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### **Author**

Vize, Jeff

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# TORTURE, FORCED CONFESSIONS, AND INHUMAN PUNISHMENTS: HUMAN RIGHTS ABUSES IN THE JAPANESE PENAL SYSTEM

Jeff Vize\*

## INTRODUCTION

Japan has rarely found itself on the most-wanted lists of human rights activists, and perhaps for good reason. It is the richest and most stable nation in Asia,<sup>1</sup> and seems to practice none of the flagrantly abusive policies of regional neighbors like China<sup>2</sup> or Myanmar.<sup>3</sup> Its massive economy provides a high standard of living.<sup>4</sup> Crime, though rising rapidly in the last ten years, is still minuscule by international standards. In 2000, Japanese authorities reported that there were 1,985 crimes for every 100,000 inhabitants, compared to 4,124 in the United States, and

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1. JAPAN'S NEW ECONOMY: CONTINUITY AND CHANGE IN THE TWENTY-FIRST CENTURY 2-3 (Magnus Blomstrom et al. eds., 2001). See also Statistics Division, United Nations, *Indicators on Income and Economic Activity*, at <http://unstats.un.org/unsd/demographic/social/inc-eco.htm> (last visited July 27, 2003) (listing Japan's per capita gross domestic product for 2001 at \$32,540, the fifth highest in the world).

2. Chris Patten, *Don't Worry, Be Happy*, NEWSWEEK, Oct. 28, 2002 at 46. The author, the former British governor of Hong Kong, argues that in China, "[c]apital punishment is meted out with mindless frequency. Too many of China's most thoughtful dissidents have been expelled from incarceration at home to exile abroad. The treatment of the Falun Gong betrays the nervousness of a regime that remembers too well the dramas of the last Chinese dynasty." *Id.*

3. *Burmese Leader Arrives for Malaysian State Visit*, AGENCE FRANCE-PRESSE, Aug. 12, 1996, LEXIS, Nexis Library, News Group File, All (quoting the Malaysian political opposition leader, who urged that Myanmar not be allowed to join ASEAN until ending its "flagrant human rights abuses").

4. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2001: JAPAN (2002) [hereinafter COUNTRY REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8319.htm>.

6,446 in France.<sup>5</sup> The lack of deviant social behavior is evidenced by an extremely low prisoner-to-population ratio of forty per 100,000 citizens – less than 10 percent of the U.S. rate.<sup>6</sup> But in such an apparently ordered society, what awaits those who do deviate and end up in the penal system? This Comment examines that question, and the answer often points to violations of international human rights law. These violations include the torture of prisoners and detainees, the failure to provide proper safeguards to protect the rights of criminal suspects under interrogation, and the general disregard for the inherent human dignity of prisoners. In the words of one lawyer, “[f]rom ancient times, Japanese prisons were places to make people suffer, and that hasn’t changed.”<sup>7</sup>

This comment addresses several questionable practices in the Japanese penal system, focusing specifically on pretrial detention, prison rules, and prison discipline. Legal instruments examined include the International Covenant on Civil and Political Rights;<sup>8</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>9</sup> and various U.N. proclamations on prison management, such as the Standard Minimum Rules for the Treatment of Prisoners.<sup>10</sup> Part I provides an overview of allegations of human rights violations that critics have leveled against the Japanese penal system in the last ten years. Part II examines international and Japanese law governing conditions of imprisonment. Part III both applies these laws to the situation in Japan and attempts to identify the best method for pressuring Japan to comply with international standards in its prisons. The comment concludes that the Japanese penal system has serious flaws that ultimately violate international law. Japan should address these violations by opening its prison system to international and domestic observers and by following the recommendations of the United Nations Human

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5. Yoshiko Matsushita, *Japan's Prisons Swell as Economic Slump Breeds Crime*, BLOOMBERG NEWS, Oct. 16, 2002, LEXIS, Nexis Library, News Group File, All.

6. *Id.*

7. Sonni Efron, *In Japan, A Prison for Reckless Drivers*, L.A. TIMES, Apr. 9, 1998, at 1 (quoting attorney Futaba Igarashi).

8. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, U.N. GAOR 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 [hereinafter CAT].

10. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) [hereinafter Standard Minimum Rules].

Rights Committee, which serves as the authoritative body on interpreting the ICCPR.

## I. THE PENAL SYSTEM IN JAPAN

Japan's Prison Law was enacted in 1908, making it possibly one of the oldest such statutes in the world.<sup>11</sup> The law has been supplemented through administrative and Standing Orders numerous times over the last ninety-five years;<sup>12</sup> ostensibly due to security considerations, however, Japan has never published these.<sup>13</sup> As a result, large portions of the Japanese prison regulations are inaccessible to the public. Supplementing these laws and regulations is the Japanese Code of Criminal Procedure, or Keisoho, which spells out procedures to be used during the detention of criminal suspects.

To an outsider, the Japanese penal system appears to be a model of orderly, effective detention. Escapes appear to be rare, inmate fights are rare, and the government has claimed that riots never happen.<sup>14</sup> Human Rights Watch reported that the Ministry of Justice "prides itself on the outstanding record of a system that has not experienced riots since the period immediately after World War II,"<sup>15</sup> and that there were only twenty-two escapes from 1983 to 1992.<sup>16</sup> The prisoner-to-population ratio is among the lowest in the world,<sup>17</sup> and preferential treatment is often given to criminal defendants who admit culpability by way of a confession.<sup>18</sup> Citing these factors, at least one writer has cited the Japanese penal system as a potential model for other nations.<sup>19</sup>

11. See HUMAN RIGHTS WATCH/ASIA & HUMAN RIGHTS WATCH PRISON PROJECT, HUMAN RIGHTS WATCH, PRISON CONDITIONS IN JAPAN vii (1995) [hereinafter HUMAN RIGHTS WATCH].

12. *Id.* at 19.

13. AMNESTY INTERNATIONAL, ABUSIVE PUNISHMENTS IN JAPANESE PRISONS, AI INDEX: ASA 22/04/98 (1998), at 2, available at: <http://www.web.amnesty.org/ai.nsf/index/ASA220041998> (last visited Oct. 20, 2002) [hereinafter AMNESTY INTERNATIONAL]; See also HUMAN RIGHTS WATCH, *supra* note 11, at 19.

14. See HUMAN RIGHTS WATCH, *supra* note 11, at vii; Nicholas D. Kristof, *Japanese Say No to Crime: Tough Methods, at a Price*, N.Y. TIMES, May 14, 1995, § 1, at 1 ("Escapes are almost nonexistent, and there appear to be few problems with prison gangs or rapes or assaults among prisoners").

15. HUMAN RIGHTS WATCH, *supra* note 11, at vii.

16. *Id.*

17. *Id.* at vi.

18. NIHON BENGOSHI RENGOKAI-HEN [JAPAN FED'N OF BAR ASS'NS], HOW ARE SUSPECTS TREATED AT THE DAIYO-KANGOKU? (1992), available at <http://www.marcus-clark.com/hr-japan-daiyo.htm> (last visited Nov. 15, 2002) [hereinafter NICHIBENREN].

19. See Stefanie Evans, Note, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521, 537 (2000) (noting that Japanese prisoners rarely seem to protest about crowded conditions).

These positive figures do not tell the whole story, however. Rates of recidivism in Japan are high, even by U.S. standards,<sup>20</sup> and overcrowding has recently become a problem.<sup>21</sup> Moreover, a system of draconian rules and a pretrial detention system during which suspects often must confess or suffer extraordinary human rights abuses sustain the appearance of order. The Japan Federation of Bar Associations, Human Rights Watch, and Amnesty International have been reporting on abuses in Japan's penal system for more than a decade. The problems they have uncovered are so extensive that there are not enough lawyers to handle the cases. The Japan Federation of Bar Associations reports that it gets more calls than its 100 volunteer lawyers can handle.<sup>22</sup>

This section will address four primary areas of concern in the Japanese Penal system and lay out the domestic statutes governing each: first, pretrial detention, known as *daiyo kangoku*, by which criminal suspects are held for up to twenty-three days without an indictment; second, the substandard physical conditions of prisons in Japan and the numerous rules which govern the minutest aspects of prisoners' lives; third, the use of so-called "minor solitary confinement" for extended periods on account of relatively small disciplinary infractions; and fourth, the use of the misnamed "protection cells" for more serious disciplinary violations.

#### A. *DAIYO KANGOKU* – THE USE OF A "SUBSTITUTE PRISON SYSTEM" DURING PRE-TRIAL DETENTION

The Japanese Code of Criminal Procedure states at Articles 203(1) and 205(1) that a criminal suspect must be brought before a judge within seventy-two hours of arrest should the prosecutor believe it is necessary to detain the suspect.<sup>23</sup> If the prosecutor seeks further detention of the suspect at the close of this three-

20. *Professor Reveals Realities of Japanese Prisons*, JAPAN WEEKLY MONITOR, Aug. 26, 2002, LEXIS, Nexis Library, News Group File, All ("[A] government survey shows that 52.5 percent of male prisoners in Japan in 2000 were serving at least their second prison term . . ."); Nicholas D. Kristof, *supra* note 14, § 1, at 1 (stating that "[t]he recidivism rate is higher in Japan than in the United States").

21. *See* Matsushita, *supra* note 5. Fukuoka Prison, Japan's sixth largest, was at 110 percent of capacity in late 2002. *Id.* Over the last decade, Japan's prison population swelled 54 percent to 67,700 in July of 2002. *Id.* The government expects that figure to reach 80,000 by 2005. *Id.*

22. Frank Gibney Jr. & Hiroko Tashiro, *Hard Time; Trapped in Japan's Harsh Prisons, Inmates are Seeking Justice. Lots of Luck*, TIME, Oct. 28, 1996, at 22.

23. KEIJI SOSHOHO [Code of Criminal Procedure] arts. 203(1), 205(1) (Japan), translated in THE CODE OF CRIMINAL PROCEDURE (1949) [hereinafter KEISOHO]; Kuk Cho, *The Japanese "Prosecutorial Justice" and its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. 39, 54 (1998).

day period, he or she must ask the judge for an extension.<sup>24</sup> If the judge allows detention, the suspect may be sent to a special detention center.<sup>25</sup> If there is no room in a detention center, however, a cell at a police station may be substituted.<sup>26</sup> As a matter of practice, however, specialized detention centers are rarely used, and police usually get custody of the suspect if they so request.<sup>27</sup> Once a transfer to a detention center is made, prosecutors have ten days to interrogate the suspect before filing charges.<sup>28</sup> If no confession results during this period, prosecutors may request another ten days, so that the total detention period may last as long as twenty-three days.<sup>29</sup>

This system of holding suspects in police custody is known in Japanese as *daiyo kangoku*; which literally means, "substitute prison."<sup>30</sup> *Daiyo kangoku* is discretionary for the judge, but in practice it is used routinely, as are extensions.<sup>31</sup> Prosecutors request detention for approximately 85 percent of all criminal suspects arrested who are referred to prosecutors; an additional ten days are requested for roughly 33 percent of the 85 percent.<sup>32</sup> Courts grant these requests 99.7 percent of the time.<sup>33</sup> The period may be extended past the twenty-three-day limit in some cases; in at least one case, detention was drawn out to nearly three years where the police had arrested a suspect for fourteen crimes.<sup>34</sup>

*Daiyo kangoku* cells are under constant police surveillance.<sup>35</sup> Rules governing conduct are strict. Prisoners may not pace in their cells, flush their toilets without permission, sit down improperly, or cover themselves with a blanket improperly.<sup>36</sup> Detainees are often not allowed to bathe for as long as a week,<sup>37</sup>

24. *Id.* art. 205.

25. HUMAN RIGHTS WATCH, *supra* note 11, at 1.

26. *Id.* (citing THE PRISON LAW art. 1(3) (Japan)).

27. *Id.*

28. KEISOHO, *supra* note 23, art. 208.

29. *Id.*; Kuk Cho, *supra* note 23, at 54.

30. *Id.* at 55 n. 93.

31. See Kuk Cho, *supra* note 23, at 54-55.

32. *Id.* (citing Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 335 (1992)).

33. *Id.* at 55 (citing Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 336 (1992)).

34. See *Id.* (citing *Murakami v. Japan*, 17 KEISHU 1795 (Sup. Ct., Oct. 17, 1963). The author describes a "trick" in which police "extend the period of detention for their initial investigation of a serious crime by first obtaining an arrest warrant for relatively minor crimes. During the period of interrogation given by the arrest warrant on the minor crimes (*bekken*), the police may continue interrogating the suspect regarding the initially pursued crime (*honken*)."

35. NICHIBENREN, *supra* note 18.

36. *Id.*

37. HUMAN RIGHTS WATCH, *supra* note 11, at 3.

and purchasing food and clothing from the outside is frequently made difficult.<sup>38</sup>

The detainee's life centers on daily interrogation sessions, which may last ten hours or more at a time.<sup>39</sup> Attorneys for the suspect are not permitted to be present at these sessions.<sup>40</sup> Those who can afford lawyers are technically allowed to hire them while in detention, but restrictions on consulting them are plentiful.<sup>41</sup> Detention officials censor correspondence and monitor meetings, and prosecutors can broadly restrict the right to counsel "[w]hen it is necessary for investigation."<sup>42</sup> Typically, this system allows prosecutors to restrict attorney access as they please.<sup>43</sup> Indigent suspects have no access to lawyers at all, as courts do not appoint lawyers until after an indictment, an event that often occurs after interrogation is finished.<sup>44</sup>

If the suspect does not confess, interrogators have been known to resort to a number of tactics. In interviews with more than one hundred former detainees, the Japan Federation of Bar Associations found that these tactics include: threatening to ruin the reputation of the suspect or his family; beating or assaulting the suspect; binding fingers; forcing the suspect to stand in a fixed position for prolonged periods; suggesting that the suspect could see family; and waking the suspect up in the middle of the night for questioning.<sup>45</sup> These tactics have proven highly effective. Japan's conviction rate has hovered in the 99.9 percent range for many decades,<sup>46</sup> and about 90 percent of all criminal cases go to trial with a confession.<sup>47</sup>

A heavy reliance on confessions obtained under the conditions outlined above has created a problem of wrongful convictions in Japan. In 2000, six juvenile boys confessed to the rape and murder of a fifteen-year-old girl; their sentences were later

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38. *See Id.*

39. HUMAN RIGHTS WATCH, *supra* note 11, at 2.

40. *Id.*

41. *Id.*

42. NICHIBENREN, *supra* note 18.

43. *See id.*; HUMAN RIGHTS WATCH, *supra* note 11, at 2-3.

44. *See* NICHIBENREN, *supra* note 18 (noting that Article 272 of the Keisocho is only applicable to indicted persons, not suspects under interrogation). *See also* Human Rights Watch, *supra* note 11, at 2.

45. HUMAN RIGHTS WATCH, *supra* note 11, at 2; NICHIBENREN, *supra* note 18.

46. Frank Gibney Jr. & Hiroko Tashiro, *supra* note 22. *See also* Nick Cohen & Richard Lloyd Parry, *British Prisoners Used as Slave Labour*, THE INDEPENDENT (London), May 28, 1995, at 14 (reporting a finding that between 1980 and 1992, the conviction rate for criminal defendants was between 99.98 percent and 99.995 percent).

47. COUNTRY REPORT, *supra* note 4.

overturned.<sup>48</sup> There have also been cases in which foreigners who did not understand Japanese signed documents that were written only in Japanese.<sup>49</sup> Legal challenges to such treatment can be difficult. It has been reported that no records are kept of the interrogation,<sup>50</sup> and because interrogators wear no identification tags, suspects cannot name their abusers.<sup>51</sup>

## B. PHYSICAL PRISON CONDITIONS AND RULES

A large number of Japanese prisoners live in single cells.<sup>52</sup> Fuchu Prison, near Tokyo, for example, has a capacity of 2,406 inmates and 1,110 single cells.<sup>53</sup> Single cells tend to be small, and, in some cases, are too short to lay a futon lengthwise.<sup>54</sup> Most cells feature windows, but often the natural light admitted by these openings is insufficient and electric light must be used throughout the day.<sup>55</sup> In the majority of prisons, light switches are outside the cells, leaving them to be controlled by guards; in some older prisons, the switches are inside the cell, but they cannot be turned off completely, even at night.<sup>56</sup> Similarly, the windows of at least 300 cells at the Tokyo Detention Center are obstructed by plastic panels; the reason given for these panels is to discourage detainees from communicating among themselves and plotting to destroy evidence against them.<sup>57</sup> Human Rights Watch reported in 1995 that the only other countries where its investigators had seen such devices were the Soviet Union and communist Poland.<sup>58</sup>

Former prisoners have reported other deficiencies in the physical conditions of prisons. Perhaps the most serious problem is the lack of cell heating. At the time of the Human Rights Watch investigation in 1995, virtually none of the cells in Japan's 189 prisons and detention centers were heated; the only exceptions were institutions on the northern island of Hokkaido.<sup>59</sup> During the winter, inmates are generally forbidden to wear hats

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48. Suvendrini Kakuchi, *Implement Torture Convention Say Activists*, INTER PRESS SERVICE, Mar. 2, 2000, LEXIS, Nexis Library, News Group File, All.

49. See Suvendrini Kakuchi, *Detained Foreigners at Risk of Abuse*, INTER PRESS SERVICE, Nov. 17, 1997, LEXIS, Nexis Library, News Group File, All. ("Some arrested or detained foreigners have been denied access to lawyers and interpreters, or made to sign documents they cannot read because of language difficulties.")

50. Cohen & Parry, *supra* note 46.

51. HUMAN RIGHTS WATCH, *supra* note 11, at 2.

52. *Id.* at 4, 12.

53. *Id.* at 4.

54. *Id.*

55. *Id.* at 5.

56. *Id.*

57. *Id.*

58. See *id.*

59. See *id.* at 6.



and gloves, and, as a result, there have been reports of frostbite.<sup>60</sup>

Other violative conditions include moldy walls, bugs, and rotting floorboards and tatami mats.<sup>61</sup> Human Rights Watch reported on the case of one detainee who said that a cell was stained with a substance resembling feces,<sup>62</sup> and a former British prisoner recalled in an interview that “[t]he jail was damp and infested with insects. I would wake up in the night and find cockroaches running all over me.”<sup>63</sup>

The most distinctive feature of the Japanese prison system is its obsessive focus on rules. Discipline can be a central concern in any prison system, and restrictive rules may be necessary for the safety of guards, staff, and inmates.<sup>64</sup> But Japan’s prison rules stand out for their extreme rigidity and tendency to govern even the minutest aspects of an inmate’s life.<sup>65</sup>

In Japan, each prison is permitted to make its own rules.<sup>66</sup> These rules are available neither to the general public, nor to lawyers who bring lawsuits concerning the rules.<sup>67</sup> Over the years, some rules have been made public through the release of small published portions of the rules and the reports of former prisoners.<sup>68</sup> The specificity and arbitrary nature of many infractions suggest that some rules are not communicated to prisoners until they are broken.<sup>69</sup> Punishable offenses include sitting or standing the wrong way in one’s cell, such as leaning against the walls or pacing; putting an object in the wrong place in one’s cell;

60. COUNTRY REPORT, *supra* note 4; AMNESTY INTERNATIONAL, *supra* note 13, at 4.

61. HUMAN RIGHTS WATCH, *supra* note 11, at 6.

62. *Id.*

63. Cohen & Parry, *supra* note 46 (quoting Roger Webb, who was arrested in 1990 and served a three-and-a-half-year robbery sentence at Kosuge Detention Center and Fuchu Prison). But see *Penal Reform Group: Japan’s Prisons ‘Too Strict’*, MAINICHI DAILY NEWS, Mar. 3, 1996, at 16 (in which Vivian Stern and Andrew Coyle of Penal Reform International note that sanitation and food at Japan’s prison facilities, including the Tokyo Detention Center and Fuchu Prison in the capital, are ‘very good.’).

64. See, e.g., HUMAN RIGHTS WATCH, *supra* note 11, at 22 (quoting the Japanese Government’s “Prison Administration in Japan,” which notes “Penal institutions accommodate divergent inmates whose characteristics and life histories vary considerably. For such clients, it is indispensable to keep a safe prison environment.”)

65. *Id.* at 19, 22.

66. *Id.* at 19.

67. See *id.* (stating that “the rules are secret and not to be made available to the outside world.”).

68. HUMAN RIGHTS WATCH, *supra* note 11, at 20

69. *Id.* at xiv (noting that rules are detailed in “prescribing ways in which things are to be done in prison, [but] they are very vague in specifying punishments, leaving a lot of latitude for arbitrary actions by individual guards or wardens.”)

failing to sleep in the prescribed manner, such as covering one's face, sleeping on one's stomach, or getting out of bed before the wake-up call; talking outside of designated times; and making eye contact with other inmates.<sup>70</sup> Other rules prohibit looking at guards, opening one's eyes during the daily reflection period, opening one's eyes at "inappropriate" times, giving food to birds, and "answering back" when speaking to guards<sup>71</sup>

Rules governing contact with other prisoners and the outside world are equally strict. Speaking with fellow inmates is strictly controlled, and often flatly prohibited. One prisoner at the Tokyo Detention Center claimed that he had not spoken to another prisoner since his arrival there in 1988.<sup>72</sup> Another inmate in Osaka claimed that he had no such contact in thirteen years.<sup>73</sup> One female prisoner, who spent twelve years at the Tokyo Detention Center, said that before she left her cell, the guards would make sure that the hallways were empty,<sup>74</sup> which ensured that she would not even see another inmate.<sup>75</sup> One international prison monitor reported that rules required prisoners to turn and face the wall when visitors passed.<sup>76</sup>

Visiting rules are more permissive, but not by much. For both sentenced inmates, all visits are monitored, including visits by lawyers.<sup>77</sup> For unsentenced inmates, all visits – except those by lawyers – are monitored by guards.<sup>78</sup> No touching is allowed for sentenced prisoners, and the language being spoken must be understood by the monitor.<sup>79</sup> For sentenced prisoners, only one visit is allowed per month upon their arrival at the institution; though if the prisoner works up to the next classification level, more frequent visits are permitted.<sup>80</sup> Visits are restricted to close family.<sup>81</sup> Attorney visits are permitted, but they are monitored by guards who watch and listen in during the meeting.<sup>82</sup> Mail

70. *Id.* at 20-21, 78-80.

71. *See id.* at 24; AMNESTY INTERNATIONAL, *supra* note 13, at 4 (describing "infractions" for which inmates were punished).

72. *Id.* at 13.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Penal Reform Group: Japan's Prisons 'Too Strict,' supra* note 63.

77. HUMAN RIGHTS WATCH, *supra* note 11, at xiii ("After sentencing, all legal visits are monitored by guards.")

78. *Id.* at 13-14 ("Every word that passes between a prisoner and the outside is carefully monitored.")

79. *See id.* (citing a rule posted in the visitors' waiting room of the Niigata detention center, which read, "Do not speak a foreign language.")

80. *Id.*

81. *Id.* at 15.

82. *Id.* at xiii, 18 ("Lawyers visits concerning a suit that a prisoner might want to or decided to bring while in prison, are monitored. . . . [L]awyers [have] remarked

correspondence for all inmates may be censored, and if the letter is in a foreign language, the prisoner must pay for translation.<sup>83</sup>

Such extensive restrictions on visitation may affect prisoners' ability to reintegrate into society.<sup>84</sup> These conditions make them effectively dead to the world, which sometimes leads to rejection by their families upon release.<sup>85</sup> Human Rights Watch labeled these practices reminiscent of practices in communist Poland, the Soviet Union and Romania.<sup>86</sup>

### C. MINOR SOLITARY CONFINEMENT

Punishment for breaking the rules can be severe. But despite the detailed nature of the rules, punishment guidelines are uncharacteristically vague.<sup>87</sup> The 1979 rules from Fuchu Prison, which Human Rights Watch says are the most recent available, contained a list of punishable infractions and a list of disciplinary measures.<sup>88</sup> These disciplinary measures included reprimand, meal reductions, suspension of rewards, suspension of exercise, and "minor solitary confinement" for not more than two months.<sup>89</sup> According to persons interviewed by Human Rights Watch, the most common disciplinary measure was solitary confinement.<sup>90</sup>

The least severe variation of solitary confinement in Japan is known as "minor solitary confinement."<sup>91</sup> Prisoners are allowed no contact with the outside world and have no exercise.<sup>92</sup> Toilet use is only allowed at prescribed times.<sup>93</sup> The prisoner spends anywhere from ten to fourteen-and-a-half hours sitting motionless, usually in the *seiza* position, which involves bending one's knees and sitting on one's heels.<sup>94</sup> Sentences to minor solitary confinement ordinarily last from a few days to two months.<sup>95</sup> In some cases, however, the period has been extended for much longer periods. One highly publicized case involves Yoichi Isoe,

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that the presence of prison guards during attorney-client conferences assures that the authorities know every detail of plaintiffs' litigation strategies well in advance.").

83. *Id.* at 15.

84. *Id.* at 59 ("limiting family contacts deprives the inmate of a support system that is invariably helpful in achieving his or her rehabilitation)."

85. See Kristof, *supra* note 14.

86. HUMAN RIGHTS WATCH, *supra* note 11, at 17.

87. *Id.* at 23.

88. *Id.*

89. *Id.* at 23-24.

90. *Id.* at xiv, 24.

91. AMNESTY INTERNATIONAL, *supra* note 13, at 5.

92. *Id.*

93. *Id.*

94. *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 11, at 7-8 (diagram of the *seiza* position).

95. *Id.* at 25.

a prisoner at Asahikawa Prison in Hokkaido, who was sentenced to life imprisonment for stabbing a police officer to death in 1979.<sup>96</sup> Isoe spent thirteen years in solitary confinement for making “antiestablishment remarks.”<sup>97</sup>

#### D. PROTECTION CELLS

More severe than the so-called “minor” solitary confinement is the use of “protection cells,” which are ostensibly reserved for violent or suicidal inmates.<sup>98</sup> According to the Japanese Ministry of Justice, these cells also may house prisoners “who persist in making a noise and refuse to obey orders to stop”<sup>99</sup> and also those “who exhibit repeatedly abnormal behaviour resulting in the dirtying of their cells or damage to property.”<sup>100</sup>

Protection cells are roughly ten square meters and contain no windows or furniture except for a bed, a sink, and a toilet.<sup>101</sup> Physical restraints are “almost invariably” used for prisoners placed in these cells.<sup>102</sup> These include leather handcuffs, gags, and body belts that perform the function of straitjackets.<sup>103</sup> The handcuffs are not removed at any time,<sup>104</sup> and along with body belts, are often fastened so tight that inmates have reported maladies such as breathing difficulty, vomiting, and loss of sensory feeling.<sup>105</sup> As a result of these restraints, prisoners are forced to eat and use the toilet without the use of their hands; they are issued pants with a slit crotch to facilitate the latter.<sup>106</sup> One former prisoner at Osaka Prison said that his handcuffs forced him to eat his food “like a dog,”<sup>107</sup> while another said that he chose not to defecate during the three days that he spent in a protection cell.<sup>108</sup> Some prisoners report having spent up to a month in these conditions.<sup>109</sup>

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96. *Court Says 13 Years of Solitary Confinement Justified*, JAPAN POLICY & POLITICS, Apr. 19, 1999, LEXIS, Nexis Library, News Group File, All.

97. *Id.*

98. HUMAN RIGHTS WATCH, *supra* note 11, at 26.

99. AMNESTY INTERNATIONAL, *supra* note 13, at 7-8.

100. *Id.*; HUMAN RIGHTS WATCH, *supra* note 11, at 26.

101. AMNESTY INTERNATIONAL, *supra* note 13, at 6.

102. HUMAN RIGHTS WATCH, *supra* note 11, at 26.

103. AMNESTY INTERNATIONAL, *supra* note 13, at 7-8; HUMAN RIGHTS WATCH, *supra* note 11, at 26.

104. AMNESTY INTERNATIONAL, *supra* note 13, at 7.

105. *Id.* at 13-16.

106. *See* HUMAN RIGHTS WATCH, *supra* note 11, at 26, 28.

107. *Id.* at 28.

108. *Id.* at 26, 28.

109. *See Id.*; *But see* AMNESTY INTERNATIONAL, *supra* note 13, at 7 (“Amnesty International has received reports of individuals being kept in these conditions for more than a week. Commonly, however, prisoners are kept in a ‘protection cell’ for periods of 2-3 days.”).

Although protection cells are not designed to be used as punishment, testimony from former prisoners suggests that they are.<sup>110</sup> They are reportedly used when inmates engage in fights or act defiantly toward guards.<sup>111</sup> But often they are used arbitrarily when a guard suspects that a prisoner poses a threat. In one infamous case, an inmate at Fuchu Prison claimed to have been placed in a protection cell so that he would desist in asserting his legal rights.<sup>112</sup> As Amnesty International described it, the dispute had begun when the inmate, whom they identified only as K, protested to guards about their failure to quickly deliver a letter he had sent to another inmate.<sup>113</sup> Later, K applied for permission to contact a local bar association in connection with his complaint.<sup>114</sup> K reported that the prison authorities responded by harassing him with arbitrary restrictions such as limits on the number of words he could write in his letters to family.<sup>115</sup> Following the initial harassment, a guard came to K's cell and accused him of several rule violations. K claimed that this confrontation was an attempt to provoke him.<sup>116</sup> When K responded to a guard's question by saying "I am nobody," the guard forced him to lie face down on the floor and then stamped on K's back; K then was restrained with metal handcuffs and a leather body belt, and placed in a protection cell for three days.<sup>117</sup> A guard pulled the leather body belt so tight that it caused internal bleeding.<sup>118</sup> At a subsequent investigation into K's misconduct, interrogation was conducted by the same guard who initially had beaten K.<sup>119</sup> K claimed that the guard had said, "Up till now, I've handcuffed around fifty prisoners and put them into a 'protection cell'. To tell the truth, only about two of them showed signs of violence."<sup>120</sup>

In a 1993 case, Chiba Prison inmate Kazuo Uchiyama claimed to have been placed first in an interrogation room because he had spoken to a guard in "informal" Japanese.<sup>121</sup> During the questioning that followed the initial infraction, Uchiyama was asked to stand formally with his fingers straight.<sup>122</sup> He was

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110. AMNESTY INTERNATIONAL, *supra* note 13, at 8.

111. HUMAN RIGHTS WATCH, *supra* note 11, at 26.

112. See AMNESTY INTERNATIONAL, *supra* note 13, at 10.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 10-11

120. *Id.* at 11.

121. *Id.* at 12.

122. *Id.*

unable to do this because he suffered from diabetes, so the guard attempted to forcibly straighten Uchiyama's fingers.<sup>123</sup> The guard and Uchiyama lost their balance and they both fell over.<sup>124</sup> Several other guards were summoned and later beat Uchiyama; ultimately he was placed in a protection cell.<sup>125</sup>

Arbitrary assaults such as Uchiyama's seem widespread, and can be administered as punishment for breaking rules or as apparent retaliation for asserting legal rights.<sup>126</sup> Former inmates claim to have been punched, trampled on, and kicked – sometimes while wearing handcuffs or body belts.<sup>127</sup> In one instance, a woman who refused to sit in the *seiza* position was transferred to a cell on an empty floor of the prison, dragged by her hair, and physically forced to sit the proper way.<sup>128</sup> Also of note is the 1994 case of a prisoner whom Amnesty International called M.<sup>129</sup> He claimed he was punched six times in the face for making eye contact with a guard.<sup>130</sup> In a subsequent incident, he was handcuffed and repeatedly assaulted by numerous guards for arguing with another prisoner.<sup>131</sup> They took him to an investigation room, beat him further, and finally placed him in a protection cell for eight days.<sup>132</sup> A forty-day period in minor solitary confinement followed.<sup>133</sup> M claimed that the assaults caused long-term damage, including loss of feeling in his wrists due to the handcuffs, muscular twitching in his jaw, and scarring.<sup>134</sup>

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 14. (discussing the case of Yoshitaka Hiura, who requested the name of a lawyer while in prison and claims that the next day, in response to his threats to sue the prison, he was assaulted by prison guards. "He claims he was kicked repeatedly and forced face down onto the floor. Guards then proceeded to trample all over his body. After this assault, Hiura claims he was taken to a 'protection cell' where he was bound with leather handcuffs and subjected to a further assault. He was forced face down onto the floor and a prison officer forcibly placed his right foot on Hiura's back and his left foot on his neck. . . . The assault caused Hiura to bite his tongue and it was only after blood started pouring from his mouth that the guard released his hold. The guard then proceeded to tighten his leather handcuffs and also put him in metal handcuffs. Hiura claims he was left like that in the 'protection cell' for four days."). *Id.*

127. *See id.* at 13-16. In addition to the incidents cited in the text, Amnesty International reported on the cases of X, who claimed to have lost feeling in his hands due to the tightness of his body belt and handcuffs, and Y, who said that guards punched him in the face fifty times while he was restrained in a protection cell. *See id.* at 15-16.

128. HUMAN RIGHTS WATCH, *supra* note 11, at 29.

129. AMNESTY INTERNATIONAL, *supra* note 13, at 13-14.

130. *Id.* at 13.

131. *Id.*

132. *Id.*

133. *Id.* at 13-14.

134. *Id.* at 14.

Another case involved a twenty-eight-year-old Filipino inmate named Edgardo Lim. One day, while working as a welder in a prison factory in 1990, Lim collapsed.<sup>135</sup> A fellow inmate, who has since been released, reported, "The guard started to kick him. He kicked him over and over again, first his legs, then his midriff, and his back. Edgardo couldn't do anything - he was like a sandbag."<sup>136</sup> A few days later, word came that Lim had died in the prison clinic of heart failure.<sup>137</sup>

Lim's case is not the only high-profile incident regarding a potentially preventable death. An inmate whom Amnesty International designated W, sentenced in 1996 to two months at Hamada Detention Center for drunken driving, died under suspicious circumstances.<sup>138</sup> He had been placed in a protection cell for becoming "noisy and violent."<sup>139</sup> Two days later, a guard noticed that W was leaning motionless in his cell.<sup>140</sup> W died later that night; the cause of death was heatstroke, possibly brought on by the poorly ventilated protection cell.<sup>141</sup>

The incidents outlined above are likely not a complete list of alleged human rights violations in Japan's prisons. Secrecy and lack of transparency have limited reports of abuse, and it is reasonable to speculate that some accusations may not be revealed publicly until prisoners report them upon release. In light of this limited reporting, it is possible to conclude that actual abuse exceeds the abuse revealed by the "leaked" stories by several factors. The following section analyzes the legality of Japan's penal practices based only on the facts reported above. Limited as they are, these stories provide enough background for determining whether Japan is violating prisoners' human rights under domestic and international law.

## II. APPLICABLE LEGAL CONSTRAINTS

Conditions in Japan's prisons and detention centers are governed by domestic laws, international treaties, and guidelines adopted by the United Nations. Japanese law and international norms agree on the three key legal issues addressed in this section. Both sources maintain that: first, freedom from torture and

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135. Richard Lloyd Parry, *Revealed: The Lethal Regime of Japan's Jails*, THE INDEPENDENT (London), June 28, 1998, at 19.

136. *Id.*

137. *Id.* The inmate quoted in the article initially thought that Lim's collapse was due to appendicitis, but the cause of death was determined to be heart failure through the Filipino Embassy. *Id.*

138. AMNESTY INTERNATIONAL, *supra* note 13, at 11-12.

139. *Id.* at 11.

140. *Id.*

141. *Id.* at 12.

other inhuman or degrading treatment or punishment is a nonderogable right enjoyed by all persons; second, coercion shall not be used to compel suspects to testify against themselves; and third, all human beings possess inherent dignity, regardless of their status in the legal system, that may not be abridged.

### A. INTERNAL JAPANESE LAW

Japan's Constitution includes provisions that can be applied to prevent the mistreatment of prisoners.<sup>142</sup> Transgression of these laws by prison officials can form the basis of civil liability suits in domestic courts; however, these restrictions are relatively new to Japan. Prior to 1879, torture and forced confessions were considered integral parts of the justice system.<sup>143</sup>

To a large extent, this legacy of mistreatment pervades the penal system today and prevents the application of more progressive modern laws. The following section will outline the most important features of Japan's modern laws protecting the mistreatment of prisoners. It will also discuss the history of these protections, and examine the extent to which the legacy of mistreatment still persists.

#### 1. Norms Prescribed in Internal Law

##### a. Ban on Coerced Confessions

Article 38 of the Japanese Constitution contains a comprehensive prohibition against self-incrimination and forced confessions. It states:

- (1) No person shall be compelled to testify against himself.
- (2) A confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.
- (3) No person shall be convicted or punished in cases where the only proof against him is his own confession.<sup>144</sup>

These constitutional provisions, enacted in 1947, seem facially strong; in practice, a competing cultural factor undermines their force. Japanese society places a high value on confes-

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142. See generally Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 181 (1994).

143. *Id.* ("Torture was an important feature of the Tokugawan criminal justice system because it facilitated the obtaining of confessions. Methods of torture were prescribed by law. Although the practice was abolished officially in the early Meiji period in 1879 many believe that torture is still commonly used as a means of obtaining confessions in present day Japan.")

144. NIHONKOKU KENPOU [Constitution] art. 38 (Japan) translated at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> (last visited Aug. 6, 2003).



sion and repentance.<sup>145</sup> Suspects who confess can expect to receive a more lenient sentence.<sup>146</sup> Confessions have been central to the Japanese criminal justice system since at least the Tokugawa era,<sup>147</sup> which lasted from 1603 to 1868,<sup>148</sup> and even today they are considered the best evidence.<sup>149</sup>

### b. General Prohibition Against Torture

Article 36 of the Japanese Constitution states that the “infliction of torture by any public officer and cruel punishments are absolutely forbidden.”<sup>150</sup> This concept is also a relatively new one to Japan. In the Tokugawa era, torture was a central component of the Japanese criminal justice system, with methods prescribed by law;<sup>151</sup> this practice continued into the Meiji era of 1868 to 1912,<sup>152</sup> and was not outlawed until 1879.<sup>153</sup>

### c. Respect for Prisoners’ Inherent Human Dignity

The Japanese Constitution lacks a provision that explicitly grants civil rights to prisoners or detainees. But such a right arguably can be inferred from the language of Article 11, which states, “The people shall not be prevented from enjoying any of the fundamental human rights.”<sup>154</sup> A more specific provision is contained in Article 13: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall . . . be the supreme consideration in legislation and in other governmental affairs.”<sup>155</sup>

## 2. *Difficulties of Enforcing Internal Norms*

Despite the full slate of constitutional rights outlined above, lawsuits seeking to enforce these rights seem to have rarely been successful in Japan, as will be shown below. The hurdles vary according to what kind of suit is brought, but essentially contain one core problem: The Supreme Court defines constitutional and

145. Ramlogan, *supra* note 142, at 198.

146. *Id.* at 199

147. *Id.* at 198.

148. ANDREW COBBING, *THE SATSUMA STUDENTS IN BRITAIN: JAPAN’S EARLY SEARCH FOR THE ‘ESSENCE OF THE WEST’* 1-5, 158 (Japan Library 2000). This period takes its name from the Tokugawa shogun who ruled Japan during this era. They established their government in Edo (present-day Tokyo), and therefore this era is also known as the Edo Period. *Id.*

149. Ramlogan, *supra* note 142, at 199.

150. NIHONKOKU KENPOU, *supra* note 144, art. 36.

151. Ramlogan, *supra* note 142, at 181.

152. COBBING, *supra* note 148.

153. Ramlogan, *supra* note 142.

154. NIHONKOKU KENPOU, *supra* note 144, art. 11.

155. *Id.* art. 13.

statutory rights in such a narrow fashion that some rights are severely curtailed.<sup>156</sup>

This problem can perhaps be seen most clearly in discussing the problem of forced confessions in *daiyo kangoku*. Confessions extracted through torture were long acceptable under Japanese law.<sup>157</sup> Though the law has changed today, in practice, some believe torture continues much as it has for centuries.<sup>158</sup>

Confessions are the centerpiece for many criminal trials,<sup>159</sup> although a conviction, as a matter of law, cannot be based on a confession alone.<sup>160</sup> One expert estimated that as many as half of the confessions used in Japanese courts could be considered "forced."<sup>161</sup> Yet, on average, courts overturn only about seven convictions a year on the ground that the conviction was based on a forced confession.<sup>162</sup>

The right to counsel, which is constitutionally enshrined in Japan, is the first theoretical guard against compelled confessions. Article 37 of the Constitution states, "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State."<sup>163</sup> This broad language implies that Article 37 applies to everyone; in case of doubt, Article 34 extends it to detainees.<sup>164</sup> But protection of this right has been weak in Japanese courts.<sup>165</sup>

The roots of this weakness are in the Keisoho, Japan's Code of Criminal Procedure.<sup>166</sup> Article 39 of the Keisoho guarantees the right to an attorney without interference from prison staff.<sup>167</sup> But other restrictions in the Keisoho make this right nominal.<sup>168</sup> First, for indigent defendants, the state only appoints counsel after indictment; therefore the right to counsel is meaningless for impoverished detainees in *daiyo kangoku*.<sup>169</sup> Second, even if the suspect retains an attorney, Article 39(3) of the Keisoho allows

156. Ramlogan, *supra* note 142, at 200-01.

157. *Id.*

158. *Id.*

159. *Id.*

160. NIHONKOKU KENPOU, *supra* note 144, art. 38.

161. Ramlogan, *supra* note 142, at 200.

162. *Id.* (stating that seven convictions were overturned because of coerced confessions in 1988; eleven in 1990; and six during the time period between 1990 and May 1991.)

163. NIHONKOKU KENPOU, *supra* note 144, art. 37.

164. *Id.* art. 34.

165. See Kuk Cho, *supra* note 23, at 58.

166. *Id.*

167. See KEISOHO, *supra* note 23, art. 39; Kuk Cho, *supra* note 23, at 58.

168. See Kuk Cho, *supra* note 23, at 58.

169. See NICHIBENREN, *supra* note 18; Kuk Cho, *supra* note 23, at 58.

the police broad discretion to restrict attorney meetings.<sup>170</sup> These restrictions can include prosecutorial interference with such meetings.<sup>171</sup>

Japan's Supreme Court has repeatedly upheld this system of restrictions.<sup>172</sup> In one case, for example, a man held for sixteen days in detention was allowed to meet with his attorney for a total of three hours, yet the court found this period of detention constitutionally acceptable.<sup>173</sup> The Supreme Court also stated that there was nothing wrong with limiting attorney-client meetings to ten minutes per visit.<sup>174</sup>

A second guard against forced confessions is found in Japan's exclusionary rule, which is based on Article 38 of the Constitution, the right of a suspect to not testify against himself.<sup>175</sup> The Supreme Court has excluded "confessions made under direct compulsion, torture or threat,"<sup>176</sup> but the rule has been applied inconsistently.<sup>177</sup> Proof of real torture can be difficult in *daiyo kangoku*: interrogations are apparently not recorded;<sup>178</sup> the durations of detentions are long;<sup>179</sup> and interrogators do not wear name tags, making them anonymous to the suspect.<sup>180</sup>

In cases in which torture cannot be proven, the exclusionary rule has rarely been applied.<sup>181</sup> This group of cases includes suspects who confessed after prolonged detention or after interrogators made false promises or inducements.<sup>182</sup> For example, the Supreme Court excluded the confession of a suspect who was held for 109 days "where the validity of the grounds for the de-

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170. See Kuk Cho, *supra* note 23, at 59.

171. *Id.* (citing Article 39 (3) of the Keisocho, which states: "Prosecutor, clerk to a prosecutor or police official may . . . designate the date, place and time of the interview [between the suspect and his counsel] . . . when necessary for the purpose of the investigation and to the extent the suspect's right to prepare his defense is not unjustifiably restricted." Article 39(3) indicates that such "designation" should be an exception, but Kuk Cho notes that in practice, the prohibition of visits is the general rule and the allowance of visits is the exception.)

172. *Id.* at 60.

173. Ramlogan, *supra* note 142, at 195.

174. *Id.* at 196.

175. See Kuk Cho, *supra* note 23, at 67-68.

176. See Kuk Cho, *supra* note 23, at 68 (citing 11 KEISHU 1882 (Sup.Ct., July 19, 1957)) ("The Japanese Supreme Court has excluded confessions 'made under compulsion, torture or threat.'").

177. See *id.*

178. *Fourth Periodic Reports of States Parties Due in 1996: Japan*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/115/Add.3, at Concluding Observations of the Human Rights Committee, para. 25 (1997)(recommending that interrogations be recorded by electronic means).

179. HUMAN RIGHTS WATCH, *supra* note 11, at 2.

180. *Id.*

181. Kuk Cho, *supra* note 23, at 68.

182. *Id.*

tion was doubtful and the suspect denied committing the crime from the beginning.”<sup>183</sup> It also excluded the confession of a girl less than sixteen years old who had been detained for seven months.<sup>184</sup> In contrast, the court upheld the confession of a suspect who had been held for over six months “where the detention was based on valid reasons and the suspect confessed in the beginning of the interrogation.”<sup>185</sup> Similarly, it “admitted a confession obtained after a 160 day detention where many witnesses adverse to the defendants existed and the defendants tried to hide their relationship to each other.”<sup>186</sup>

This inconsistency has been explained by legal scholar Kuk Cho as a demonstration of the court’s “adherence to the reliability of the confessions without serious caution [regarding] confessions by prolonged arrest, detention, promises or inducement.”<sup>187</sup> As a result, Cho wrote, the court has drawn no clear distinction between voluntary and involuntary confessions and police have no clear rules for interrogations.<sup>188</sup> In sum, the effectiveness of Japan’s exclusionary rule is limited. The court has recognized it in principle, but has been reluctant to enforce it. The court has essentially allowed the rule to be bent, saying that the “appropriateness”<sup>189</sup> of the actions under the circumstances and “a balancing with the public interest”<sup>190</sup> are relevant in determining whether to exclude a confession.<sup>191</sup> For example, the court has also allowed a confession through a non-stop all-night interrogation as part of a “voluntary accompaniment,” stating that it did not deviate from the scope of a “socially accepted voluntary investigation.”<sup>192</sup>

Criminal charges alleging torture have not fared better. Japanese courts have rarely upheld conviction for torture or inhumane treatment. Over a forty-year period beginning roughly in 1952, there were more than 12,000 complaints of torture and similar abuses; about fifteen were accepted by the courts and only eight resulted in the punishment of the police.<sup>193</sup> Moreover, the courts do not seem to welcome civil suits by prisoners alleging

183. *Id.* (citing 2 KEISHU 944 (Sup.Ct., July 19, 1948)).

184. *Id.* (citing 6 KEISHU 769 (Sup.Ct., May 14, 1952)).

185. *Id.* (citing 2 KEISHU 17 (Sup.Ct., Feb. 6, 1948)).

186. *Id.* (citing 4 KEISHU 1562 (Sup.Ct., Aug. 9, 1950)).

187. *Id.* at 69.

188. *See id.*

189. *Id.* at 71 (quoting KEISHU 479, 487 (Sup. Ct., Feb. 29, 1984) (internal quotations omitted)).

190. *Id.* (quoting 32 KEISHU 670, 688 (Sup.Ct., June 20, 1978)(internal quotations omitted)).

191. *Id.*

192. *Id.* at 69.

193. Ramlogan, *supra* note 142, at 182.

torture. Yoichi Isoe, the prisoner held in solitary confinement for almost thirteen years, filed a lawsuit in 1987 in which he alleged that his conditions of confinement violated Article 36 of the Constitution, the prohibition against torture by public officials.<sup>194</sup> A district court ultimately dismissed that suit in 1999.<sup>195</sup> Presiding Judge Norio Saiki said the solitary confinement of Isoe was “reasonable” and “necessary for keeping order” in the prisons.<sup>196</sup>

Many reasons have been asserted for the Japanese public’s acceptance of brutality toward suspects and inmates. The most common explanation is that the public turns a blind eye because of the Japanese respect for authority.<sup>197</sup> The general consensus is that the courts will continue to interpret the constitutional prohibition against torture in the narrowest fashion.

## B. INTERNATIONAL HUMAN RIGHTS LAW

### 1. Norms Prescribed in International Human Rights Law

Japan is a state party to two key international treaties governing abuses in prisons and detention centers, the International Covenant on Civil and Political Rights, which it ratified in 1979, and the Convention Against Torture, to which it acceded in 1999.<sup>198</sup> It is not a party to the first ICCPR protocol,<sup>199</sup> which allows petitions to the United Nations Human Rights Committee for redress of grievances.<sup>200</sup> The ICCPR and the CAT, however, both contain provisions requiring Japan to take administrative, legislative, and judicial measures to protect the rights contained in the respective documents.

The ICCPR states at Article 2:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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194. JAPAN POLICY & POLITICS, *supra* note 96.

195. *Id.*

196. *Id.*

197. See Ramlogan, *supra* note 142, at 181-182 (discussing the Japanese public’s acceptance of questionable police tactics during interrogations of criminal suspects).

198. UNITED NATIONS HIGH COMMISSION FOR HUMAN RIGHTS, *Treaty Body Database*, at <http://www.unhchr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet> (last visited Nov. 15, 2002).

199. *Id.*

200. Optional Protocol to the International Covenant on Civil and Political Rights, Art 2, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>201</sup>

The CAT also contains a requirement for effective remedies dealing specifically with torture, stating, "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>202</sup>

To interpret how international treaties like the ICCPR apply in a prison setting, the use of other international documents is helpful. These documents, such as the Standard Minimum Rules, adopted in 1955,<sup>203</sup> and the Basic Principles for the Treatment of Prisoners, adopted in 1990,<sup>204</sup> are not treaties but they have been approved and promulgated by the United Nations.<sup>205</sup> Thus, they are considered as authoritative guides in fleshing out prisoners' human rights and on structuring prison systems to comply with international law.<sup>206</sup>

#### a. Ban on Coerced Confessions

Article 14 (3) of the ICCPR states:

201. ICCPR, *supra* note 8, art. 2.

202. CAT, *supra* note 9, art. 4.

203. See Standard Minimum Rules, *supra* note 10.

204. Basic Principles for the Treatment of Prisoners, G.A. Res. 111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 200, U.N. Doc A/45/49 (1990) [hereinafter Basic Principles].

205. HUMAN RIGHTS WATCH, *supra* note 11, at 55.

206. See HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS STANDARDS GOVERNING THE TREATMENT OF PRISONERS (2001), at <http://www.hrw.org/prisons/standards.html> (last visited Nov. 15, 2002).

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- ...  
 (g) Not to be compelled to testify against himself or to confess guilt.”<sup>207</sup>

This statement seems straightforward; however, it ignores the fact that by their very nature, criminal interrogations are designed to extract admissions of guilt from suspects. Are all interrogations invalid under this provision? If not, then what sorts of circumstances qualify as violations of Article 14? The best answer lies in an examination of the U.N. rules for prisons and in the Human Rights Committee’s prior interpretations of the ICCPR.

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prohibits “tak[ing] undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.”<sup>208</sup> Principle 21.2 of this document further states that “[n]o detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”<sup>209</sup> The Human Rights Committee’s comment on the ICCPR’s Article 7 prohibition against torture is also worth remembering in this context. The Committee stated in its General Comment of 1992 that acts causing mental or physical pain can be considered torture.<sup>210</sup> In light of this statement, any act constituting torture would undoubtedly qualify as taking “undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess,” as prohibited by Principle 21.2 of the Body of Principles. In other words, since torture is already prohibited under Article 7 of the ICCPR, the use of torture to coerce a confession can be deemed “taking undue advantage.”

The Human Rights Committee examined the issue of forced confessions in *Estrella v. Uruguay*, a 1983 case.<sup>211</sup> In this case, Miguel Angel Estrella, a citizen of Argentina, claimed that he

207. ICCPR, *supra* note 8, art. 14, para. 3.

208. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc A/43/49 (1988) at Principle 21.1 [hereinafter Body of Principles].

209. *Id.* Principle 21.2.

210. See General Comment 20, U.N. Human Rights Committee, 44th Sess., April 10, 1992, para. 5, available at <http://www.irct.org/usr/irct/home.nsf/unid/JREW-5FCGTB#20-7> (last visited Aug. 7, 2003) [hereinafter General Comment 20].

211. *Estrella v. Uruguay*, comm. No. 74/1980, SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL VOL. 2 at 93-98,

was subjected to severe psychological and physical torture by his government jailers in an effort to compel him to confess.<sup>212</sup> The prisoner said that “[t]he tortures consisted of electric shocks, beatings with rubber truncheons, punches and kicks, hanging us up with our hands tied behind our backs, pushing us into water until we were nearly asphyxiated, making us stand with legs apart and arms raised for up to 20 hours, and psychological torture.”<sup>213</sup> The psychological torture included threats of violence toward relatives or friends, extensive interrogation, and induced hallucination.<sup>214</sup> The Committee concluded that these tactics, among others, constituted a violation of ICCPR Article 14(3)(g), “because of the attempts made to compel him to testify against himself and to confess guilt.”<sup>215</sup> It concluded that Uruguay “[was] under an obligation to provide the victim with effective remedies, including compensation, and to take steps to ensure that similar violations [did] not occur in the future.”<sup>216</sup>

#### b. General Prohibitions Against Torture

The ICCPR and the CAT both establish the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. This right is considered nonderogable, meaning that it cannot be subjugated under any circumstances.<sup>217</sup> Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>218</sup>

The question of what constitutes torture is a difficult one because it encompasses physical and mental abuse, and can often vary according to the views of the victim, perpetrator, and observer. For the purposes of international law, one comprehensive and respected definition is set out in Article I of the CAT:

[T]he term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when

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U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1 (1990) [hereinafter SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE].

212. *Id.* at 94

213. *Id.*

214. *Id.*

215. *Id.* at 98.

216. *Id.*

217. CAT, *supra* note 9, art. 2, para. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

218. ICCPR, *supra* note 8, art. 7.



such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>219</sup>

The U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment<sup>220</sup> also contains a prohibition against torture or inhumane treatment at Principle 6:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.<sup>221</sup>

It gives the following guideline for defining the term in a prison setting: "The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental . . . ."<sup>222</sup> In light of this statement, it can be deduced that certain violations of the U.N. guidelines for prisons can amount to torture if these violations involve intentional infliction of severe pain.

Another of the United Nations prison-related documents, the Standard Minimum Rules, states at paragraph 33:

Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

- (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
- (b) On medical grounds by direction of the medical officer;
- (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.<sup>223</sup>

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219. CAT, *supra* note 9, art. 1, para. 1.

220. Body of Principles, *supra* note 208.

221. *Id.* at Principle 6 (footnote omitted).

222. *Id.* at footnote to Principle 6.

223. Standard Minimum Rules, *supra* note 10, para 33.

Similarly, the Basic Principles state: "Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged."<sup>224</sup>

The Human Rights Committee has interpreted this web of guidelines and treaties on numerous occasions. In *Larrosa v. Uruguay*,<sup>225</sup> a 1983 case, the Committee examined the allegations of David Larossa, the brother of Gustavo Raul Larrosa Bequio; Gustavo was a Uruguayan national who was detained at several institutions, including Libertad Prison.<sup>226</sup> Larrosa was detained in solitary confinement in "La Isla," a prison wing with cement beds, no windows, and artificial light twenty-four hours a day.<sup>227</sup> He was kept in these conditions for more than one month.<sup>228</sup> The Committee based its decision in part on Larrosa's having been held in "La Isla", finding that Articles 7 and 10(1) of the ICCPR had been violated because Larrosa had "not been treated in prison with humanity and with respect for the inherent dignity of the human person."<sup>229</sup> It stated that Uruguay was obligated to ensure such violations did not occur in the future, to take immediate steps to ensure strict observance of the ICCPR, and to provide effective remedies to the victim, who suffered violations of Article 10.<sup>230</sup> The Committee's opinion contained little specificity as to prison conditions other than solitary confinement. The Committee thus appeared to reach its decision primarily based on the duration and conditions in solitary confinement.

The Committee also addressed a torture claim in its opinion in *Estrella*. In this case, the author of the communication to the Committee had alleged that government officials used electric shocks, beatings, induced hallucinations, threats of violence against himself and his friends or family, and forced interrogation where he and other prisoners stood with their arms raised and legs apart.<sup>231</sup> Based on these allegations, the Committee found that the interrogations violated Article 7.<sup>232</sup>

In its General Comment of 1992, the Committee cast its disapproval of excessive solitary confinement in more general terms, stating that "prolonged solitary confinement . . . may

224. Basic Principles, *supra* note 204, para. 7.

225. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Larrosa v. Uruguay*, comm. No. 88/1981.

226. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Larrosa v. Uruguay*, comm. No. 88/1981 at 118-21.

227. *Id.* at 119.

228. *Id.*

229. *Id.* at 121.

230. *Id.*

231. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 137, *Estrella v. Uruguay*, comm. No. 74/1980, at 94.

232. *See id.* at 97-98.

amount to acts prohibited by Article 7."<sup>233</sup> Finally, the Committee stated in the same comment that the use of corporal punishment – which can include the use of restraints that cause extreme discomfort or lasting damage<sup>234</sup>– also is prohibited under Article 7.<sup>235</sup>

The use of physical violence against prisoners can qualify as torture in many contexts. The use of physical violence by an interrogator, for example, is considered to be a breach of Article 7.<sup>236</sup> But the use of psychological tactics by this same interrogator may also be considered torture, in light of definitions included in the CAT and the Body of Principles. In its 1992 General Comment, the Committee supported this view, declaring that “[t]he prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”<sup>237</sup> Violations thus would include threats of violence, extensive interrogation that induces exhaustion, or induced hallucinations, all of which were factors in the *Estrella* case.<sup>238</sup>

### c. Respect for Prisoners’ Inherent Human Dignity

The ICCPR states, at Article 10: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>239</sup> In plain language, this provision means that prisoners do not become subhuman simply by virtue of conviction. The Human Rights Committee has interpreted this to mean that, broadly speaking, prisoners should enjoy the same rights that all other citizens do, with the exception of freedom of movement.<sup>240</sup>

The Committee has developed various factors that can be combined to create an overall prison situation in which the inherent dignity of prisoners is not respected. Extreme emphasis on discipline, harsh punishments imposed for trivial violations, and extensive limitations on human contact may all contribute to a violation of Article 10.<sup>241</sup>

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233. General Comment 20, *supra* note 210, para. 6.

234. HUMAN RIGHTS WATCH, *supra* note 11, at 64

235. See General Comment 20, *supra* note 210, para. 5.

236. See HUMAN RIGHTS WATCH, *supra* note 11, at 63.

237. General Comment 20, *supra* note 210, para. 5.

238. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 94. See also *supra* text accompanying note 163.

239. ICCPR, *supra* note 8, art. 10 para. 1; See also HUMAN RIGHTS WATCH, *supra* note 11, at 55.

240. See HUMAN RIGHTS WATCH, *supra* note 11, at 56 (citing General Comment 21, United Nations Human Rights Committee, 44th Sess. (1992)).

241. See *id.* at 57.

The Committee has previously examined prison conditions and deemed them to be in violation of Article 10. In one 1982 case, *Campora v. Uruguay*,<sup>242</sup> it considered the allegations of David Campora, a man held at Libertad Prison. The Committee cited Campora's description of prison conditions:

He described the daily life of the prisoners, including their constant harassment and persecution by the guards; the regime of arbitrary prohibitions and unnecessary torments; the combination of solitude and isolation on the one hand and the fact of being constantly watched . . . on the other hand; the lack of contact with their families, . . . [and] the cruel conditions in the punishment wing in which a prisoner might be confined for up to 90 days at a time. . . . In sum, he asserts that the [prison] is 'an institution designed, established and operated with the exclusive objective of totally destroying the individual personality of everyone [sic] of the prisoners confined in it.'<sup>243</sup>

Although the author of the communication to the Committee referred to prison mistreatment in general terms, the Committee did not base its decision on such mistreatment.<sup>244</sup> Rather, the Committee appears to have based this assessment solely on Campora's description of the prison's conditions.<sup>245</sup> The Committee stated that Uruguay "[was] under an obligation to provide the victim with effective remedies, including compensation."<sup>246</sup>

The Committee also found violations of Article 10 in the *Larrosa* and *Estrella* cases. In *Estrella*, the Committee found that the conditions of confinement were inhuman based on, *inter alia*, this description given by the author:

The author states that the reasons for punishment at Libertad Prison are endless (for example, . . . for walking without having their hands behind their back; for looking directly at a prison guard; for trying to share food or clothes with a detainee; for drawing, for writing music, for not executing an order quickly enough . . .). He recalls that he was punished over and over again for saying "hello" with a smile to other detainees while distributing their breakfast. . . . He further states that punishments could be entirely arbitrary. He mentions that once he had to remain in solitary confinement in a punishment cell for one month because "a group of European friends" had come to see him and the prison authorities had decided not to allow the visit.<sup>247</sup>

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242. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Campora v. Uruguay*, comm. No. 66/1980, at 92.

243. *Id.*

244. *Id.* at 93

245. *Id.*

246. *Id.*

247. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 95-96.

The Committee also took note of Estrella's placement for ten days in a "cage-like" cell in "La Isla" and of his allegation that "the whole system at Libertad is aimed at destroying the detainees' physical and psychological balance, that detainees are continuously kept in a state of anxiety, uncertainty and tension and that they are not allowed to express any feeling of friendship or solidarity among themselves."<sup>248</sup>

Taken together, these conditions of confinement contributed to a violation of Article 10.<sup>249</sup> In *Larrosa*, the Committee referred to Larrosa's time in "La Isla" and found violations of Article 7 and 10(1).<sup>250</sup>

These Committee decisions suggest that a systematic disregard of a prisoner's dignity is a violation of Article 10. Several small violations of the Body of Principles or Standard Minimum Rules can, taken together, be evidence of a systematic disregard for prisoners' dignity. Violations of this sort include departures from guidelines set out in the Standard Minimum Rules and similar documents; such as the lack of adequate bathing allowances,<sup>251</sup> excessive and arbitrary discipline,<sup>252</sup> cruel or inhumane punishments for disciplinary violations,<sup>253</sup> unreasonable restrictions on visitation,<sup>254</sup> the failure to publish disciplinary rules,<sup>255</sup> and problems with sanitation.<sup>256</sup>

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248. *Id.* at 96.

249. *See id.* at 98.

250. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Larrosa v. Uruguay*, comm. No. 88/1981, at 120, para. 20, 121, para 12.

251. Standard Minimum Rules, *supra* note 10, para. 13 ("Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.").

252. *See id.* paras. 27 ("Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."), 30(1) ("No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence."), 30(2) ("No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case."), 31 ("Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.").

253. *See* Body of Principles, *supra* note 208, at Principle 6 ("No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.").

254. *See* Standard Minimum Rules, *supra* note 10, para. 37 ("Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.").

255. Body of Principles, *supra* note 208, at Principle 30 ("1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall

## 2. *Invoking International Law in Japanese Courts*

A final source of law to consider in determining whether or not Japanese prisons conditions violate internal law is the relevance of international law in Japan. Ratified treaties have the full force of law in Japan under Article 98(2) of the Constitution.<sup>257</sup> This makes treaties, such as the ICCPR, self-executing.<sup>258</sup> No legislation is required to implement them. Their rank is generally considered to be a notch below the Constitution, but above statutes.<sup>259</sup>

The Japanese government has reaffirmed this proposition, telling the Human Rights Committee in its 1991 response to the Third Periodic Report on Japan that its citizens may bring legal actions in national courts against the government for violations of the ICCPR.<sup>260</sup> Reality, however, has not reflected the government's statement. One former Japanese Supreme Court Justice labeled the court's attitude toward arguments based on the ICCPR as "extremely half-hearted," and the entire court system's attitude "highly negative."<sup>261</sup> This observation comes despite the fact that provisions in the Constitution and the ICCPR are facially similar. Safeguards against torture and self-incrimination, for example, are virtually identical. The problem, it seems, is not in the rights themselves, but in their enforcement.

The first problem in enforcing international human rights norms is that Japanese courts tend to interpret provisions of international human rights treaties as identical to similar provisions in the Japanese Constitution.<sup>262</sup> The interpretations of the national Constitution have been exceedingly narrow.<sup>263</sup> The second problem is that Japanese courts have often simply refused to find human rights violations that other bodies, such as the Human

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be specified by law or lawful regulations and duly published; 2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.").

256. Standard Minimum Rules, *supra* note 10, para 12 ("The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.").

257. Nihonkoku Kenpou, *supra* note 144, art. 98(2); Ramlogan, *supra* note 142, at 153.

258. Ramlogan, *supra* note 142, at 153.

259. *Id.* at 154.

260. Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 469 (1999), citing *Third Periodic Report of States Parties Due in 1991: Japan*, Comments of the Human Rights Committee, U.N. Doc. CCPR/C/70/Add.1, paras. 16-17 (1992).

261. *Id.* at 469-70.

262. *Id.* at 469.

263. See Ramlogan, *supra* note 142, at 202-03. *But see Id.* at 204 (discussing the Takada Case, where "the Supreme Court held that a fifteen-year delay violated the constitutional right to a speedy trial.").

Rights Committee, have recognized.<sup>264</sup> Examination of sample cases illuminates these two problems.

In September 2000, for example, Japan's First Petty Bench of the Supreme Court overturned the judgments of two lower courts and held that a thirty-minute time limitation on attorney visits to prisoners did not violate Article 13 (respect for individuals)<sup>265</sup> or Article 32 (the right of access to the courts)<sup>266</sup> of Japan's Constitution.<sup>267</sup> The Court also held that there was no violation of Article 14 of the ICCPR, which at subsection (b) recognizes the right to adequate time and facilities for the preparation of a criminal defense.<sup>268</sup> The Japan Fellowship of Reconciliation criticized the court, stating that "[t]he tendency of the courts in Japan, especially the Supreme Court, to try to avoid passing judgment on international human rights treaties, including the ICCPR, is remarkable."<sup>269</sup> The Fellowship noted that although the Human Rights Committee had identified twenty-nine "points of concern" in its 1997 report on Japan, the Supreme Court at that point had never found any law, regulation, or measure in violation of the ICCPR.<sup>270</sup>

Consider again the case of "K," who in 1994 brought a suit in Tokyo District Court based on the relevant provisions of the ICCPR.<sup>271</sup> He alleged, among other things, that a guard had forced him to lie down and that the guard stamped on his back; that he was placed in a protection cell for about three days; and that he was shackled with metal handcuffs and a body belt that caused him internal bleeding.<sup>272</sup> The national court ruled in 1998 that there had been no violation of the ICCPR.<sup>273</sup> The measures used against K, it held, were within the limits of prison rules designed to maintain order.<sup>274</sup> If these measures were proved to have actually caused long-term damage as K alleged, the Court might have been more sympathetic to K's claim that they were

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264. *Id.* at 470.

265. Nihonkoku Kenpou, *supra* note 144, Art. 13 ("All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.").

266. *Id.* at Art. 32 ("No person shall be denied the right of access to the courts.")

267. U.N. ESCOR, 54th Sess, Item 1, E/CN.4/Sub.2/2002/NGO/22, at 2-3 (2002), available at [www.unhcr.ch/Huridocda/Huridoca.nsf/0/7b13546591804c86c1256c05005a3344/\\$FILE/G0214349.doc](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/7b13546591804c86c1256c05005a3344/$FILE/G0214349.doc) (last visited Oct. 20, 2002).

268. *Id.* at 4.

269. *Id.*

270. *Id.*

271. *Prison's Restraints 'Within Bounds,'* JAPAN TIMES, June 30, 1998, LEXIS, Nexis, News Group File, All.

272. AMNESTY INTERNATIONAL, *supra* note 13, at 10-11.

273. *Prison's Restraints 'Within Bounds,' supra* note 271.

274. *Id.*

excessive. But prison officials refused to release complete medical records, essential evidence for proving that he had been abused.<sup>275</sup>

Resistance in Japan to lawsuits based on the ICCPR is not universal. The lower courts have invoked the ICCPR numerous times, although they have sometimes been overruled by the Supreme Court. In 1993, the Tokyo High Court – whose prestige is just below the Supreme Court<sup>276</sup> – became Japan’s first court to apply the ICCPR directly, in ruling that the government could not charge a defendant for the cost of a trial interpreter.<sup>277</sup>

Other isolated victories have followed, including a 1998 decision, also by the Tokyo High Court, holding that using handcuffs in a protection cell could be “excessive,” and thus prohibited.<sup>278</sup> But this victory was limited in scope, as the court did not declare that the use of restraints was illegal *per se*.<sup>279</sup> A recent case suggests, however, that courts are now more apt to find the use of handcuffs “excessive.” Kevin Neal Mara, an American who spent four and a half years in Fuchu Prison, sought 6 million yen (approximately US\$50,000) in damages in 1996 after he was handcuffed overnight in solitary confinement.<sup>280</sup> In June 2002, the Tokyo District Court awarded Mara 10 percent of that amount on account of what it called the “inhumane treatment” that Mara suffered.<sup>281</sup> As in the 1998 case, the judge in *Mara* was careful to limit the scope of the ruling, noting that the use of handcuffs had been partially justified because Mara had behaved wildly.<sup>282</sup> While these decisions give some hope for abused inmates, disparate outcomes of similar cases illustrate that, at best, Japanese courts apply international human rights law haphazardly.

### III. DISCUSSION

#### A. PRACTICES IN JAPAN’S PENAL SYSTEM PERSIST EVEN THOUGH THEY VIOLATE DOMESTIC LAW

In light of provisions in the Japanese Constitution, abuses in Japanese prisons would appear to violate domestic law. Some

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275. See AMNESTY INTERNATIONAL, *supra* note 13, at 11.

276. Brown Hamano, *supra* note 260, at 475.

277. Brian P. Menard, Yuji Iwasawa, *International Law, Human Rights, And Japanese Law: The Impact Of International Law On Japanese Law; Evidence Of Compliance*, 40 VA. J. INT’L L. 763, 781 (2000) (book review).

278. Brown Hamano, *supra* note 260, at n. 272.

279. *Id.*

280. *Ex-Inmate Wins Yen 600,000 in Inhumane-Treatment Case*, JAPAN TIMES, June 29, 2002, LEXIS, Nexis, News Group File, All.

281. *Id.*

282. *Id.*



lower courts have agreed.<sup>283</sup> The Japanese Supreme Court's interpretation of these provisions, however, has cast doubt upon this conclusion. Domestic constitutional rights have been so narrowly defined that even flagrant abuse, such as thirteen years of solitary confinement, is seen as appropriate.<sup>284</sup> Likewise, invocations of the ICCPR in the Japanese Supreme Court have been entirely rejected, with only slightly better results in the lower courts.<sup>285</sup>

The Japan Fellowship of Reconciliation has noted this disregard for the ICCPR; and in fact this disregard creates a separate problem in itself: Such disregard is a violation of Article 2 of the Convention, which imposes a duty upon states to provide an effective remedy for violations of ICCPR rights.<sup>286</sup> Given the apparent conservatism of the judiciary in Japan, it is highly unlikely that the courts will spontaneously expand either constitutional or ICCPR rights.

## B. JAPAN'S PENAL PRACTICES FURTHER VIOLATE INTERNATIONAL HUMAN RIGHTS LAW

In light of international human rights laws, moreover, abuses in Japanese prisons would appear to violate international law. This section will address how international law applies to violations concerning practices during *daiyo kangoku*; the substandard physical conditions and arbitrary rules of prisons; the use of minor solitary confinement; and the use of protection cells.

### 1. Daiyo Kangoku

Former detainees maintain that physical and psychological abuse in the *daiyo kangoku* system is utilized as a matter of course. Tactics such as imposing ten-hour interrogation sessions, waking the suspect in the middle of the night to extract confessions, beating the suspect, binding the suspect's fingers, forcing the suspect to stand in a fixed position for hours, and threatening the suspect's family are all objectively capable of inflicting severe mental and physical pain. Because these tactics are systematically used, are severe, and are performed by state actors, they

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283. Brown Hamano, *supra* note 260, at n. 272.

284. *See supra* text accompanying notes 147-48.

285. Brown Hamano, *supra* note 260, at n. 272. (citing a case which ruled the use of certain handcuffs was illegal in a particular case, but not a per se violation of any constitutional right). *See also supra* text accompanying notes 213, 219-23.

286. ICCPR, *supra* note 8, art. 2 (3)(a); U.N. ESCOR, 54th Sess, Item 1, E/CN.4/Sub.2/2002/NGO/22, at 4 (2002), available at [www.unhcr.ch/Huridocda/Huridocda.nsf/0/7b13546591804c86c1256c05005a3344/\\$FILE/G0214349.doc](http://www.unhcr.ch/Huridocda/Huridocda.nsf/0/7b13546591804c86c1256c05005a3344/$FILE/G0214349.doc) (last visited Oct. 20, 2002).

constitute torture as defined by Article I of the CAT.<sup>287</sup> The Japanese government is obligated to prevent these tactics under the ICCPR and the CAT.<sup>288</sup>

Japan cannot plead ignorance to charges of abuse during *daiyo kangoku*. The use of torture to extract confessions has deep roots in Japan,<sup>289</sup> and its continuing use should not surprise the government. Even if it did, a study by the Japan Federation of Bar Associations of the treatment reported by over 100 former detainees has revealed a systematic use of torture, not simply a few isolated cases.<sup>290</sup> The government's refusal to act despite such evidence suggests that interrogators are acting with the explicit consent of the larger government – especially the justice system, which relies enormously on confessions to maintain its 99.9 percent conviction rate.<sup>291</sup> The Supreme Court's reluctance to enforce more rigorously Japan's constitutional exclusionary rule further supports the proposition that confessions play too large a role in the justice system.

The use of torture in detention when used to compel a detainee to confess also violates Article 14(3)(g) of the ICCPR – the right of a suspect to not be compelled to confess guilt – as interpreted in the Human Rights Committee's decision in *Estrella v. Uruguay*.<sup>292</sup> In this case, the Committee found that interrogators had used severe psychological and physical torture in an effort to compel confession by a detainee.<sup>293</sup> The tactics included electric shocks, beatings, punches and kicks, being forced to stand with his legs apart and arms raised above his head for up to twenty hours, and threats of violence.<sup>294</sup> Japan appears not to have been accused of using electric shocks, but some inmates have reported beatings and psychological tactics such as threats and intimidation.<sup>295</sup> Persons have also alleged that interrogators force suspects to stand for prolonged periods of time. Reports from lawyers, former detainees, relatives of former detainees,

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287. See CAT, *supra* note 9, art. 1; See also *supra* text accompanying note 168, which provides the full definition of torture contained in the CAT.

288. See CAT, *supra* note 9, art. 2 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”) and ICCPR, *supra* note 8, art. 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . .”).

289. Ramlogan, *supra* note 142, at 181.

290. See HUMAN RIGHTS WATCH, *supra* note 11, at 1-2.

291. COUNTRY REPORT, *supra* note 4.

292. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 98.

293. *Id.* at 97.

294. *Id.* at 94.

295. See HUMAN RIGHTS WATCH, *supra* note 11, at xi-xvi.

and others have shown that the *daiyo kangoku* system entails a web of restrictive, arbitrary, and inhumane rules that place undue pressure on criminal suspects to confess.<sup>296</sup> Practices such as constant surveillance, middle-of-the-night wake-up calls, and regulations on when suspects can flush the toilet make life unnecessarily uncomfortable for detainees.<sup>297</sup> Furthermore, holding suspects in these conditions for up to twenty-three days without charges being filed and without an attorney can create an enormous incentive to confess, regardless of guilt. When an interrogator offers freedom from these conditions in exchange for an admission of guilt, the interrogator is clearly taking advantage of the situation. Although these conditions may not mirror the precise fact pattern in *Estrella*, they violate the spirit of its holding; that is, that interrogators may not use excessive tactics to extract confessions.<sup>298</sup>

Finally, the combined use of torture and inhumane conditions of confinement in *daiyo kangoku* amounts to a violation of Article 10 of the ICCPR, which protects the inherent human dignity of prisoners and detainees. A detainee's dignity is not preserved when he is subjected to torture, forced to live in degrading conditions, and cut off from the world for twenty-three days – all without even one charge being filed. The standard set out in the Human Rights Committee's description of "inhuman" prison conditions in *Campora*<sup>299</sup> and *Estrella*<sup>300</sup> is clearly met. The Committee's description of Uruguay's Libertad prison in *Campora* conforms almost precisely to the conditions of *daiyo kangoku*.<sup>301</sup> In *Campora*, the Committee referred to Campora's description of prison conditions, including "constant harassment and prosecution by the guards" and a "regime of arbitrary prohibitions and unnecessary torments," and that the prison was "designed, established and operated with the exclusive objective of totally destroying the individual personality of [the prisoners]."<sup>302</sup> In Japan, detainees are subject to nearly constant harassment by interrogators as well as arbitrary prohibitions and

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296. *See id.*

297. *Id.*; NICHIBENREN *supra* note 18 (describing tactics used to make "the suspect extremely exhausted both physically and mentally").

298. *See* SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 97-98.

299. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Campora v. Uruguay*, comm. No. 66/1980, at 92-93.

300. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 98.

301. *Compare* SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Campora v. Uruguay*, comm. No. 66/1980, at 92 and HUMAN RIGHTS WATCH, *supra* note 11, at 1-3.

302. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Campora v. Uruguay*, comm. No. 66/1980, at 92.

punishments.<sup>303</sup> The Human Rights Committee agreed with this assessment in its last report on Japan, in which it expressed concern that the guarantees in Articles 10 and 14

are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-day day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defence counsel under article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect. The Committee strongly recommends that the pre-trial detention system in Japan should be reformed with immediate effect to bring it in conformity with articles 9, 10 and 14 of the Covenant.<sup>304</sup>

The Committee went on to say that it was “deeply concerned”

about the fact that a large number of the convictions in criminal trials are based on confessions. In order to exclude the possibility that confessions are extracted under duress, the Committee strongly recommends that the interrogation of the suspect in police custody or substitute prisons be strictly monitored, and recorded by electronic means.<sup>305</sup>

## 2. *Physical Prison Conditions and Rules*

The combination of difficult physical conditions and rigid rules that regulate the minutest details of inmates' lives represents a disregard for prisoners' inherent human dignity, and thus constitutes a violation of Article 10 of the ICCPR. Again, the relevant standard is the Human Rights Committee's decisions in *Campora* and *Estrella*, in which the Committee held that prison conditions such as harsh arbitrary rules, excessive solitary con-

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303. See NICHIBENREN *supra* note 18 (noting that the *daiyo kangoku's* operators have “a variety of coercive torturous ways to obtain confessions; making the suspect extremely exhausted both physically and mentally by questioning from early morning until late at night every day for a long period of time; the beating, poking and kicking of the suspect's body by several policemen at the same time; binding fingers unbearably tight; hitting the table or turning over the chair on which the suspect is sitting; making the suspect stand in a fixed position; shouting close to his ear that he has committed the crime; inducing the suspect to confess by saying that he could go home, receive items sent to him or buy things more freely or, in an exceptional case, see his spouse or friends if he confessed; tormenting the suspect by showing colour photos of the victim when the suspect is eating, or by waking him up every hour during the night.”); HUMAN RIGHTS WATCH, *supra* note 11, at 57-58.

304. *Concluding Observations of the Human Rights Committee: Japan*, U.N. Doc. CCPR/C/79/Add.102 (Concluding Observations/Comments), para. 22 (1997) [hereinafter *Concluding Observations of the Human Rights Committee*].

305. *Id.* para 25.

finement, and constant harassment can be contribute to "inhuman" conditions in which may violate Article 10's protection of prisoners' inherent human dignity. No one detail of Japanese prisons meets this description, but numerous factors build a strong case for a violation.

The most disturbing aspect of the Japanese prison system may be the emphasis on strict, arbitrary rules. In *Estrella*, the Committee cited an inmate's statement that there were endless reasons for punishment, such as saying hello to other inmates or looking directly at a guard, and that these punishments could be extremely arbitrary, in concluding that the prison conditions contributed to an inhumane environment.<sup>306</sup> Japan's endless and arbitrary system of rules fits the *Estrella* description well. Japan's prison officials regulate when prisoners can open their eyes, where and how they can place objects in their cells, and how they can cover themselves at night.<sup>307</sup> This environment not only treats the inmates as subhuman, but it also creates an environment ripe for rule violations. Since rule violations can lead to punishments such as Japan's harsh versions of solitary confinement, the dangerousness of such an environment should not be taken lightly. Rules must be crafted with an eye on what is essential to maintain security. Japanese prison rules go beyond what is essential, contain elements of vindictiveness and punishment, and ultimately "seek to destroy the individual personality," to quote the description the Committee used to describe conditions in *Campora*.<sup>308</sup>

The basic physical conditions of Japanese prisons may not violate Article 10 in and of themselves, because overcrowding is not widespread,<sup>309</sup> and sanitation and food rations are apparently "very good."<sup>310</sup> But the conditions come close to a violation in other respects. Conditions like stuffiness and extreme heat in the summer, constant artificial lighting, moldy walls, insect infestations, and total absence of heating in subzero temperatures build the case for an Article 10 violation.<sup>311</sup> In *Larrosa*, the Human Rights Committee referred to the fact that the prisoner had been held in solitary confinement in an area where lighting was used

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306. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 95-96.

307. HUMAN RIGHTS WATCH, *supra* note 11, at 20-22, 24.

308. *Id.* at 57-58.

309. *Id.* at vii.

310. *Penal Reform Group: Japan's Prisons "Too Strict,"* MAINICHI DAILY NEWS, *supra* note 64, at 16 (quoting Vivien Stern, secretary-general of London-based Penal Reform International).

311. See HUMAN RIGHTS WATCH, *supra* note 11, at 4-11.

twenty-four hours a day.<sup>312</sup> This holding could be extended to a regular prison setting to find Japan's use of constant lighting equally inhumane.

Also of concern are the strict rules governing contact with other prisoners and the outside world.<sup>313</sup> The utter deprivation of human contact that ex-prisoners have reported is not designed as punishment, but it functions as such, and constitutes evidence of an inhumane environment.

The Human Rights Committee stated in its concluding observations on Japan's 1997 Fourth Periodic Report that it was "deeply concerned at many aspects of the prison system in Japan which raise serious questions of compliance with articles 2, paragraph 3 (a), 7 and 10 of the Covenant."<sup>314</sup> These aspects included "[h]arsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy."<sup>315</sup>

### 3. *Minor Solitary Confinement*

The excessive use of "minor solitary confinement" represents a violation of Articles 7 and 10 of the ICCPR as well as the CAT. The conditions imposed upon prisoners in solitary confinement and the length of time spent there also supports the assertion that this punishment constitutes torture. The degradation involved in this process also entails an infringement of the human dignity of the incarcerated, which the ICCPR requires Japan to respect.

International standards dictate that solitary confinement is to be used sparingly as punishment;<sup>316</sup> nevertheless, former inmates have reported that solitary confinement was the most commonly used disciplinary measure in Japan.<sup>317</sup> Solitary confinement has allegedly been meted out as punishment for exceedingly trivial rule violations, such as looking at a guard and opening one's eyes during the daily reflection period.<sup>318</sup>

Even when used for violations of legitimate rules, the harsh conditions of solitary confinement themselves also amount to a

312. See SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Larrosa v. Uruguay*, comm. No. 88/1981, at 119-20.

313. See HUMAN RIGHTS WATCH, *supra* note 11, at 4, 12-18.

314. *Concluding Observations of the Human Rights Committee*, *supra* note 304, para. 27.

315. *Id.* para. 27(a).

316. See Basic Principles, *supra* note 204, para. 7 ("Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.")

317. HUMAN RIGHTS WATCH, *supra* note 11, at xiv, 24.

318. *Id.* at 25.

violation of Articles 7 and 10 of the ICCPR. The idea behind solitary confinement is to punish by cutting off the inmate from the rest of the prison, and by extension, from other people. This practice by itself does not constitute torture or inhuman treatment; it is simply an undesirable punishment for most prisoners. In Japanese prisons, however, it has been noted that simple solitary confinement is not really a punishment for many prisoners, since about half of them are usually housed in single cells.<sup>319</sup> Thus, harsher measures are used, and these practices do amount to torture. Forcing prisoners to spend fourteen hours sitting in either a *seiza* or cross-legged position<sup>320</sup> inflicts unnecessary degradation upon them. Forbidding movement while in these positions – under threat of further punishment<sup>321</sup> – furthers the abuse and degradation. This practice is also torture, in that fourteen hours in the *seiza* or cross-legged position can be painful. An appropriate comparison is forcing prisoners to stand in *Estrella*. The Human Rights Committee found that *Estrella* had been subject to torture during a period in which he claimed to have been forced to “stand, with legs apart and arms raised for up to 20 hours,” among other methods of mistreatment.<sup>322</sup> Similar forced standing would most likely constitute or contribute to torture in a prison because it is utilized solely to inflict mental and physical pain on inmates.

The length of solitary confinement sentences in Japan also amounts to a violation of Article 7. The controlling Human Rights Committee case is *Larrosa v. Uruguay*, in which the Committee found a violation of articles 7 and 10(a) of the ICCPR, basing its decision in part on the fact that the prisoner had been “kept in solitary confinement for over a month.”<sup>323</sup> The Committee appears to have reached its decision despite the initial complaint’s apparently containing very few factual allegations, some of which were the length of time held in solitary confinement, the sparse conditions of the cell, and the fact that the cell was lit twenty-four hours a day with artificial light.<sup>324</sup>

Evidence shows that the length of solitary confinement in Japan often exceeds the thirty-day sentence challenged in *Larrosa*. Reports indicate that Japanese prison regulations allow

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319. *Id.* at 4, 24.

320. *Id.* at 24-25; AMNESTY INTERNATIONAL, *supra* note 13, at 5.

321. HUMAN RIGHTS WATCH, *supra* note 11, at 24-25.

322. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 94 para 1.6, 97 paras. 8.1-8.3, 98 para. 10.

323. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Larrosa v. Uruguay*, comm. No. 88/1981 at 119, 120, paras. 10.1, 10.3.

324. *See id.* at 119, para 2.5.

sentences of sixty days or more.<sup>325</sup> Testimony from former prisoners confirms that the use of extended solitary confinement is common.<sup>326</sup> In the case of Yoichi Isoe, solitary confinement lasted for thirteen years and seven months with only short break periods.<sup>327</sup> Though conditions such as sparse cells and constant artificial lighting may not necessarily be met, other conditions – such as forcing inmates to sit in the *seiza* position and forbidding them to move their eyes – are probably more degrading. These conditions are clearly a violation of the standard set out in *Larrosa*. The Human Rights Committee seemed to agree with this assessment in its 1998 concluding observations on the Fourth Periodic Report of Japan, when it specifically condemned the “[u]se of harsh punitive measures, including frequent resort to solitary confinement” as an issue that raised serious questions of compliance with paragraph 3(a) of Article 2, and Articles 7 and 10 of the ICCPR.<sup>328</sup>

#### 4. Protection Cells

The excessive use of protection cells as instruments of punishment, as well as the harsh conditions in those cells, is a flagrant violation of Articles 7 and 10 of the ICCPR and the CAT. The broad consensus in international law is that the use of physical restraints should be reserved for prisoners who pose an escape risk; for violent prisoners who pose an immediate threat to the safety of themselves, prison staff, and other prisoners; or for prisoners who need to be restrained on medical grounds.<sup>329</sup> The purpose of these instruments is to restrain, not to punish. The conditions of such confinement may not degrade or torture the prisoner, moreover, simply because he or she poses a threat.<sup>330</sup>

Evidence shows that Japanese prison officials utilize degrading treatment in protection cells and frequently use these cells to punish inmates, despite the above principles. Guards have even been accused of provoking or exaggerating incidents of misbe-

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325. HUMAN RIGHTS WATCH, *supra* note 11, at 25. See also JAPAN POLICY & POLITICS, *supra* note 96.

326. See HUMAN RIGHTS WATCH *supra* note 11, at 24 (“Virtually all of the former prisoners interviewed by Human Rights Watch stated that solitary confinement was the most frequently applied disciplinary measure.”).

327. JAPAN POLICY & POLITICS, *Court Says 13 Years of Solitary Confinement Justified*, *supra* note 96.

328. *Concluding Observations of the Human Rights Committee*, *supra* note 304, para. 27(b); See *id.* para 27.

329. See Standard Minimum Rules, *supra* note 10, para 33 (considered to be an international standard for good prison administration).

330. See ICCPR, *supra* note 8, art. 10 (1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”).



havior so that a disfavored prisoner might be sent to a protection cell. An example is the case of K, who claimed to have been placed in a protection cell subsequent to an altercation with a guard that occurred at some point after K had applied for permission to contact a bar association regarding a complaint against his detention center.<sup>331</sup> Likewise, in the incident involving inmate Uchiyama, an incident that began with a prisoner “lying the wrong way on his bed” ended with that same prisoner being tossed in a protection cell.<sup>332</sup> These incidents are examples of protection cells clearly being used to punish and, by extension, to degrade the inmate so as to encourage complete deference to guards in the future.

Even when used for violent inmates who pose legitimate safety concerns, the conditions of protection cells constitute torture. The use of restraints, such as leather handcuffs and body belts, for days at a time creates a physically painful experience for those in protection cells. These restraints allegedly have been used too forcefully, and have caused physical injury.<sup>333</sup> Mentally, being restrained is no less painful. Since restrained prisoners lack the use of their hands, they must relieve themselves through a slit in their pants and “eat like a dog,” as at least two protection-cell veterans have noted.<sup>334</sup> The very expression “eat like a dog” implies an egregious disregard for human dignity. The physical and mental pain associated with these conditions rises to the level of torture.

Because of the inhuman conditions and physical restraints associated with protection cells, the use of these cells for punishment flagrantly violates both the ICCPR and the CAT, as well as past Human Rights Committee proclamations. The Committee has stated that the use of corporal punishment – which can include the use of restraints that cause extreme discomfort or lasting damage – is prohibited under Article 7.<sup>335</sup> Beatings during confinement contributed to a finding of torture in *Estrella*,<sup>336</sup> and have been reported to sometimes occur in protection cells. Likewise, the description in *Campora* of inhuman prison conditions – “the regime of arbitrary prohibitions and unnecessary torments, the combination of solitude and isolation on the one hand and

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331. See AMNESTY INTERNATIONAL, *supra* note 13, at 10.

332. See *id.* at 12.

333. See *id.* at 10, 16.

334. See HUMAN RIGHTS WATCH, *supra* note 11, at 26, 28.

335. General Comment 20, *supra* note 210, para. 5.

336. See SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Estrella v. Uruguay*, comm. No. 74/1980, at 94 (stating that “[t]he [prisoner] was subjected to severe physical and psychological torture,” which likely included the beatings referred to earlier in the Committee’s decision).

the fact of constantly being watched”<sup>337</sup> – describes Japan’s protection cells. The Committee has agreed that some aspects of Japan’s protection cells may violate international law. In its most recent observations on the report by Japan, when it chastised the government in 1998 for “[f]requent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment.”<sup>338</sup>

### C. TOWARD ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS NORMS TO BRING AN END TO INHUMANE PENAL PRACTICES IN JAPAN

The reports of former prisoners, the investigations of human rights NGOs, and the declarations of the Human Rights Committee all point to one conclusion: practices in Japan’s penal system systematically violate Articles 7, 10, and 14 of the ICCPR, as well as the CAT. The question of what must be done to remedy these violations can be answered relatively easily. Japan must abolish the system of *daiyo kangoku* in its present form and implement a new system with shorter detention periods, no use of torture, more access to attorneys, and less inhumane conditions. Japan must publish its prison rules and regulations in detail, particularly those sections dealing with punishment, and abolish rules that regulate minute details of daily life. Japan must limit the use of solitary confinement to only the most serious offenses. Japan must never use protection cells as punishment, and must ensure that the use of physical restraints is limited so as not to degrade prisoners. Finally, Japan must open its prisons to international and domestic monitors to ensure that human rights laws are being respected.

These solutions are straightforward and ought not to be particularly difficult for Japan – a nation with vast economic resources – to implement. The more difficult question is how the Japanese government can be compelled to adopt these reforms.

The fact that Japan is violating international laws implies, of course, that the international community of nation-states and nongovernmental organizations should be involved in this reform effort. But unless this involvement is carefully calculated, that path could be fraught with danger. Japan tends to be sensitive to foreign criticism. This phenomenon is both deeply historical and ingrained. Japan is one of only a few Asian nation-states that

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337. SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE, *supra* note 211, *Campora v. Uruguay*, comm. No. 66/1980, at 92.

338. *Concluding Observations of the Human Rights Committee*, *supra* note 304, para. 27(f).

was not meaningfully colonized by Western powers.<sup>339</sup> Until Commodore Perry arrived on Japan's shores in 1853, the nation had been sealed off from the rest of the world for more than two centuries.<sup>340</sup> Perry's ultimatum – open up or be forced to open and be colonized – seemed to have set off alarm bells in Japan that, in some ways, have never stopped ringing. Japan embarked on a frantic era of modernization that was designed to fend off Western encroachment. This process was sparked by a simultaneous fear of, and fascination with, the West. In other words, Japanese intellectuals decided that their country needed to be like the West if it wanted to avoid being dominated by the West.<sup>341</sup> This path has proven enormously successful. Aside from being one of only a few states never colonized in Asia, Japan is also the most developed state in Asia, and one of the wealthiest in the world.<sup>342</sup>

But even the most nationalistic Japanese would probably admit that their nation's modernization was not without Western influences. One of the defining features of the Meiji Restoration – the period when most of the modernization took place – was a diaspora of leaders who went abroad to learn.<sup>343</sup> In order to establish their nation's respect in the modern world, Japanese leaders decided they had to be more like Western powers.<sup>344</sup> Thus, Meiji leaders went everywhere, and brought back everything.<sup>345</sup> They utilized their newfound knowledge to embark on a vast modernization campaign.<sup>346</sup> This process continues to be a part

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339. See Iris Huang, *Science Education in Asia*, FRONTIERS: THE INTERDISCIPLINARY JOURNAL OF STUDY ABROAD (Fall 1997), at <http://www.frontiersjournal.com/back/three/huang.htm> (last visited Nov. 15, 2002); See also Siew Lee Ting, *Asia's Colonial Story*, HARDBOILED (Oct. 1998), at <http://www.hardboiled.org/2-1/colonial.html> (last visited Aug. 11, 2003) (noting that Asia "was largely carved up into different spheres of influence" by the 19th century).

340. See MICHAEL A. BARNHART, *JAPAN AND THE WORLD SINCE 1868* 1-4 (1995); see *History: Edo Period*, Japan-Guide.com, available at <http://www.japan-guide.com/e/e2128.html> (last visited Aug. 11, 2003) (noting that "In 1633, shogun Iemitsu forbade traveling abroad and almost completely isolated Japan in 1639 by reducing the contacts to the outside world to very limited trade relations with China and the Netherlands in the port of Nagasaki. In addition, all foreign books were banned.").

341. *Id.* at 5.

342. *JAPAN'S NEW ECONOMY: CONTINUITY AND CHANGE IN THE TWENTY-FIRST CENTURY*, *supra* note 1, at 2-3. See also United Nations Statistics Division, *supra* note 1.

343. BARNHART, *supra* note 340, at 10.

344. *History: Meiji Period*, Japan-Guide.com, at <http://www.japan-guide.com/e/e2130.html> (last visited Aug. 11, 2003).

345. *Id.*

346. *Id.* ("In order to transform the agrarian economy of Tokugawa Japan into a developed industrial one, many Japanese scholars were sent abroad to study Western science and languages, while foreign experts taught in Japan.")

of modern Japan.<sup>347</sup> Although outsiders may see Japan as an intensely foreign culture, Japanese can also accurately be described as borrowers.<sup>348</sup> That is, they take what they like from other cultures, modify it, and reap the benefits.<sup>349</sup>

Herein lays a potential starting point for remedying the problems within Japan's penal system. Japan looked west to gauge its progress from a confederation of feudalistic fiefdoms to an economic superpower. It can do the same when it comes to human rights. The difficulty, of course, is determining which mechanisms will be used to encourage Japan once again to see that it needs to look west again. In the past, this realization has come primarily from within. Commodore Perry arrived in Japan with a threat, but it was not he who declared the country backwards. It took an internal realization of this fact. A similar epiphany is needed in the area of human rights.

Japanese lawyers can take the first step toward this goal by filing more prisoners-rights cases. Whenever possible, these claims should implicate domestic as well as international law. Two factors make this goal difficult: first, the current regulations that limit attorney prison visits; and second, the relative lack of domestic human rights lawyers. But recent trends have shown that an increase in lawsuits is not impossible. There were an estimated 125 lawsuits relating to prisoners' rights in Japanese courts in 1996<sup>350</sup> – a number unimaginable two decades ago.<sup>351</sup> More importantly, a few inmates have actually won their cases, such as in the *Mara* case cited above.

The current state of Japan's penal system provides ample grounds for claims of abuse for such a litigation explosion. Groups such as the Japan Federation of Bar Associations, Human Rights Watch, and Amnesty International have been reporting on these abuses for over a decade. There simply needs to be more lawyers willing to take the cases. The Japan Federation of Bar Associations reports that it gets more calls than its 100 volunteer lawyers can handle.<sup>352</sup> This is where the international community can play a key role. Lawyers working in justice sys-

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347. Howard Schlossberg, *On a crusade for better design; Psychologist: Consumers fed up with complexities of products*, AMERICAN MARKETING NEWS, March 30, 1992 at 1. (Quoting University of California at San Diego psychologist Donald Norman, who, noting Japanese corporations' tendency to borrow product ideas, stated "[t]he Japanese are well-known borrowers. They borrow useful things and adapt them to their systems.").

348. *Id.*

349. *Id.*

350. Sheryl WuDunn, *Prisons in Japan are Safe but Harsh*, N.Y. TIMES, July 8, 1996, at A6.

351. Gibney & Tashiro, *supra* note 22.

352. *Id.*

tems more receptive to such human rights lawsuits should seek out receptive Japanese attorneys and judges in order to educate them about solutions to the problem. The word "receptive" is important here, considering Japan's traditional sensitivity to outside criticism. This caution operates broadly, but it is by no means a blanket fear. There is a progressive element within Japan's legal community, and it needs to take the torch when it comes to addressing prisoners' rights. The progressives' less receptive peers are more likely to listen to Japanese critics than to their foreign counterparts.

In addition, Japanese judges should be trained in international human rights law. International human rights nongovernmental organizations and foreign governments can play a role by staffing this educational process. Ideally, this educational process would enlarge the number of Japanese lawyers working on prison law issues, make judges more receptive to ICCPR claims, and result in more lawsuits being filed and more victories by inmate plaintiffs.

The process of encouraging more prison and detention related claims would bring about the most important step in the process: Informing the Japanese public. Although one observer has called Japan "politically apathetic,"<sup>353</sup> it is a media-saturated country, with the largest per-capita newspaper circulation in the world.<sup>354</sup> An explosion of suits alleging that Japan is violating the ICCPR would not go unnoticed by the press. Mass allegations of human rights violations would touch a historical sore spot in the Japanese psyche; that is, the fear that Japan is backwards. When domestic awareness of the problem reaches a critical point, the research efforts of the Japan Federation of Bar Associations, Amnesty International, and Human Rights Watch will begin to pay larger dividends. Allegations by the Human Rights Committee will begin to sting. Shame, which anthropolo-

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353. Peter McKillop, *Letter from Japan: Get off Your Bum! Your Country Needs You*, TIME ASIA, May 26, 2000, available at <http://www.time.com/time/asia/asiabuzz/2000/05/26/> (last visited Oct. 20, 2002).

354. *Japan: Country Profile*, ASIA & PACIFIC REVIEW OF WORLD INFORMATION, QUEST ECONOMICS DATABASE, Oct. 9, 2002, LEXIS, Nexis Library, News Group, All. See also: *Country at a Glance: Japan*, UNITED NATIONS CYBERSCHOOLBUS, (2002), available at <http://www.cyberschoolbus.un.org/infonation/index.asp?theme=tec&id=392>, which puts Japan's newspaper circulation at 578 per 1,000 inhabitants; Japan Information Network, *Communications*, at <http://www.jinjapan.org/today/society/society10.html> (last visited Nov. 22, 2002), stating that in 1994, Japan had 121 daily newspapers with a circulation of 53 million, meaning each household consumes 1.2 newspapers per day. This compares to the United States with 61 million (1991), Russia with 57 million (1992), Germany with 26 million (1991), and the United Kingdom with 22 million (1992).

gist Ruth Benedict called one of Japan's defining cultural traits,<sup>355</sup> will begin to set in.

Ideally, public awareness would set in motion the "look-west" phenomenon of reform outlined above. Public response would take the fight out of the courtroom and into the Diet, where comprehensive reform could be legislated. And ultimately, comprehensive reform is what is really necessary if Japan wants to comply with the ICCPR. The Japanese penal system is a relic from another era, a time when Japan was emerging from centuries of feudalism and was still clinging to many aspects of an ancient regime. Japan is no longer in that era, and it needs to modernize accordingly.

### CONCLUSION

The Japanese justice system has coasted for decades using the easy confessions obtained through the *daiyo kangoku* system. The prison guards have likewise utilized brutal order-keeping tactics with impunity. The use of so-called minor solitary confinement and of protection cells is excessive, unnecessary, and brutal. These ingrained practices will not stop with a few court decisions. They must be thoroughly examined, fully understood, and radically reformed. This examination ultimately must come from within Japan, but this requirement does not mean that international human rights lawyers and nongovernmental organizations cannot play a part. Japan has a tradition of looking abroad to better itself. The international community must work to increase Japanese public scrutiny of the penal system, publicize its flaws, and work behind the scenes to enact meaningful reform.

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355. See RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* 222-227 (1946).

