

Additional NGO Report on Arbitrary Detention

**(in penal institutions, psychiatric hospitals
and immigration detention facilities)**

among the issues included in the List of Issues regarding the 7th

Periodic Report of the Government of Japan based on ICCPR

(including counterarguments to the response the Government)



**Network Against
Arbitrary Detention**

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I. Introduction

1 The author of this report

Compared with other civilized countries, Japan is a society in which the right to liberty is restrained on the basis of highly arbitrary criteria and in which there is a lack of fair means for restoring it. The extremely alarming situation of the right to liberty in Japan does not arise only in one particular area, but across the spectrum of penal institutions, psychiatric hospitals, and immigration detention.

We are a network of human rights organizations working to improve the human rights situation of people deprived of their liberty in Japan, and we have collaborated to produce this report to provide a cross-sectional perspective on the issue of detention in Japan. The submitted reports and annexes, including a list of constituent organizations, are as follows:
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_CSS_JPN_43401_E.pdf
https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_CSS_JPN_43402_E.pdf

II. Pretrial Detention in General

In our previous report, we did not refer the issue of pretrial detention (detention of persons suspected of committing crimes while they are on trial), which is one of the serious problems of detention in Japan.

1 Relevant LOI

Para 16 Treatment of persons deprived of physical liberty and freedom (Articles 7, 9 and 10 of the ICCPR)

2 Suggested recommendations

- 1) Interrogation for coercing confession and pretrial detention shall be abolished.
- 2) The substitute prison system, which is a breeding bed for miscarriage of justice and false confessions, shall be abolished immediately.
- 3) The system should be amended so that bail can be obtained even during pre-indictment detention.
- 4) All suspects shall be guaranteed the right to be assisted by a defence counsel at the expense of the State from the time of arrest and shall be allowed to have a defence counsel present during interrogation by the investigative body.
- 5) Strict limits should be placed on the duration of interrogations, legislative measures should be taken to regulate the methods of interrogation, and all interrogations by investigative bodies shall be videotaped.
- 6) Complaint mechanism shall be established that is independent of the prefectural public safety commissions (supervising body for police) and has the authority to investigate promptly, fairly and effectively any allegations of torture or unfair treatment made during interrogation.

3 Evidence of Facts and Reasons for Recommendations

- (1) If you are arrested, the interrogation will go on and on.

Many Japanese people seem to think that if they are suspected of committing a crime and arrested by the police, it is their fate to be interrogated from morning till night, day after day, and sometimes to be shouted at. When a person suspected of a crime is arrested by an investigative agency such as the police or the public prosecutor's office, the investigative agency begins to interrogate him. If the police arrest the person, they will send him to the prosecutor's office, and the prosecutor will decide whether or not to request detention within 48 hours of the arrest. The judge shall also decide within 72 hours of the arrest whether to issue detention order or release.

In principle, after the court decision of detention, the detainee should be kept in a detention center under the jurisdiction of the Ministry of Justice, but in practice in Japan, the detainee is usually kept in a police detention facility. In principle, the period of detention is 10 days or less, but in many cases, the detention is extended up to more 10 days.

This police detention after court decision is called a substitute prison (Daiyo Kangoku) because the prisoner is placed in a police station instead of being originally detained in a detention center.

In cases where a prosecutor has arrested a person, the person is held in a detention center as a rule, but there is not much difference compared to the case of a substitute prison in that the prosecutor can use the interrogation room in the detention center, which is under the jurisdiction of the Ministry of Justice to which the Public Prosecutor's Office belongs, to interrogate the person for a long time before the prosecution. (For the police, the detention center is not a place at their disposal, but for prosecutors, it is a place at their disposal).

- (2) Substitute prisons produce false confessions and are a breeding bed for miscarriage of justice.

Japanese police detention, a hotbed of coerced confessions, is known around the world as "Daiyo Kangoku".

In the Menda, Zaidagawa, Matsuyama, Akabori, cases, all of which involved death penalty convicts

who were granted retrials, false confessions were obtained in substitute prisons. The same is true for the Hakamada case. Supreme Court's decision in January 2021 dismisses the High court decision that was just reversed district court retrial decision.

(3) The Detainee Treatment Act of 2005 failed to reform pretrial detention.

In the wake of the torture and ill-treatment incident at Nagoya Prison, the Prison Law, which was enacted in 1908, was amended between 2004 and 2005. As a result of this amendment, the overemphasis on discipline and order in treatment of prisoners was curbed to some extent, and inspection committees composed by members of lawyers, doctors, researchers, and citizens were established in each penal institution and detention facility. The alternative detention nature of substitute prisons was maintained, and the exceptional legal status of police detention facilities was retained, but the abolition of substitute prisons could not be realized due to strong resistance from the police.

In other words, Article 15 of the Penal Detainee Treatment Act succeeded Article 1, paragraph 3 of the former Prison Act, and reads as follows: "The persons listed in the items of Article 3 may be detained in a detention facility in lieu of being committed to a penal institution, except for the persons listed below. This means that detainees, except those who are sentenced to imprisonment or death row inmate, can continue to be detained in detention facilities.

In addition, the principle of presumption of innocence in the treatment of the unconvicted has not been enshrined, and in most cases, police detention facilities continue to be used as places of detention after the court's decision on detention. Important issues requested by international organizations, such as restrictions on the duration and time of interrogations, full videotaping of interrogations, the introduction of a bail system before prosecution, and the presence of defense counsel at interrogations, have also not been realized. The serious problem of the lack of full-time doctors and medical staff in the police detention facilities, which means that the detainees have to rely entirely on commissioned doctors, has also remained unchanged.

(4) Even the separation of investigation and detention has not overcome the harmful effects of substitute prisons

In response to the HRC recommendation that police interrogations lead to the production of false confessions, the Government of Japan, in accordance with Article 16(3) of the newly enacted Penal Detainee Treatment Act, stipulates that "detention officers shall not engage in the investigation of crimes involving detainees detained in their detention facilities". It is explained that the harmful effects have been eliminated because the police have separated those in charge of investigation from those in charge of detention. However, even with the separation of responsibilities under the same chief, since the purpose of the police organization itself is to investigate crimes, the coercion of false confessions has continued even after the law was amended, and no fundamental solution has been achieved.

Of particular interest is the 2012 case of remote-control threatening e-mails. This case was a complete crime of omission in which it was later confirmed that there was another real criminal. Two of the four innocent people who were wrongly arrested were forced to make false confessions by the police. At the Kanagawa Prefectural Police, the juveniles were told, "If you deny it...you will be sent to a reformatory" and " If the case is referred to the prosecutor, it will be a trial and many people will be watching. Even with regard to the victims who did not confess falsely, according to the defense counsel's report, the Osaka Prefectural Police did not listen to what the victims had to say and applied psychological pressure to them

during the interrogation. In addition, the Mie Prefectural Police admitted that they conducted a total of 24 interrogations over a total period of 12 days for a total of about 50 hours, the longest of which lasted about 8 hours per day, despite the denials of the victims.

There is no other way to avoid "the dangers of prolonged interrogation and abusive interrogation methods aimed at obtaining confessions" than to abolish the use of substitute prisons.

(5) Prolonged pre-trial detention, absence of a pre-indictment bail system, and inability of lawyers to attend interrogations

International standards strictly stipulate that a person shall not be returned to the police after a decision to detain has been made by the police¹. In addition, according to international standards on the human rights

¹ Such a system as the substitute prison exists only in Japan, even if we search the whole world.

The rationale for making this statement is as follows: When the substitute prison system was condemned internationally in the 1980s, the Japanese government countered that similar investigative practices could be found in investigations of violations of the State Security Law in Hungary, Finland, and South Korea, as well as in investigations of terrorism in Turkey and the United Kingdom. It is believed that the Ministry of Justice found similar examples through its worldwide research. However, it can be assessed that these similar cases have been improved sequentially by the recommendations made by international organizations (the United Nations and the Council of Europe), and the world has been wiped clean of a system in which interrogations by investigative bodies continue.

For example, the European Committee for the Prevention of Torture (CPT), established under the Council of Europe's European Convention for the Prevention of Torture, stated in paragraph 42 of its General Report 92 that "police detention should, in principle, be of relatively short duration. It is not, therefore, expected that the physical conditions of persons detained in police establishments will be as good as those in other places where they are subjected to prolonged detention, but certain important requirements must be met." The Act provides.

The European Committee for the Prevention of Torture has worked tirelessly to shorten the period of police detention in Turkey, so that by September 2003, the 1990 system, under which the maximum period of police detention for cases under the jurisdiction of the National Security Court was 15 days, and could be extended to 30 days if a state of emergency was declared, was replaced by a system under which the maximum period of police detention was In principle, the period of police detention in cases under the jurisdiction of the State Security Court is 24 hours; in principle, the period of police detention in cases under the jurisdiction of the State Security Court is 48 hours; and the maximum period of detention in police custody of suspects for collective crimes (i.e., when three or more persons have gathered) may be extended to four days upon written order of the public prosecutor.

The European Committee for the Prevention of Torture is also working to reduce the length of police detention in Hungary. Originally, in Hungary, the principle place of unconvicted detention was a detention centre, according to the Law on the Execution of Sentences, but in marked contrast to other European countries, very long police detentions were exceptionally allowed. It appeared that such detentions were legally unlimited and, in practice, sometimes continued for several months. Hungary ratified the CPT in 1992 and CPT visits began in 1994; in March 1998 the law was amended to provide that the principle of police detention was 72 hours and that police detention could last for 30 days, which could be extended to 60 days in exceptional cases. At the time of the visit in 2003, there were still cases of police detentions lasting several months, but these were decreasing and a law was to be implemented in January 2005 which would, in principle, carry out pre-trial detentions in

of criminal detainees, pretrial detention is intended to secure a person's custody for trial, not to obtain a confession. The arrested person is interrogated by the investigating authorities for a few hours and for no other purpose than to record the suspect's statement at the time of arrest. Those who are not likely to escape are, in principle, released on bail after the decision on their detention. As for the time to be kept in police custody, HRC recommends in principle up to 48 hours.

In Japan, however, it is a natural assumption that pretrial detention is used for the purpose of obtaining confessions, and defense counsel cannot be present during interrogations. There is no bail system prior to prosecution. In principle, a suspect can be held in custody for 23 days based on the fact of a single arrest; furthermore, if the case is subdivided, the arrest and detention can be repeated.

It is true that the videotaping of interrogations has progressed over the past 40 years, such as the imposition of the obligation to record certain cases in the field of pretrial detention. However, there are still many interrogations that have not been made visible. In addition, defense for the suspect has been expanded, and the court-appointed defense system has been expanded for all cases in which a decision on detention has been made, and criminal defense at government expense is provided, but for the three days between

detention centres (Committee report of 17 June 2004). In response, the Hungarian Government replied that it was pressing ahead with the construction of more detention centres as soon as possible. (Written reply of the Hungarian Government dated 17 June 2004)

In Europe and the United States as well, it is not entirely absent that suspects are interrogated by investigative agencies after they are transferred to a detention center. However, it is regarded as an interview by the investigator (voluntary interrogation), and the suspect is guaranteed the freedom not to meet with the investigator.

In its general comment, in which the Committee itself determined the criteria for interpreting article 9 of HRC, the Committee stated that " While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill treatment(para 33). "

The opinion also states that " The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power.¹⁰¹ The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody¹⁰² and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment. In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice(para34).

"In the Committee's view, a second detention should not involve a return to police custody, but should rather be made in another establishment under the jurisdiction of another authority, where the danger to the rights of the detainee is more easily mitigated." Id. (2014 General Comment 35). It is precisely the general opinion that indicates that substitute prisons are not permissible.

arrest and detention, there is only a duty lawyer system in which the bar association bears the costs.

Although there is a bail system after prosecution, bail is rarely granted if the accused denies the facts of the charges. This is known as "hostage justice." Although the rate of bail granting has increased slightly, there are still cases where people are not allowed to see their families freely even after being released on bail due to the strict conditions of bail. In the case of Mr. Ghosn, it is said that he could not even see his wife without the presence of his lawyer. In the Kansai Ready-mix Concrete case, in which more than 60 labor union members were recently arrested, there are reports of cases in which even after being released on bail, even full-time union staff members were not allowed to visit the union office and were unable to engage in social activities.

During the examination of the Government's report by the Committee on the Covenant on Civil Liberties in 2014, the Committee made strict recommendations on these after intense questioning².

² During the examination of the Government's report by the Committee on the Covenant on Civil Liberties in 2014, the Committee recommended, after intense questioning, that

"The Committee regrets that the State party continues to justify the use of substitute prisons on the grounds of the lack of available resources and the efficiency of this system for criminal investigations.

The Committee remains concerned that, prior to prosecution, the lack of the right to bail or the right to the assistance of a court-appointed defence counsel increases the risk of extracting coerced confessions in substitute prisons.

The Committee further expresses its concern at the absence of strict regulations on the conduct of interrogations and regrets that the video recording of interrogations proposed in the 2014 "Reform Plan" (referring to the "Results of the Research and Deliberation on the Establishment of a New Criminal Justice System", Special Committee on Criminal Justice for a New Era, Legislative Council, 9 July 2014) We regret the limited scope of the proposed mandatory video recording of interrogations." This reform plan was later turned into a draft law and the new Code of Criminal Procedure was enacted in June 2016. The reforms were only partial and did not even make the entire interrogation process visible. On the other hand, the scope of interception of communications was expanded, plea bargaining was introduced, and investigative powers were expanded.

At the end of the Commission's review, Chairman Sir. Nigel Rodley made the following concluding remarks

"There are two issues (the substitute prison system and the comfort women issue) that need to be touched upon. He made the point that the Japanese government is repeating the same process over and over again. With regard to the substitute prison system, the government cited a lack of resources as a reason for not changing the system, but the Chairperson pointed out that a situation in which respect for human rights depends on resources should not exist in a developed country like Japan.

The only reason why this kind of system is maintained is because the prosecution wants to seek a confession. Such a situation is clearly inconsistent with the Statute.

The Japanese government will not be surprised if the Commission issues its recommendations in a stronger form than before.

The Japanese government clearly appears to be resisting the international community." He went on to say.

The recommendation was a red card to Japan's pretrial detention system, which has been subject to numerous yellow cards.

Civil society must, once again, redouble its efforts to achieve the fundamental reforms to the pre-trial detention system set out in the 2014 concluding observations.

² A/HRC/WGAD/2018/55, para 72

Despite that, unconvicted detainees in Japan continues to take no account of their legal status as presumed innocent.

(6) The recommendation of the Arbitrary Detention WG that the pending detentions of Mr. Hiroji Yamashiro and Mr. Carlos Ghosn were arbitrary.

The Arbitrary Detention WG made recommendations that the pending detentions of Mr. Hiroji Yamashiro in 2018 and Mr. Carlos Ghosn in 2020 were arbitrary detentions. The details and significance of these cases will be discussed in a separate section.

III. Suppression of the Right to Freedom and Arbitrary Detention of a Human Rights Defender in Okinawa

1. Relevant LOIs

Para 16: Treatment of persons deprived of liberty and freedom (Articles 7, 9 and 10 of the ICCPR)

Para. 27: Freedom of peaceful assembly and association (Article 21 of the ICCPR)

2. Suggested recommendations

(1) The State party shall respect Opinion 55/2018³ adopted by the United Nations Working Group on Arbitrary Detention, undertake without delay an independent investigation into the arbitrary deprivation of liberty of Mr. Hiroji Yamashiro, a human rights defender and leader of peaceful protests, and provide remedy and compensation for Mr. Yamashiro without delay in line with international human rights standards.

(2) The State party shall ensure that people in Okinawa and throughout Japan are able to hold peaceful demonstrations and protests without the threat of police force, in light of the diminishing effect that the arrest and prolonged detention of peaceful protest leaders has had on protests against the construction of US bases in Okinawa.

(3) The State party shall confirm that protests and peaceful gatherings are one of the legitimate purposes of road use,⁴ and ensure that protesters are not subjected to abusive arrests for violating the Road Traffic Act.

(4) The States party shall uphold the voluntary pledges they have announced in their

² Ministry of Foreign Affairs of Japan (January 2019) "Japan's Human Rights Commitments and Pledges" last accessed on 6 January 2021 at:

<https://www.mofa.go.jp/files/000175306.pdf>

² A/HRC/WGAD/2018/55, para 70 and 77

² Ibid, para 82

² Ibid, para 70

² a/hrc/wgad/2018/55

² A/HRC/35/22/Add.1, para 60

³ A/HRC/WGAD/2018/55

⁴ A/HRC/WGAD/2018/55, para 72

elections to the Human Rights Council⁵ and accept country visits by the UN Working Group on Arbitrary Detention and cooperate with its investigations.

3. Facts and Reasons for Seeking Recommendations

(1) Targeted arrests of a protest leader

Okinawa Prefecture was once a state called the Ryukyu Kingdom, but was annexed by Japan in 1879 as a result of the Ryukyu Disposition. At the end of the Pacific War, Okinawa became the site of ground battles between the Japanese and U.S. forces, and it remained under U.S. control until 1972, when it was returned to Japan. During that time, much of the land was seized by U.S. military to construct U.S. military bases.

Okinawa Prefecture is a small island prefecture that accounts for only about 0.6% of Japan's land area. However, about 70% of the U.S. military facilities in Japan are still concentrated there, and the people of Okinawa have consistently called for a reduction of the burden of U.S. military bases since the end of World War II (or since 1972). Hiroji Yamashiro, a chairman of the Okinawa Peace Movement Center, has been one of the leaders, for many years, peacefully leading the peace movement and protests against the US bases in Okinawa.

In 2014, construction of a new base began in Henoko, Nago City, Okinawa Prefecture, as a relocation site for the U.S. Futenma Air Station, and in 2016, construction of U.S. Marine Corps helipads in the Takae area of Higashi Village began in earnest. Mr. Yamashiro has led protests in both the Henoko and Takae areas.

On October 17, 2016, Mr. Yamashiro was arrested on suspicion of destruction of property for "cutting two barbed wire on the fence" during a protest in Takae, Higashi Village. He then continued to be detained for about five months before his trial.

The charges brought against him are:

- (1) He cut a piece of barbed wire worth 2,000 yen (15 US dollars) in the mountains of Takae on October 17 of the same year;
- (2) He injured an employee of the Okinawa Defense Bureau with bruises that lasted two weeks on August 25 of the same year;
- (3) Between January 28 and 30 of the same year, he piled up concrete blocks in front of the

⁵ Ministry of Foreign Affairs of Japan (January 2019) "Japan's Human Rights Commitments and Pledges" last accessed on 6 January 2021 at:

<https://www.mofa.go.jp/files/000175306.pdf>

gate of US base in Henoko and obstructed the traffic of construction vehicles.

These are all minor offences, but after his initial arrest for a minor offence (destruction of property), he was repeatedly arrested and detained for a series of past cases, resulting in his prolonged detention for as long as five months before trial. This constitutes "hostage justice," a long-standing problem in Japanese criminal justice.

Furthermore, the case of obstruction of business by force, in which he was also arrested and detained, took place 10 months before his arrest, and involved his act of openly stacking blocks in front of a large number of Okinawa Prefectural Police officers and Okinawa Defense Bureau officials. If the act had been malicious, the police officers could have stopped the act or arrested him on the spot, but they did not stop him apart from filming him on video. On November 29, ten months later, four people, including Yamashiro, were arrested, and the police raided tents, a protesting citizens' base in Henoko, and the Okinawa Peace Movement Center, and confiscated computers, etc. Considering that the ceremony for the partial return of the Northern Training Area was scheduled for December 22 and the resumption of Henoko construction work was scheduled for late December, there is no other explanation than that the detention was aimed at prolonging the detention of Mr. Yamashiro in order to allow the helipad construction work in Takae to be completed in time for the ceremony for the partial return of the Northern Training Area and to keep him away from the site for a long time before the resumption of Henoko construction work.

In these circumstances, the Working Group found that not only " the Government appears to be targeting Mr. Yamashiro not for his specific alleged offences but for his lifelong exercise of the rights and freedoms as an Okinawan pacifist and environmentalist" but also that " Mr. Yamashiro's political views are clearly at the centre of the present case and that the authorities have displayed an attitude towards Mr. Yamashiro that can only be characterized as discriminatory."⁶

It further found that the deprivation of liberty resulting from Mr Yamashiro's arrest and prolonged detention was "in contravention of articles 2, 5, 7, 9, 19, 20 and 25 of the Universal Declaration of Human Rights and of articles 2, 7, 9, 10, 19, 21, 26 and 27 of the International Covenant on Civil and Political Rights, is arbitrary"⁷, and expressed concern about the "chilling effect on public expression"⁸.

(2) Unjustifiable restrictions during detention and after bail

⁶ A/HRC/WGAD/2018/55, para 70 and 77

⁷ Ibid, para 82

⁸ Ibid, para 70

During his detention, Mr. Yamashiro was not allowed to see anyone including his family, except his lawyer. Moreover, he was forbidden to exchange any letters except with his lawyer. According to Mr. Yamashiro, although the light was slightly dimmed at bedtime, the lights are left on 24 hours a day at the detention center, and there is no clock, which deprives him of a sense of time, causing him great suffering. Mr Yamashiro also had to fight the fear of a recurrence of his malignant lymphoma, which he was not allowed to see a doctor about, despite the fact that he was still in need of regular check-ups. Even when he was released on bail, making contact with those involved in the protests, which effectively restricted his participation in the protests.

In particular, the ban on visits from family members not involved in the protests and the restrictions on bail lack proportionality, reasonableness and necessity and are punitive. It also has a chilling effect not only on Mr. Yamashiro but also on the Okinawans who are protesting with him.

(3) Disregard for international human rights standards

On March 14, 2018, the Naha District Court sentenced him to two years in prison and three years of probation for obstruction of business by force. The Naha Branch of the Fukuoka High Court dismissed the appeal on December 13, 2018. Yamashiro appealed to the Supreme Court, but on April 22, 2019, the Supreme Court dismissed the case and the sentence was confirmed.

The UN Working Group on Arbitrary Detention expressed its view in Opinion No 55/2018⁹ of December 2018 that the deprivation of liberty due to the arrest and prolonged detention of Mr. Hiroji Yamashiro was discrimination based on his political opinion and an arbitrary deprivation of liberty. However, that opinion was never respected by the Japanese courts. The Working Group on Arbitrary Detention has also called on the Japanese Government to conduct an independent investigation into the deprivation of Ms. Yamashiro's liberty and to provide remedy and compensation without delay, but this has yet to be done, more than two years after the opinion was made public. In view of the fact that Japan is a State Party to the ICCPR and a member of the United Nations Human Rights Council, the Government of Japan has obligation to respect and implement the observations expressed by the Working Group.

(4) Chilling effect

The arrest and prolonged detention of Mr. Yamashiro, a leader of peaceful protests in Okinawa, not only violates his own rights, but also, as the Special Rapporteur on freedom of

⁹ a/hrc/wgad/2018/55

expression has expressed his concern, has a chilling effect on other protesters and threatens their right to freedom of expression and peaceful assembly.¹⁰

In addition to Mr. Yamashiro, the frequency of arrests against citizen protesting against the construction of U.S. bases is remarkably high. For example, 14 citizens protesting the construction of helipads at the U.S. Northern Training Area in Okinawa were arrested in nine cases in the four months between August and November 2016. However, the majority of them were released without being detained. In light of the fact that the detention rate for criminal offenses in Japan as a whole is 90% (2015), some lawyers have pointed out that the right to arrest is being used "arbitrarily" in order to stifle opposition movements.¹¹

Regarding the large number of cases in which protesters were arrested for minor offenses such as violating the Road Traffic Law, the Government of Japan responded that "the police were merely acting under the Act in order to prevent road hazards and to ensure the smooth and safe flow of traffic" and that "[t]he arrests were made in accordance with due process of law provided for in the Code of Criminal Procedure".¹²

However, "[a]ssemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic"¹³ and "[a]n 'assembly' ... can take the form of demonstrations, meetings, strikes, processions, rallies or sit-ins"¹⁴, sometimes of long duration. "[E]xcessive and disproportionate punishments for violations of the law, and unreasonable restrictions on the use of public spaces all negatively affect the right to freedom of peaceful assembly"¹⁵ and state parties are expected to change their operation to meet international human rights standards, rather than stressing the procedural legality of road traffic laws and criminal procedure codes.

IV. Additional information on the criminal detention of Mr. Carlos Ghosn

1 Overview

Mr. Ghosn, a former representative director of a major Japanese automobile manufacturer, who has been accused of violating the Financial Instruments and Exchange Law and other charges was detained for a total of 128 days, from November 19, 2018 to March 6, 2019 and from April 4, 2019 to April 25, 2019. For this detention, on 20

¹⁰ A/HRC/35/22/Add.1, para 60

¹¹ <https://www.okinawatimes.co.jp/articles/-/133698>

¹² A/HRC/WGAD/2018/55, para 42

¹³ A/HRC/31/66, para 32. See also A/HRC/20/27, para. 41, and ODIHR/OSCE *Guidelines*, para. 20.

¹⁴ A/HRC/31/66, Para10

¹⁵ *Ibid*, para 7

November 2020, the UN Working Group on Arbitrary Detention issued an opinion that the deprivation of liberty was arbitrary.

2 Factual backgrounds

From November 19, 2018 to December 10, 2018, Mr. Ghosn was arrested and detained for violations of the Financial Instruments and Exchange Law (false statements in securities reports by stating less remuneration than actual), which were carried out between 2010 and 2014. Ghosn was charged with the same offense, and on the same day he was arrested and detained for making false statements in securities reports, which were carried out between 2015 and 2017. However, after the court rejected the prosecutor's request for an extension of the detention period, on December 21, 2019, the prosecutor arrested and detained Mr. Ghosn for another violation of the Companies Act (crime of an aggravated breach of trust). After being charged with these crimes, Mr. Ghosn was released on bail on March 6, 2019, after posting bail of 1 billion yen. However, a day after Ghosn announced he would hold a press conference, he was arrested and detained on April 4, 2019, on another violation of the Companies Act. After being charged with the same offense, Mr. Ghosn was released on bail again on April 25 after posting another bail of 500 million yen.

3 Contravention of Articles 9 and 14 of the ICCPR

- (1) Mr. Ghosn was detained for a long period of time, a total of 128 days, which is due to the absence of a bail system in pre-indictment detention. As already mentioned, in Japan, the maximum period of arrest and detention for a single case is 23 days. Therefore, investigative agencies routinely make separate arrests for each case, instead of arresting multiple cases together. And because there is no pre-indictment bail system, if a person is deemed by the court to be at risk of destruction of evidence or of absconding, he or she may not be released for up to 23 days. Article 9(3) of the Covenant stipulates the right to be released within a reasonable period of time, and Japan's Code of Criminal Procedure, which does not provide for pre-indictment bail, violates the Covenant.
- (2) In addition, Mr. Ghosn was interrogated every day during his detention, but his lawyer was not present. The Japanese government believes that the investigative authorities have the right to conduct interrogations during detention, and police officers and prosecutors refuse to allow lawyers to be present during interrogations. In interrogations where lawyers are not present, they may say that a suspect exercising the right to remain silent will be disadvantaged if he or she remains silent or say insulting words to him or her. This violates the suspect's right to request counsel and is in violation of Article 14(3)(b) of the Covenant.
- (3) The investigative authorities arrested and detained him for the series of cases separately for 2010-2014 and 2015-2017, which is considered to be two separate arrests and detentions in order to carry out lengthy interrogations that should have been held in one session. It is written in (1) that the investigating agency tend to arrest and detain one case

separately. In addition, even though he had already been released on bail, the investigating agency arrested and detained him for the fourth time in order to conduct an interrogation. It seems that the purpose of this arrest and detention was to prevent Mr. Ghosn from influencing the media when he was about to hold a press conference, so that the arrest and detention may have been unnecessary. In addition, at the time of the arrest, in front of the press, Mr. Ghosn used handcuffs and a waist rope, which were not necessary, even though there was no specific threat that he would lash out or flee. The law does not stipulate in which cases handcuffs may be used in making arrests; the rules are set out in regulations issued by the National Public Safety Commission, but are considered as not legally binding. These repeated arrests and detentions and the use of handcuffs and waist ropes violate Article 14(3)(g) of the Covenant because they cause excessive mental and physical suffering to suspects or damage their social reputation and lead to the coercion of confessions.

- (4) With regard to the WGAD's opinion concerning Mr. Carlos Ghosn, the Minister of Justice Yoko Kamikawa held a press conference to protest that the facts recognized in the opinion were incorrect. It is true that two facts in the opinion, that he was not taken in front of the judge before the detention following arrest and that he was not able to contest his detention at the court during his detention were not correct. However, this misunderstanding occurred because the state refused providing information on Mr. Ghosn's case. There is no error in the facts recognized by the opinion other than these two points.

V. Additional Information on Immigration Detention

1 Overview of Immigration Detention in Japan and Recent Developments

According to the Japanese Ministry of Justice / Immigration Bureau, all persons subject to deportation proceedings are to be detained in principle (principle of detention, principle of detention in all cases), and necessity, reasonableness and proportionality are not requirements for detention. There is no opportunity for judicial review of the initiation or continuation of detention, unless the detainee files a lawsuit on his or her own. Detainees are excluded from government legal assistance and are not guaranteed any opportunity for judicial review. Even when judicial review does take place, the courts recognize the principle of detention, so that detention is rarely held to be illegal at all.

As a result, the means of release from detention is virtually limited to provisional release conducted by the Immigration Bureau. The Immigration Bureau has a wide discretion to grant a provisional release in any case. As described in detail in the previous report (pp. 24-26), in recent years, detention tended to be extremely prolonged in the years before the spring of 2020, when the Covid-19 disaster became serious.

That is, as of June 30, 2019, there were 1,253 detainees nationwide under deportation orders, of whom 679 had been detained for longer than six months, 531 for longer than one year, 251 for longer than two years, and 76 for longer than three years.

2 Two-Week Provisional Release and Opinion by the UN Working Group on Arbitrary Detention

(1) Two-week provisional release

As mentioned in the previous report, in response to the increase in the number of detainees on hunger strike due to the prolonged detention and the incident in which a Nigerian man died of starvation in the detention center, the Immigration Bureau started a policy of releasing detainees on provisional release for about two weeks. Among the detainees who were subjected to the two-week provisional release, there were those whose bodies were destroyed by internal diseases, those who developed (or aggravated) mental disorders, those who repeatedly attempted suicide or self-harmed, those who were unable to control their defecation and started to wear diapers, and those who started to smear feces and urine on their bodies or on the walls of the facilities.

(2) Reporting to the Working Group on Arbitrary Detention

In this context, two applicants for refugee status, Mr. A and Mr. B, who were repeatedly exposed to indefinite detention and two-week provisional release, were reported to the Working Group on Arbitrary Detention on 10 October 2019. On 28 August 2020, the Working Group adopted the opinion that the detention of the two persons violated Articles 2, 3, 8, 9 and 14 of the Universal Declaration of Human Rights and Articles 2, 9 and 26 of the International Covenant on Civil and Political Rights (the Covenant on Civil Liberties).

3 Nagoya Immigration Detainee Death Case

On 6 March 2021, a Sri Lankan national, Ms. Wishma Sandamali, who had been detained at the Nagoya Immigration Bureau for approximately six and a half months since August 2020, died inside the Bureau. She had not violated any laws other than overstaying. She had been beaten by the man she was living with, and when she went to the police for advice after being evicted from her house by the man, she was arrested and taken directly to the Immigration Bureau.

Her application for provisional release, which he filed in January 2021, was denied, and a second application for provisional release, filed in February, was pending at the time of his death. By the time of her death, Ms. Wishma had lost about 20 kilograms of her body weight and began vomiting after eating and drinking. She and her supporters had requested intravenous fluids and inpatient treatment, but this request was not accepted.

In August 2021, an investigation report by a team of immigration officials was made public, but¹⁶ the cause of death was listed as "unknown". It did not even consider whether Mr. Wischma's detention was consistent with the Constitution or international human rights law, including the ICCPR.

Surveillance footage during which Ms. Wishesma was detained also exists, but the immigration

¹⁶ The specific members of the investigation team are not known, and although several experts were involved in the investigation, their method was to provide comments and suggestions based on the records and reports prepared by the investigation team.

authorities refused to disclose it. In the end, Wishesma's two surviving sisters were only allowed to view the footage, which had been edited down to two hours by the Immigration Bureau, in the Ministry of Justice. Their request to accompany their lawyers was refused by the MOJ.

4 Submission and Withdrawal of the Proposed Amendment to the Immigration Control Act

On February 19, 2021, the government decided on a bill to "amend" the Immigration Control and Refugee Recognition Act. The bill maintains the principle of indefinite detention, detention without judicial review, and detention in principle, denies the application of international human rights law in determining residency, and does not fundamentally revise the refugee status recognition procedure, which almost no one is granted. (1) In principle, making it possible to deport multiple applicants for refugee status from the third time onwards, even if they are still in the process of examination. (2) Establishing a new "crime of evading deportation" for some people who do not accept deportation even after a deportation order is issued (the Minister of Justice decides the scope of such people by a public notice); (3) Establishing a system to avoid detention in the form of "monitoring measures" only when the chief examiner deems it "appropriate (4) Establishment of a new crime of abscondence of a monitored person, and (5) Establishment of a new crime of unlawful employment of a monitored person.

In responding to it, the United Nations High Commissioner for Refugees (UNHCR) released an opinion piece expressing "very grave concerns" regarding compliance with the Non-Furman Principles and other issues¹⁷. The Special Rapporteur on the human rights of migrants, the Working Group on Arbitrary Detention, the Special Rapporteur on freedom of thought and belief, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment issued a joint letter. In the letter they expressed "serious concerns about the compatibility of the Cabinet Act with Japan's obligations under international law, in particular the International Covenant on Civil and Political Rights (ICCPR)¹⁸.about the existence of a system of detention without a cap on the length of detention, the existence of a system of detention without judicial review, and the creation of monitoring measures.

In Japan, researchers issued a joint statement of opposition, and many citizens raised their voices in opposition.

As a result, the bill was withdrawn in May 2021. However, the government has not acknowledged that the current immigration detention system and the amendment bill that preserves it violate international human rights laws such as the Covenant on Civil Liberties, and has not given up on re-proposing the bill.

¹⁷ (full text) <https://www.unhcr.org/jp/wp-content/uploads/sites/34/2021/04/20210409-UNHCR-Full-Comments-on-ICRRA-Bill-English.pdf> (summary) [Executive-Summary-ICRRA-20210409.pdf](https://www.unhcr.org/jp/wp-content/uploads/sites/34/2021/04/20210409-UNHCR-Executive-Summary-ICRRA-20210409.pdf) (unhcr.org)

¹⁸ <https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL-JPN31-03-21.pdf>

5 Summary

As mentioned above, the government's unwillingness to comply with international human rights law with regard to immigration detention has become more apparent, and the need for the "recommendations that we request" (pp. 24, 29) mentioned in the previous report to be made has become even more urgent.

VI. Additional Information on Physical Restraints in Psychiatric Hospitals

1 Overview

The rate of physical restraints per population in mental health in Japan (physical restraint rate) is about 270 times higher than in the United States, 600 times higher than in Australia, and 3,200 times higher than in New Zealand.

Subjecting patients to being tied down to a bed completely deprives them of their right to liberty (Article 9 of the ICCPR). In addition, as was the case with the patient in the case below, when patients are under such physical restraints, they are often subjected to "inhuman or degrading treatment" (Article 7 of the ICCPR), such as force-feeding through a nasogastric tube instead of oral food intake and using urethral catheters or diapers.

As to the background of why such easy uses of physical restraints in mental health are permitted in Japan, there are problems with legal requirements that allow physical restraints that are too loose and that courts confirm arbitrary physical restraint by giving doctors discretion in interpreting the requirements.

A decision that clearly embodies these problems was handed down by the Tokyo District Court in June 2021. This case is reported below.

2 Factual backgrounds

The following is a report on the district court's decision which upheld the lawfulness of 60 days out of 77 days of physical restraint for a girl with an eating disorder who was 14 years old at the time.

On May 19, 2008, the girl (hereinafter T), who was 14 years old at the time, was diagnosed with an eating disorder (anorexia nervosa) and voluntarily admitted to K Hospital.

Although the extent of her condition was moderate, the doctor warned her that if she could not consume at least 80% of the food given to her three times a day, the doctor would feed her with liquid food through a nasogastric tube. In addition, she was prohibited from contact with the outside world, including her parents, prohibited from bringing in anything other than one stuffed animal, was not allowed to listen to music, read, or watch television, and was subjected to extremely strict treatment in which she was required to rest without getting out of bed. Furthermore, she was not given any concrete explanation as to the conditions and timing of the ease of these restrictions. For these reasons, on May 23, the fifth day of her hospitalization, T pleaded with the doctor to permit her to see her parents for just 10 or 20 minutes, to write letters to her friends, or at least to listen to music. However,

the doctor did not listen to her at all.

On May 24, the sixth day of her hospitalization, T couldn't stand it mentally anymore. She complained that she wanted to move to the internal medicine department, and if she couldn't, she wanted to be discharged from the hospital. She removed her intravenous drip (inserted for rehydration) as she cried. Thereafter, although T took a rebellious attitude toward the doctor who examined her, she did not behave in a violent manner that could have caused harm to those around her. T regained her composure as the nurses listened to her and she eventually accepted her continued hospitalization at K Hospital.

However, the doctor suddenly instructed to start restraining T (5-point restraints: arms, legs, and shoulders) on the grounds that T's life was in danger. Furthermore, the doctor did not release T's restraints at all, neither for eating nor for excretion. The doctor instructed that T should be nourished only through a nasogastric tube, and that she should be kept in bed with a urinary catheter and diaper for excretion. Thus, the doctor violated T's personality and dignity.

Furthermore, this physical restraint continued for 77 days until August 8. After being released from physical restraint, T was finally allowed to see her parents on September 26, 131 days after the start of her hospitalization, and she strongly asked her parents to discharge her. As a result, T was discharged from the hospital on November 21.

T got married in 2015. Owing partly to the understanding and cooperation of her husband, she consulted lawyers in 2016, hoping to clarify that the physical restraint she had been subjected to was wrong. The lawyers negotiated with K Hospital, but the Hospital did not admit its fault.

Therefore, in May 2018, T filed a lawsuit against K Hospital in the Tokyo District Court for damages, claiming that the 77-day physical restraint on her was illegal.

However, in June 2021, the Tokyo District Court held that K Hospital's initiation of physical restraint of T and its continuation for 60 days thereafter were legal, saying that "it cannot be recognized as unreasonable" and judged that only the last 17 days of physical restraint were illegal (hereinafter "the decision of the case").

Both T and K Hospital appealed against the decision to the Tokyo High Court. As of October 2021, the lawsuit is still pending.

3 Laws and Regulations Concerning Physical Restraints in Psychiatric Hospitals in Japan

Article 36, paragraph 1 of Act on Mental Health and Welfare for the Mentally Disabled (Mental Health and Welfare Act) provides that the administrator of a psychiatric hospital may restrict the activities of hospitalized persons to the extent deemed necessary for the medical care and protection of the said persons. Article 37, paragraph 1 of the Act provides that the Minister of Health, Labour and Welfare may determine the criteria necessary for the treatment of persons hospitalized in a psychiatric hospital. Based on Article 37 above,

the public notice¹⁹ by the Minister stipulates that physical restraint is exceptionally permitted only when both of the following requirements (1) and (2) are fulfilled.

(1) Requirement 1: The said patient must be in one of the following conditions.

(a) Suicide attempt or threat of self-injurious behavior are extremely imminent.

(b) Hyperactivity or disquiet are prominently manifested.

(c) Other than (a) or (b) above, in cases where the said patient is deemed likely to endanger his/her own life due to his or her mental disorders if left untreated.

(2) Requirement 2: There is no alternative method other than physical restraint.

4 Problems in the decision of the case

In the decision of the case, the Tokyo District Court found that of the 77 days of physical restraint on T, the 60 days fulfill the requirement (1) (c), and requirement (2) above.

However, the following three reasons in the decision of the case ((i), (ii) (iii)) are problematic because the reasons clearly contradict the purpose of the Mental Health and Welfare Law and the Public Notice, which states that physical restraint is allowed only in exceptional situations because it can easily lead to the restriction of human rights of patients by doctors.

(i) The patient bears the burden of proof for the illegality of physical restraint.

In principle, physical restraint without a person's consent is an illegal act that is also a crime of arrest and confinement under the Penal Code. Therefore, the fact that the physical restraint fulfills the requirements of the public notice above is a ground for justification, and the hospital should bear the burden of proof.

(ii) Discretion of doctors

The court held that the doctor had reasonable discretion in determining whether the requirements of the notification above were fulfilled or not.

(iii) Imminentness or manifestness are not required in fulfilling the requirement of (1)(c) in the public notice above.

Considering the balance with (1)(a) and (1)(b), the danger of life must be objectively obvious and imminent in the requirement (1)(c).

However, the court held that such a restrictive interpretation of (1)(c) was unnecessary. The court held that even if the obviousness or imminence of the danger to life was not objectively clear, it was not unreasonable for a doctor to determine, by his or her discretion, that the requirements of (1)(c) were fulfilled.

5 Suggested recommendations

(i) (1)(c) of the public notice that defines the requirements for physical restraint, "Other than (a) or (b) above, in cases where the said patient deemed likely to endanger his/her own

¹⁹ Standards of Treatment Specified by the Minister of Health and Welfare based on Mental Health and Welfare Act Article 37 (Ministry of Health and Welfare Notification No. 130, April 8, 1988).

life due to his or her mental disorders if left untreated,” does not explicitly require imminence or manifestness of danger to the patients’ lives. As a result, arbitrary implementations by the discretion of onsite doctors are allowed. Therefore, the government shall immediately amend the public notice to make the requirements so strict to the extent that it does not allow room for physicians' discretion.

- (ii) In addition, the current remedy system (reviews by the Psychiatric Review Board) is not functioning enough, and therefore the Government shall establish a National Human Rights Institution. We have pointed out this problem in Section 3, “Detention in psychiatric hospitals” of the first report that we have already submitted.