

Credit:

UTokyo Online Education, Refugees and Migrants - International and Japanese Comparisons 2019 Allan Mackey

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**University of Tokyo, Graduate Program on Human Security.  
International Refugee, Complementary Protection, Migration -  
Course 2. November 2019**

**Course 2: Comparative approaches to refugee and other  
international protection**

Course leader : Allan Mackey (NZ & UK), fmr President (IARMJ)

Assisted by : Mai Kaneko (UNHCR)Tokyo,

Prof. Yasu Sato & Soojin Lee (UTokyo HSP).

And joined for Days 2 and 3 by: Martin Treadwell, President IARMJ A/P  
Chapter & Dep Chair NZIPT, Attorney Suzuki Masako, Prof.  
Ando Yukari

And also joined on Sunday 17<sup>th</sup> at 6pm by: Maria Josefina G. San Juan-  
Torres ( Regional Trial Court Judge, Supreme Court of the  
Philippines)

University of Tokyo, Graduate Program on Human Security.  
International Refugee, Complementary Protection, Migration -  
*Course 2. November 2019*

## Comparative approaches – Day 1:

1. UNHCR Tokyo role & Statelessness. (Mai san & ARM)
2. “Mandated refugees” NZ, Korea, (ARM & Soojin)
3. Complementary Protection /“gaps” beyond the CSR
4. Detention of asylum seekers: NZ, Japan, Korea?
5. A brief introduction to the UN Global compacts.
6. **Days 2 and 3** :Court decisions : Japan , Korea & International Refugee law

**University of Tokyo, Graduate Program on Human Security. International Refugee, Complementary Protection, Migration and Human Rights regimes -  
*Course 2. Nov 2019***



**COMPLEMENTARY PROTECTION  
(aka “subsidiary protection” in EU)**

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**Part 1: The International Perspective**

# COMPLEMENTARY PROTECTION

5

The principle of complementary protection derives from States' *non-refoulement* obligations under international law.

*“The term ‘complementary protection’ describes States’ protection obligations arising from international legal instruments and custom that complement – or supplement – the 1951 Refugee Convention. It is, in effect, a shorthand term for the widened scope of non-refoulement under international law.”*

Guy Goodwin-Gill and Jane McAdam  
*The Refugee In International Law*

# COMPLEMENTARY PROTECTION

6

What is meant by complementary? According to Ruma Mandal:

4. ...The term 'complementary protection' has emerged over the last decade or so as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously: 'subsidiary protection', 'humanitarian protection' and 'temporary asylum' to name but a few examples.

# COMPLEMENTARY PROTECTION

7

5. What all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention /1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country.

Ruma Mandal

*Protection Mechanisms Outside of the 1951 Convention  
("Complementary Protection")*

Legal and Research Policy Section, UNHCR (June 2005)

# COMPLEMENTARY PROTECTION

8

The primary sources of *non-refoulement* are in

- Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) which proscribe removal to torture or cruel, inhuman or degrading treatment or punishment; or to a place where a person may be arbitrarily deprived of their life.



# COMPLEMENTARY PROTECTION

9

## **Regional Approaches**

### **European Union**

The Qualification Directive has streamlined the complementary protection approaches of the member countries. It acknowledges that the Refugee Convention is the foundation of the international law regime that protects refugees but also provides for “subsidiary protection”.

# COMPLEMENTARY PROTECTION

10

## Regional Approaches

### Europe

The Qualification Directive defines ‘a person eligible for subsidiary protection’ as:

A third country national or a stateless person who does not qualify as a refugee but in respect of whom **substantial grounds have been shown for believing** that the person concerned, if returned to his or her country of origin... would face a **real risk of suffering serious harm as defined in Article 15**, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

# COMPLEMENTARY PROTECTION

11

## Regional Approaches Europe

Article 15 defines “serious harm” as:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

# COMPLEMENTARY PROTECTION

12

## Regional Approaches

### Africa

The 1969 OAU Convention incorporates the 1951 Refugee Convention definition of ‘refugee’ contained in article 1A(2) but also expands the definition:

The term ‘refugee’ shall also apply to every person who, owing to **external aggression, occupation, foreign domination or events seriously disturbing public order** in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

# COMPLEMENTARY PROTECTION

13

## Regional Approaches

### Americas

Conclusion three of the **Cartagena Declaration on Refugees (1984)** recommends that:

...the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees **persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**

# COMPLEMENTARY PROTECTION

14

## Regional Approaches

### Americas

While the Cartagena Declaration is not a formally binding treaty, its provisions are respected across Central America and have been incorporated in some domestic laws. Mexico has ratified the declaration and enacted domestic legislation meeting all the requirements of the Declaration, the only country in Latin America to do so.

All states except Cuba have ratified the Refugee Convention. The US has ratified the 1967 Protocol instead.

# COMPLEMENTARY PROTECTION

15

## Regional Approaches

### Americas

The USA has a CAT-based complementary protection system.

“Withholding of removal” protects against *non-refoulement* when an applicant can show he or she is “**more likely than not**” to be tortured in the country of removal.

*Immigration and Nationality Act*, 8 CFR §§ 208.16, 208.17 (1952)

Note the higher standard than “substantial grounds for believing”.

# COMPLEMENTARY PROTECTION

16

## Regional Approaches

### Americas

Canada has a system for both CAT and ICCPR determinations. The *Adjei* test was that both should also be decided using the same standard of proof:

“reasonable chance or serious possibility.”

BUT, this has since changed to a standard of “**on the balance of probabilities**” or “more likely than not” after *Li v Canada (Minister of Citizenship and Immigration)* [2005] FCA 1, at [18]–[28]. **The change is problematic** for both CSR & CP.



# COMPLEMENTARY PROTECTION

17

## Regional Approaches

### Australia

Complementary protection obligations are codified in the Migration Act 1958 (amended by the Migration Amendment (Complementary Protection) Act 2011).

Section 36(2) provides protection for people when:

The Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is **a real risk** that the non-citizen will suffer significant harm.

Real risk equates to a real chance.

# COMPLEMENTARY PROTECTION

18

## **PART 2: COMPLEMENTARY PROTECTION IN NEW ZEALAND**

# COMPLEMENTARY PROTECTION

19

The Immigration Act 2009 sets up a statutory scheme to address human rights concerns. The Refugee Status Branch (1<sup>st</sup> Instance) and IPT must consider these issues, *in this order*:

- ❑ Refugee status
- ❑ CAT protected person
- ❑ ICCPR protected person
- ❑ Any humanitarian appeal (IPT only)

# COMPLEMENTARY PROTECTION

20

## **NZ Act - s.129 Recognition as refugee**

(1) A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

# COMPLEMENTARY PROTECTION

21

## **NZ Act - s.130 Recognition as protected person under Convention Against Torture**

(1) A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

# COMPLEMENTARY PROTECTION

22

## **NZ Act- s.131 Recognition as protected person under Covenant on Civil and Political Rights**

(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

# COMPLEMENTARY PROTECTION

23

## **Primacy of the Refugee Convention... in statute**

### **s137 Matters to be determined by refugee and protection officer**

- (1) For each claim accepted for consideration, a refugee and protection officer must determine, in the following order:
  - (a) whether to recognise the claimant as a refugee on the ground set out in section 129; and
  - (b) whether to recognise the claimant as a protected person on the ground set out in section 130; and
  - (c) whether to recognise the claimant as a protected person on the ground set out in section 131.

# COMPLEMENTARY PROTECTION

24

## **Primacy of the Refugee Convention... by academics**

“[S]ubsidiary protection is only to be granted if a person does not qualify for refugee status, and stems from the rationale that the Convention is to be given full and inclusive interpretation. This is of particular importance in a regime that differentiates between protection needs based on the type of harm feared, since the result of wrongly classifying a claim has serious consequences for status. It also has theoretical significance, since characterising an individual as a subsidiary protection beneficiary without fully considering the application of the Convention may have the effect of stultifying that instrument’s development.”

Jane McAdam

“The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime” 17 IJRL (2005) 461



# COMPLEMENTARY PROTECTION

25

## **Primacy of the Refugee Convention... in NZ case law**

“[60] ... [T]he operation of the protected person jurisdiction under section 130 and 131 of the Act should not come at the expense of protection under the refugee protection jurisdiction under section 129. Therefore, approaches to the operation of the protected person jurisdiction which have or could have the effect of diminishing or undermining the relevance of the Refugee Convention as the cornerstone of the protection regime under the Act are to be avoided.”

*AC (Syria)* [2011] NZIPT 800035

# COMPLEMENTARY PROTECTION

26

Bearing in mind this critical need not to allow mechanisms for complementary protection to undermine the Refugee Convention, no aspect of complementary protection (including the degree of risk and the required severity of harm) should be interpreted in such a way as to provide a weaker standard than that required by the Refugee Convention.

# COMPLEMENTARY PROTECTION

27

How does this work in real life?

The essential elements in ss 130 and 131 are:

- **Evidential requirement** – “substantial grounds for believing”
- **Degree of risk** – “in danger of”
- **Harm** – “torture / arbitrary deprivation of life / cruel treatment”

# **“Alternatives to Detention” – Tokyo November 2019**

## **The New Zealand Immigration and asylum approach to detention of asylum seekers and irregular migrants**

**Allan Mackey**

**Former: Chair NZ Immigration and Refugee tribunals. Judge  
UK Upper Tier tribunal & President IARMJ.**

## “Alternatives to Detention” – November 2019

**NZ’s principal aims can be summed up as:**

- ***Avoid detention wherever possible.***
- ***Keep legality of status wherever possible.***
- ***That in all Refugee law and procedures to:***
- ***“Get it right first time”.***

# “Alternatives to Detention”

## Tokyo, November 2019

### **NZ approach to detention of asylum seekers and irregular migrants**

1. The underlying philosophy is summed up in Slide 2.
2. NZ has no mandatory detention of asylum seekers. Unlike Australia & many other states. Art 31 CSR51 is applied & asylum seekers are prima facie not treated as criminals
3. All NZ RSD aims to be high quality, promptly done and consistent with International norms.

# “Alternatives to Detention”

## Tokyo November 2019

### NZ aims for avoiding detention

- To ensure minimising detention a “Tiered process” is followed.
- At all steps the mind set of Immigration Officers(IO) is : “What is the lowest level of detention necessary in the public interest”.
- IO’s have delegated authority and can use a “generous” visa application process to ensure legality of status is maintained so far as possible.
- After expiry of visa there is a 42 day period to appeal on exceptional humanitarian and not against public interest grounds.

# “Alternatives to Detention” Tokyo November 2019

## Processes at the Border\*

IO conducts preliminary i/v to decide whether to accept or refuse entry irrespective of a claim for RS. IO checks:

- Valid passport
- Valid visa
- Return ticket
- Funds to maintain themselves
- Character –criminality, previous convictions NZ or elsewhere

\* The vast majority of RS claims are made at the airport border.



# “Alternatives to Detention”

## Tokyo November 2019

### Processes at the Border

- If purely irregular entry /migrant then “turnaround” procedures follow. ( i.e. next available plane out.)
- If IO finds the ID and/or it is a low risk asylum claimant, the IO will issue 1 month visit visa to allow time to lodge claim for confirmation with Refugee Status Branch. (RSB).
- If ID cannot be established or character concerns with claimant...

# “Alternatives to Detention” – Tokyo November 2019

## Processes at the Border

- Pragmatically to avoid detention IOs may detain for 4 hours to conduct suitable release arrangements, with claimants, which includes access to lawyer (and some legal aid).
- The release arrangements can include (under s.115 of Act)-so called “soft detention”. ( see photos of ‘Open Soft detention centre’) This has the benefit of no Court intervention. If ID and /or character issues are overcome in 28 days the claimant will get visit or work visa and go through usual RSD with RSB & IPT processing. (This takes usually no more than 9 -12 months max.)

# “Alternatives to Detention” – Tokyo November 2019

## Processes to minimise detention

- The “generous” visa approach used by IOs comes from a Ministerial delegation under s.61 of the Act.
- It is particularly useful as it allows IOs and claimants to overcome illegality of status and loss of appeal rights through oversights, misunderstandings and poor or wrongful advice.
- Thus often 1 day visa can be issued and then this allows a 42 day humanitarian appeal right becomes available.
- If , of course, the appeal right is not used or appeal to IPT fails the person can be deported.

# “Alternatives to Detention” – Tokyo November 2019

## Processes to minimise detention

- In practice IOs will discuss potential detention with people who are illegal and liable for detention and deportation. The process involves:
- Seeing if the person can be readily deported.
- If they can and are low risk IOs will encourage the person to leave voluntarily with a “compassionate” approach of :

# “Alternatives to Detention” – Tokyo November 2019

## Processes to minimise detention

1. Pointing out this avoids a 5 year ban on re-entry.
2. NZ will provide tickets in many situations with suitable repayment arrangements.
3. The person will also benefit in all future travel arrangements from having no deportation order against their name.
4. Their NZ record will show a “deemed deported” note only.

# “Alternatives to Detention” Tokyo November 2019

## Processes to minimise detention

5. The next possible step for IOs is a Restriction of Movement arrangement - termed (RRR), with the person. Soft detention is then an option as discussed above. This works well with no Court involvement, an agreed reporting arrangement and departure plan.
6. If there is criminality (in NZ or offshore) or wilful non compliance then if the person decides to use next available flight again they go with no warrant of commitment from the Court needed or against their name.
7. IO's discretion ( in terms of the Act)is always used with any potential refugee of protected person.