



Beyond Borders:

*Analysing Japan's Immigration and
Detention Landscape in Light of
International Legal Standards*



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INTRODUCTION

Japan has often been praised for its economic advancement, technological innovation, and commitment to peace.¹ The country's foreign policy contains a multitude of references to the promotion of peace internationally and humanitarian aid.² Yet, the Japanese government's lack of commitment to those seeking asylum within their borders is paradoxical to their other humanitarian commitments.³

Japan's approach to migration and asylum policy can be defined as restrictive, and as such it has been internationally criticised. The conditions of detainees at immigration facilities have been denounced for years by several human rights advocates, such as Amnesty International.⁴ Additionally, Japan's stringent policy for refugee recognition resulted in the acknowledgement of only 202 refugees in 2022 out of 3,772 applicants.⁵ Thus, legal scholars have critiqued that Japan's burden sharing responsibilities should extend beyond financial contributions,⁶ the principle of burden sharing is the equitable division of the diverse costs of granting asylum among a greater number of states.⁷ This principle has been articulated at international solidarity and responsibility sharing in a number of documents,⁸ summarising "respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community".⁹ Rather than formulating a holistic approach to address the needs of asylum seekers who are unable to repatriate, the Japanese government has concentrated its efforts on upholding strict standards for determining refugee status, erecting facilities for detention purposes and implementing rudimentary financial interventions.¹⁰

A significant legislative change occurred on June 6th, 2023, when Japan's Diet (parliament) passed an

- 1 Meryll Dean, *Japan: Refugees and Asylum Seekers* (United Nations High Commissioner for Refugees, Protection Information Section (DIP) 2006) 2.
- 2 Bert Edström, 'The Yoshida Doctrine in Uncharted Water' in Bert Edström (eds), *Japan's foreign policy in transition: the way forward for Japan as an international actor in a world in flux* (Institute for Security and Development Policy 2011).
- 3 Ibid; Marie Söderberg, 'Japanese ODA and Initiative for Peace Building' in Bert Edström (ed), *Japan's foreign policy in transition: the way forward for Japan as an international actor in a world in flux* (Institute for Security and Development Policy 2011) 45–46.
- 4 Amnesty International, *JAPAN: LONG-STANDING DISCRIMINATION UNCHANGED AMNESTY INTERNATIONAL: SUBMISSION TO THE 42ND SESSION OF THE UPR WORKING GROUP* (Amnesty International 2023) INDEX: ASA 22/5760/2022.
- 5 Atsushi Yamagata, 'A Critical Analysis of Japan's Decision to Accept Ukrainians Following the Russian Invasion in 2022' (2023) 00 Refugee Survey Quarterly 1, 11.
- 6 Michael Strausz, 'International Pressure and Domestic Precedent: Japan's Resettlement of Indochinese Refugees,' (2012) 20(3) Asian Journal of Political Science 247, 247-9; Yoshio Kawashima, 'Japanese Laws and Practices on Indo-Chinese Refugees' (1991) 38(1) Osaka University Law Review 1, 1-12.
- 7 James Milner, *When Norms Are Not Enough: Understanding the Principle and Practice of Burden and Responsibility Sharing for Refugees Paper No. 2* (Centre for International Governance Innovation 2018) 2.
- 8 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), 13; UN High Commissioner for Refugees (UNHCR): Division of International Protection, *A Thematic Compilation of Executive Committee Conclusions 7th Edition* (UNHCR 2014).
- 9 UNHCR, 'Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees' (16 January 2002) UN Doc HCR/MMSP/2001/09.
- 10 Minami Orikasa, *Seeking Asylum in Japan: Oral Tales of a Contemporary Other* (Graduate Institute Publications 2023) 4–5.

amendment to the Immigration Control and Refugee Recognition Act.¹¹ The present report delves into the ramifications of Japan’s Amendment Bill to the Immigration Control and Refugee Recognition Act, concentrating on its implications for asylum seekers.

Section 1 provides historical context on immigration in Japan. The second section discusses Japan’s Amendment Bill and its key provisions and changes, specifically the Bill’s alignment with Japan’s obligations under international law, most notably with the International Covenant on Civil and Political Rights (ICCPR). Finally, Section 3 draws on testimonies from migrant detainees and former migrant detainees. It summarises key findings and underscores the necessity of addressing these issues.

Background

Japan, a “Homogenous” Nation

To explain existing attitudes, laws and negative experiences of asylum seekers, a historically informed perspective on Japan as a self-imposed isolated and homogenous nation is vital. The idea of Japan as homogenous draws on *nihonjinron*, a post-war nationalist narrative emphasising the value of a state built for the *wajin* or Yamato ethnic group, a singular people.¹² The notion that fully participating in Japanese society is reliant on being of Japanese lineage legitimises the exclusion of minorities such as migrants.

Pre-war legal scholars made use of a discriminatory rhetoric that supported a united empire made up of different East Asian ethnicities under Japanese superiority.¹³ Japan, as an imperial power, deemed it could create unity in its colonial population through an assimilation policy which mandated Japanese education, culture, and surnames. This line of argumentation was elaborated upon by Hwaji Shin and Keiko Yamanaka, who found that sharing heritage was imperative during the 1864-1945 ethnically heterogeneous Asian empire.¹⁴ Oguma, while highlighting a difference in imperial and post-war Japanese identity, still noted displays of imperial identity which found diversity to pose a threat to the dominant culture.

The idea of the ‘self’ (Japanese hemogenic unity) and ‘other’, aside from enforcing homogeneity and ascribing a racial order within imperial Japan, reemerged in the 1980s with political officials describing Japan’s ‘mono-ethnic’ nature as being a part of its post-imperial identity.¹⁵ A political slogan emerged from this that is still used today, ‘Japan of one race, one nation, and one language’ (一國一民族一文化). This slogan finds no place for either national or international minorities in a traditional Japanese society. This rapprochement to imperial Japanese norms occurred after a

- 11 Teppei Kasai, ‘Japan Immigration Law Creates New Obstacles for Asylum Seekers - Heightened Risk of Refugee Applicants Being Returned Home to Harm’ (*Human Rights Watch*, 14 June 2023) Watch <<https://www.hrw.org/news/2023/06/15/japan-immigration-law-creates-new-obstacles-asylum-seekers>> accessed 27 September 2023.
- 12 Manabe Kazufumi and Harumi Befu, ‘Japanese Cultural Identity: An Empirical Investigation of Nihonjinron’ (1993) 4(1) *Japanstudien* 89, 93-4.
- 13 Oguma Eiji, *A Genealogy of Japanese Self-Images* (Trans Pacific Press 2002) 209-216.
- 14 Keiko Yamanaka, ‘Citizenship, immigration and ethnic hegemony in Japan’, in Eric Kaufmann (eds), *Rethinking Ethnicity: Majority Groups and Dominant Minorities* (Routledge, 2004) 161-3; Hwaji Shin, ‘Colonial legacy of ethno-racial inequality in Japan’ (2010) 39(3/4) *Theory and Society* 327, 327-342.
- 15 Masataka Okamoto, ‘Confusions regarding the concept of “Japanese” and Japanese nationalism’ (2011) 19(2) *Faculty of Human and Social Studies Bulletin, Fukuoka Prefectural University* 2, 79.

distancing from this history at the end of the Second World War, shrouded in historical amnesia of Japan's nationalist and imperial past.¹⁶

Many scholars have overlooked this history to focus on more recent history. The lack of recognition of how modern mobility narratives - including discourses on refugees - emerged from the homogeneity discourse is an effect of the focus on the recent past. The focus on the recent past as such has produced extremely problematic representations and attitudes towards migrants as it has invisible mobility histories.

Japan, its Colonial Past and Today's Media

Japan's loss of colonies played a crucial role in the formation of its national identity. As evidenced by the experiences of other former colonial states, attitudes towards mobility and migrants developed hostilely due to their association with the memory of decolonisation and a desire to separate oneself from the empire's failings. Along with the historical amnesia surrounding the mobile and ethnically diverse nature of Japanese society, there was a progressive alienation from its imperial past.¹⁷ Up to the (neo)colonial redrawing of the map of Asia itself and Japan's position on it by the Allied forces, the identities of colonial migrants were constantly changing along with the bounds of nationality. By February 1946, 1 million Koreans, 40,000 Chinese, and 18,000 Taiwanese had been sent back to their native nations.¹⁸ The 1950 revision of the Nationality Law (1899) resulted in the gradual deprivation of citizenship from colonial migrants who remained in Japan, turning them into outsiders in a nation that had formerly claimed them as its own. Due to the legal designation of their ancestors as "Zainichi," which implies that they are foreign and transient, they are still considered to be aliens.¹⁹ The 'myth' of Japan's homogeneity as a result of its internalisation by Japanese society and how it has grown accustomed to the erasure of its multi-ethnic and diverse history.²⁰ This is clear from the way immigration regulations, which just institutionalised pre-existing hostile sentiments and discriminatory practices towards the 'Other', were influenced by post-war notions of a homogeneous Japan and the stigmatisation of foreignness.²¹

The refugee crisis in Indochina from 1978, the significant influx of Japanese diaspora from Brazil and Peru (*nikkeijin*), and the growing number of migrant workers through the 2000s were all established as new risks to the government and its conception of Japanese society due to these significant gaps in collective memory.²² The discourse on migrants, refugees, and policy is informed by the discourse on homogeneity, and as such, despite foreigners in Japan being a politicised issue many government

16 Orikasa (n 10) Chapter 4: Perspectives on mobility in Japan.

17 Lori Watt, *When Empire Comes Home: Repatriation and Reintegration in Postwar Japan* (Harvard University Press 2010) 200.

18 Ibid, 3.

19 Min Byung Chae, 'The Evolving Zainichi Identity and Multicultural Society in Japan' (*The Yale Review of International Studies*, June 2020) <<http://yris.yira.org/comments/4092>> accessed 20 September 2023.

20 Mokoto Rich and Hikari Hida, 'In Japan, the Message of Anti-Racism Protests Fails to Hit Home,' (*New York Times*, 1 July 2020) <<https://www.nytimes.com/2020/07/01/world/asia/japan-racism-black-lives-matter.html>> accessed 22 September 2023.

21 Richard Siddle, 'Race, ethnicity, and minorities in modern Japan,' in Victoria Bestor, Theodore Bestor, and Akiko Yamagata (eds) *Routledge Handbook of Japanese Culture and Society* (Routledge 2011) 150.

22 Keiko Yamanaka, 'Return Migration of Japanese-Brazilians to Japan: The Nikkeijin as Ethnic Minority and Political Construct,' (1996) 5(1) *Diaspora: A Journal of Transnational Studies* 65, 78.

officials skirt the subject as there are differing and conflicting opinions between and within parties.²³

The failure to acknowledge migrants in Japan has been a challenge to the Japanese State's self-image as a champion for human rights.²⁴ At the 2015 United Nations General Assembly, in response to criticism from the international community of Japan's lack of burden sharing efforts, Prime Minister Shinzo Abe replied that "I would say that before accepting immigrants or refugees, we need to have more activities by women, elderly people and we must raise our birth rate. There are many things that we should do before accepting immigrants".²⁵ This statement can be best described as a tension between Japanese search for legitimacy in its state identity through the economic and democratic sphere, and their national identity as an ethnically homogeneous country.²⁶ Herein lies the inherent contradiction between Japan's large contributions to aiding the refugee crisis at the global level and their strict immigration policies.

Additionally, Japanese media discourse on asylum seekers fosters negative assumptions: there is often a distinction between 'fake refugees' (偽難民, *gisō nanmin*) and 'real refugees' (真難民, *shin no nanmin*); the low rate of refugee status approvals compared to applications is used to justify the dichotomy of 'real refugees' and 'fake refugees' or 'illegal' migrants.²⁷

Other Japanese media pieces state that

[u]nlike immigration nations like the United States and Australia, Japan is not accustomed to accepting people from abroad. Establishing a system that eases tensions, such as Japanese language education, vocational training, and a means to familiarise people with Japanese customs, will be essential when considering refugee policies.²⁸

This perfectly encapsulates the homogeneity discourse and policies focused on language and culture to 'fix' the gap between foreigners and Japanese people. Most immigration countries have a form of integration policy and on one hand it is necessary for migrants to comprehend Japanese language and society. However, Japan goes beyond other immigration nations as Japan is very critical of concepts of family reunification, legal protection, psychological assistance, and the right to education and employment and that is delusory.²⁹ This is particularly troubling because these beliefs affect how the public perceives migrants, and how Japanese anti-immigration policies are framed.

23 Akashi Junichi, 'New aspects of Japan's immigration policies: is population decline opening the doors?' (2014) 26(2) *Contemporary Japan* 175,186-192.

24 Terry Narramore, 'The politics of rights and identity in Japan,' (1997) 10(1) *The Pacific Review* 39, 39-56.

25 David Brunnstrom and Rodrigo Campos, 'Abe says Japan must solve its own problems before accepting any Syria refugees,' (*Reuters*, 30 September 2015) <<https://www.reuters.com/article/us-un-assembly-japan-syria-idUSKCN-0RT2WK20150929/>> accessed 20 September 2023.

26 Petrice Flowers, *Refugees, Women, and Weapons: International Norm Adoption and Compliance in Japan* (Stanford University Press 2009) 37; Atsushi Yamagata, 'Conflicting Japanese Responses to the Syrian Refugee Crisis' (2017) 15(24) *The Asia-Pacific Journal* 1, 4.

27 *Nikkei Shimbun*, 'Further reforms to protect "true refugees"' (*Nikkei*, 17 January 2018) <<https://www.nikkei.com/article/DGXXKZO25820240X10C18A1EA1000/>> accessed 19 September 2023.

28 *Ibid.*

29 James Clifford, 'Diasporas,' (1994) 9(3) *Cultural Anthropology* 302, 313.

AMENDMENT BILL & COMPATIBILITY WITH INTERNATIONAL LAW

2.1 International Standards of Detention

International human rights norms state that detention for immigration purposes should only be used as a last resort, be limited to adults, be used for the shortest term possible, and only when no less restrictive option is available.³⁰ The use of this measure could result in arbitrary detention, which is forbidden if it is not reasonable, necessary, lawful, and proportionate under Article 9 of the Universal Declaration of Human Rights (UDHR)³¹ and Article 9 of the ICCPR,³² to which Japan has been a party since 1979.³³

According to Article 9 of the ICCPR, personal freedom is the rule, while imprisonment and restrictions on that freedom are the exceptions. As a result, States are required to respect personal freedoms and only deviate from them in extreme circumstances.³⁴ For instance, when examining the detention of two asylum seekers in Japan with Turkish and Iranian nationality in August 2020, the UN Working Group on Arbitrary Detention concluded that this detention was not only arbitrary, but also discriminatorily based on their status as migrants, and thus violated Articles 2, 9, and 26 of the ICCPR.³⁵

The Committee Against Torture also determined that confinement solely centered on immigration status may constitute torture, especially when it is imposed or continued with the intent of discouraging, threatening, or penalising irregular migrants or their families, pressuring them to withdraw their applications for asylum, subsidiary protection, or other stays.³⁶ In these circumstances, holding migrants in detention would violate Articles 1, 2, and 16 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT),³⁷ to which Japan acceded on June 29th, 1999, as well as article 7 of the ICCPR.³⁸

According to the Working Group on Arbitrary Detention's Revised Deliberation No. 5 on Deprivation of Liberty of Migrants, "alternatives to detention must be sought to ensure that the detention is resorted

30 Ibid.

31 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 9.

32 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 9.

33 OHCHR, 'Ratification Status by Country or by Treaty (Japan)' (*United Nations Human Rights Treaty Bodies Database*, 2023) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=87&Lang=EN> accessed 4 October 2023.

34 ICCPR (n 32).

35 Human Rights Council (Group on Arbitrary Detention) 'Opinion No. 58/2020 concerning Deniz Yengin and Heydar Safari Diman (Japan)' (25 September 2020) UN Doc A/HRC/WGAD/2020/58, 100.

36 Felipe González Morales et al., 'Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention and the Special Rapporteur on freedom of religion and belief' (18 April 2023) UN Doc OL JPN 1/2023, 2.

37 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), arts 1, 2, 16.

38 OHCHR, 'Ratification Status by Country or by Treaty (Japan)' (n 33).

to as an exceptional measure” in the context of immigration proceedings.³⁹ Through the approval of the Global Compact for Safe, Orderly and Regular Migration, which Japan has endorsed,⁴⁰ Member States’ commitment to utilise immigration detention only as a last resort and strive towards alternatives to detention was reiterated.⁴¹

Detention and the Amendment Bill

Before the June 6th amendment, the Working Group on Arbitrary Detention’s opinion no. 58/2020 had already objected to the Immigration Control and Refugee Recognition Act of Japan. Given that the Act permitted indefinite immigration detention, the Working Group on Arbitrary Detention questioned whether it was consistent with Japan’s duties under international law, in particular with the ICCPR.⁴²

The Amendment Bill closely resembled its precursor, which was rejected in 2021 after previous communication (OL JPN 3/2021)⁴³ and public outcry following the death of Ratnayake Liyanage Wishma Sandamali, a 33-year-old Sri Lankan woman, in an immigration detention centre.⁴⁴ Japan’s immigration and refugee policies have long been entangled in bureaucratic red tape, with excessively restrictive measures. Many asylum seekers find themselves detained for extended periods in centres devoid of judicial oversight, and sometimes without access to adequate medical care.⁴⁵ The most recent available statistics of November 2020 count 22,624 migration detainees in Japan.⁴⁶ Even upon temporary release, immigration detainees in Japan are denied work permits, basic social services, and are even restricted from leaving their residential areas.⁴⁷

The new amendment bill keeps in place a presumption of a detention-based system. Articles 39 and 52 of the previous bill have been modified, and as of 2021, they no longer set the “monitoring measure” as an exception to detention.⁴⁸ Within Articles 44-3-5 and 52-3-5 of the new amendment bill, a monitoring measure can be the designated monitor providing updates on the subject’s day-to-day activities, provided that the supervising immigration inspector makes the request. The monitor would still be subject to a fine of no more than one-hundred-thousand yen if they were to break any of these

39 Human Rights Council ‘Report of the Working Group on Arbitrary Detention’ (18 July 2018) UN Doc A/HRC/39/45, Annex, 31-37.

40 United Nations ‘Participants (Japan)’ (*United Nations Global Compact*, 2023) <https://unglobalcompact.org/what-is-gc/participants/search?search%5Bkeywords%5D=japan&button=&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc&search%5Bper_page%5D=10> accessed 7 October 2023.

41 UNGA Res 73/195 (11 January 2019) UN Doc A/RES/73/195, 13.

42 Human Rights Council (Group on Arbitrary Detention) (n 35), 24.

43 Felipe González Morales et al., ‘Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention and the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment’ (13 March 2021) OL JPN 3/2021, 3.

44 Toshinari Takahashi, ‘Videos show callous treatment of detained Sri Lankan woman’ (*The Asahi Shimbun*, 4 March 2023) <<https://www.asahi.com/ajw/articles/14853685>> accessed 5 October 2023.

45 Amnesty International, ‘Japan: ‘Endless detention’: Migrants speak out as government proposes harsh immigration bill’ (*Amnesty International*, 14 March 2023) <<https://www.amnesty.org/en/latest/news/2023/03/japan-endless-detention-migrants-speak-out-as-government-proposes-harsh-immigration-bill/>> accessed 10 October 2023.

46 Global Detention Project, ‘Japan Immigration Detention Data Profile’ (*globaldetentionproject.org*, 2020) <<https://www.globaldetentionproject.org/countries/asia-pacific/japan#statistics-data>> accessed 16 November 2023.

47 Amnesty International (n 45).

48 Morales et al., (n 36) 2.

duties.⁴⁹ Articles 44-2-2-6 and 52-2-2-5 of the bill state that the supervising immigration inspector may still require the payment of a deposit of no more than three million yen if they believe it is necessary to stop the person who is the subject of monitoring measures from fleeing or from engaging in illegal work.⁵⁰ In general, monitoring measures are at the discretion of the monitor and inspector. In practice, the “monitoring measure” would continue to be unduly onerous, and may amount to socioeconomic status discrimination, having a detrimental effect on both the monitors and the migrants’ enjoyment of their right to privacy. To reiterate, even with the “monitoring measures”, there are no guarantees in the bill that detention measures will only be employed as a last resort.⁵¹ Additionally, the supervising immigration inspector, an administrative official, would have the option to decide whether to hold a person facing deportation or impose a “monitoring measure” until the individual can be deported.⁵²

2.2 International Standards on Deportation

Legislative efforts to lift the automatic suspension of deportation procedures for asylum seekers violate international human rights law and the principle of non-refoulement, in the absence of adequate procedural safeguards that expressly require individual assessment of the circumstances and protection needs prior to deportation.⁵³

Under international human rights, refugee, humanitarian, and customary law, the principle of non-refoulement constitutes an important and inalienable form of protection.⁵⁴ According to Article 33 of the Refugee Status Convention, to which Japan has been a party since 1981,⁵⁵ “no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion”.⁵⁶ Article 3(1) CAT, to which Japan acceded in 1999, also codifies this principle - specifically in relation to torture.⁵⁷ Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED),⁵⁸ to which Japan is a party since 2009, further notes non-refoulement,⁵⁹ applying to those who are legally recognized as does the Human Rights Committee’s general comment number 20, which reminds its importance in upholding state obligations under article 7 ICCPR.⁶⁰ In addition to this, the Working Group on Arbitrary Detention’s revised deliberation no. 5 on the deprivation of liberty of migrants states that the principle of non-refoulement must always be respected, and that to expel anyone in need of international protection,

49 Ibid 3.

50 Ibid 2.

51 Ibid, 1-2 & 5.

52 Ibid 4.

53 Ibid.

54 Ibid.

55 OHCHR, ‘Ratification Status by Country or by Treaty (Japan)’ (n 33).

56 Refugee Convention (n 8), art 33.

57 CAT (n 37), art 3(1).

58 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 12 January 2007, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) art 16.

59 OHCHR, ‘Ratification Status by Country or by Treaty (Japan)’ (n 33).

60 Human Rights Council, ‘General Comment 20’ in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (10 March 1992) UN Doc HRI/GEN/1/Rev.1, 30.

respective of their legal status, constitutes a violation of international law.⁶¹

2.2.1 Deportation and the Amendment Bill

For those who have applied for refugee status for a third time or more, Article 61-2-9 of the Amended Bill generally permits lifting the automatic suspension of the deportation procedure, thus executing the deportation itself.⁶² The new bill also maintains Articles 55-2-1 and 72-8, which state that refusal to leave will result in issuance of a deportation order⁶³ and that failure to comply will result in penalties including up to a year's imprisonment or a fine (Article 72-8 of the bill).⁶⁴ The restrictive standards used in reference to “complementary protection”, meaning subsidiary protection to persons who have not been recognised as a refugee within the 1951 Convention⁶⁵ have also been maintained since regulations within Articles 61-2-2 and 61-2-3 were not altered by the new amendment bill.⁶⁶

2.3 International Standards on Judicial Review

According to article 9(4) of the ICCPR, anybody who is imprisoned or otherwise deprived of their liberty has the right to file a claim so that a judge can promptly determine whether their imprisonment was legal and, if it was not, order their release.⁶⁷ The right to challenge the legality of detention in court is described as a self-standing human right in the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Liberty to Bring Proceedings Before a Court, and its absence constitutes a violation of human rights. It is applicable to all foreigners, including all types of immigrants, refugees and stateless people.⁶⁸

The Working Group on Arbitrary Detention recommended that “a maximum detention period in the course of migration proceedings must be set by legislation” and that “the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary”.⁶⁹ Japan's obligations under Article 9(1) of the ICCPR⁷⁰ are not reconcilable with their Immigration Control and Refugee Recognition Act, which allows for arbitrary, indefinite immigration detention. The same standards that apply to nationals should also apply to the custody of migrants, including the requirements of legality, necessity, proportionality and, in exceptional circumstances calling for administrative or preventative detention, periodic review.⁷¹

61 UN Working Group on Arbitrary Detention, ‘Revised Deliberation No. 5 on deprivation of liberty of migrants’ (7 February 2018) UN Doc A/HRC/39/45, 43.

62 Morales et al., (n 36) 5.

63 Ibid.

64 Morales et al., (n 26) 4.

65 UNHRC, ‘Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)’ (2005) UN Doc PPLA/2005/02, viii.

66 Morales et al., (n 36) 5.

67 ICCPR (n 32) art 9(4).

68 UNHRC, ‘Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court’ (6 July 2015) UN Doc A/HRC/30/37.

69 Human Rights Council ‘Report of the Working Group on Arbitrary Detention’ (n 43) Annex 31-37.

70 OHCHR, ‘Ratification Status by Country or by Treaty (Japan)’ (n 37); ICCPR (n 32) art 9(1).

71 UNCHR, ‘Report of the Special Rapporteur on Torture’ (2018) UN Doc A/HRC/37/50, 73.

2.3.1 Judicial Review and the Amendment Bill

The new measures under the Amendment Bill still make no provision for a maximum time of detention, or for a periodic court review of detainees.⁷² Under the Amendment Bills Article 52-8, a surveillance measure will be evaluated by the supervising immigration inspector every three months following the detention.⁷³ This, however, does not meet judicial review standards under international law. International law mandates that “any form of detention, including detention in the course of migration proceedings, must be ordered and approved by a judge or other judicial authority”.⁷⁴

Unless the supervising immigration inspector deems it appropriate to apply “monitoring measures”, as seen in Section 2.1.1 (Articles 52-8-2, -3, -4, and -5 of the new bill) or has made a decision on provisional release (Articles 54 of the Act), immigrants and asylum seekers who are subject to a deportation order would remain detained until the time of deportation.⁷⁵

The Working Group on Arbitrary Detention further maintained that *[a]nyone detained in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, legal, and non-arbitrary.*⁷⁶

Furthermore, indefinite imprisonment based only on a person’s immigration status may constitute torture and other forms of ill treatment, according to the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment.⁷⁷

2.4 International Standards on the Protection of Children within Migration Law

All migrant children must be granted all the rights outlined in the Convention on the Rights of the Child,⁷⁸ to which Japan has been a party since 1994.⁷⁹ This stance has been supported by the Committee on the Rights of the Child’s joint general remark no. 23 (2017) on States’ obligation to respect children’s human rights in the context of international migration in countries of origin, transit, destination, and return. Children should not be held in immigration detention, according to several special procedures mandate holders.⁸⁰ The Working Group on Arbitrary Detention has emphasised, regarding the loss of liberty of migrants, that it is forbidden to deprive an asylum-seeking, refugee, stateless or migrant children of their freedom - including in the case of unaccompanied or separated children.⁸¹

72 Morales et al., (n 36) 4.

73 Morales et al., (n 36) 3-4.

74 Morales et al., (n 28) 2.

75 Ibid.

76 Human Rights Council ‘Report of the Working Group on Arbitrary Detention’ (n 39), Annex, 31-37.

77 UNCHR, ‘Report of the Special Rapporteur on Torture’ (26 February 2018) UN Doc A/HRC/37/50.

78 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

79 OHCHR, ‘Ratification Status by Country or by Treaty (Japan)’ (n 33).

80 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of the Child ‘Joint general comment No. 4 (2017) and No. 23 (2017)’ (16 November 2017) CMW/C/GC/4-CRC/C/GC/23, 9.

81 UN Working Group on Arbitrary Detention (n 61).

2.4.1 Protection of Children and the Amendment Bill

The current amendment does not yet explicitly forbid the detention of children for immigration purposes, including unaccompanied minors, separated minors, and minors with their families. This lack of child-sensitive measures has grave consequences: for instance,, the Global Detention Project found that five children were placed in immigration detention in 2019 - in absence of more recent statistical data.⁸² This contravenes Japan's international obligations, as every migrant child should be treated as a child first and foremost, regardless of their immigration status.⁸³

82 Global Detention Project (n 46).

83 Morales et al, (n 36) 4.

CONCLUSION & THE LIVES OF MIGRANTS IN JAPAN

Testimonies of Migrants and Asylum Seekers in Japan and the Imposition of the Amendment Bill

As seen in Section 2, the Amendment Bill further undermines the rights of migrants and asylum seekers as it contradicts the obligations Japan holds toward the international community. The Director of Amnesty Japan stated that

[m]igrants have painted a grim picture of what it's like to claim refugee status in Japan. Their testimonies make clear that Japan's immigration detention system needs reform, but instead the Japanese authorities are attempting to pass an amendment bill that will enable them to carry on detaining asylum seekers and other irregular migrants by default.⁸⁴

In March 2023, months before the legislative change but soon after the proposal of the Amendment Bill, Amnesty International interviewed over thirty migrants and asylum seekers in Japan. Among these individuals, some were already being held in immigration detention centres, suffering for years due to the contemporary Japanese Immigration Control and Refugee Recognition Act. The conditions and policies before the Amendment Bill had already motivated hunger strikes in the immigration detention centres, as well as even suicide attempts.⁸⁵

In an Amnesty interview, a Nepalese former detainee recounted that he was physically abused by officers and placed in a 'punishment room' for refusing to stop an exercise in order to speak to the officers. The former detainee recalled that

[d]ozens of staff members came to the scene and after being beaten and slapped, I was taken to the isolation room. I had no memory afterwards... I also experienced isolation on a number of occasions, simply because I told them that this treatment was wrong in terms of medical care and food.

A Somalian migrant recalled "[f]rom when we wake up, we are treated like animals".⁸⁶

The Amnesty interviews focused on the detention centres; here, the only way out is temporary provisional release, which is not only rarely granted, but they lack clear criteria for eligibility. Once released, detainees do not even enjoy basic rights - being left with no support to find employment and denied basic public services such as medical insurance; this causes many to resort to extreme measures in order to secure temporary release.⁸⁷ A detainee shared that "the only way to get out of the immigration detention centre was to get sick or go on a hunger strike to the point of death".⁸⁸

According to Amnesty's interviews, many detainees have either witnessed suicides or attempted suicide themselves due to automatic and prolonged detention. A detainee said "I saw a person who tried to cut his throat in an attempt to kill himself. I saw many other people who had taken [swallowed] detergent in an attempt".

In November 2002, a man detained at the Tokyo Immigration Bureau took his life with a television

84 Amnesty International (n 45).

85 Ibid.

86 Amnesty International (n 45).

87 Amnesty International, *International Report 2022/2023 – The State of the World's Human Rights* (Amnesty International 2023) POL 10/5670/2023, 214.

88 Amnesty International (n 45).

cord when his provisional release permit was revoked.⁸⁹ The necessity for the Japanese government to end automatic and extended immigration detention is demonstrated by these migrants' accounts. Any incarceration should be for the least amount of time possible, and be without any cruel, inhumane, or degrading treatment. Worryingly, it must be reminded that these testimonies were taken before the even more stringent Amendment Bill was implemented.

Key Issues with the Amendment Bill

As Section 2 of this report outlined, the Amendment Bill breaches human rights law obligations which Japan owes to the international community. There are four specific concerns: i) the presumption of detention, coupled with indefinite detention; ii) the lifting of the suspension of the deportation procedure; iii) lack of judicial review; iv) detention of children.

Firstly, the Amendment Bill continues the presumption of detention, whenever “monitoring measures” and the application of such measures are without clear criteria, at the discretion of the immigration officer. As Sections 2.1 and 2.1.1 contend, this policy puts Japan in contradiction with its international obligations under Article 9 of the ICCPR and Article 9 of the UDHR, defending personal liberty and seeing detention as a last resort.

Secondly, the suspension of the deportation procedure for those who apply for refugee status but do not receive it violates the principle of non-refoulement, as outlined in Sections 2.2 and 2.2.1. Thus, Japan is acting against its obligations under Article 3 of the CAT, Article 16 of the ICPPED, Article 33 of the Refugee Status Convention, and Article 7 of the ICCPR which codify this principle. The absence of procedural safeguards and of the individual assessment of personal circumstances before deportation undermine the international human rights which these asylum seekers are entitled to.

Thirdly, as analysed in Sections 2.3 and 2.3.1, the Amendment Bill does not implement any judicial review nor a maximum time regarding immigration detention, aside from an immigration official conducting a review every three months. This, however, does not constitute judicial review under international standards seen by Article 9(4) of the ICCPR. Indefinite detention of migrants with no judicial authority infringes Japan's obligations towards both Articles 9(1) and 9(4) of the ICCPR.

Finally, as shown by the Working Group on Arbitrary Detention and Sections 2.4 and 2.4.1, the Amendment Bill does not explicitly prohibit the immigration detention of children. Such detention has occurred in at least five cases, contravening Japan's obligations within the Convention on the Rights of the Child.

As it stands Japan, with its Amendment Bill, further deprives migrants and asylum seekers of their fundamental human rights enshrined in the ICCPR, CAT, Refugee Status Convention, and ICPPED.

Conclusions and Recommendations

The exercise of migrants' human rights and dignity must not be adversely impacted by any migration governance measures, particularly those designed to manage irregular migration. Human rights extend to everyone regardless of nationality, age, gender, migratory status or other characteristics. To comply

⁸⁹ Ibid.

with their commitments under all the key international human rights treaties, States must ensure that human rights are at the forefront of their efforts to address migration in all its forms.

With regards to the Amendment Bill, it must undergo serious re-assessment in line with the advice of the Working Group on Arbitrary Detention, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on freedom of religion or belief, the Japanese Lawyers Network for Refugees, Network Against Arbitrary Detention, and Amnesty International. Without exception, the centre of any system must be our fundamental human rights, and not just their simple taking into account.

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