

# **Procedural Fairness and Increased Caseloads: Maintaining Fairness and Efficiency in the Modern Asylum Context**

## Asian Network on Refugee and International Protection (ANRIP)

Date: November 24<sup>th</sup>-26<sup>th</sup>, 2016  
Venue: South Seas Centre – Tower 2 (Hong Kong SAR)  
Hosts: ANRIP, UNHCR Hong Kong

Written by: Hannah Nono, Jafar Atayee, Patrick Kongmalavong



## **Introduction**

ANRIP (Asian Network for Refugees and International Protection) is an organization established in December 2014 concentrating on refugee law and practice in Asia. The members of ANRIP are composed of government officials, jurists, UNHCR officers, and academics from various regions and countries in Asia, including Japan, Korea, the Philippines, and Hong Kong.

As Asia has significant numbers of refugees, asylum-seekers, and other persons who are in need of international protection, it is ANRIP's aim to form the platform to share information and good practices between the members. Our goals are to promote the rule of law and the application of international standards in refugee and international protection decision making process.

The function of this conference is one that acts as international and regional discussion forum on the mechanisms and bodies that overlook the asylum process in the context of each participant's respective states. At the core of this convergence was the notion that ideas would be exchanged and scrutiny and constructive criticisms are able to be conveyed in a safe space in order to better understand the unfolding asylum challenges in the modern context.

### **Speakers**

***Martin Treadwell***

Deputy Chair  
Immigration and Protection Tribunal  
New Zealand

***Bridget Dingle***

Member  
Immigration and Protection Tribunal  
New Zealand

***Amanda Weston***

Barrister  
Garden Court Chambers  
United Kingdom

### **Facilitator**

***Ambrose Chiu***

Assistant Protection Officer  
UNHCR Hong Kong

**Welcome Speech**  
***Prof. Saburo Takizawa, ANRIP Chairman***

Good morning, ladies and gentlemen. It is nice to see again old friends and meet new friends at this 2nd ANRIP Conference held in Hon Kong.

Since we met last time in Manila, there have been several developments relevant to the work of ANRIP.

The first is Brexit in the context of a massive influx of asylum seekers/migrants into Europe, many of them from Syria. We are seeing a surge in anti-refugee/migrant sentiments in European countries and adoption of restrictive measures by States. In the past, EU has been leading efforts to defend and adjust the 1951 Refugee Convention regime, therefore these developments are worrying.

The second is the election of Donald Trump as the US president. Although we do not know what will be the refugee policies of the new Administration, the prospect does not seem to be positive. The US has been a pillar of the Global Refugee Regime, accepting over 100, 000 refugees annually and providing up to 30% of UNHCR's budgets. We may face difficult times if Trump actually implements what he has been saying.

But we also have positive developments. The UN General Assembly organized its first-ever Summit on Refugees in September this year, and it has committed to establish a new Compact on refugees and another on Migration by 2018, based on the spirit of responsibility sharing and innovation. We are also happy to have as the new SG Antonio Guterres, the former High Commissioner for Refugees, who has vigorously defended the rights of people who were forcibly displaced. I hope that his passion, leadership and political skills will reduce the emerging risks to the international refugee protection regime.

Here in Asia, we are also seeing a growing number of people seeking asylum. Japan expects more than 10,000 asylum seekers this year (7500, 5000, 800), although most of them are from ASEAN/South Asian countries and not from Middle East or Africa. The sharp increase is adding considerable pressure on the asylum system in Japan. I understand that other Asian countries, like Korea, are experiencing similar trends.

We need to find ways to balance the "human security" of refugees and "state security" and genuine concerns of citizens. So, it is quite fitting that the global theme of this Conference is "Procedural Fairness and Increased Caseloads: Maintaining Fairness and Efficiency in the Modern Asylum Context".

I hope that frank and evidence-based discussions at this Conference by eminent speakers like Mr. Treadwell and Ms. Dingle of New Zealand, Ms. Weston of UK, judges, decision makers, academics and NOGs, will help deepen our understanding of the causes and consequences of the forced migration in the region, so that we can find better and common approaches to saving as many victims of human rights violations as possible.

Finally, this Conference is not possible without the support of UNHCR Office in Hong Kong, in particular Mr. Ambrose Chiu, who has spent days and night to organize the 2nd Conference despite his heavy workloads.

PS: We have participants from Hong Kong, Korea, the Philippines, Japan, as well as speakers from New Zealand.

## **CONFERENCE PROPER**

**Training Workshop Day  
Thursday, November 24<sup>th</sup>, 2016**

### **I. Structured Approach to Credibility and Decision Writing** *Martin Treadwell*

This workshop is primarily targeted towards decision makers. It aims to provide a more effective approach in determining which claimants should or should not be approved, as well as to provide insight on properly structured decisions.

There are aspects in protection decision-making that make the task challenging. If one is a decision maker, one is expected not to have a closed mind, and not to have any biases influencing their decisions. One must remember that Protection and Immigration are two entirely different areas; if one is a Protection Officer, it is imperative that he or she will not think like an Immigration Officer, who is primarily concerned with border control. Protection Officers must instead focus on their mandate when making decisions, which is providing protection to those who need it.

In order to tackle these issues in decision-making, as well as in decision-writing, it is important to note the following concepts:

#### **1. Who are decision makers writing for?**

- The parties involved
  - First and foremost, decision-makers are writing for whomever is involved – in this case, it is the Claimant
- Counsel and immigration advisers
- Other decision makers
  - Includes those all decision makers (review, appeal, and precedent), both domestic and international
- The community
- Decision-makers should be writing in behalf of your community
- The media
- An international audience
  - Such as the UNHCR, NGOs, etc.

#### **2. Who is their default target?**

- They write for the educated non-specialist (layman)
- They write for those who are not familiar with Protection Law

#### **3. What are the parts of a well-structured decision?**

- i. Introduction
- ii. The Claim
- iii. Credibility Assessment
- iv. Grounds of Appeal
- v. Assessment of the claim

vi. Findings

4. For a decision maker to succeed in conveying their message to their default target with their writing, **the decision must be:**
- **Clear**
    - It should make sense
  - **Concise**
    - It should keep to the essentials
  - **Compelling**
    - It should lead the reader logically to the conclusion
  - **Correct**
    - It should convey sound legal reasoning

These are the four C's that serve as the guiding principles for decision writing.

5. The **basic formula** for the progress and structure of any legal decision is as follows:

**The Facts** + **Law** + **Applying Law to Facts** = **Outcome**

To apply the formula to protection decisions, the parts should correspond as follows:

**The Facts** + **Law** + **Applying Law to Facts** = **Outcome**  
↓ ↓ ↓ ↓  
**The Claim + Credibility Assessment** + **CAT (Convention Against Torture Treaty), CIDT (Cruel, Inhuman, or Degrading Treatment), Persecution Risk** + **Assessment** = **Findings**

6. The **'Issues-Based' Approach** in Decision Writing

In order to accomplish the requirements for effective decisions listed above, we are introduced to the 'Issues-Based' Approach in Decision Writing.

'Issues-Based' decision-writing requires a decision maker to identify the issue(s) at the outset:

- It forces one to identify the essence of the case before you start;
- It encourages one to strip away everything which is not relevant to the issues; and
- It signals to the reader the direction in which the reasoning will head.

It thus promotes all four of the guiding principles in decision writing.

A common mistake by decision-makers is they start writing while they are still coming to grips with the file, hoping that the answer will become clear as they write. This makes it difficult for the decision to be clear, concise, compelling, and correct to its readers.

But if the decision maker identifies the issues before they start writing – they will be able to focus on the issues and thus will be able to write with authority. It is therefore imperative for a decision maker to identify the issues before they start to write.

A decision maker's task for their readers is to explain to them, in one short paragraph at the outset of the decision, what the core of the case is. It should encapsulate the crux or the kernel of the case. This emphasizes on the *conciseness* and *clarity* of the decision.

In framing the issues, it is necessary to keep in mind that:

- a. The progress of the decision will be helpfully driven by the issue(s) that were identified
- b. The decision maker can and should revise their draft to prune anything that is not relevant to the case

This way, as the 'issues-based' approach becomes second nature to the decision maker, the whole process, from the early consideration of the file to hearings, will be issues-driven.

7. In addition, whatever the final outcome of the decision will be, the decision maker must set out the **claimant's claim** in the decision as follows:
  - It should be in its last version
  - It should be set out in the best possible light while making it clear to the reader that no assessment is yet being made
    - To set out the case in its best possible light, it is important to avoid the following:
      - Editorializing (adding judgmental asides or comments)
      - Entering the credibility discussion
8. In **making credibility findings**, it is important to note the following:
  - A decision maker is likely to get different answers every time. Hence it is important to record all answers for reference in formulating the decision.
    - It should be noted that the claimant may exaggerate or embellish their claims, believing that doing so would boost their chances of being approved. The decision maker must therefore see past this and focus instead on the important issues that make up the core of the case – is the claimant at risk of torture, persecution, etc.?
    - The decision maker must then always give claimants the benefit of the doubt since the risk to them is too great
  - A decision maker must also repeat asking the claimant as often as necessary: the claimant's explanations should be exhausted to ensure that the decision, whatever it turns out to be, is fully informed.

- The claimant is entitled to make an explanation on credibility issues
- In making an effort to exhaust the claimant's explanations, the decision maker will thus come out as very fair
- When a decision maker is going to reject someone on the basis of credibility, it is imperative that it is tied to the core of the case
- If the findings are adverse, persuading the reader that these findings are correct is critical to being "compelling." Failure to persuade will lead the decision maker's findings of fact (on which protection needs will be assessed) to not be accepted, making the decision to be irretrievably seen as wrong.
- It is also important for the decision maker not to rely on demeanor, as various factors can affect a claimant's behavior or appearance such as PTSD, etc.

9. On **adverse credibility findings**, there are four standard types of credibility concerns:

- Inconsistency
- Irrationality
- Counter to known facts
- Implausibility
  - Note that implausibility can be very problematic, because this requires complete knowledge of the circumstances (i.e. COI, claimant's personality, etc.) by the decision maker. It should not be relied on as a credibility concern unless it is clear.
  - Consider the following excerpt from Refugee Appeal No. 701210 (April 10, 1997):

“Overall, it seemed most unlikely that the appellant would supply poetry of a politically sensitive nature on the basis of an undertaking that it not be published until the appellant was in a “safe country.” It is *implausible* that the appellant would have given MR. H F, or anyone else, poems that may endanger the appellant without a clear agreement as to when those poems would be published. If a publication really posed a threat to the appellant's safety, we would expect the appellant to have fled to a “safe country” first, before giving poems to someone for publication.

The excerpt makes an adverse credibility finding on the basis of the implausibility of the appellant's decision to have his poems published before he ensured his safety in another country. It fails to consider how people in general are capable of making illogical decisions or the possibility that the appellant may not have had the ability to flee the country whereas the publication of the poems were of utmost urgency. To justifiably reject the appellant's claim as implausible would require the decision maker to have a sound understanding of:

- The political and social culture of the country
- The claimant's personality
- The publisher's personality
- How well the claimant knew the publisher
- Whether the undertaking was reliable for other reasons
- How well connected the publisher was politically
- The laws and practices of publishing in that country
- Whether surveillance of the post meant that sending it from overseas was, in fact, more risky

The excerpt does not touch on any of the above items, making it a poor 'implausibility' point.

**10. In recording adverse credibility findings, there are four critical steps:**

- 1) Concern + Explanation + Rejection of Explanation = Established Concern
  - If a decision maker has a credibility concern, they must raise it to the claimant, who in turn must provide an explanation
  - If explanation is insufficient, a new credibility concern is established. The decision maker must once again raise this to the claimant
  - This step must be repeated as often as necessary until the explanations are satisfactory
- 2) Accumulate concerns
  - In conjunction with #1, decision makers must not make final findings on each point
- 3) Make one finding at the end that the cumulative weight of all the concerns is satisfactory that the core of the account is not credible
  - Ensure that a cumulative conclusion is reached

**E.G.: Conclusion on Credibility**

[35] The foregoing concerns are such that, taken cumulatively, they satisfy the Tribunal that the core of the appellant's account – that he is at risk of serious harm at the hands of either the hijra gang or the second gang – is false. Those aspects of this account (including ancillary claims, such as the assertion that the second gang has been making enquiries for him with his family) are rejected as untruthful.

- 4) Record findings of fact that are believed or accepted as truthful

**11. In making and writing down assessments, existing laws are applied to the facts. The assessment hence should be made on the cumulative totality of the claimant's characteristics that are based on the recorded findings of fact.**

In the application of the laws to the facts, the following approaches/focal points are suggested:

**A. On Torture:**

- 1) Objectively, on the facts as found, are there substantial grounds for believing the claimant to be in danger of being subjected to torture if returned to his/her home country?
- 2) If so, would the torture be by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity?
- 3) If so, would the torture arise only from, or be inherent in or incidental to lawful sanctions?

**B. On CIDT:**

- 1) Objectively, on the facts as found, is the claimant at risk of being subjected to cruel, inhuman, or degrading treatment if returned to his/her home country?
- 2) What is the degree of risk? (Requirement is equivalent to a real chance of CIDT)
- 3) What is the severity of harm? (Requirement is equivalent to serious harm)

**C. On Persecution Risk:**

- 1) Objectively, on the facts as found, does the claimant face a real chance of being persecuted if returned to his/her home country?
- 2) If so, is it for a Convention reason

**12.** In closing, decision makers should remember that it is “infinitely better to cancel refugee status than to reject claims on insufficient grounds”

- Decision makers must not feel like they are being duped or misled
- It is not personal
- It is better to err on the side of caution

**II. Fair Process and Efficiency – Balancing Tensions**  
**Determining Protection Obligations with Fair Process and Efficiency**  
*Bridget Dingle*

This workshop aims to tackle the issues surrounding approaches used in protection determination. Similar to the previous workshop, it is targeted towards protection officers and individuals involved in decision making.

In protection determination, the fulfilment of international and domestic legal obligations to protect persons who fulfill the legal criteria is paramount. These obligations are a matter of law, not discretion. Therefore, within the protection determination space, there should be no focus on border control, immigration policy, detention, prosecution for false documents, political policy, or public perception about who should be permitted to stay. Since the questions of life, personal safety, and liberty are at stake in protection cases, only the highest standards of fairness will suffice. Protection Determination Systems are therefore expected to be objective. They should be fair, efficient, and affordable (cost-effective) systems that produce correct determinations as to whether individuals are entitled to be recognized as refugees or protected persons.

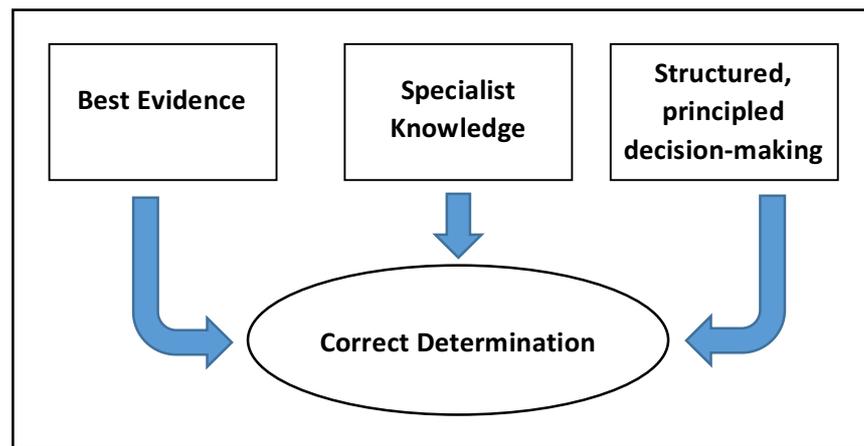
1. In **Protection Determination**, it is important to note the following:
  - The claimant is trying to navigate a foreign legal system
  - The claim relates to a country, society, and/or political system about which the decision maker may have little or no knowledge
  - The claimant will often have difficulty presenting evidence beyond their testimony
    - “It is general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases, a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof, in principle, rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.” (*UNHCR Handbook 2011, p.38*)
    - In presenting evidence of torture, for example, the decision maker cannot and should not expect that torturers will testify to torturing the claimant
  - The claimant may be vulnerable or have special needs
    - The claimant may be afflicted with PTSD or something similar, as a result of previous abuse
  - The focus is on the future, not the past
  - The core treaties, such as CAT, the Refugee Convention, and the ICCPR are “living instruments and their interpretation develops over time
  - The process requires the following basics:
    - 1) Specialist Knowledge
      - Specialist knowledge on psychological issues, memory, and cultural norms the claimant has been subjected to is necessary to give the decision maker a better understanding of the circumstances underlying the claim
    - 2) Access to information/evidence
    - 3) Legal representation
    - 4) Time
    - 5) Other services (medical/psychological/social)
    - 6) Adequate review/appeal opportunities
      - Peer review is advisable, in accordance with and in pursuit of transparency

The following diagram therefore illustrates the formula for an efficient and effective protection determination process:

[Grab your reader’s  
quote from the document

attention with a great  
or use this space to

emphasize a key point. To place this text box anywhere on the page, just drag it.]



## 2. On the **prevention of access to protection determination**:

The United Nations Declaration on Human Rights states in Article 14 that:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution...”

Preventing access to the determination procedure, de jure or de facto, will therefore lead to a violation of the rights of non-refoulement for those who are refugees or are eligible for non-refoulement under CSR51/CAT/ICCPR/other obligations in regional domestic law.

In spite of this, claimants are prevented access from determination through various inconspicuous means such as the following:

- Lack of information available to claimants who indicate that they need protection
- Lack of support (legal, social, medical, etc.) to assist claimants in accessing and using the process
- “Early-screening” / “Pre-screening” mechanisms to prevent claimants from entering the process
- Accelerated procedures (in certain circumstances)

## 3. “Pre-Screening” Mechanisms

“Pre-screening” mechanisms assume that the claimant is willing and able to spontaneously present important information about their claim and their personal circumstances to a screening officer. This however fails to consider a claimant’s lack of access to evidence as well as the existence of possible health issues preventing the claimant from presenting the necessary information.

“Pre-screening” mechanisms therefore must have sufficient procedural safeguards and will necessarily require highly-intensive, specialized resources such as the following:

- Experienced lawyers with availability

- Medical and psychological assistance
- Interpreters
- Expert information/Country of Origin Information (COI)
- Experienced screening personnel
- Review/appeal process
- Application of a generous benefit of the doubt

#### 4. Accelerated Procedures

Accelerated procedures were established to cut the costs and time it takes for the protection determination process. Having said that, such procedures may therefore be appropriate for certain types of claims:

- Applicants in detention
- Vulnerable applicants
- Manifestly founded claims / Prima facie refugee (i.e. claimant is clearly a refugee on the outset, such as Syrian asylum claimants, due to the Syrian Civil War)
- Credibility accepted claims
- Subsequent appeals with no changed circumstances
- Applicants from a *safe country of origin*
- Applicants who are a security risk
- Uncooperative and undocumented applicants

Further, the UN considers it appropriate to use accelerated procedures for manifestly unfounded and abusive claims:

“The Executive Committee of UNHCR (ExCom) has stated that a claimant who is found not to be a refugee, and any claimant whose claim for refugee status is declared manifestly unfounded or abusive, must be given right to appeal such a decision within a reasonable time.” (*UNHCR, ‘Determination of Refugee Status’ (ExCom Conclusions No 8 (XXVIII)-1977, 12 October 1977) para (e) (vii)*)

Due to its characteristics, Accelerated Procedures, however, can prevent claimants from gaining access to protection determination. In light of this, it is therefore important to place emphasis upon the following considerations in Accelerated Procedures:

- Fundamental fairness of both the system and its application in particular cases must be considered
- Resource allocation – lawyers, interpreters, medical practitioners/psychologists, decision-makers (at all levels) must be available for highly intensive procedures
- Adequate time must be provided to claimants to lodge an appeal and access information and services
- The system must have flexibility to provide extensions of time or to allow claims to move out of accelerated procedure
- Getting it wrong is expensive and causes further delays and backlogs

#### 5. Safe Countries of Origin

The “safe country of origin” concept is a presumption that certain countries may be designated as safe for their nationals because there is generally and consistently no torture, inhuman or degrading treatment or punishment, or other risk of being persecuted. In cases wherein the claimants come from such “safe” countries, the presumption is that an application for international protection is likely to be *unfounded* and is often used in relation to accelerated procedures.

The UNHCR does not oppose, however, the notion of ‘safe country of origin’ as long as it is used as a procedural tool to prioritize and/or accelerate examination of an application in very carefully circumscribed situations.

In order to ensure that the “safe country of origin” as a mechanism is effective, procedural safeguards are set in place:

- Applicant must still be able to access an individual and complete the examination during which the presumption of safety may be rebutted
- Safe country of designation should not affect the burden of establishing the claim or the shared inquiry
- Notification of safe country designation and opportunity to respond should be available before the first instance decision
- A country cannot be considered “safe if it is so only in part of its territory
- A designation of safe countries should have, as an attachment, a list of COI and expert evidence used as factual grounds to adopt that decision
- A list of safe countries should come under regular review

## **6. Country of Origin Information (COI)**

COI is crucial in protection determination because it provides context and greater understanding for the decision maker in protection determination.

The following factors are important with regard to COI:

- Accessibility
  - For the applicant and the decision maker; timely disclosure of all country information being considered by all participants
- Competence
  - Refers to specialist country information researchers and the competent use of information
- Consistency
  - The same country information should be available for all applicants/decision-makers
- Timeliness
  - For quality control, country information must be updated as necessary and must be readily available for reference

COI has many uses. COI bundles can be shared by state counsel, appellants, and decision makers at all levels. Core country information bundles can be used in all relevant cases and then simply updated or added to as required in specific cases. They can also be used by other agencies such as immigration, border control, and security.

## 7. Subsequent Claims

Second and subsequent claims are correctly permitted in some circumstances, especially in *sur place* claims.

The limits to these claims are as follows:

- Subsequent claims should not be permitted where they are being used simply to extend a period of stay or re-litigate a previous claim
- Subsequent claims must raise a “new” issue not previously considered and/or which has arisen since the determination of the previous claim
- Decision-makers are entitled to rely on previous findings but are free to make new findings if appropriate

The methods on dealing with subsequent claims on the other hand are as follows:

- There must be a jurisdictional threshold in law/regulations which must be met before a subsequent claim is accepted
- Dealing with the cases in a separate stream can be considered
- It must be ensured that there is some right of appeal or review of the decision, whether or not jurisdiction is met
- Where appropriate, hearing such cases on the papers can be considered

**Conference Day 2**  
**Friday, November 25<sup>th</sup>, 2016**

**I. Absolute and Non-derogable Rights:  
Identifying Prohibited Harm under Human Rights Instruments – Key Principles  
and Examples**

*Amanda Weston*

This seminar is targeted towards protection officers and individuals involved in decision making. It aims to give insight into the interpretation of the international laws concerning the human rights of asylum or non-refoulement claimants.

**1. Acronyms**

International lawyers love using acronyms but this can sometimes be an impenetrable vernacular. For the purposes of this paper:

- a) “ECHR” refers to the European Convention on Human Rights
- b) “ECtHR” or The Strasbourg Court refers to the European Court of Human Rights.
- c) “IACHR” refers to the Inter-American Convention on Human Rights
- d) “IACtHR” refers to the Inter-American Court of Human Rights
- e) “ICCPR” refers to the International Convention on Civil and Political Rights
- f) “HRC” refers to the Human Rights Committee, which has responsibility for considering complaints of violations of the ICCPR
- g) “UNCAT” refers to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- h) “the UNCAT Committee” refers to the Committee established under UNCAT to consider complaints of torture

**2. General Principle – The Harmonization of International Law**

Human rights jurisprudence of different international, regional and domestic courts and tribunals has contributed to the formation of some general bedrock protection principles.

- Different legal instruments can use different language to protect from the same risks.
- International treaties do not exist in a vacuum and should not be interpreted in one. They form part of the common corpus of international law.
- Due to their universal nature, international protection norms are usually given greater weight and precedence.

**A. Harmonious interpretation in practice**

- Adopt a construction/interpretation which, as much as possible, coordinates the effect of instruments of protection and minimizes conflict and opposition between them.
- **Autonomous** meaning - that means that persecution under the Refugee Convention has its own meaning - states are not free to develop their own interpretations.
- Universal and absolute nature of the prohibition, the different treaties have been read as imposing **equivalent** levels of protection.
- The cases decided in the ECtHR are a useful guide.

## B. Remember when considering claims

- Evidence of past human rights violations is not determinative of future risk
- BUT – It may be a helpful indication
- The FOCUS of your enquiry is what may happen in **future**.

## C. What is Torture?

- Severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.
- Sometimes used for prohibited purposes
  - E.G.: Extraction of a confession or information, secure compliance.
- Nexus to the state may or may not exist in cases of torture in the form of deliberate acts by the state or acquiescence to the act of torture.
- **Severe pain or suffering**, whether physical or mental, is **intentionally** inflicted on a person.
  - For such **purposes** as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.
- When such pain or suffering is inflicted **by or at the instigation of** or with the **consent or acquiescence** of a public official or other person **acting in an official capacity**
- It does not include pain or suffering arising only from, inherent in, or incidental to, **lawful sanctions**
- This definition of torture is without prejudice to any other international or domestic legal instrument which is "of wider application".

### E.G.: Is there a torture risk?

Evelyn has fled her home as other female members of her family and community have been raped by government soldiers.

There are women of a particular ethnic minority being targeted for rape by soldiers in an area of the country facing insurrection by that ethnic minority. No action has been taken by the government.

- Drawing on the UNCAT definition, the Strasbourg Court has described torture under Article 3 ECHR as having two elements: a **purposive** element and a **severity** element
- SO, questions for decision-makers:

- What is the **purpose** of the torture?
- How severe is its **impact** on the claimant?
- An "act" of torture should not be construed narrowly. It encompasses both acts and omissions. For example, a detainee who has food and water or human contact withheld from him by the detainer can still be a victim of torture, notwithstanding that it is an omission rather than an act.

**a. Is Torture Persecution?**

Torture may be considered as persecution because it meets the level of seriousness and is a violation of a fundamental right (not to be tortured). To further evaluate this, one should assess if the reason for torture falls under the provisions of the Refugee Convention. If so – it is persecution.

The formula for an act to be classified as Torture is thus as follows:

**Torture = intention** (“deliberate inhuman treatment”) + **the intensity of the consequences** (“causing very serious and cruel suffering”)

**b. State Nexus**

Under the ICCPR, is the state nexus required?

- The principal difference between torture and other categories of impermissible treatment is the **severity**
- The requirement for a state nexus to the torture is not uniformly applied across human rights instruments
- Acquiescence in non-state agent torture may include a failure to protect from torture – this is similar to the persecution 'non-state agent' test

**D. Cruel, Inhuman, or Degrading Treatment or Punishment (CIDT)**

- **Article 7 of the ICCPR - The prohibition on cruel inhuman or degrading treatment or punishment**

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

- Treatment which, while not reaching the threshold of torture, has no place in human society.
- It must meet a minimum level of severity. However, that minimum level is **not a fixed line** to be applied universally in all cases. It is relative and requires an assessment of all the circumstances of the case *Ireland v. UK, n.6 at [162]*
- Considerations in evaluation if the case falls under CIDT:
  - Duration
  - Physical and mental effects (in the short and in the long term)

- Place Degree of control, helplessness
- Vulnerability of claimant
- Mental and physical health
- Claimant's previous experiences
- What else may be relevant? Does it bear on the impact on the claimant?

**E.G.: the Georgian LGBT protestors**

Mental anguish of being subjected to verbal and physical attacks - aggravated by the homophobic and transphobic overtones.

Feelings of fear, anguish and insecurity incompatible with guarantee of human dignity and crossed the minimum level of severity (Identoba and Others)

- Inhuman and degrading treatment are different concepts
  - Inhuman treatment is concerned with physical or mental suffering
  - Degrading treatment is that which is grossly humiliating to the victim and offends their sense of human dignity notwithstanding the fact it does not generate physical or mental harm.

**E. How should decision-makers respond?**

- **Questions for decision-makers?**
  - Does the treatment (act or omission) cause "anguish or inferiority capable of humiliating and debasing" the victim?
  - Is there a failure of adequate state protection from such treatment?
- **What are the state's duties to protect?**
  - Negative obligations: NOT to inflict such treatment
  - Positive obligations:
    - System of laws and punishments
    - 'Practical and effective protection'
    - Duty to investigate allegations
- **The principle of non-refoulement/non-return of a person at protection risk:**
  - The 1951 Refugee Convention imposes a prohibition on the return of persons at risk of persecution (Article 33).
  - Prohibition where there is a real risk that the individual being removed will be subjected to torture or to inhuman or degrading treatment or punishment in the receiving state.
- **Burden and standard of proof**
  - There is a shared burden on claimants AND the host state:
    - Why? Because states often have greater resources/information to establish 'well-foundedness'

- Decision makers make use of the '**real risk**' or '**serious likelihood**' test, which has a lower standard in evaluating cases

- **Rationale for the 'lower standard':**

- Decision-makers in the UK generally refer to a “real risk” standard and apply a uniform standard of proof to decisions concerning both persecution and protection risks. “Risk” is the most appropriate word to use because “it factors in both the probability of harm and its severity.”
- This helps to streamline what can be an over-complicated process of enquiry.
- The common lower standard applies to both past events AND future risk.
- Nor is there a separate standard of proof for other questions under Refugee Convention (E.G. whether internal relocation would be unduly harsh to expect the applicant to settle there). The one standard applies to questions arising in protection claims.
- Decision-makers should be wary of using a short-hand to assimilate the concept of risk into probability or displaces it. The ultimate question will always resolve down into whether there is a real risk that the feared harm will occur.
- That necessarily involves a degree of 'informed speculation' which the lower standard recognizes.

- **Benefits of using a lower standard:**

- Allows decision-makers to be sensitive to the unique difficulties that asylum seekers face in securing corroborative evidence to establish their claim
  - E.G. Human rights violators do not provide their reasons in writing in a form to be handed to the decision-maker
- Merely because an applicant's account has been disbelieved does not mean the claim automatically fails. It is still necessary to determine whether there is a real risk of being subjected to rights violations in future.
- The decision-maker may be in a better position to gather and put before a Tribunal information about the prevailing country conditions and the treatment of particular groups within it.
- Other considerations:
  - Problems with early disclosure
  - Fear of authority
  - Gender related or other fears of vilification or shame
  - Trauma
  - Mental health problems

- Language problems
- Learning difficulties

#### **F. On Individual or Systemic Harm**

- No requirement that the receiving state engages in systemic violations of human right.
- Notwithstanding an absence of previous persecution or harm, the presence of systemic violations may establish a sufficient individual risk of harm.
- Claimant may be specifically targeted or belong to a particular group which is subjected to serious harm. In both cases the enquiry will focus on the evidence of risk but in the former case the claimant's own evidence of past events may be more relevant and in the latter case evidence of systemic violation is unlikely to emanate from the claimant but will have to be looked for elsewhere.

#### **G. On Modification of behavior**

Persecuted groups or persons cannot be asked to modify their behavior upon return to their country of origin in order to avoid the feared harm. (E.G.: LGBTI cases)

#### **H. On Other Forms of Harm Potentially Engaged:**

There are other forms of harm aside from torture and/or persecution and CIDT, such as:

- ❖ Modern Slavery
- ❖ Trafficking
- ❖ Human Bondage
- ❖ Domestic Worker Abuse

- Laws concerning these other forms of harm:

##### **Article 4 HKBOR Article 8 ICCPR**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. 3 (a) No one shall be required to perform forced or compulsory labor (unless part of a lawful criminal punishment by a court).

E.G.: A victim of sexual and physical violence in her home country gratefully accepted help from a relative to find a better life in the United Kingdom but it was, in fact, a trap. Upon arrival, her travel documents were confiscated, she was threatened with violence, effectively imprisoned and forced to work for the benefit of her captors. (*Taken from an actual case CN v. the United Kingdom 12013] 56 EHRR 24*)

- Cases in which trafficking for sexual and other economic exploitation are often very hard to identify owing to the fear that trafficked persons of their traffickers who may be threatening family members in the home state.

## I. Statelessness

- Will arise where it is not possible to determine the country of nationality or removal
- There is the need to avoid claimants being 'bounced back'.
- It is important to note the difference between '*de facto*' and '*de jure*' statelessness
  - *De Facto* Statelessness refers to cases wherein a person is originally a national of a state but no longer enjoys the protection of the state either because the state now refuses to provide them protection or they refuse the protection provided by their national state
  - *De Jure* Statelessness refers to cases wherein a person is not a national of any state either because they have not been given a nationality at birth or they have lost their nationality and have not acquired a new one
- Statelessness may be a consequence of persecution

## II. Being Persecuted, Torture, and CIDTP – the Same, but Different *Bridget Dingle*

Similar to the previous seminar, this is targeted towards protection officers and decision-makers. It aims to describe more elaborately the principles surrounding protection determination for claimants, tackling issues such as risk and degree of harm.

### 1. Protection Determination

Decision-makers are looking at whether an individual is at risk of going home and facing:

- “Being Persecuted”/“Persecution Risk”
- Torture (CAT/ICCPR/HKBOR)
- Cruel Inhuman Degrading Treatment (and Punishment (ICCPR/HKBOR3\*))

#### A. Harm

- Harm is the **common requirement**:

*Persecution Risk/Torture/Cruel Inhuman Degrading Treatment and Punishment*

- All of these assessments require a finding that the claimant faces harm of some sort. Without harm, there is no engagement of any protection obligation and that would be the end of the assessment.
- For all of these assessments decision-makers must find the facts and determine:
  - What is the harm faced on return?
  - What is the risk of that harm?

- **Persecution – which harms are relevant?**
  - "Being Persecuted" / "Persecution Risk" – means that there must be serious harm through a sustained or systemic violation of fundamental human rights, demonstrative of a failure of state protection.
  - So, a wide range of human rights are relevant including: freedom from torture & CIDTP, freedom from slavery and forced labor (including trafficking and debt bondage), freedom of expression, religion & political opinion, freedom from discrimination (in particularly serious cases), right to citizenship, right to liberty and security of person, right to be free from unlawful interference in privacy & family, deprivation of socio-economic rights...
  
- **CAT CIDTP – which harms are relevant?**
  - Convention Against Torture requires the harm of **torture** (plus some reasons for the torture – to coerce, punish, intimidate... and involvement of state official)
  - CIDTP requires the harms of cruel, inhuman or degrading treatment or punishment.
  - Both are **relevant to assessment of Refugee Risk**

## B. Evidential Requirement

This deals with the concept of “**substantial grounds for believing**”/”**substantial grounds to believe**”

- However, it is undesirable to try to define this further. Akin to there being evidence that leads decision- maker to "being satisfied" (Refugee Convention) a pragmatic and robust threshold.

## C. Degree of Risk

This considers the degree of what the claimant is “**in danger of**”

“[83] The most that can be said is that “in danger of” raises a low threshold. What must be established is less than the balance of probabilities but something more than mere speculation or random or remote risk. To that extent, the standard can be seen as analogous to the standard applied in refugee law but it goes no further than that.” (*AI (South Africa) [2011] NZIPT 800050-53*)

- Suggest that “in danger of”, “real risk”, “real chance” and “personal and substantial risk of” be interpreted as the same degree of risk.

## 2. Different Assessments in Protection Determination

### Elements of Legal Definitions

Consideration	Refugee Convention	CAT/ICCPR	HK BOR3
<b>Evidential Requirement</b>	Satisfied that	Substantial grounds for believing	Substantial grounds to believe
<b>Degree of Risk</b>	Real chance of	In danger of	Personal and

			substantial risk of
<b>Harm</b>	Being persecuted (serious harm which includes torture, CIDTP, slavery, trafficking and violations of other fundamental human rights)	Torture / CIDTP	Torture / CIDTP

**A. Why the different assessments?**

- While there is overlap in the relevant harms, and alignment in the evidential and risk thresholds, there are reasons to have CAT and CIDTP assessments as well as a persecution risk enquiry
- Convention reason requirement for CSR51 means that some people at risk of torture will not be found to meet the CSR51 definition. Exclusion provisions Article 1F CSR51 excludes certain person from being extended refugee status
- So, in those cases, claimants may still access protection from return to torture and CIDT through "complementary provisions" of CAT /ICCPR / HKBOR3

**B. Protection Determination**

Persecution Risk /Torture /Cruel Inhuman Degrading Treatment and Punishment – How to determine them?

If you need to make determination for each, suggest that assessment begins with persecution risk / being persecuted because it engages the widest range of harm and include assessment of Torture /CIDT if relevant. If there is no Convention Reason or Exclusion, then rely on assessment that there is risk of torture/CIDT and find CAT / HKBOR3 protection.

**C. Summary of the CAT/CIDTP and CSR51 relationship**

- Torture and CIDTP **cannot be seen in isolation from the Refugee Convention** because they are engaged by the notion of 'being persecuted' – in many cases Torture/CIDTP will be found to be persecution (just need a Convention reason)
- The Refugee Convention has primacy at international law because it is the primary protection document to which the international community has subscribed
- **Torture and CIDTP do not set different standards or tests to the concepts of harm** in the Refugee Convention. What they do provide is a **widening of the scope of protection** to certain categories of harm, even where there is no Convention ground

**III. Understanding Services for Non-Refoulement Claimants (in Hong Kong)**

**Briefing for UNHCR Delegation**

*International Social Services (ISS), Hong Kong SAR*

This briefing was provided to describe the functions and services of the International Social Services organization in providing assistance to non-refoulement claimants in the context of Hong Kong.

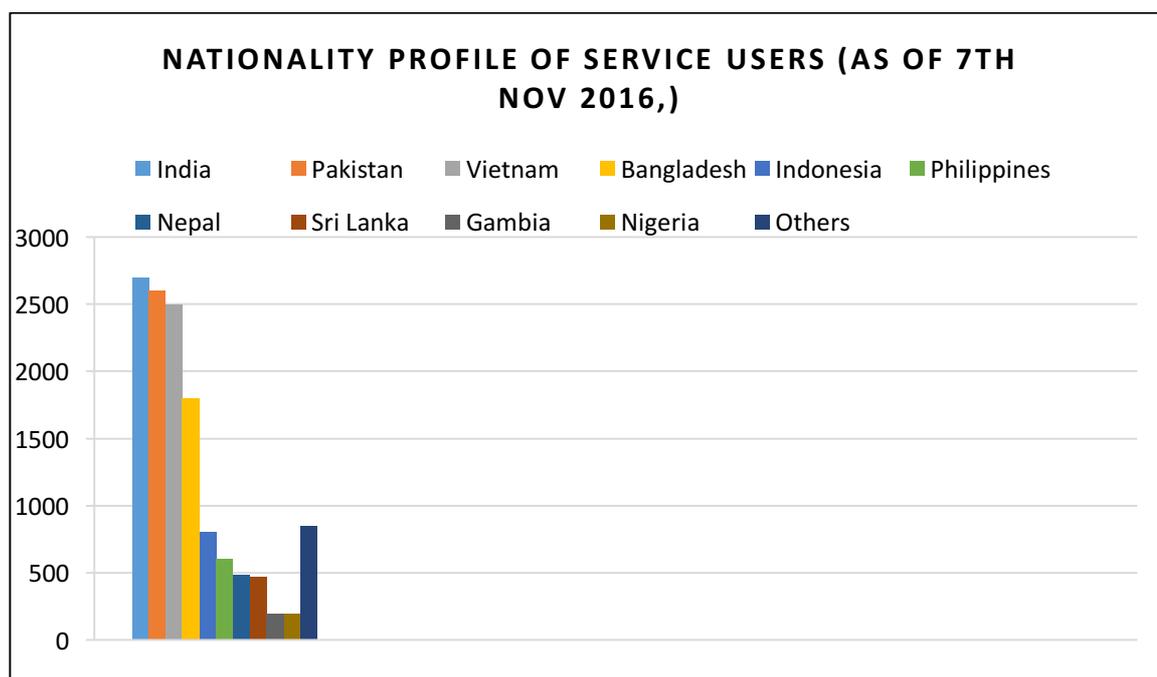
## 1. History

- **1975-1998:** ISS-HK worked with Vietnamese refugees in detention centers in Hong Kong-social work, education and recreational activities
- **2006-May 2015:** ISS-HK Assistance to Asylum Seekers and Torture claimants Project (ASTC)
- **May 2015-current:** Name changed to ISS-HK Provision of Assistance to Non-Refoulement claimants (NRC)

## 2. Who is a Non-Refoulement Claimant?

Based on the Unified Screening Mechanism HKID-March 2014, a non-refoulement claimant is an individual who falls under any of the following categories:

- Asylum seeker & Refugee (UNHCR)
- Torture Claimant (HKID)
- CIDTP Claimant (HKID)
- CAT Claimant (HKID)



## 3. Outline of the Non-Refoulement Claimants Project

### A. Provision of Assistance for Non-refoulement Claimants (NRC) Project

- Government assistance is provided through ISS-HK to eligible applicants as a humanitarian, tide over grant.

- As a condition of stay, NRC must report regularly to the Immigration Department. They are not allowed to work while awaiting a decision on their claim.
- Model: community living vs detention centers.

**B. Provision of Assistance for Non-refoulement Claimants (NRC) Project**

- SWD determines policies and standard levels of assistance.
- Individual casework approach: ISS Caseworkers assess needs of service users on a case-by-case basis.

**C. Requirements for Eligibility for Referral to our Service**

- Valid Recognizance document.
- Verification of Status of Non-refoulement Claims.

**D. Referrals**

- All cases must be referred by SWD.
- Completed referral forms should be faxed to the Kwun Tong Office (Head Office of NRC Project). These are screened for urgency and distributed to relevant District Office.
- Enquiries regarding individual cases can be directed to the relevant District Office.
- Urgent cases can be provided assistance on the same day if necessary.
- Referral will be internally transferred to another district office if the applicant informs about the change of address and district.
- **Before making a referral to ISS:**
  - Please ensure that names of all accompanying family members are included in one referral.
  - Please ask if they are already an ISS service user or are a former ISS service user.
  - Please try to get the full temporary address of the applicant.
  - Please try to get an alternative phone number for the applicant.
  - Remind the applicant to inform ISS-HK as soon as possible about the change of address or contact number.

**4. Casework in the NRC Project**

**A. NRC Social Workers/Counsellors**

- Assessment of service users' vulnerability and needs.
- Advocate for assistance beyond standard level or category if necessary.
- Monthly review of assistance based on service users' circumstances.
- Give timely instruction to the support units (service units) regarding provision of assistance.
- Conduct home visits and also escort the service users for different appointments if needed.
- Engage in counselling and crisis intervention where appropriate. Make referrals for specialized treatment where necessary.

**B. Service Contract**

- Signed between service user and caseworker at initial interview.

- Reviewed and signed again at each subsequent monthly contract renewal appointment.
- Outlines the type of assistance the service user is eligible for during that month only.
- Specifies certain conditions of service provision.
- Services cannot be provided unless the contract for that current month is signed.

### **C. Monthly Contract Renewal (CR)**

- Monthly appointment to:
  - a) Review needs and status of service users.
  - b) Adjust levels of assistance if necessary.
  - c) Renew ISS contract for the current month.
  - d) Provide assistance: food coupons, toiletries and transport money, if eligible.
- Service users can also:
  - Submit relevant documents (e.g. tenancy agreements TA), utility bills (electricity/water/gas), medical certificates, etc.)
  - Request for individual counseling or discussion sessions.

## **5. Service Units and Types of Assistance**

### **A. NRC Project Service Units – Flow**

- Caseworker assesses/reassesses service user's eligibility
- Caseworker makes instruction to Service Unit
- Service Unit **provides/stops assistance** to service user (until further instruction from caseworker)

### **B. Different NRC Project Service Units**

- **Accommodation Unit**
  - Provides rent payments
  - Provides deposit (agency fee) payments
  - Provides utilities assistance by auto-payment
  - Provision of emergency accommodation
  - Can accompany caseworkers for support
  - Conducts spot checks on service users accommodation every six months
- **Food Unit**
  - Provides monthly food allowance of HKD 1,200.00 to each service user
    - Only for food items
    - Non-cashable
    - Non-transferable
  - Provides monthly allowance for food through the following means:
    - Supermarket Food coupons

- Per coupon denomination of HKD 100 x 12 pieces in one booklet
  - Electronic token/s (E-card)
  - No replacement for lost coupons/card
- Provides pre-packed toiletries
- Provides emergency relief items, including food and infant milk formula
- **Finance Unit**
  - Transport Money
  - Utilities
  - In charge of the following:
    - Accommodation cash control
    - Food coupon control
    - Other payments

### **C. Additional Assistance**

- Counseling Individual session (s); depend on needs
- Can be carried out at office, or in the field
- Scheduled appointments or ad-hoc (incorporated in CR)
- Further specialized counselling or psychiatric treatment by NGO or public hospitals would be recommended
- ISS-HK can sometimes arrange a suitable professional interpreter for very sensitive cases that require one (requires special permission from SWD head office)

**Conference Day 3 - Closing**  
**Saturday, November 26<sup>th</sup>, 2016**

The final day of the conference began with a brief update on the global situation, which examined the developing situations in Europe, the Gulf of Aden, the Bay of Bengal, and the Asia-Pacific region. Following this outline, in closing, the experiences and practices in place in the UK, Japanese, and Filipino context were discussed in detail. Each contingency presented prevalent domestic concerns and their influence on decision-making, but also explicated the types of effective resolutions and practices in order to combat these issues.

**Part 1. Update on Mixed Movement Trends in East Asia and the Pacific Region**  
*Ambrose Chiu (UNHCR Hong Kong)*

The UNHCR regional office based in Bangkok carry out multiple jobs that include interviewing people about their motivations for migrating, often people who would be mid-movement. This presentation broke down the types of trends emerging in different regions. They are presented as such, in tandem with the extant issues of that region.

**Europe**

To date, the UNHCR has observed a sharp increase of maritime arrivals to Greece and Italy via the Mediterranean Sea. According to statistics, there were approximately 1 million arrivals in Europe in 2015, which led to 400 deaths, meaning a fatality rate of 0.37%. This has seen a six times increase in arrivals in Europe during the first half of 2016, which is triple the amount of new arrivals as experienced in 2014. As a consequence, new challenges have emerged that have not been really experienced within Europe before. Accordingly, governments sought predictable and harmonized responses, yet the fallacies and holes in the system became apparent as evidenced by the mass arrivals of boats on the shores of Italy and Greece.

Although distressing images of the situation have captured the attention of the broader community, the European response has been mixed. Attempts to find work permits for refugees, the promise of relocation, and financial assistance, are overshadowed by

gaps present in system which fail to provide basic protection for claimants who have experienced gendered and severe violence in their country of origin or during their travel. In this dire situation many are left with very few reunion opportunities with their other family members.

### **Gulf of Aden**

Heavy fighting and intense activity in the horn of Africa has seen a phenomenon of reverse flows to Yemen from Somalia and vice-versa. Interestingly, people are fleeing from one conflict zone to another where circumstances are far direr.

The movement of people within the Horn of Africa, a region scarred by poverty, famine and political instability, is not a new phenomenon. However, in recent decades, Yemen has become an ever more important link between this volatile region of eastern Africa and the oil-rich Persian Gulf countries.

In 2007, an estimated two-thirds of those who reached Yemen alive sought assistance from UNHCR, while others attempted to find employment as unskilled laborers in Yemen or moved to the Gulf and further in the search for a decent job and the chance to remit money home to their families.

Yemen has called on the international community for more support in dealing with the ceaseless flow of migrants and refugees. The UNHCR and partners have stepped up work in Yemen and Somalia to help new arrivals, raise awareness about the dangers, and train coastguards and authorities on refugee law.

### **Bay of Bengal**

The Rohingyas constitute the majority of this large scale movement. Statistics may suggest in recent times that there has been a drop in numbers moving through the Bay of Bengal which was at its peak in May 2015. The reason for its decrease can be attributed to a lack of data collection, gaps in collation, and failure to track all movements due to the frequency of movement. In June 2016, isolated attempts to reach Malaysia and Australia, few individuals who utilized small boats, and stowaways on carriers were identified. UNCHR in Bangkok conjectures that the decrease in movement is due to the increased activity of Thai authorities, bolstering defense against small vessels, which is not necessarily effective; rather, it is costly and invites claimants to make exorbitant bribes and as a result, people are now arranging their own vessels. As a consequence, people are now exploring alternatives to the traditional means of movement.

Due to an increase in these barriers, smugglers now demand payment up front – a far cry from the preceding payment methods that people opted for – formerly, people would organize their mode of transport through a broker, and negotiate payment. Now, they demand a guarantor prior to departure.

The numbers of movement in the region has dropped off and it is not predicted that the amount of asylum seekers fleeing will rise. It is worth noting that the plummet in numbers is not telling of the situation in their countries of origin; conflict is still present for the reasons for refuge have not changed.

A distinct observation is the decrease of seaborne movements attributable to interdiction efforts by Bangladeshi and Thai authorities of information distribution to the parties concerned that detail the perilous nature of the asylum journey. However, increased difficulty of travelling via sea has forced people to consider travel via air and land, which in turn influences the number of transnational mobilization.

Prominent concerns posited by the UNHCR is that many countries lack a legal framework that deal with asylum seekers or do not recognize claimants in any capacity. Thus, legal pathways are becoming scarcer.

In response to this, the Bali process was established in 2002 as a forum to discuss human trafficking and transnational movements in the region. In 2016, the Bali Declaration was announced, which reinforced common values and posits with the Bali process, to determine commitments that include a better education for claimants and protection from people-smuggling, a dimension not enacted previously. More predictable disembarkation procedures were also thus outlined. In the context of its establishment, no countries were accepting vessels. Now with the declaration enacted, parties of the process now encourage states to provide cooperation and temporary access to ports to replenish supplies. It was acknowledged that there is a higher number of ships stranded at sea than is recorded, therefore it was determined that accurate data should be pursued. Furthermore, a lack of resources to respond to the unfolding challenges and a sporadic distribution of personnel who do not necessarily possess the expertise and skills to respond to the relevant issues were identified as underlying issues.

### **Asia-Pacific region**

This region spans from South-West Asia to include states as far as Australia and New Zealand. Persons of concern are generally from Central and South West Asia – 7.7 million people of concern are projected in this region. Although meagre, still a significant majority are from Afghanistan and Myanmar; Afghans constitute the largest refugee group globally. Two-thirds of these peoples are concentrated in urban areas and the protection needs of these refugees differ according to the region, and at best 1.5 million people are assumed stateless. However, this is an approximation for the nature of statelessness makes it difficult to pinpoint the exact figure.

Discoveries made by the UNHCR on smuggling have found there are many overlapping concerns over the shortage of legal pathways to travel. People are now forced to opt for people-smuggling, and thus a changing modus operandi has emerged. Fraudulent documentation is now a common means for travel, such as fake student visas and marriage contracts. Technologically advanced methods have also come into use – for example, fraudulent fingerprinting.

Other notable shifting trends are the existence of so-called transit states where people would use genuine documents then depart said country with forged documents. In addition, travel methods have become more sophisticated, seaborne travel has lessened, air travel has become more frequent, and the modus operandi of people-smugglers has become of a more refined quality – for example, the use of forged documents.

Most importantly, all who opt for travel through people-smugglers experience some form of trauma. Moreover, authorities who lack the expertise to respond to the unique traumatic experiences of claimants cannot effectively process or assuage their concerns.

What is clear from these findings is that human trafficking is endemic and the most vulnerable are women who are smuggled to states to be forced into the sex work industry. Nationals seeking asylum or victims of human trafficking are prevalent in the People's Republic of China, Bangladesh, and Malaysia.

In sum, mixed migration in Asia is not unique. However, it is crucial to note the common motivations are not necessarily economically based; the unfolding situation on ground can be attributable to people's motivations, or the fallacies within the refugee convention may be a cause for these emerging challenges.

## **Part 2. Discussions and Experience Sharing: Screening and Case Management Best Practices**

### **I. The UK Case** *Amanda Weston*

The spike of protection seekers in the UK has alarmed domestic politics, public and media response. A confluence of these factors have provided impetus to the decision making process, causing the process to become a reactionary system, which in effect implements a blanket policy with the purpose to expedite cases. Weston asserts this practice as problematic for it is prudent to implement a plan tailored to the actual events on ground and appropriate to the context. In the UK, fast-tracked procedures have gained traction, which is an accelerated procedure with additional supervision and control. The reason why this is problematic is due to the fact it is applied in a short window of time and 13 years after it was implemented the courts have just begun to deem all applications of it unlawful, yet applicants who sought this means of protection now have unresolved claims which has resulted in numerous litigation cases.

#### **1. Status Determination Issues**

- A key feature lacking in accelerated process is the lack of involvement of lawyers in the early stage. The cooperation of law experts can expedite and refine the scope of the problem and can better identify people who are at risk or not. The UK government has made provisions for directly non-funded organizations to hire individuals to carry out legal work which could be employed via the government. As a consequence, this saw the emergence of lawyers who were better equipped to deal with new issues, which in turn

created a network of lawyers who had established connections with NGOs domestically and internationally.

- Another issue encountered in this process was people abusing legal aid which would delay the legal process and hamper efforts. Weston advises that judiciary acts are sometimes necessary in order to facilitate determination process, as well as proper training of legal professionals to become literate in refugee law, and accreditation of said service providers.
- Accountability, a system of supervision that manages funding and peer reviewing of the quality of the practices being implemented to ensure the legal process is efficient and avoids falsified claims.

In relation to domestic politics in the UK experience, accelerated procedures have shown to be highly problematic; tailored programs are thus better suited to the actual conditions. For example, an influx of a certain group of cases at a certain time warrants specific needs, it is therefore worthwhile to utilize raw resources and personnel who can respond to the specific demands of the cases. Rather than implement a broad policy that seeks to address the cases comprehensively, it runs the risk of truncating the needs of the case, therefore it is advisable to devote resources and expertise tailored to the unfolding circumstances. The accelerated process overlooks the specifics of an individual case.

A truncated time scale means that the appropriate timeline is opaque and the sourcing of expertise of the process makers responsible for these cases was poor. In the UK in particular, for over 13 years, individuals who were processed swiftly and rejected within that time frame often sought litigation.

These cases and the evidence required of claimants to submit for their appeal would run parallel. For example, appellants whose applications which were rejected would often at that point of time only receive the necessary documentation to make a stronger claim, therefore they would once again attempt another application, which is then susceptible to judgment from decision makers and thus a vicious cycle forms.

## **2. Human Trafficking in the UK**

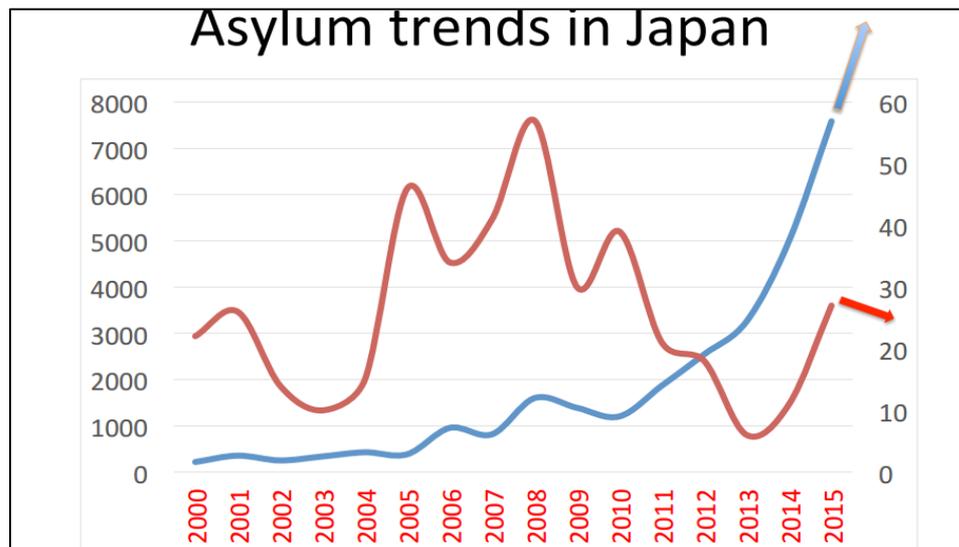
Human exploitation is a global issue and it is in the interests of states to deal with human trafficking problems with other states as it is vital to create an environment where this practice is condemned jointly and its eradication pursued actively. The exploitation of humans is not tolerated, for the hallmark of a civilized state is one that seeks to eliminate this practice. Placing systems and measures which disrupt these practices and provide protection and a safe environment for victims of this trade is an effective method to undermine this practice. In the UK, the system in place is known as the National Referral Mechanism (NRM) which is a framework for identifying victims of human trafficking or modern slavery and ensuring they receive the appropriate support.

The NRM is also the mechanism through which the Modern Slavery Human Trafficking Unit (MSHTU) collect data about victims. This information contributes to building a clearer picture about the scope of human trafficking and modern slavery in the UK. The NRM was introduced in 2009 to meet the UK's

obligations under the Council of European Convention on Action against Trafficking in Human Beings. At the core of every country's NRM is the process of locating and identifying "potential victims of trafficking."

## II. The Japanese Case *Prof. Saburo Takizawa (Japan for UNHCR)*

### 1. Asylum Trends in Japan



10,000 asylum seekers expected in 2016, but only around 20 will be recognized as Convention refugees, in addition to unknown complementary/humanitarian protection:

- Majority of asylum seekers are from ASEAN/South East Asia
- Small number of asylum seekers from China, Russia and NK
- Out of 500 Syrians in Japan about 70 sought asylum since 2011 (Zero in 2016. Most sought humanitarian status. Nobody was deported.)

Primary countries of origin and number of applicants (2015):

- |                        |                   |
|------------------------|-------------------|
| ➤ Turkey: 920          | ➤ Cameroon: 70    |
| ➤ Iran: 70             | ➤ Indonesia: 70   |
| ➤ Pakistan: 300        | ➤ Russia: No data |
| ➤ Sri Lanka: 470       | ➤ China: 160      |
| ➤ Nepal: 1700          | ➤ Bangladesh: 240 |
| ➤ North Korea: No data | ➤ India: 230      |
| ➤ Nigeria: 150         | ➤ Thai: 80        |
| ➤ Myanmar: 800         | ➤ Vietnam: 570    |
| ➤ Philippines: 300     |                   |

### 2. "Japan Bashing"

Japan has come under much scrutiny for its pale commitment to the developing refugee crisis. Many media pundits have characterized its stance as the following:

- "Door closed"

- Japan is closing doors to refugees amidst refugee crisis (Economist, April 2015)
- If you are a refugee, don't even bother with Japan (Reuter, March 2015)
- "Free rider"
  - Japan is seen to "free-ride" on asylum (global public good) provided by other states

### 3. MoJ measures taken since 2015

#### A. Acceleration of RSD process

Work started late in 2013 to "prioritize" cases aiming at reducing "abusive" cases

- Cases are classified into four categories:
  - A Category
    - Likely to get positive decision or humanitarian status
  - B Category
    - Did not submit any of the five reasons<sup>1</sup> (manifested unfounded)
  - C Category
    - Repeated claims without new evidences
  - D Category
    - All others
- A, B, and C Categories are processed expeditiously
- Work permit may not be given to B and C Categories

#### B. Articulation of decision criteria

Measure was initiated in response to criticism that decision criteria are opaque and too strict/restrictive. Currently, efforts to articulate "persecution" are being done.

- Convention refugee status is granted when the following conditions are met:
  - 1) <sup>1</sup>Reasons: Based on nationality, religion, race, political opinion, specific social group
  - 2) Object: Applicant is specifically targeted
  - 3) Subject: Persecutor is government agency
  - 4) Prevention: Effective domestic protection is missing
  - 5) Causality: Persecution causes imminent danger
  - 6) Severity: Grave/serious threat to life/liberty through unbearable harm
- Courts largely endorse MoJ's criteria and decision
- Notes on the Decision Criteria
  - All six conditions must be confirmed for refugee status; if any condition is not met, "complementary protection" or humanitarian status may be granted
  - There are high evidential thresholds
    - Requires documentary evidence
  - There is limited COI capacity due to the following:
    - Language barrier

- Limited sources
- Limited role of the UNHCR
- The quality of refugee examination councilors are also questioned

## C. Context surrounding MoJ Measures

### 1) Migration Policy

- “Japan will never accept migration” (Prime Minister Abe)
  - “Shrinking population is a chance for Japan”
- Officially, there are no immigrants in Japan, hence no national social integration policy is required
- However, in actuality, there are approximately 1 million foreigners living in Japan as technical trainees, students, or are Japanese descendants
  - Moreover, over 10,000 asylum seekers work in SMEs
- The Government intends to increase skilled workers, students, tourists, but not refugees
- The values underlying this migration policy can be summed up in the following sentence: “Japan is only for the Japanese; only those who are useful are allowed on a time limited basis.”

### 2) Economic Migration

- 80% of applicants are from Asian countries; only 1.5% are from “conflict countries.”
- In 2010, there was an increase when permission to work was given to all “legal” applicants after six months
- Income disparity, labor shortage, “no immigration policy,” tourist visa policy cause “abuses”
- Asylum system has become a channel of cheap labor migration

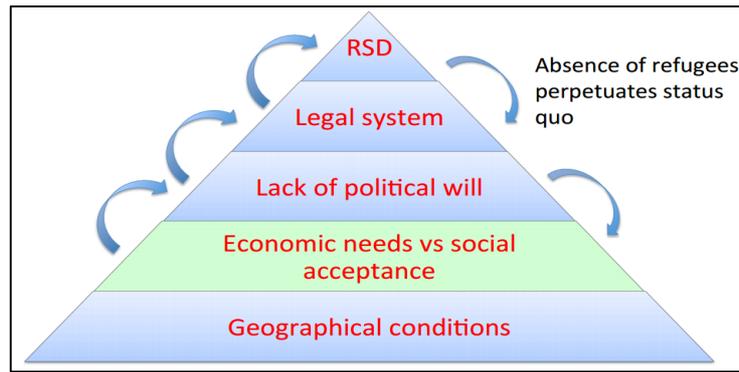
### 3) Social Anxiety; Low Social Acceptance

- In a survey to the public, the Asahi newspaper posed the following question and the responses were as follows:

2015 Asahi Newspaper Survey: **“Should Japan accept more refugees?”**

- Yes – 24%
- No – 58%
- There is a negative image of refugees, hence uneasiness prevails and is further exacerbated by the recent developments in Europe
- For politicians, refugee issue is a taboo, a risky agenda – only few politicians support a liberal refugee policy

What further compounds efforts to Japan’s commitment to refugees is the prevalent bureaucracy present in the government. Furthermore, the absence of refugees perpetuates the status quo. This is illustrated by the following diagram:



#### 4. 3rd Country Resettlement Program

- Indo-Chinese refugees in the 1980s
  - 11,000 were accepted
  - But there was insufficient integration support – many remained in low economic and social strata
- Myanmar refugee resettlement
  - First in Asia since 2010
  - Annual quota is 30 Myanmar refugees – only 120 came in 7 years (zero in 2012)
- Japan is not a popular destination
  - Although policy is based on the notion that “Japan is a preferred country of asylum”

#### 5. Notes on In-country Support

- Asylum seekers
  - Emergency shelter is provided for a few hundred claimants
  - Some are therefore in “homeless” conditions
  - Some (if visa holders) are allowed to work after six months
- Convention refugees and resettled refugees
  - Given six months residential training in Tokyo – inclusive of Japanese language training, social adaptation and job placement
  - The resettlement budget is \$1.5 million annually (for 30 people)
- Refugee community is too small to offer assistance
  - Therefore there is no chain migration
- Local governments
  - Not willing to take in refugees in the absence of subsidy

#### 6. Financial Assistance

- Japan’s financial contributions to the UN have been high
  - \$200 million~\$300 million for UNHCR (8% of budget)
  - Have assisted 2 million – 3 million refugees and Internally Displaced Persons
- Private donations for refugees are high
  - Japan for UNHCR collected \$25 million last year from 120,000 individuals
- Financial contributions face no objections from the public
  - In this context, Japan is not a free-rider, but contributions are “discounted” due to Japan’s small number of acceptance

- Visible domestic cost of acceptance < invisible international cost of non-acceptance

## 7. Recent Developments

- Immigration Policy
  - The Japanese governments is trying to attract “useful” foreigners:
    - Technical traineeship program has been expanded
    - New residence category for care and construction workers has been established
    - A target of 300,000 foreign students and 40 million tourists was set
- Refugee Policy
  - The government (MoJ) still has no intention to increase refugees
  - There is no resettlement of Syrians except for 150 students in five years
  - Asylum system, which costs \$4 million, is losing its credibility and relevance
- Private Sector Initiatives
  - UNIQLO has pledged to employ 100 refugees
  - JAR is accepting several Syrians on a private student sponsorship program

## III. The Philippine Case

*Ricardo Paras III (Department of Justice, Philippines)*

The Philippines, along with Cambodia, are the only signatories of the South East Asian states to the Refugee Convention. In its efforts to accomplish its tasks under the convention, the Philippines has established a system on status determination and the protection of refugees overseen by the Department of Justice. The relevant officers and agencies are thus mandated to actively pursue the protection of refugees and asylum seekers.

### 1. Historical Context

The Philippines has welcomed many seeking protection to its shores; presented here are three significant groups who had a particular impact on the social landscape and legal architecture of the state:

- A) The Jews escaping persecution during the Holocaust. President Quezon was willing to facilitate refugees escaping the Holocaust in the Philippines, leading the way to the official authorization of their stay as well as the Immigration Act of 1940, which remains effective until today.
- B) The White Russians, supporters of the Tsarist court opposed to the Bolshevik revolutionists, and anti-communists, sought refuge in China. However, when communism found its way into power under Mao Zedong, the White Russians became displaced and fled to the Philippines, where they were accepted. They were mainly situated in Tubabao Island in the Visayas.
- C) The Indochinese Refugees/Boat People in the Philippines, fleeing for political freedom following the fall of Saigon in 1979 and the communist invasions of

Laos and Cambodia. A mass exodus of Indochinese refugees erupted from these regions. In response, the Geneva Convention was set up to address the crisis, which resulted in a global commitment to facilitate settlement. Due to this meeting, all Vietnamese boat arrivals were automatically deemed as refugees. In addition, the Comprehensive Plan of Action (CPA) was implemented under the provision that the claimant's refugee determination would be carried on shore. 73 countries are signatories to this agreement, and those who were recognized were eventually resettled in resettlement countries, whereas those rejected were stranded in the Philippines to which the state determined to let claimants stay in country at the behest of the Catholic Church who urged under humanitarian reasons for their settlement in the Philippines.

## **2. Legal Framework**

Even before becoming party to the refugee convention 1951 and 1961 protocol, the Philippine immigration act of 1940, section 47 D stipulates the precedent to admit aliens, refugees who are fleeing political and religious persecution, and individuals who are not opposed to the public interests. Under 47 D visa, claimants are allowed to stay permanently in the Philippines, and as a result, many have become naturalized citizens.

From 1981 to 1988, UNHCR Philippines was primarily responsible for Refugee Status Determination (RSD). The Department of Justice (DOJ), also responsible for RSD, established the refugee application unit which in 1998 then transferred all of RSD cases to the DOJ.

## **3. Best Practices in the Philippine Context**

The government pursues policies that strengthen the protection environment for asylum seekers:

- In 2015, agencies sought to address key issues that involved affected parties – for example, the procurement and provision of materials for assistance, and social services to asylum seekers and stateless persons. Those who have shouldered this burden are mostly faith organizations that have been crucial in providing assistance to those concerned.
- Non-detention is a guiding principle with regard to accommodating refugees and stateless persons. However, it is at the discretion of the secretary of the justice to release the detainee if they are found to be a refugee in accordance to the guidelines delineated by the DOJ.
- Once an applicant claims refugee status they are summarily recognized as a refugee
- The body that undertakes cases is a constituent which operates under the auspices of the DOJ, which is supervised and controlled by the Secretary of Justice, therefore making the asylum process easy to conduct.
- No punitive measures shall be imposed on those who enter illegally into the state as long as the applicant duly alerts their presence to the authorities. According to Article 31 of the 1951 Convention, asylum seekers who enter the country illegally, especially those who enter with forged documents, will not be subject to punitive measures under the condition they present themselves and seek asylum immediately.

- Placing emphasis on the reservation of family unity and family reunification – this program is paramount to derivative refugee status, spouses and children who arrive after the principal refugee may be granted derivative refugee status subject to exclusion clauses. For this reason, spouses and family members below 18 or dependents who are economically, socially, and even emotionally reliant on the principal applicant may be conferred refugee status. The DOJ then distributes them documentation that deems them as asylum claimants.
- The system is non-adversarial and non-inquisitorial – the department espouses these values for the speedy protection of refugees and stateless persons consistent with international law and humanitarian concerns within the state of the Philippines.
- The proceedings are submitted to the DOJ without an opposing party. In this case, protection officers and the claimant have agency to determine the amount of information necessary to determine the credibility of the individual's claim. It also allows the decision-maker to have some insight into the general patterns and preceding cases regarding human rights and similar episodes.
- Non-refoulement and non-expulsion are key guiding principles of the Filipino system which discourages repatriation of the individual should their life or political freedoms be violated on account of their race, political leanings, and religion.
- Suspension of deportation proceedings upon application.
- Free access to legal aid to public authorities – the UNHCR entered a memorandum of understanding which sought to put into effect obtainment of legal counsel in all stages of the processing of administrative and judicial appeal of cases involving an indictment of a person's refugee status.
- Claimants' specific needs are referred to the relevant departments to assist them with their settlement and integration into the host society. For example – the Department of Social Welfare & Development (DSWD) assists with general well-being and the Department of Labor and Employment (DOLE) works to provide working visas
- Strictly confidential process in order to determine the veracity of the applicant's claim
- Right to assess Articles 17 and 18 provide claimants the right to wage employment and self-employment overlooked by DOLE
- Claimants also have an overall access to the following:
  - Social economic rights
  - Social security benefits
  - Public services
  - Free elementary education
  - Judicial and administrative citizenship procedures
  - Courts and legal assistance
  - Freedom of enjoyment of religion
  - Enjoyment of freedom of movement
  - Access to documentation

In summary, claims that the Filipino system is well equipped to process asylum seekers can be owed to long established mechanisms for the protection of refugees and asylum seekers.

**Annex**  
**Photos Taken During the Conference**

**Day 1 – Training Workshop Day – November 24<sup>th</sup>, 2016**



*Welcome Speech by Prof. Saburo Takizawa*

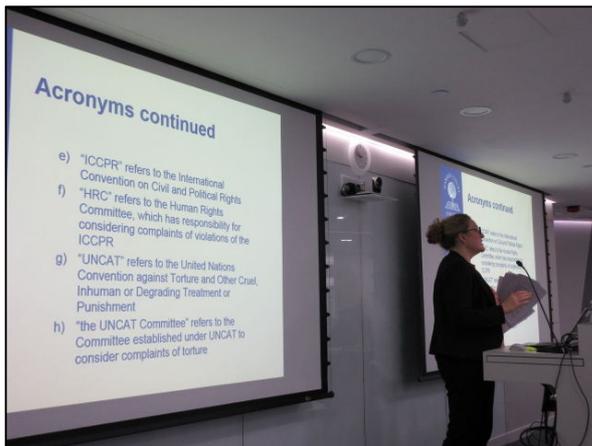


***Workshop 1 by Martin Treadwell***



***Workshop 2 by Bridget Dingle and Amanda Weston***

**Day 2 – Seminars and Tour of ISS Hong Kong – November 25<sup>th</sup>, 2016**



***Seminars by Amanda Weston and Bridget Dingle***



*Briefing c/o ISS Hong Kong*

**Day 3 – Seminars and Closing Remarks – November 25<sup>th</sup>, 2016**



*Briefing on Mixed Movement Trends by Ambrose Chiu*



*Sharing of Experiences and Best Practices (UK)*



*Sharing of Experiences and Best Practices (Japan)*



*Sharing of Experiences and Best Practices (Philippines)*



*Delegates and Participants – ANRIP Conference 2016, Hong Kong SAR*