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Introduction

How can Japan move toward gender equality, the elimination of authoritarian police practices and realization of the human rights enshrined in its laws and treaty obligations? Many Japanese human rights lawyers and activists believe that one important path forward lies through international institutions, especially those created under the auspices of the United Nations. In the latest round of an ongoing battle to enforce international norms in Japan, lawyers and activists presented a powerful case before the UN Human Rights Committee in Geneva and succeeded in persuading the Committee to deliver stinging criticisms of Japan's failures to take action to remedy several longstanding human rights problems.



The Palais des Nations, where the UN Human Rights Committee conducted hearings on Japan's human rights practices in October 2008

The World's Most Important Human Rights Treaty and Japan

The International Covenant on Civil and Political Rights (the "Covenant" or "ICCPR"), adopted by UN General Assembly resolution in 1966, is the most comprehensive and widely recognized human rights treaty. More than 160 states have ratified the Covenant. Japan did so in 1979. The Covenant does more than merely proclaim a long list of civil and political human rights. It also imposes obligations on member states to take action to promote observance of those rights through such action as adopting appropriate legislation, insuring that victims of right abuse

have access to effective remedies, and training government officials (including judges) in their obligations to enforce the Covenant. The implications of Japan's access to the Covenant have only gradually become apparent over the past four decades.

The United Nations Human Rights Committee, a body led by 18 individuals elected for four year terms, is charged with monitoring compliance. Its primary tool to do so is created by Article 40 of the Covenant, which requires each member country to submit periodic reports "on the measures they have adopted" to give effect to treaty rights "and on the progress they have made in the enjoyment of those rights." (Treaty Text (<http://www.learnstuff.com/learn-about-the-international-covenant-on-civil-and-political-rights/>))

When the Government of Japan submitted its fifth such report in December 2006, it opened the door to a three-cornered debate among government officials, representatives of civil society organizations, and the UN Human Rights Committee, the entity created by the treaty to monitor compliance. This exchange culminated in two days of live public hearings before the Committee held at the Palais de Nations in Geneva on October 15-16, 2008 and by the Committee's issuance of "Concluding Observations" on October 30. Composed of 34 numbered paragraphs of comments and

recommendations, the Observations sharply criticized the Japanese government's failure to take action to address several longstanding human rights problems and recommended a number of specific remedial actions. (Observations

(<http://www.unhcr.org/refworld/type,CONCOBSERVATIONS,HRC,JPN,,0.html>))

We will review the Committee's statement and the process that led up to it, evaluate its conclusions, and consider the effect it may have on human rights development in Japan.

Key Comments and Recommendations by the Human Rights Committee

Because the International Covenant on Civil and Political Rights is a comprehensive human rights treaty, the ground to be covered in member states' periodic reports is vast, as is the responsibility of the Committee as the monitoring body. Accordingly, the Concluding Observations issued by the Committee on October 30, 2008 cover a wide range of topics, including discriminatory treatment of women and non-Japanese persons, unrestricted interrogation of criminal suspects, poor treatment of prisoners, the lack of prosecution of perpetrators of crimes related to human trafficking, unreasonable restrictions of free speech, and disregard of the Committee's longstanding recommendation that Japan establish an independent institution charged

with protecting human rights. (For a description of independent human rights institutions, go [here](http://www.unhchr.ch/html/menu6/2/fs19.htm) (<http://www.unhchr.ch/html/menu6/2/fs19.htm>.) Problems identified by the Committee in 2008 were not new. Many of the Committee's comments and recommendations repeated similar statements issued by the Committee in response to preceding periodic reports, most recently in response to the fourth Japan periodic review in 1998.¹

In a press release issued following the hearings, the Committee put aside diplomatic niceties to quote one of its experts who declared, "it was repeatedly regretted that observations from several earlier country reviews of Japan had not had any effect and that Experts were making the same recommendations again. Sometimes, it seemed to be a dialogue of the deaf."

In an effort to recharge this dialogue, the Committee made several new recommendations. The first was a demand that Japan produce another report "within one year explaining the follow-up given to the Committee's recommendations" concerning two areas of special concern: interrogations of criminal suspects and extended solitary confinement of inmates on death row. This was the first time the Committee has set such a short fuse to a Japan report.

Two other new items stand out. One is the

Committee's demand that Japan "abolish" the practice of extended custody in local police jails commonly known as "*daiyou kangokū*." This practice facilitates coerced confessions and has been excoriated by human rights campaigners and by the Committee itself for many years. In 2008, the Committee called for abolishment for the first time. Another is the very practical recommendation that Japan's national parliament adopt a new statute to define the term "public welfare," which appears in Articles 12 and 13 of the Constitution. Japan's courts routinely invoke these abstract and open-ended words to justify arrests and restrictions on free speech and other individual rights. The Committee had criticized this practice in the past. In 2008, it suggested a specific remedy for the first time: legislation designed to solve the problem. We will discuss these two items in more detail as we review the Committee hearing process.

Proceedings Before the UN Human Rights Committee -- Two Years of Dialogue

Round One -- The Japan Government Report

The Treaty monitoring process begins with delivery of the government report required by Article 40. In recent years, the Committee has received 12 to 15 reports per year. The 103-page English language document presented by the Japanese government in December 2006 addressed a wide range of topics, including gender equality, application of the death penalty,

treatment of criminal suspects, prisoners and other individuals in government custody, policies related to the *burakumin* and to the preservation of Ainu culture, the rights of children, foreigners, others in special categories and many administrative and other issues. Creation of this document was a collective effort involving representatives of a number of government agencies coordinated by the Ministry of Foreign Affairs. Key participants included the Ministry of Justice and the National Police Agency, the National Personnel Authority (charged with educating government officials), the Ministries of Education and Science and Management and Coordination, which hold broad mandates relevant to implementation of treaty obligations, and specialized agencies, such as the Council for Gender Equality.

In each case, Foreign Ministry officials worked with counterparts in other agencies to confirm respective areas of responsibility, obtain input, and craft a Japanese language statement acceptable to the agency and the Foreign Ministry. When this process was complete, MoFA officials then arranged English translations of the texts and sent them back to each of the participating agencies for further review prior to compilation of the official government report.

The result of this process is undeniably a report that presents government efforts in a very positive light and avoids dwelling upon

potentially embarrassing topics. Readers would learn much about such items as the strenuous (but unsuccessful) efforts of the government between 1997 and 2003 to pass a new human rights protection bill, the ongoing work of the Ministry of Justice to resolve human rights disputes through mediation and non-judicial means, and of measures adopted with the intention of providing better treatment for detainees in government custody. They would learn less about maltreatment of prisoners, government denials of responsibility related to foreign victims of the war years, the failure to prosecute the purveyors of human trafficking, and other embarrassing topics. Government Report (http://www.mofa.go.jp/policy/human/civil_rep6.pdf).

The government maintains that human rights are fully protected by Japan's domestic law. One example is the government explanation for application of the "public welfare" provision of Japan's Constitution. Constitutional scholars have long charged that Japan's courts have expansively interpreted these words to uphold government restrictions on individual rights. In its comments on previous reports, the Committee itself has criticized the practice. But the government baldly asserts "there is no room for arbitrary use of the concept of 'public welfare' by the state." This conclusion is supported by nothing more than the simple declaration that

“individual rights are not absolute” and that they must be weighed against other interests, such as the “public welfare.” There are no citations to cases where courts or other bodies may have defined the limits of the public welfare concept or worked to develop a meaningful balancing process. It was the inadequacy of this response that drove the Committee to call for legislation to clarify the scope of “public welfare.”

The government deals with another fundamental issue in similar summary fashion. How do Japan’s courts undertake their obligation to enforce rights guaranteed by the Covenant? Government authors present the fact that “In no case has the Supreme Court found laws, rules or administrative dispositions to be in violation of the Covenant.” But whereas rights activists and scholars make the same statement to support their assertion that Japan’s Supreme Court has ignored the country’s treaty obligations, the government report cites the lack of any Supreme Court precedent as evidence that no treaty violations exist.

NGO Alternative Reports

In order to develop a more complete picture, the Committee also receives information from non-governmental sources, including alternate reports (also known as “shadow reports”) from NGOs and statements from expert witnesses. Committee practice also allows NGOs to make very limited presentations before the Committee

itself. Anyone can seek to lobby Committee members individually. (In one special effort, the Japan Federation of Bar Associations (JFBA) arranged to bring two members of the Committee to Japan during the summer of 2008.)



A Japanese Attorney Addresses the UN Human Rights Committee in Geneva

Aware that the government report was due back in 2002, some writers had been at work on their own alternative reports for months and even years before the government report actually appeared. In the case of the JFBA, a working group was formed as early as 2001, according to its chairperson, Fujiwara Seigo, a lawyer from Kobe. (At that time, he also served as a vice-chairperson of the national bar association.) With the government report in hand, the NGOs could now focus their efforts on filling gaps and otherwise rebutting objectionable aspects of the government case. The United Nations has published a total of 16 alternative reports they submitted (Link

(<http://www2.ohchr.org/english/bodies/hrc/hrcs94.htm>). The NGO effort was led by the extraordinary work of the national bar association. Fujiwara's team would ultimately produce an authoritative 217 page report. It begins by criticizing the "extreme inadequacy" of the government's report concerning issues previously raised by the Committee and carries this theme throughout. Citations to court decisions, academic writing and other relevant work, and details from dozens of specific cases provide numerous demonstrations of the "inadequacy" of the government report² (Link (http://www.nichibenren.or.jp/ja/kokusai/humanrights_library/treaty/data/Alt_Rep_JPRep5_ICCPR.pdf)).

For example, regarding extended detentions for criminal suspects, JFBA authors wrote the following:

"if a request of detention is made by a public prosecutor after a suspect is arrested, it is hardly ever rejected by a judge. According to Supreme Court records, the percentage of rejected detention requests was 0.7% in 2006, and 0.99% in 2007....The percentage of defendants in detention at the time of their first hearing was 64.6%, of which 15.8% were bailed. Accordingly, the current status quo is that the

majority of defendants remain in custody at the time of trial." (p. 10)

Citing further statistics that show Japan's courts issued 147,000 detention warrants in 2006, but the number of cases where detention was revoked prior to indictment was only four, the authors conclude that the system for revoking detention is "non-functional."

Such precise data illustrates the very important role NGOs can play in the treaty monitoring process. The UN Human Rights Committee is composed of 18 part-time members who ordinarily meet for only three two-week sessions per year and have limited staff support. It is simply impossible for the Committee to generate this kind of information through its own resources. Due to the efforts of the JFBA team and other NGOs, they would have information like this before them as they prepared for the upcoming hearings.

Round Two -- List of Issues

Initial reports of the government and the NGOs would comprise the first round of the debate. After examining these reports, the Committee launched the second round in May at its regular meeting held in New York by approving a "List of Issues" to be reviewed in connection with the government report. The list identifies topics that have attracted strong interest of Committee members, effectively setting the agenda for the

live hearings to come.

The brief List of Issues directed the government to provide detailed information such as descriptions of specific cases where the Covenant had been invoked in Japan, the status of any legislation proposed to address issues related to matters previously raised by the Committee, including gender discrimination and prison conditions, and other action addressed to specific problems.

Injecting their key issues into the list is a major tactical objective of the NGOs. In this case, the Committee's "List of Issues" directly reflected NGO input. The spirits of NGO authors must have soared when they saw the list. The UN Committee had taken the questions they raised and placed them directly before the government. Now the government and NGO teams went to work preparing written responses to the Committee list. Live hearings were only five months away.

The Japanese government and some of the NGOs delivered written responses to the List of Issues by September. The JFBA team turned out another meaty document, this one running to 46 pages. Of course, many of the items had been covered in the original JFBA report. This round provided an opportunity to press these arguments one more time.

Round Three -- Live Hearings

Participants

The UN Human Rights Committee formally meets for three two-week sessions per year, twice in Geneva and once in New York. The Committee ordinarily allots six hours of hearing time to review each government report, in two three-hour sessions held on consecutive days.

During its October 2008 session in Geneva, held in conference rooms at the elegant Palais des Nations, the Committee conducted hearings on reports from five countries, including Denmark, Monaco, Nicaragua, and Spain. The Japan hearings were scheduled for October 15 and 16.



Japan Government Representatives Address the Committee

The Government of Japan was represented by a delegation comprised of no fewer than 27 individuals, led by two holding the rank of ambassador. Some of the most critical comments delivered by the Committee in response to previous reports concern coercive police and

prosecution practices, including extended detentions and denial of counsel during interrogations. Officials of Japan's Ministry of Foreign Affairs may well be capable of representing their country's position on such issues, but the government decided it would be better if National Police Agency and Ministry of Justice officials were present, both to defend their agencies' actions and to hear Committee members' comments directly. The full delegation also included officials from the Gender Equality Bureau of the Cabinet Office, the Ministry of Health, Labor and Welfare, and the Ministry of Education, Culture, Sports, Science and Technology.

Japan's NGO community was represented by approximately sixty individuals from ten different organizations. They came prepared to make public presentations and lobby individual committee members whenever possible. Knowing the schedule was very tight, the JFBA took the extraordinary step of creating a 45 minute documentary film with English sub-titles to present a graphic depiction of the abuse that can arise when police hold unrestricted power over detainees. The film tells the story of the infamous *Shibushicase*, in which 11 individuals were charged with vote buying in a local election in Kagoshima. Many were subject to abusive interrogations for months, including the successful candidate, who was detained for an incredible 395 days. Despite the interrogators'

success in producing several confessions, all defendants were found not guilty by a trial court that decided the confessions were coerced and the entire story was concocted by the police (link (<http://www.nytimes.com/2007/05/11/world/asia/11japan.html>)).



JFBA Members Prepare to Screen the Documentary Film "Manufactured Confessions - The Shibushi Tragedy"

The screening was held on the evening before the formal Japan hearings began. I was told that approximately one hundred persons were in the audience. Of special significance to the forthcoming hearing, one attendee was Mr. Ivan Shearer, a UN committee member who would question Japan government representatives the following day.

Some Comments from Committee Members

The October 15 committee hearing commenced with a presentation from government representatives, followed by questions from

committee members. Although these sessions are open to the public, Committee procedures allow only credentialed government representatives to speak. The Committee did allocate the lunch hour on both days for NGO representatives to make their own very brief presentations.

Primary responsibility for specific items on the List of Issues was allocated to individual members. For example, Ms. Elisabeth Palm of Sweden raised questions on gender issues, Mr. Jose Luis Sanchez-Cerro of Peru asked about Japan's failure to create a national human rights institution, and Mr. Michael O'Flaherty of Ireland asked about children's rights and protection from abuse. But panel members were free to range over other issues as well.

Because the Committee singled out interrogations of criminal suspects and extended solitary confinement of inmates on death row for special treatment, requiring that Japan provide "information on the follow up given to the Committee's recommendations" on these matters, we will focus on these issues in the remainder of this report.

Committee members Rajsoomer Lallah of Mauritius and Christine Chanet of France were primarily charged with criminal procedure issues. Lallah said he was "shocked" by the government statement that the presence of counsel would interfere with interrogators'

efforts to "win the suspect's respect" and "have the suspect to disclose the truth." "This is a complete invasion by the prosecution, by the police, of the role of the court," he said. "It is the court which does this. And in court he is not required to confess or to give evidence against himself. It seems to me that this is a complete misunderstanding of what prosecutions should be and what investigations should be within the terms of Article 14 of the Covenant." Article 14 guarantees of fair criminal procedures, including the right to counsel, adequate time and facilities for the preparation of the defense, and above all, in paragraph g, the right "Not to be compelled to testify against himself or to confess guilt."



Committee Members Question Japan Government Representatives

Mr. Lallah summarized by saying the government position is "clearly a confession by the Japanese authorities that they don't understand Article 14 at all. The presence of counsel is necessary precisely to ensure that the

rights of the accused are ensured.”

The idea that the Japanese government does not understand its Covenant obligations was also expressed by Ms. Chanet, who said, “what I am still rather perplexed about is a lack of understanding of what the Covenant actually is and being able to show that to the Committee. Not at any moment in time did a member of the delegation ever use the word ‘Covenant’”. The government’s hesitancy to refer to the Covenant was apparent in the report submitted in December 2006. Although the 103 pages of that report provide much detail on government efforts to promote understanding and protection of human rights, there are few mentions of the Covenant itself and of Japan’s Covenant obligations. For this reason, when it composed its “List of Issues,” the Committee expressly requested “information on cases, and their outcome, where provisions of the Covenant have been invoked directly before the courts or administrative authorities.”

Ms. Chanet addressed *daiyou kangoku* with these words: “Day and night each police station does what it wants without video, without a lawyer, and very often lawyers are considered as getting in the way. And everything is done basically to extract the confessions.....How can you say that you respect Article 14, paragraph g and the equality between the accuser and defense when such favor – such weight – is given to the indicting authority whereas the lawyer is

relegated to the corner?”

The Committee’s concern over the harsh treatment of criminal suspects led to its request that Japan submit a follow up report on these issues within one year of the Geneva hearing. The only other issue to be singled out for this treatment is the solitary confinement of death row prisoners and other restrictions that lead to a relatively small number of appeals from death row. Sir Nigel Rodley of the United Kingdom would say that he was very surprised “to see that in December 2006 one person was executed after 30 years of detention at the age of 77. And that on the 7th December 2007, another person was executed after 29-plus years of detention at the age of 74. And that as recently as 17th June of this year, somebody was held for more than two decades – 21 years – and executed at the age of 73.” Mr. Rodley would go on to say that “it is rather hard for me to comprehend...the protracted detention in isolation and then the very advanced age of those being executed.”

The Failure of the Courts

Japan’s 1979 ratification of the Covenant added little, if any substance to the long list of human rights protections declared by Japan’s 1947 Constitution. Like its counterparts in democratic countries around the world, the Government of Japan is bound by its own Constitution to respect fundamental human rights. Despite these constitutional guarantees, Japan’s human rights

campaigners fought hard throughout the 1970s for ratification. Why?

The answer lies not in the Covenant's textual declaration of rights, but in the hope for better enforcement. Of course, the drafters of Japan's Constitution were themselves concerned about enforcement. In their effort to secure individual rights, they took two especially significant steps. First, they insisted that the rights be "entrenched." This means that declarations of individual rights, along with other constitutional provisions, cannot be changed by an ordinary law or other act of the parliament or of the executive offices of government. The Constitution itself provides that any amendment would require consent of two-thirds of all the members of each house of the parliament followed by approval in a national plebiscite. This hurdle is so high that it has never been surmounted.

The second key measure is found in Constitution Article 81, which reads "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." Every declaration of individual rights is also a declaration of limitations on government power. Through Article 81, the Constitution entrusts the duty to uphold these rights – and enforce limitations on government power – to the courts. The extreme reluctance of Japan's Supreme Court to rule against the government has led some foreign scholars to

describe it as "the most conservative constitutional court in the world."³ Since Japan's Supreme Court obtained the power of judicial review in 1947, it has declared government action unconstitutional on fewer than ten occasions. Six decades of constitutional litigation have not yielded a single case in which the Court has found the actions of Japan's police or other government officials to violate the fundamental rights of anyone.⁴ If the Supreme Court would strike a more positive stance in enforcing the human rights provisions of the Constitution, international human rights committees might have little role to play.

The campaigners who fought for Japan's ratification looked to the Covenant as a potential catalyst to break the Court's reluctance to restrict government action. They foresaw that they could use the Covenant in two ways. The first was through suits filed in Japan's own courts. The second was through proceedings before international bodies such as the UN Human Rights Committee.

The Covenant in Japan's Courts

After the Covenant was ratified in 1979, Japan's human rights lawyers began to add citations to Covenant provisions alongside relevant cites to Japan's domestic law in legal briefs and otherwise made arguments to judges based on Covenant provisions.⁵ So far, this approach has found scant success. Nearly thirty years after

ratification, as the JFBA team prepared their response to the Committee's request for "information on cases, and their outcome, where provisions of the Covenant have been invoked directly before the courts," they found only a single court judgment "which has made an explicit, outright finding of violation of the Covenant." This was a 1993 decision by the Tokyo High Court, which found a violation of the Covenant in a case where a criminal defendant was required to bear the costs of interpretation services related to the trial. In all other final court decisions, appeals based on the ICCPR have either been rejected or ignored.

Some suggest this pattern of defeat may change. Although three decades of litigation have yielded no other cases where a court rendered a final judgment indicating a violation of the Covenant, many observers were cheered by a reference made to the Covenant by Japan's Supreme Court in 2008. This involved one of the most heavily reported cases of the year, a rare Supreme Court decision ruling a domestic statute in violation of the Constitution. The case concerned the citizenship of individuals born out of wedlock to a father with Japanese citizenship and a non-citizen mother, where the father recognized paternity only after the birth. The Court held that denial of citizenship in these cases violated Article 14 of Japan's Constitution, which guarantees equal protection of the law.

Even more unusual than the decision of

unconstitutionality was the Court's positive reference to the Covenant. The Court found that "in light of changes...in the domestic and international social environment surrounding Japan," the provision of Japan's nationality law denying citizenship was no longer reasonable. Although the Court based its decision on the Constitution rather than the Covenant, it cited both the ICCPR and the Convention on the Rights of the Child as factors supporting its decision. This was progress.

Of course, this rare action by the Supreme Court invalidating national legislation reminds us that Japan's courts do indeed have authority to monitor the protection of every right recognized by Japan's Constitution and laws as well as by international treaties. It is the overall failure of the courts to respond to their demands that has driven human rights lawyers to seek enforcement of Japan's human rights obligations through a different path, seeking justice outside Japan by bringing their demands before international institutions. We will consider the effects of this approach after briefly reviewing developments that followed the appearance of the Committee's Concluding Observations.

Rounds Four and Beyond

The work of the lawyers and NGOs was rewarded with a set of Concluding Observations that recognized many of their arguments. Several of the published comments address

aspects of criminal procedure and the penal system. One recommendation reads as follows:

The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions. (from Concluding Observation 19)

If this recommendation were followed, Japan's interrogation process would be revolutionized, resulting in a sharp reduction in the number of confessions.⁶ The day after the Committee issued its Concluding Observations, the JFBA sent out an English press release outlining several key items and urging the Government "to take the Committee's recommendations seriously and make every effort to resolve the issues."⁷ (Link (<http://www.nichibenren.or.jp/en/activities/statements/081031.html>))

But the immediate government response indicates that it does not share the lawyers' enthusiasm. An extraordinary gathering of

lawmakers, government officials and NGOs was held in a conference room of the Diet House of Councillors on November 18, one month after the Geneva hearings. According to Teranaka Makoto of Amnesty International, the meeting was attended by eleven Dietmembers and nearly sixty officials from the National Police Agency, the Ministry of Justice, and other government agencies represented at the Geneva hearings.⁸

Contrary to the Committee recommendations, Ministry of Justice officials indicated that they have no intention of reducing the number of executions or the use of solitary confinement or otherwise reforming procedures applied to prisoners on death row. Regarding *daiyou kangoku* Police Agency officials said that in light of the importance of this practice to Japan's criminal justice system, it should not be eliminated. They denied that current procedures reverse the presumption of innocence or lead to coerced confessions and denied that these practices violate any of Japan's obligations under Article 14 of the ICCPR. Moreover, neither agency would consider videotaping the complete interrogation process. Teranaka echoed UN Committee members Lallah and Chanet when he wrote that government officials have no understanding of the concept of a presumption of innocence and that Japan's law enforcement agencies "take for granted that physical detention is for the purpose of investigation; they do not recognize that this is extraordinary or that it

violates the basic principles of the code of criminal procedure.”

Teranaka reports that several parliamentarians at the meeting criticized the officials’ comments, complaining that the government position after the Committee recommendations was no different from what it had been before. But MPs who make time to participate in meetings like this one and speak out against coercive police practices are a tiny minority without power to change the law.

The Effect of UN Human Rights Monitoring

Of course, the repeated formulation that Japanese authorities “do not understand” their Covenant obligations is merely a rhetorical device. Officials of the Ministry of Justice and the National Police Agency fully understand their obligations under Covenant Article 14 and provisions of Japan’s Constitution that guarantee the rights of criminal suspects, including Article 34 (the right to counsel) and Article 38 (no person shall be compelled to testify against himself). They understand, but they have every intention not to comply. And they need not comply because Japan’s courts have sanctioned the very practices attacked by the Committee and other international observers.

Courts throughout Japan issue hundreds of search and arrest warrants every day. They approve prosecutors’ requests to detain individuals almost without exception. They *do*

not issue orders to limit the hours of interrogation or instruct that defense counsel be present during interrogations. They *do* accept a standard practice that prohibits suspects from petitioning the courts for release during the first 23 days of detention. Suspects able to resist interrogators’ demands for confessions for 23 days are then allowed to file requests for release on bail, but judges nearly always deny such bail requests opposed by the prosecution. When suspects do agree to the confessions drafted for them by prosecutors, with rare exceptions the courts accept those statements as evidence.

In Japan, the rules governing detention and interrogation are set by the police and prosecutors themselves, not by the Constitution, international treaties, or by the courts. Judges look the other way.

As I write this, I assume that working groups in the Ministry of justice and the NPA are puzzling over what kind of “follow up information” they can prepare for consideration by the UN Human Rights Committee before the end of this year. There has been no significant change in the handling of criminal suspects in Japan since I first interviewed Japanese criminal defense lawyers nearly thirty years ago, not long after Japan ratified the Covenant. The Japanese government has been ignoring the recommendations of UN human rights committees and other domestic and international critics for decades.

As noted above, the ICCPR is only one of six human rights treaties ratified by Japan. At the moment, the eyes of Japan's human rights activists are trained on the upcoming Japan hearing under a different treaty, the Covenant to Eliminate Discrimination Against Women (CEDAW), scheduled for July 23 in New York. Perhaps there is more room for progress on that front. Most programs to improve the lot of Japanese women need not overcome the objections of the Ministry of Justice and the National Police Agency.

Despite all this, there is no question that the UN treaty process continues to inspire hope for progress. And experts remind us that some progress has in fact been achieved. According to a 2003 comment by one authority:

Japanese law and practice have significantly improved through revisions of laws and administrative practices after the constructive dialogue in the U.N. Human Rights Committee and other monitoring bodies. Among improvements are the abolition of the fingerprinting system,⁹ elimination of the nationality requirement from the National Pension Law, enactment of the Equality in Employment Opportunity Law and its revisions, *de facto* abolition of charging for

interpretation costs in court proceedings, and a number of other significant developments.¹⁰

Critics of the UN treaty process point out that bodies such as the HRC can make recommendations, but have no authority to enforce them, that many countries delay and even disregard their obligations to submit country reports and that the work of these committees has little connection to the activities of other United Nations agencies.¹¹ Despite these weaknesses, the Japan experience may well provide an ideal example of the manner in which the monitoring process was intended to work. The process is highly respected and taken very seriously by all parties, with the government and other organizations preparing voluminous reports and sending large delegations to participate in Committee hearings. The participation of the JFBA and other NGOs insures that the Human Rights Committee gets a full picture of the situation in Japan. The monitoring process creates opportunities for dialogue that otherwise would not exist.

Human rights lawyers and other activists see the Committee hearing process as a unique opportunity to bring human rights problems to the attention of the international community and to pressure the government for change. Stymied by a government insensitive to individual rights and a judiciary that rarely rules against it, the

lawyers' and activists' long-term goal is to obtain results via international institutions that they have little hope of achieving solely within Japan's domestic legal system. One short-term task is to be ready to respond to the government's "follow-up information" due at the United Nations Human Rights Committee by October 2009.

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Notes

¹ The JFBA maintains English and Japanese versions of the Committee's Concluding Observations responding to the Third Periodic Report (1993) and Fourth Periodic Report (1998) in its online "Human Rights Library." Link (http://www.nichibenren.or.jp/ja/kokusai/humanrights_library/materials/)

² The JFBA holds a unique status among Japanese

NGOs. Because Japanese law requires that every private lawyer be a member of the national association, it can draw upon a large body of experts with professional understanding of the law who are accustomed to working in an adversary context. Moreover, unlike the other groups that would make presentations in Geneva, the JFBA is well-funded. The primary source of revenue is the mandatory annual fee paid by all members. In 2005, the total budget was approximately U.S. \$40 million.

³ Law, David S., "The Anatomy of a Conservative Court: Judicial Review in Japan," (Texas Law Review, 2009). Texas Law Review, Vol. 87, 2009. Available [here](http://ssrn.com/abstract=1406169) (<http://ssrn.com/abstract=1406169>).

⁴ "The most significant Supreme Court decisions finding legislation or government action unconstitutional have involved voting and citizenship rights. Although these rights may be considered fundamental, they are generally not considered among the core human rights which are understood to be freedoms from government control. For a valuable recent discussion of these issues, see Shigenori Matsui, "The protection of 'fundamental human rights' in Japan," in Peerenboom, Petersen, and Chen (eds.), Human Rights in Asia – A comparative legal study of twelve Asian jurisdictions, France and the USA (Routledge, 2006).

⁵ The International Covenant on Civil and

Political Rights is “self-enforcing” in Japan, meaning its provisions can be applied directly in litigation in Japan’s courts. The most authoritative text generally available in English on this issue and many others raised in this paper is Yūji Iwasawa, *International Law, Human Rights, and Japanese Law: the Impact of International Law on Japanese Law* (Oxford University Press, 1998).

Professor Iwasawa currently serves as a United Nations Human Rights Committee member and served in that capacity during the 2008 Japan review

⁶ This section of the text is based on Mr. Teranaka’s essay in CRS Newsletter No. 56, published by the Center for Prisoners Rights. Link (<http://www.jca.apc.org/cpr>)

⁷ The JFBA and others have mounted a campaign to gain Japan’s ratification of the First Optional Protocol to the Covenant, which would enable individuals to bring complaints of government violation of Covenant obligations directly before the Committee. As of 2008, 109 states had ratified this Protocol.”

⁸ The Human Rights Committee Concluding Observations related to interrogations tracked similar statements made by the United Nations Committee Against Torture following hearings held in May 2007. The Committee Against Torture wrote that Japan’s practice of prolonged detention “coupled with insufficient procedural guarantees for the detention and interrogations

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.”

Full text found here (<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46cee6ac2>).

⁹ Professor Yakushiji refers to the elimination of regular fingerprinting of non-citizen permanent residents of Japan. In 2007 Japan joined the United States in imposing biometric screening of all foreign visitors to Japan. (Non-citizen permanent residents need not submit to biometric screening.) See news accounts reporting introduction of this system here (<http://search.japantimes.co.jp/cgi-bin/nn2007121a1.html>) and here (<http://search.japantimes.co.jp/cgi-bin/nn2007121a2.html>).

¹⁰ Kimio Yakushiji, “Interpretation and Application of Human Rights Covenants in Japanese Courts” (2003).

¹¹ After describing UN committee hearings as a “strange diplomatic ritual,” an Amnesty International lawyer writes “There is scope for NGOs to use the treaty bodies to achieve positive results; but to get such a positive result requires considerable investment.” Andrew Clapham, “United Nations Human Rights Regulatory Procedures: An NGO Perspective,” in Philip Alston and James Crawford (eds.) *The Future of*

United Nations Human Rights Treaty Monitoring(Cambridge University Press, 2000).