the ICRRA, the Minister of Justice may use his/her discretionary powers to grant special residence permits to failed asylum applicants. The proposed reform seems to confirm for the future the use of such powers by providing the Minister specific authority to do so (see Art. 61-2-2-2 of the draft law). However, the interpretation of what are the "circumstances that merit special granting of residence status" to failed applicants is unclear. In practice, the Adjudication Division of the Ministry of Justice decides both on appeals against negative asylum decisions, and requests for "humanitarian status", as defined in the Japanese system. "Humanitarian status" may therefore be granted in the context of the deportation procedure to persons who, according to the Ministry of Justice, do not fall under the scope of the 1951 Convention. In UNHCR's understanding, the category of "humanitarian status" as currently applied, may also encompass persons in need of international protection even if they do not meet the definition of Article 1(A) of the 1951 Convention. [37]

36. In UNHCR's view, the proposed reform of the appeal procedure does not provide a comprehensive treatment of all applications for international protection. The same minimum guarantees should be applied in all procedures leading to the grant of whatever form of international protection is available in national legal systems. As the circumstances that force people to flee their country are complex and often of a composite nature, each case should be examined in its entirety, ideally by the same authority, and this can be best achieved if the claim is considered in a single procedure. UNHCR also believes that a single asylum procedure will help to increase efficiency and reduce the costs of decision-making in asylum matters.

37. The reform of the Immigration Control and Refugee Recognition Act could provide an opportunity to introduce a single asylum procedure. Such a procedure would serve to increase considerably the efficiency of the asylum system to identify persons in need of international protection. The examination of a claim under the 1951 Convention allows for information to be obtained which could usefully be considered as relevant also for the examination of the "humanitarian protection category" in Japan, which in other countries fall under subsidiary protection and humanitarian categories.

Office of the United Nations High Commissioner for Refugees
19 May 2004

[37] See Global Consultations on International Protection, Complementary Forms of Protection, EC/GC/01/18, 4 September 2001.