

**Opinion to Request Partial Amendments to the Act on Penal Detention Facilities and Treatment of
Inmates and Detainees and the Code of Criminal Procedure
In Response to the Conclusions of the Committee against Torture**

17 April 2008

Japan Federation of Bar Associations

About this Opinion

On 18 May 2007, the Committee against Torture (the CAT) issued its Conclusions and recommendations to the government of Japan on issues including the abolishment of *Daiyo Kangoku* (the substitute prison system), the thorough separation of investigation and detention functions, and the transparency of interrogations, etc. The CAT requests the government of Japan to provide information in response to the Conclusions within one year.

On 17 April 2008, the Japan Federation of Bar Associations drafted its “Opinion to Request Partial Revisions to the Act on Penal Detention Facilities and Treatment of Inmates and Detainees and the Code of Criminal Procedure In Response to the Conclusions of the Committee against Torture” and submitted it to the Speaker of the House of Representatives, the President of the House of Councillors, the Minister of Foreign Affairs, the Minister of Justice and the Commissioner General of National Police Agency on 22 to 24 of April 2008. This Opinion clarifies concrete details of the institutional reforms which the Conclusions requested the Government of Japan to ensure in paragraph 15 “*Daiyo Kangoku* (detention in the substitute prison system)” and paragraph 16 “Interrogation rules and confessions” of the Conclusions..

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I Summary

Based on paragraphs 15 and 16 of the Conclusions of the Committee against Torture (CAT) issued to the Government of Japan in May 2007, the Japan Federation of Bar Associations (JFBA) requests partial amendments be made to the Act on Penal Detention Facilities and Treatment of Inmates and Detainees and the Code of Criminal Procedure, as shown in the attached sheets.

II Reasons for this Opinion

1. Introduction

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the “Convention against Torture”) is an international convention drafted in 1984, which aims to prevent violence, mental intimidation and inhuman treatment at police stations, prisons and immigration detention centers etc. There were 145 member states as of October 2007, and Japan acceded to the CAT in 1999. The First Report of the Government of Japan was submitted in December 2005.

The Committee against Torture, the treaty body established based on the Convention Against Torture, considered the report of the Government of Japan on 9-10 May 2007. The Committee issued an epoch-making recommendation on 18 May 2007 which included, the thorough separation of investigation and detention functions, the transparency of interrogations and the abolishment of *Daiyo Kangoku*.^{*1}

^{*1} Although this opinion focuses on the issues of police detention and interrogation, and requests systematic reforms in these areas, the Conclusions of the Committee pointed out important issues in addition to these.

Regarding immigration control policies, the Committee recommended the following significant points: establishment of a third party organization for investigating treatment at immigration detention centers; an express prohibition on deportations to countries in which there are substantial grounds to suspect the risk of torture (non-refoulement); and pointed out the lack of an independent review body to review refugee recognition applications etc.

Concerning the treatment of detainees, the Committee recommended the following points: the provision of prompt and independent medical services to such detainees and the placement of such medical services under the jurisdiction of the Ministry of Health; a reexamination of the overall mental health

The JFBA submitted an alternative report and a list of issues to the Committee in March 2007. These reports are available on the JFBA's website.

When these reports were considered in May 2007, the JFBA sent a delegation of four attorneys and attempted to explain the precise real-life situation of Japanese criminal procedure and the criminal detention system. Shortly before this review was scheduled, we arranged, in Geneva, a screening of director Masayuki Suo's movie "I Just Didn't Do It," which describes the actual conditions facing those coming into contact with the Japanese criminal justice system, and asked the members of the Committee against Torture and staff members of the UN Secretariat to better understand the real-life conditions of interrogations in Japanese *Daiyo Kangoku* and the difficulties facing those attempting to clear false accusations in Japanese criminal trials. On 8 May of that year, the JFBA delegation attended a meeting of the Committee and various NGOs. Subsequently, the delegation also observed Committee sessions and each day prepared a presentation paper addressing the concerns of the Committee members.

All the records of the Committee's review, along with details of the JFBA's and other human rights NGOs' activities toward the Committee are summarized in a book edited by the JFBA and entitled "CONSIDERATION ON JAPAN'S FIRST REPORT ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT: RECORDS AND FOLLOW-UP" (Gendaijinbun-sha, 2007).

2. The 2006 Prison Law and the *Daiyo Kangoku* Issues

In June 2006, a revised law which included the provision of treatment for prisoners awaiting sentencing and death row inmates was established as the "Act on Penal Detention Facilities and Treatment of Inmates and Detainees" (hereinafter referred to as the "2006 Prison Law"). The 2006 Prison Law fully revised the previous Prison Law which had been enacted in 1908.

The 2006 Prison Law was criticized for perpetuating *Daiyo Kangoku*. When comparing the 2006 Prison Law with the "Act on Penal Institutions and the Treatment of Sentenced Inmates (2005)" (hereinafter referred to as the "2005 Prison Law"), we feel compelled to say that the provisions relating to the treatment of pre-sentenced inmates in the 2006 Prison Law are mere confirmations of the current situation and we find little notable improvement except for the establishment of Detention Facilities Visiting Committee.

conditions of inmates undergoing prolonged periods of solitary confinement; and a limitation on the length of solitary confinement periods.

Regarding the death penalty, the Committee suggested the possibility that the following may fall under the definition of torture: death row inmates being subject to solitary confinement without exception and only being notified of their impending execution on the exact day of the execution. Additionally, the Committee recommended that Japan consider taking measures for an immediate moratorium on executions and adopting procedural reforms including commutations of sentences and the possibility of pardons. The Committee also stated that a right of appeal should be mandatory for all capital sentences.

The draft revisions are a mere confirmation of the status quo of *Daiyo Kangoku*. However, when compared to the draft bills on Criminal Facilities and Detention Facilities (1982), which aimed to perpetuate *Daiyo Kangoku*, the draft revisions at least clarify that accommodating prisoners in such detention facilities is a substitute for detention in penal institutions. In addition, the draft revisions maintain the system of claiming for reimbursement of a detained person's expenses, which we may refer to as a systematic symbol of *Daiyo Kangoku*. The incidental resolution of the Act confirmed, "In 1980, Legislative Council of the Ministry of Justice reported, 'the authorities concerned should build more penal institutions, increase capacity and gradually reduce cases of accommodating detainees in *Daiyo Kangoku* in order to meet the needs of detainees as much as possible in the future.' Compared with the situation at that time, the issue of over-crowding at penal institutions has become even more urgent, thus the authorities concerned should conscientiously put forward their best efforts to resolve this matter." It also confirmed as follows: "given that we are facing an era of fundamental change for the criminal justice system, when we discuss what form it should take, we should consider not only the investigative methods used, including interrogations, but also the *Daiyo Kangoku* system, in relation to overall criminal procedure."

In this way, the substitute prison system has remained an unsolved issue for the national administration, and the JFBA has never given up its aim of seeking the abolishment of *Daiyo Kangoku*. The JFBA's predominant goal in the Committee's consideration of the report of the Government of Japan was to gain some clear message from an international human rights organization towards seeking the abolishment of the *Daiyo Kangoku* system.

3. Concerning *Daiyo Kangoku*, What Questions did the Committee against Torture Pose?

Regarding *Daiyo Kangoku*, the Committee held in para. 15 of the Conclusions that "The Committee is deeply concerned at the prevalent and systematic use of the *Daiyo Kangoku* substitute prison system for the prolonged detention of arrested persons even after they appear before a court, and up to the point of indictment. This, coupled with insufficient procedural guarantees for the detention and interrogation of detainees, increases the possibilities of abuse of their rights, and may lead to a de facto failure to respect the principles of presumption of innocence, right to silence and right of defence." In other words, the Committee indicates that the detention of arrested persons in police stations even after they have appeared before a court is itself inconsistent with human rights protection under the CAT.

In particular the Committee says that it is gravely concerned at:

- (a) The disproportionate number of individuals detained in police facilities instead of detention centres during periods of investigation and up to the point of indictment, and in particular during the interrogation phase of the investigation;
- (b) The insufficient separation between the functions of investigation and detention, whereby investigators may be engaged in the transfer of detainees, and subsequently be in charge of investigating their cases;
- (c) The unsuitability of the use of police cells for periods of prolonged detention, and the lack of appropriate and prompt medical care for individuals in police custody;
- (d) The length of pre-trial detention in police cells before indictment, lasting up to 23 days per charge;

- (e) The lack of effective judicial control and review by the courts over pre-trial detention in police cells, as demonstrated by the disproportionately high number of warrants of detention issued by the courts;
- (f) The lack of a pre-indictment bail system;
- (g) The absence of a system of court-appointed lawyers for all suspects before indictment, regardless of the categories of crimes with which they are charged. Currently, court-appointed lawyers are limited to cases involving felonies;
- (h) The limitations of access to defence counsel for detainees in pre-trial detention, and in particular the arbitrary power of prosecutors to designate a specific date or time for meetings between defence counsel and detainees, leading to the absence of defence counsel during interrogations;
- (i) The limited access to all relevant material in police records granted to legal representatives, and in particular the power of prosecutors to decide what evidence to disclose upon indictment;
- (j) The lack of an independent and effective inspection and complaints mechanism accessible to detainees held in police cells;
- (k) The use of gags at police detention facilities, in contrast with the abolition of their use in penal institutions.

The above understanding of the actual situation of police detention is inherently accurate, thus we assume that it is impossible for the Government of Japan to object to the above findings of fact themselves.

4. Limiting Detention in Police Stations in line with International Standards

On these bases, the Committee requests that Japan take immediate and effective measures to bring pre-trial detention into conformity with international minimum standards, and in particular Japan should amend the 2006 Prison Law, in order to limit the use of police cells during pre-trial detention. We feel it necessary to point out that this point is a new view which had not been expressly included in the past Conclusions and recommendations of the Human Rights Committee.

First, the Committee requests the amendment of the Japanese Government's legislation to ensure the complete separation of investigation and detention and to limit the maximum time detainees can be held in police custody to bring it in line with international minimum standards. As mentioned in detail in the next paragraph, the international standard of the maximum time detainees can be held in police custody is 24 to 48 hours. Thus the provision in the Code of Criminal Procedure allowing a public prosecutor to request a judge to detain the suspect for a period of 72 hours seems to be excessively long taking into account international standards. At a minimum, the Committee recommends the amendment of the 2006 Prison Law, which allows the use of police cells as substitute prisons, and to prohibit police detention after being brought before a court, and thereby aims to limit the period of police detention up to 72 hours including the time after a detainee is sent to a prosecutor.

Moreover, the Committee requests the Japanese Government to amend the 2006 Prison Law art. 16 para. 3, which provides for the separation of investigation and detention, so that investigators are prohibited from handling detention matters including transfer of detainees who are under police custody.

On 5 March 2008, in a case under public prosecution involving charges of theft, forcible obstruction of business, murder and arson to an uninhabited structure, the Kokura Branch of the Fukuoka District Court acquitted the defendant on charges of murder and arson. The main issue in this case was the admissibility of trial testimony by the defendant's substitute prison cellmate that she had heard the (female) defendant's "confession" of committing arson after murdering her brother. The judgment rejected as inadmissible the part of her confession contained in the cellmates' trial testimony as there was doubt about its voluntariness. The judgment severely criticized the method of investigation which utilized the *Daiyo Kangoku* system in order to gain the defendant's confession. That is, the cellmate and the defendant were detained in the same *Daiyo Kangoku* (a cell at the Fukuoka Prefectural Police's Suijo Police Station). After the defendant's first indictment, she was transferred to a branch detention center. Subsequently, the defendant was later rearrested for forcible obstruction of business and detained in *Daiyo Kangoku* (a cell at the Fukuoka Prefectural Police's Yahata-nishi Police Station). Her former cellmate was also re-arrested and detained in the same *Daiyo Kangoku*. Then the cellmate was continuously held in the *Daiyo Kangoku* without being transferred to the detention center even after prosecution. The female detention space at this *Daiyo Kangoku* has the capacity to hold two people, and for a period of over two months until the defendant was transferred to the detention center, the defendant and her cellmate were the only two held in this *Daiyo Kangoku*. During this time, the cellmate underwent few interrogations regarding the alleged charges for her own case. Instead, she mainly had hearings regarding the defendant's statements in the *Daiyo Kangoku*, and thus the cellmate's statements were made. The judgment criticized such a method of investigation saying of the police that "they have intentionally used the *Daiyo Kangoku* to situate the defendant and her cellmate in the same cell for the purpose of obtaining information via the cellmate. It should inevitably be criticized that detention in *Daiyo Kangoku* was abused for criminal investigations," and "it can be said that the defendant was subject to investigators' interrogations via the cellmate. The court must say that physical detention was abused for the purposes of criminal investigations, which should have been kept separate." This is a typical situation in which both the investigation and detention functions work together to obtain confessions from a defendant using *Daiyo Kangoku* and clearly displays the dangerous nature of *Daiyo Kangoku*. In order to fully ensure that such investigations do not continue to take place, there is no option other than to abolish *Daiyo Kangoku*. Until its abolishment, it is necessary to establish institutional guarantees to effectively prohibit such investigation methods.

5. The International Standard for the Period of Police Detention is 24-48 Hours.

As the Conclusions pointed out, this raises the question of how to define the maximum period of police detention to be specified as an international standard.

The Human Rights Committee, the treaty body established based by the International Covenant on Civil and Political Rights issued a General Comment 8 [16] (art.9, Liberty of Person, Procedure to arrest or detain) 7/28/1982 concerning art.9 of the Covenant. According to the comment, "Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge

or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days.”

The Human Rights Committee’s recommendations to the Government of Nicaragua recognize that the Nicaraguan law allowing 5 days after an arrest before a detainee is brought before a judge does not comply with art. 9, para. 3 of the Covenant (UN Doc.GAOR:45th Session Supplement No.(A/45/40),vo.1, para.406 and 425).

Regarding Germany, the Committee also suggests that detention for 48 hours without being brought before a judge is too long (No.40 A/45/40,vo.1, para.333 and 352).

The United Nations, PROFESSIONAL TRAINING SERIES No.3 “Human Rights and Pre-trial Detention” (1994) states in para. 66 that in order “to comply with the standards for the treatment of detainees, officials should not detain persons in places of detention administrated by authorities responsible for investigation and apprehension of suspected criminals.” It also says that, “where possible, authorities responsible for the detention of arrested persons should be placed in a facility under the supervision of a separate chain of command. If there is no possible alternative to detention in police facilities, such detention should last for a very short period. Furthermore, officers responsible for supervising detainees should be independent from arresting officers and officers conducting investigations.”

In addition, we have reviewed the opinions of the European Court of Human Rights, which is the judicial organ for the Council of Europe and has established the most clearly elaborated theory of international human rights. It should be noted that Japan should respect the judgments handed down by this Court, as the Government of Japan participates in the Council as an observer and is requesting the approval of the Diet for ratification of the Convention on Cyber-Crime, which was drafted in the Council.

In the case of *Brogan and Others v. United Kingdom* (29 November 1998, Series A No. 145-B, para. 62), the Court held that a period of 4 days and 6 hours of detention by police, under the UK's emergency arrest for the prevention of terrorism provisions, was in breach of the European Convention on Human Rights (ECHR) art. 5 para 3. Similarly, in the case of *Aksoy v. Turkey* (18 December 1996, RDJ1996, RDJ1996-V , 2260, para83 et seq.), the Court held that 14 days of detention by police in Turkey was in breach of the ECHR art. 5 para 3.

In addition, the European Committee for the Prevention of Torture (CPT), established under the Council of Europe’s European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, states in paragraph 42 of the 2nd General Report on the CPT's activities in 1991 that “custody by the police is in principle of relatively short duration. Consequently, physical conditions of detention cannot be expected to be as good in police establishments as in other places of detention where persons may be held for lengthy periods. However, certain elementally material requirements should be met.”

The CPT has actively worked to achieve the shortening of the Turkish detention period at police stations. Under the 1990 system, the longest period of police detention allowed was 15 days in cases under the jurisdiction of State Security Courts, which was able to be extended up to 30 days when a state of emergency was announced. This system was reformed in September 2003 so that in principle the period of

police detention is now limited to a maximum of 24 hours, or 48 hours in cases under the jurisdiction of State Security Courts. In case of crimes of assembly (cases in which 3 or more persons assemble in breach of the law), the maximum police detention period for a suspect can be extended up to 4 days with a written order from a prosecutor.

The CPT has also worked to achieve the shortening of the period of detention in Hungarian police stations. Originally, in Hungary, the site designated for pre-sentence detention was, in principle, a detention center, as based on the Criminal Penalty Enforcement Law, but overly long periods of police detention were allowed as an exception, which was very different from the systems in place in other European countries. Such detention had no legal limitation so that in practice it sometimes lasted for several months. Hungary ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1992 which resulted in the CPT beginning to visit Hungary in 1994. Hungary amended their law in March 1998, and as a result the detention period is, in principle, now limited to a maximum of 72 hours with police detention lasting for up to 30 days. Police detention can be extended to 60 days in exceptional cases. When the CPT visited Hungary in 2003, it was still common for persons to be held in police establishments, often for periods of several months. However, the number of such inmates had recently decreased, and a new Code of Criminal Procedure, according to which pre-trial detention must, as a rule, be carried out in remand prisons, was to be enacted in January 2005. (Report on 17 June 2004). Responding to this report, the Government of Hungary stated that they would open newly-built remand prisons soon after completion, according to the Response of the Hungarian Government on 17 June 2004.

Considering the opinions of international human rights organizations generally, the international standard for detention periods in police facilities appears to be approximately 24 to 48 hours and may not be extended over approximately 4 days even for purposes of countering terrorism or organized crime.

6. Institutional Guarantee for Preventing Infringement of Human Rights at *Daiyo Kangoku*

Secondly, the CAT requests the Japanese government to ensure prompt access for medical treatment during detention in police facilities, to make legal consultation available for all detainees from the time of arrest for defense preparation purposes and to allow attorneys to attend interrogations. It also requests access be ensured to all materials in the records of police after indictment.

Thirdly, the CAT requests the Japanese government to ensure the independence of outside inspection of police detention facilities and procedures. They are to do this by requiring the inclusion of attorneys recommended by bar associations as members of Detention Facilities Visiting Committees, which Prefectural Police Departments are set to establish in June 2007. The CAT assumes that appointment of members recommended by bar associations indicates the independence of the Visiting Committees. Regarding this issue, currently, half or more of the prefectural police departments have appointed attorneys recommended by bar associations to participate in these committees, while a few prefectural police departments have failed to do so. We must strongly request all prefectural police departments to appoint attorneys recommended by bar associations in the next business year. This must be institutionally guaranteed.

Fourthly, the CAT requests the establishment of a complaints appeals system which is effective and independent from the National Public Safety Commission for examining appeals from detainees in police detention facilities. Such institutional revision has been partially realized in that “the Review and Investigation Panel on Complaints by Inmates in Penal Institutions (Complaints Consideration Panel)” deals with appeals to the Minister of Justice regarding treatment in detention facilities, a policy which the JFBA had appealed to realize. Regarding the appeals consideration system for allegations of torture and/or cruelty, as the Human Rights Committee recommended in 1998, it is necessary to abolish the Protection of Personal Liberty Rules Habeas Corpus Rule art. 4 and make petition for a writ of habeas corpus completely effective without any limitation or restriction.

Fifthly, the CAT requests consideration of the adoption of alternatives to custody at the pre-trial stage. Legislative Council of the Ministry of Justice are discussing various measures surrounding this issue such as diversion for community-based treatment but the Government should also positively consider introducing a home detention system and pre-indictment bail system.

Sixthly, the CAT also requests abolishment of the use of gags at police detention facilities. The Government described in a deliberation of the National Diet that it has adopted a policy for abolishing the use of gags at police detention facilities after preparing protection rooms. However, the Government should accelerate the nationwide plan of equipping protection rooms and promptly reveal their plans to abolish the usage of such gags.

7., What issues did the Committee raise regarding the interrogation system and confessions?

The Convention against Torture provides that “Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture (art. 11).” The most important pillar of the Convention is the establishment and enactment of strict regulations on interrogations to prevent infringement of human rights, as periods of police interrogation are some of the most likely times for torture to occur.

In para. 16 of the Conclusions, the CAT shows especially deep concern regarding the large number of convictions in criminal trials based on confessions, in light of the lack of effective judicial control over the use of pre-trial detention and the disproportionately high number of convictions over acquittals in the Japanese legal system. In fact, in para. 13 of the Conclusions they state that, “The Committee is concerned at the insufficient level of independence of the judiciary, in particular the tenure of judges and the lack of certain necessary safeguards” and that “the State party should take all necessary measures to reinforce the independence of the judiciary, and in particular ensure the security of tenure of judges.” The Committee assumes that the high percentage of convictions illustrates that judges are not completely independent from investigative authorities.

The Committee also displays concerns about the lack of means for verifying the proper conduct of interrogations of detainees while in police custody, in particular the absence of strict time limits for the

duration of interrogations and the fact that it is not mandatory to have defence counsel present during all interrogations. In addition, the Committee says it is concerned that, under domestic legislation, voluntary confessions made as a result of interrogations not in conformity with the Convention may be admissible in court, in violation of article 15 of the Convention.

8. The Conclusion Requests Audio and Video Recording of All Interrogations, Strict Restriction of Interrogation Length and Prohibition of Confessions in Illegal Interrogations as Evidence.

The Committee declared, “The State party should ensure that the interrogation of detainees in police custody or substitute prisons is systematically monitored by mechanisms such as electronic and video recording of all interrogations; that detainees are guaranteed access to and the presence of defence counsel during interrogation; and that recordings are made available for use in criminal trials.”

The partial video recording of interrogations and the use thereof as evidence is nothing more than the presentation of a confession. This is likely to result in the misjudgment of judges and lay judges alike regarding the actual conditions of interrogations. As the Committee requests, the properness of interrogations can never be guaranteed without all interrogations being both electrically and visually recorded.

The government should decide to record all interrogations by police or prosecutors electrically and visually at least by the commencement of the lay judge system.

The Committee also states that Japan should promptly adopt strict rules concerning the length of interrogations, with appropriate sanctions against non-compliance. An interrogation which lasts overnight is a typically torturous interrogation which corners suspects physically and mentally. Therefore it is important to regulate the length of interrogations, and nighttime interrogation must be prohibited. In Taiwan, the length of police detention is limited to 24 hours (actually 16 hours). Night interrogations are completely prohibited, but if interrogations are suspended they may later be extended for an equivalent length of time. In Japan, since the period of arrest and detention is as long as 48 hours, we believe that a total prohibition of night interrogations without such alternative measures will not cause any inconvenience.

Moreover, the Committee says that Japan should amend its Code of Criminal Procedure to ensure full conformity with art. 15 of the Convention. The Committee requests the revision of arts. 319 and 322 of the Code of Criminal Procedure to exclude the admissibility of any confession obtained through illegal investigation or interrogation, because the current provisions only exclude as evidence involuntary confessions or statements containing admissions of disadvantageous facts.

Regarding admissibility and arts 319 and 322 of the Code of Criminal Procedure, this point has been discussed from two conflicting theories, one being the involuntary confession theory and the other **the illegality theory**. However, the Convention requests the exclusion of any confession obtained as a result of an illegal interrogation whether or not it is voluntary. This means that it requests the amendment of the Code of Criminal Procedure to end any such conflict between the two theories of interpretation.

9. Responding to the Conclusions of the Committee: Let us Aim to Reform the Entire Criminal Justice System

The Attached document 1 “Outline of the Draft Bill Amending the Act on Penal Detention Facilities and Treatment of Inmates and Detainees and Parts of the Code of Criminal Procedure” (also known as the “Outline Draft Bill against Torture”) provides an abstract of the targets for justice system reforms in response to the problems facing the Japanese criminal justice system and criminal detention system, which were pointed out in the Committee’s Conclusions in paras.15 and 16.

We have prepared this Outline to clearly show the institutional reforms requested by the Committee regarding the criminal justice system and criminal detention system, for the Government of Japan, the members of the Diet, ruling parties and/or opposition parties, press and citizens interested in these issues to shape their public opinions.

International experts on detention systems have come up with a detailed and very concrete plan of reformation. The Committee’s recommendations at this time have shown the direction necessary for reforms of the Japanese criminal justice and detention systems.

Paras. 15 and 16, regarding *Daiyo Kangoku* and interrogations, are set as priorities on which Japan should provide information to the Committee within one year.

Also in May 2008, the United Nations Human Rights Council is set to conduct a Universal Periodic Review (UPR) of Japan. In autumn 2008, the Human Rights Committee considers the report of the Government of Japan. In these reviews conducted by international human rights organizations, the Government of Japan will be questioned as to whether the government has genuinely implemented the reformation plan provided in the Committee’s Conclusions. The JFBA should widely propose and promote the Outline Draft Bill against Torture and request the overall reformation of the criminal justice system and criminal detention system based on the terms contained therein.

10. Position of the Attached Outline Draft Bill

Finally, we will describe the relationship between the attached outline draft bill and the JFBA’s opinions on related issues.

In this outline draft bill, the JFBA tries to clarify the justice system reforms necessary for implementing the Committee’s Conclusions faithfully in relation to the domestic justice system. The Government of Japan itself should prepare a bill like this if the Government recognizes and respects such concrete Conclusions issued by international organizations.

In 1992, the JFBA proposed a counter bill against the governmental Criminal Facilities Bill entitled the “Criminal Treatment Bill,” and published a “Commentary of the Criminal Treatment Bill” in 1994. In this, the JFBA also proposed the abolishment of *Daiyo Kangoku* by 2000. At the same time, as measures to be utilized until their abolishment, we proposed (1) the prohibition of detention in *Daiyo Kangoku* in cases involving serious crimes, denials, silence, women and juveniles; (2) the creation of the right of a suspect and an attorney to request a changes in the place of detention; (3) a clear separation of investigation and detention, (4) the prohibition of applications of penalties and protection rooms; and (5)

the Minister of Justice's supervision. Regarding the abolishment of *Daiyo Kangoku*, the outline draft bill this time basically follows these contents.

We hope that the publication of this outline draft bill accelerates the abolishment of *Daiyo Kangoku*, which have caused numerous false accusations, and that the draft bill becomes a new starting point for overall criminal justice and detention system reforms.

Separate Sheet

**Outline of the Draft Bill Amending the Act on Penal Detention Facilities and Treatment of Inmates
And Detainees and Parts of the Code of Criminal Procedure
(also known as the Outline Draft Bill against Torture)**

Regarding the regulation of issues surrounding *Daiyo Kangoku*, interrogations and confessions, which the Committee against Torture's Conclusions pointed out in paras. 15 and 16, the below provides an abstract for issues related to justice system reforms and drafts a bill in an outline format.

I. Regarding *Daiyo Kangoku* System

1. Abolishment of *Daiyo Kangoku*

Delete the following provisions:

- i. Act on Penal Detention Facilities and Treatment of Inmates And Detainees, art. 14 para. 2 item 2
- ii. Art. 15 of the law

However, certain police detention facilities may be used as *Daiyo Kangoku* until 2020 at the latest.

2. Limitation of Using *Daiyo Kangoku* as Interim Measures

Until *Daiyo Kangoku* are abolished, the following interim measures shall be taken.

Limit police detention facilities for substitute detention use to certain facilities.

In addition to the persons whom art. 15 para. 1 items 1 to 4 of the Act provides as exceptions, exclude the following persons from those who may be detained in substitute detention facilities.

- i. Persons who denied or kept silent for charges totally or partially at interviews conducted before detention;
- ii. Women;
- iii. Juveniles; and
- iv. Suspects whose charges include statutory death penalty, and/or life imprisonment with or without labor.

3. Separation of Investigation and Detention

Amend art.16 para. 3 of the Act so that a detention officer shall not be engaged in any criminal investigation, and police officials who attend criminal investigations shall not be engaged in any detention functions including as escorts.

Prosecutors and police officials in charge of investigations shall not utilize the situations of suspects detained in *Daiyo Kangoku* for the convenience of investigations.

4. Medical Treatment in Detention Facilities

Amend art. 201 of the Act to add the following as paragraph 2.

“In the case that a detainee requests medical treatment by a doctor, promptly give him/her medical treatment by a doctor commissioned by a detention services manager and take other necessary medical measures.”

5. Detention Facilities Visiting Committee

Add the following provisions to art. 21 para. 2 of the Act:

“provided, however, that it shall appoint at least one person whom each prefectural bar association (each district bar association in Hokkaido and the three bar associations in Tokyo) recommended as a member of each committee.”

The same applies to art. 8 para. 2 of the Act.

6. Abolishment of Gags

Amend art. 213 of the Act as follows:

Delete “gags” from the title;

Amend para. 2 to “may not be used in combination with any arresting rope or handcuff”;

Delete para.3 and amend the article as follows:

- i. Amend para. 4 to “in case the preceding paragraph provides, ... a strait jacket shall be used before an order.”
- ii. Amend para. 5 to “a strait jacket shall be used up to 3 hours, provided, however, that detention supervising officials ...”
- iii. Delete “or gags” from paras. 6 and 7.
- iv. Amend para. 8 to “the forms of arresting ropes, handcuffs and strait jackets are”

7. Effective Complaint Appeal System Independent from the National Public Safety Commission

Complaints Investigation and Review Committee

Provide the following as art. 230 para. 2 of the Act.

- i. In the event that the National Public Safety Commission receives an appeal according to the preceding paragraph, it shall promptly consult with the Complaints Investigation and Review Committee which consists of outer knowledgeable persons including attorneys recommended by bar associations.
- ii. The Complaints Investigation and Review Committee shall have a secretariat which includes attorneys recommended by bar associations as its staff members.
- iii. In making a decision, the National Public Safety Commission shall receive and review the report of one third party group at a minimum. In the event that it makes a decision differing from the recommendations contained in the report, the reasons must be clearly identified in the decision.

Improving Petitions for Writs of Habeas Corpus

Delete art. 4 of the Rules on Protection of Personal Liberty.

II. Regarding the Right to Receive Defense and Regulation of Interrogations

1. Guaranteeing Court Appointed Defense Counsels for All Arrested Suspects

Amend art. 37-2 of the Code of Criminal Procedure so that all arrested suspects shall have access to court appointed defense counsel .

2. Abolishing Allocation System for Suspects-Attorneys Communication

Delete art. 39 para. 3 of the Code of Criminal Procedure; abolish the time allocation for suspect-attorney communication which is currently conducted by prosecutors.

3. Attorneys' Attendance, and Video/Audio Recordings of Interrogations

Add the following provision as art. 198-2 of the Code of Criminal Procedure:

Prior to interrogating a suspect or an accused, give him/ her an opportunity to have an attorney in attendance at the interrogation;

In the event that a suspect, an accused or an attorney requests to attend the interrogation, the interrogation shall not be conducted without such attendance; and

The entire process of interrogating suspects or accused, from the beginning to the end, shall be video/audio recorded electronically.

4. Legal Limitation on Length of Interrogations

Add the following article as art. 198-3 of the Code of Criminal Procedure:

The maximum length of interrogations shall be 8 hours per day; and

Interrogations of suspects or accused who are arrested or detained shall follow time schedules for meals, sleeping and other activities provided in advance at the facility. Interrogations during nighttime shall be prohibited.

5. Inadmissibility of Confessions made under Torture or Inhumane Treatment as Evidence

Amend art. 319 para. 1 of the Code of Criminal Procedure as follows:

“The following confessions may not be admitted as evidence:

- i. Confessions made under compulsion, torture, threat, ... or when there is doubt as to its voluntariness;
- ii. Confessions made under cruel, inhumane or degrading treatment.”

6. Inadmissibility of Statements Induced by Illegal Interrogations as Evidence

Provide the following as art. 322 para. 2 of the Code of Criminal Procedure:

“Notwithstanding the preceding provision, statements made under interrogations which breach art. 198-2 and/or 198-3 may not be admitted as evidence.”

7. Disclosure of Evidence Kept by Investigating Authorities

Revise art. 40 of the Code of Criminal Procedure as follows:

“A counsel may, after indictment, inspect and copy documents and articles of evidence relating to the trial kept by an investigative authority or a court; provided, however, that ... when copying the articles of evidence (ibid).”

III. Non-detention Measures

1. Bail before Indictment

The proviso contained in art. 207 para. 1 of the Code of Criminal Procedure shall be deleted so that the bail system shall apply to suspects before indictment.

2. Introducing Other Measures of Treatment in Community-based Diversions

Treatment in community-based diversions for pre-trial detainees such as home detention and behavior restriction shall be established.

For Your Information

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION (JAPAN)
Conclusions and recommendations of the Committee against Torture (Extract)**

18 May 2007

***Daiyo Kangoku* (detention in the substitute prison system)**

15. The Committee is deeply concerned at the prevalent and systematic use of the *Daiyo Kangoku* substitute prison system for the prolonged detention of arrested persons even after they appear before a court, and up to the point of indictment. This, coupled with insufficient procedural guarantees for the detention and interrogation of detainees, increases the possibilities of abuse of their rights, and may lead to a de facto failure to respect the principles of presumption of innocence, right to silence and right of defence. In particular the Committee is gravely concerned at:

- (a) The disproportionate number of individuals detained in police facilities instead of detention centres during investigation and up to the point of indictment, and in particular during the interrogation phase of the investigation;
- (b) The insufficient separation between the functions of investigation and detention, whereby investigators may be engaged in the transfer of detainees, and subsequently be in charge of investigating their cases;
- (c) The unsuitability of the use of police cells for prolonged detention, and the lack of appropriate and prompt medical care for individuals in police custody;
- (d) The length of pre-trial detention in police cells before indictment, lasting up to 23 days per charge;
- (e) The lack of effective judicial control and review by the courts over pre-trial detention in police cells, as demonstrated by the disproportionately high number of warrants of detention issued by the courts;
- (f) The lack of a pre-indictment bail system;
- (g) The absence of a system of court-appointed lawyers for all suspects before indictment, regardless of the categories of crimes with which they are charged. Currently, courtappointed lawyers are limited to cases of felony;
- (h) The limitations of access to defence counsel for detainees in pre-trial detention, and in particular the arbitrary power of prosecutors to designate a specific date or time for a meeting between defence counsel and detainees, leading to the absence of defence counsel during interrogations;
- (i) The limited access to all relevant material in police records granted to legal representatives, and in particular the power of prosecutors to decide what evidence to disclose upon indictment;
- (j) The lack of an independent and effective inspection and complaints mechanism accessible to detainees held in police cells;
- (k) The use of gags at police detention facilities, in contrast with the abolition of their use in penal

institutions.

The State party should take immediate and effective measures to bring pre-trial detention into conformity with international minimum standards. In particular, the State party should amend the 2006 Prison Law, in order to limit the use of police cells during pre-trial detention. As a matter of priority, the State party should:

- (a) Amend its legislation to ensure complete separation between the functions of investigation and detention (including transfer procedures), excluding police detention officers from investigation and investigators from matters pertaining to detention;**
- (b) Limit the maximum time detainees can be held in police custody to bring it in line with international minimum standards;**
- (c) Ensure that legal aid is made available to all detained persons from the moment of arrest, that defence counsel are present during interrogations and that they have access to all relevant materials in police records after indictment, in order to enable them to prepare the defence, as well as ensuring prompt access to appropriate medical care to persons while in police custody;**
- (d) Guarantee the independence of external monitoring of police custody, by measures such as ensuring that prefectural police headquarters systematically include a lawyer recommended by the bar associations as a member of the Board of Visitors for Inspection of Police Custody, to be established as of June 2007;**
- (e) Establish an effective complaints system, independent from the Public Safety Commissions, for the examination of complaints lodged by persons detained in police cells;**
- (f) Consider the adoption of alternative measures to custodial ones at pre-trial stage;**
- (g) Abolish the use of gags at police detention facilities.**

Interrogation rules and confessions

16. The Committee is deeply concerned at the large number of convictions in criminal trials based on confessions, in particular in light of the lack of effective judicial control over the use of pre-trial detention and the disproportionately high number of convictions over acquittals. The Committee is also concerned at the lack of means for verifying the proper conduct of interrogations of detainees while in police custody, in particular the absence of strict time limits for the duration of interrogations and the fact that it is not mandatory to have defence counsel present during all interrogations. In addition, the Committee is concerned that, under domestic legislation, voluntary confessions made as a result of interrogations not in conformity with the Convention may be admissible in court, in violation of article 15 of the Convention. The State party should ensure that the interrogation of detainees in police custody or substitute prisons is systematically monitored by mechanisms such as electronic and video recording of all interrogations; that detainees are guaranteed access to and the presence of defence counsel during interrogation; and that recordings are made available for use in criminal trials. In addition, the State party should promptly adopt strict rules concerning the length of interrogations, with appropriate sanctions for non-compliance. The State party should amend its Code of Criminal Procedure to ensure full conformity with article 15 of the

Convention.

The State party should provide the Committee with information on the number of confessions made under compulsion, torture or threat, or after prolonged arrest or detention, that were not admitted into evidence.