Opinion Paper regarding the Japanese Government's Comments on the Concluding Observations of the Human Rights Committee

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Japan Federation of Bar Associations

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The Japan Federation of Bar Associations (JFBA) has compiled this opinion regarding the Japanese Government's comments in response to the Concluding Observations of the Human Rights Committee ("The Committee") on its 5th periodic report. The Government Comments were submitted to the Committee on December 24, 2009, and posted on the Ministry of Foreign Affairs' website the following day.

The JFBA's opinions and their reasons are stated below, and listed in the same order as the follow-up points covered in the Government Comments.

1. Introduction to the Comments
   1. Opinion

      The JFBA highly values the fact that in the introduction to its Comments, the Japanese Government promised to "make efforts in addressing such significant issues as the establishment of a 'national human rights institution' and the ratification of optional protocols to the relevant UN human rights treaties which provide individual complaint procedures." The JFBA calls for the immediate enactment of the Committee's recommendations.

   2. Reason

      While the Comments include aspects that need to be improved upon, attention is given to the fact that it states, "The present situation of the concerned recommendations for which information on the follow-up was requested is as follows," implying that the Comments do not provide a final answer, and instead leave room for future developments.

      Also, despite not being points that required follow-up, the Government promised to "make efforts in addressing such significant issues as the establishment of a 'national human rights institutes' and the ratification of optional protocols to the relevant UN human rights treaties which provide individual complaint procedures." Here, the Government addressed matters raised in the Concluding Observations, of which comments were not required for the Follow-up Comments, showing the Committee's regard for them as issues of importance. The JFBA highly values such comments, and strongly calls for the urgent enactment of matters such as the establishment of a body to provide relief for human rights violations and the ratification of optional protocols to the relevant UN human rights

treaties that provide for individual complaint procedures.

2. Improvements on the Capital Punishment System (Paragraph 17)
   1. The establishment of a mandatory system of review in capital cases
      (1) Opinion

      The Government's response to the recommendation for the establishment of a mandatory system of review in capital cases is not substantive.

      (2) Reason

      The Committee noted with concern that "an increasing number of defendants are convicted and sentenced to death without exercising their right of appeal," and recommended, "the State party should introduce a mandatory system of review in capital cases (on appellate trials)."

      In response, the Government commented: "In Japanese criminal proceedings, the right to appeal a conviction or a sentence is widely recognized under its three-tiered judicial system. Additionally, in capital cases, defense counsel must be appointed, and the counsel is granted the right to appeal, with the result that many capital cases have been appealed."

      This is not a substantive response to the recommendation. Since 1993, the number of people whose death sentence was confirmed and who were then executed without exhausting their rights of appeal has increased to 26, which is over 30% of the total number executed. This includes two people who were sentenced to death in appellate trials despite being sentenced to life imprisonment in lower courts, and whose death sentences were confirmed without appeal to the Supreme Court. Among seven people who were executed in 2009, four people were confirmed their death sentences at their first trials – over half. A death sentence must not be erroneously handed down because it takes human life: Due to its particular nature and gravity as a criminal punishment, a mandatory system of review should be introduced in capital cases regarding the appeal procedure in the Code of Criminal Procedure, so that appellate trials are unfailingly carried out, regardless of the will of the defendant.

2. Suspension of execution during requests for retrial or pardon

(1) Opinion

The response substantively rejects the recommendation for the suspensive effect of requests for retrial or pardon, but no reason for this is indicated.

(2) Reason

The Committee noted with concern that “requests for retrial or pardon do not have the effect of staying the execution of a death sentence,” and recommended that the Government “ensure the suspensive effect of requests for retrial or pardon in such cases. Limits may be placed on the number of requests for pardon in order to prevent abuse of the suspension.”

In response, the Government stated: “Requests for retrial or pardon in capital cases have no effect on the suspension of execution under the Japanese criminal justice system. However, when issuing an order to execute capital punishment, given the magnitude of such punishment, the Government takes into full account circumstances concerning requests for retrial or pardon irrespective of the number of the requests.”

This is a negative response. Although it is true that in practice, execution is rarely carried out during requests for retrial or pardon, there have been cases of such execution in the past, and the effect of such requests on the suspension of execution should be clearly noted by amending the Code of Criminal Procedure.

3. Confidential meetings between death row inmates and the lawyers dealing with their request for retrial

(1) Opinion

The Government’s response to the recommendation for confidential meetings between death row inmates and the lawyers dealing with their request for retrial will consider need for improvement, including in regard to legislative measures, in order to improve upon current practices. Whilst this point can be viewed positively, such consideration is extremely insufficient as it is limited to “the need for improvement.”

(2) Reason

The Committee noted with concern ““that meetings of death row inmates with their lawyer in charge of requesting a retrial are attended and monitored by prison officials until the court has decided to open the retrial,” and recommended that the Government “ensure the strict confidentiality of all meetings between death row inmates and their lawyers concerning retrial.”

In response, the Government stated: “inmates sentenced to death whose appeal for retrial has not been granted may meet with their lawyers without the presence of prison officers at the discretion of the warden of the penal institution provided that certain conditions stipulated in the Act on Penal Detention Facilities and Treatment of Inmates and Detainees are satisfied.

In the case that the certain conditions mentioned above are not satisfied, the presence of prison officers is required at meetings of inmates sentenced to death, because the nature of their custody makes it highly necessary that these inmates be kept in secure custody and their emotional state carefully ascertained The recognition of the certain conditions has been considered, case by case, however, not universally. With regard to meetings between inmates sentenced to death and their lawyers, the need for legislative measures or improvement of operations will be considered.”

This response indicates that the need for improvement, including legislative measures, will be considered in order to improve upon current practices. Whilst this point can be viewed positively, it is extremely insufficient that the proposed consideration of this matter remains limited to “the need for improvement.” Urgently requiring consideration is not “the need for improvement,” but refers to the type of improvements that should be made and how they are to be implemented. Moreover, this comment reiterated the Government’s already known position that excessively emphasizes the need for secure custody and assessment of the situation of death row inmates, and such basic position itself goes against the principle of human rights protection and the legislative interpretation of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees. The confidential meeting of an inmate with the lawyer in charge of his or her trial should be assumed as a principle even under current

legislation (Sources include the verbal response of the Minister of Justice Seiken Sugiura in the Upper House Judicial Affairs Committee on April 5, 2006). Before revising the law, the Government should immediately begin deliberations in order to thoroughly amend this practice. The Government should amend the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, during its review on the fifth year since its enactment to incorporate the Committee's recommendations. Namely, to ensure strict confidentiality between the inmate and his/her lawyer, and confidential meetings under the same conditions as with a lawyer dealing with a criminal trial. Regarding the amendment of legislation, it should first be clearly noted that the fundamental rule is to ensure confidential meetings, and the requirements for imposing exceptions to this rule should be laid down as strict conditions that can only be stipulated by law. Moreover, it should be clearly noted that even if permission is granted to limit a confidential meeting, the meeting itself cannot be forbidden.

3. Reform regarding the Substitute Prison (*Daiyo Kangoku*) System and Criminal Defense (Paragraph 18)
   1. Abolishing the Substitute Prison System
      (1) Opinion

      The only way to avoid "the risk of prolonged interrogations and abusive interrogation methods with the aim of obtaining a confession" is to abolish substitute prisons, which the JFBA has consistently called for. The Government should not use reasons such as the lack of detention centers, the convenience of visitation, and the fact that it is taking measures to completely separate investigation and detainment within the police institution, as justification for the failure to abolish the substitute prison system...

      (2) Reason

      The Committee stated: "The Committee reiterates its concern that, despite the formal separation of the police functions of investigation and detention under the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, the substitute prison system (*Daiyo Kangoku*), under which suspects can be detained in police detention facilities for a period up to 23 days to facilitate investigations,

without the possibility of bail and with limited access to a lawyer especially during the first 72 hours of arrest, increases the risk of prolonged interrogations and abusive interrogation methods with the aim of obtaining a confession," and that "The State party should abolish the substitute detention system or ensure that it is fully compliant with all guarantees contained in Article 14 of the Covenant".

The Government responded: *"Under the Japanese criminal justice system, a decision of whether or not to indict a suspect is required through comprehensive and careful investigations within a relatively limited detention period of 20 days maximum. Therefore, it is necessary to detain the suspect 1) in a location easily accessible to the investigating bodies and 2) in a place with appropriate interrogation rooms and related facilities."* The Government implied that it is difficult to abolish substitute prisons on grounds such as the lack of detention centers, the convenience of visitation, and the fact that it is taking measures to completely separate investigation and detainment within the police institution.

However, there is no other system in the world where police detention can be continued for as many as 20 days. In addition, the excuse that it is impossible to construct detention facilities cannot be accepted today, 30 years after the problem of substitute prisons was first pointed out by the JFBA. The only way to avoid "the risk of prolonged interrogations and abusive interrogation methods with the aim of obtaining a confession" is to abolish substitute prisons, which the JFBA has consistently called for. The JFBA is not calling for the immediate abolition of all substitute prisons however: the Government should begin with abolishing the detention of suspects to whom it would cause more adverse effects, such as those who deny the alleged crimes and juvenile suspects.

2. The right to confidential access to a lawyer and access to legal aid

(1) The right of access to a lawyer

(1) Opinion

The Government response was insufficient in its failure to mention the abolishment of the designated interview system. The standing order cited in the Government's response was also

problematic in that the order allows interrogations to continue until breaks or mealtimes, notwithstanding requests for meetings with lawyers, thereby not permitting such requests to interrupt the interrogations and assigning a higher priority to the latter.

(2) Reason

The Concluding Observations of the Committee pointed out the fact that meetings with lawyers were being rejected on the basis of the designated interview system, and required the elimination of Article 39 (3) of the Code of Criminal Procedure.

The Government should also amend Article 37 (2) of the Code of Criminal Procedure to enable suspects to have court-appointed defense counsel not only when detention order has been issued, but from the time of arrest. This should also apply of course, in instanceswhen an individual is asked to voluntarily attend the police station, and during his/her subsequent voluntary interrogation.

In the Ashikaga Case, the suspect was coerced into making a false confession after voluntarily going to the police. Arrest procedures then followed. The voluntary accompaniment of suspects to police stations in Japan should be viewed in the same way as custodyregarding matters such as the limitation of the custody period and the provision of court-appointed defense counsel, the same safeguards provided at the time of arrest should be applied from when the suspect is asked to go voluntarily to the police station and during the interrogation. The UN Human Rights Committee, have clarified the view, in regard to individual complaints that those in pre-charge custody have the right to access legal aid.[1]

Under the current system, suspects cannot access court-appointed defense counsel unless they are suspected of crimes with a statutory penalty of more than three years in prison. Suspects should be given access to court-appointed defense counsel regardless of the nature of the crime they charged with.

In response to this concluding observation, the Government stated: *"Article 39 (1) of the Code of Criminal Procedure stipulates*

[1] Borisenki v. Hungary (852/99)

that suspects in custody have the right to interview with their counsel or prospective counsel without any official being present, whene ver they wish, unless investigation requires otherwise. The Japanese police have offered further consideration for interviews between suspects and their defense counsel or prospective counsel since September 2008. For example, if a defense counsel or prospective counsel requests an interview with a suspect under interrogation, an appointment must be arranged as soon as possible." "Additionally, in April 2008, the Public Prosecutor's Office publicized measures to ensure appropriate interrogation to a further extent. Such measures include that: 1) the Public Prosecutor's Office immediately informs a defense counsel if a suspect under interrogation requests a consultation with the counsel and 2) the Office grants an opportunity as soon as possible if a defense counsel requests a meeting with a suspect under interrogation. Interrogation is being conducted in line with the above-mentioned measures."

However, it cannot be overlooked that this does not mention the abolishment of the designated interview system, and furthermore, the Government instruction mentioned above was also problematic in that it allowed interrogations to continue until breaks or mealtimes, notwithstanding requests for meetings with lawyers, thereby not permitting such requests to interrupt the interrogations and assigning a higher priority to the latter.

(2) The system for court-appointed defense counsel for suspects

(1) Opinion

The response by the Government is not incorrect as a description of the process, but urgent improvement is needed as the right to request court-appointed defense counsel is still not guaranteed for all cases when the suspect is in custody. The appointment could be made only upon the Court's decision to detain the suspect.

(2) Reason

It is true that *"Since May 2009, the scope of this stipulation has been widened to include cases in which a suspect has allegedly committed 'crimes punishable with the death penalty, life imprisonment with or without labor or for a maximum period of*

three years or more.' This change in scope requires that the court appoint defense counsel in necessary cases even before indictment." However, urgent improvement is needed because the right to request court-appointed defense counsel is still not guaranteed for all cases; namely, whilst the suspect remains in custody,. The appointment could be made only after the court has issued the decision to detain the suspect.

3. Disclosure of evidence held by criminal investigation authorities

(1) Opinion

The Government's response clarified that it will assess the current system of disclosure of evidence and whether or how it might be improved. This can be viewed positively. The Government is strongly requested to give further consideration towards establishing a system of full disclosure.

(2) Reason

The Committee recommended that the Government secure the right of lawyers to the disclosure of all evidence held by criminal investigation authorities.

The prosecutor's duty to disclose all evidence that benefits the defendant is the result of the principle of equal footing between the two parties, articulated many times by the Human Rights Committee.

The Human Rights Committee's General Comment 32 (90) (Right to equality before courts and tribunals and to a fair trial, July 2007) states the following in regard to equality before courts and disclosure of evidence:

"13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant 13." The annotation referred to in the above text is as follows: "13 Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4." It is also stated: "33. "Adequate facilities" must include access to documents and other evidence; this access must include all materials 69 that the prosecution plans to offer in court against the accused or

that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense (e.g. indications that a confession was not voluntary)."

In response to this observation, the Government stated: *"The amendment of the Code of Criminal Procedure in May 2004 provides that the prosecutors should disclose evidence for clarifying issues in dispute and preparing for the defense of the accused, while balancing the need for disclosure against possible adverse effects. The Government of Japan will continue to study what disclosure of evidence is appropriate based on the implementation of the above -mentioned procedure."* Article 316 (2) to (32) of the Code of Criminal Procedure, the result of the "amendment of the Code of Criminal Procedure in May 2004," is not a system for full disclosure but only partial disclosure, allowing the prosecutor discretion in "balancing the need for disclosure against possible adverse effects." TThe defendant must reveal his or her arguments and evidence to be presented in advance to the prosecutor and court in order to receive partial disclosure.The Government's response clarified that it will assess the current system of disclosure of evidence and whether or how it might be improved. This can be viewed positively. The Government is strongly requested to give further consideration towards establishing a system of full disclosure.

4. Adoption of a pre-indictment bail system

(1) Opinion

It is stated that, *"There exist mechanisms that ensure a judicial review even during a short detention period before indictment and pre-indictment bail of the suspect if necessary.*[1]*"* However, this mechanism hardly functions in practice. The lack of a pre-indictment bail system means that until indictment,almost all suspects are held in police detention centers (*Daiyo Kangoku*, or substitute prisons) even after their detention order has been confirmed by the courts, allowing

[1] In Japan a pre-indictment bail system is not adopted. " *pre-indictment bail of the suspect if necessary. "should be corrected as releasement of the suspect*

this period to be used for interrogation by the police and the prosecutor. The Government stated, adoption of the pre-indictment bail system that the Committee recommends is a subject for future consideration, and did not deny the possible adoption of the system. The Government is strongly requested to give further consideration towards urgently realizing the adoption of a pre-indictment bail system.

(2) Reason

The Committee requires the adoption of a pre-indictment bail system. Given this, in order to substantiate the principle of non-custody at the pre-trial stage, the JFBA has requested the Government to delete the provisory clause in Article 207 (1) of the Code of Criminal Procedure to apply the bail system to suspects, and to adopt measures to ensure appearance, as stated in the JFBA "Proposal for adoption of measures to ensure appearance," which was released on July 16, 2009. The Government stated: *"Under the Japanese criminal justice system, the investigation is conducted on non-compulsory basis in principle. The arrest or the detention of suspects is allowed only in extremely limited cases after the review by judge. There exist mechanisms that ensure a judicial review even during a short detention period before indictment and pre-indictment bail of the suspect if necessary. It is a matter for consideration whether it is necessary to introduce a system of releasing suspects before indictment as the Committee recommends."*

As the JFBA informed the Committee during the 5th periodic review process, after arrest, a warrant for detention is provided as the investigating authorities request, and lawyers do not have the right to attend the review by the judge, depriving the process of practical meaning.

It is stated, *"There exist mechanisms that ensure a judicial review even during a short detention period before indictment and pre-indictment bail of the suspect if necessary."* However, this mechanism hardly functions in practice. The lack of a pre-indictment bail system means that until indictment, most suspects are held in police detention centers (*Daiyo Kangoku*, or substitute prisons) even after their detention has been confirmed, allowing this period to be

used for interrogation. The Government stated, however, that it regards whether or not to adopt the pre-indictment bail system that the Committee recommends a subject for future consideration, and did not deny the possible adoption of the system. The Government is strongly requested to give further consideration towards urgently adopting of a pre-indictment bail system.

4. Interrogations and Investigation (Paragraph 19)
   1. Legislative limit to length of interrogation period
      (1) Opinion

      The Government stated that appropriate limitations are established through internal regulations, but the Committee has recommended limiting the time for interrogation through legislation with sanctions, instead of internal regulations. Internal regulations, which can be affected by the unpredictable and diversified nature of investigation, cannot prevent coercive interrogations that lead to false confessions. The Government should follow the Committee's recommendation.

      (2) Reason

      The Committee recommended that, "The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance […] with a view to preventing false confessions and ensuring the rights of suspects under Article 14 of the Covenant."

      Given this, the JFBA requested the revision of the system to "amend the Code of Criminal Procedure, and prescribe the maximum time for interrogation at 5 hours (2 hours in the morning and 3 hours in the afternoon). Interrogation hours would be regulated to be from 10am to (taking time for meals and breaks). However, when unavoidable, with the permission of the court, interrogations can be carried out to a necessary and reasonable extent.

      Interrogation of suspects/defendants who are arrested or detained should comply with the schedules regulated by the police institution, such as mealtimes and bedtime, and interrogation should not be allowed at night."

      The Government, in its comments, while admitting that *"There is no law that provides an interrogation which exceeds certain duration or*

time limit is per se illegal, because of the unpredictable and diversified nature of investigation," stated that *"In recent years, however, Japanese police officers and prosecutors have been paying more attention than ever to the duration and the hours of interrogations in order not to place excessive burdens on suspects. Unless they have compelling reasons, they refrain from interrogating suspects during the middle of the night or for long hours,"* and that *"The police have prescribed clearly in their own regulation that they shall avoid conducting the interrogation of a suspect in the middle of the night or for a long period of time, except when there are unavoidable reasons. The police have their own rule for conduct that require advanced approval by the Chief of the respective Prefectural Police or other appropriate officers when interrogation is to be carried out over eight hours in a single day, for example, and that if police officers conduct interrogation without such advanced approval, the interrogation is to be stopped or appropriate measures are to be taken." "Additionally, Japanese police officers and prosecutors document the interrogation process and conditions and have suspects confirm and sign a record with a fingerprint; and the police have their own regulation regarding this point."*

However, the Committee has recommended limiting the time for interrogations through legislation with sanctions, instead of internal regulations, because it is believed that internal regulations are affected by the unpredictable and diversified nature of investigation, and cannot prevent coercive interrogations that lead to false confessions. The Government should follow the requests of the Committee and the JFBA.

2. Full transparency of interrogations and attendance by lawyers

(1) Opinion

The partial recording of confessions, as described in the Government's response, does not at all prevent acts such as forced confessions from taking place at times that are not recorded. Partial recording is dangerous not least because itmay give those trying to ascertain the facts false impressions of the confession. Such partial recording does not fall within the "the systematic use of

video-recording devices during the entire duration of interrogations," as recommended by the Committee.

Nevertheless, the Government stated, *"Additionally the Government of Japan studies measures to address this issue including research on the situation of criminal investigations, such as methods of criminal investigation and conditions of audio or video recording of interrogations in foreign countries,"* maintaining that it is looking into measures being taken in other countries regarding the full recording of interrogations, including criminal investigation methods. Although the Government's statement that the matter is currently under consideration can be positively assessed as a response reflecting the proactive position of the current Minister of Justice towards the recording of the full interrogation process; it is still insufficient. The Government should make its stance clear regarding the issue of making full recordings, as was clarified in the Ruling Democratic Party's manifesto before the 2009 Parliamentary election.

(2) Reason

The Committee recommended that the Government "ensure the systematic use of video-recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations."

Given this, the JFBA requested the Government to "amend the Code of Criminal Procedure, and give the defense counsel the right to be present at the interrogation of the suspect/defendant, and make sure that interrogation cannot be carried out without the presence of the defense counsel in cases when the suspect/defendant or the defense counsel is requesting the defense counsel's attendance of the interrogation." The JFBA also stated, "The situation of the interrogation of the suspect or the accused should be electronically recorded from the beginning of the interrogation to its end."

In response, the Government stated: *"In order to examine ways to demonstrate to lay judges the voluntariness of confessions by suspects in an effective and efficient manner, the police have been trying the audio or video recording as an appropriate part of an interrogation to the extent that it does not hamper the functioning of the interrogation.*

The Public Prosecutor's Office has also been trying the audio or video recording of an appropriate part of an interrogation to the extent that it does not hamper the functioning of the interrogation based on the prosecutors' judgment and responsibility as part of its consideration of ways to prove the voluntariness of confessions by suspects effectively and efficiently, in lay-judge cases. The Supreme Public Prosecutor's Office compiled and reviewed the result of the experience in February 2009. Based on the review, since April 2009, the prosecutors have conducted the above-mentioned recording in all lay-judge cases in which the accused pleaded guilty."

The partial recording after the confessions, as described in the Government's response, does not prevent acts such as forced confessions from taking place at times that are not recorded. It is even dangerous in that it may give those trying to ascertain the facts false impressions regarding the confession. Such partial recording does not fall within the "the systematic use of video-recording devices during the entire duration of interrogations," as recommended by the Committee.

Nevertheless, the Government stated, *"Additionally the Government of Japan studies measures to address this issue including research on the situation of criminal investigations, such as methods of criminal investigation and conditions of audio or video recording of interrogations in foreign countries,"* maintaining that it is looking into measures being taken in other countries regarding the full recording of interrogations, including criminal investigation methods. Although the Government's statement that the matter is currently under consideration can be positively assessed as a response reflecting the proactive position of the current Minister of Justice towards the recording of the full interrogation process; it is still insufficient. The Government should make its stance clear regarding the issue of making full recordings, as was clarified in the Ruling Democratic Party's manifesto before the 2009 Parliamentary election.

With regard to defense counsel's presence at interrogations, the Government only responded in relation to the appointment of, and meetings with the defense counsel and stated that such measures *"make interrogations appropriate,"* which is not a direct response to

the Committee's recommendations.

3. Criminal Investigations and the role of the police in criminal procedures

(1) Opinion

The Government's response, that the goal of criminal procedure is to reveal the true facts in a case and police investigation is aimed at solving cases by revealing this truth, is missing the point of Committee's observation. Granted that one of the goals of a criminal case is *"to reveal the true facts of cases,"* it is still clear that the role of investigation, which as a procedure in preparation for trial, is not to establish the truth, but to collect evidence. The confirmation of this premise should be the starting point to transform current criminal investigations, which overemphasize confessions. The Government's response, which does not admit this fundamental truth, is incomprehensive, and this is an object of serious concern as it reveals the Government's lack of understanding regarding the Committee's intentions.

(2) Reason

The Committee recommended that the Government "also acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations."

This point was made based on the accurate understanding of serious mistrials that have recently come to light, such as in the Shibushi, Ashikaga and Fukawa cases, whereby investigative bodies tried to conclude the case by gaining confessions, instead of collecting objective evidence. This point includes the extremely important implication that in order to prevent mistrials, reform is needed regarding interrogations that take place over long hours and the overemphasis on obtaining confessions in investigations.

Given this, the JFBA has requested the Government to legislate that "confessions made through the process of cruel, inhumane or degrading treatment" and "confessions collected in violation of interrogation time limits" cannot be used as evidence. Furthermore,

that evidence examined at trial must be stored for re-examination.

In its Comments, however, the Government only made the off-point comment that: *"Japan's Code of Criminal Procedure, which covers all criminal procedures ranging from investigation to indictment, trial, and the execution of a sentence, stipulates that 'the purpose of this Code, with regard to criminal cases, is to reveal the true facts of cases and to apply and realize criminal laws and regulations quickly and appropriately' (Art. 1). Investigation by the police is aimed at solving cases by revealing the truth."* Granted that one of the goals of a criminal cases is *"to reveal the true facts of cases,"* it is still clear that the role of investigation, which as a procedure in preparation for trial, is not to establish the truth, but to collect evidence. The confirmation of this premise should be the starting point to transform current investigations, which overemphasize confessions. The Government's response, which does not admit this fundamental truth, is incomprehensive, and this is an object of serious concern as it reveals the Government's lack of understanding regarding the Committee's intentions.

5. Solitary confinement (Paragraph 21)

1. General rule of solitary confinement for inmates on death row

(1) Opinion

The Government's response was that it would improve its operations, but this only takes alternative measures while continuing to maintain the general rule of solitary confinement; moreover, the content of the measures is nothing new, and the Government did not respond sufficiently to the Committee's recommendations.

(2) Reason

The Committee expressed its concern "that death row inmates are confined to single rooms day and night, purportedly to ensure their mental and emotional stability," and recommended that the Government "relax the rule under which inmates on death row are placed in solitary confinement."

Ever since the amendment of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, the JFBA has opposed the

use of the argument of maintaining the inmates' "peace of mind" as a basis for limiting their rights, and has opposed the general rule of solitary confinement for death row inmates.

The Government responded: *"The Act allows inmates sentenced to death to make contact when deemed advantageous to maintaining their peace of mind. Moreover, in order to save the inmates from the suffering of isolation and to contribute to their peace of mind, penal institutions have contrived measures such as counseling provided by nongovernmental volunteers, religious services offered by chaplains, consultation by prison officers if necessary, and opportunities to watch television and videos. Further improvement of the treatment of inmates will continue to be sought."*

The Government's response was that it would improve its operations, however the above response merely takes alternative measures whilst continuing to maintain the general rule of solitary confinement; moreover, the content of the measures is nothing new, and the Government did not respond sufficiently to the Committee's recommendations. The mental and physical effects of the solitary confinement rule for death row inmates is serious, and it is absolutely necessary to amend Article 36 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, so as to substantively guarantee mutual contact outside of individual cells.

2. Confinement to protection cells

(1) Opinion

Regarding confinement to protection cells, the Government's response was that it would make efforts towards suitable management, but there are limits to how much improvement can be made through management without legislation, and the government should follow the recommendations to introduce time limits to confinement to protection cells, and legislate the obligation to conduct prior medical examinations.

(2) Reason

The Committee expressed concern about "reports that inmates may be confined to protection cells without prior medical examination

initially for a period of 72 hours, which is indefinitely renewable," and recommended the Government to "introduce a maximum time limit and require the prior physical and mental examination of an inmate for confinement in protection cells."

The Government responded: *"when the necessity of confinement ceases to exist, the confinement shall be suspended immediately, and that when the period of confinement in a protection room is renewed, due consideration shall be paid to the health condition of the inmate by obtaining the opinion of a medical doctor on the staff of the penal institution. Thus, the Act explicitly provides for legal conditions concerning the period of confinement in a protection room and the involvement of medical doctors, and the system is administered appropriately with due consideration to the circumstances of individual inmates and the opinions of medical doctors. These measures are aimed at the protection of inmates, imposing conditions such as a maximum time limit on confinement; and the mandatory involvement of medical doctors prior to confinement would in fact cause problems in some cases, including hindering the taking of timely measures to protect inmates.*

Without a doubt, the Government of Japan recognizes that careful attention should be paid to the health condition of inmates confined in protection rooms, and it will continue to make efforts to appropriately administer the confinement in protection rooms."

Regarding this point, too, the Government responded that it will make efforts towards suitable management, but as the JFBA has consistently requested, "the Government should, regarding the confinement to protection cells, clearly regulate measures such as making the basic rule 48 hours, renewal every 24 hours, and the maximum of length of confinement 7 days." In addition, regarding regulations about obtaining a medical doctor's opinion, it should be amended as: "The inmate should be medically examined prior to confinement, and the doctor's opinion should be obtained."

3. Segregation of inmates

(1) Opinion

The Government's response stated that it will make efforts to improve

the treatment of inmates *"so that as few as possible are treated in a single room throughout day and night,"* can be assessed as a positive response. However this response is limited as it amounts only to a pledgeto make efforts towards improvement in the operation of the system. The JFBA requests the Government to introduce maximum time limits for the segregated confinement of inmates. Moreover, Japanese Government has created similar system of solitary confinement outside the limits safeguarded by law, through lower-ranking ordinances. Even regular medical examinations, which are provided in the case of segregated confinement, are not carried out. This is a circumvention of the regulation of segregated confinement under the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, and such practice should be stopped immediately.

(2) Reason

The Committee expressed concern that "lifetime prisoners are sometimes also placed in solitary confinement for protracted periods of time," and over reports that "a certain category of prisoners are placed in separate 'accommodating blocks' without the opportunity to appeal against this measure," and recommended that the Government "ensure that solitary confinement remains an exceptional measure of limited duration, […] and discontinue the practice of segregating certain inmates in 'accommodating blocks' without clearly defined criteria or possibilities of appeal."

In response, the Government stated: *"Penal institutions have been making efforts to eliminate the reasons for which the inmates are treated in a single room through day and night by taking measures such as encouraging the inmates to switch to group treatment through consultation by prison officers and having medical examinations conducted by psychiatrists.*

Additionally, treatment in a single room throughout day and night is covered by a complaints mechanism. Moreover, in order to ensure the appropriate administration of the treatment of inmates, a variety of measures are being taken, including firsthand examination by the Ministry of Justice and by the Regional Correction Headquarters as well as visits by the Penal Institution Visiting Committee. The

Government will try to improve the treatment of inmates so that as few as possible are treated in a single room throughout day and night."

The Government's response stated that it will make efforts to improve the treatment of inmates *"so that as few as possible are treated in a single room throughout day and night,",* This can be assessed as a positive response by the Government, but only pledges to make efforts towards improvement in the operation of the system. In order to steadily implement this recommendation, the JFBA first requests the Government to introduce maximum time limits for the segregated confinement of inmates. This has been a strong request of the JFBA since the new Act was established. The JFBA's opinion is that the maximum length of solitary confinement should be limited to 6 months, and it should be ensured that confinement to single rooms remains an exceptional measure. Once this period has ended, group treatment should at least be attempted.

Moreover, the Japanese Government has created a similar system of solitary confinement outside the limits safeguarded by law, through lower-ranking ordinances. Even regular medical examinations, which are provided in the case of segregated confinement, are not carried out. This is a circumvention of the regulation of segregated confinement under the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, and such practice should be immediately stopped.

Comments by the Government of Japan on the Concluding Observations of the Human Rights Committee (CCPR/C/JPN/CO/5)

1. In the concluding observations of the Human Rights Committee on the Fifth Periodic Report submitted by Japan, the Committee requested the Government of Japan to submit, within a year, information on the follow-up given to the Committee's specific recommendations. The present situation of the concerned recommendations for which information on the follow-up was requested is as follows. The Government of Japan intends to make efforts in addressing such significant issues as the establishment of a "human rights violations relief organ" and the ratification of optional protocols to the relevant UN human rights treaties which provide individual communication procedures.

Paragraph 17

The State party should introduce a mandatory system of review in capital cases and ensure the suspensive effect of requests for retrial or pardon in such cases. Limits may be placed on the number of requests for pardon in order to prevent abuse of the suspension. It should also ensure the strict confidentiality of all meetings between death row inmates and their lawyers concerning retrial.

2. Introduction of a mandatory system of review

In Japanese criminal proceedings, the right to appeal a conviction or a sentence is widely recognized under its three-tiered judicial system. Additionally, in capital cases, defense counsel must be appointed, and the counsel is granted the right to appeal, with the result that many capital cases have been appealed.

3. Suspensive effect of requests for retrial or pardon in capital cases

Requests for retrial or pardon in capital cases have no effect on the suspension of execution under Japanese criminal justice system.

However, when issuing an order to execute capital punishment, given the magnitude of such punishment, the Government takes into full account circumstances concerning requests for retrial or pardon irrespective of the number of the requests.

4. Meetings between death row inmates and their lawyers concerning

cases in which the commencement of retrial has not been determined

Consultation between inmates sentenced to death and their defense counsel in cases where the commencement of retrial has been determined is covered by the legal provisions concerning unsentenced inmates (the Code of Criminal Procedure, art. 39), which do not require the presence of prison officers.

Additionally, inmates sentenced to death whose appeal for retrial has not been granted may meet with their lawyers without the presence of prison officers at the discretion of the warden of the penal institution provided that certain conditions stipulated in the Act on Penal Detention Facilities and Treatment of Inmates and Detainees are satisfied.

In the case that the certain conditions mentioned above are not satisfied, the presence of prison officers is required at meetings of inmates sentenced to death, because the nature of their custody makes it highly necessary that these inmates be kept in secure custody and their emotional state carefully grasped. The recognition of the certain conditions has been considered, case by case, not uniformly. With regard to meetings between inmates sentenced to death and their lawyers, the need for legislative measures or improvement of operations will be considered.

Paragraph 18

The State party should abolish the substitute detention system or ensure that it is fully compliant with all guarantees contained in article 14 of the Covenant. It should ensure that all suspects are guaranteed the right of confidential access to a lawyer, including during the interrogation process, and to legal aid from the moment of arrest and irrespective of the nature of their alleged crime, and to all police records related to their case, as well as to medical treatment. It should also introduce a pre-indictment bail system.

5. Substitute detention system and article 14 of the Covenant

Under the Japanese criminal justice system, a decision on whether or not to indict a suspect is required through comprehensive and careful investigations within a relatively limited detention period of 20 days maximum. Therefore, it is necessary to detain the suspect 1) in a location easily accessible to the investigating bodies and 2) in a place with appropriate interrogation rooms and related facilities. It is also necessary that the location should be easily accessible

for the detainee's defense counsel and family members. However, under the current situation in Japan, the number of penal institutions is limited compared to that of police detention facilities, while it is not easy to increase the number of penal institutions as it requires a huge budget allocation. Thus, the substitute detention system is operated for swift and appropriate investigation and also for the convenience of the detainee's defense counsel and family members.

Moreover, the substitute detention system has been well controlled legally as described below.

Firstly, Japan's Code of Criminal Procedure fully guarantees the principle of so-called presumed innocence, the right to remain silent, and the right to appoint a lawyer, and naturally, the same applies to suspects held at police detention facilities. Furthermore, the detention of suspects is decided following adequate judicial review, and the place of detention is determined by a judge.

As a practice of the Japanese police, under the substitute detention system, investigators have been prohibited from controlling the treatment of suspects held in police detention facilities, and detention services are assigned to a general/administration affairs department. This thorough separation of the functions of investigation and detention allows police detention facilities to treat detainees with full respect of their human rights. In particular, the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, which came into effect in 2007, stipulates: 1) the principle of the "separation of investigation and detention;" 2) a newly established mechanism by which the Detention Facilities Visiting Committee, consisting of external third parties, visits detention facilities, interviews detainees and thereby presents its opinions to the detention services managers; 3) a complaints mechanism with regard to the treatment of those detained in detention facilities; 4) a similar level of treatment, which includes the serving of meals, provision of medical care and other treatment covering visitation, and sending/receiving of letters, as unsentenced inmates awaiting trial in penal institutions; and 5) the provision of human rights education for detention officers.

Moreover, since last year, the police have conducted training once again for police officers on the Covenant itself and on the content of the concluding observations of the Human Rights Committee. The police are strictly implementing a thorough separation of the functions of investigation and detention, and are conducting detention services in an appropriate manner, giving due consideration to the human rights of detainees.

6. Right of confidential access to a lawyer and of access to legal aid

Article 39, paragraph 1 of the Code of Criminal Procedure stipulates that suspects in custody have the right to interview with their counsel or prospective counsel without any official being present, whenever they wish, unless investigation requires otherwise. The Japanese police have offered further consideration for interviews between suspects and their defense counsels or prospective counsels since September 2008. For example, if a defense counsel or prospective counsel requests a interview with a suspect under interrogation, an appointment must be arranged as soon as possible.

Additionally, in April 2008, the Public Prosecutor's Office publicized measures to ensure appropriate interrogation to a further extent. Such measures include that: 1) the Public Prosecutor's Office immediately informs a defense counsel if a suspect under interrogation requests a consultation with the counsel and 2) the Office grants an opportunity as soon as possible if a defense counsel requests a meeting with a suspect under interrogation. Interrogation is being conducted in line with the above-mentioned measures.

Moreover, regarding the right of a suspect to access legal aid, it has been stipulated that judges should appoint an official defense counsel in cases in which the suspect in custody has allegedly committed "cases punishable with the death penalty, life imprisonment with or without work or for not less than one year", if the suspect is unable to appoint a counsel due to indigence or other reasons. Since May 2009, the scope of this stipulation has been widened to include cases in which a suspect has allegedly committed "crimes punishable with the death penalty, life imprisonment with or without work or for a maximum period of three years or more." This change in scope requires that the court appoint defense counsel in necessary cases even before indictment.

As described above, with due regard for the spirit of the Committee's recommendation, the Government of Japan has been making efforts for the right of confidential access to defense counsels and of access to legal aid, including active implementation of the above-mentioned measures. The Government of Japan will continue to examine necessary measures and take appropriate actions concerning this issue.

7. Disclosure of Evidence

The amendment of the Code of Criminal Procedure in May 2004 provides that

the prosecutors should disclose evidence for clarifying issues in dispute and preparing for the defense of the accused, while balancing the need for disclosure against the possible adverse effects. The Government of Japan will continue to study what disclosure of evidence is appropriate based on the implementation of the above-mentioned procedure.

8. Release of Suspects before Indictment

Under the Japanese criminal justice system, the investigation is conducted on non-compulsory basis in principle. The arrest or the detention of suspects is allowed only in extremely limited cases after the review by judge. There exist mechanisms that ensure a judicial review even during a short detention period before indictment and pre-indictment bail of the suspect if necessary. It is a matter for consideration whether it is necessary to introduce a system of releasing suspects before indictment as the Committee recommends.

Paragraph 19

The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video-recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions and ensuring the rights of suspects under article 14 of the Covenant. It should also acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations.

9. Legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance

There is no law that provides an interrogation which exceeds certain duration or time limit is per se illegal, because of the unpredictable and diversified nature of investigation. In recent years, however, Japanese police officers and prosecutors have been paying more attention than ever to the duration and the hours of interrogations in order not to place excessive burdens on suspects.

Unless they have compelling reasons, they refrain from interrogating suspects during the middle of the night or for long hours. The police have prescribed clearly in their own regulation that they shall avoid conducting the interrogation of a suspect in the middle of the night or for a long period of time, except when there are unavoidable reasons. The police have their own rule for conduct that require advanced approval by the Chief of the respective Prefectural Police or other appropriate officers when interrogation is to be carried out over eight hours in a single day, for example, and that if police officers conduct interrogation without such advanced approval, the interrogation is to be stopped or appropriate measures are to be taken. Additionally, Japanese police officers and prosecutors document the interrogation process and conditions and have suspects confirm and sign a record with a fingerprint; and the police have their own regulation regarding this point.

10. Audio or video recording of the entire process of interrogation

In order to examine ways to demonstrate to lay judges the voluntariness of confessions by suspects in an effective and efficient manner, the police have been trying the audio or video recording as an appropriate part of an interrogation to the extent that it does not hamper the functioning of the interrogation.

The Public Prosecutor's Office has also been trying the audio or video recording of an appropriate part of an interrogation to the extent that it does not hamper the functioning of the interrogation based on the prosecutors' judgment and responsibility as part of its consideration of ways to prove the voluntariness of confessions by suspects effectively and efficiently, in lay-judge cases. The Supreme Public Prosecutor's Office compiled and reviewed the result of the experience in February 2009. Based on the review, since April 2009, the prosecutors have conducted the above-mentioned recording in all lay-judge cases in which the accused pleaded guilty.

Such audio or video recording by police officers and prosecutors reveals the condition of the interrogation room and the interrogator's questioning and the suspect's facial expressions, tone of voice, and behavior. In a recorded interrogation, the suspect is allowed to make any statement regarding the conditions under which he/she was interrogated and made a confession. Moreover, it is stipulated that the recording should not be suspended even when the suspect testifies counter to building the case and that the recording should be disclosed to the defense counsel without any modification or editing.

Additionally the Government of Japan studies measures to address this issue including research on the situation of criminal investigations, such as methods of criminal investigation and conditions of audio or video recording of interrogations in foreign countries.

11. Right of all suspects to have counsel present during interrogations

Since May 2009, the availability of government paid defense counsel has been widened to cases where a suspect has allegedly committed cases punishable with the death penalty, life imprisonment or imprisonment for a maximum period of three years or more. This has opened up ways for suspects in custody to have defense counsel appointed immediately and to receive assistance such as advice through consultation. Measures mentioned above and in Sections 9 and 10 make interrogations appropriate.

12. Role of the police

Japan's Code of Criminal Procedure, which covers all criminal procedures ranging from investigation to indictment, trial, and the execution of a sentence, stipulates that "the purpose of this Code, with regard to criminal cases, is to reveal the true facts of cases and to apply and realize criminal laws and regulations quickly and appropriately" (art. 1). Investigation by the police is aimed at solving cases by revealing the truth.

Paragraph 21

The State party should relax the rule under which inmates on death row are placed in solitary confinement, ensure that solitary confinement remains an exceptional measure of limited duration, introduce a maximum time limit and require the prior physical and mental examination of an inmate for confinement in protection cells and discontinue the practice of segregating certain inmates in "accommodating blocks" without clearly defined criteria or possibilities of appeal.

13. Recommendation to relax the rule under which inmates on death row are placed in solitary confinement and to ensure that solitary confinement remains an exceptional measure of limited duration

In penal institutions, attention should be paid to helping the inmates sentenced

to death maintain their peace of mind, while securing their custody. The Act on Penal Detention Facilities and Treatment of Inmates and Detainees provides that the treatment of an inmate sentenced to death shall be conducted in a single room throughout day and night and that no inmates sentenced to death shall have mutual contact even outside the inmate's room in principle.

At the same time, the Act allows inmates sentenced to death to make contact when deemed advantageous to maintaining their peace of mind. Moreover, in order to save the inmates from the suffering of isolation and to contribute to their peace of mind, penal institutions have contrived measures such as counseling provided by nongovernmental volunteers, religious services offered by chaplains, consultation by prison officers if necessary, and opportunities to watch television and videos. Further improvement of the treatment of inmates will continue to be sought.

14. Recommendation to introduce a maximum time limit and to require the prior physical and mental examination of an inmate for confinement in protection cells

Protection rooms are intended to confine inmates, such as those who are likely to commit self-injurious acts and generate a loud voice or noise against a prison officer's order to cease doing so, for a limited period of time to calm and protect the inmates when deemed necessary.

The Act on Penal Detention Facilities and Treatment of Inmates and Detainees stipulates that the period of confinement in a protection room shall be seventy-two hours or less, that if there is a special necessity to continue the confinement, the period may be renewed upon expiration thereof and every forty-eight hours thereafter, that when the necessity of confinement ceases to exist, the confinement shall be suspended immediately, and that when the period of confinement in a protection room is renewed, due consideration shall be paid to the health condition of the inmate by obtaining the opinion of a medical doctor on the staff of the penal institution.

Thus, the Act explicitly provides for legal conditions concerning the period of confinement in a protection room and the involvement of medical doctors, and the system is administered appropriately with due consideration to the circumstances of individual inmates and the opinions of medical doctors. These measures are aimed at the protection of inmates, imposing conditions such as a maximum time limit on confinement; and the mandatory involvement of medical

doctors prior to confinement would in fact cause problems in some cases, including hindering the taking of timely measures to protect inmates.

Without a doubt, the Government of Japan recognizes that careful attention should be paid to the health condition of inmates confined in protection rooms, and it will continue to make efforts to appropriately administer the confinement in protection rooms.

15. Recommendation to discontinue the practice of segregating certain inmates in "accommodating blocks" without clearly defined criteria or possibilities of appeal

The recommendation by the Human Rights Committee seems to refer to the treatment of inmates in single rooms throughout day and night. In penal institutions, there are sentenced persons who do not wish to be housed in groups and demand single rooms throughout day and night, and also those who cannot be treated in groups for reasons such as their physical and mental health conditions. Thus, there are cases in which sentenced persons who are not suitable for group treatment are treated in single rooms throughout day and night.

The penal institutions have been making efforts to eliminate the reasons for which the inmates are treated in a single room through day and night by taking measures such as encouraging the inmates to switch to group treatment through consultation by prison officers and having medical examinations conducted by psychiatrists.

Additionally, treatment in a single room throughout day and night is covered by a complaints mechanism. Moreover, in order to ensure the appropriate administration of the treatment of inmates, a variety of measures are being taken, including firsthand examination by the Ministry of Justice and by the Regional Correction Headquarters as well as visits by the Penal Institution Visiting Committee. The Government will try to improve the treatment of inmates so that as few as possible are treated in a single room throughout day and night.