



**JAPAN:**  
**Fourteenth Session of the Working Group on the Universal Periodic Review**  
**Human Rights Council**  
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**Joint Written Statement submitted by**  
**The Advocates for Human Rights, a non-governmental organization in special consultative status, in collaboration with The World Coalition against the Death Penalty, an alliance of NGOs, bar associations, local authorities and unions**

**I. INTRODUCTION**

1. The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition Against the Death Penalty.
2. The World Coalition Against the Death Penalty, an alliance of more than 120 NGOs, bar associations, local authorities and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.
3. This submission addresses Japan's compliance with its human rights obligations with regard to its use of the death penalty. This submission concludes that Japan's refusal to accept the main death penalty recommendations of the Human Rights Council during its last Universal Periodic Review in 2008, should not excuse Japan from implementing other measures to protect the fundamental human rights of persons facing the death penalty, in accordance with Japan's existing international obligations and commitments to human rights made during the last UPR. Although Japan has made some small gestures toward reform, Japan's death penalty system remains essentially unchanged and therefore

places innocent and incompetent persons at risk of being sentenced to death:

- A. Japan continues to rely on an unmonitored pretrial detention and interrogation system that fosters abuse, torture, and other human rights violations, leading to potentially false confessions.
- B. Japan has not developed a system of mandatory or automatic appeals of all death sentences, and does not require a stay of execution orders during all post-trial proceedings.
- C. Japan has not fundamentally altered its practice of placing death row inmates in extreme isolation for extended periods, creating conditions that constitute cruel, inhumane, and/or degrading treatment.
- D. Japan remains at risk of executing insane persons, in violation of well-established international standards.

## II. LEGAL FRAMEWORK

### A. *Scope of International Obligations*

4. In accordance with the most recent technical guidelines for the submission of stakeholder information, this submission omits discussion of the scope of Japan's international obligations.

### B. *2008 UPR Recommendations, Japan's Response, and the Domestic Legal Framework*

5. During Japan's first Universal Periodic Review, the Working Group made the following recommendations relating to the death penalty:

- Immediately reconsider placing a moratorium on executions with a view towards abolition of the death penalty.
- Respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, and restrict the use of the death penalty;
- Add the possibility of a life sentence without parole to the range of penalties for heinous crimes.<sup>i</sup>

6. The Working Group made the following recommendations regarding Japan's criminal justice system and interrogation methods:

- Review the Criminal Code to ensure its conformity treaty obligations and to avoid the police and judiciary putting excessive pressure on the accused to confess;
- Review the "daiyo kangoku" system to ensure that detention procedures are consistent with Japan's obligations under human rights law;
- Institute mechanisms to enhance procedural guarantees for the detention of detainees, including systematic monitoring and recording of interrogations.<sup>ii</sup>

7. Japan expressly stated that it would not reconsider a moratorium on executions or the abolishment of the death penalty,<sup>iii</sup> but it neither accepted nor rejected the remaining recommendations. Additionally, Japan stated that: “a careful consideration is needed to introduce mandated recording or video-taping of all interrogations.”<sup>iv</sup> Japan also assured the Working Group that it was committed to treating detainees appropriately under the substitute prison system, “bearing in mind their human rights.”<sup>v</sup> This submission therefore addresses whether Japan is indeed safeguarding the human rights of persons facing the death penalty, and highlights recent developments related to Japan’s death penalty practices.

8. Eighteen offenses in Japan carry the death sentence, which is always carried out by hanging.<sup>vi</sup> Japan has stated that it reserves the death penalty for only the most heinous crimes (i.e., mass murders). The Japanese Government has repeatedly stated to this body and human rights treaty bodies that the application of the death penalty is unavoidable due to the existence of these heinous crimes, and, therefore, the abolition of the death penalty is inappropriate.<sup>vii</sup> But Japan has not reduced the number of crimes punishable by death and as recently as 2011, a Japanese court sentenced a person to death for a single murder conviction.<sup>viii</sup> Japan claims that upwards of 85% of Japanese citizens support the death penalty, although the most recent and cited poll from 2009 did not ask whether Japanese citizens “supported” the death penalty, but instead whether they viewed it as inevitable.<sup>ix</sup> Japan has also repeatedly rejected calls for a moratorium on the death penalty.<sup>x</sup>

### III. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

#### A. *Recent developments*

9. The entire death penalty process in Japan is cloaked in secrecy, making it difficult for international observers and outside groups to secure transparent information on the application of the death penalty and conditions on death row. It can even be difficult for the families and lawyers of an accused or convicted detainee to obtain critical information about a person’s case or medical condition.<sup>xi</sup> Such secrecy also greatly restricts public debate. In 2010, the Minister of Justice at the time, Keiko Chiba, did allow members of the press to visit part of an execution chamber for the first time, but the realities of what actually happens during an execution have never been publicly disclosed.<sup>xii</sup> Ms Chiba also organized an informal group to study the death penalty in Japan.<sup>xiii</sup> Many in Japan, including the **Japanese Federation of Bar Associations**,<sup>xiv</sup> wanted the government to go much further, and create an official, transparent, and professional death penalty review body to make public recommendations for reform. In October 2011, the JFBA **for the first time called for the abolition of the death penalty:**

“For many years, various problems in the Japanese death penalty system have been pointed out. As we can see from the four cases in which defendants had been sentenced to death but were subsequently acquitted by retrials, it is obvious that the death penalty

system has failed at the most fundamental level since there will always be the possibility of a miscarriage of justice and the damages resulting from such wrongful judgments can never be recovered once such persons have been executed.”<sup>xv</sup>

10. Unfortunately, Japan’s new **Minister of Justice**, Toshio Ogawa, supported by Prime Minister Yoshihiko Noda, **dismissed the informal study group** established by Ms. Chiba. Mr. Ogawa said the group has “run out of things to discuss” when it comes to any consideration of the abolition of the death penalty and it has yielded no “new” opinions.<sup>xvi</sup> He also **canceled** his immediate predecessor’s plans for a more **formal death penalty study panel**<sup>xvii</sup> that would have incorporated experts from all sides of the debate.<sup>xviii</sup> He stated that it is his duty to start ordering executions again,<sup>xix</sup> and indeed **executions resumed on March 29, 2012, with the hanging of 3 people.**

11. Although no executions took place in 2011, the **long-term trend may be a steep increase in executions.** In 2008, Japan executed 15 prisoners -- the highest number in 33 years. Executions slowed to 7 in 2009 and to 2 in 2010 before Ms Chiba’s de facto moratorium began.<sup>xx</sup> But according to recent statements by the current Minister of Justice, Mr. Ogawa, as of February 2012, approximately 130 prisoners sit on death row in Japan.<sup>xxi</sup> Japan’s death row population is now at the highest level since World War II,<sup>xxii</sup> and has risen most rapidly since 2003. As noted earlier, **Mr. Ogawa** has stated that he **views as “inexcusable” any failure to sign off on executions**, given the number of inmates on death row and popular support for the death penalty.<sup>xxiii</sup> It is disturbing that the Japanese government’s primary solution for the presence of too many inmates on death row is to start executing them. Indeed, after the March 29 hangings took place, Mr. Ogawa’s immediate predecessor Hideo Hiraoka voiced his disappointment that Japan had returned to the status quo with regard to executions and the death penalty:

"I regret that executions took place last month without being examined or discussed...regarding the way in which the death penalty is enforced and death-row inmates are treated in Japan."<sup>xxiv</sup>

***B. Japan’s Criminal Justice System Lacks Essential Death Penalty Safeguards to Protect Innocent or Incompetent persons and Japan’s Death Row Conditions Constitute Cruel and Unusual Treatment.***

12. United Nations ECOSOC Resolution 1984/50 states that a death sentence “may only be carried out . . . after legal process which gives *all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights*, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings,” and the right not to confess guilt.<sup>xxv</sup> Article 6 of the ICCPR prohibits sentencing a person to death without a fair trial, or after a trial based upon a confession secured through abuse or torture, or after a trial based upon a confession obtained when the accused did not have access to counsel.<sup>xxvi</sup> Critically, since its last UPR, Japan has not instituted the substantive reforms necessary to avoid such death sentences.

*1. Japan's pretrial detention system fosters abuse, torture, and potentially false confessions used to convict and impose the sentence of death.*

13. Article 9 of the ICCPR requires that a detainee be “promptly” brought before a judge or other reviewing officer and that he or she “shall be entitled to trial within a reasonable time or to release.” Under Japanese law, the police can detain and interrogate suspects in police facilities for up to 23 days (or longer) under the “daiyo kangoku,” or substitute prison system.<sup>xxvii</sup> In principle, suspects may challenge their detention in court and meet with lawyers every day, but in practice arrested persons appear to have little opportunity to exercise these rights.<sup>xxviii</sup> **Prosecutors have great discretion over every stage of the process, including whether and when to allow defense counsel access to the accused during interrogations.**<sup>xxix</sup> Detainees can be interrogated for many hours and days on end, sometimes in harsh conditions, exacerbating the risk of torture and other degrading treatment.<sup>xxx</sup>

14. Japan has not followed through on its stated commitment during its 2008 UPR to give careful consideration to introducing monitoring of all interrogations. Japan has recently introduced limited reforms to its interrogation system, including some **video-monitoring of interrogations**,<sup>xxxi</sup> **but interrogation practices have changed little.** Japan continues to lack a credible means of verifying the proper conduct of investigations, as requested by UN Treaty Bodies, such as mandatory video-monitoring of *all* interrogations or allowing defense counsel to be present at *all* interrogations. **Police and prosecutors can pick and choose which segments of an interrogation to record** and which to release to the court or defense counsel,<sup>xxxii</sup> effectively nullifying any deterrent effect that video-monitoring might have on police intimidation or torture. In 2009, the Committee against Torture identified internal documents from the Ehime Prefectural Police entitled “guidelines for interrogating suspects,” which outlined measures to “weaken” suspects who refused to confess. But when pressed by the Committee to elaborate on the documents and to identify any steps taken after their disclosure, the Japanese Government simply dismissed the documents as unofficial.<sup>xxxiii</sup>

15. In preparation for Japan's next periodic review in 2012, CAT in 2010 again raised serious concerns about daiyo kangoku and asked Japan how it has reformed this practice.<sup>xxxiv</sup> In its 2011 response, Japan continued to defend the importance of daiyo kangoku to maintaining the integrity of criminal investigations, and **argued that the presence of defense counsel would inhibit the essential function of investigations** “where interrogators face suspects and clarify the true facts of cases by obtaining statements of truth from the suspects.”<sup>xxxv</sup> Japan appears to give precedence to compelling confessions over its human rights obligations relating to the rights of the accused. Japan also defended its conviction rate and denied that convictions were rendered solely on the basis of confessions, which the Japanese Constitution in theory prohibits, but provided no data to support this assertion.<sup>xxxvi</sup>

**16. Japanese courts have issued decisions that recognize the abuses inherent in the Daiyo Kangoku system.** Iwao Hakamada was sentenced to death in 1968. His case, and

the human rights concerns raised by daiyo kangoku, are discussed at length in a 2011 report by the Anti-Death Penalty Asian Network (ADPAN).<sup>xxxvii</sup> One of three judges in Mr. Hakamada's original case who believed that Mr. Hakamada was innocent filed a petition for Mr. Hakamada's retrial. He argued that Mr. Hakamada confessed to the crimes only after being interrogated and tortured for 20 days without access to a judge or lawyer. Without the confession, no other reliable evidence remained to convict him. New DNA tests were conducted in 2011 with more tests scheduled to resolve inconsistencies. These tests along with new evidence disclosed by prosecutors, are expected to strengthen Mr. Hakamada's case for a retrial.<sup>xxxviii</sup> Mr. Hakamada has spent close to 45 years in solitary confinement, waiting to die. He is reported to have suffered severe mental deterioration.

17. Two recent non-death-penalty cases also illustrate the serious flaws with daiyo kangoku.<sup>xxxix</sup> On March 2010, the Utsunomiya District Court acquitted Toshikazu Sugaya of murder after a retrial and a new DNA test requested by defense lawyers. The court determined that Mr. Sugaya had been bullied by investigators and that his confession was not credible – prosecutors admitted his confession had been made under duress.<sup>xl</sup> Although Mr. Sugaya had been sentenced to life in prison, he could have faced the death penalty. In March 2012, the Osaka District Court reopened a case in which a couple had been convicted of murder based on confessions extracted during detention in daiyo kangoku. The presiding judge questioned the credibility of the couple's confessions, calling their statements “unnatural” and “unreasonable from a scientific standpoint.”<sup>xli</sup>

*2 Japan has not developed a system of mandatory or automatic appeals of all death sentences, and does not require a stay of execution orders during all post-trial proceedings*

18. Japan's **trial and post-conviction criminal proceedings continue to lack important procedural safeguards** intended to minimize the chances that an innocent or incompetent person will be put to death, in possible violation of Articles 6 and 14 of the ICCPR and ECOSOC Resolution 1984/50.<sup>xlii</sup> During the 2008 UPR, Japan did not expressly reject the recommendation that it ensure adequate legal safeguards for those facing the death penalty, nor did the interactive dialogue reveal an explicit rejection of these principles. Therefore, it is appropriate for the current UPR process to explore these issues in depth. Some of the most serious procedural defects in Japan's criminal justice system include:

19. **No mandatory appeal of the death sentence.**<sup>xliii</sup> Mandatory appeals are necessary to protect persons who are not competent to file an appeal for themselves—whether due to severe depression or other mental illness or insanity—or who choose not to file an appeal due to cultural or other pressures. The HRC has noted with concern a steady increase in the number persons sentenced to death in Japan who do not exercise their right to appeal.<sup>xliiv</sup> In some cases, persons are put to death without any review of the original conviction.<sup>xliv</sup>

20. **No unanimous verdict requirement to impose a sentence of death.** If the evidence against a person cannot support a unanimous verdict of guilt by all judges and/or lay-judges hearing a case,<sup>xlvi</sup> then there is clearly room for “an alternative explanation of the facts” and imposition of the death penalty violates Resolution 1984/50 and Article 6 of the ICCPR.

21. **Prosecutors may seek the death sentence on appeal.** After a lower court imposes a sentence of life imprisonment, prosecutors may appeal to seek the death penalty. Currently, 15 persons sitting on death row with their convictions confirmed by the Japanese Supreme Court had their original life sentences elevated to death sentences after a prosecutorial appeal.<sup>xlvii</sup> This practice turns the right of appeal on its head to benefit the state, rather than the accused.

22. **No mandatory stay of execution upon petitions for retrial, even if a judge actually orders a retrial *except* at the discretion of the prosecutor or judge, and no mandatory stay of execution pending the outcome of post-conviction petitions for clemency.**<sup>xlviii</sup> The outcome these post-conviction proceedings for a death row inmate could be acquittal or commutation of a death sentence to life in prison or another lesser sentence. Although Japan rarely grants retrials and almost never pardons an inmate sentenced to death, the fact remains that retrials in Japan usually result in acquittals and a successful clemency petition would always reduce the sentence of death.<sup>xlix</sup> In particular, and in light of the high rate of convictions based on possibly coerced confessions, the retrial process in Japan has become an important if limited tool to reassess the quality of evidence used to convict. If an inmate can be put to death before such proceedings are finalized, successfully or not, that person could be arbitrarily deprived of his or her life in violation of Articles 6 and 14 of the ICCPR.

23. Finally, the **execution of a death penalty order rests within the discretion of the Minister the Justice.** The Minister has wide discretion as to whether and when to carry out that order, although the **views of the current Prime Minister and political party in power, as well as the established ministry bureaucracy, are believed to play an important role in influencing the Justice Minister’s exercise of discretion.**<sup>1</sup> Japanese law requires that the Minister sign the death warrant within 6 months of a death sentence becoming final and binding. However, the law also grants the Minister broad discretion to extend this period almost indefinitely depending on various factors, such as requests for a retrial or pardon.<sup>li</sup> Thus, Japanese law seems to recognize compelling reasons exist to halt the execution of a person sentenced to death, but the law relies entirely on the discretion, or inaction, of the current Minister of Justice, rather than allowing relief in a predictable and procedurally just manner. Every new Minister brings fresh anxiety. The current Minister is a distinctive example, as he scrapped his predecessor’s death penalty study group and ordered 3 executions shortly thereafter. This discretionary system is not consistent with minimum international safeguards for persons facing the death penalty.

### *3. Japan’s Treatment of Death Row Inmates Constitutes Cruel and Inhuman Treatment.*

24. The Human Rights Committee has called on member states to improve death row conditions as required under Article 7 and 10(1) of the ICCPR. ECOSOC has also urged UN member states “to effectively apply the [UN] Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.” Japan has failed to meet these standards.

### ***Solitary Confinement***

25. Death row inmates continue to be isolated from the regular prison population and kept in strict solitary confinement for as long as they remain on death row.<sup>lii</sup> The detention center warden limits and screens visitors, and prison authorities may even monitor and record meetings with defense lawyers.<sup>liii</sup> The Japanese Diet in 2007 enacted legislation to improve the conditions of detainees and curb the practice of indefinite solitary confinement, but such practices have not changed for death row inmates.<sup>liv</sup> Death row prisoners are not informed in advance of their execution, and their families and lawyers are notified of the execution only after death.<sup>lv</sup> Hangings are carried out in secret at detention facilities.

26. Prolonged solitary confinement results in inhuman and degrading treatment of death row inmates. **For prisoners on death row, solitary confinement is the rule**, despite statements the Japanese Government has made to the Committee against Torture that the imposition of solitary confinement is reviewed on a regular basis, and at least every three months.<sup>lvi</sup> These reviews do not affect death row inmates, however, because Japanese law requires that inmates sentenced to death be held “*in a single room throughout day and night,*” and that “*no inmate sentenced to death shall, in principle, be permitted to make mutual contact even outside of the inmate’s room.*”<sup>lvii</sup>

27. The Committee against Torture has expressed deep concern that detainees in Japan could be held in solitary for long enough, and in such degrading physical and mental conditions, as to constitute torture in violation of Japan’s treaty obligations. The Committee requested that Japan amend its laws to ensure that solitary confinement remains “an exceptional measure of limited duration” in compliance with minimum international standards.<sup>lviii</sup> Yet Japan stated as recently as 2011 that it will not place any limits on the length of time that inmates can remain in solitary confinement, and Japanese law clearly requires that death row inmates be held *only* in isolation, whether he or she sits on death row for one year or forty years.<sup>lix</sup> During this time, inmates must sit without moving for hours on end, with few or no visitors.<sup>lx</sup> Moreover, there are **no objective standards by which to measure whether “continued isolation” is justified**. A warden’s determination that isolation is necessary due to “a risk of disrupting discipline and order in the penal institution” appears to be sufficient.<sup>lxi</sup>

28. When asked by the Committee in 2010 to: “provide information on steps taken to systematically review all cases of prolonged solitary confinement,” Japan responded by stating it **does not maintain data on the use of solitary confinement**.<sup>lxii</sup> It is impossible to determine whether imposition of solitary confinement is exceptional and of limited



duration, as required by CAT, if there are no data about its use. But Japanese law requiring death row inmates to be held in single cells and prohibiting them from mutual contact with other inmates demonstrates that prolonged solitary confinement is not the exception, but the rule.

### *Peace of mind conditions*

29. Purported attention to the inmate's "peace of mind" results in inhuman and degrading treatment of death row inmates. Japanese law requires that "attention shall be paid to help [the death row inmate] maintain peace of mind."<sup>lxiii</sup> This requirement has become a **pretext for imposing harsh conditions on inmates**, in violation of international guarantees and safeguards for death row inmates. Such "peace of mind" conditions include:

- Strict restrictions on communication with outside people;
- Prolonged solitary confinement and strict restrictions on movement;
- Monitoring of meetings between inmates and their lawyers (with exceptions);
- Denial of independent psychiatric evaluation and treatment;
- Censorship of books and letters.<sup>lxiv</sup>

30. Such restrictions intensify isolation and increase the risk of mental deterioration of inmates on death row. They also directly interfere with an inmate's ability to prepare an effective appeal or to make other efforts to challenge a death sentence. **"Peace of mind" is also the pretext used to justify Japan's practice of refusing to notify inmates of their execution date until the day of execution.** Japan contends that if detainees were to be informed of their execution date in advance, "their peace of mind may be negatively affected and the notification could rather inflict excessive pain on them."<sup>lxv</sup> Amnesty International has described these practices as **creating "[h]ighly stressful and oppressive conditions of detention**, ironically framed in terms of protecting the prisoner's peace of mind."<sup>lxvi</sup> The practices have been difficult to curb or change because there are no objective standards to measure a death row inmate's "peace of mind," and because **there is no clear means to challenge a "peace of mind" condition.** A recent decision by the Hiroshima High Court suggests that Japanese courts are beginning to look less favorably on these practices, but it is too soon to evaluate any present effect on death row conditions.<sup>lxvii</sup>

31. Finally, the **families of detainees are notified of an execution only after death.** Japan contends that earlier notification would "cause unnecessary psychological suffering to those who have received the notification."<sup>lxviii</sup> Yet HRC has stated that "the failure to notify the family and lawyers of the prisoners on death row of their execution" is incompatible with the ICCPR, and that Japan's practice in particular leads to "psychological suffering caused by the lack of opportunity to prepare" for the execution.<sup>lxix</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions stated in 2006 that such actions were "inhuman and degrading."<sup>lxx</sup> Perplexingly, Japan continues to defend the practice as "unavoidable."

#### 4. Possible Execution of Insane Persons

32. Basic human rights principles and minimum international standards prohibit the execution of insane persons. Additionally, the Human Rights Committee has expressed concern about what has become known as “death row phenomenon” or “death row syndrome,” which is the serious deterioration of a prisoner’s mental condition as a consequence of psychological tension suffered during prolonged detention on death row without appropriate medical treatment.<sup>lxxi</sup> As noted by the United States Supreme Court in 2009: “The process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”<sup>lxxii</sup>

33. Japanese law forbids the execution of insane persons,<sup>lxxiii</sup> but in practice Japan has never officially suspended an execution by reason of an inmate’s insanity.<sup>lxxiv</sup> Japan remains at a high risk of executing inmates with mental disorders who could be considered insane because **Japan lacks an independent and effective system for evaluating every inmate’s mental condition** at every stage of a criminal proceeding, from arrest to execution.<sup>lxxv</sup> As outlined in Part III.B.2 above, Japan also lacks important procedural safeguards, which are particularly important for ensuring protection of the rights of people with mental disorders, or who could be considered insane.<sup>lxxvi</sup> In addition, as noted in Part III.B.3, all death row inmates are detained in strict solitary confinement. Such treatment can last for years if not decades. Not surprisingly, death row inmates **often suffer serious mental deterioration and psychological suffering,**<sup>lxxvii</sup> in violation of Japan’s treaty obligations.

34. Japan’s failure to institute a systematic and specialized psychological and psychiatric evaluation of death row prisoners, particularly those who have been held in solitary confinement for years, has had tragic results, well-documented by Amnesty International in a comprehensive 2009 report.<sup>lxxviii</sup> According to this report, **numerous people of questionable mental states or mental capacity have been convicted and sentenced to death, sometimes after being found incompetent by one court to face trial or execution by reason of insanity, and then later found competent by another court to die.**<sup>lxxix</sup> The report also documented the extreme psychological debilitation caused by long periods of solitary confinement and the failure of the Japanese prison or health system either to evaluate the condition or to attempt to treat it, or to allow defense counsel or family members to request an independent evaluation of an inmate if the state fails to do so, or if any evaluation conducted by prison authorities could be considered inadequate or biased.<sup>lxxx</sup> Additionally, both the CAT committee and the HRC have requested that Japan take a more humane approach to the execution and detention of mentally impaired persons and to ensure sound and independent evaluations of death row inmates’ mental conditions.

#### C. Recommendations

35. Japan should:

- **reform its criminal justice system to ensure compliance with minimum international standards and safeguards for persons facing the death penalty** or already sentenced to death, particularly with regard to:
  - a) monitoring of all interrogation procedures,
  - b) introducing a mandatory system of appeals,
  - c) barring prosecutors from requesting the death penalty on appeal, and
  - d) suspending execution orders during all post-conviction proceedings including petitions for retrial, and clemency requests;
- **end its practice of isolating death row prisoners indefinitely**, ensuring that solitary confinement is exceptional and of limited duration and **institute a systematic and specialized psychological and psychiatric evaluation of prisoners on death row**;
- **reconsider its opposition to a moratorium on executions and create an official and transparent expert study group** to review the application of the death penalty in Japan and disseminate information about the death penalty and criminal justice system to the public.
- **end its practice of imposing arbitrary and harsh peace of mind conditions on death row inmates** and institute clear and objective guidelines governing the treatment of death row inmates such that conditions of detention comply with international standards for the treatment of prisoners and detainees.

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<sup>i</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review, Japan, U.N. Doc. A/HRC/8/44, May 30, 2008, para. 12.

<sup>ii</sup> *Id.* at para. 13.

<sup>iii</sup> “Japan’s position is stated in the interactive dialogue as recorded in Report of the Universal Periodic Review. Japan is not in a position either to consider granting a moratorium on executions or to abolish death penalty.” Human Rights Council, Report of the Working Group on the Universal Periodic Review, Japan, Addendum, Conclusions and/or recommendations, U.N. Doc. A/HRC/8/44/Add.1, August 25, 2008, para. 2(e).

<sup>iv</sup> *Id.* at para. 2(f).

<sup>v</sup> *Id.*

<sup>vi</sup> Japanese Penal Code, Act 45, various articles (2007). See Penal Code, Art. 11: “The death penalty shall be executed by hanging at a penal institution.” Unofficial English translations accessed at: <http://www.japaneselawtranslation.go.jp/law> (translation date April 1, 2009).

<sup>vii</sup> See, e.g., Report of the Working Group, Japan, U.N. Doc. A/HRC/8/44, n. i at para. 9.

<sup>viii</sup> Tatsumi Tateyama was sentenced to death in June of 2011 after being found guilty in Chiba District Court for the murder of a female university student in Matsudo, Chiba Prefecture. Japan Innocence & Death Penalty Research Center, *Man sentenced to death for murdering female student in Chiba*, [http://www.jiadep.org/Tateyama\\_Tatsumi.html](http://www.jiadep.org/Tateyama_Tatsumi.html).

<sup>ix</sup> Original survey results available at: <http://www8.cao.go.jp/survey/h21/h21-houseido/2-2.html> (in Japanese). See also Kawai Mikio, *The Death Penalty in Japan, How Genuine is Public Support?*, <http://nippon.com/en/currents/d00025/> (Feb. 13, 2012) (calling support in Japan for the death penalty “passive, with many people regarding capital punishment as a kind of unavoidable evil.”)

<sup>x</sup> See, e.g., Report of the Working Group, Japan, Addendum, U.N. Doc. A/HRC/8/44/Add.1, n. iii at para. 2(e).

<sup>xi</sup> For example, as reported by Amnesty International: “Because of the stringent isolation placed on prisoners, the secrecy regarding prison conditions and prisoners’ health, and the lack of scrutiny by independent mental health professionals, it is necessary to rely substantially on secondary testimony and

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documentation to adjudge the mental state of those on death row.” Amnesty International, *Hanging by a Thread: Mental Health and the Death Penalty in Japan* (2009), at 33. Another commentator has noted that “the secrecy and silence that shroud Japan’s death penalty are taken to extremes not seen in other nations.” David T. Johnson, *Japan’s Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings*, *Asian-Pac. L&P J.*, 62, 70 (Summer 2006). “So secretive are authorities about Japan’s gallows that even elected politicians must surrender recording and photographic equipment when they visit.”

<sup>xii</sup> *Japan opens up death chamber to media*, *Death Penalty News* (Aug. 27, 2010) (with photos). For a more information on Ms. Chiba allowing media to view part of the execution chamber and its limited public and political impact, see Maiko Tagusari, *What is changing and unchanging: two years after political change in Japan*, 3-5, 16 at <http://www.semisottolaneve.org/ssn/docs/3955.pdf> (2011).

<sup>xiii</sup> *Yomiuri Shimbun, Chiba: 'It was my duty to watch' Justice minister says death penalty discussions should start anew*, *Death Penalty News* (July 28, 2010). See also Tagusari, id n. xii at 2-3.

<sup>xiv</sup> *Declaration Calling for Establishment of Measures for Rehabilitation of Convicted Persons and Cross-Society Discussion on Abolition of the Death Penalty* (Oct. 7, 2011),

[http://www.nichibenren.or.jp/en/document/statements/year/2011/20111007\\_sengen.html](http://www.nichibenren.or.jp/en/document/statements/year/2011/20111007_sengen.html).

<sup>xv</sup> *Id.*

<sup>xvi</sup> *The Japan Times, Justice minister feels signing off on hangings just part of job description* (Feb. 1, 2012), <http://www.japantimes.co.jp/print/nn20120201f2.html>.

<sup>xvii</sup> Mr. Hiraoka is reported to have said: “[S]ome people say not signing off executions is sabotaging the duty of the justice minister, but the minister also has the duty to consider how to handle the death sentence amid various international opinions on the subject.” Minoru Matsutani, *Hiraoka urges 'active' debate on executions*, *The Japan Times* (Sept. 20, 2011).

<sup>xviii</sup> *The Japan Times, Ogawa assailed after scrapping plan to set up death penalty discussion panel* (April 1, 2012), <http://www.japantimes.co.jp/text/nn20120401a4.html>.

<sup>xix</sup> *Justice minister*, n. xvi.

<sup>xx</sup> A chart compiled by Amnesty International documents the steady growth in Japan’s death row population since 1979, with the heaviest growth occurring from 2003 through the present. See *Hanging by a Thread*, n. xi at 28.

<sup>xxi</sup> *Justice Minister*, n. xvi.

<sup>xxii</sup> According to statistics compiled by the Japan Innocence & Death Penalty Research Center, 132 people have had their death sentences finalized by the Japanese Supreme Court as of March 29, 2012. Another 31 people have been sentenced to death in the lower courts. See [http://www.jiadep.org/Chart-DeathRow\\_files/page481\\_1.html](http://www.jiadep.org/Chart-DeathRow_files/page481_1.html) (last updated March 29, 2012).

<sup>xxiii</sup> *Justice minister*, n. xvi.

<sup>xxiv</sup> *Mainichi Japan, Former Justice Minister Voices Regrets Over Resumption of Executions*, <http://deathpenaltynews.blogspot.com/2012/04/japan-former-justice-minister-voices.html>.

<sup>xxv</sup> UN Economic and Social Council (ECOSOC), “Safeguards guaranteeing protection of the rights of those facing the death penalty”, Resolution 1984/50, 25 May 1984. The UN Secretary-General stated in 2010 that the 1984 ECOSOC safeguards “should be considered the general law applicable on the subject of capital punishment.”

<sup>xxvi</sup> *International Covenant on Civil and Political Rights* (entered into force 1976). Available at <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>xxvii</sup> *Japanese Code of Criminal Procedure, Part II, Chap. I. The Act on Penal and Detention Facilities and the Treatment of Inmates and Detainees (Act 50)* technically changed the name of daiyo kangoku, “substitute prison,” to “substitute penal institution,” but few have adopted the change in terms as the fundamental aspects of the system remain the same. See *Japanese Federation of Bar Associations, Japan’s ‘Substitute Prison’ Shocks the World, Daiyo Kangoku and the UN Committee against Torture’s Recommendations* (Sept. 2008), at 2,

[http://www.nichibenren.or.jp/library/en/document/data/daiyo\\_kangoku.pdf](http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf).

<sup>xxviii</sup> Suspects can be detained for up to 72 hours at a police station before any request is made to a judge (by the public prosecutor) for continued detention or before the prosecution would be required to allow the accused to meet with defense counsel. Once that request is granted, it can be extended for 10-15 days and prolonged indefinitely if the needs of the investigation require it (e.g. fresh accusations arise against the

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detainee). Japanese Code of Criminal Procedure, Part II, Chap. I (Art. 199 and following). See also *Japan's 'Substitute Prison' Shocks the World*, chart at p. 2.

<sup>xxxix</sup> See Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Second periodic report of States parties due in 2011, submitted in response to the list of issues (CAT/C/JPN/Q/2) transmitted to the State party pursuant to the optional reporting procedure, U.N. Doc. CAT/C/JPN/2, Sept. 15, 2011, at paras. 8, 10, 15. All prosecutors are appointed under the authority of the Ministry of Justice. It is “[p]rosecutors alone and at their discretion, without the obligation to bring suspects before a judge, who may order a police investigation and bring suspects before a court.” International Federation for Human Rights, *The Death Penalty in Japan: The Law of Silence*, 20 (October 2008), <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDHJapan94.pdf>.

<sup>xxx</sup> Accused persons have reported being handcuffed to a chair and not allowed to use the toilet, during an interrogation process that lasted 16 hours a day, together with repeated requests to sign a statement that they could not understand. Roland Buerk, *Japan urged to end 'false confessions'*, BBC News, <http://news.bbc.co.uk/2/hi/8290767.stm> (Oct. 5, 2009).

<sup>xxxii</sup> See the Act on Penal and Detention Facilities and the Treatment of Inmates and Detainees (Act 50), which in theory codifies the principle of separating functions of investigation and detention, but this does not clearly apply where suspects are detained and interrogated in the same place (i.e. a police station).

<sup>xxxiii</sup> See CAT, Japan's Response to the List of Issues, n. xxviii at paras. 98-100 (Japan is still “experimenting” with audio-visual recordings of parts of interrogations “to the extent that the function of interrogations is not damaged”).

<sup>xxxiiii</sup> CAT, Japan's response to list of issues, n. xxviii at paras. 4-5.

<sup>xxxv</sup> Committee Against Torture, List of issues prior to the submission of the second periodic report of Japan, U.N. Doc. CAT/C/JPN/Q/2, Jan. 19, 2010, at para. 2.

<sup>xxxvi</sup> CAT, Japan's Response to List of Issues, n. xxviii at para. 10.

<sup>xxxvii</sup> *Id.* at paras. 16-17.

<sup>xxxviii</sup> ADPAN, *When Just Fails, Thousands Executed in Asia After Unfair Trials* (Amnesty International 2011), <http://www.amnesty.org/en/library/asset/ASA01/023/2011/en/103678e4-fa6f-4b1c-86a9-7d94e42b9494/asa010232011en.pdf>

<sup>xxxix</sup> Amnesty International, *Japan: Justice for Hakamada Iwao*, <http://action.amnesty.org.uk/ea-campaign/clientcampaign.do?ea.client.id=1194&ea.campaign.id=8658> (March 2012).

<sup>xl</sup> In Japan, only four confirmed death sentences have been reversed on retrial since 1945. See Japan Innocence and Death Penalty Research Center, *Death Row: Supreme Court Confirmed Sentences*, [http://www.jiadep.org/Chart-DeathRow\\_files/page481\\_1.html](http://www.jiadep.org/Chart-DeathRow_files/page481_1.html). At least two of these reversals highlighted false confessions used to convict: Sakae Menda, acquitted on his sixth appeal and released in 1983 after almost 35 years on death row, and Shigeyoshi Taniguchi, acquitted in March 1984 after more than 28 year son death row – he had been detained and interrogated for *four months* before his confession and was later convicted and sentenced to death. See *The Death Penalty in Japan*, n. xxviii at 31.

<sup>xli</sup> Martin Fackler, *Falsely Convicted, Freed and No Longer Quiet*, N.Y. Times, A9 (Aug. 14, 2010).

<sup>xlii</sup> <http://mainichi.jp/english/english/mdnnews/national/news/20120307p2g00m0dm109000c.html>.

<sup>xliii</sup> See, e.g., Safeguards guaranteeing protection of the rights of those facing the death penalty, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, <http://www2.ohchr.org/english/law/protection.htm>.

<sup>xliiii</sup> CAT, Japan's Response to List of Issues, n. xxvi at para. 28.

<sup>xliiii</sup> Report of the Human Rights Committee, Concluding observations on the fifth periodic report of Japan (CCPR/C/JPN/5), U.N. Doc. A/64/40 (Vol. I), Oct. 2008, 30 at para. 17.

<sup>xliiii</sup> Masaharu Hamada was executed on September 18, 2002, after withdrawing the appeal filed by his lawyers.

<sup>xliiii</sup> In 2009, Japan introduced a new “lay-judge” system. Persons accused of capital crimes have their cases heard by a panel of three professional judges and six “lay-judges,” or members of the public. Previously, cases were heard by a panel of professional judges only. While it is beyond the scope of this submission to address the impact of the new lay-judge system on Japan's death penalty system, it is important to note that of 13 cases under the new system where the prosecutor sought the death penalty, eight death sentences have

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been handed down by the court of first instance, as of October 2011. One of these sentences was for a single murder. See Tagusari, n. xii at 12-14.

<sup>xlvi</sup> Japan Innocence & Death Penalty Research Center, List of Defendants Who are Under Sentence of Death in Japan, [http://www.jiadep.org/Chart-DeathRow\\_files/page481\\_1.html](http://www.jiadep.org/Chart-DeathRow_files/page481_1.html) (updated March 29, 2012).

<sup>xlvii</sup> Japan's Response to List of Issues, n. xxviii at paras. 29-31.

<sup>xlvi</sup> See, e.g., *id.* notes xxxvi, xxxviii, xxxix.

<sup>l</sup> Prime Minister Noda has said he has no plans to do away with capital punishment. Mainichi Japan, *Former Justice Minister Voices Regrets Over Resumption of Executions*, <http://deathpenaltynews.blogspot.com/2012/04/japan-former-justice-minister-voices.html>. See also Tagusari, n. xii at 1-5. Ms. Tagusari notes: "[G]enerally speaking, the role of Justice Minister of Japan has been strictly limited to the authorization of bureaucratic initiatives. This also explains why *so much emphasis is placed on the obligation of the Justice Minister to order executions under the Criminal Procedure Law*. In other words, the most important task of the Minister is to straightforwardly apply the provisions of the statute book. Therefore, not to sign the execution warrant is regarded as showing an unacceptable ignorance of the law." *Id.* at 5.

<sup>li</sup> Japan Code of Criminal Procedure, Article 475 (1)-(2); Japan's Response to List of Issues, n. xxviii at paras. 32-34.

<sup>lii</sup> Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Art. 36.

<sup>liii</sup> CAT, Japan's Response to List of Issues, n. xxviii at paras. 35-6, 205-207.

<sup>liii</sup> See Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Art. 36 (requiring death row inmates to be held in a single cell day and night); Although the Act in theory requires more frequent evaluation of the use of solitary confinement for other inmates, it places no actual limit on how long an inmate can be held in solitary and requires only occasional medical evaluation by a prison staff doctor. CAT, Japan's Response to List of Issues, n. xxviii at paras. 195, 199.

<sup>liv</sup> CAT, Japan's Response to List of issues, n. xxviii at paras. 202-204.

<sup>lv</sup> *Id.* at paras. 195, 200.

<sup>lv</sup> Act on Penal Detention Facilities, Art. 36, n. xlix.

<sup>lvii</sup> CAT, List of issues, Japan, n. xxxiii at para. 25(a) (citing U.N. Doc. CAT/C/JPN/CO/1, para. 18).

<sup>lviii</sup> CAT, Japan's Response to List of Issues, n. xxviii at para. 199.

<sup>lix</sup> *Hanging by a Thread*, n. ix at 24 ("Exercise is limited to two short (30 minute) sessions per week outside their cells in summer and three times a week in winter.. A prison staff member observes these exercise periods during which the prisoner is alone. Apart from this and toilet visits, prisoners are not allowed to move around their cell but must remain seated.")

<sup>lx</sup> CAT, Japan's Response to List of issues, n. xxviii at para. 194.

<sup>lxi</sup> *Id.* at para. 201; CAT, List of Issues, Japan, n. xxxiii at para. 25(b).

<sup>lxii</sup> Act on Penal Detention Facilities and Treatment of Inmates and Detainees, Art. 32 (Principle of Treatment for Inmates Sentenced to Death).

<sup>lxiii</sup> See detailed description in *Hanging by a Thread*, n. xi at 24-27.

<sup>lxiv</sup> CAT, Japan's Response to List of Issues, n. xxviii at para. 202.

<sup>lxv</sup> *Hanging by a Thread*, n. xi at 58.

<sup>lxvi</sup> See Hiroshima high court. The court held that prison guards should not attend a confidential meeting between a death row inmate and his lawyer without special reasons to do so, and protecting the mental stability of the inmate by itself cannot be a reason for monitoring.

<sup>lxvii</sup> CAT, Japan's Response to List of Issues, n. xxviii at para. 203.

<sup>lxviii</sup> Report of the Human Rights Committee, Concluding observations on the fifth periodic report of Japan (CCPR/C/JPN/5), U.N. Doc. A/64/40 (Vol. I), Oct. 2008, 30 at p. 16. See also Concluding Observations of the Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add.102, Nov. 19, 1998, para. 21.

<sup>lxix</sup> ECOSOC, Commission on Human Rights, Civil and Political Rights, Extrajudicial, summary or arbitrary executions Report of the Special Rapporteur, Philip Alston, U.N. Doc. E/CN.4/2006/53, Mar. 8, 2006, at para. 31 ("[C]ondemned persons, their families, and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency petitions, and executions. Experience demonstrates that to do otherwise is highly likely to lead to *violations of due process rights* and to *inhuman and degrading treatment*.")

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<sup>lxxi</sup> “Death row phenomenon” encompasses the notion that prolonged imprisonment on death row constitutes cruel, inhuman, or degrading punishment, as the Human Rights Committee has found that Article 7 of the ICCPR prohibits psychological as well as physical torture. Two important cases in this regard are *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc) (span of 14 years between conviction and execution in the case of a Jamaican prisoner was “inhuman punishment.”), and *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. 439 (1989) (European Court of Human Rights) (years spent on death row meant the “condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”) “Death row syndrome” is generally the term used to describe the significant negative psychological impacts of prolonged detention on death row. See, e.g., Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment and Confinement: a Critical Review of the Literature*, 20 *Behav. Sci. & L.* 191 (2002).

<sup>lxxii</sup> *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-3000 (2009), quoting *People v. Anderson*, 6 Cal. 3d 628, 649 (1972).

<sup>lxxiii</sup> The Japanese Criminal Code, Art. 39, states that (1) an act committed by an insane person will not be punished, and (2) an act of diminished capacity shall lead to the punishment being reduced.

<sup>lxxiv</sup> CAT, Japan’s Response to List of Issues, n. xxviii

<sup>lxxv</sup> Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture: Japan, U.N. Doc. CA T/C/JPN/CO/1, Aug. 3, 2007, paras. 18-19.

<sup>lxxvi</sup> In December 2011, A Japanese citizen filed a petition to the JFBA, saying that at least eight death row inmates, including Iwao Hakamada and Shoko Asahara, guru of Aum Shirikyo cult, are suffering from serious mental illness and their executions should be legally suspended.

<sup>lxxvii</sup> *Hanging by a Thread*, n. xi at 23-27.

<sup>lxxviii</sup> *Id.*

<sup>lxxix</sup> *Id.* at 9-10. See also *id.* at 19-20 for a discussion of the case of Seiha Fujima, executed in 2007 despite an 18-month suspension of his case due to a finding of incompetence. Subsequent courts found him competent and the Supreme Court confirmed his death sentence in 2004.

<sup>lxxx</sup> *Id.* at Part 3 (Health Care for Death Row Prisoners). It has been reported that former Minister Keiko Chiba ordered an evaluation of the condition of all the death row inmates but that the results showed there were no inmates who had serious mental problems. These results have not been released and it is also unknown who conducted the evaluation or how it was conducted.